

Case Note

Textual Imagination

Brickwood Contractors, Inc. v. United States, 49 Fed. Cl. 738 (2001).

Textualism's revival illuminated the judicial imagination at play behind the search for congressional intent through legislative history.¹ *Brickwood Contractors, Inc. v. United States*² shows that textualism substitutes structural interpretation of statutory text to veil even wider-ranging judicial imagination when gap-filling of statutory ambiguities is necessary.

Textual imagination will be increasingly prevalent as the Supreme Court's shift to textualism³ outstrips in speed and scope its enunciation of sufficiently comprehensive and coherent canons of statutory construction to fill gaps in statutory text. The difficulty is demonstrated by the relationship between *Brickwood* and the Supreme Court's opinion that gave rise to it, *Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources*.⁴ This Case Note suggests that judicial imagination is better constrained by a cross-hatch of textual and historical sources of textual meaning and congressional intent, rather than a dialectical shift to only textual sources. Rules on permissible aids should consider reliability, accessibility, and the democratic character of the sources. This will give Congress incentive to refine rules on creation of these sources to incorporate these goals, while creating guides for the courts to prevent judicial imagination so wide-ranging as to constitute judicial legislation.

1. Textualists argue that the search for legislative intent is often chimerical. ANTONIN SCALIA, A MATTER OF INTERPRETATION 32 (1997) (arguing that for "99.99 percent of the issues of construction reaching the courts, there is no legislative intent, so that any clues provided by the legislative history are bound to be false"); Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983) (characterizing the search for legislative intent as "wild guesses"); see also William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 641-56 (1990) (summarizing textualist critiques).

2. 49 Fed. Cl. 738 (2001).

3. For a description of the Supreme Court's shift away from legislative history since the mid-1980s, see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 226-28 (1994).

4. 532 U.S. 598 (2001).

I

An excursion into *Buckhannon* is necessary to understand *Brickwood*'s context. *Buckhannon* is a recent example of the Supreme Court's mounting disregard for legislative history and its concomitant attempt to erect replacement canons of statutory construction to guide textual interpretation. The opinion privileged a canon of statutory construction over the legislative record of congressional intent. Of more imminent and practical impact, *Buckhannon* invalidated the catalyst theory of awarding plaintiff's fees to "prevailing parties" under statutes authorizing private attorneys general to bring suit, overturning the rule of every circuit except the Fourth and Federal Circuits.⁵ The theory prevents a defendant from avoiding an award of attorney's fees through tactics like mootng a promising suit, by positing that a litigant may still "prevail" by obtaining relief without judgment. The Court held that the theory did not apply to suits under the Americans with Disabilities Act (ADA) and the Fair Housing Amendments Act (FHAA).⁶ The Court's dicta might be interpreted as rendering the catalyst theory inapplicable to suits under 42 U.S.C. § 1988 and other major civil rights statutes.⁷

Like many situations where the catalyst theory is invoked, the *Buckhannon* facts involved a defense of civil rights. In 1996, West Virginia state law required that all residents of residential board and care homes be capable of "self-preservation" in emergencies, such as fleeing a fire.⁸ State officials ordered Buckhannon Board and Care Home to close because it housed three elderly residents not capable of self-preservation.⁹ The care home sued, arguing that the law violated the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990. The suit survived summary judgment, but was dismissed as moot when, later that year, the state legislature enacted two bills eliminating the self-preservation requirement.¹⁰ The care home requested attorney's fees as the "prevailing party" according to the catalyst theory.¹¹ The Fourth Circuit denied the

5. *Id.* at 626 n.4 (Ginsburg, J., dissenting) (citing cases from circuits recognizing the catalyst rule). In 1994, the Fourth Circuit, sitting en banc, parted from its sister circuits, reading the Supreme Court's dicta in *Farrar v. Hobby*, 506 U.S. 103 (1992), to require a plaintiff to obtain "an enforceable judgment, consent decree, or settlement" to be deemed prevailing. S-1 & S-2 v. State Bd. of Educ., 21 F.3d 49, 51 (4th Cir. 1994). The Federal Circuit never considered the issue.

6. *Buckhannon*, 532 U.S. at 600 (interpreting the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994), and the Fair Housing Amendments Act, 42 U.S.C. §§ 3601-3619).

7. *See Buckhannon*, 532 U.S. at 624 n.1 (Ginsburg, J., dissenting) ("Section 1988 was patterned upon the attorney's provisions contained in Titles II and VII of the Civil Rights Act of 1964 and § 402 of the Voting Rights Act Amendments of 1975.") (citations omitted).

8. *Id.* at 600 (majority opinion).

9. Brief of Petitioner at 2-3, *Buckhannon* (No. 99-1848).

10. *Buckhannon*, 532 U.S. at 601.

11. The fees were requested under the FHAA, 42 U.S.C. § 3613(c)(2), which provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and

motion under its holding in *S-1 & S-2 v. State Board of Education*,¹² where it broke ranks with its sister circuits to hold the catalyst theory invalid.¹³ The Supreme Court granted certiorari to resolve the circuit split.¹⁴

The Court's 5-4 decision ultimately hinged on the meaning of "prevailing party." *Webster's Third New International Dictionary* offered a broader definition that could embrace the catalyst theory, while *Black's Law Dictionary* offered a narrower definition.¹⁵ Chief Justice Rehnquist, writing for the majority, used two textualist tools to render ambiguous text "plain" in meaning. He first applied the canon that legal terms of art susceptible to multiple meanings will be defined by their legal meaning.¹⁶ Thus, the majority followed *Black's Law Dictionary's* definition of "prevailing party" as one that wins judgment.¹⁷ He also harmonized the provision at issue with the wider body of law¹⁸ by knitting together prior decisions¹⁹ governing the threshold "judgment" necessary, holding that

costs," and the ADA, 42 U.S.C. § 12205, which states that "the court . . . in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs."

12. 21 F.3d 49, 51 (4th Cir. 1994).

13. See *supra* note 5.

14. *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 530 U.S. 1304 (2000).

15. Compare *Buckhannon*, 532 U.S. at 633 (Ginsburg, J., dissenting) (citing the definition of "prevailing" in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1797 (1976) as meaning to "gain victory by virtue of strength or superiority: win mastery: triumph"), with *id.* at 603 (majority opinion) (citing the definition in BLACK'S LAW DICTIONARY 1145 (7th ed. 1999) of "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded (in certain cases, the court will award attorney's fees to the prevailing party).—Also termed *successful party*").

16. *Id.* at 603 (majority opinion) ("Congress employed the term 'prevailing party,' a legal term of art."); see also *id.* at 615 (Scalia, J., concurring) ("Words that have acquired a specialized meaning in the legal context must be accorded their *legal meaning*").

17. *Id.* at 603 (majority opinion).

18. *Id.* at 605 ("[I]t behooves us to reconcile the plain language of the statutes with our prior holdings."). Compare this with recommendations by archtextualist and Supreme Court Justice Scalia on rendering open-textured language unambiguous:

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.

Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring); see also Eskridge, *supra* note 1, at 623-24 (stating that textualists confirm the apparent meaning of statutory text by resort to the "structure of the statute, interpretations given similar statutory provisions; and canons of statutory construction").

19. *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) (holding that a party who achieves only a nominal award of damages could satisfy the requirement); *Hensley v. Eckhart*, 461 U.S. 424, 433 (1983) (holding that a party that succeeded on some but not all claims constituted a prevailing party); *Maher v. Gagne*, 448 U.S. 122, 129-30 (1980) (awarding attorney's fees after plaintiffs obtained a court-ordered consent decree).

“enforceable judgments on the merits and court-ordered consent decrees create the ‘material alteration of the legal relationship of the parties’ necessary to permit an award of attorney’s fees.”²⁰

The majority discounted clear statements in committee reports contradicting its outcome. Chief Justice Rehnquist prefaced his review of the committee reports with a dismissal, stating, “We doubt that legislative history could overcome what we think is the rather clear meaning of ‘prevailing party’—the term actually used in the statute. Since we resorted to such history in [past cases], however, we do likewise here.”²¹ The Senate Report for 42 U.S.C. § 1988, on which the ADA and FHAA provisions were modeled, stated that “parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.”²² Similarly, the House Report stated that “the phrase ‘prevailing party’ is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits.”²³ The reports also referenced an Eighth Circuit case that followed the catalyst theory.²⁴ Chief Justice Rehnquist characterized these statements as “ambiguous” and “insufficient to alter the accepted meaning of the statutory term.”²⁵ As a result, the canon concerning legal terms of art trumped the form of legislative history deemed most reliable by adherents of intentionalist and purposivist schools of statutory interpretation.²⁶ The canon on legal terms of art also trumped another of the Court’s canons: to interpret the attorney’s fees provisions enacted by Congress so as to give the provisions effect.²⁷

II

Buckhannon spurred the *Brickwood* court to reconsider its grant of attorney’s fees.²⁸ The controversy in *Brickwood* arose from a Navy-issued Invitation for Bids to perform repair and environmental impact assessment

20. *Buckhannon*, 532 U.S. at 604 (quoting *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)).

21. *Id.* at 607.

22. S. REP. NO. 94-1011, at 5 (1976).

23. H.R. REP. NO. 94-1558, at 7 (1976).

24. *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 429-30 (8th Cir. 1970) (awarding attorney’s fees to the plaintiff because his “lawsuit acted as a catalyst which prompted the [defendant] to take action . . . seeking compliance with the requirements of Title VII”).

25. *Buckhannon*, 532 U.S. at 608.

26. *ESKRIDGE*, *supra* note 3, at 222 tbl. (listing committee reports as the most authoritative).

27. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (“‘The cardinal principle of statutory construction is to save and not to destroy.’ It is our duty ‘to give effect, if possible, to every clause and word of a statute’ rather than to emasculate an entire section.” (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); and *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882))).

28. *Brickwood*, 49 Fed. Cl. at 739 (describing the review of the prior decision as spurred by *Buckhannon*).

work. Brickwood Contractors submitted the lowest of five bids, but the Navy later decided to exclude the environmental work. As a result, Brickwood Contractors no longer had the lowest bid. Seeking award of the contract, it filed suit, alleging that the Navy did not have the authority to convert the Invitation for Bids. After a hearing on the claim, but before judgment, the Navy cancelled the solicitation altogether, and Brickwood's suit was dismissed as moot. Brickwood then filed suit under the Equal Access to Justice Act (EAJA),²⁹ requesting attorney's fees and expenses.³⁰ On April 9, 2001, the Court of Federal Claims ruled that Brickwood Contractors was a "prevailing party" for fee-shifting purposes under the catalyst theory.³¹ On May 29, 2001, the Supreme Court decided *Buckhannon*, and the defendant filed a motion for relief from judgment.³²

The *Brickwood* court used textualist interpretation to cabin *Buckhannon*'s reach through a startling act of judicial imagination couched as structural interpretation unconstrained by legislative history. *Brickwood* noted that *Buckhannon*'s holding was limited to the FHAA and the ADA, and statutes interpreted by courts to have similar attorney's fees provisions.³³ No mention was made of the EAJA.³⁴ The question reduced to whether the EAJA's meaning of "prevailing party" could be distinguished from *Buckhannon*'s "prevailing party" provisions. The inquiry would have been simple had the *Brickwood* court turned to legislative history. The Third and Sixth Circuits, as well as the Court of Appeals for Veterans Claims, had read "the legislative history of section 2412 [to] indicate[] that Congress intended that 'prevailing party' as used in the [EAJA] be read consistently with other fee-shifting statutes."³⁵

Disregarding legislative history altogether, *Brickwood* reasoned that, unlike the statutes at issue in *Buckhannon*, the EAJA contains a presumption that attorney's fees "shall" be awarded to the prevailing party, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."³⁶ Because the court had to inquire into whether the United States's

29. 28 U.S.C. § 2412 (1994).

30. *Brickwood*, 49 Fed. Cl. at 740.

31. *Brickwood Contractors, Inc. v. United States*, 49 Fed. Cl. 148, 154 (2001) (ruling that a party may be considered prevailing for fee-shifting purposes if its lawsuit is a "causal, necessary, or substantial factor in obtaining the result plaintiff sought").

32. *Brickwood*, 49 Fed. Cl. at 739.

33. *Id.* at 744 (citing *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 610 (2001)).

34. *Id.*

35. *Vaughn v. Principi*, 15 Vet. App. 119, 120 (2001); see *Heeren v. City of Jamestown*, 39 F.3d 628, 631 (6th Cir. 1994); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 545 (3d Cir. 1994); *Lematta v. Brown*, 8 Vet. App. 504, 508 (1996). The courts relied on House and Senate reports on the EAJA.

36. *Brickwood*, 49 Fed. Cl. at 746 (quoting 28 U.S.C. § 2412(d)(1)(A) (1994 & Supp. IV 1998) (emphasis added)).

position was substantially justified, “[e]ven if there occurred a voluntary change in the conduct of the government for an EAJA claim, the court would have to assess the merits of the government’s action.”³⁷ Therefore, “under [the] EAJA, the term ‘prevailing party’ must mean something different from the term ‘prevailing party’ used in the fee-shifting provisions examined and referenced in *Buckhannon*.”³⁸

Fidelity to *Buckhannon*’s disregard for legislative history thus left the *Brickwood* court to extrapolate congressional intent from statutory design, a mode advocated by textualists.³⁹ Unlike the *Buckhannon* Court, the *Brickwood* court imagined Congress as a body of legislators who look to effect, rather than lawyers who look to strict design. The analysis both showed solicitude for congressional intent and conformed with *Buckhannon*’s dismissal of legislative history.

As with any act of imagination, however, the *Brickwood* court’s conception is contestable. The Court of Appeals for Veterans Claims expressly rejected the *Brickwood* court’s act of imagination, relying on legislative history to invalidate the catalyst theory under the EAJA.⁴⁰ In critiquing the *Brickwood* court’s reasoning, the Veterans Claims Court offered a contrary imagination of congressional intent based on structural design. The Veterans Claims Court surmised that the additional “substantial justification” requirement in the EAJA may have been added as a protection against unworthy applications, since the EAJA, unlike the FHAA and ADA, gives no discretion to the court once the appellant establishes eligibility.⁴¹ This contrary holding highlights the difficulty with textual imagination: The range of stories judges can posit is as wide as the limits of credulity. Moreover, credulity under structural analysis loses the additional constraint of legislative history.

III

Brickwood illustrates that wide judicial imagination lurks at the opposite end of the pendulum swing from free-wheeling use of legislative history. Ironically, the dialectical shift to what Judge Wald termed “blinders jurisprudence”⁴² is justified as a move to restrain willful

37. *Id.*

38. *Id.* at 747.

39. See Eskridge, *supra* note 1, at 623-24.

40. *Thayer v. Principi*, 15 Vet. App. 204, 208-09 (2001) (citing the discussion of legislative history in *Lematta*, 8 Vet. App. 504).

41. *Id.* at 209 (citation omitted).

42. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 303 (1990).

judging.⁴³ To accomplish this purpose calls for a balance of interpretive tools that will constrain the ambit for imagination and yield more stable and reproducible results among courts. Logically, this calls for amplifying congressionally created constraints on judicial imagination. The number of constraints must be limited, however.

Substantive rules on permissible sources can respond to textualist concerns over the antidemocratic nature of legislative history.⁴⁴ Limitations should be couched in terms of the reliability of the sources as measured by their relative ability to reflect democratically agreed understandings, rather than unilateral or factional insertions. Sources can be further distinguished by their relative abilities to serve the public notice function of law, in terms of brevity and accessibility. Such substantive limitations may condition Congress to refine procedures for the creation of acceptable sources to facilitate reliability and accountability.⁴⁵ Congress has a strong stake in seeing its statutory goals furthered, rather than thwarted, by courts.⁴⁶

Even improved by such substantive limitations, historical sources remain imperfect substitutes for statutory text. Their importance is as tools to constrain judicial imagination, working in concert with textualist tools. The constraints must be checks on each other—that is, a cross-hatching of horizontal and vertical sources indicating statutory purpose and textual meaning.⁴⁷ Vertical, historical sources like legislative history may be a check on horizontal sources of evidence like the larger body of law or other provisions in the statute.

This balancing may sound like Goldilocks's efforts to find something "just right," but the dialectics of the past point to a surer path. Intentionalism's mistake before textualism's renaissance was overemphasis on legislative history at the expense of downplaying the importance of text.⁴⁸ Intentionalism's second mistake was multiplying the acceptable

43. SCALIA, *supra* note 1, at 18 (critiquing the search for intent as leading to a substitution of what judges believe the law ought to be).

44. *E.g.*, SCALIA, *supra* note 1, at 17 (likening the search for intent to Roman Emperor Nero's practice of posting laws high so that the populace could not read them); *id.* at 30 (arguing law is the will of the majority of both houses); *In re Sinclair*, 870 F.2d 1340, 1343-44 (7th Cir. 1989) (Easterbrook, J.) ("Desires become rules only after clearing procedural hurdles, designed to encourage deliberation and expose proposals (and arguments) to public view and recorded vote.").

45. Compare this project with the efforts of the Rehnquist Court to condition Congress to conform with canons of statutory interpretation to facilitate clear statements.

46. See *Statutory Interpretation and the Uses of Legislative History: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong. (1990) (recording concern on the part of both Republican and Democratic legislators over decreasing reliance on legislative history).

47. Professor William N. Eskridge, Jr., described the distinction between horizontal and vertical sources of evidence regarding congressional intent. Eskridge, *supra* note 1, at 655.

48. *Id.* at 625 (describing textualism's contribution as drawing attention to statutory text and "reminding courts and attorneys that legislative history is, at best, secondary and supporting evidence of statutory meaning").

sources of legislative history, though the reliability of sources varies.⁴⁹ Textualism's peril is removing the cross-hatch of vertical, historical constraint on the judicial imagination.⁵⁰ The recent experience of English courts' historic, narrow embrace of a limited number of legislative sources under prescribed conditions in *Pepper v. Hart*⁵¹ points to the possibility of convergence based on practices at opposite ends of the dialectical pendulum. For many years, English courts allowed resort only to White Papers and official reports regarding the "mischief sought to be corrected,"⁵² but forswore any parliamentary materials as aids in construction.⁵³ The English courts still allow resort only to legislative materials where a statute "is ambiguous or obscure or [where] the literal meaning . . . leads to an absurdity"—and then, only where such material "clearly discloses the mischief aimed at or the legislative intention."⁵⁴

England is still in transition to an appropriate balance and its current rules are not sufficiently mature to serve as a model. Its approach does not completely account for the fact that statutes may not appear ambiguous until resort to legislative history is had,⁵⁵ or that legislatures often have a specific intent regarding only a few applications of a statute, and novel facts may arise about which the legislature never formed an intent.⁵⁶ In the latter case particularly, a degree of judicial imagination is necessary. The key is that a limited and prescribed set of legislative history materials should be available in all circumstances to constrain the parameters of imaginative space. This will best keep judicial imagination from becoming judicial legislation that defeats important congressional objectives, like maintaining the viability of private attorneys general.

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49. Even nonlegislators' comments are taken into consideration. See ESKRIDGE, *supra* note 3, at 222 tbl.

50. Wald, *supra* note 42, at 285 ("[T]he textualist view *logically* points to a full-scale attack on the use of any and all extra-statutory materials under any and all circumstances.").

51. *Pepper v. Hart*, 1993 A.C. 593 (H.L. 1992).

52. *Id.* at 635 (Lord Browne-Wilkinson).

53. Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 374.

54. *Pepper*, 1993 A.C. at 634.

55. Michael P. Healy, *Legislative Intent and Statutory Interpretation in England and the United States: An Assessment of the Impact of Pepper v. Hart*, 35 STAN. J. INT'L L. 231, 250 (1999) (observing that post-*Pepper* courts are more likely to find a statute ambiguous when text contradicts legislative history).

56. *United States v. Klinger*, 199 F.2d 645 (2d Cir. 1952). Judge Learned Hand wrote: "When we ask what Congress 'intended,' usually there can be no answer, if what we mean is what any person or group of persons actually had in mind. Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion. He who supposes that he can be certain of the result is the least fitted for the attempt."

Id. at 648.