EXHIBIT 1
DATE 4/12/2011
HB 35

February 17, 2011

Dear Members of the House Committee on State Administration:

I am writing to support HB 578, requiring that a written record be kept of legislative meetings. As a law librarian at the University of Montana School of Law, I spend time almost daily researching and teaching legislative history. In 2009, my co-author and I researched the Montana Supreme Court's use of legislative history and concluded that access to current and historical legislative documents is crucial to the insuring that Montana's laws are interpreted and applied as the legislature intended but that future access is endangered by non-written, non-archival formats. This bill insures this crucial access.

Montana Code Annotated § 1-2-102 requires, "In the construction of a statute, the intention of the legislature is to be pursued if possible." It is inconsistent to require that courts determine legislative intent but leave them no means of doing so. The Montana Supreme Court has more than once stated the rule that if the meaning of a statute is unclear, it must turn to the legislative history to determine the intent of the legislature. For example, *in Infinity Ins. Co. v. Dodson*, the Court stated

> Further, statutory language must be construed according to its plain meaning and, if the language is clear and unambiguous, no further interpretation is required . . . . If the plain words of a statute are ambiguous, however, the next step in judicial interpretation of the statute is to determine the intent of the legislature. This is accomplished by examining the legislative history of the statute, including the title of the original bill.

14 P.3d 487, 496 (Mont. 2000).

It is true that neither the statute nor the Court require examination of *written* committee minutes, but providing access through other formats has proved to be problematic. Online availability of full committee hearings almost immediately after the hearings is incredible for those who are tracking bills in the current legislature; I myself have taken advantage of that access more than once in the last couple of weeks. But if those electronic formats are never reduced to writing, access will be lost over time. Recently I was assisting a student who was trying to determine the legislative intent of a statute for which there were no written minutes. We had the audio of the hearing, but the first several minutes of the hearing were not; it will never be possible to determine the legislative intent of that statute. Neither audio nor video are archival formats; they require equipment that quickly becomes obsolete and unavailable, they are expensive to copy, and they are unstable and easily destroyed.

A second significant issue mandating access to legislative history is the fundamental "right to know" provision in Montana's constitution. Article II, Section 9 provides that all persons have the right to "examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions..." But Montanans valued public access even before it was embodied in the new constitution. In 1969 the Montana Legislature stated that "it is the public policy of the state of Montana that noncurrent records of permanent value to the state and to local governments should be preserved and protected... and that to the end that the people may receive maximum benefit from a knowledge of state and local government affairs, the state and local governments should preserve noncurrent records of permanent value for study and research." Montana Code Annotated § 22-3-201.

As important legislative documents are kept in formats that are inherently unreliable and that become obsolete over time the eventual result is that longstanding public policy and fundamental rights will be weakened. Neither the courts nor the people of Montana will be able to determine what legislators intended when laws were enacted. When the underlying intent of a law is forgotten, the only option will be to reinterpret it. Please pass HB 578.

Sincerely,

Stacey L. Gordon
Missoula

ARTICLES

LOST LEGISLATIVE INTENT: WHAT WILL MONTANANS DO WHEN THE MEANING ISN'T PLAIN?

Stacey L. Gordon* and Helia Jazayeri**

I. INTRODUCTION

A work of fiction means something different to each reader, because each individual reader interprets the work based on his or her own life experiences and belief system. The author may have intended some specific meaning and may have clearly conjured that meaning in his or her own mind, but that meaning is still only one of an infinite number of meanings. In fiction, both the author and the reader have the prerogative to craft meaning, and it is the fiction writer's role to use language in a way that allows readers the freedom to interpret.

Laws are also made up of words and in that sense their drafters are also writers, but the job of legal drafters is to create only one meaning. Laws are the "source of rights, duties, and powers"[1] that govern how people behave in a particular society. Therefore, the drafters of laws must be precise. Legislatures do not have the freedom to play with words and create infinite possibilities of meaning. Laws would have no effect if each member of society were free to interpret them based on his or her own beliefs, experiences, or whims.

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1. Richard A. Posner, *The Problems of Jurisprudence* 220–221 (Harvard U. Press 1990) (quoted in *Black's Law Dictionary* 900 (Bryan A. Garner, ed., 8th ed., West 2004)).

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That much is obvious. The problem is the English language. Justice Oliver Wendell Holmes noted:

> It is true that in theory any document purporting to be serious and to have some legal effect has one meaning and no other, because the known object is to achieve some definite result. It is not true that in practice (and I know no reason why theory should disagree with the facts) a given word or even a given collection of words has one meaning and no other. A word generally has several meanings, even in the dictionary.[2]

In opening hearings on the use of legislative history in statutory interpretation before the House Subcommittee on Courts, Intellectual Property, and the Administration of Justice, Rep. Robert W. Kastenmeier stated:

> In a perfect world, the legislation we passed would always be clear and unambiguous, leaving to the courts the relatively simple task of applying, on a case-by-case basis, the unobscured will of Congress as embodied in the U.S. Code. Needless to say, ours is not a perfect world.[3]

Justice Frankfurter formulated the problem in this way:

> [U]nlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision. If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness. Apart from the ambiguity inherent in its symbols, a statute suffers from dubieties. It is not an equation or a formula representing a clearly marked process, nor is it an expression of an individual thought to which is imparted the definiteness a single author can give. A statute is an instrument of government partaking of its practical purposes but also of its infirmities and limitations, of its awkward and groping efforts.[4]

In our imperfect legal world, even though legislators intend for their statutes to be unambiguous, courts are often faced with the task of interpreting ambiguous statutes. This is the role of the courts, and in this role the courts must often determine the underlying legislative intent.[5] But how does one branch of government determine the intent of another branch of government?

The legislative process does leave a paper trail that would seem the best way of determining legislative intent. Theoretically, the legislative history of a statute contains precisely the intent courts are looking for. However, two issues cloud the effectiveness of the legislative history as a reliable record of legislative intent. First, the legislative process itself probably does not leave an unadulterated record. Second, it is unlikely that legisla-

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2. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 417 (1898).

3. H.R. Subcomm. on Courts, Intell. Prop. & Admin. of Just. of the Comm. on the Judiciary, *Statutory Interpretation and the Uses of Legislative History*, 101st Cong., 2d Sess. 1 (Apr. 19, 1990) (opening statement of Chairman Kastenmeier).

4. Felix Frankfurter, *Some Reflections of Reading Statutes*, 47 Colum. L. Rev. 527, 528 (1947) (quoted in Norman J. Singer, *Statutes and Statutory Construction* vol. 2A, 6 (7th ed., West 2007).

5. Singer, *supra* n. 4, at § 45.5.

tive history actually reflects the collective intent of the legislature—if a collective intent even exists.

The use of legislative history to interpret law is therefore controversial. Justice Scalia, perhaps the most outspoken jurist on the issue, offers a widespread general condemnation of the use of legislative history.[6] The U.S. Supreme Court has gone through periods in which it rarely used—or even commented on the use of—legislative history. There have been times in which it used legislative history fairly liberally, and times when it has been more reserved in relying on legislative history. The Montana Supreme Court has more definitively articulated a rule regarding the use of legislative history, but sometimes still veers away from its own holdings.

Given the arguments on both sides of the legislative history debate, courts may justifiably choose to limit the use of legislative history. Nevertheless, legislative history is a source of legal interpretation that legislatures must preserve. This article will first discuss what legislative history is and how both the U.S. Supreme Court and the Montana Supreme Court use legislative history in statutory interpretation. Then, in Part IV, this article will focus on why the Montana Legislature should ensure comprehensive access to legislative history. Finally, Part V will discuss the current barriers to accessing Montana legislative history and offer suggestions for a more reliable and accessible legislative record.

II. Defining Legislative History

It is important to distinguish between legislative history and legislative intent. *Black's Law Dictionary* defines legislative intent as "[t]he design or plan that the legislature had at the time of enacting a statute."[7] Legislative intent does not necessarily reveal the meaning of individual words, though it does provide courts with a means of choosing between competing interpretations. Some schools of legislative interpretation provide that the court's duty is to discern and uphold the intent of the legislature; others eschew both the existence of a collective intent and the need to discern such if it does exist.[8] For those in the former school, legislative history is one way to discover legislative intent.

Black's Law Dictionary defines legislative history as "[t]he background and events leading to the enactment of a statute, including hearings,

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6. Joseph L. Gerken, *What Good Is Legislative History? Justice Scalia in the Federal Courts of Appeals* 87 (William S. Hein & Co. 2007). Gerken goes so far as to say that Justice Scalia had made it clear that legislative history "is of virtually no use" in statutory interpretation. *Id.* at 86. However, "virtually" is the key word in that phrase and Gerken later notes that even Scalia recognizes the limited use of legislative history to avoid absurdities in interpretation. *Id.* at 110.

7. *Black's Law Dictionary*, *supra* n. 1, at 919.

8. *See infra* Section IV.

committee reports, and floor debates."[9] The beginning of this definition—"the background and events"—is actually broader than the common understanding of legislative history and, if it were not limited by the remainder of the definition, would seem to encompass more than the documents created during the legislative process. Legislative history includes the "documents [legislatures generate] in the course of enacting statutes."[10] The complicated legislative process can be divided into three stages when referring to "legislative history": pre-enactment history, enactment history, and subsequent-enactment history (amendment).[11] Justice Scalia's definition of legislative history refers simply to "the pre-enactment statements of those who drafted or voted for a law,"[12] though likely the phrase "pre-enactment statements" simply distinguishes documents that are part of the legislative record from those that comment on the legislation after its enactment.[13]

Undoubtedly, the political process generates statements both written and unwritten that are not part of the official record. Scalia notes that "[these statements are] considered persuasive by some, not because they reflect the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding."[14] Though it barely hides his distrust of legislative history, Justice Scalia's definition also suggests a limitation on the documents that can be considered part of a bill's legislative history. Only those written documents that would have been available to the legislative body as a whole are properly part of the legislative history. A federal legislative history can contain committee reports, hearing transcripts with both written and oral testimony, sponsor statements, bill amendments, floor debate (which is published daily in the Congressional Record), voting records, and presidential signing statements. For examples of compiled legislative histories, see those published by William S. Hein & Co.[15]

The amount of legislative history for a Montana bill is significantly smaller. The Montana legislative process produces written hearing minutes with the exhibits distributed at the hearing and any written testimony presented at the hearing. The legislative process also produces hearing tes-

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9. *Black's Law Dictionary*, *supra* n. 1, at 919.

10. Gerken, *supra* n. 6, at 1.

11. Singer, *supra* n. 4, at § 48.01.

12. *D.C. v. Heller*, 128 S. Ct. 2783, 2805 (2008).

13. *See id.* Scalia says later, "[Legislative history] most certainly does not refer to the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification. That sort of inquiry is a critical tool of constitutional interpretation." *Id.* (emphasis in original).

14. *Id.*

15. For example, the Hein legislative history of the Economic Growth and Tax Relief Reconciliation Act of 2001 is contained in 16 volumes. The legislative history of the USA PATRIOT Act is 21 volumes long.

timony in audio format, bill amendments, and voting records. In contrast to voluminous legislative histories that accompany federal statutes, a Montana legislative history may only contain a few sheets of paper.

The question is whether legislative history is a reliable source to discover the will of Congress. Is the political process transparent enough that the documents it creates truly reveal the intent of the whole? The U.S. Supreme Court largely says no, except in certain circumstances. Justice Scalia takes the extreme position that legislative history cannot reflect the intent of Congress and therefore should not be used to determine the correct interpretation of a statute. Justice Breyer, on the other hand, advocates the use of legislative history in statutory interpretation.[16]

III. The Uses of Legislative History

A. *How the U.S. Supreme Court Uses Legislative History*

> In the case of a statute . . . it would be possible to say that as we are dealing with the commands of the sovereign the only thing to do is to find out what the sovereign wants. If supreme power resided in the person of a despot who would cut off your hand or your head if you went wrong, probably one would take every available means to find out what was wanted.[17]

This quotation, isolated from its context, appears to support the use of legislative history. But Holmes is actually arguing the opposing view: interpreting statutes is no different than interpreting contracts or wills. Holmes advocates interpreting documents according to what a "normal speaker of English" under the circumstances would understand.[18] Three years after publication of this article, Holmes was appointed to the U.S. Supreme Court, during an era in which the Court generally subscribed to the "plain meaning rule."[19]

The Court's use of legislative history can be divided into four general periods.[20] In his exhaustive examination of Justice Scalia's opinions regarding the use of legislative history, Joseph Gerken characterized these periods as: (1) the founding of the Court in 1789 through its decision in *Holy Trinity Church v. United States* in 1892, (2) the period between 1892

16. *See infra* Section IV.

17. Holmes, *supra* n. 2, at 419.

18. *Id.*

19. *See* Gerken, *supra* n. 6, at ch. 3.

20. *Id.* There is a significant body of literature about the Court's use of legislative history. A comprehensive discussion of how the Court has used and currently uses legislative history is well beyond the scope of this article. The chapter in Gerken's book is sufficient for the purposes of this article. However, researchers who would like to dig deeper into this topic can consult, among other sources: Beth M. Henschen, *Judicial Use of Legislative History and Intent in Statutory Interpretation*, 10 Legis. Stud. Q. 353 (1985); Singer, *supra* n. 4, at ch. 48, 48A.

and 1940 when the Court tended to follow the "plain meaning rule," (3) a period of more liberal use of legislative history between the early 1940s and Justice Scalia's appointment in 1986, and (4) the current era in which Justice Scalia's views have caused the Court to reconsider its use of legislative history.[21]

Holy Trinity Church v. United States[22] is commonly regarded as the case in which the Court defined its willingness to use legislative history as a tool to interpret statutes.[23] This case marks a significant departure from the preceding period in which the Court rarely used legislative history, and when it did, it did so without explanation or with explanations that seemed contradictory.[24] In one early case, the Court said that "'when any ambiguity exists,' it would be appropriate to look 'to the public history of the times in which it was passed.'"[25] However, until *Holy Trinity*, the Court did not affirmatively state that legislative history was a proper tool for interpreting statutes.[26]

After *Holy Trinity*, the Court recognized the appropriateness of using legislative history in limited situations[27] and generally followed the "plain meaning rule." Under the plain meaning rule, the Court must look first to the face of the statute. If the meaning is unambiguous, it cannot turn to legislative history. The one exception is when application of the plain meaning rule would lead to an absurd result.[28]

Caminetti v. United States[29] is the most commonly cited case for the application of the plain meaning rule, even though the Court recognized and used the rule prior to its decision in *Caminetti*.[30] In *Caminetti*, the Court applied the rule to reach an extreme result even when use of the legislative history would have dictated the opposite result.[31] The *Caminetti* defendants were charged under the Mann Act[32] for transporting women across state lines with "an immoral purpose."[33] The defendants argued the Mann Act was intended to prevent transporting women for prostitution, but in each of

21. Gerken, *supra* n. 6, at 39.
22. *Holy Trinity Church v. U.S.*, 143 U.S. 457 (1892).
23. Gerken, *supra* n. 6, at 42.
24. *Id.* at 40–42. Gerken notes two cases in which the Court seemed to espouse opposing principles: *Aldridge v. Williams*, 44 U.S. 9 (1845), in which the Court rejected the use of legislative history for statutory interpretation; and *Dubuque & P. R.R. v. Litchfield*, 64 U.S. 66 (1860), in which the Court's use of legislative history was the determinative factor in its decision. Gerken, *supra* n. 6, at 40–42.
25. Gerken, *supra* n. 6, at 41 (quoting *Aldridge*, 44 U.S. at 24).
26. *Id.* at 42.
27. *Id.* at 45.
28. *Id.*
29. *Caminetti v. U.S.*, 242 U.S. 470 (1917).
30. Gerken, *supra* n. 6, at 52.
31. *Id.* at 54.
32. White Slave Trade Act of 1910, Ch. 395, 36 Stat. 825 (1910).
33. *Caminetti*, 242 U.S. at 482–483 (cited in Gerken, *supra* n. 6, at 54).

their cases the women were mistresses and there was no evidence of prostitution.[34] Their argument was well-supported by the legislative history, including Congressional Representative Mann's own statement that the statute was "limited to the cases in which there is an act of transportation in interstate commerce for the purposes of prostitution."[35] Nevertheless, the Court upheld the convictions, rejecting the legislative history argument by stating that

> [it] is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.[36]

In the years following *Caminetti*, the Court at various times rejected the use of legislative history because the meaning of the statute was clear, prefaced its use of legislative history by first noting that the meaning of the statute was not plain on its face, or, interestingly, used legislative history to support the obvious plain meaning.[37]

Then, with its decision in *United States v. American Trucking Association*,[38] the Court espoused a new theory of statutory interpretation in which it recognized the use of legislative history even though the meaning of the statute was plain.[39] In *American Trucking*, the Court stated, "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"[40] Under this reasoning, the Court could use legislative history whether or not the statute's plain meaning was ambiguous or would lead to an absurd or unreasonable result. The Court could also consider legislative history when application of the plain meaning of the statute was simply contrary to legislative intent.[41]

The above discussion suggests a more linear development than what actually occurred. These four periods mark major shifts, but in reality the Court's use of legislative history was far more nuanced than the above sum-

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34. *Id.* (cited in Gerken, *supra* n. 6, at 54).

35. *Id.* at 498 (McKenna, J., dissenting)).

36. *Id.* at 485 (citing *Lake Co. v. Rollins*, 130 U.S. 662, 670–671 (1889); *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 33 (1894); *U.S. v. Lexington Mill and Elevator Co.*, 232 U.S. 399, 409 (1914); *U.S. v. Bank*, 234 U.S. 245, 258 (1914)) (quoted in Gerken, *supra* n. 6, at 55).

37. Gerken, *supra* n. 6, at 57–59.

38. *U.S. v. Am. Trucking Assn.*, 310 U.S. 534 (1910).

39. Gerken, *supra* n. 6, at 65.

40. 310 U.S. at 543–544 (citing *Bos. Sand & Gravel Co. v. U.S.*, 278 U.S. 41, 48 (1928); *Helvering v. N.Y. Trust Co.*, 292 U.S. 455, 465 (1934)) (quoted in Gerken, *supra* n. 6, at 65).

41. Gerken, *supra* n. 6, at 66.

mary suggests. For example, *Holy Trinity* may be characterized as announcing a "soft plain meaning" rule under which it was the Court's role to determine congressional intent and the best indicator of intent was the plain language of the statute itself. But because discovering intent was the underlying goal, legislative history could trump plain meaning.[42] The Court rejected this approach in *Caminetti*. However, despite the Court's strict application of the plain meaning rule in *Caminetti*, Yale law professor William N. Eskridge notes that "[i]n almost all of the leading plain meaning cases of the Warren and Burger Courts, the Court checked the legislative history to be certain that its confidence in the clear text did not misread the legislature's intent."[43] Under Eskridge's analysis, the soft plain meaning rule was at least in the background of the Court's statutory interpretation jurisprudence for over a century.

Justice Scalia's appointment to the Court marked the end of the Court's more liberal use of legislative history. With the first sentence of his book about Justice Scalia and legislative history, Gerken succinctly summarizes: "Justice Antonin Scalia hates legislative history."[44] That may not be quite accurate, but in just one decade the Court went from using legislative history in virtually every statutory interpretation case in the 1981 session to using it in approximately 15% of such cases in the 1989 session, which prompted Justice Breyer to predict that the Court's use of legislative history to interpret statutes would soon become a rarity.[45]

Eskridge characterizes Scalia as a "new textualist"[46] and credits him, along with Seventh Circuit Judge Frank Easterbrook, with founding this school of statutory interpretation that is fairly averse to the use of legislative history.[47] New textualism returns to the strict plain meaning rule, maintaining that legislative history is irrelevant and should not be used even to support the plain meaning, which can be well supported by the structure of the statute itself, the interpretation of similar statutes, and traditional canons of

42. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 626 (1989) (reprinted in Singer, *supra* n. 4, at vol. 2A, 783–848).

43. *Id.* at 627.

44. Gerken, *supra* n. 6, at 1. To be fair, Gerken backs off his statement somewhat, but only slightly. *See id.* Scalia's views of legislative history as a statutory interpretation tool cannot be comprehensively covered in the scope of this article; they are better the subject of a book. Fritz Snyder notes that in the years 1986–1996 "well over a hundred law review articles have appeared on this topic." Fritz Snyder, *Legislative History and Statutory Interpretation: The Supreme Court and the Tenth Circuit*, 49 Okla. L. Rev. 573, 573 (1996). Gerken's book contains an excellent bibliography for further research into Scalia's legislative history jurisprudence. *See* Gerken, *supra* n. 6, at 337–347.

45. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 846 (1992) (internal citations omitted).

46. For an explanation of this terminology, *see* Eskridge, *supra* n. 42, at 623 n. 11.

47. *Id.* at 650.

statutory construction.[48] Scalia recognizes that statutory language may be ambiguous but believes ambiguities can be resolved by a reading of the statute as a whole.[49]

First announced in *Immigration and Naturalization Service v. Cardoza-Fonseca*,[50] Scalia's new textualism rejects the basis of the soft plain meaning rule. Although he concurred with the result, Scalia refused to join the majority opinion because he disagreed with the majority's use of legislative history to determine whether Congress expressed an intent that would contradict the plain language. In his concurring opinion, Scalia said, "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."[51] Furthermore, Scalia generally disapproves of using the legislative process to determine legislative intent. His distrust can be summarized in three points: (1) an "intent of the whole" that reflects the unified intent of every member of Congress does not exist; (2) even if such intent existed, legislative history is not the proper source to discover that intent; and (3) legislative history is never enacted into law.[52]

The Court may have significantly reigned in its use of legislative history, but the issue remains controversial, with Justices Breyer and Scalia supporting opposite ends of the spectrum. Two years before he was appointed to the Court, while still sitting on the First Circuit Court of Appeals, Stephen Breyer defended the use of legislative history.[53] He noted that context is often used to determine meaning.[54] For example:

> The meaning of [a] sign [in a city park], the scope of its rule, depends on context, on convention, and on purpose. Is this fact not true of words in statutes as well? Should one not look to the background of a statute, the terms of the debate over its enactment, the factual assumptions the legislators made, the conventions they thought applicable, and their expressed objectives

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48. *Id.* at 623–624.

49. Student Author, *Why Learned Hand Would Never Consult Legislative History Today*, 105 Harv. L. Rev. 1005, 1005 (1992) [hereinafter *Legislative History Today*].

50. *Immig. & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (Scalia, J. concurring) (cited in *Legislative History Today*, *supra* n. 49, at 1005).

51. *Id.* at 452–453. Scalia criticized the majority not only for its motivation in using legislative history, but also for its extensive discussion of legislative history. He viewed the majority's discussion as gratuitous and feared that such a lengthy discussion of legislative history would encourage its further use. *Id.* at 453.

52. Gerken, *supra* n. 6, at 91–97.

53. *See* Breyer, *supra* n. 45.

54. *Id.* at 848. In making this argument, Breyer uses the example of a sign that says, "No animals in the park." Without knowing the context (i.e. the specific park in which the sign is posted), this sign would seem to ban all animals from some park. However, once you know the context, that the sign is posted in Central Park. for example, you realize that the sign is probably intended to keep dogs out of the park, but does not apply to animals such as squirrels. *Id.*

> in an effort to understand the statute's relevant context, conventions, and purposes?[55]

Breyer offered five situations in which legislative history is helpful in interpreting statutes. The first three uses he characterized as uncontroversial: (1) avoiding an absurd result (with which even Justice Scalia has agreed); (2) correcting drafting errors; and (3) illuminating special meanings of certain language (which Justice Scalia also seems to approve of).[56] He conceded that these last two uses are more controversial: (1) "identifying a 'reasonable purpose' "; and (2) selecting from multiple reasonable interpretations when the statute is politically controversial.[57] Despite possible controversy, Breyer demonstrated that using legislative history in these last two situations at least provides a result that fairly corresponds to the intent of the legislators.[58] More importantly, Breyer deflates one of Scalia's main arguments against legislative history (without ever mentioning the argument) by demonstrating that the legislative process is trustworthy.[59]

Despite the sharp decline in the Court's use of legislative history, it may not be accurate to credit Justice Scalia's criticisms as the sole cause of that decline. Justice Scalia's criticisms have certainly added to the body of judicial discussion about the proper role of legislative history, but Gerken notes that Justice Scalia's criticisms almost always appear in concurring or dissenting opinions in cases in which the Court has found legislative history to be a relevant and helpful source of interpretation.[60] For example, in the dissent in *Hamdan v. Rumsfeld*, Justice Scalia bitterly criticized the majority for inappropriately using legislative history, highlighting the majority's selectivity and the nature of the documents selected, as particularly egregious.[61] Referring to the majority's use of floor statements, Scalia wrote:

> Of course this observation, even if true, makes no difference unless one indulges the fantasy that Senate floor speeches are attended (like the Philippics of Demosthenes) by throngs of eager listeners, instead of being delivered (like Demosthenes' practice sessions on the beach) alone into a vast emptiness. Whether the floor statements are spoken where no Senator hears, or written where no Senator reads, they represent at most the views of a single Senator.[62]

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55. *Id.*

56. *Id.* at 848–853, 861.

57. *Id.*

58. *Id.* at 853–861.

59. Breyer, *supra* n. 45, at 858–860.

60. Gerken, *supra* n. 6, at 4.

61. *Hamdan v. Rumsfeld*, 548 U.S. 557, 665–668 (2006) (Scalia, J. dissenting).

62. *Id.* at 665–666. Curiously, this contention that nobody listens to statements from the floor undermines Justice Scalia's own argument that the use of these particular floor statements was improper in part because of their highly political nature.

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Regardless of these criticisms, the majority used both the floor statements Justice Scalia complained about and the drafting history of the Detainee Treatment Act to come to its decision.[63]

In *District of Columbia v. Heller*,[64] Scalia himself wrote an opinion that relied heavily on extrinsic documentary evidence to interpret the original meaning of the Second Amendment.[65] However, he could not help but criticize his colleague, Justice Stevens, for mischaracterizing these documents as legislative history, stating,[66]

> "Legislative history," of course, refers to the pre-enactment statements of those who drafted or voted for a law; it is considered persuasive by some, not because they reflect the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding. . . "Postenactment legislative history," . . . a deprecatory contradiction in terms, refers to statements of those who drafted or voted for the law that are made after its enactment and hence could have had no effect on the congressional vote. It most certainly does not refer to the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification. That sort of inquiry is a critical tool of constitutional interpretation.[67]

Irrespective of the proper classification of the documents relied on by Justice Scalia, he was careful to refute the characterization of them as legislative history, thereby protecting his stance against the use of legislative history.

B. How the Montana Supreme Court Uses Legislative History

> Further, statutory language must be construed according to its plain meaning and, if the language is clear and unambiguous, no further interpretation is required . . . If the plain words of a statute are ambiguous, however, the next step in judicial interpretation of the statute is to determine the intent of the legislature. This is accomplished by examining the legislative history of the statute, including the title of the original bill.[68]

The Montana Supreme Court is under a statutory mandate to determine legislative intent: "In the construction of a statute, the intention of the legislature is to be pursued if possible."[69] This statute does not require the Court to turn to legislative history; it merely says that the Court must ascertain legislative intent, without naming the sources the Court must use to make

63. *Id.* at 578–580, 580 n. 10.

64. *Heller*, 128 S. Ct. 2783 (2008).

65. *Id.* at 2805–2816.

66. *Id.* at 2805.

67. *Id.* (internal citations omitted).

68. *Infinity Ins. Co. v. Dodson*, 14 P.3d 487, 496 (Mont. 2000) (citing multiple references).

69. Mont. Code Ann. § 1–2–102 (2007).

that determination. The Court has clearly stated the rule that the first source of legislative intent is the plain meaning of the statute itself.[70]

In its earliest discussions of statutory interpretation, the Montana Supreme Court subscribed to the more flexible soft plain meaning rule, recognizing the Court's duty to uncover legislative intent and its power to "recur to the history of the times when [the statute] was enacted" if necessary to determine that intent.[71] This language recalls the U.S. Supreme Court's statement in *Aldridge* that the Court could appropriately look "to the public history of the times in which it was passed."[72]

Interestingly, this is not really an endorsement of using legislative history; it is more a recognition of the appropriateness of using extrinsic sources that can aid in statutory interpretation. In fact, in a case interpreting a Montana statute that was intended to implement a federal statute, the Montana Supreme Court looked to the circumstances surrounding the passage of the federal statute.[73] To arrive at an interpretation consistent with the purpose of the federal statute, the Court was forced to construe the language such that "or" meant "and,"[74] which might appear to be an overstepping of the role of interpreter by assuming the role of drafter. The Court did not cite the plain meaning rule but instead asserted:

> In construing a statute, the intention of the legislature is the controlling consideration, and, to ascertain the reason and meaning of particular provisions of doubtful meaning, courts may recur to the history of the times and the cause or necessity influencing the passage of the act.[75]

However, the Court further explained that extraordinary circumstances—in this case a special session of the legislature—may require the use of unusual documents. "[I]n this instance, the language is to be understood in the light of the special message of the [g]overnor submitting the subject-matter for legislative consideration."[76] In other cases, the Montana Supreme Court specifically included legislative history as a proper source for ascertaining legislative intent. For example, in *Nichols v. School District No. 3 of Ravalli County*,[77] the Court noted that it could "avail [itself] of the actual proceedings of the Legislature in the enactment of laws as disclosed by the legislative records."[78] By 1994, this was stated as a rule: "When analyzing statutory law, courts look first to the plain meaning of the

70. *See Infinity Ins. Co.*, 14 P.3d at 496.

71. *Sullivan v. City of Butte*, 211 P. 301, 302 (Mont. 1922) (citing *Lerch v. Missoula Brick & Tile Co.*, 123 P. 25, 26 (Mont. 1912)).

72. *Aldridge*, 44 U.S. at 24.

73. *Mont. ex rel. Williams v. Kamp*, 78 P.2d 585 (Mont. 1938).

74. *Id.* at 588.

75. *Id.* at 586 (citing *Lerch*, 123 P. at 26).

76. *Sullivan*, 211 P. at 302 (citing *Mont. v. Clancy*, 76 P. 10, 13 (Mont. 1904)).

77. *Nichols v. Sch. Dist. No. 3 of Ravalli Co.*, 287 P. 624 (Mont. 1930).

78. *Id.* at 626.

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words used in the statute, and if that is unclear, then courts look to legislative history."[79]

Like the U.S. Supreme Court, the Montana Supreme Court has always recognized the "absurd result" exception to the plain meaning rule. In *Montana v. Heath*,[80] the Montana Supreme Court stated, "It has long been a rule of statutory construction that a literal application of a statute which would lead to absurd results should be avoided whenever any reasonable explanation can be given consistent with the legislative purpose of the statute."[81]

In *Heath*, the Court analyzed several statutory interpretation rules. In addition to its reliance on the soft plain meaning rule and the absurd-result exception to the plain meaning rule, the Court also iterated the concept that statutes must be construed holistically—interpretation must look at the "'statute's text, language, structure, and object.'"[82] Furthermore, the interpretation must give effect to the entire statute.[83] Finally, the Court must select an interpretation that renders the statute constitutional.[84]

The statute at issue became ambiguous after an amendment renumbered the various sections but did not correct all the internal citations.[85] The Court first turned to the plain meaning of the statute, but quickly found the plain meaning was ambiguous to the point it could render part of the statutory scheme meaningless.[86] In trying to untangle the legislature's intent, the Court cited testimony from the House and Senate committee hearings along with the "whereas" clauses in the bill itself, and determined that the legislature, in enacting the amendment, intended to make no substantive changes to the former statute. The Court fulfilled its duty to determine the intent of the legislature, stating, "This Court will not permit legislative intent to be thwarted, and the whole of the judiciary's sentencing authority to be undermined, by a mere scrivener's error."[87] Nevertheless, despite its reliance on legislative history, the Court followed the plain meaning rule and looked first to the plain language of the statute.

In *Farmers Alliance Mutual Insurance Company v. Holeman*,[88] both the majority and the dissent followed the plain meaning rule but with differ-

79. *Carbon Co. v. Dain Bosworth, Inc.*, 874 P.2d 718, 722 (Mont. 1994) (citing *Mont. ex rel. Roberts v. Pub. Serv. Com. of Mont.*, 790 P.2d 489, 492 (Mont. 1990)).

80. *Mont. v. Heath*, 90 P.3d 426 (Mont. 2004).

81. *Id.* at 434 (citing *Chain v. Dept. of Motor Vehs.*, 36 P.3d 358, 361 (Mont. 2001); *Darby Spar Ltd. v. Dept. of Revenue*, 705 P.2d 111, 113 (Mont. 1985); *Mont. ex rel. Spec. Road Dist. No. 8 v. Mills*, 261 P. 885, 889 (Mont. 1927)).

82. *Id.* at 432 (quoting *S.L.H. v. St. Compen. Mut. Ins. Fund*, 15 P.3d 948, 952 (Mont. 2000)).

83. *Id.* at 433 (citing *Mont. v. Berger*, 856 P.2d 552, 554 (Mont. 1993)).

84. *Id.* at 435 (quoting *Mont. v. Helfrich*, 922 P.2d 1159, 1160 (Mont. 1996)).

85. *Id.* at 430–431.

86. *Heath*, 90 P.3d at 434.

87. *Id.*

88. *Farmers Alliance Mutual Ins. Co. v. Holeman*, 924 P.2d 1315 (Mont. 1996).

ent results.[89] This would seem to indicate that the plain meaning was ambiguous after all, but neither the majority nor the dissent turned to legislative history; both relied on interpreting the words in the statute itself.[90] The majority did note that if its interpretation was an error, at least it was consistent with public policy.[91]

Despite its proclaimed adherence to the plain meaning rule (more properly characterized as the soft plain meaning rule), the Montana Supreme Court occasionally deviates from strictly applying the rule. For example, in *Carbon County v. Dain Bosworth, Inc.*,[92] the Court restated the plain meaning rule,[93] but then went on to discuss the legislative history of the statute without first finding the plain meaning was ambiguous.[94] Curiously, the Court then concluded that "the plain meaning of the Revolving Fund Law and the legislative history support the legislative intent to allow counties to choose whether to finance the districts by issuing bonds secured by the revolving fund."[95] The Court confused the rule here by using legislative history to determine a meaning that it then said was plain; however, by definition "plain meaning" should not require an inquiry into legislative history.

In *Thiel v. Taurus Drilling Ltd. 1980-II*,[96] the Court considered both the plain meaning and the legislative history but determined that neither provided any guidance in determining the legislature's intent.[97] So the Court turned instead to an article published in the Montana Law Review as evidence of the "circumstances surrounding the change in the law."[98] Again, this recalls the U.S. Supreme Court's early statements about appropriate sources for statutory interpretation.

The Montana Supreme Court continues to be more liberal in its use of legislative history than the U.S. Supreme Court. So far, there is no movement in Montana to curtail the use of legislative history analogous to Justice Scalia's "new textualism." In fact, the Montana Supreme Court has never cited Justice Scalia in its discussions of the use of legislative history. The Montana Supreme Court has consistently stated, if not always exactly ad-

89. *Id.*

90. *Id.*

91. *Id.* at 1320.

92. *Carbon Co. v. Dain Bosworth, Inc.*, 874 P.2d 718 (Mont. 1994).

93. *Id.* at 722 (citing *Mont. ex rel. Roberts*, 790 P.2d at 492; *Blake v. Mont.*, 735 P.2d 262, 265 (Mont. 1987)).

94. *Id.* at 722–723.

95. *Id.* at 723.

96. *Thiel v. Taurus Drilling Ltd. 1980-II*, 710 P.2d 33 (Mont. 1985).

97. *Id.* at 36.

98. *Id.*

hered to, a version of the plain meaning rule under which legislative history is an appropriate source of interpretation if the plain meaning is ambiguous.

IV. Access to Legislative History in Montana

Section III reveals two realities that suggest comprehensive access to legislative history is crucial to statutory interpretation. First, as can be seen in the U.S. Supreme Court's jurisprudence, theories of statutory interpretation and trends in the use of legislative history shift and develop; if legislative history becomes inaccessible, the practical result will be the end of inquiry and thought on this subject. Law is dynamic and should not be hindered by the inaccessibility of research material. Second, even where a court consistently limits its use of legislative history, it still needs access to complete legislative history in the instances that legislative history becomes a necessary tool of interpretation. Even Justice Scalia recognizes at least one potential use for legislative history: avoidance of an absurd result under application of the plain meaning of the statute.[99] Justice Breyer elaborated on at least three other instances in which the use of legislative history is not particularly controversial,[100] or at least were uncontroversial at the time he wrote the article, which was early in Justice Scalia's tenure on the Court. The Montana Supreme Court's occasional consideration of the public history underlying a statute strongly justifies maintaining comprehensive access to legislative history. History can be gleaned from many sources—treatises, newspapers, contemporary law review articles—but only legislative history can reveal the legislature's responses to social forces. Other sources provide only background, not true legislative context.

Consider the Montana Urban Renewal Act.[101] The minutes of a hearing before the Montana House Committee on Affairs of Cities reveal that this law was drafted in response to a polio outbreak in Browning, on the Blackfeet Reservation—hardly an urban area.[102] The bill was drafted by an attorney for the Blackfeet Tribe with the intent of receiving funding under the federal Housing Act to remove a blighted area in Browning in order to prevent further disease.[103] The bill, of course, applied beyond Browning and authorized municipalities to remove areas that had become blighted.[104] Researching the public history at time of enactment would likely reveal the

99. Gerken, *supra* n. 6, at 110 (citing *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989); *Cardoza-Fonseca*, 480 U.S. 421 (Scalia, J. concurring)).

100. Breyer, *supra* n. 45.

101. Mont. Code Ann. §§ 7-15-4201 to 7-15-4324 (2007).

102. *See*, Michelle Bryan Mudd, *Was the Big Sky Really Falling? Examining Montana's Response to* Kelo v. City of New London, 69 Mont. L. Rev. 79, 86-87 (2008).

103. *Id.*

104. *Id.*

concern about the polio outbreak, but probably would not reveal that the legislature responded by enacting the Urban Renewal Act. Only the legislative history makes that connection.

An important and unique consideration favoring access to legislative history in Montana is the Montana Constitution's strong constitutional "Right-to-Know" provision:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.[105]

The first clause of this provision seems to require comprehensive access to legislative documents. Although not in reference to the legislative process, the Montana Supreme Court has recognized "an 'affirmative' duty on government officials to make all of their records and proceedings available to public scrutiny."[106] The Court has never applied the Right-to-Know provision to legislative documents. The case law applying the provision focuses on two issues: what is a public body (and what is a public writing), and what is protected from examination by individual privacy considerations?[107] The analysis of these questions does not remove legislative documents and proceedings from the application of Right-to-Know provision.[108] Most compelling is the fact that the Montana statutory definition of "public documents" includes legislative documents.[109] Professor Fritz Snyder points out that the Montana Supreme Court tends to interpret this definition liberally.[110] This suggests that Montanans have a constitutional right to "examine" legislative history.

Two further questions arise in the context of the legislative process: what is access, and for how long must the legislature provide access? Article II, Section 9 grants the public the right to "examine documents" or "observe deliberations."[111] This seems to require that legislative history be publicly accessible. However, the provision is silent on the issue of format. As the Montana Legislature moves away from paper formats to exclusively digital formats, including audio, the question arises as to whether those formats provide all Montanans with the necessary public access to "examine

105. Mont. Const. art II, § 9.

106. *Great Falls Tribune v. Mont. Pub. Serv. Commn.*, 82 P.3d 879, 885–886 (Mont. 2003) (cited in Fritz Snyder, *The Right to Participate and the Right to Know in Montana*, 66 Mont. L. Rev. 297, 324 (2005) [hereinafter Snyder, *The Right to Participate*]).

107. Snyder, *The Right to Participate*, *supra* n. 106, at 311–327.

108. *See id.*

109. Mont. Code Ann. § 2–6–101(2)(a) (2007). Many states exclude legislative documents from the definition of public writings. Carol D. Billings, *State Government Efforts to Preserve Electronic Government Information*, 96 L. Lib. J. 625, 626 (2004).

110. Snyder, *The Right to Participate*, *supra* n. 106, at 324.

111. Mont. Const. art II, § 9.

documents." Furthermore, unless legislative "documents" in any format are archived in perpetuity, the Right-to-Know provision is weakened as historical access is lost. Even before the Right-to-Know provision was included in the 1972 Montana Constitution, it was a matter of public policy and statutory law in Montana that "noncurrent records of permanent value to state and local governments should be preserved and protected . . . and to the end that the people may receive maximum benefit from the knowledge of state and local government affairs, the state and local governments should preserve noncurrent records of permanent value for study and research."[112]

V. Improvements and Barriers to Legislative History Access in Montana

Admittedly, the limited access to Montana legislative history is probably not a reaction to the Montana Supreme Court's limited use of legislative history. It is more probable that the barriers to access, all of which are format-driven, are the result of the allocation of limited resources.

The most important Montana legislative history documents, the minutes of committee hearings, have been published in various formats over time including print, electronic format on CD, as "pdf" documents available online, and audio format online. Currently, one can access committee hearing minutes only in audio format online.[113] Confusing access even more, for the 1999 and 2001 legislative sessions, the House transcribed only summary minutes that provided very brief summaries of committee actions and time references to the audio recordings.

The Montana Historical Society archives legislative history in all formats, and both the Historical Society and the State Law Library of Montana provide excellent reference service that photocopies documents. In addition, print documents are available on publicly accessible microfiche from 1987 to 1995 at the University of Montana School of Law Library, allowing the researcher to browse the documents to some degree. These combined services allow the researcher to access and print legislative history documents at a low cost.

Unfortunately, access becomes more problematic as the legislature moves toward publishing legislative history in electronic formats. Consider the history recorded on the 1997 Legislative CD. At this point, the software needed to run the CD is obsolete, making it difficult to access the materials. Again, both the Montana Historical Society and the State Law Library of Montana will copy and send the materials, but the researcher must know exactly what he or she wants to make a request. The serendipitous aspect of

112. Mont. Code Ann. § 22–3–201.

113. For access to minutes and audio files, go to http://leg.mt.gov/css/.

research is all but lost. In addition, to "examine" the 1999 and 2001 House hearings, researchers must request audio tapes from the Montana State Historical Society and listen to or transcribe the hearings, a development that reappeared and seems to have been made permanent beginning with the 2005 legislative session.

The current trend toward online publication of legislative materials provides immediate access beginning with the 1999 legislative session. With online access, however, the format of the documents becomes a potential problem. Until the 2005 session, committees posted electronic word processing or pdf files of the committee minutes. Access that required the researcher to have specific software was problematic but posting in pdf format has solved that problem. However, in 2005, some committees elected to no longer transcribe the minutes and instead provide access to the audio files only. This significantly decreased access to those hearings because researchers again must have the appropriate proprietary software. The problem was compounded in 2007 when all hearings were posted online in audio format only. Anecdotal evidence reveals that researchers are unlikely to listen to and transcribe the audio files, so for practical purposes, access has been limited, not made easier, by this move to audio only.[114]

Another concern is that it is unclear whether there is a retention policy requiring the Historical Society to maintain legislative records in an archival format, particularly when they arrive at the Historical Society only in non-archival formats. In archival practice, print and microforms are traditional archival formats with well-established preservation standards, but standards are still being developed for archival preservation of electronic formats.[115] Scholars are beginning to address this issue as the trend in academic publishing moves toward publishing in electronic formats so that scholarship is quickly and easily available on the Internet.[116] Internet publication certainly broadens the discourse, but there remain questions as to how that discourse will be preserved.[117] Without long-term future access, scholars will not be able to learn from or build on the work of other scholars. The Montana Legislature faces the same consideration. The availability of legislative hearings on the Internet allows the public greater access to

114. The question I am asked most as a reference librarian is for assistance compiling a legislative history. Montana attorneys seem to be diligent in discovering legislative intent (and presumably then, citing that intent to the Court). Almost everybody is willing to search for and print records on microfiche even though that can be a tedious and time consuming process. On the other hand, very few are willing to listen to and transcribe the audio files.

115. *See e.g.* National Archives, *Toolkit for Managing Electronic Records*, http://toolkit.archives.gov/pls/htmldb/f?p=102:1:5818791015763374966 (visited Sept. 22, 2008).

116. Richard A. Danner, *Issues in the Preservation of Born-Digital Scholarly Communications in Law*, 96 L. Lib. J. 591, 591 (2004).

117. *Id.*

relatively recent and almost real-time legislative information. This provides Montanans more timely access to the legislature, which in turn enhances the public's constitutional rights to know and to participate.[118] Courts, however, do not always need recent legislative histories; often, in fact, what they need most are the older documents. This is certainly true when what they seek is the underlying social history. The Montana Legislature and Montana Historical Society must ensure not only that legislative information is available in usable formats now, but also that it is available in the more distant future.

The goal of preserving legislative history in usable formats can be accomplished through a formal records-access-and-retention policy. The policy must address both archival preservation and current issues of format accessibility. If records are archived in electronic format, there must be some way to ensure future access even as technology changes and formats become obsolete. The 1997 Legislative CD is an example of access hindered by an obsolete format. Fortunately, at this point, there is current technology that has allowed translation of the data into a more stable and accessible format.[119] Unfortunately, it is unclear whether these records are also stored in an archival format.

Audio formats are even more problematic. Both current access and archival preservation are significant issues. Virtually no technology is required to access print formats. This is not true of audio formats, all of which require some form of technology to access. The hearings of the past two legislative sessions, and presumably the upcoming 2009 session, that are accessible only in audio format online require not only computer and Internet access, but also proprietary online audio players. Such technology-dependent access is not universal. At this point, if there are no written transcripts of the hearings, some researchers have no practical means of access. Preservation of audio formats is a larger issue that must take into account the preservation of electronic files and also the preservation of technology that enables access to those files in the future. A discussion of the technical standards and requirements for preserving audio files is well beyond the scope of this article, but must be included in a records retention policy.

The Montana Legislature is to be commended for using technology to increase real-time and current access to legislative records. Even though there are some format issues related to access, Montanans have a great deal more access to current legislative proceedings than in the past. In fact, the Legislative Council has approved additional funding to provide audio feeds

118. Mont. Const. art. II, §§ 8, 9.

119. Bob Peck at the William J. Jameson Library at The University of Montana School of Law has translated the documents on the CD from the Folio database into a more stable searchable pdf file.

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in the Senate and committee hearing rooms during the 2009 legislative session.[120] It is unclear, however, whether the audio will be recorded or accessible in the future. When the Montana Supreme Court decides at some time in the future that it is appropriate to turn to legislative history to interpret a statute enacted in 1997 or 2007, will that legislative history still exist?

VI. CONCLUSION

The appropriate use of legislative history to interpret statutes is far from settled. Courts, including the U.S. Supreme Court and the Montana Supreme Court, limit the use of legislative history but do not seem to hesitate to use it when their jurisprudence deems the use appropriate. Currently, and relatively consistently, the Montana Supreme Court espouses a more liberal rule regarding the use of legislative history and is more likely than the U.S. Supreme Court to turn to legislative history to resolve statutory ambiguities.

The reality is that legislative history has a variety of uses, and however it is used, is a necessary and important social and legal record to which legislatures must ensure continuous, comprehensive access. The Montana Constitution's fundamental Right-to-Know provision mandates access to the legislative record regardless of how Montana courts utilize that record.

While the Montana Legislative Services has taken a huge step forward in using technology to provide access to recent records, that very same technology may hinder future access, leaving citizens and courts without a vital record.

120. *Council Says Changes Will Aid Reporters*, Missoulian, Sept. 18, 2008 (available at http://www.missoulian.com/articles/2008/09/18/bnews/br25.txt).