American Association of Law Libraries

Law Library Journal Author’s Guide

General Information for Contributors

Law Library Journal is the official journal of the American Association of Law Libraries. It is published quarterly and circulates to more than 5000 members and subscribers. This guide is provided to assist authors in preparing articles for the Journal.

1. Content. Law Library Journal includes articles in all fields of interest and concern to law librarians and others who work with legal materials. Examples include law library collections and their acquisition and organization; services to patrons and instruction in legal research; law library administration; the effects of developing technology on law libraries; law library design and construction; substantive law as it applies to libraries; and the history of law libraries and legal materials. Submissions aimed at all types of law libraries and at all areas of library operations are encouraged. The Journal also encourages the publication of memorials to deceased members of the Association.

In preparing a manuscript, an author may use any approach appropriate to the topic: case studies, descriptive or historical narratives, commentaries, or reports on research projects. Bibliographies on topics of substantive law or of law librarianship are welcomed; annotated bibliographies and bibliographic essays are preferred.

2. Author’s Responsibilities. Manuscripts are accepted for review with the understanding that they have not been published elsewhere and are not currently being considered for publication elsewhere. Authors are responsible for the accuracy of statements in their articles and for the accuracy and adequacy of the references. Citations to published literature should be carefully checked. References to unpublished material may be included; however, the author is responsible for securing approval, in writing, from any person cited as the source of an unpublished work. The author is also responsible for obtaining permission to use copyrighted material. Such permissions should be secured in writing. By submitting a manuscript to Law Library Journal, an author is certifying that he or she has obtained all necessary approvals and permissions. Copies may be requested by the editor.

3. Editorial Policies. Manuscripts are evaluated for their appropriateness for Law Library Journal, significance, and clarity. If accepted, manuscripts will be edited for clarity of expression and to remove any ambiguities in the presentation. If extensive revisions are indicated, manuscripts are returned to authors for approval of changes and corrections before type is set. Throughout the editorial process, the editor’s purpose is to assist authors in effectively communicating their ideas. The editor welcomes advance queries from authors about possible Journal articles.


5. Bibliographies. All bibliographies, whether submitted independently or to accompany a substantive article, should follow the bibliography style described in paragraphs 14.56–14.317 of The Chicago Manual of Style. Prospective compilers of bibliographies or authors of bibliographic essays are encouraged to contact the editor about their projects before committing them to final form.
Instructions for Preparing Manuscripts

1. Title and Author Page. Provide a title that is brief, specific, and descriptive of the article's content. Below the title, provide the name(s), professional title(s), and affiliation(s) of the author(s), and the address of the author to whom correspondence should be sent.

2. Abstract. Provide an abstract of fifty words or less.

3. Table of Contents. If the article is divided into headings and subheadings (which is preferred), provide a table of contents telling where in the text each heading is found.

4. Text. The entire text, including quotations, should be typed double-spaced with 1½ inch margins on all sides. Quotations of fewer than fifty words should be enclosed in quotation marks; quotations of fifty or more words should be blocked off and indented an additional inch on the left and right. Footnotes should be identified in the text by superscript numbers.

5. Footnotes. Acknowledgments (if any) should be preceded by an asterisk and placed before the first footnote. Footnotes should follow the form of the AALL Universal Citation Guide (2d ed. 2004) where applicable. For matters not covered in the UCG, use the form of The Bluebook (19th ed. 2010).

6. Appendices, Bibliographies, Tables, and Illustrations. Supplementary materials, such as appendices and bibliographies, should be provided on separate pages. Each table, illustration, and all similar material that is to be published within the text should be individually numbered (e.g., “Table 1”). Indicate the desired placement by providing an appropriate instruction within brackets in the text (e.g., [Insert Table 1]). Camera-ready copy must be supplied for all illustrations.

7. Submitting the Manuscript. Manuscripts should be sent to the editor, Janet Sinder, Brooklyn Law School Library, 250 Joralemon St., Brooklyn, NY 11201. Telephone: (718) 780-7975; e-mail: janet.sinder@brooklaw.edu. Electronic versions in either Word (preferred), WordPerfect, or PDF may be sent by e-mail. If manuscripts are submitted in paper format, two complete copies should be mailed to the address above.

The editor will notify the author that the manuscript has been received and inform the author when an acceptance decision may be expected. After an article has been accepted, the editor will require an electronic manuscript, either on disk or as an e-mail attachment.

The author (one designated author, if there are multiple authors) will receive a clean copy of the manuscript before it is sent to the printer. The copy must be proofread, approved, and returned within 15 days. Before publication, the author will be asked to agree to the Journal’s policy on classroom photocopying, which is published in each issue of the Journal. Upon publication, the author will receive two free copies of the issue in which the article appears, plus twenty-five individual offprints of the article itself. A form for ordering additional reprints will be sent to the author at the time the issue is published.
These Commentaries are based almost entirely on the formal and informal documentation of the Third United Nations Conference on the Law of the Sea (UNCLOS III, 1973-1982), coupled, where necessary, with the personal knowledge of editors, contributors, or reviewers, many of whom were principal negotiators or UN personnel who participated in the Conference. The scope and duration of the “Virginia Commentary” project is without precedent as an academic undertaking in the field of international law. The project was conceived by its editors to meet the need - particularly essential in the absence of an official legislative history for the Convention - for an objective and comprehensive analysis of the articles in the Convention and in the Agreement relating to the Implementation of Part XI of the Convention that entered into force in 1996.

For more information, a 30-day institutional trial, consortia deals and other pricing options, contact the Brill Sales Department at sales-us@brill.com

International Maritime Boundaries Online
Coalter G. Lathrop, Sovereign Geographic, co-Publication with the American Society of International Law

International Maritime Boundaries is an unmatched comprehensive reference for international state practice concerning maritime boundary delimitation, and is used and referenced widely by practitioners and scholars of international law.

Updated content from the complete six-volume series is organized by region, complete with maps and keyword search functionality. Annual online updates keep the collection current. Features include:

• systematic, expert analysis of all international maritime boundaries, joint development zones and unitization agreements worldwide;
• comprehensive coverage, including the text of every modern maritime boundary treaty concluded from 1942 to present;
• analysis of maritime boundaries established by decision of the International Court of Justice, the International Tribunal for the Law of the Sea and ad hoc tribunals;
• detailed maps depicting individual boundaries in their geographic context;
• annually updated, detailed, color regional maps to accompany reports examining the status of maritime boundary delimitation in eleven regions of the world;
• expert essays on specific topics in the development of maritime boundary theory and practice; and
• a country-by-country index and hyperlinked regional maps for - enhanced access to the contents of this comprehensive series.

For more information, a 30-day institutional trial, consortia deals and other pricing options, contact the Brill Sales Department at sales-us@brill.com

Introduction to International Criminal Law, 2nd Revised Edition
M. Cherif Bassiouni

Written by one of the world’s pioneers and leading authorities on international criminal law, this textbook covers the history, nature, and sources of international criminal law; the rationale persona--sources of substantive international criminal law; the indirect enforcement system; the direct enforcement system; the function of the international criminal court; rules of procedure and evidence applicable to international criminal proceedings; and the future of international criminal law.

This textbook is fully updated, comprehensive, easy to read, and ideally suited for classroom use.

M. Cherif Bassiouni is Emeritus Professor of Law and President Emeritus of the International Human Rights Law Institute at DePaul University College of Law. He is President of the International Institute of Higher Studies in Criminal Sciences, which he helped found in 1972, and Honorary President of the International Association of Penal Law, of which he was President between 1989 and 2004.

International Law and Human Rights E-Book Collections

The Martinus Nijhoff (a Brill imprint) International Law and Human Rights E-Book Collections are available on booksandjournals.brillonline.com

Brill Online Books and Journals is among the richest scholarly sources of its kind, with the full text of more than 2,400 e-books and 175 journals covering the Humanities, International Law and Biology. The platform contains over 150,000 book chapters and journal articles, and is updated daily.

For more information please send your e-mail to brillonline@brill.com
# Table of Contents

## General Articles

<table>
<thead>
<tr>
<th>Title</th>
<th>Author</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A Legislative History of the Affordable Care Act:</td>
<td>John Cannan</td>
<td>131</td>
</tr>
<tr>
<td>How Legislative Procedure Shapes Legislative History</td>
<td></td>
<td></td>
</tr>
<tr>
<td>[2013-7]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Library Services for the Self-Interested Law School:</td>
<td>Simon Canick</td>
<td>175</td>
</tr>
<tr>
<td>Enhancing the Visibility of Faculty Scholarship</td>
<td></td>
<td></td>
</tr>
<tr>
<td>[2013-8]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Training in FCIL Librarianship for Tomorrow’s World</td>
<td>Neel Kant Agrawal</td>
<td>199</td>
</tr>
<tr>
<td>[2013-9]</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

## Review Article

<table>
<thead>
<tr>
<th>Title</th>
<th>Author</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Keeping Up with New Legal Titles [2013-10]</td>
<td>Benjamin J. Keele</td>
<td>231</td>
</tr>
<tr>
<td></td>
<td>Nick Sexton</td>
<td></td>
</tr>
</tbody>
</table>

## Regular Features

<table>
<thead>
<tr>
<th>Title</th>
<th>Author</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Practicing Reference . . .</td>
<td>Mary Whisner</td>
<td>243</td>
</tr>
<tr>
<td>Other Uses of Legislative History [2013-11]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Making Management Work . . .</td>
<td>Lynne F. Maxwell</td>
<td>255</td>
</tr>
<tr>
<td>How to Impress Your Boss, Win Friends, and Influence People [2013-12]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Diversity Dialogues . .</td>
<td>Raquel J. Gabriel</td>
<td>263</td>
</tr>
<tr>
<td>Challenging the Status Quo [2013-13]</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History

John Cannan*

Using the health care legislation passed in 2010 as a model to show how legislative procedure shapes legislative history, this article posits that legislative procedure has changed, making the traditional model of the legislative process used by law librarians and other researchers insufficient to capture the history of modern legislation. To prove this point, it follows the process through which the health care legislation was created and describes the information resources generated. The article concludes by listing resources that will give law librarians and other researchers a grounding in modern legislative procedure and help them navigate the difficulties presented by modern lawmaking.

¶1 We, as law librarians, are “doing” legislative history incorrectly. We tend to view and teach legislative history as a static process, generating a specific series of documents that can be used to understand legislation and divine legislative intent. But legislative history is a reflection of legislative procedure, a dynamic process that constantly evolves as politicians create, change, and adapt the rules according to which they conduct their business. This dynamic process may not generate legislative history documents that researchers expect to find and may make those that do exist difficult to locate. This article uses the federal health care legislation passed in 2010, hereinafter referred to as the Affordable Care Act (ACA), as an example of how legislative procedure works now and how this procedure can shape legislative history in unexpected ways.¹ It is also a bibliographic essay, describing the proce-

---

¹ The ACA is composed of two separate pieces of legislation, the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010. References to the ACA will be to the full law and references to its component parts will be used when discussing their individual passage into law.
ducal events that took place in passing the ACA and citing the documents that make up one legislative history of the law. The article concludes with observations on how law librarians and other researchers can learn about congressional procedure to fully capture the legislative history of contemporary laws.

“Ad Hoc” Legislating

2 Legislative history is commonly understood as the collection of documents created by the process by which a legislature creates laws. While the procedures that produce such information are generally acknowledged to be complex, the understanding most legal researchers have of the federal legislative process is that it is a systematic, linear route from introduction to passage. A bill is introduced and sent to a committee. The committee holds hearings and publishes a report. The bill is sent to a chamber floor where it is discussed by chamber members, and these debates are published for public review. When the bill is approved by one chamber, it is sent to the other chamber for committee consideration, floor debate, and a vote. If the chambers disagree on the legislation, they can reach agreement through a conference committee, which issues a report, and both chambers vote on this agreement. When the two chambers unite to pass a bill with the same text, it is then presented to the executive to be signed and afterward becomes law. This legislative process seems so elementary that it was successfully distilled into a whimsical three-minute cartoon—“I’m Just a Bill”—in the series Schoolhouse Rock. Compiling a legislative history typically consists of following the process’s trail, collecting the documents generated at each step along the way—committee reports, debates, hearings, draft bills, and so on. This conception of legislative history has been the standard for decades and continues to be how the practice is taught in law schools today. While a convenient generalization in many cases, it no longer reflects the modern process of lawmaking, and sole reliance upon it may now be more misleading than it is helpful.

8. See, e.g., BERRING & EDINGER, supra note 2, at 166–67; 2A SINGER & SINGER, supra note 4, § 48.4.
¶3 The fundamental problem with the traditional approach to legislative history is that it imposes a static model on a dynamic process. Passing legislation has always been a procedural chess game where proponents try to move bills through both chambers while opponents attempt to kill or delay them. Such maneuvers can determine what record is available—hearings may have been held in previous Congresses, committee reports might not have been issued, and individual initiatives might have been attached to larger, unrelated legislation. Even so, the traditional model was able to accommodate those aberrations. However, as Congress has been buffeted by political, social, and technological forces—“hyper-partisanship,” the intense scrutiny of the 24-hour news cycle, deficits, the demands of campaign finance, and social media—the paradigm has shifted more dramatically away from the traditional model. Legislative processes have evolved to become less systematic and more “ad hoc.” Walter Oleszek of the Congressional Research Service has chronicled the evolution of the modern congressional process and describes it this way: “Members find new uses for old rules, employ innovative devices, or bypass traditional procedures and processes altogether to achieve their political and policy objectives.” These new practices can have a dramatic impact on legislative history, depriving researchers of some materials they would expect to find and making those that are available harder to locate. The traditional view of legislative history must now be modified to accommodate the practices of ad hoc lawmaking so that researchers will know what legislative history information is available and where it can be found.

¶4 The ACA is an excellent representative case of how ad hoc legislating works, how it differs from the traditional model, and how it impacts legislative history sources. Passed to provide health care coverage for virtually all Americans, the ACA is likely to dramatically reshape this country’s vast health care system and become one of the most significant pieces of legislation in American history. The debate over health care was contentious from the legislation’s inception, and enacting it required a variety of ad hoc procedures. Its path to becoming law is instructive on how legislative history actually happens in modern congressional procedure and what kinds of legislative history documents are generated by this process.

¶5 That the ACA does not fit into the traditional model of legislating is evident from the fact that it was not one single health care bill that became law, but two—

10. See BERRING & EDINGER, supra note 2, at 167.
13. This situation can occur if a chamber is trying to expedite legislation. See, e.g., Kathryn E. Hand, Someone to Watch Over Me: Medical Monitoring Costs Under CERCLA, 21 B.C. ENVTL. AFF. L. REV. 363, 386 n.219 (1994).
16. Id. at 375.
the initial health care legislation, the Patient Protection and Affordable Care Act (PPACA), and the Health Care and Education Reconciliation Act of 2010 (HCERA), passed almost immediately after the PPACA to amend that legislation. As a result, researching the legislative history of the ACA means navigating the legislative procedural cycle at least twice.

§ 6 Another significant difficulty with the ACA and the traditional legislative history model is that the standard sources of compiled legislative history—Statutes at Large, THOMAS, West’s United States Code Congressional and Administrative News (U.S.C.C.A.N.), and ProQuest Congressional (formerly LexisNexis Congressional, and before that the Congressional Information Service)—all provide different accounts of the legislative histories of both laws. The legislative history listed at the end of the PPACA in Statutes at Large contains a very short menu of the legislation’s path through Congress, references pages of the Congressional Record for its floor debate, and notes a presidential statement. The session law of the HCERA contains similar information with the addition of a House Budget Committee report, which, as will be seen, is not actually relevant to either the PPACA or the HCERA. THOMAS, the Library of Congress’s legislative database, provides considerably more information, giving an apparently seamless time line of the health care bills’ paths through Congress from introduction to debate in the House and Senate to final passage.

§ 7 A careful reading of some of the legislative documents, though, poses numerous questions: Were there any committee reports besides the one produced by the House Budget Committee? What is “reconciliation” and why was it used in the ACA’s passage? Why was the PPACA originally titled, and referred to in floor debate as, the Service Members Home Ownership Tax Act of 2009? U.S.C.C.A.N. adds nothing new and merely reprints the Budget Committee report referenced in the slip law for the HCERA. ProQuest Congressional includes much more information, perhaps too much, including companion health care bills and lists of hearings and reports. Some of these are from earlier Congresses than the one that

22. 124 Stat. at 1083.
23. See infra § 76.
passed the health care legislation. How are these related to the legislative history of the PPACA and HCERA?

§8 To understand which compiled legislative history, if any, is the correct one, the researcher must know something about the procedure that produced the legislative history information being reported. This requires an explanation of the ad hoc legislating that created the ACA as well as much other legislation generated today.

**Legislative Histories, Not History**

§9 A fundamental flaw of legislative history is that the phrase itself is a misnomer, presuming as it does that legislation has just one history—the product of one bill’s passage through a particular Congress.26 In reality, the passage of legislation often involves multiple attempts to pass multiple bills over multiple Congresses. Similar legislation and, sometimes, several pieces of similar legislation can be introduced during the span of a particular Congress.27 The legislative clock to pass any legislation is only two years, a deadline set by custom and congressional procedure.28 That is not a particularly long time to create a bill, hold hearings on it, fashion a consensus (especially if the issue is complex or contentious or both), and then push it through all the necessary votes in both the House and Senate in the midst of competing priorities.29 And failure to pass legislation does not signify a failure to generate legislative history. Each attempt generates its own legislative history, history that may be important to understanding the law that is finally enacted.30 The history of any legislation is more likely to be a tapestry of many histories woven together than a single thread.


27. For example, an attempt to pass an Anti-Atrocity Alien Deportation Act, restricting immigration to this country by individuals who participated in atrocities, generated several bills over several Congresses. See, e.g., H.R. 2642, 106th Cong. (1999); H.R. 3058, 106th Cong. (1999); S. 1375, 106th Cong. (1999); H.R. 1449, 107th Cong. (2001); S. 864, 107th Cong. (2001); H.R. 1440, 108th Cong. (2003); S. 710, 108th Cong. (2003). The legislation was finally enacted as an amendment to the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1551, 118 Stat. 3638, 3740.


29. For example, a hearing on the anti-atrocity provisions discussed in note 27 supra was held four years before the legislation was finally passed. Adopted Orphans Citizenship Act and Anti-Atrocity Alien Deportation Act: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary, 106th Cong. (2000). Rep. Mark Foley, who wrote the provisions that were enacted into law, testified at the hearing. Id. at 7–11.

30. See 2A Singer & Singer, supra note 4, § 48.3, at 561. The Supreme Court, for example, has used prior versions of a bill to reinforce its interpretation of the one that passed. See, e.g., Exxon Corp.
¶10 In at least one case, legislation was incorporated into the ACA that bonded it with multiple prior and contemporary legislative histories. Members of Congress had been trying to pass a bill to encourage the study of postpartum depression for almost seven years before work started on the ACA.\textsuperscript{31} Practically every Congress between the 107th and 111th had bills on the issue introduced in the House and the Senate. The language of each did not differ dramatically from any of the others. The House bill introduced on the subject early in the 111th Congress—the Melanie Blocker Stokes MOTHERS Act—was reported out of the Committee on Energy and Commerce with a written report.\textsuperscript{32} Though this bill and its companion Senate bill appeared to have died in the 111th Congress, the language its proponents had been trying unsuccessfully to make into law was incorporated into the ACA, which did pass. The ACA potentially has many such histories under the umbrella of its own.\textsuperscript{33}

¶11 How far back can the legislative history of the ACA conceivably go? The history of health care legislation could be seen as taking place over the course of an entire century, from Theodore Roosevelt’s advocacy for a health care system to Bill Clinton’s failed effort in 1993.\textsuperscript{34} While it hardly seems worthwhile to investigate the Murray-Wagner-Dingell bill—an effort to enact compulsory health care during Truman’s presidency\textsuperscript{35}—the 2010 health care legislation did not emerge from a vacuum. Besides provisions that have their own history, such as those on postpartum depression mentioned above, documents from the 111th Congress provide some guidance on how far back in time a researcher needs to travel. For example, the House Committee on Education and Labor counted nineteen House and Senate hearings on health care in the 110th Congress.\textsuperscript{36} The House Energy and Commerce Committee noted that its Health Subcommittee held seventeen hearings on health care access and the problems of the noninsured during that session.\textsuperscript{37} All these hearings took place in the waning years of the George W. Bush administration, which had no inclination to pass comprehensive health care reform along the lines that the Democratic Congress desired. Congress still investigates issues even if the possibility of passing legislation is remote, and this was especially true for the session of Congress that preceded the one that passed the ACA. Nevertheless, the legislative history of enacted legislation provides the best information for determining what Congress intended the legislation to do, and thus it is best to focus on the actions of the 111th Congress when looking at the ACA.

\textsuperscript{33} In fact, ProQuest Congressional includes the history of the Melanie Blocker Stokes MOTHERS Act in its history of the PPACA.
\textsuperscript{35} Id. at 311.
\textsuperscript{37} Id. pt. 1, at 328.
The House Crafts Its Health Care Bills

¶12 Health care reform was one of newly elected President Barack Obama’s top domestic priorities, and he was determined to press forward with the effort early in his first term.38 Rather than having the executive craft the bill that would ultimately be introduced in Congress, as had been done in President Clinton’s failed effort more than fifteen years earlier, President Obama laid out the broad principles and goals that he wanted in a health care bill and left it to the House and Senate to provide the legislative details.39 Both chambers began working on health care in the early months of 2009, with the House taking the lead.40

¶13 In March 2009, the three chairmen of the House committees with jurisdiction over health care—Education and Labor, Energy and Commerce, and Ways and Means—agreed to harmonize their efforts to draft legislation, perhaps in an effort to avoid the committee “turf wars” that hampered President Clinton’s health care efforts.41 After a series of hearings from March through early May 2009,42 the committee chairmen, with input and direction from Speaker of the House Nancy Pelosi, released a “discussion draft” proposal for health care reform on June 19, 2009.43 It included provisions for a health insurance exchange, where consumers could “shop” for insurance; a public health insurance option; an expansion of those covered by Medicaid; a mandate for individuals to either have insurance coverage or pay a fee (with hardship exemptions); and a mandate for employers to provide insurance or pay a contribution fee (with some exemptions).44 Funding details, however, remained vague.45 This discussion draft was the first public incarnation of health care legislation. It does not appear in the more popular compiled histories, but it can be located on the Internet.46

¶14 After additional hearings were held that June and early July,47 on July 14 the committee leaders introduced House bill 3200—America’s Affordable Health

43. Id. pt. 1, at 328; House Discussion Draft, stamped F:\P11\NH1\MDCR\HRDRAFT1.XML (June 19, 2009, 3:50 P.M.), available at http://waysandmeans.house.gov/media/pdf/111/HRdraft1xml.pdf.
46. House Discussion Draft, supra note 43.
47. The House Education and Labor Committee held a hearing on the draft proposal on June 23, 2009. On June 24, 2009, the Committee on Ways and Means held its hearing. The Committee on Energy and Commerce’s Subcommittee on Health held three days of hearings on June 23, 24, and 25, 2009. See H.R. Rep. No. 111-299, pt. 3, at 68–70. At the time of the writing of this article, the hearings were not yet available in ProQuest Congressional. Statements and video of the testimony are available at the web site of the Committee on Energy and Commerce’s Democratic members. See, e.g., Legislative Hearing on “Comprehensive Health Reform Discussion Draft (Day 1),” Comm. on
Choices Act of 2009. House bill 3200 contained many of the provisions that were in the earlier draft, along with some additional features, one of the more notable of which was a surcharge on wealthier Americans to help pay for it. This bill was subsequently referred to the same three committees whose chairmen had already had a hand in drafting it—Education and Labor, Energy and Commerce, and Ways and Means—and, in addition, to the committees on Oversight and Government Reform, and on the Budget, though these latter two were subsequently discharged from considering the bill. Even so, each committee worked with a bill containing its own amendments, which made slight alterations to the legislation they had received.

¶15 Congressional committees evaluate and shape legislation through the markup process, in which committee members debate, amend, and then vote on whether to report out legislation. Under the traditional model, the markup ranks highly as an expression of what Congress wanted to do and why because it contains one of the first intensive discussions of the legislation by members. In the past, markups were not often used when compiling legislative histories because it was difficult to obtain proceeding transcripts. Now, proceedings are recorded and displayed on committee web sites, C-SPAN’s web site, and even YouTube. Unfortunately, the accessibility to markup proceedings has coincided with a decrease in the substance of the deliberations that made them so valuable. Instead, committee leadership now usually drafts a bill outside the markup process, behind closed doors, and this is what happened with House bill 3200.

¶16 Once the committee draft is agreed upon, the primary goal of the majority during the markup is not to shape it, but to retain the agreed-upon form, or at least


54. Berring & Edinger, supra note 2, at 178–79.
58. Sinclair, supra note 9, at 18.
a form that can pass on the chamber floor, and to keep any amendments to a minimum. The minority party, left out of the extra-committee consultations and usually unwilling to provide any positive input, is relegated to advancing futile amendments to embarrass the majority. Thus, the intensive committee discussion of the form legislation should take no longer occurs.

¶17 This lack of public committee deliberation is clear in the House committee markups of the health care legislation. Having already drafted House bill 3200, the markups of the Education and Labor and Ways and Means committees represented housekeeping rather than robust debate. For example, the Education and Labor Committee passed an amendment in the nature of a substitute which simply fine-tuned and expanded coverage under the original bill and called for more consumer protection provisions. Subsequent committee amendments included waivers of some of the bill’s requirements for Hawaii’s insurance program and Tricare (a health program for military families and states implementing a single-payer system) as well as temporary hardship waivers for small businesses that could not provide health insurance. Minority attempts to gut the legislation or restrict abortion procedures were voted down. Both the Ways and Means and the Education and Labor committees marked up the bills and reported them to the House floor on July 17, 2009.

¶18 More rancor emerged in the Committee on Energy and Commerce, where the fiscally conservative “Blue Dog” Democrats held sway and made known their unhappiness with the cost and size of the health care bill. Withholding their votes as leverage, the Blue Dogs managed to win several changes to the bill in intense bargaining with Committee Chairman Henry Waxman, Speaker Pelosi, and White House Chief of Staff Rahm Emanuel, including reductions in its cost and limiting the public insurance plan so that private insurers could more easily compete against it. But even this committee dispute was discussed outside of the markup, taking place behind the scenes or in the press. The Energy and Commerce Committee finished its work on July 31, 2009, with a more scaled-back version of House bill

59. Id.
65. In fact, the Energy and Commerce Committee did not hold the markup until July 30, waiting until an agreement was hammered out. See Pear & Herszenhorn, Impasse, supra note 64. The Congressional Record Daily Digest shows that markup of H.R. 3200 was supposed to be continued on July 21, 2009. 155 Cong. Rec. D872 (daily ed. July 20, 2009). It was not until July 29 that the Daily Digest reports the continuation of markup on July 30. 155 Cong. Rec. D944 (daily ed. July 29, 2009).
3200, which also contained amendments to promote good health behaviors, create an approval process for generic drugs, and restrict premium increases.\footnote{66. Pear & Herszenhorn, Consensus, supra note 64.}\

¶19 The three versions of House bill 3200 were finally reported to the floor on October 14, 2009, many weeks after work on them had been completed.\footnote{67. H.R. REP. NO. 111-299 (2009).} The delay was apparently due to an agreement with the Blue Dogs not to rush a chamber vote as well as a general unwillingness to proceed until the Senate had produced its own bill.\footnote{68. See Sinclair, supra note 9, at 190; Lois Romano, A Blue Dog with Time and Clout on His Side, Wash. Post, July 30, 2009, at A17.} Thus the history of House bill 3200 came to an end as its three versions languished on the House Union Calendar—a list of bills involving taxation or appropriations that are eligible to be heard by the whole House\footnote{69. 155 Cong. Rec. H11,383 (daily ed. Oct. 14, 2009); David M. Herszenhorn & Robert Pear, White House Team Joins Talks on Health Care Bill, N.Y. Times, Oct. 15, 2009, at A24.}—and a new bill was introduced to carry the House’s health care provisions to the next legislative step. Though procedurally the bill was at a standstill, House leaders were working behind the scenes throughout the late summer and fall to “blend” the separate versions together.\footnote{70. Oleszek & Oleszek, supra note 17, at 259.}\

¶20 On October 29, 2009, the House’s health care bill switched tracks with the introduction of House bill 3962, the Affordable Health Care for America Act.\footnote{71. H.R. 3962, 111th Cong., § 59C (2009) (as introduced in the House), available at http://www.gpo.gov/fdsys/pkg/BILLS-111hr3962ih/pdf/BILLS-111hr3962ih.pdf.} The new bill was the culmination of negotiation among different factions of House Democrats.\footnote{72. Landmark Health Care Overhaul, supra note 49, at 13–5.} House bill 3962 resembled its predecessor, House bill 3200, in many ways—it contained health exchanges, a public option, individual and employer mandates, Medicaid expansion, and a surcharge on those with high incomes.\footnote{73. H.R. 3962, 111th Cong., § 262, 552.} It also included the negotiated Medicaid rates that the Blue Dogs wanted and had won in the Energy and Commerce Committee. Some elements were altered. For example, instead of the graduated high income surcharge, House bill 3962 as first introduced in the House had a straight 5.4% surcharge on taxpayers earning more than $1,000,000.\footnote{74. Id. §§ 262, 552.} Whole new sections were added as well, including a revocation of the McCarran-Ferguson Act, which exempts insurance companies from federal antitrust law, and an excise tax on medical devices.\footnote{75. Robert Pear & Sheryl Gay Stolberg, Obama Strategy on Health Care Legislation Appears to Be Paying Off, N.Y. Times, Nov. 9, 2009, at A10.} Yet some issues had not yet been resolved, a major one inevitably being whether or not to cover abortion services.\footnote{76. Robert Pear & David M. Herszenhorn, Buoyant House Democrats Unveil Overhaul Bill, N.Y. Times, Oct. 30, 2009, at A20. See also Sinclair, supra note 9, at 193–95.}
While its predecessor, House bill 3200, generally followed a traditional legislative history track, House bill 3962 jumped that track. House bill 3962 was not referred to committee for any substantive review. It was not even listed on the House Union Calendar, which would make the bill eligible for consideration by the House. Yet it was called up on the House floor on November 7, 2009, less than two weeks after it had been introduced. The means to accomplish this feat were drawn from the many tools House leaders have to set agendas and advance legislation considered to be of greatest importance. Such agenda control procedures can have a significant impact on legislative history research, and those unaware of them may find themselves missing significant legislative history sources: for example, hearings that may have been held on another bill, such as House bill 3200.

One of the primary means of controlling the legislative agenda in the House is through a House Rules Committee resolution. Students of legislation are probably more familiar with resolutions that lack substantive impact, such as acts expressing the sense of one or both congressional chambers, and that have little bearing on actual legislation. House Rules Committee resolutions, on the other hand, have direct procedural and substantive effects on legislation.

As a procedural document, the rules resolution effectively lets a bill jump ahead in consideration. It also lays the parliamentary ground rules for its debate, often determining how many amendments can be made on the floor and the length of debate that will be allowed. Rules resolutions fall into three different categories for this purpose: open, closed, and complex. Open rules resolutions allow for any amendments allowed under House rules. Closed rules forbid any amendments. Complex rules operate in the area between the extremes, allowing for specifically designated amendments to be discussed.

It is the potential substantive effect of the rules resolution, though, that produces more dramatic results, permitting changes to a bill that can range from small amendments to an entirely different text, such as a new consensus product that is more likely to pass. Such rules resolutions usually come in the form of self-

---

78. However, resolutions are an integral part of the budget process. Oleszek, supra note 15, at 71–72. A continuing resolution is employed to keep the government funded should Congress fail to pass appropriations bills for that purpose. Id. at 50–51.
80. Bach, supra note 79, at 554.
81. TIEFER, supra note 79, at 269.
82. See Oleszek, supra note 15, at 148, 157–58. A noteworthy example of the considerable power of the House Rules Committee to shape legislation took place in 1987, during the debate over long-term care legislation. Expanding Medicare to cover long-term care was a cause célèbre for Rules Committee chairman and legislative veteran Rep. Claude Pepper. Pepper was opposed in his efforts for a more expansive plan by powerful Ways and Means chairman Dan Rostenkowski. To avoid having a long-term care bill go through Rostenkowski’s committee, Pepper used his power in the Rules Committee to take a reported bill, H.R. 3436, which dealt with technical corrections to the Older Americans Act of 1965, and substitute its language with his own long-term care bill. A frustrated Rostenkowski quipped, “When you own the umpire, chances are you’re going to win the ballgame.” Long-Term Care Legislation, in 1987 CQ ALMANAC 535, 535 (Christine C. Lawrence ed., 1988).
executing rules, which state that certain language is “considered adopted” and automatically incorporated into the bill once the rules resolution is passed.\(^8^3\) This tool is now frequently used to avoid direct votes on measures that would be controversial if discussed individually or are too significant to risk being held up by the traditional legislative process.\(^8^4\) More important for the purposes of legislative history, it provides an opportunity to incorporate eleventh-hour changes into a bill in order to attract the floor votes necessary for passage.\(^8^5\)

\(^{25}\) The rules resolution also generates its own legislative history. The House Rules Committee holds a hearing to deliberate the resolution, with votes on amendments as well as the final product, and issues the resolution with a report that defines how the procedure will be employed on the House floor, the changes that have been made to the bill, and some commentary on those changes.\(^8^6\) The history of a rules resolution, often existing outside the limits of traditional legislative history, explains what parliamentary procedure was used to debate a bill.\(^8^7\) This explanation, in turn, can help researchers understand what kind of legislative history will be available in the floor debate. For example, bill consideration under a closed rule can explain the lack of any amendments made from the floor.\(^8^8\)

\(^{26}\) Here, the House Rules Committee moved the health care bill to the floor via House resolution 903, a special rule with both procedural and substantive components. First, House resolution 903 played the traditional role of a rules resolution, providing a procedural road map for how House bill 3962 would be considered on the House floor. It waived all points of order, set the time of debate for several hours, and called for a vote once debate was concluded.\(^8^9\) As a structured rule, House resolution 903 allowed for debate and vote on only two amendments.\(^9^0\) One was from Representative Thomas “Bart” Stupak, prohibiting any federal funding of abortion under the health care bill. The second essentially contained Republican health care proposals.\(^9^1\)

\(^{27}\) The substantive components of House resolution 903 incorporated myriad changes to House bill 3962, which had been crafted during the ongoing negotiations between House Democratic leaders and various factions of the Democratic party. Part A of the resolution was a “self-executing rule,” containing automatic changes to House bill 3962, such as rewriting the repeal of the McCarran-Ferguson Act’s antitrust exemption for health insurance companies.\(^9^2\) Part B was a perfecting


84. See id. at 2.


87. See, e.g., id. at 1–2.


92. Id. at 7–8; H.R. 3962, 111th Cong., § 262 (as passed by the House, Nov. 7, 2009), available at http://www.gpo.gov/fdsys/pkg/BILLS-111hr3962pcs/pdf/BILLS-111hr3962pcs.pdf. See also Shailagh
amendment—an amendment that makes changes only to parts of legislation, not the whole. This made changes to Part A’s self-executing rule, effectively amending the amendment. For example, one of the sources for funding the House bill was closing a loophole in a biofuel tax subsidy. Part A included a substantial portion of language on this measure, but it was amended by Part B, which merely excluded unprocessed fuels from the tax credit. These changes are not in House resolution 903 itself; they are in the report that went with it when it was reported out of committee. The resolution incorporated these changes by reference. House resolution 903 passed the House in the early afternoon of November 7, 2009, after an hour of debate. House bill 3962 was passed at 11:15 that same evening, after four hours of scheduled debate. It was received in the Senate three days later.

¶28 Under traditional legislative history, the Senate should have sent the House bill to committee for consideration and markup, after which it would have been reported to the floor for a vote. If the Senate approved the House bill as passed, it would then go on to the President for his signature. If not, the bill would be returned to the House for its concurrence or to request a conference. None of these events took place. As it would turn out, the Senate would take the lead in shaping the form the ACA was to take.

The Senate Takes Up Health Care

¶29 At the time the House began crafting its legislation in the spring of 2009, two Senate committees—the Committee on Health, Education, Labor and Pensions (HELP) and the Committee on Finance—had already been charged with the task of producing that chamber’s version of health care legislation. The initiation of


96. This introduction of new language into the bill seems to have gone unnoticed even by the Congressional Information Service. Though the CIS Legislative History does include H.R. Rep. No. 111-330 with the history of the PPACA, it does not list the provisions included in the document as it does with other reports generated by traditional committee review. CIS does not list this report in the legislative history of the HCERA even though the biofuel provision can be traced to this report. A minor point to be sure, unless you are a researcher tasked with understanding the history of the biofuel provision.


100. SINCLAIR, supra note 9, at 187. The latter was no easy task since HELP’s chairman, Edward M. Kennedy, favored a substantial health care program, while the chairman of the Finance Committee, Max Baucus, was inclined toward a more conservative approach. Robert Pear, 2 Democrats Spearheading Health Bill Are Split, N.Y. TIMES, May 30, 2009, at A7.
the legislative process in the Senate began in much the same way as it had in the House. Hearings and discussions, following on proceedings from previous Congresses, were held to delve into the issue. Though the committee chairmen had somewhat different positions, the staffs of both committees communicated with each other as they designed their legislation. Their eventual goal was the same as it was for the House committees—to produce legislation that could be merged together into a single bill that could be brought to the floor.

§30 The paths of the Senate’s effort and that of the House began to diverge with the introduction of the Senate bills through their respective committees. The traditional model of the legislative process ignores the power of House and Senate committees to generate legislation on their own, tending to imagine all bills as being initially introduced on the chamber floor. This is not necessarily the case, and one way to introduce a bill in committee is via the markup process. A committee does not actually need to use a bill introduced on the chamber floor and referred to it for markup. Instead, it can come up with statutory language of its own, such as the chairman’s mark—a committee chairman’s draft of what the legislation should look like. Senate committees have even greater flexibility than those in the House because they can report out original bills, and this was the case with the health care bills that came out of HELP and Finance. While this power may seem a mere technicality, it can create a vexing annoyance for legislative history researchers, especially those tracking legislation as it is being debated in Congress.

§31 Bills are numbered as they are introduced. Bills that originate in committee have not yet been introduced in the technical sense and, as a result, are not numbered until after they are reported out of committee. This can make the original committee-generated bills hard to find. The Library of Congress’s THOMAS database does not acknowledge the committee bill until it has been introduced on the floor, nor are such bills printed by the Government Printing Office (GPO). This is troublesome for those researching pending legislation, as it can take some time for a bill to be debated, marked up, and then finally reported to the floor, making THOMAS useless for their research. Researchers are also deprived of the original bill’s language to compare with the version that was reported out of committee. Fortunately, there are other alternatives for such information—committee or press

102. Id. at 187–88.
103. See JOHNSON, supra note 52, at 8–9.
104. OLESZEK, supra note 15, at 120.
108. This process can cause considerable confusion. See, e.g., Josh Tauberer, When Do Bills Get a Number?, GOVTRACK.USA BLOG (Oct. 14, 2009), http://www.govtrack.us/blog/2009/10/14/when-do-bills-get-a-number/.
web sites.\textsuperscript{109} Of course, the problem with relying on these sources, as with any Internet source, is that documents are frequently moved or removed, especially as the political cycle goes on to the next contentious issue.\textsuperscript{110}

§32 The Senate HELP Committee completed its health care bill first.\textsuperscript{111} One of the defining aspects of HELP’s work was the review of the legislation’s cost by the Congressional Budget Office (CBO) and the committee’s response to it. The HELP Committee introduced an unnumbered draft on June 9, 2009, with elements that were intended to be filled in during markup.\textsuperscript{112} Under the draft bill, uninsured persons would be required to purchase insurance through state exchanges or make payments to the government. Those in lower and middle incomes would receive subsidies to help them purchase policies, as would small businesses to offer insurance to their employees. No public option was included in the proposal.\textsuperscript{113} The bill was submitted to the CBO for an estimate of the legislation’s cost.\textsuperscript{114}

§33 The initial CBO review of the incomplete bill determined it would cost $1 trillion and decrease the uninsured by a net sixteen million people.\textsuperscript{115} The bill
drafters then added more details and fine-tuned the existing language,\footnote{116} releasing an amendment to the chairman’s mark on July 2, 2009.\footnote{117} The new language scaled back subsidies and included a public option called the Community Health Insurance Option, to be run by the Department of Health and Human Services and offered through the exchanges.\footnote{118} These changes won a more palatable estimate from the CBO.\footnote{119}

¶34 Markup occurred between June 17 and July 14, 2009, during which approximately five hundred amendments were made.\footnote{120} The final vote on the HELP Committee’s bill was held on July 15, 2009, but the legislation, titled the Affordable Health Choices Act, was not reported until months later, on September 17, 2009, by which time it had been numbered Senate bill 1679. It went to the floor without a committee report.\footnote{121}

¶35 The Senate Finance Committee’s work was distinguished by two conversations that took place as it tried to complete the bill, as well as by its long delay in finally reporting one. The first conversation was between a group of three Democratic senators—Finance Committee chairman Max Baucus, Jeff Bingaman, and Kent Conrad—and three Republican senators—Mike Enzi, Chuck Grassley, and Olympia Snowe. This “group of six” met throughout the late spring, summer, and early fall of 2009 but could not reach an agreement.\footnote{122} Despite the group’s failure, some of the ideas it generated were incorporated into the Finance Committee bill.\footnote{123} There is no official record of their discussions, which were apparently conversational in nature, though they were covered in the press. Senator Grassley is said to have tweeted about some of the meetings after they were held, raising the titillating prospect that social media could now be a source of legislative history.\footnote{124}

¶36 Baucus was not only talking with senators across the aisle, he was also negotiating with the pharmaceutical industry with the blessing of the White

---

118. Id. at § 3106; see also Jackie Calmes, Revisions to Health Bill Are Unveiled by Democrats, N.Y. TIMES, July 3, 2009, at A16.
120. SINCLAIR, supra note 9, at 188.
122. According to a Finance Committee time line on the health care law’s passage, the group met thirty-one times, for a total of sixty hours, between June 18, 2009, and September 14, 2009. Health Care Reform from Conception to Final Passage, supra note 109. See also David M. Herszenhorn & Robert Pear, Health Policy Is Carved Out at Table for 6, N.Y. TIMES, July 28, 2009, at A1.
123. Senator Baucus stated that his chairman’s mark was largely based on the group’s discussions. 156 CONG. REC. S1823 (daily ed. Mar. 23, 2010).
On June 20, 2009, President Obama announced a deal between the pharmaceutical industry and Senator Baucus for an $80 billion commitment to make drugs more affordable for older Americans and to reduce the price tag of health care reform. The deal was not completely altruistic—the drug companies were promised that health care reform would not involve government-negotiated prices of drugs or the importation of drugs from Canada. In a similar deal, the White House also negotiated with hospital associations for $155 billion in savings. Neither the full terms of these deals nor any record of them was made public, though apparently their provisions did have an impact on the Finance Committee’s health care bill.

The Finance Committee also had the unfortunate distinction of taking the most time to produce its bill, as its work dragged on into September after a contentious summer during which public support for the health care overhaul fell precipitously. Unable to reach an agreement through the group of six, Senator Baucus ended the negotiations and finally introduced a chairman’s mark for health care legislation. This version enjoyed three incarnations before it was considered by the committee. First, a Baucus draft proposal was circulated when President Obama spoke on the health care issue before a joint session of Congress on September 9, 2009. A week later, on September 16, Baucus introduced a chairman’s mark, the America’s Healthy Future Act of 2009. This met with withering criticism not only from health care reform opponents but from proponents as well, who protested the legislation for not covering enough people and not providing a public option.

128. David M. Herszenhorn, Democrats Divide over a Proposal to Tax Health Benefits, N.Y. TIMES, July 9, 2009, at A19. Hospitals and pharmaceutical companies were not the only groups that offered concessions for promises about what the eventual health care bill would contain. Insurers agreed to end rate-setting practices that charged higher rates to sick people if the legislation required all Americans to carry insurance. Robert Pear, Insurers Offer to Soften a Key Rate-Setting Policy, N.Y. TIMES, Mar. 25, 2009, at B1. Walmart apparently agreed not to oppose provisions mandating that employers cover workers as long as it was not required to pay part of the cost of workers on Medicaid.

129. The Huffington Post claimed to have a memo detailing the deal with drug manufacturers, although it was said to have been obtained from an unnamed lobbyist who received a copy from an unnamed participant in the negotiations. Ryan Grim, Internal Memo Confirms Big Giveaways in White House Deal with Big Pharma, HUFFINGTON POST (updated May 25, 2011), http://www.huffingtonpost.com/2009/08/13/internal-memo-confirms-bi_n_258285.html.
130. For example, an attempt to require drug manufacturers to provide steeper discounts on drugs offered under Medicare was rejected in the Finance Committee. Robert Pear & Jackie Calmes, Senate Panel Rejects Bid to Add Drug Discount, N.Y. TIMES, Sept. 25, 2009, at A18.

131. SINCLAIR, supra note 9, at 191.
134. SINCLAIR, supra note 9, at 192.
week later, Baucus introduced an amended version that increased the number of people covered. Again, none of these chairman’s mark versions of the bill were included on THOMAS or are available through GPO.

¶38 Committee markup began on September 22, 2009, with members having to contend with 564 proposed amendments. The committee’s work was completed in the early morning hours of October 2, but the vote was postponed until after the CBO completed its analysis of the legislation, which was published on October 7. Finally, on October 13, the full committee voted to report out Senate bill 1796, the America’s Healthy Future Act, along with a committee report.

¶39 Senate bill 1796 included elements common to its predecessors. Individuals would be required to obtain insurance. Those in lower and middle income brackets could do so through nonprofit cooperatives and would have the benefit of subsidies. Medicaid would be expanded to cover those with the lowest incomes. Larger employers would be penalized if their employees received insurance through the cooperatives, and tax credits would be available to some employers to provide employee insurance.

One of the means to pay for the bill was a tax on plans with premiums above $8000 for individuals and $21,000 for families, one of the proposal’s most controversial provisions—though the premium limit was $5000 higher for retirees and those in high-risk professions. Other funding came from limiting flex plan spending accounts to $2500 and fees on segments of the medical industry. Perhaps the most significant feature of the Finance Committee’s bill was what it did not contain—a public option. Democratic senators had attempted to include one, but their proposals were voted down with the assistance of Chairman Baucus, who did not believe the public option could muster the sixty votes necessary for passage on the Senate floor.


142. Id.


¶40 After the Senate committee bills were both finally reported out to the floor, Senate Majority Leader Harry Reid led the effort by prominent Democratic senators and the White House to merge the HELP and Finance Committee bills into one. The path Reid’s bill would have to take to passage in the Senate is only fully understandable with a basic primer on that chamber’s rules.

¶41 On paper, the Senate lacks many of the procedural mechanisms to expedite floor debate that House leaders enjoy. Senate rules, compared to those of the House, are extraordinarily brief, and those rules that do exist favor individual action at the expense of majoritarian control. Senators can engage in unlimited debate and are barely limited in the number of amendments they can offer to legislation. There is no requirement that amendments be germane to the legislation they alter, nor is there any priority of germane amendments over those that are not. Further, the Senate has no comparable institution to the House Rules Committee, which can set rigid limits on floor debate. Combining this lack of control with the supermajorities needed to conduct many important matters of business, and the availability of other obstructionist tactics, small minorities of senators, and sometimes even individual senators, have the potential to frustrate legislation they oppose by grinding the chamber’s work to a halt.

¶42 The rule that had the greatest effect on the Senate’s consideration of Reid’s bill, as with any contentious matter before that chamber, was Rule XXII, which governs cloture, or how debate can be closed. Again, the Senate’s rules generally empower each member with the right to speak for an unlimited amount of time, a power that can be used to obstruct consideration of, or filibuster, a measure. This right can only be circumscribed on debatable questions by the invocation of cloture—a vote to limit debate to no more than thirty hours—which requires a supermajority of sixty votes. Cloture also has the effect of limiting amendments to the bill under consideration. Only amendments submitted before cloture may be considered and, of these, only those that are germane to the legislation.

¶43 Typically, two invocations of cloture are necessary to get to a vote on a bill. The first is for closing debate on a motion to proceed that calls a bill up for consideration. The second is for closing debate on the bill itself. The Senate’s voting
duality creates a complexity for researchers. The motion to proceed is focused solely on procedure. Following this vote, the battle over the substance of the bill, such as modifying it with germane and nongermane amendments, runs until the cloture motion vote closes it off. Knowing where the battle over substance begins and ends helps screen out, or otherwise put into context, hours of debate that a researcher must comb through for legislative history.

¶ 44 Given the united Republican opposition to Democratic health care legislation, Reid would have to make sure his proposal could count on the votes of all fifty-eight Democrats and the two independent senators who caucused with them—no easy task considering there were disagreements on such complicated matters as the public option, employer mandates, taxing high-priced plans, and the need to keep the legislation’s price tag below the President’s $900 billion limit. This reality narrowed what form the final proposal could take, since one unhappy senator could derail the entire bill. It also shaped the debate that would take place and the information that would be generated from it.

¶ 45 Majority Leader Reid’s proposal was unveiled on November 18, 2009, after the CBO provided an estimate of its cost. The legislation included a tax on “Cadillac health plans,” had less restrictive provisions regarding abortion, and was less punitive to those who did not obtain insurance. In addition, this legislation was paid for, in part, through a tax on elective cosmetic surgery; fees on insurance companies, makers of medical devices, and drug companies; and by delaying its implementation to 2014, a year later than the House bill. The Reid proposal was cheaper than the House’s version—$821 billion over ten years versus $1.03 trillion over that same time frame—but would also leave several million more people uninsured. Unlike the Finance Committee bill, it contained a public option, a modified version of the Community Health Insurance Option from HELP’s Senate bill with an opt-out provision for states that did not wish to participate. The Reid proposal did not become a new piece of legislation but rather was inserted as an amendment to an existing one. With this decision, the legislative history of health care merged with that of the Service Members Home Ownership Tax Act of 2009.

¶ 46 The association between these unrelated bills is inexplicable without an understanding of a “cut and paste” procedure used to forge the necessary chamber agreement—“amendment between the houses.” In the House, the procedure works...
like this: the House first passes its own bill, then it takes up a Senate bill, strikes that bill’s text, and replaces it with the House bill’s language. The Senate can then accept the House version of its bill, make amendments of its own, and send it back to the House, or it can go into conference to hammer out differences with the House. Alternatively, the two chambers can keep sending the legislation back and forth until complete agreement is achieved, avoiding a conference altogether. The process is similar in the Senate.

¶ For example, earlier in the 111th Congress, House bill 1586 started off as a bill to tax bonuses received by recipients of the Troubled Asset Relief Program (TARP). After the Senate received it, text below the enacting clause was struck and replaced by the FAA Air Transportation Modernization and Safety Improvement Act. This was returned to the House, which made amendments of its own, and sent it back to the Senate, which amended it again and returned it to the House. The House agreed with the Senate amendments, and the bill was sent on to the President to be signed into law. Though it is typical to select a bill on the same subject passed by the other chamber, examples such as this one demonstrate that there is no requirement to do so.

¶ Amendment between the houses, also known as ping-ponging, is the increasingly common, some would even argue exclusive, method through which chamber differences are now resolved. There are numerous reasons for its popularity. Avoiding conferences with select panels from the House and Senate provides the chamber leadership more control, and affords lawmakers the opportunity to decide what provisions can be kept in, kept out, or added. In the Senate, request-
ing a conference committee with the House requires unanimous consent. If that unanimity does not exist, opponents of a bill have many opportunities to frustrate getting to that stage.\footnote{49}

¶49 What this reliance on amendment between the houses means for researchers is that one of the most important documents of legislative history, the conference committee report, may not be available. It also means that the legislative histories of two different bills intersect, and the researcher has to be aware of this junction to follow the detours. Staying on track may not be a problem in cases where the bill used for the ping-ponging has the same subject matter.\footnote{50} But when it does not, amendment between the houses may detour the unwary researcher onto unanticipated and unwanted paths.

¶50 For the health care legislation, Majority Leader Reid used a vehicle with a completely different subject matter, and those unfamiliar with congressional decision making may want to know why. For a bill to be considered by the Senate, it must be on the Senate Calendar of Business or be brought into consideration through unanimous consent,\footnote{51} something again impossible to achieve without full chamber agreement. At the time Reid was preparing the blended health care bill, the Senate had a handful of House bills available to use for an amendment between the houses on the Senate Calendar of Business, including House bill 3962, the House’s health care bill,\footnote{52} and House bill 3590, the Service Members Home Ownership Tax Act of 2009.

¶51 At this point, it is worth noting that House bill 3962 was never referred to a Senate committee. While Senate rules provide that House bills go to the Senate committee with jurisdiction for review after two readings, there are exceptions to this procedure. If a senator objects to further proceedings on the bill after two readings, the legislation bypasses committee review and goes on the Senate Calendar of Business, where it can be called up for floor consideration.\footnote{53} That was the case with both House bill 3590 and House bill 3962.

¶52 The main attraction of using House bill 3590 (as opposed to the House’s health care bill) was that it was obsolete by the time Majority Leader Reid was blending the Senate health care bills. Its tax credits for service persons had been included in the Worker, Homeownership, and Business Assistance Act of 2009, which had already been passed by Congress and signed by the President almost two

\footnotetext[49]{See Oleszek, \textit{supra} note 168, at [5]–[10].}
\footnotetext[50]{For example, in 2004, the House and Senate were working on a spending bill for the Department of Homeland Security. The House measure was House bill 4567. The Senate’s was Senate bill 2537. After the House passed its version, the Senate took it, struck its language, inserted that of Senate bill 2537, passed it, and sent it back to the House. Homeland Bill Sheds Some Baggage, in 2004 CQ Almanac 2-26, 2-28 to 2-29 (Jan Austin ed., 2005).}
\footnotetext[52]{See 155 Cong. Rec. S11,382 (daily ed. Nov. 16, 2009).}
weeks earlier.\textsuperscript{175} When it came time to select the health care “vehicle” legislation, Reid believed House bill 3590 was a “non-controversial” choice for amendment between the houses.\textsuperscript{176} Therefore the original text of House bill 3590 was struck and replaced with the Reid health care proposal, Senate amendment 2786.\textsuperscript{177}

\textsection{53} This act of legislative expediency is an example of the perils that an amendment between the houses poses to the unwary researcher of legislative history. It creates the illusion that one bill emerged from the other and that their histories are related—that is, that the PPACA originated from the Service Members Home Ownership Tax Act—an illusion enabled by no less an authority the Library of Congress’s THOMAS database.\textsuperscript{178} Furthermore, it obscures the fact that the original content of the Service Members Home Ownership Tax Act actually did pass. Because the Service Members Home Ownership Tax Act became intertwined with health care, it requires more sophisticated searching to divine its actual fate.\textsuperscript{179}

\textsection{54} Once Reid had a vehicle to use, the first phase of its consideration went relatively smoothly. On November 21, cloture on the motion to proceed passed on a party-line vote. Majority Leader Reid then called up his amendment to House bill 3590, and the process moved on to a debate of the proposal.\textsuperscript{180} The second cloture vote, effectively ending debate on Reid’s bill, would prove to be more of a hurdle

---

\textsuperscript{175} Pub. L. No. 111-92, 123 Stat. 2984.

\textsuperscript{176} “[B]asically, we needed a non-controversial House revenue measure to proceed to, so that is why we used the Service Members Home Ownership Tax Act. It wasn’t more complicated than that.” E-mail from Kate Leone, Senior Health Counsel, Office of Sen. Harry Reid, to author (Apr. 21, 2011, 3:25 P.M.) (on file with author). The importance of H.R. 3590’s status as a revenue measure is due to the constitutional requirement that such bills originate in the House. ROBERT KEITH & BILL HENIeff JR., CONG. RESEARCH SERV., RL33030, THE BUDGET RECONCILIATION PROCESS: HOUSE AND SENATE PROCEDURES 68 (2005), available at http://assets.opencrs.com/rpts/RL33030_20050810.pdf. It has also been suggested that the choice may have been made to create a facade through which Democrats would appear to be voting for something more popular than health care, i.e., veterans benefits. SINCLAIR, supra note 9, at 201–02. However, at least one witness to the events doubted this interpretation. Letter from Sen. Arlen Specter to author (Feb. 20, 2012) (on file with author).

\textsuperscript{177} S. AMEND. 2786, 115 CONG. REC. S1,607 (daily ed. Nov. 19, 2009).

\textsuperscript{178} See Bill Summary & Status, 111th Congress (2009–2010), H.R.3590, All Congressional Actions, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR03590:@@@X (last visited Jan. 11, 2013). THOMAS gives a chronological record of a bill’s progress through Congress in its “Bill Summary & Status” view. A researcher of H.R. 3590 following this record would begin with H.R. 3590’s initial incarnation as a bill providing tax credits for homeownership for service members and end with the PPACA as passed into law.

\textsuperscript{179} For example, THOMAS reports that House bill 3590 became the vehicle for health care, but it also shows that similar legislation, Senate bill 1728, the Service Members Home Ownership Tax Act of 2009; House bill 3573, the Call to Service Homebuyer Credit Act of 2009; and House bill 3780, the Service Members’ Homebuyer Tax Credit Extension Act 2009, all died in committee. Bill Summary & Status, 111th Congress (2009–2010), S.1728, THOMAS, http://hdl.loc.gov/loc.uscongress /legislation.111s1728 (last visited Jan. 21, 2013); Bill Summary & Status, 111th Congress (2009–2010), H.R.3573, THOMAS, http://hdl.loc.gov/loc.uscongress/legislation.111hr3573 (last visited Jan. 21, 2013); Bill Summary & Status, 111th Congress (2009–2010), H.R.3780, THOMAS, http://hdl.loc.gov /loc.uscongress/legislation.111hr3780 (last visited Jan. 21, 2013). OpenCongress.org and Govtrack.us also show all this legislation as having died (and in only some cases show it as linked to the health care bill). The confusion created the impression that the service person tax credit extension legislation had not passed; my colleague Lyndsey Steussy was able to find that the tax credit extension had passed by using the text of one of the failed bills as terms for a search in the U.S. Code.

\textsuperscript{180} 155 CONG. REC. S11,967 (daily ed. Nov. 21, 2009).
than the first. Democrats unhappy with the legislation’s initial form were unwilling to block its path to consideration, but they threatened to filibuster if changes were not made.181 Reid had to have the support of each one to get to a vote. While Republicans had not dug in their heels to fight the motion to proceed, hoping to tarnish vulnerable Democrats by forcing them to vote in a way that could be characterized as a substantive vote for the health care bill, they would not be so accommodating with the next cloture motion, and they were united in their opposition.182

¶55 Senate consideration of House bill 3590 as amended proceeded on two parallel tracks. The first was a traditional one, involving floor debate and votes recorded in the Congressional Record. THOMAS lists 506 offered amendments to Majority Leader Reid’s amendment to House bill 3590—Senate amendment 2786—suggesting a vigorous effort to alter the bill’s final form on the Senate floor.183 But this number is deceptive. In actuality, only a tiny fraction of these amendments has any significance to the PPACA’s legislative history.184 The ability to separate the few relevant amendments from the many immaterial ones requires an understanding of how the Senate regulates its floor debate through uniform consent agreements (UCAs).185

¶56 A UCA allows senators to temporarily waive existing rules and make new ones, creating a structure for debate that might not otherwise exist.186 For example, UCAs can be used to set debate time limits and the number and type of amendments that can be offered during floor consideration of a bill.187 “They arise from negotiation, usually between the majority and minority leadership. Since any objecting senator can derail these agreements, discussions can include individual senators with a keen interest in the debate as well.”188 As the products of negotiation, UCAs involve the same processes as any contract—give and take, quid pro quo, benefit, and cost. The complexities in arranging them often require several UCAs during debate rather than any one comprehensive agreement.189 Whatever their form, “they are formally recorded in the Congressional Record, the [Senate] Calendar of Business, and the Senate Journal.”190

181. Sinclair, supra note 9, at 202–03.
182. Oleszek & Oleszek, supra note 17, at 269.
185. Palmer, supra note 107, at 1.
187. Riddick & Frumin, supra note 105, at 1311.
189. Id. at 236–37.
190. Id. at 236.
Given that Democrats and Republicans were polarized on the health care issue, agreement on any UCA seems incredible. But the impetus for UCAs is that they expedite the business of the Senate, especially consideration of a bill. Their appeal, even for those opposing the legislation, is that they create predictability where none would otherwise exist, guaranteeing senators that they will be heard on a matter. Once concluded, they are enforceable and can be changed only by unanimous consent.  

Thus, both parties reached a UCA after the cloture vote and before adjourning on November 21, 2009, and they continued to do so on a nearly daily basis until December 14, 2009. These UCAs set debate time limits and determined which amendments would be considered, usually allowing for debate on an amendment offered by a Democratic senator, which was set off by a side-by-side amendment or a motion offered by a Republican senator. A key component to these agreements was that an amendment could only pass if it had a sixty-vote majority. These agreements were beneficial for both sides. Democrats were able to get the bill debated and amended in a form guaranteed to reach the sixty votes needed for cloture. Republicans were given the chance to voice their concerns and draw distinctions between themselves and their opponents concerning a bill that they believed was losing public support.  

While the UCAs limited which amendments could be considered, senators offered additional ones for symbolic purposes. This practice accounts for the vast majority of amendments proposed during the Senate debate on Reid’s amendment to House bill 3590. All of those amendments not covered by UCAs were ordered to lie on the table as soon as they were introduced and had no parliamentary standing at all.  

From a legislative history perspective, the challenge with the Senate amendments to Majority Leader Reid’s own amendment to House bill 3590 is separating the handful covered by the UCAs from the hundreds that had no effect on the legislation. THOMAS is the best source for this task, but the researcher should not be deceived by the “Amendments” link on the Bill Summary and Status web page. This leads to a full list of all amendments offered, with no distinction between

---

192. The major UCAs governing debate and amendment of H.R. 3590 can be found at 155 Cong. Rec. S11,977 (daily ed. Nov. 21, 2009), 155 Cong. Rec. S12,016 (daily ed. Nov. 30, 2009), and 155 Cong. Rec. S12,090 (daily ed. Dec. 1, 2009). Many, but not all, of the UCAs were reported in the Daily Digest for the day they were agreed upon.  
193. Sinclair, supra note 9, at 204.  
194. The rationale behind the sixty-vote requirement is that it allows bill proponents to avoid obstacles created by cloture, i.e., the inability to vote on a measure through a failure to end debate as well as the time requirements to get to that vote even if cloture is achieved. There are incentives for opponents to agree to this term. They are assured of the supermajority requirement for a final vote and often are granted the right to offer competing proposals for debate and vote. Megan Suzanne Lynch, Cong. Research Serv., RL34491, Unanimous Consent Agreements Establishing a 60-Vote Threshold for Passage of Legislation in the Senate 2 (2008), available at https://opencrs.com/document/RL34491/.  
195. See Oleszek & Oleszek, supra note 17, at 269.  
amendments allowed by UCAs and those that were not. The link for “All Congressional Actions with Amendments” has a time line with the amendments that were debated and voted upon. In addition, pending amendments and votes are also included in the Congressional Record Daily Digest for the days when they were before the Senate.\(^{197}\)

\[\text{¶61} \text{The fragile truce on side-by-side amendments began to unravel over difficulties in reaching a UCA for a motion by Senator Mike Crapo of Idaho to commit the bill to the Senate Finance Committee.}^{198}\] The agreement completely fell apart on December 16, 2009, when Republican Senator Tom Coburn insisted, as a delaying tactic, that a lengthy amendment by Independent Senator Bernie Sanders for a public option be read on the floor.\(^{199}\) The process of amending the bill on the floor of the Senate had come to an end.

\[\text{¶62} \text{A second deliberative track was taking place elsewhere and was arguably more important. This included negotiations between Majority Leader Reid, representatives from the White House, and a group of ten senators—five moderates and five liberals.}^{200}\] The satisfaction of the moderates was key, as they had not been completely happy with the bill that had been reported to the floor. Over the course of December, provisions began to be added or eliminated to placate the recalcitrants. In some cases it was to please a single senator. The Senate’s public option was dropped due to opposition from Senators Joe Lieberman and Ben Nelson.\(^{201}\) A compromise to allow persons between the ages of 55 and 64 to buy into Medicare was likewise jettisoned due to Senator Lieberman’s opposition.\(^{202}\) Opposition to funding the proposal through taxes on elective cosmetic surgery led to a change

\begin{center}
\begin{footnotes}
\footnotetext{197. For example, the Daily Digest for November 30, 2009, lists as pending the Reid Amendment No. 2786, the Mikulski Amendment No. 2791 to the Reid Amendment, and a McCain motion to commit H.R. 3590 to the Committee on Finance. 155 Cong. Rec. D1373 (daily ed. Nov. 30, 2009). The Daily Digest for December 3, 2009, notes that the Mikulski Amendment passed (61 to 39) and the McCain motion was withdrawn after a negative vote (42 to 58). 155 Cong. Rec. D1395 (daily ed. Dec. 3, 2009). That same day an additional amendment was unanimously approved—Bennet Amendment No. 2826. Another—Murkowski Amendment No. 2836—was rejected (41 to 59) and withdrawn. The Reid amendment was still pending, as were Whitehouse Amendment No. 2870 and a motion by Orrin Hatch to commit the bill to the Finance Committee. Id.}
\footnotetext{198. Republicans complained that Democrats were blocking consideration of amendments, as did Senator Chuck Grassley: “On this side of the aisle, we have been waiting for a long period of time to vote on some amendments that are now before the Senate, such as the Crapo motion which would send the bill back to committee to take out the tax increases that are in it.” 155 Cong. Rec. S12,878 (daily ed. Dec. 10, 2009).

Democrats objected that Republicans were the ones stalling. “How many times do we have to ask for permission to call amendments for a vote, run into objections from the Republican side, and then hear the speech: Why aren’t you voting for amendments?” 155 Cong. Rec. S12,981 (daily ed. Dec. 11, 2009) (statement of Senator Dick Durbin).}
\footnotetext{199. Sanders was outraged: “We have two wars, we have global warming, we have a $12 trillion national debt, and the best the Republicans can do is try to bring the U.S. Government to a halt by forcing a reading of a 700-page amendment.” 155 Cong. Rec. S13,290 (daily ed. Dec. 16, 2009).


\end{footnotes}
\end{center}
that taxed “indoor tanning services” instead.\textsuperscript{203} Senator Nelson won a major concession limiting abortion coverage.\textsuperscript{204} Under the agreement with Nelson, states could choose to prohibit abortion coverage in the insurance markets, or exchanges, where most health plans would be sold. But if a health plan did cover the procedure, subscribers would have to make two separate monthly premium payments: one for all insurance coverage except for the abortion coverage and one for the abortion coverage.\textsuperscript{205} Finally, concessions were made to benefit the states of individual lawmakers.\textsuperscript{206} In two of the more famous examples, Ben Nelson’s Nebraska and Mary Landrieu’s Louisiana won substantial Medicaid dollars.\textsuperscript{207}

\textsection{63} Ultimately, the modifications made off the floor were combined into a manager’s package—Senate amendment 3276—introduced by Majority Leader Reid on December 19, 2009.\textsuperscript{208} To close down debate and start the clock running toward a final vote, Reid presented three successive cloture motions: one to close debate on the manager’s amendment; one to close debate on his original amendment, Senate amendment 2786; and, finally, one on the amended House bill 3590 itself.\textsuperscript{209} Setting the Senate on the path toward the final votes on the bill and its amendments also created some curious legislative history minutiae.

\textsection{64} Immediately after the cloture motions, Reid made a number of amendments: Senate amendment 3280, a motion to commit, which required the Finance Committee to report back on the bill in two days after enactment; Senate amendment 3281, which changed that deadline to one day; and Senate amendment 3282, which changed it to “immediately.”\textsuperscript{210} These amendments had no substantive value but had the significant procedural effect of “filling the amendment tree.” An amendment tree is one of several diagrams in Riddick and Frumin’s \textit{Senate Procedure} that shows different “slots” which determine the order of precedence governing which amendments can be heard when one is disposed of under specific circumstances.\textsuperscript{211} Filling the slots limits any further amendments from being offered and serves as another control on floor action that the Senate rules otherwise lack.\textsuperscript{212} The Senate majority leader, given his or her right to priority in recognition

\begin{itemize}
  \item \textsuperscript{203} Robert Pear, \textit{Negotiating to 60 Votes, Compromise by Compromise}, N.Y. TIMES, Dec. 20, 2009, at A37.
  \item \textsuperscript{207} The deals were derided in the press and by Republicans with epithets such as the “Cornhusker Kickback” and the “Louisiana Purchase.” See, e.g., Dana Milbank, \textit{Looking Out for Number One (Hundred Million)}, WASH. POST, Dec. 22, 2009, at A2.
  \item \textsuperscript{209} 155 CONG. REC. at S13,477–78 (daily ed. Dec. 19, 2009).
  \item \textsuperscript{210} Id. at 13,478.
  \item \textsuperscript{211} See, e.g., RIDDICK & FRUMIN, supra note 105, at 74.
  \item \textsuperscript{212} See CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., RS22854, FILLING THE AMENDMENT TREE IN THE SENATE 2 (2008), available at https://opencrs.com/document/RS22854/.\end{itemize}
on the chamber floor, can, and often does, fill the amendment tree for procedural purposes, as Senator Reid did in the health care debate. Researchers should be aware of these amendments because although they are symbolic, they do appear in the record just like any other pending amendment to be voted upon. Further, they serve as a signpost that changes from the floor were limited.

\[65\] The three cloture votes fell into place as Christmas neared. Senate amendment 3276 passed on December 22; Senate amendment 2786 passed on December 23; and House bill 3590 finally passed on December 24. One of the final acts of housekeeping was to rename the bill the Patient Protection and Affordable Care Act.

\[66\] Conventional legislative history would suggest that the next step in the consideration of the health care bill would be a conference committee. The committee report from the conference committee would then be one of the most valued documents of legislative history, particularly because it would provide a statement of the conferees’ views of the legislation and why certain provisions were added, changed, or deleted.

\[67\] As has been noted, however, the conference committee is not the only device through which agreement between the houses can be obtained, nor is it the most

\[213\] Id. The import of the tactic was not lost on Republicans, as an exchange between Senator Coburn and the Senate’s presiding officer showed:

Mr. COBURN. Mr. President, reserving the right to object, and I do not intend to object, but I want to make a parliamentary inquiry prior to us doing that. And the inquiry is this: Based on the second-degree amendments just filed by the majority leader, as well as the elimination of their language, is it, in fact, the effect that no other amendments will be allowed on this bill?

The PRESIDING OFFICER. There are no available amendment slots at this time.

Mr. COBURN. Further in my parliamentary inquiry, if there were amendments available, could they be filed on this bill?

Mr. REID. I am sorry, I could not hear my friend.

Mr. COBURN. If, in fact, amendments were available, could amendments be filed to this bill and made pending?

I will restate my inquiry to the Chair. Is it, in fact, a fact that because of the filling of the tree by the majority leader, the opportunity to amend the bill before us will be limited?

The PRESIDING OFFICER. The Senator is correct.


Republicans were not completely thwarted from trying to offer amendments. Senator Jim DeMint made an unsuccessful motion to suspend the rules to offer an amendment banning the trading of earmarks for votes. 155 CONG. REC. S13,832–33 (daily ed. Dec. 23, 2009).

\[214\] For example, Senate amendments 3277 through 3282, introduced on December 19, 2009, appear as pending in the Daily Digest for December 20, 2009. 155 CONG. REC. D1503 (daily ed. Dec. 20, 2009). Senate amendments 3280, 3281, and 3282 “fell” with the vote to close debate on Senate amendment 2786 on December 21, while the others remained pending. 155 CONG. REC. D1506 (daily ed. Dec. 21, 2009). Senate Amendment 3278 was tabled and Senate Amendment 3277 was withdrawn on December 22. 155 CONG. REC. S13,715–16 (daily ed. Dec. 22, 2009). Senate amendment 2878 was withdrawn on December 23. 155 CONG. REC. S13,833 (daily ed. Dec. 23, 2009).

\[215\] Reid filled the tree on December 22 to pass his manager’s amendment and quickly refilled it after the vote. 155 CONG. REC. S13,716 (daily ed. Dec. 22, 2009). See also Oleszek & Oleszek, supra note 17, at 271.


\[219\] This was done by unanimous consent. Id. at S14,140.
favored. In the case of health care, it does not appear to have been seriously considered as an option. The primary reason lay, again, with the contra-majoritarian rules of the Senate. For the Senate to request a conference and appoint conferees would require overcoming potential filibusters, giving Republicans more opportunities to stall, if not thwart, the legislation. Democrats were eager to pass a bill as soon as possible, preferably by the President’s State of the Union address on January 20, 2010, but by early February at the latest. So, instead, Democratic congressional leaders and White House officials met in what one article described as a “substitute for a Congressional conference committee” to draft a proposal that could pass both houses. The negotiations were held behind closed doors, which raised transparency concerns and meant that this important stage would leave no record aside from what was reported in the press.

Reconciliation

Even had a conference committee been considered, a politically earth-shattering event outside of Washington, D.C., would have doomed its prospects just as it threatened to derail health care reform as a whole. On January 19, 2010, Massachusetts voters elected Republican Scott Brown in a special election to fill the seat formerly held by the late Democratic Senator Ted Kennedy, subtracting one crucial vote from what had been the Democrats’ sixty-vote, filibuster-proof majority. Since the Democrats had no hope of winning any Republican support for their health care proposal, Brown’s election cast a pall on the health care bill’s prospects for passage. A conference committee, which had been unlikely before, was now impossible.

Health care reform was not dead after Scott Brown’s election, but it was on life support. There were procedural options for moving ahead, though they were limited. The easiest solution would be for the House to pass the Senate bill, but House Democrats were uneasy with several provisions in that legislation. Another option was to strip the legislation down to its most popular components and pass those either individually or as a single bill. Ultimately, the Democratic leadership, concluding that giving up on health care reform would be more political...
cally expensive than passing expansive legislation, went ahead with a complicated but often used parliamentary practice that would enable them to avoid the sixty-vote obstacle in the Senate—reconciliation, an optional deficit control step in the congressional budget process laid out in the Congressional Budget Act of 1974.229

¶70 Understanding reconciliation and its effect on legislative history requires a background in the procedure of the Congressional Budget Act. By May 15 of every year, Congress is required to agree upon a concurrent resolution, setting forth a spending blueprint for the next fiscal year and at least the following four years.230 The resolution can control discretionary spending—funding for authorized federal activities for a specific year; for example, the programs of the Department of Agriculture or the Environmental Protection Agency—by setting limits to which the appropriation committees should adhere. Alterations in direct spending—that which the government must, under law, automatically spend each year—are handled differently.231 If Congress wants to bring direct spending under control, it can issue instructions in the concurrent resolution to the committees with jurisdiction, requiring them to find savings of a certain amount, through either changes in existing law or tax increases. These committees report legislation to their chamber’s Budget Committee, which bundles them, without changes, together into an omnibus reconciliation bill.232

¶71 The critical point about reconciliation legislation is that in both chambers it is considered under slightly different rules than traditional legislation. The rules for House consideration limit the types of amendments that can be made.233 In the Senate, amendments to reconciliation bills must be germane to budgetary matters.234 More important, reconciliation has features that circumvent the Senate’s traditional supermajority requirements. Closing of debate on a reconciliation bill is not a debatable motion and only requires a simple majority to pass.235 Further, debate is automatically limited in the Senate to twenty hours.236

¶72 Reconciliation’s relative lack of procedural obstructions has transformed it from a step in the budgetary process into a major policy implementation tool. Since the Reagan administration, both Republican and Democratic Congresses have used reconciliation for laws tangentially related to the budget: Medicare reform,237 portability of health insurance,238 penalizing hospitals for “dumping”

231. Most direct spending is for entitlement programs, such as Social Security, Medicare, and Medicaid. It also includes interest on the national debt. Currently, direct spending accounts for most of the federal budget. Oleszek, supra note 15, at 51.
232. Oleszek, supra note 15, at 76.
233. Sinclair, supra note 9, at 124.
emergency room patients who cannot pay for care, and the tax cuts of 2001 and 2003. Understandably, perceptions of reconciliation change depending upon who is using it and who opposes its use. For example, Senator Judd Gregg defended using reconciliation to allow drilling in the Arctic National Wildlife Refuge in 2005:

Reconciliation is a rule of the Senate set up under the Budget Act. It has been used before for purposes exactly like this on numerous occasions.

The fact is, all this rule of the Senate does is allow a majority of the Senate to take a position and pass a piece of legislation, support that position.

Is there something wrong with majority rules? I don’t think so.

Four years later, though, when his party was in the minority, Gregg decried the maneuver in no uncertain terms: “If you are going to talk about reconciliation, you are talking about something that has nothing to do with bipartisanship; you are talking about the exact opposite of bipartisanship. You are talking about running over the minority, putting them in cement, and throwing them in the Chicago River.”

The use of reconciliation with health care would necessarily be complex. The same version of legislation has to be passed by both chambers to become law, but the Democratic House was unwilling to accept the Senate version of PPACA, House bill 3590, “as is,” and the full Senate was unlikely to muster the sixty votes to pass any changes the House made to that bill. Therefore, in order to use reconciliation, an entirely separate bill amending House bill 3590 had to be negotiated between the various Democratic constituencies with a nod toward what could command a Senate majority. Passage required something of a procedural dance: the House would first pass House bill 3590 as received from the Senate. With both chambers in agreement on that bill, PPACA would be eligible to be presented to the President for his signature. Next the House would pass the reconciliation legislation amending the PPACA, send it to the Senate for a majority vote, and, if it passed, it would go on to the President to be signed as well.

If reconciliation provided the way forward for passage of health care, it also introduced a new layer of complexity to ACA’s legislative history by adding an additional bill, with its own legislative history, to the process—House bill 4872.

245. SINCLAIR, supra note 9, at 215–16.
Though it was the final stage in the procedure used to pass the ACA, the history of House bill 4872, or the HCERA, actually began at the same time the President and Democrats in Congress were making their initial moves on health care a year earlier.

¶75 The genesis of the reconciliation measure began with the budgetary resolution that Congress had debated and passed in the spring of 2009. Senate Democrats had considered using reconciliation as a means to pass health care, but yielded to objections that this would ruin any chances for a bipartisan compromise and deny to the minority party any input on health care legislation. Still, House Democrats were unwilling to completely surrender reconciliation as a tool to achieve health care, and provisions for its use were included in their version of the concurrent resolution. The resolution went to a joint conference, where the House's call for a fallback position, in case a bipartisan compromise could not be achieved, won out. The concurrent resolution called on the House Energy and Commerce, Ways and Means, and Education and Labor committees to each come up with changes in law that would reduce the deficit by $1 billion. These recommendations were to be submitted to the House Budget Committee by October 15, 2009. The Senate Finance and HELP committees were under a like charge, being required to reduce the deficit by $1 billion between 2009 and 2014. Their recommendations were to be reported to the Senate Budget Committee, which would also have to report out a reconciliation bill by October 15, 2009.

¶76 The concurrent resolution's procedure generated the only conference report in health care's legislative history. Even as a conference report, it is not a helpful document in interpreting health care legislation, but it does have value in describing the process that would be used the following year and explaining how health care came to be linked to higher education. Besides health care, one of President Obama’s early signal initiatives was reform of the student loan program for higher education. Controversial even for members in the President’s own party, inclusion of the student loan program in reconciliation ensured that it too could get through the Senate, where it had powerful opponents, with just a majority vote.

¶77 As the health care debate crawled along through the spring, summer, and fall of 2009, the procedural mechanics were in place to ensure that reconciliation remained an option. Two days before their deadline, the Ways and Means and

252. S. CON. RES. 13 § 202(a).
253. Id. § 202(c).
254. Id. § 201.
Education and Labor committees submitted their versions of House bill 3200, passed the previous summer, to the Budget Committee. These were reprinted in the Budget Committee’s report, *The Reconciliation Act of 2010*, issued on March 17, 2010. This is the report listed in the legislative history of HCERA in *Statutes at Large* and published in *U.S.C.C.A.N.* Its inclusion in the legislative history of health care is understandable, as it was the last traditional report issued on the health care legislation and conceivably could contain congressional views on the final form of the legislation that passed. Unfortunately, it does not.

¶ 78 The conference report actually creates a serious wrinkle for legislative history researchers of the health care legislation because it does not provide any substantive analysis of the legislation or reasoning behind the committee’s actions. The purpose of the Budget Committee’s report, *The Reconciliation Act of 2010*, is simply to comply with the 1974 Budget Act and Senate concurrent resolution 13, that is, bundling together the reconciliation bills sent from the committees authorized to produce them under the resolution and transmitting them to the House “without any substantive revision.” For the health care portion of the report, the committee merely reprinted the reports of the House Ways and Means and Education and Labor committees on House bill 3200, the predecessor of the final House health care bill that died in the Senate, House bill 3962. These reports on House bill 3200 had no, or very little, relevance to the version of House bill 4872 that was voted on in the House and Senate. Consequently, the House Budget Committee report also has very little relevance to the legislative history of health care that passed. The House Budget Committee could not shape the reconciliation bill, but the House Rules Committee certainly could, and this body became the conduit that took House bill 4872 from being a reincarnation of House health care proposals from the previous year and made it into something completely different.

¶ 79 As it turned out, the actual language of House bill 4872 did not emerge from any committee. The reconciliation legislation was born from negotiations between White House officials and Democratic congressional leaders, again working outside of the traditional legislative process. Though Democrats would rely on their majorities for success, differences between party factions, especially the anti-abortion and fiscal conservative blocs, influenced what they would be able to accomplish. President Obama helped initiate discussions in February 2010 with his proposal of what reconciliation should look like. Negotiations continued throughout early March as the House leadership assembled the necessary votes in

---

261. *Id.* at 6, 898.
their chamber. At the same time, drafters sought an estimate from the CBO and the Joint Committee on Taxation on how much PPACA would cost.\textsuperscript{264} ¶80 House bill 4872 began to take shape through amendments published by the House Rules Committee. The initial version of the reconciliation legislation was unveiled on March 18, 2010, as an “Amendment in the Nature of a Substitute.”\textsuperscript{265} The draft contained 153 pages of changes to the Senate version of House bill 3590, such as increased subsidies for exchange-offered insurance; a phaseout of the “doughnut hole” in Medicare’s drug benefit; a delay on the tax on expensive, employer-sponsored plans; inclusion of Medicare tax on investment income above $200,000 for joint returns and $250,000 for individual returns; an information-sharing program between the Center of Medicaid and Medicare Services (CMS) and the Internal Revenue Service (IRS); and reinclusion of a provision from House bill 3962 that closed a loophole in a biofuel tax subsidy.\textsuperscript{266} The CBO published a draft cost estimate the same day the amendment went public.\textsuperscript{267} Two days later, the Rules Committee published additional and final changes to the reconciliation bill in a manager’s amendment titled “Amendment to the Amendment in the Nature of a Substitute to House Bill 4872.”\textsuperscript{268} This included additions, deletions, and changes to some provisions already published in its predecessor—for example, a last-minute deal to address disparities in Medicare reimbursements to rural doctors and hospitals, the renaming of the Medicare tax to “Unearned Income Medicare Contribution,” the removal of the CMS-IRS information sharing program, and modification of some of the tax provisions.\textsuperscript{269} The CBO published a cost estimate of the reconciliation bill as revised which came in under the budget target set for it.\textsuperscript{270} So the House had negotiated its fix outside of the floor and committee, and now a Rules Committee resolution would bring it up to a vote. ¶81 The Rules Committee issued House resolution 1203, which provided for gutting the Budget Committee’s version of House bill 4872 and adding the agreed-

\begin{itemize}
\item 264. SINCLAIR, supra note 9, at 216; David M. Herszenhorn & Robert Pear, Showdown Near, Health Overhaul Gains Two Votes, N.Y. TIMES, Mar. 18, 2010, at A1.
\item 265. Amendment in the Nature of a Substitute to H.R. 4872, as Reported, stamped F:\P11 \NH\RECON3\HECARA_001.XML (Mar. 18, 2010), http://housedocs.house.gov/rules/hr4872/111 _hr4872_amndsub.pdf. The draft did not appear on THOMAS.
\item 268. Amendment to the Amendment in the Nature of a Substitute to H.R. 4872, stamped F:\P11 \NH\RECON3\MANAGERS_006.XML (Mar. 20, 2010), http://housedocs.house.gov/rules /hr4872/111_managers_hr4872.pdf.
\item 269. H.R. REP. NO. 111-448, at 21 (2010); Noam N. Levey & Kim Geiger, Stage Is Set for Historic Health Vote; House Democrats Today Expect to Pass the Biggest Change Since Medicare, L.A. TIMES, Mar. 20, 2010, at A1. The House bill, H.R. 3962, had included a section authorizing the National Academy of Science’s Institute of Medicine to study geographical disparities in Medicare payments to doctors and hospitals and use the report’s findings to alter Medicare rules to address those disparities. The Senate version of the health care legislation did not include such a provision.
\end{itemize}
upon provisions as an amendment in the nature of a substitute.\footnote{271} The actual text of what would go into House bill 4872 was found in the accompanying report, House report 111-448—Part A of the report was the original amendment and Part B was the manager’s amendment to the amendment in Part A.\footnote{272} Under the Rules Committee’s plan, the House would first vote to concur with the Senate version of PPACA and, if that passed, would immediately move on to the House’s reconciliation package in House bill 4872 under a closed rule.\footnote{273} Debate was limited to two hours, divided evenly between the parties, and there was no opportunity to make amendments.\footnote{274} On the evening of March 21, 2010, the Senate version of House bill 3590 passed the House.\footnote{275} Previously approved by the Senate and now by the House, the bill was enrolled for the President’s signature. House bill 4872 was passed soon afterward and was engrossed for further action by the Senate.\footnote{276} Congress had now essentially passed a health care program, but the process was not yet over because the fate of House bill 4872 was still in play, even if its outcome was not in doubt.

\paragraph*{¶82} While reconciliation was politically expedient for health care reform advocates, it presented some procedural pitfalls that had to be navigated to achieve an up or down vote. The referee over how to proceed in the Senate was that chamber’s parliamentarian, a normally obscure post which had temporarily risen in prominence thanks to the health care debate.\footnote{277} On March 11, the Senate Parliamentarian had ruled that the House had to pass House bill 3590, and it had to be signed by the President into law, before the Senate could even take up the reconciliation bill. After the President signed House bill 3590 on March 23, the reconciliation bill had to negotiate several potential obstacles before passage. The first was the Byrd Rule, a procedural rule passed into law as an amendment to the Congressional Budget Act of 1974.\footnote{278} Named after its leading advocate, Senator Robert C. Byrd, it was created to block use of the Senate’s expedited reconciliation process as a means to pass measures unrelated to the budget.\footnote{279} If a significant enough feature of House bill 4872 could be found to be extraneous, it might doom the overall bill.

\paragraph*{¶83} The second obstacle was the offering of amendments. Though debate was limited to twenty hours, senators could offer unlimited amendments, even after debate ended.\footnote{280} The votes on these amendments, whimsically called “vote-a-rama,” are offered on a rapid basis, with proponents having a brief time to make their case for their amendment and opponents having the same amount of time to respond.\footnote{281}
While debate in the Senate over House bill 4872 may not have differed in substance from that on House bill 3590, it was significantly different in its form.

¶84 The procedure in the Senate was subtly different as well. Engrossed House bills go to the appropriate Senate committee for review after two readings. Budget reconciliation measures, in particular, are sent to the Senate Budget Committee for its recommendations. But there are exceptions to these procedures. If a senator objects to further proceeding on the bill after two readings, the legislation bypasses committee review and goes on the Senate Calendar, where it can be called up for floor consideration. Majority Leader Reid employed this rule, objecting to the second reading of House bill 4872, bringing it onto the Senate Calendar, and moving it onto the floor for consideration.

¶85 The Senate, unlike the House, could not control attempts to amend the legislation within the twenty-hour time limit set by reconciliation rules, and Republicans were eager to offer changes in the hopes of embarrassing Democrats, who had pledged to their House counterparts that they would not make any changes. Though THOMAS lists 149 offered amendments, most of these were ordered to lie on the table—the most likely reason for this being that they failed to meet reconciliation’s germaneness requirement. Only thirty-four of these amendments met the requirements for a vote. The subsequent debate was orchestrated through mutual agreement of the parties under UCAs and took place over two days. The “vote-a-rama” occurred immediately afterward under a UCA that allowed one minute by a proponent to explain the amendment to be voted on and a minute by an opponent who disagreed. This expedited debate-and-vote ran into the afternoon of March 25. Armed with a significant majority, the Democrats were easily able to vote down each amendment.

¶86 House bill 4872 finally passed in the Senate on March 25, but even then the legislative history of House bill 4872 did not end. Prior to the Senate vote, the Parliamentarian had advised that there were two points of order against two minor provisions in the student loan portion of the bill, and these had to be struck from the text. This meant the Senate could not pass the exact same legislation as the House, and the bill would have to be returned to the lower chamber for its approval. This then created more legislative history as the bill was immediately reported back to the House, which had been kept in session specifically for this contingency. The

285. 156 Cong. Rec. S1821 (daily ed. Mar. 23, 2010). Minority Leader Mitch McConnell quickly noted that this was the first time a reconciliation bill had been sent to the floor without first going to committee. Id.
291. Id. at S2085.
House Rules Committee generated another rules resolution, House resolution 1225, setting House bill 4872 back before the House for a vote to concur with the version that emerged from the Senate. Only ten minutes of debate was allowed. Finally, at 9:02 P.M. on March 25, the House voted to concur with the Senate on House bill 4872, allowing it to be forwarded to the President, who would sign it into law.

¶87 The legislative history of ACA continued even after its approval by both chambers. The President can also have a role, albeit a controversial one, in generating documents important to legislative history. The most familiar legislative history source from the executive branch is the “signing statement,” a statement by the President upon the signing of a bill in which he makes some determination on how the law will, or will not, be implemented. In the health care reform saga, an executive document did just that on the subject of abortion.

¶88 Abortion had proved a contentious issue throughout the health care debate, and threatened to be an obstacle to getting the majority House leaders needed to pass the bill. The Senate version of PPACA excluded the provisions Representative Stupak had managed to include in the House bill, but did include a provision denying the use of federal tax credits to purchase the part of a health policy that covered elective abortion services. Stupak and other anti-abortion Democrats were not convinced that this language upheld the Hyde Amendment, the long-standing ban on federal abortion funding. To win their support, President Obama agreed to dispel the ambiguity with an executive order that stated that the Hyde Amendment’s abortion restriction applied to the new health care legislation. While often legislative history from the executive and legislature conflict, in affirming the control of the Hyde Amendment over health care, they were working in concert. On the House floor, Representative Stupak and Representative Henry Waxman had a discussion explicitly to insert this understanding into the bill’s legislative history:

Mr. STUPAK. I wish to engage the chairman in a colloquy, if I may.

Throughout the debate in the House, Members on both sides of the abortion issue have maintained that current law should apply. Current law with respect to abortion services includes the Hyde amendment. The Hyde amendment and other similar statutes to it have been the law of the land on Federal funding of abortion since 1977 and apply to all other health care programs—including SCHIP, Medicare, Medicaid, Indian Health Service,

297. Rob Stein, Order on Abortion Angers Core Backers; Women’s Advocates Bristle as President Signs Health Proviso, Wash. Post, Mar. 25, 2010, at A8. Apparently this agreement was reached between Rep. Stupak and then White House Chief of Staff Rahm Emanuel in a chance meeting at the House gym. Shailagh Murray & Lori Montgomery, Divided House Passes Health Bill; Measure Goes to Obama; No Republicans Join 219 to 212 Majority, Wash. Post, Mar. 22, 2010, at A1.
Veterans Health Care, military health care programs, and the Federal Employees Health Benefits Program.

The intent behind both this legislation and the Executive order the President will sign is to ensure that, as is provided for in the Hyde amendment, that health care reform will maintain a ban on the use of Federal funds for abortion services except in the instances of rape, incest, and endangerment of the life of the mother.

Mr. WAXMAN. If the gentleman will yield to me, that is correct. I agree with the gentleman from Michigan that the intent behind both the legislation and the Executive order is to maintain a ban on Federal funds being used for abortion services, as is provided in the Hyde amendment.298

This was the same interpretation advanced in President Obama’s executive order on the topic, “The Act maintains current Hyde Amendment restrictions governing abortion policy and extends those restrictions to the newly created health insurance exchanges.”299 With the signing of the executive order, the legislative history of the ACA, whenever it might have begun, came to a close.

¶89 The ACA, though, was destined to have one more phase—judicial review. Vehement opposition to the law ensured immediate challenge to its provisions on constitutional grounds.300 Disparate federal trial and appellate opinions made a decision by the U.S. Supreme Court almost inevitable.301 The Court heard five and a half hours of argument over three days, each day covering a particular issue: whether a pre-enforcement action could be brought under the Anti-Injunction Act, whether the individual mandate was constitutional, and whether the individual mandate was severable from the rest of the law.302 During oral argument the ACA’s legislative history was never discussed in depth. In fact, some of the Justices appeared eager to avoid delving into it.303 The Court reached a final decision in

300. The Supreme Court noted in its opinion upholding the ACA that a suit was brought the very day the President signed the bill into law. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012).
301. See, e.g., Thomas More Law Ctr. v. Obama, 651 F.3d 529 (6th Cir. 2011); Florida ex rel. Atty. Gen. v. U.S. Dept. of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011) (finding individual mandate unconstitutional but severable from legislation); Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011) (holding the ACA constitutional under Commerce Clause). Other circuits heard challenges but dismissed them without an opinion on constitutional issues. New Jersey Physicians, Inc. v. President of U.S., 653 F.3d 234 (3d Cir. 2011); Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253, 266 (4th Cir. 2011), cert. den., 133 S. Ct. 59 (U.S. 2012) (holding that the State of Virginia lacked standing); Liberty Univ., Inc. v. Geithner, 671 F.3d 391 (4th Cir. 2011) (finding the act could not be challenged until it was enforced).
303. Justice Kennedy said on the third day of argument: “[W]e don’t want to go into legislative history, that’s intrusive.” Transcript of Oral Argument at 17, Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (Nos. 11-393 & 11-400). Justice Scalia invoked the Eighth Amendment when Deputy U.S. Solicitor General Edwin S. Kneedler suggested the Court could look to the legislative history to make a determination on severability. Id. at 38. The record does show that Justice Roberts understood the transactional dynamics that created the ACA:

The reality of the passage—I mean, this was a piece of legislation [where there] had to be a concerted effort to gather enough votes so that it could be passed. And I suspect with a lot of these miscellaneous provisions that Justice Breyer was talking about, that was the price of a vote: Put
June 2012, upholding the ACA’s individual mandate, but striking down its expansion of Medicaid.\textsuperscript{304} Although legislative history was not referred to in the majority opinion, in sustaining the law, the Court ensured that its history would remain relevant.\textsuperscript{305}

**Researching Legislative Procedure to Research Legislative History**

\%90 Clearly, the ACA’s passage shows that the traditional model and understanding of legislative history is insufficient to describe the complexity of today’s legislative process and, more important, to capture all the information generated by it. Legislative history researchers must adapt to this new reality. Doing so is essential not only to compiling a legislative history, but also to judging the worth of a history that has already been compiled. The best legislative histories provided by THOMAS or ProQuest are a catalog of documents—potentially hundreds of documents for more complex bills. The only guide to the importance of each document is the type of resource under which it is cataloged—“report,” “hearing,” “bill,” and so on. Knowing legislative procedure allows researchers to make judgments about how documents are interrelated and which are more important. For example, with all the bills listed for the PPACA and HCERA in THOMAS and Proquest, procedural knowledge enables the researcher to separate the important ones from those that played a more ancillary role.\textsuperscript{306} Understanding the reconciliation process allows researchers to avoid reliance on the House Budget Committee’s reconciliation report and focus on more important information, like the House Rules Committee’s resolution and the report that brought House bill 4872 to the House floor. Procedural knowledge not only enhances legislative history research skill, it improves research efficiency as well. Acquiring this procedural knowledge is not difficult—there are ample resources available on congressional procedure, and most of them are now digital and freely available on the web.

\textsuperscript{304} Sebelius, 132 S. Ct. at 2600, 2608.


\textsuperscript{306} For example, with the PPACA, THOMAS’s list of companion bills includes measures dealing with tax credits for those in military service. Bill Summary & Status, 111th Congress (2009–2010), H.R.3590, THOMAS, http://hdl.loc.gov/loc.uscongress/legislation.111hr3590 (last visited Jan. 18, 2013). Though CIS is more thorough, it lists the Senate Finance Committee’s S. 1796 as a companion bill to H.R. 3590, and it relegates the HELP Committee’s S. 1679, the bill blended with S. 1796 to create the PPACA, to the category of “Other Senate Bills.” The placement of 1679 has been upgraded to Bills Versions in Proquest Congressional. Legislative History of PL111-148, PROQUEST CONGRESSIONAL, http://congressional.proquest.com/congressional/docview/t33.d34.111_pl_148 (last visited Feb. 18, 2013) (subscription required for access).
¶91 The fundamental components of congressional procedure are, of course, the standing rules of each chamber. The rules of the House are in the Constitution and in Jefferson’s Manual and Rules of the House of Representatives, which is referred to as the “House Manual” and published as a House document for each Congress. 307 Jefferson’s Manual is a guide to parliamentary procedure written by Thomas Jefferson while he was vice president during the John Adams administration. 308 Though Jefferson wrote the Manual with the Senate in mind, the House incorporated it into its own rules, and its provisions still govern except where they conflict with modern House rules. 309 The House rules benefit from substantial annotations and references that help explain their provisions. 310 The House rules are printed in the Senate Manual. 311 The Senate, ironically, does not make use of Jefferson’s work. 312 Not only does the Senate have many fewer rules than the House, its Senate Manual lacks the interpretive information available for the House rules. Resources for both chambers are available from FDsys 313 as well as chamber web sites.

¶92 Application of the House and Senate rules is fleshed out by collections of precedential rulings from their respective chairs. House precedents are collected in several volumes covering different historic periods and are best known by their respective authors. Hinds’ Precedents of the House of Representatives of the United States and Cannon’s Precedents of the House of Representatives of the United States together constitute one eleven-volume set. The Hinds portion, volumes 1 through 5, covers House rulings from 1789 to 1907. 314 Volumes 6 through 8, by Cannon, supplement the Hinds period and bring coverage of precedents up to 1935. 315 Volumes 9 through 11 are indexes. Deschler-Brown-Johnson Precedents of the United States House of Representatives is an eighteen-volume effort begun in 1974 to bring the precedents up to date. 316 The Senate’s precedents form a single volume—Riddick’s Senate Procedure. 317 All of these are also available on FDsys.

¶93 The main obstacle to obtaining procedural knowledge is not the availability of procedural resources but that the body of literature contains complexities that even legislators find it hard to understand. Such difficulties are easily surmounted with a large body of secondary source literature that helps explain procedural mechanisms. The Congressional Research Service (CRS)—the research arm of Congress—has published numerous reports on chamber rules and procedures for

307. See, e.g., Sullivan, supra note 28. One of the several idiosyncrasies of the House Manual is that its printing is authorized by the previous Congress. As a result, its document number also relates to the previous Congress. Judy Schneider, Cong. Research Serv., 98-262, House Rules Committee: Summary of Contents 1 (2007).
309. Id.; Johnson, supra note 52, at 28.
310. See Schneider, supra note 307, at 2.
316. 1 Deschler et al., supra note 88, at iii.
the benefit of legislators. Though these reports are not publically available from CRS, many have found their way onto the Internet and are published on sites such as Open CRS and Wikileaks. The Law Librarians’ Society of Washington, D.C., has done a great service by publishing many of the CRS reports on congressional procedure on one web page.

There are many books on congressional procedure, and the better ones acknowledge the dynamism of the legislative process. Foremost among these is Congressional Procedures and the Policy Process by Walter J. Oleszek. Barbara Sinclair’s Unorthodox Lawmaking is also helpful and covers new uses of congressional procedure in specific examples of major legislation. Charles Tiefer’s Congressional Practice and Procedure, though published in 1989 and currently out of print, remains one of the most exhaustive examinations of this topic. Researchers doing frequent studies of legislative history should ensure that they have access to these books.

Context, while always helpful in sifting through legislative material, now plays an even more important role now in at least two ways. First, more legislating may be taking place away from committee meetings and chamber floors, requiring more reference to sources reporting on the deliberations that are taking place behind closed doors. Second, since political realities often dictate procedural choices, knowledge of the opportunities or limitations of a specific Congress provides guidance as to what method it might have used to pass a law and, thus, what ingredients of legislative history may be available.

Perhaps one of the more byzantine uses of procedure to pass legislation took place in February 2012. Speaker John Boehner was attempting to pass a spending bill for highway projects, House bill 7. To gather support from his own party for the legislation, Boehner used a Rules Committee resolution, House resolution 547, to break House bill 7 into three different bills: the transportation bill and two measures to pay for it—revenues from new arctic and offshore oil and gas leases, and offsets from increasing federal employee contributions to retirement funds. In addition, the new natural resources leases were linked to approval of the controversial Keystone XL pipeline. The separate measures were then to be merged into House bill 7 once they passed. To make matters even more confusing, instead of using House bill 7 as reported from committee, the resolution referred to a committee print for this cutting and pasting. H.R. REP. NO. 112-398 (2012). Mercifully, researchers were spared having to deal with this complex procedure, as Boehner’s plan unraveled. Matters went awry when the provision for federal employee retirement contributions was used in offsetting continuation of payroll tax cuts in another bill, House bill 3630. Kathryn A. Wolfe et al., Highway Bill Delayed in Both Chambers, CQ WEEKLY, Feb. 20, 2012, at 361. Only House bill 3408 passed. Jan Austin, 2012 Legislative Summary: Drilling, Energy Regulation, CQ WEEKLY, Jan. 14, 2013, at 86. This was never engrossed for consideration in the Senate. Bill Summary & Status, 112th Congress (2011–2012), H.R.3408, THOMAS, http://hdl.loc.gov/loc.uscongress/legislation.112hr3408 (last visited Feb. 18, 2013).

322. Sinclair, supra note 9.
323. Tiefer, supra note 79.
324. Perhaps one of the more byzantine uses of procedure to pass legislation took place in February 2012. Speaker John Boehner was attempting to pass a spending bill for highway projects, House bill 7. To gather support from his own party for the legislation, Boehner used a Rules Committee resolution, House resolution 547, to break House bill 7 into three different bills: the transportation bill and two measures to pay for it—revenues from new arctic and offshore oil and gas leases, and offsets from increasing federal employee contributions to retirement funds. In addition, the new natural resources leases were linked to approval of the controversial Keystone XL pipeline. The separate measures were then to be merged into House bill 7 once they passed. To make matters even more confusing, instead of using House bill 7 as reported from committee, the resolution referred to a committee print for this cutting and pasting. H.R. REP. NO. 112-398 (2012). Mercifully, researchers were spared having to deal with this complex procedure, as Boehner’s plan unraveled. Matters went awry when the provision for federal employee retirement contributions was used in offsetting continuation of payroll tax cuts in another bill, House bill 3630. Kathryn A. Wolfe et al., Highway Bill Delayed in Both Chambers, CQ WEEKLY, Feb. 20, 2012, at 361. Only House bill 3408 passed. Jan Austin, 2012 Legislative Summary: Drilling, Energy Regulation, CQ WEEKLY, Jan. 14, 2013, at 86. This was never engrossed for consideration in the Senate. Bill Summary & Status, 112th Congress (2011–2012), H.R.3408, THOMAS, http://hdl.loc.gov/loc.uscongress/legislation.112hr3408 (last visited Feb. 18, 2013).
Legislative history researchers are probably already familiar with some key contextual information sources. The *Congressional Quarterly Almanac* is a helpful annual digest of congressional activity, with summaries of action on the most significant legislative initiatives of a particular year. Newspapers with substantial political coverage, for example the *New York Times* and the *Washington Post*, offer coverage of procedural maneuverings and on the debate taking place outside hearings and chamber floors. Periodicals with good political coverage include Congressional Quarterly publications such as *Roll Call* and *Congressional Quarterly Weekly*, the *National Journal*, and *The Hill*. Of course, there are an enormous number of blogs covering political issues, many of which are too partisan to be useful.

Occasionally, significant legislation may have a documented history that provides background about why and, more important, how it was passed. Two of the leading representatives of this type of work are *Showdown at Gucci Gulch*, which chronicles the passage of the 1986 revisions to the U.S. tax code, and Charles Tiefer’s law review article detailing the use of reconciliation to pass the 2001 tax cuts. The passage of the ACA already has some brief chronicles of its history: *Landmark: The Inside Story of America’s New Health Care Law and What It Means for Us All*, written by journalists at the *Washington Post*, as well as a chapter in Sinclair’s *Unorthodox Lawmaking*.

One unintended consequence of researching legislative history is the discovery of how important nontraditional sources currently are. C-SPAN and YouTube are both sources of committee markups. Committee web sites are, of course, valuable sources of information on committee action, especially for chairman’s marks, which may not be available elsewhere. CBO scoring letters can also provide some explanation of legislative text, in addition to clarifying why it was used or added. Reputable interested organizations may also provide some helpful background information. For the health care legislation, the Henry J. Kaiser Foundation provided brief analyses of what the different health care bills offered in the House and Senate contained. The disappearance and breaking of web links, especially on committee web sites after a change in party control, often requires use of the Internet Archive’s Wayback Machine to locate important documents.

For law librarians, the requirement of additional research into the legislative process is not without benefit—it provides an important opportunity to demonstrate and increase our relevance. Congressional procedures are changing at a time when civics education is nearly extinct at the primary and secondary levels, and the civics knowledge of college students is drastically poor. As a result, citi-
zen understanding of how Congress works is rudimentary at best and nonexistent at worst. The complexities of congressional procedure are apt to be especially confusing to the uninitiated when they are forced to confront them during the debate on a significant legislative initiative.\textsuperscript{331} Law librarians can use their specialized knowledge to dispel part of this confusion among members of the interested public.

\textbf{Conclusion}

\textsuperscript{100} The factors that have propelled the ad hoc legislating that is shaping legislative history are increasing. The only certainty law librarians and other researchers can have is that the traditional model of legislation can serve just as the most basic introduction to the legislative process. Far more understanding is required of procedure than in the past. In this sense, ACA’s passage serves as an illustrative example of modern lawmaking, especially for major initiatives. It is the rule now, not the exception.

\begin{quote}
\textsuperscript{331} For example, tax attorney and blogger Kelly Phillips Erb, a.k.a. Taxgirl, was confused by the Senate’s use of the Service Members Home Ownership Tax Act of 2009 in an amendment between the houses to produce its own health care bill:

So, um, wow. Now the bill is even longer. And better yet, it’s attached to popular items like modifying the first-time homebuyers credit for members of the Armed Forces. Who’d vote no to that?

Which brings me to my cynical question du jour: was the health care reform bill amended to another bill for purposes of consolidation and simplification? Or something else?

Me? I don’t know.

\end{quote}
Library Services for the Self-Interested Law School: Enhancing the Visibility of Faculty Scholarship*

Simon Canick**

This article suggests a new set of filters through which to evaluate law library services, in particular those that support faculty scholarship. These filters include recent profound changes in legal education and the motivators of today’s law professors. By understanding the needs of self-interested deans and professors, libraries can fill new roles that are consistent with our core values. Libraries can also focus on dissemination and promotion of faculty work, especially through innovative open access projects.

Introduction: Library Services in a Period of Transition

¶1 Every so often, especially after a particularly painful round of budget cutting, academic law librarians start wringing their hands, saying: “Cutting staff in the library is short-sighted!” “Why don’t they understand how important we are?” or “We have to do a better job articulating the value we add to the school!” Underlying these comments is the notion that if law school administrators understood the library, things would be different. This reaction is predictably consistent with human nature; after all, we work hard, we help people, we care, we are smart, we do important work. It is easier to believe that those making decisions are short-sighted or incompetent than to accept steep cuts as a negative judgment. A more productive approach for librarians is to recognize that while others in the law school probably do have a pretty good idea of what we do, they just may not value

---

* © Simon Canick, 2013.
** Associate Dean for Information Resources and Associate Professor of Law, William Mitchell College of Law, St. Paul, Minnesota.
the library’s contribution as highly as we do. Further, we might concede that law school administrators who also have an eye on other departments are better suited than most librarians to judge the relative value of our services.

¶2 Librarians’ evaluation of the administration’s wisdom in these matters may be predictive of how we fare the next time the school looks for budget savings. Feeling misunderstood or underappreciated leads to a defensive posture, and consequently diminishes our credibility. It may also result in our exclusion from future conversations and in steep library cuts without meaningful librarian input. Instead, librarians should listen carefully and ask questions designed to assess the school’s priorities. There should be nothing to defend: our goal is deeper understanding, creative thinking, and innovation, not a particular outcome.

¶3 Unsurprisingly, budget-related conversations are often challenging and emotionally charged. Readers might imagine a room full of senior administrators, each of whom brings a particular perspective based on their own work. All of that work is certainly important. With demand for legal education declining, we need terrific admissions and marketing officers to recruit prospective students. In a tough job market, we need outstanding career services staff with solid connections. As tuition revenue declines, we need accomplished fund-raisers. Meanwhile professors remain the core of the educational program, and besides, most have tenure. This scenario has implications for everyone who works in the library. A director needs to see past his own staff and recognize the value that others bring, generate an accurate view of where the library fits, and envision ways to support evolving strategic priorities. Library staff members need to help their director to think of new services that support those priorities.

The New Normal in Legal Education

¶4 Legal education has entered a period of profound change and reflection. In just two years, the number of LSAT test takers is down by twenty-four percent,¹ and law school applicants have dropped by twenty-three percent.² The job market is

---

¹. LSATS Administered, LAW SCH. ADMISSION COUNCIL, http://www.lsac.org/lsacresources/data/lsats-administered.asp (last visited Jan. 26, 2013). The October 2012 test administration showed a 16.4% year-over-year decline in test takers, after a 16.9% drop the year before. Id.

Law schools face a fundamental business decision: accept fewer students with similar credentials, lower the qualifications to entry in order to boost enrollment, or some combination of the two. Many schools will seek short- or medium-term budget cuts, and others will restructure their operations. Many others will lay

3. Joe Palazzolo, Law Grads Face Brutal Job Market, WALL ST. J., June 25, 2012, at A1 (reporting that nine months after graduation, “[j]ust a dozen schools reported that 80% or more of graduates found full-time, long-term legal jobs.”).


11. Karen Sloan, “Voldemort” Attempts to Salve Worries That ABA Might Drop Tenure Requirement, NAT’L J. (ONLINE) (Jan. 7, 2001) (available only on LexisNexis) (noting that New York Law School dean Richard Matasar suggested that “the proposal would open the door for new law schools to have the flexibility to take a different approach to staffing and develop lower-cost ways to deliver legal education,” and “faculty salary represents between 45% and 50% of law school budgets.”).

off staff and institute pay or benefit cuts.\textsuperscript{13} A few law schools are likely to close down, while others may merge.\textsuperscript{14}

\¶6 Now think again about the relative value of library services. Most academic law libraries were designed to store books that nowadays are rarely used, yet our budgets remain skewed toward the purchase, processing, and organization of print materials. Even as disintermediation has cut traffic at the reference desk, we have added reference positions and services.\textsuperscript{15} As services proliferate, more librarians are hired to provide them. But our evolution lacks the harsh reality of natural selection—as long as staffing levels increase over time, there is little incentive to cull less critical services.\textsuperscript{16} Our instructional role is extensive, but its impact and relative strategic value are unclear.\textsuperscript{17} We write guides and tutorials but know little about

\begin{flushleft}
\textsuperscript{13} The Hastings strategic plan included “[l]ayoffs, reductions in time, voluntary separations, and closing of vacant positions.” Frank H. Wu, \textit{Spring 2012 Strategic Plan Implementation Update}, \textsc{Univ. of Cal. Hastings College of the Law} (Apr. 19, 2012), http://www.uchastings.edu/about/leadership/chancellor-dean/letters/04-19-12a.php. Four members of the library staff were laid off, and two others had their hours reduced. \textit{See} Final Reorganization List, Univ. of Calif. Hastings Coll. of Law (on file with author; document was removed from law school’s web site); see also Matt Bodie, \textit{Reforming Legal Education’s Finances: How to Cut Salaries}, \textsc{PrawfsBlawg} (Nov. 15, 2012), http://prawfsblawg.blogs.com/prawfsblawg/2012/11/reforming-legal-educations-finances-how-to-cut-salaries.html (focusing on cutting faculty salaries as an alternative to layoffs).

\textsuperscript{14} See Brian Leiter, \textit{Predictions About Closings of ABA-Accredited Law Schools over the Next Decade}, \textsc{Brian Leiter’s Law Sch. Reports} (Oct. 3, 2012), http://leiterlawschool.typepad.com/leiter/2012/10/predictions-about-closings-of-aba-accredited-law-schools-over-the-next-decade.html (predicting that at least a few law schools will close).

\textsuperscript{15} From 1993 to 2011, median FTE professional librarian positions have increased from 7.5 to 8.4. Am. Bar Ass’n, Sect. on Legal Education & Admissions to the Bar, \textit{Comprehensive Law Library Statistical Table—Data from Fall 1993 Annual Questionnaire} (May 12, 1994); Am. Bar Ass’n, Sect. on Legal Education & Admissions to the Bar, \textit{Comprehensive Law Library Statistical Table—Data from Fall 2011 Annual Questionnaire} (Apr. 10, 2012) (both on file with author).

\textsuperscript{16} \textit{But see} Carl Yirka, \textit{The Yirka Question and Yirka’s Answer: What Should Law Libraries Stop Doing in Order to Address Higher Priority Initiatives?}, \textsc{AALL Spectrum}, July 2008, at 28.

\textsuperscript{17} Teaching legal research can be a strategic decision by the library, but probably only to the extent that teaching it a certain way helps the school balance its budget. Having librarians teach the research component of the first-year program may mean hiring fewer adjuncts, or could free up time for the full-time faculty. If the priority is cost-cutting, will the dean care that moving research instruction to the first year may mean losing several advanced research classes with low enrollment?

This analysis can be applied to other areas as well. Library functions frequently overlap with those of other law school departments. For example, both library staff and administrative assistants gather materials for professors and upload documents to course management sites. If the school has an open position for a faculty support administrative assistant, the library might offer to take responsibility for the overlapping functions. That could be enough for the school to redefine the support role as part time, and save salary and benefit dollars. Meanwhile, the service will improve because library workers can search and retrieve information more efficiently. As an added benefit, centralizing support for course management is a strategic service tied to innovation in teaching with technology, faculty-student communication, and the transition to electronic textbooks. Another option is to embrace the research assistant (RA) pool model, under which the library budgets for and coordinates the activities of RAs. This approach serves professors whose research needs fluctuate and provides a higher level of training and oversight for students, who benefit from working with numerous professors with varied research interests. \textit{See}, e.g., Darcy Kirk & Barbara Rainwater, \textit{The Research Assistant Pool in the Law Library}, \textsc{6 Trends L. Libr., Mgmt. & Tech.} 4 (1994–1995). If comprehensive oversight of law school RAs is not possible, consider an arrangement with the law school administration whereby RAs from the library’s pool do not count against professors’ discretionary accounts. This gives professors a financial incentive to use the library’s service, and the administration can cut faculty spending on RAs. \textit{See also infra ¶ 20 regarding the role of an associate dean for research.}
their effectiveness. Our primary area of expertise is still not included on the bar exam. Furthermore, useful measures for assessment of library collections or services continue to elude us.18 “When a dean looks at a law school budget, the biggest expenditure after faculty salaries is the library, and many must now wonder ‘what are all those people doing with all that money?’”19 Unless we change our priorities, layoffs and budget cuts will, and should, land disproportionately on the library.

§7 Of course libraries have advantages as well. They employ highly educated and creative people who, having lived through transformative change in their own profession, bring flexibility and adaptability to this difficult time in legal education. Most libraries can still cancel print subscriptions to save (potentially) hundreds of thousands of dollars, money which might be reallocated to save crucial staff positions. Another even more hopeful route is for everyone in the library to embrace services that support new institutional priorities.20

What Do Deans and Professors Want from the Library?

§8 What should the library do to maximize its value to the school? We can ask deans and professors that question directly, but we should not expect useful responses. My experience last year as the librarian on an ABA site inspection team21 confirmed earlier impressions that we gain little from general inquiries:

Librarian: Are you happy with the library?
Professor: Oh, they’re absolutely wonderful!
Librarian: That’s great to hear. So what are they doing that you really like?
Professor: Um, well, when I contact them they respond right away. And they get me whatever I want. They can track down anything. They’re diligent, responsive . . . just really great people.
Librarian: Great, well, is there anything you’d like to see the library do more or better?
Professor: Gosh, no, I can’t think of anything. . . . They’re just terrific.

18. The ABA has moved from quantitative oversight (volume count, circulation statistics, etc.) to something almost exclusively qualitative. See Sarah Hooke Lee, Preserving Our Heritage: Protecting Law Library Core Missions Through Updated Library Quality Assessment Standards, 100 LAW LIBR. J. 9, 2008 LAW LIBR. J. 2. Chapter 6 of the ABA’s Standards for Approval of Law Schools includes “effective support” (601(a)); “appropriate range and depth” of services (605), “sufficient financial resources” (601(b)), and “a competent staff, sufficient in number to provide appropriate” service (604). AM. BAR ASS’N, 2012–2013 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 43–45 (2012). But what is “effective,” “appropriate,” and “sufficient”? What does “competence” look like?
20. “As we acquire fewer books . . . we need fewer catalogers and fewer staff to process books. Does this mean that libraries should cut staff, or should we redirect current staff to other tasks? If so, how do we determine what we are not doing that we should be doing?” Id. at 96, ¶ 16.
21. ABA site inspection teams typically include a librarian who finds facts that will help assess effective or competent service. Evidence of such service comes from discussions with professors and students (among others). “Evaluate the quality of library services and how this effectiveness is measured (student surveys, annual conversations with faculty, focus groups, etc.). Discuss any deficiencies in current service programs and/or any necessary services that are not offered.” Joan Howland, Discussion Group G—Information Resources, Technology, and Facilities, in AM. BAR ASS’N, ABA SITE EVALUATION WORKSHOP (Nov. 14, 2009) (section II.3.h), http://apps.americanbar.org/legal/ accreditation/sitevisit/SEW%20NOV%2009%20Dig%20Agenda%20Book.pdf.
¶9 It is a familiar dialogue: professors genuinely like the library and respect the people who work there. But a lack of criticism is not validation. Without specific alternatives, the professor has no context to judge services.22 Yet we often intuit our value to the school from such affectionate but ignorant expressions of support. Internal surveys and anecdotal evidence are not enough.23

¶10 Only through a deeper understanding of the school’s priorities and faculty needs can the library thrive in this new era, and everyone who works in the library is responsible for gaining that understanding. Any library staff member can be more active in the law school community, perhaps by developing relationships with individuals in other departments, or by attending colloquia and events. One might learn about major strategic objectives: for example, the school could be embracing (belatedly) Carnegie-style curricular reform,24 developing a new LL.M. or certificate program, expanding the use of technology in teaching, launching an online continuing legal education series, or seeking new sources of revenue. Small projects may emerge as well, such as meeting the needs of faculty members who want to learn about grant-funding opportunities, or assisting journal editors in revamping their web sites. Gathering intelligence of this sort can help the library to overcome the school’s challenges, and it also broadens our understanding of what motivates professors.

**Motivation: Why Law Professors Teach, Write, and Serve**

¶11 We cannot hope to understand the interests, and thus the needs, of “the faculty” as if it is a monolithic entity. Different subgroups (e.g., nontenured, clinical, legal writing) are likely to be motivated by different needs and goals.25 It is important to recognize that, like all people, individual professors mix values, priorities, and insecurities with other combustible elements. These quirks and preferences may be useful in customizing library services.26 Nevertheless, we can speak

22. But see Yirka, supra note 16, at 29–30 (“While it is more common for librarians to ask users if they like the library’s services, it is uncommon for librarians to ask open-ended questions.”).

23. Of course, it can be helpful, after dreaming up new services, to gauge the faculty’s interest. They (or their representatives on the library committee) can evaluate a specific proposal in relation to their own needs.


25. Some professors become less productive after they pass the tenure threshold. See Ira P. Robbins, Exploring the Concept of Post-Tenure Review in Law Schools, 9 Stan. L. & Pol’y Rev. 387, 387 (1998) (defining “deadwood” professors as “extremely underproductive or detached from their work”). On the other hand, tenured professors may be more open to blogging or other borderline scholarly activities that can be more interesting than law review articles and can reach a broader audience. See J. Robert Brown Jr., Essay, Law Faculty Blogs and Disruptive Innovation, 2 J. of L. 525, 548–49 (2012) (arguing that blogging can enhance name reputation, increase SSRN downloads, and otherwise “rout[e] around traditional means of determining reputation”); see also Stephanie Davidson, Way Beyond Legal Research: Understanding the Research Habits of Legal Scholars, 102 Law Libr. J. 561, 578, 2010 Law Libr. J. 32, ¶ 42 (arguing that faculty status is likely to affect research habits in terms of funding, community relationships, and time available).

26. There are many labels we can attach to law professors: “(un)productive scholars,” “(dis)engaged colleagues,” “(non)tenured,” “tech savvy,” “(future) deans,” “clinicians,” “professionally active,” etc. Any one of these may suggest a certain package of library services. Taken to an extreme
generally about law faculty interests based on unique and pervasive aspects of the profession.

¶12 In recent years, researchers have attempted to understand faculty motivation by distinguishing between intrinsic and extrinsic factors.27 Intrinsic motivators—for example, wanting to help people or make a meaningful contribution to a field of study—suggest positive ideals of autonomy, mastery, and purpose.28 These drivers are sometimes described with different terms, but the idea is the same. Douglas Ray believes that “job satisfaction comes from: knowing that you make a difference; knowing that you are appreciated; knowing that you are part of a group doing something that matters; and knowing that you can continue to learn and grow.”30 While it might be possible to derive satisfaction only from within, for many, personal satisfaction grows from academic acceptance.31

¶13 Extrinsic motivators—tenure and security of position, recognition of peers, financial incentives—play a major role, perhaps more than internal factors, and perhaps even more than they did for previous generations. Whether the trend toward an incentive-based “academic capitalism” is good or bad depends on one’s point of view: “[A]cademics . . . with a sense of personal agency or those who see financial, professional or social benefits may see it as opportunity rather than imposition.”32 On the other hand, “Faculty who become temporary scholars to achieve tenure, feeling both pressed and oppressed by the need to produce three major journal articles (published in ‘top tier journals’), are less likely to experience

## Footnotes


28. We should not forget the sadder intrinsic motivators. Shortly after I became associate director for library services at the University of Connecticut School of Law, I attended a library management workshop in California. The facilitator asked everyone to think of the things that motivated them to do their best work. People gave honest and honorable examples like “helping others” and “doing genuinely important work.” My answer was “fear of failure.” Fear keeps me up late and it drives me to achieve results.

29. Daniel Pink has written that human beings are motivated by autonomy, mastery, and purpose. See Daniel Pink, Drive: The Surprising Truth About What Motivates Us 85–146 (2009). But that cannot explain faculty members who have better access to each of these motivators than most workers. Law professors have academic freedom and security of position, the opportunity to mold the next generation of lawyers, and a platform to affect important debates in their areas of expertise. If autonomy, mastery, and purpose were the only key drivers, then all professors would be content and cooperative. Sadly, that is not the case.


31. See Blackmore & Kandiko, supra note 27, at 404 (“No matter how intrinsically motivated, an academic is part of a community of colleagues, whose shared epistemologies and social practices strongly influence thinking and discourse in the field and whose approval confers high intellectual standing.”).

32. Id. at 402.
the personal enjoyment and life satisfaction associated with a lifetime of scholarship . . . .”; 33
¶ 14 Many longtime academics say that academia was once a happier place. Faculties were collegial and involved. They met routinely both at work and socially, and were engaged with one another’s work.

It was not uncommon, in the mid-1970s to all have coffee together twice a day—10:30 am and 2:30 pm. When one person moved, almost every young professor met to help. Weekends were spent together in families. Christmas parties of whole Departments were held in rented halls with 300+ attendees, with singing and comedy and talent shows. 34

The job of the “law professor” typically included a near lifetime appointment; a flexible schedule; a generous salary; a platform to influence debates of local, regional, or national significance; and the ability to help the careers of future lawyers. Although many law professors are happy and fulfilled in their careers, 35 times and perspectives have changed. The professoriate is (or has become) more competitive, status obsessed, and uncooperative. 36 “Now we talk about our ‘heroes’ by noting that ‘she was published in that journal’ or ‘he just received a huge research award.’ These are our icons; but, is their work edifying anyone—including themselves?” 37

33. Rich, supra note 27, at 125 (arguing that “extrinsic” motivators like financial rewards are potentially destructive to both the campus community and long-term professional satisfaction). Think about library services designed with not-yet-tenured professors in mind. What do they need to get through the process? Time to write? Project management? Solid administrative support? The library ought to work with the dean for research to consider the opportunities. If we reach professors when they are new, especially in a way that has a meaningful impact on something as important as tenure, then we will have customers for life.


35. Indeed, a survey of Yale Law School graduates demonstrates that academics are the most likely of all graduates to be “very satisfied” with their career choice. Yale Law Sch. Career Dev. Office, What Yale Law School Graduates Do: A Summary of CDO’s 5th Year Career Development Survey, Classes 1996–2000, at 1, 4–5 (2001), http://www.law.yale.edu/documents/pdf/cdo-summary_mem0_96_00.pdf (noting “very satisfied” rates of 24% for law firms, 49% for business, 60% for public service, 75% for academia, and 49% overall).

36. See, e.g., Michael A. Livingston, Why Are Law Professors So Edgy?, FROM MILAN TO MUMBAI (Mar. 1, 2006), http://mikelivingston.blogspot.com/2006/03/why-are-law-professors-so-edgy.html (arguing that the profession has become “(a) very competitive; (b) primarily personal (that is, non-cooperative) in nature, and (c) almost entirely devoid of objective standards that might be used to measure success or failure in the activity.”); Megan McArdle, The Life of the Mind, ATLANTIC (Apr. 22, 2008), available at http://www.theatlantic.com/business/archive/2008/04/the-life-of-the-mind/3296/ (“I’ve never seen a group of people—including investment bankers—more obsessed with status.”). See also Ilya Somin, Are Law Professors Miserable, and If So Why?, VOLOKH CONSPIRACY (Dec. 29, 2007), http://volokh.com/2007/12/29/are-law-professors-miserable-and-if-so-why/ (“[A]chievements and failures are measured by citation rates, conference invitations, offers of visiting positions, promotion to tenure, pay increases (which at many schools are at least partly merit-based), and of course student evaluations. None of these measures are perfect. But collectively they should give most professors a reasonably good indication of their professional standing.”).

37. Parsons & Frick, supra note 34, at 35; see also id. at 42 (“[T]eaching, research and service (the holy trinity of sorts) [have become] depoliticized acts reduced to ‘getting ahead.’ But ‘getting ahead’ means ‘falling behind’ when the effect is to deskill or remove academics from processes of deliberation and reflection.”).
We believe some things are systemic—competition for what seem like finite research dollars; strong personal competition for salary and promotion; and an academic culture driven by less than convivial philosophical groundings—and the things that go with that [such as a personal lack of efficacy and fullness that makes us, shall we say, edgy (on edge)].

¶15 One might accept the implication of these anecdotes, yet reasonably ask whether pining for the academy of yesterday helps us to evaluate the library services of today. One response is that it does, at least to the extent that the dean and other tenured faculty members seek a return to those happier times—in that case the library could develop ways to help in the transition. Indeed, we might hope that innovative support will result in more successful scholarship, which will in turn lead to a friendlier working environment. A second, less sentimental response is that we ought to limit our inquiry to factors that do motivate professors, and ignore those that either used to, or never did, have an effect. The quest for recognition and reputation are real enough, though not necessarily indicative of our best natures.

¶16 The desire for recognition from the public, from the news media, from students, and most crucially from peers (internal and external) is a critical motivator. Faculty watch for lateral moves, appointments to national committees, publication in visible journals, invitations to speak at conferences, and mentions in the blogosphere as evidence of professional importance. Seen in this way, we understand why teaching may come second, and service (including governance) a distant third; after all, teaching and service are less directly associated with reputation, at least outside the building.

¶17 In my early years at William Mitchell, I attended a faculty workshop on the importance of self-promotion. Professors shared tips on using social media, submitting articles to nonlegal or interdisciplinary publications, and speaking at conferences. Attendees were encouraged to “squeeze the juice” out of their research and writing. Every good idea should be heard by as many people, in as many ways,
as possible. The model of writing an article, submitting it for publication, and then moving on to other projects was shunned as incomplete and outdated. The reason, according to the presenters, was that our practical work should not be hidden; instead the community should put it to use. Thus self-promotion, once (and still, in some circles) regarded as tacky, had been reborn and swaddled in a wrapper of social good. But it also appealed to professors’ desire for recognition, not to mention the law school’s interest in promoting a faculty with national impact.

¶18 The workshop spawned a fascinating law school task force on enhancing the visibility of faculty work. The group took its work seriously and had the approval of both law school administration and the faculty as a whole. No surprise—its work hit the sweet spot between professorial and institutional self-interest.

¶19 Understanding patrons’ needs has always been central in librarianship—in reference or circulation interactions, in developing or refining services, and so on. Dipping below the surface to ascertain what motivates the law school and its faculty has major implications as we reimagine the academic law library. We know that law schools are seeking to cut expenses, that promotional efforts are valued but pushed back to professors, and that professors are increasingly motivated by external factors like recognition and reputation.

Support for Production and Visibility of Faculty Scholarship

¶20 From time to time law schools post announcements of positions like “Associate Dean for Faculty Development” or “Vice Dean for Research.” These jobs are generally designed to help professors get their work published and disseminated broadly, find speaking engagements, and increase attention for the school, among other things. The fact that schools have advertised for positions like this is evidence of the desire for increased scholarly productivity and visibility. But law schools do not need more deans; instead they need to trim administrative costs during a historic period of declining enrollments.

44. This seems an opportune moment to state that these suggestions were neither bad nor base. There were, in fact, numerous good and practical ideas shared during the meeting. Without attaching judgment, I seek to recognize and learn something real about human nature, and (eventually) suggest corresponding implications for library services.

45. Reputation is worth a combined forty percent of the U.S. News & World Report rankings. See Theodore P. Seto, Understanding the U.S. News Law School Rankings, 60 S.M.U. L. Rev. 493, 506 (2007). Faculty members’ efforts to promote their own work are doubly important in an era of fiscal austerity. Marketing and public relations groups must also focus on campus events and calls from news media, etc.

46. Common functions of a faculty development position include mentoring and assistance with professional development opportunities; oversight of grants, awards, fellowships, and development funds; development of programs on writing and teaching; assistance with curriculum planning; and maintaining a calendar of faculty development opportunities.

47. See Joseph P. Tomain & Paul L. Caron, The Associate Dean for Faculty Research Position: Encouraging and Promoting Scholarship, 33 U. Tol. L. Rev. 233, 234 (2001). At the University of Toledo College of Law, the associate dean position was created to “(1) promote excellence in scholarship and teaching; (2) facilitate and coordinate scholarly activities; and (3) publicize the scholarly activities of the faculty.” Id.

48. See generally James Lindgren, Fifty Ways to Promote Scholarship, 49 J. Legal Educ. 126 (1999). Professor Lindgren offers terrific suggestions on creating an internal environment in which scholars can thrive. Id. at 127–32. He suggests that schools create research dean positions, noting that “Texas
¶21 With significant financial and public relations stress, law schools may deemphasize scholarship in favor of teaching because teaching has a more direct and obvious correlation with student outcomes and is, therefore, more responsive to critiques of legal education. Libraries can add immediate value to the school by absorbing functions related to promotion and dissemination of scholarship, including many of those held by research deans, and others that professors have been asked to accomplish on their own.49 Librarians have (or can develop) the talents necessary to take primary responsibility for faculty development.

¶22 This new role is not a stretch. Even now, research deans cannot serve optimally without the cooperation and support of the library. After all, librarians conduct research, and often coordinate research assistant pools, to guarantee high-quality inputs for scholarship.50 We know that as sources of information proliferate, professors need more help in searching and filtering.51 Increasingly, it is not enough to scan for articles in one’s area, run keyword searches in favorite databases, and talk to peers. Professors who are provided with better source materials have an advantage, and creative librarians hold the key.

¶23 Research is the library’s sphere of influence, and the scholarly cycle moves quickly from there. In between research and the finished product, professors are usually alone with their computers and their coffee,52 and then, after the article is finished, a research dean may offer advice on how to place it in an appropriate journal. But experience and anecdotal evidence suggest that many professors handle the postcompletion work alone (or with the help of an administrative assistant), leading to inconsistency, inefficiency, and error.
¶24 I propose a more streamlined process that better utilizes librarians’ talents and garners more attention for faculty work. One librarian should serve as scholarly communication “czar,” responsible for the school’s publication and open access efforts, including SSRN,53 ExpressO,54 and the institutional repository. This librarian might reasonably emerge from either public or technical services.55 A designated point person signals the library’s commitment to the endeavor and provides a contact for faculty members and vendors.56

¶25 If the school does not already have an institutional repository, the library should invest in one.57 A repository houses a publicly accessible record of the school’s intellectual output58 and serves as the cornerstone of its participation in the open access movement. Open access initiatives (and the repository specifically) build connections with the community (including the bench and bar), assist with fund-raising,59 expose the school’s work to a national or even worldwide audience, and accomplish a social good by unlocking valuable information.60 Undertaking this repository project will have the support of faculty members because the library can promise vastly increased reach for their work,61 and support for open access

53. SSRN (www.ssrn.com) is the Social Science Research Network, an interdisciplinary scholarship repository widely embraced by law professors and valued for its download tracking statistics.
54. ExpressO, http://law.bepress.com/expresso/ (last visited Jan. 26, 2013). ExpressO is a manuscript submission service developed by Berkeley Electronic Press (bepress) that allows authors to send completed articles to dozens (or hundreds) of law journals at once and monitor acceptance or rejection.
55. Reference librarians might seem the obvious choice because of their preexisting relationships with professors, but this role also has great potential for catalogers or others in technical services. For one thing, as libraries cut print collections, those who had processed print materials have more time available. More important, many of the skills necessary to spearhead and maintain an open access initiative are possessed by technical services librarians: an understanding of taxonomy and controlled vocabulary, being consistent and organized, and attention to detail.
56. Anyone who has spent significant time evaluating or using institutional repositories can confirm the importance of a dedicated individual. Without one, repositories often languish. It is embarrassing to the school to present a repository, ostensibly its public archive of faculty work, to which nothing has been added for years.
57. Ideally the school will supplement the library’s budget, but regardless, libraries must find the money. Digital Commons, for example, costs between $15,000 and $20,000 per year for hosted, supported service. See DIGITAL COMMONS, http://digitalcommons.bepress.com (last visited Jan. 26, 2013). DSpace is open source, locally hosted software, which means it is cheaper, highly customizable, and more staff-time intensive. See DSPACE, http://www.dspace.org (last visited Jan. 26, 2013).
58. For a great overview of open access in the context of legal education, including considerations for implementing an institutional repository, see Carol A. Parker, Institutional Repositories and the Principle of Open Access: Changing the Way We Think About Legal Scholarship, 37 N.M. L. Rev. 431 (2007).
59. See David Shulenburger, Closing Keynote at SPARC Digital Repositories Meeting (2008), http://www.arl.org/sparc/bm--doc/shulen_trans.pdf (“The job of digital repositories is to ensure that the extremely valuable scholarly or creative products that have been paid for by the public or by donors are ultimately accessible to them, as well as to students, faculty and researchers everywhere.”).
60. See Richard A. Danner, Applying the Access Principle in Law: The Responsibilities of the Legal Scholar, 35 INT’L J. LEGAL INFO. 355, 394 (2007) (encouraging scholars to “insist that the journals which accept their works be openly accessible or at least allow authors to post their accepted works in institutional or disciplinary open access repositories.”).
61. See Parker, supra note 58, at 466 (“[O]ne need only visit the topic of download counts to find evidence that one of the driving forces behind archiving in open access repositories is increased visibility, and thus increased impact of one’s work.”).
initiatives will increase as professors see the repository’s effects in terms of download counts, among other benefits.\textsuperscript{62}

\textsuperscript{¶}26 Facilitating free and open access to scholarship virtually guarantees that more people will read and cite to it.\textsuperscript{63} Important research conducted by James Donovan and Carol Watson demonstrates that “[o]pen access legal scholarship . . . can expect to receive fifty-eight percent more citations than non–open access writings of similar age from the same venue.”\textsuperscript{64} The effect appears to be quite durable, with older articles (including many uploaded to open access venues years after traditional publication) continuing to be found and cited at a higher rate than articles published in print alone.\textsuperscript{65} The reasons are uncertain, though easier availability of materials via Google and other search engines seems the most significant cause.\textsuperscript{66}

\textsuperscript{¶}27 Professors may ask whether articles already on SSRN ought to have a second open access home. The issue is whether a repository will siphon away a percentage of authors’ SSRN downloads, resulting in diminished ranking and status. Donovan and Watson believe that the question arises from a faulty “zero-sum” assumption; namely that readers for a particular article are a scarce resource, and adding multiple access points divides them.\textsuperscript{67} Instead, they argue that SSRN and IRs more likely draw from different readerships, meaning that downloads recorded for the repository copy represent not diverted SSRN readers but a new audience for the content. SSRN and IRs do not fight for the same eyeballs, but instead target different populations defined by how readers find their way to the desired content.\textsuperscript{68}

\textsuperscript{¶}28 Our law school’s experience with using both SSRN and our repository, Mitchell Open Access, supports Donovan and Watson’s key conclusion; namely that

\textsuperscript{62} Professors who never expressed much interest in open access report their appreciation for receiving monthly download statistics from the repository. Probably a part of it is vanity, but there are other reasons as well. Seeing a spike in downloads for an older article tells a professor that a long-forgotten research interest may be worth revisiting. Professors have also been invited to submit new articles for forthcoming symposia, or to present at conferences, because of work found in the institutional repository or SSRN.

\textsuperscript{63} Dozens of studies in various fields have demonstrated the increased impact factor of open access articles. See The Effect of Open Access and Downloads (“Hits”) on Citation Impact: A Bibliography of Studies, OPEN CITATION PROJECT, http://opcit.eprints.org/oacitation-biblio.html (last updated Dec. 5, 2012).

\textsuperscript{64} James M. Donovan & Carol A. Watson, Citation Advantage of Open Access Scholarship, 103 LAW LIBR. J. 553, 570, 2011 LAW LIBR. J. 35, ¶ 50.

\textsuperscript{65} See id. at 571–72, ¶ 56.

\textsuperscript{66} Donovan and Watson note three possible causes: the open access postulate (convenient access), the early access postulate (earlier uploading gives the author a foothold on hot topics), and the self-selection bias postulate (authors self-select their best work to post online). Id. at 570–72, ¶¶ 51–56. They dispute the notion that more convenient access explains citation advantage because law professors already have access to legal periodical literature via HeinOnline, LexisNexis, and Westlaw. Id. at 571, ¶ 53. Yet they do not consider the possibility that faculty research habits have changed, and that, like students, faculty have begun to utilize general search engines either before or instead of fee-based databases to find legal literature. See Davidson, supra note 25, at 572, ¶ 25 (acknowledging our lack of knowledge about faculty research process and preferences). “Do faculty scholars use the resources that librarians expect them to use?” Id. at ¶ 26.

\textsuperscript{67} James M. Donovan & Carol A. Watson, Will an Institutional Repository Hurt My SSRN Ranking? Calming the Faculty Fear, AALL SPECTRUM, Apr. 2012, at 12, 12.

\textsuperscript{68} Id.
redundant posting dramatically increases net downloads.\textsuperscript{69} In William Mitchell’s case, SSRN downloads have declined marginally since the debut of Mitchell Open Access, but net downloads have skyrocketed.\textsuperscript{70} This is the rare service with no downside; it provides broad dissemination of faculty work, predictable and enthusiastic institutional support, quantifiable and measurable success, and fixed costs (excluding staff time).\textsuperscript{71}

\textsection{29} At the same time as libraries evaluate repository platforms and build support, they can improve their schools’ scholarship content on SSRN by undertaking a retrospective uploading project. This process includes scanning articles from print journals in the collection (absent an author’s digital copy, or an agreement with HeinOnline to reuse already digitized files) and obtaining permission from copyright holders.\textsuperscript{72} Luckily most student-edited, law-school-supported journals allow for open access reuse, or will readily grant permission.\textsuperscript{73} Naturally, libraries will also need permission from professors, but should experience few obstacles if they have institutional support and inform faculty about the project.\textsuperscript{74}

\textsection{30} Completing a repository or retrospective SSRN-uploading project will build the library’s credibility and help librarians understand and appreciate the breadth of the faculty’s work. Other valuable steps are for the library director to serve as the school’s SSRN editor (if such a position exists),\textsuperscript{75} and for both the director and the scholarly communication librarian (among others) to attend faculty colloquia.\textsuperscript{76}

\textsuperscript{70} See the appendix infra for a chart of download numbers.
\textsuperscript{71} Readers may see the cost as a drawback, but I view it as a beneficial reallocation of resources.
\textsuperscript{72} See Parker, supra note 58, at 468–72 (describing issues related to obtaining permission from journals that own exclusive copyright in already published works).
\textsuperscript{73} Experience shows that student-edited journals rarely deny permission (if they even respond to permission requests), but peer-reviewed journals (especially those owned by for-profit companies) rarely grant it. The approach apparently taken by some law schools of posting all materials until the copyright holder objects is simpler, but not recommended.
\textsuperscript{74} The promise of faculty visibility with expert support and no additional outlay of funds should generate institutional enthusiasm. Notify the faculty without asking for permission. Describe the library’s plan and rationale, and tell them their feedback is welcome. When it comes time to upload articles, e-mail each professor with a list of the articles ready to post. Their feedback will likely focus on specific articles to add or subtract from the list, not on the initiative itself. “We are doing this, let me know if you object” is more effective than “we would like to do this, let me know if it is okay.”
\textsuperscript{75} The value of having an SSRN editor is that it signals the law school administration’s embrace of open access, or at least of the widest possible dissemination of faculty work. Even if library directors cannot get the title, they are well positioned to know what other professors are writing, and can serve as a conduit of information for librarians working on open access projects.
\textsuperscript{76} Ideally all librarians would attend, and participate actively in, workshops at which professors present their research. This serves the library’s goals of institutional visibility and knowledge of faculty interests, and it lays the groundwork for future professor-librarian collaboration.
§31 Armed with knowledge of ongoing projects, librarians should check in with professors periodically. Upon completion of a full draft, the librarian can offer a preliminary citation check, designate key words, write an abstract (if necessary), post the article to SSRN, add it to the school’s SSRN Research Paper Series, and submit it for inclusion in selected SSRN Subject Matter eJournals. Immediately thereafter, the librarian can add a link to the professor’s online bibliography and add an entry to the database of faculty accomplishments.

§32 Between uploading a working paper and finalizing the manuscript for publication, the library should shift to a marketing role. Librarians can promote the work from their Twitter or other social media accounts, identify blogs or listervs whose authors and readers might be notified, suggest participation in internal colloquia or topical conferences (particularly those venues that will allow professors to present their work), and encourage authors to thank those upon whose work they developed their ideas. Librarians might also work with the alumni relations

77. The director may want to visit faculty members who have “fallen off the grid” and ask what is going on, perhaps offering to pair them with a librarian or have someone work with their research assistants, or do whatever it takes to position the library to help kick-start their research.

78. The librarian may need to be aggressive. If a response to e-mail is not received, the librarian must visit the professor’s office and say, “This is what I need.” The challenge is that many librarians are uncomfortable pushing professors. They are used to responding to requests, not making them, and certainly not demanding a response. This transformation from librarian-in-service to librarian with a separate, equally important task will need acceptance and support for it to succeed. Librarians may need coaching, but in the end both groups may end up with more realistic and accurate perceptions of each other—librarians will see professors as regular people, and professors will see librarians as the professionals they are, and think of them more as colleagues.

79. Professors may be reluctant to upload works in progress. They want to present their best work, which is understandable. But the library can articulate the value of staking out one’s territory online and obtaining early reactions, while also beginning to accumulate downloads.


81. SSRN features hundreds of “eJournals” that include newly posted articles on topics both narrow and broad. Most pertinent to this discussion is the Legal Scholarship Network (LSN), SSRN’s umbrella for law related e-journals. See Legal Scholarship Network Journal Offerings, SSRN, http://www.ssrn.com/update/lsn/lsn_jrl.html (last visited Jan. 26, 2013), for a complete list of LSN subject matter e-journals. One example of a dedicated librarian’s value is in selecting appropriate e-journals—each one has a unique subscriber list, and inclusion in nonlegal or interdisciplinary e-journals is a good way to expose a work to a wider audience.

82. In an ideal world, the library also controls faculty bibliographies online, guaranteeing consistency of inclusion and formatting.

83. Each law school should have a single, comprehensive, reliable database to track faculty scholarship and accomplishments. It can be used to generate monthly activity reports, track scholarship posted in SSRN and the institutional repository, and assist with promotional activities. It could also include media mentions, awards, presentations, congressional (and other) testimony, blogging, committee work (ABA, AALS, etc.), or other activities of particular interest to the school. The library’s technology expertise, along with its interest in promoting faculty work, make it a good choice for developing and maintaining this database.

84. See Benjamin J. Keele & Michelle Pearse, How Librarians Can Help Improve Law Journal Publishing, 104 LAW LIBR. J. 383, 404, 2012 LAW LIBR. J. 28, ¶ 51 (“[L]ibrarians are well situated to know which Web 2.0 channels are ideal venues for marketing journals or individual articles.”).

85. I credit my colleague, Professor Ted Sampsell-Jones, for this last idea. He suggests that authors send their SSRN link to people whose work they have cited (with approval). It is a form of networking, ego-stroking, and useful self-promotion to say, in essence, “I wanted you to see my new article because your work really got me thinking.”
department to promote the work to the author’s former students, or to graduates who practice in a related area. After publication, librarians can set up Google Alerts (or similar services) to monitor reaction.\footnote{86}

¶33 Having “workshopped” the article and incorporated feedback, the professor should send the completed manuscript to his assigned library contact.\footnote{87} The library, which, in many cases, budgets and pays for an institutional ExpressO account, also should handle the manuscript submission process.\footnote{88} During this stage the library can (1) ensure all formatting and similar requirements are met,\footnote{89} (2) utilize the preferred submission method for specific journals (e.g., Scholastica\footnote{90} instead of ExpressO); (3) suggest the best time of year for submission;\footnote{91} (4) help authors balance offers of publication for the greatest impact and fit;\footnote{92} and


87. Note that librarians must have enough support so that they need not handle tasks that can be accomplished by paraprofessionals, student workers, or the library’s administrative assistant (if it has one).

88. Bepress currently offers two institutional memberships for ExpressO: Open Account Plan ($2.20 per submission, with billing for actual use); and Complete Prepaid Plan ($2200 per year for unlimited use). \textit{Pricing, ExpressO}, http://law.bepress.com/expresso/index.html#index_pricing (last visited Jan. 26, 2013).


90. \textit{Scholastica}, https://scholasticahq.com (last visited Jan. 26, 2013). Scholastica is a relatively new journal submission platform—a competitor to ExpressO. Only a small number of law journals use it so far, but of those, two highly ranked journals (\textit{California Law Review} and \textit{University of Chicago Law Review}) no longer accept articles through ExpressO.

91. Evidently ExpressO’s institutional subscription, which allows submission of articles to hundreds of publications simultaneously, has swamped editorial staffs. This means that many journals, already notorious for valuing author reputation over content, can do even less analysis than before when choosing articles. The \textit{University of Chicago Law Review} and the \textit{California Law Review} may see Scholastica’s $5 fee as a way to limit submissions to authors who really want to publish in their journals. \textit{See Dan Filler, ExpressO Under Attack? Scholastica and the Five Dollar Submission, FACULTY LOUNGE} (Aug. 6, 2012), http://www.thefacultylounge.org/2012/08/law-review-submissions-rise-of-scholastica-demise-of-expresso.html; \textit{see also} James G. Milles, \textit{Redefining Open Access for the Legal Information Market}, 98 \textit{LAW LIBR. J.} 619, 631–32, 2006 \textit{LAW LIBR. J.} 37, ¶ 42 (noting that in other disciplines, submission to twenty or more journals “would be considered highly unethical, but it is standard practice in legal scholarship”).

92. A few years back I attended a bepress presentation about the best and worst times of year to submit an article for publication. Spring is the worst time to submit an article because recently elected student board members are inexperienced and afraid to commit. June and July are better because editors have free time after exams. By August, the window of opportunity is closing because students are preparing for the new academic year. By September and October, full editorial staffs have assembled to read article submissions and choose the majority of the year’s articles. Over the winter, journals look for last-minute replacements because a certain number of their authors miss deadlines.

93. \textit{See, for example, Washington & Lee University School of Law’s remarkable \textit{Law Journals: Submission and Ranking} site, http://lawlib.wlu.edu/LJ} (last visited Jan. 26, 2013), which allows scholars to rank general and subject-specific journals based on citations to those journals in cases, later articles, etc.
(5) recommend license agreement modification to guarantee the school’s future ability to disseminate or reuse the work.93

¶34 Upon formal publication, the library should post the finished product to the institutional repository, thus providing a complete record of the law school’s scholarly output. At the same time, the draft version on SSRN should be replaced with the final article94 and the published journal citation added. Last, the library should update the citation on the professor’s online bibliography and in the school’s database of faculty accomplishments, and also add links to the institutional repository.

¶35 After publication, the library can continue to promote the work via social media and monitor the blogosphere for reaction. Postpublication is a good time to ask professors if they want to see a list of nonlegal publications that might publish a similar piece. If the author has reprints, the library can suggest individuals (e.g., scholars, deans, or alumni) who might like to receive copies. The library can also find a practitioner to write a short review of the work for a school publication, thereby creating a connection with a member of the bar and demonstrating the practical utility of faculty work. Finally, the library can distribute to the faculty and administration lists of recently published works (including abstracts and links), along with regular statistics that demonstrate an expanded readership.95

Moving Forward with Open Access: E-book Initiatives

¶36 Professors devote themselves to a variety of writing projects, including, in rough order from most to least “scholarly,” monographs, law review articles, hornbooks, practice materials, study guides, and casebooks. Blogs can fit almost anywhere on the spectrum, depending on the professor’s depth of treatment.

¶37 Pursuing an open access agenda for the library logically begins with law review articles for several reasons. First, rightly or wrongly, they are the principal unit of measure for legal scholarship. Tenure and national recognition derive from the placement and impact of articles. Second, school-sponsored, student-edited law journals are usually willing to allow open access publication, meaning libraries can expect relatively few copyright obstacles. Third, professors have strong incentives (and few disincentives) to participate. With no expectation of direct financial benefit from traditional law review publication, professors lose nothing by embracing open access.

¶38 Obstacles to open access publishing of other types of writing are more significant. Notably, professors who produce commercial publications like treatises, casebooks, and study guides do so in part because of potential royalties. Consequently,

93. Among many useful and highly recommended resources is the Scholar’s Copyright Addendum Engine, SCIENCE COMMONS, http://scholars.sciencecommons.org (last visited Jan. 26, 2013).
94. The URL stays the same to ensure uninterrupted download tracking for the piece.
95. See Lindgren, supra note 48, at 131 (“Distribution in house lets faculty members know what has been published, reminds them of what they ought to be doing, and promotes interaction and positive feedback.”).
schools must implement open access publishing in a way that counteracts any financial disincentives.

¶39 Though an appropriate place to start, in certain respects articles actually offer less open access benefit than other types of scholarship. This is because the primary audience for most law review articles is other law professors, one of the few demographics that, by virtue of institutional subscriptions to LexisNexis, Westlaw, and HeinOnline, does not need open access.96 Other groups, notably students and practitioners, would most benefit from free legal content, and the remainder of this article focuses on opportunities to serve those groups.

Practice Guides and Treatises

¶40 Chief Justice John Roberts Jr. made headlines in 2011 when he accused law professors of writing on topics irrelevant to the bench and bar:

Pick up a copy of any law review that you see, and the first article is likely to be . . . the influence of Immanuel Kant on evidentiary approaches in eighteenth-century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.97

Probably the comment was an attempt at humor and not a careful critique; after all, many law review articles are genuinely useful to attorneys and are cited by courts. But law review articles, like their authors, can be disconnected from practice. They are valued by academics (and sometimes policy makers) for their prescriptive nature; professors spot a problem and propose a solution.98 Practicing lawyers prefer practical tips and guidance on how to handle certain scenarios.

¶41 Law schools that increasingly embrace skills training should now embrace practical writing, but instead they continue to glorify articles that typically only generate citations by other academics in later law reviews.99 Law professors who write practical treatises or blogs do so with the knowledge that their work will be marginalized by their colleagues.100

96. See Donovan & Watson, supra note 64, at 571, ¶ 53 (“[L]aw faculty already have as much access to the periodical literature as they can use.”).


98. Of course, law review articles might not be an adequate vehicle even for academics to talk to one another. “The wider question is whether the law review model of content—with its long lead time to publication, editing by students, and format that’s resistant to after-publication editing—yields enough scholarly gems to deserve surviving in its present form even online.” Walter Olson, Abolish the Law Reviews!, ATLANTIC (July 5, 2012, 12:40 P.M.), http://www.theatlantic.com/national/archive/2012/07/abolish-the-law-reviews/259389/.

99. See, e.g., Brian Leiter, Top 70 Faculties in Scholarly Impact, 2007–2011, BRIAN LEITER’S LAW SCH. RANKINGS (July 2012), http://www.leiterrankings.com/new/2012_scholarlyimpact.shtml. A potentially useful exercise is to imagine other metrics for evaluating the importance of law review articles (e.g., citation in briefs submitted to trial and appellate courts and citation by judges).

100. See Milles, supra note 90, at 632–33, ¶ 48 (“Once the chief purpose of legal scholarship, and nostalgically recalled by the bench and bar, this is . . . generally viewed by legal academics as a lower function—a pro bono service, [and] not real, significant scholarship.”).
Librarians can help improve the low esteem in which practical legal writing is held by educating their communities about the need for increased competition in publications geared toward practitioners. Librarians can remind professors and administrators, for example, that corporate publishers no longer have a stranglehold on the means of publication, nor do they add many unique editorial advantages. Librarians should call attention to the high cost of legal publications, which many practitioners (and law libraries) cannot afford.

Practice guides have significant open access potential. Although they are written for attorneys, many practitioners lack meaningful access to them. In general, practice guides (including deskbooks and manuals) are available either through their publishers’ platforms (e.g., Westlaw, LexisNexis, Intelligonnect) or, decreasingly, in print formats, which can be found at academic, state, or county law libraries. Large firms may purchase relevant titles, but lawyers in small firms or solo practitioners face a significant disadvantage because of the cost of these materials.

One solution to this problem is for law schools to invest in student-edited practice guides instead of the traditional student-edited law review. It would engage faculty advisors in a worthwhile endeavor, give students a better educational experience (i.e., creating a substantive overview of a legal topic), and make a huge impact on practitioners. Students could write the work in consultation with faculty, alumni, or other practitioner experts, and keep it up-to-date. A blog connected to the guide could note recent cases and encourage discussion.

Another, (perhaps) less radical option is for one or more professors to write a treatise, but publish it for free online instead of through a traditional publisher. The issue here is that faculty members may be reluctant to embrace self-publishing if they cannot profit from the endeavor, even though relatively few treatise authors earn significant income from their work. Further complicating the matter is the

101. Id. at 631, ¶ 37.
102. These are sometimes referred to as practice materials, or lumped in with treatises. See, e.g., STEVEN M. BARKAN ET AL., FUNDAMENTALS OF LEGAL RESEARCH 72 (9th ed. 2009) (“[P]ractice-oriented books usually furnish analyses of the law, practical guidance, forms, checklists, and other time-saving aids.”); MORRIS L. COHEN ET AL., HOW TO FIND THE LAW 407 (9th ed. 1989) (“[T]he most widely used of this type are the procedural manuals issued commercially for particular jurisdictions.”).
103. See Milles, supra note 90, at 633, ¶ 51 (arguing that students engaged in editing law journals are not learning the right skills: “Journal students learn meaningless citation-checking skills and bad editing habits, but demonstrate an aptitude for tedious detail and a willingness to work hard. The trade-off is that they skip classes to produce the journal.”).
104. See id. at 635, ¶ 59 (stating that law schools, “using readily available distribution technologies such as RSS, blogs, wikis, and other collaborative authoring tools, could easily compete with the commercial publishers of many . . . legal newsletters and loose-leaf services”).
105. See Eugene Volokh, The Future of Books Related to the Law?, 108 MICH. L. REV. 823, 837 (2010) (noting that for “most law professors, the income from academic books is a small fraction of our salaries”). Volokh argues that most law professors would trade money for increased readership, but he does so not in support of open access, but in order to cut publishers out of the process, thereby increasing profits for authors. Id. at 837–38.
allure of a professionally printed and bound finished product. For many professors, even though traditional publishers no longer offer many editorial services, holding a book and including its citation on their curriculum vitae outweigh the open access promise of enhanced readership. Of course, we should not judge faculty too harshly for feeling this way. For hundreds of years, academics have associated books with permanence, accuracy, and authenticity. The book is the physical manifestation and reminder of one’s impact as a scholar. Unlike open access articles, which often go online in conjunction with a publication that is recognizable and rooted in print, an open access book has no tie to a publisher with an imprimatur of quality. The psychology is evolving, but in 2013 it remains fairly entrenched.

¶46 Librarians can help speed these changes in a couple of ways. First, they should embrace open access for their own books and demonstrate the reputational benefits of enhanced readership. Most legal research books are published in print. If librarians cannot embrace open access in their own work, they will not convince others to do so; indeed, the effort might seem hypocritical. Second, librarians can recommend that their schools adopt incentives for professors to devote time to writing electronic treatises or similar projects. For example, schools can designate stipends, bonuses, or course load reductions for faculty members who pursue projects of this type. Third, librarians can continue to promote the concept with faculty allies, with the goal of finding pioneers willing to pilot the effort.

Casebooks

¶47 An even better hope for a speedy transition to open access publishing is casebooks. Partly this is because authoring a casebook is a less desirable credential than other types of scholarship; indeed, academics may not even consider casebooks scholarship at all. This being the case, professors may be open to innovations in format. And again, only one professor (or a small group) is necessary to pilot an effort; unlike the institutional repository scenario, the library need not build faculty consensus or obtain administrative support to create an open access casebook. The pitch is compelling: lower costs for students, increased name recognition for both the author and the law school, customizability of content, and robust support from the library.

106. “Publishers’ selection of a book is a signal (though a necessarily imperfect one) of the book’s passing at least some threshold of quality.” Id. at 839.

107. See id. at 839 (noting that “many publishers don’t provide much substantive editing”). One example is that authors typically now must create indexes for their own books.


109. Volokh, supra note 105, at 845 (“Textbook writing is generally less valued as intellectual activity than is writing original scholarship; less valued by tenure, promotion and lateral hiring committees, less valued by colleagues, and less valued by the scholar-authors themselves.”).

110. See Bodie, supra note 108, at 14 (“Because their notion of the proper course materials is likely not to match perfectly with that of the authors, most professors feel the need to ‘edit’ the casebook by leaving out some materials and adding others. The syllabus must carefully indicate
¶48 In 2001, Aspen published Erwin Chemerinsky’s constitutional law casebook with a list price of $91. When the second edition was released in 2005, the price jumped to $132, a forty-five percent increase. The third edition, published in 2009, has a current list price of $214, sixty-two percent more than its predecessor and well over double the original price. With all the major publishers implementing similar increases, it is fair to describe this as a shocking and unjustified money grab. Worse still, the legal academy is complicit by supplying the authors and perpetuating the market.

¶49 The presence of original content or significant editorial enhancement might justify some of the cost, but sadly there is little of either. Casebooks are filled primarily with appellate decisions. These are no doubt carefully selected and edited, but the main content is obtained from bona fide government information available in the public domain. Also included are brief introductory narratives and questions for class discussion.

¶50 By migrating to open access casebooks, law schools could save students more than $1000 per year. Helping students minimize their debt upon graduation is a worthy goal by itself, but embracing open access to course materials offers public relations benefits as well. Alumni will approve, as will prospective law students. Furthermore, law students at other schools would pressure their professors to adopt them, and those professors would comply as long as the quality was comparable. For schools that produce free, high-quality casebooks, there is a tremendous opportunity to attract attention as a leader in electronic publishing. It also

which cases, notes, or other materials are to be read, and which are to be skipped.

111. ERWIN CHEREMINSKY, CONSTITUTIONAL LAW (2001).
115. See Natsuko Hayashi Nicholls, Univ. of Mich. Library, The Investigation into the Rising Costs of Textbooks 4 (2010), available at http://hdl.handle.net/2027.42/78553 (“[B]etween December of 1986 and December of 2004, textbook prices have increased at twice the rate of inflation, increasing by 186 percent”). Id. at 5.
116. But see John Mayer, Rip, Mix, Learn: From Case Law to Casebooks, VoxPopuli (May 25, 2011), http://blog.law.cornell.edu/voxpop/tag/elangdell/ (noting the problem that arises when public domain case law is only available via a subscription database).
117. Some newer casebooks have evolved from the established model and incorporate items such as learning objectives and study-aid-type materials.
provides a positive message for law school administrators who desperately want to change the narrative about legal education.

¶51 The Center for Computer-Assisted Legal Instruction (CALI) has been a leader in encouraging law schools and professors to revamp the casebook publication paradigm. The eLangdell initiative, which launched in late 2010, encourages professors to post textbooks with a creative commons license on CALI’s platform. CALI’s executive director, John Mayer, has since proposed an ambitious project whereby law schools would share the work of creating one hundred open access casebooks over three years. Under the plan,

Every law school puts forth a Fellow who will participate in a team of faculty to write a casebook in a substantive area of law over 12 months. The law school gives the Fellow leave from teaching a course or an institutional stipend for writing the book. The details are to be worked out between the school and the Fellow.

¶52 Underlying Mayer’s proposal is the notion that creating open access casebooks (and achieving the critical mass necessary to upend traditional casebook publication) requires joint action by law schools. And he trusts schools to move forward based on our collective interest in lowering costs for students. Professor Orin Kerr, writing for the Volokh Conspiracy (a law professor blog), believes Mayer’s plan will not work. “Specifically, it assumes that schools have an incentive to pay extra money or take professors out of the classroom so they can write casebooks, and that professors have strong nonmonetary incentives to write and update them instead of doing other things.”

¶53 I would argue that both objections can be addressed by replacing “fellow” with “librarian.” For one thing, fellows cost additional money, and law schools already have librarians. A designated librarian could leverage existing faculty relationships, audit the target class to better understand how that professor might edit selected cases, find other appropriate source material, clear copyright as necessary, coordinate with administrative assistants, assign tasks to student workers and library research assistants, and outline a teacher’s guide to accompany the text. Although it would mean changing priorities and making a commitment within the library, there is little reason to believe it cannot work.

119. The eLangdell Bookstore, CALI, http://elangdell.cali.org (last visited Jan. 26, 2013). The license allows for noncommercial reuse, with attribution. See About eLangdell Permissions & Creative Commons, CALI, http://elangdell.cali.org/content/about-elangdell-permissions-creative-commons (last visited Jan. 26, 2013). “Please steal our books, as long as you’re not doing so to make money off them. Seriously. Redistribute them through other free channels, repurpose them, edit them. And while we’d absolutely love to hear what you’re doing with our content, you don’t need to ask permission. Just give us credit.” Id.


121. Id.

Conclusion

¶54 Librarians must understand the context within which they operate, and absorbing that context, they must refine their thinking. Instead of defending current operations, rewriting elevator speeches, confronting deans, or otherwise rearticulating their value, they must radically rethink their services, collections, and facilities in light of the law school’s priorities. They must demonstrate their awareness and creativity by presenting ideas that benefit the school, even if that means reductions in service or reliance on digital collections.

¶55 This article suggests a new set of filters through which to evaluate law library services, in particular those that support faculty scholarship. Librarians should consider how their schools’ strategies must change in the face of increasing competition for students, extensive public critiques of legal education in the mainstream media, and downward pressure on tuition. A library whose suite of services is designed primarily to facilitate and teach legal research will be challenged to persuade law school administrators and deans of its importance relative to other departments and roles, and is likely to face large resource cuts in the coming years.

¶56 At the same time, librarians must recognize and understand the factors that motivate today’s law professors. We know that professors value (and are increasingly rewarded for) journal placement, download count, media mentions, invitations to speak at events and conferences, and citation by judges and academics, among other quantifiable evidence of professional reputation. Desire for personal recognition might not foster a more collegial atmosphere, but it helps explain the popularity of library services that result in positive attention.

¶57 Pitching open access initiatives as marketing for the self-interested professor may feel unsavory to librarians, but there are numerous advantages, including real collaboration with professors on issues of personal and professional consequence, development of and recognition for expertise in “trending” areas like social media and web development, and competition with the legal publishers (whose pricing policies have so damaged law libraries).

¶58 Retrospectively uploading faculty scholarship, revamping the process for the submission and uploading of new articles, advising the faculty on self-promotion, and undertaking simple marketing efforts all build a solid foundation of expertise and credibility. That foundation will support new open access initiatives because, having experienced the benefits of its past projects, professors and administrators will endorse the library’s new directions.

¶59 Another foundational element also plays a role: successful open access initiatives can produce cultural change within the institution—change that lays the groundwork for reconnection with the school’s mission. The change in question is ensuring that all scholarship is posted for the world to use. Professors will become accustomed to seeing new work online as a matter of course. Over time, the core values of open access (e.g., facilitating broader access to valuable information) may replace self-interest as a rationale. Recall that earlier in the process few cared about providing access to information—their interests began and ended with promotion and download counts. Eventually the extrinsic motivators and the rewards of self-interest will share space with the feeling of having done something good for its own sake.
Appendix

Faculty Scholarship on SSRN and Mitchell Open Access
Training in FCIL Librarianship for Tomorrow’s World*

Neel Kant Agrawal**

Foreign, comparative, and international law (FCIL) librarianship has grown in importance along with the increased emphasis on global legal research. As the field moves forward, it is important to develop core competencies in FCIL librarianship. These core competencies will provide a common knowledge base among librarians throughout the world. New developments in technology, culture, and legal research necessitate a fresh look at the skills required to be successful in FCIL librarianship. This will then permit a wide range of information professionals to acquire an expertise in FCIL librarianship, through a certification process based on the attainment of these core competencies.

Introduction: The New FCIL Librarianship ................................................. 200
History of Organizations and Training Related to FCIL .......................... 203
  Organizations of Importance ............................................................... 204
    AALL FCIL-SIS ................................................................. 204
    International Association of Law Libraries .................................. 205
    American Society of International Law ...................................... 205
    International Federation of Library Associations and Institutions ... 205
  Other FCIL-Related Associations ................................................... 206
History of Training in FCIL Librarianship .............................................. 206
  AALL FCIL-SIS ................................................................. 207
  IALL ...................................................................... 208
  ASIL and the Law Library of Congress ...................................... 208
  Joint Study Institutes ............................................................... 209
A Survey on FCIL Librarianship .......................................................... 209
Core Competencies in FCIL Librarianship ............................................. 212
  Geographic Competencies ............................................................. 213
  Universal Subject Matter Competencies ................................... 215
Certification in FCIL Librarianship ....................................................... 216
Conclusion: Future Possibilities in FCIL Librarianship Training .............. 217
Appendix A: Survey on FCIL Librarianship ............................................ 219
Appendix B: Essential Reading List on FCIL Librarianship ..................... 226

* © Neel Kant Agrawal, 2013. This is a revised version of the winning entry in the student division of the 2012 AALL/LexisNexis Call for Papers competition.
** Foreign, Comparative, and International Reference Librarian, Los Angeles County Law Library, Los Angeles, California.
Introduction: The New FCIL Librarianship

¶1 The prominence of foreign, comparative, and international law (FCIL) in today’s global legal landscape is uncontested. As legal education and practice become more and more globalized, librarians are required to make sense of this vast and intricate body of law. Over the past sixty years, there has been a growing community of information specialists around the globe and in various roles, helping others to better access, understand, and use the laws of the world.

¶2 FCIL librarianship can be broadly defined as encompassing the roles of librarians in a variety of settings who are “committed to the service of providing research assistance and resources to those who are interested in foreign, international, comparative, and transnational laws.”¹ FCIL librarians generally provide services in the areas of reference, teaching, collection development, and cataloging,² but library staff at all levels and in every position interact with FCIL information.

¶3 Although this article focuses on those who engage, to varying degrees, with FCIL librarianship in academic settings, there are multiple types of FCIL librarians, working in law firms and multinational corporations,³ legal nonprofits and foundations,⁴ international organizations and institutes,⁵ public and county law libraries,⁶ and government bodies such as the Law Library of Congress.⁷ Many types of librarians form the core of this perpetually expanding field.

¶4 The increasingly global focus of legal education carries significant implications for students, faculty, staff, and the curriculum.⁸ For example, law students can

---

1. Dan Wade, Wisdom from Mount Nebo (Hiei): Advice to a Young Person Aspiring to Become a Foreign and International Law Librarian, 25 LEGAL REFERENCE SERVICES Q., nos. 2/3, 2006, at 51, 54.
4. For example, during an internship, I worked closely with the librarian at Open Society Justice Initiative, a branch of Open Society Foundations focusing on international human rights. Unfortunately, there is a dearth of research on this area of law librarianship.
6. For example, my current position is Foreign, Comparative, and International Law Librarian at the Los Angeles County Law Library.
7. Foreign law specialists at the Law Library of Congress prepare reports for the legislative, executive, and judiciary branches; provide reference assistance to the public; and have selection responsibilities for the collection like other law librarians. Unlike most FCIL librarians, they also conduct analysis of the law. Examples include reports on Israeli reproductive rights and the Mexican right to bear arms. Foreign law specialists are trained as attorneys in their own countries, which contributes to their specialized knowledge of those legal systems. Telephone Interview with David S. Mao, Law Librarian of Congress (Oct. 25, 2011). See also Andrew Weber, An Interview with Sayuri Umeda, Foreign Law Specialist, IN CUSTODIA LEGIS (Feb. 23, 2011), http://blogs.loc.gov/law/2011/02/an-interview-with-sayuri-umeda-foreign-law-specialist.
typically study abroad in all corners of the world, enroll in an array of FCIL courses, work in international clinics, participate in international moot court programs, and staff FCIL journals. Law schools are simultaneously creating these global opportunities to prepare students for a more internationalized world and responding to the pedagogical necessities posed by a worldwide legal discourse. The globalization of legal education and practice impacts law librarians, as libraries are increasingly concerned with providing access to FCIL resources.

§5 The ways that librarians bring together disparate subject matter and geographically diverse legal resources are a testament to their vision, perseverance, and collaboration. Efforts to help make FCIL materials more accessible to users have largely been piecemeal. A mosaic of partnerships among law librarians and other information professionals enhances access to materials in this expansive and multidimensional FCIL research environment. Collaborative initiatives such as digitizing, preserving, and improving access to bodies of foreign law, creating databases of legal information, discussing and sharing materials on discussion lists, forming

9. Another example of the current emphasis on international law studies is the proliferation of international law reviews. “In 1976 U.S. law schools sponsored only fifteen law reviews with a foreign, comparative, or international law focus; the number increased to sixty-four law reviews in 1996 and seventy-three in 2001—a greater than 450 percent increase during [a] twenty-five-year period . . . .” Carole Silver, Adventures in Comparative Legal Studies: Studying Singapore, 51 J. LEGAL EDUC. 75, 78 (2001) (footnotes omitted).

10. See generally Michael Crommelin & Carole Hinchcliff, Global Legal Education and Its Implications for Legal Information Management, in IALL HANDBOOK, supra note 3, at 65.

11. Locating foreign law presents problems for many researchers: “The day comes when one must search for bankruptcy laws in Greece or banking laws of the Cayman Islands or initiate an interlibrary loan request for the Bolivian civil code. At this point, one begins to appreciate the difficulty of foreign legal research and, at the same time, there dawns an apprehension of the enormous, diverse and casually controlled range of foreign legal materials.” Thomas H. Reynolds & Arturo A. Flores, Introduction, FOREIGN LAW GUIDE, http://www.foreignlawguide.com/ip/flg/Introduction.htm (last visited Jan. 30, 2013) (subscription required for access).


15. Some examples of FCIL-related discussion groups are the INT-LAW Electronic Discussion Group, FCIL-SIS Electronic Discussion Forum, IALL Member Listserv, CARALL-Talk, and LAW-L.
library consortia, surveying FCIL collections, authoring research guides, and establishing professional organizations have resulted in more equitable access to FCIL information.

The motivation for this article was to determine how to develop training programs that can help current and future law librarians become better equipped for the growing challenges of FCIL research. For some academic librarians, FCIL is central to their jobs, while many others will encounter the field more tangentially. In either instance, it is essential that all law librarians be able to address the changing needs of FCIL information users. Some of the queries posed in the research agenda of the International Association of Law Libraries (IALL) provide an excellent starting point for understanding the training needs for FCIL librarianship:

What opportunities are available worldwide for the education and training of law librarians? A status report on the nature and availability of formal and informal courses and other training for law librarianship on an international basis is required. Are there specialised courses or law librarianship options within established library school programmes? Is there a specialist certification process? What qualifications are required for the practice of law librarianship?

A country-by-country study of educational programs for law librarians is beyond the purview of this article. Rather, this discussion aims both to get a bird’s-eye view and to make a detailed examination of the current state of the field, and it offers recommendations for training programs that will better prepare professionals for the FCIL research of tomorrow’s world.

The article begins by examining the emergence of professional organizations that have shaped FCIL librarianship and continue to promote its forward progress. The meetings, scholarship, and training institutes conducted over the past thirty years form the backbone of the education of those law librarians particularly interested in FCIL. Training in the field is sponsored and organized by various professional organizations.

The next section of the article is devoted to survey results that illuminate the perceptions of FCIL librarianship held by law librarians. The survey elicited

---

16. For example, there is a Northeast Foreign Law Librarians Cooperative Group (NEFLLCG), with librarians from Columbia, Cornell, Fordham, Georgetown, Harvard, NYU, Penn, and Yale. See also FLARE: FOREIGN LAW RESEARCH, http://ials.sas.ac.uk/flare/flare.htm (last updated Feb. 12, 2013) (collaborative foreign law project among major British law libraries).


21. Respondents were library directors, heads of reference, and FCIL librarians, among others. The survey questions and summary results are presented infra in appendix A. Detailed survey results are on file with the author.
qualitative feedback concerning the challenges faced by contemporary librarians working with FCIL information. The thirty-two substantive questions touched upon many facets of the field. The survey received responses from more than 130 librarians, nearly all of whom work in the United States.

Following an examination of the survey results, the article discusses core competencies, both geographic and subject based. The survey results reveal a lack of standardization in training for FCIL librarianship. Due to the ubiquity of FCIL services in libraries, it is most essential to develop broad, universal competencies in FCIL librarianship, concerning (1) foreign and comparative legal research, (2) international legal research, (3) reference, (4) teaching and instruction, (5) technical services, (6) collection development, (7) information management and trends, and (8) job skills. Core competencies would provide an FCIL knowledge base among librarians and foster consistency in library services.

To aid in the development of core competencies, the article then explores the possibility of certification in FCIL librarianship. Professional organizations can work together to create training programs for certifying librarians who attain core competencies relating to the field. Voluntary certification should be inclusive and flexible enough to enable many types of librarians to attain core competencies through a variety of training programs and practical experiences around the world.

The discussion concludes by identifying future possibilities for training in FCIL librarianship. With the vast improvements in incorporating technology into education, future training can be hosted by experts in the field, conducted online, and completed at the convenience of the participants. Online training programs should be collaborative endeavors between various professional organizations. Web-based instruction would obviate most of the budgetary and logistical challenges librarians face in accessing FCIL training and would place librarians in a better position to meet the challenges presented by FCIL research. And of course, the future of the field depends on its community of members.

**History of Organizations and Training Related to FCIL**

Although FCIL librarianship stems from long-standing and deep-rooted traditions, the modern epoch commenced shortly after World War II. The first generation of FCIL librarians in the United States came from abroad. These included many displaced lawyers from Europe who, “unable to practice law when

---

23. There were also respondents from South Africa, Nigeria, the Netherlands, the United Kingdom, and Kazakhstan.
25. From the early twentieth century until World War II, the collecting of FCIL materials was largely the domain of the Law Library of Congress and a few large academic, county, bar, and law firm libraries. Penny A. Hazelton, *The Education and Training of Law Librarians*, in IALL HANDBOOK, supra note 3, at 43, 51.
they emigrated to the United States, sought employment as law librarians.”

With a shared sense of “seriousness and discipline,” a key group of distinguished librarians from this early generation were instrumental in developing the field: “They built large collections of foreign law materials, created classification systems to organise these collections, produced important scholarship in FCIL, and participated with energy and imagination in the AALL [American Association of Law Libraries].” Together, many of these FCIL librarians eventually established professional organizations in which they served with great pride and distinction.

Organizations of Importance

¶13 A handful of organizations from around the world contribute enormously to developing training programs in FCIL librarianship. These organizations occupy critical roles in advancing the discourse centered on the profession of FCIL librarianship, in building a robust global community of librarians dedicated to the field, and in equipping librarians with critical FCIL knowledge and skills.

**AALL FCIL-SIS**

¶14 In the United States, the AALL Foreign, Comparative and International Law Special Interest Section (FCIL-SIS) is actively involved in promoting the professionalization of FCIL librarianship. The FCIL-SIS became a special interest section of AALL in 1985, but its history goes back much further. In the early 1940s, AALL established a Committee on Cooperation with Latin American Law Libraries in order to supply those countries with legal materials from the United States. In 1950, to reflect its broadened focus, the committee changed its name to the Committee on Foreign Law. And in 1977, it became the Committee on Foreign, Comparative, and International Law.

¶15 The primary objective of the FCIL-SIS is to “provide a forum for the exchange of ideas and information on foreign, comparative, and international law; and to represent its members’ interests and concerns within the AALL.” Historically, its membership has been quite large, perhaps due to the organization’s rapidly expanding schedule of educational opportunities consisting of programs, institutes, workshops, and round tables. Over the years, the FCIL-SIS has

---

26. *Id.* at 52.
27. *Id.*
28. *Id.*
30. See Hazelton, *supra* note 25, at 52; see also *SIS History, FOREIGN, COMPARATIVE & INT’L LAW SPECIAL INTEREST SECTION*, http://www.aallnet.org/sis/fcilsis/history.html (last visited Jan. 25, 2013), for a historical time line on the FCIL-SIS, oral histories of members, a list of its leadership and grant recipients, and the history of its name.
32. Membership in FCIL-SIS is currently about the same as in 1991, when there were 426 members. There were 361 members in July 1995; 299 members in July 2000; 356 members in July 2005; 425 members in July 2010; and most recently, 429 members in March 2012 (statistics on file with AALL Headquarters).
developed into a community where members share expertise among themselves and with other law librarians.

**International Association of Law Libraries**

¶16 Another organization of immense significance to the members of the field working throughout the world is the International Association of Law Libraries (IALL). This association, founded in 1959, has more than 600 members hailing from more than fifty countries.\(^{33}\) IALL is a “worldwide, cooperative non-profit organisation concerned with access to legal information, particularly on a multinational and global scale.”\(^{34}\) It encompasses law librarians, law libraries, and other persons and institutions “active in the acquisition, delivery and use of legal information from sources beyond their own jurisdiction.”\(^{35}\) IALL’s objective is to “connect law librarians and law libraries around the world to each other and to broaden the understanding of legal systems and legal materials in other countries.”\(^{36}\)

**American Society of International Law**

¶17 The American Society of International Law (ASIL) focuses on FCIL training through continuing legal education programs: “ASIL advances international law education for legal professionals as well as for the broader policy-making audiences and the public through a variety of programs.”\(^{37}\) The International Legal Research Interest Group (ILRIG) is a new group within ASIL designed specifically for FCIL researchers, including law librarians.\(^{38}\)

ILRIG provides a forum for discussion among legal information professionals, legal scholars, and attorneys. ILRIG enhances its members’ opportunities to share their knowledge about available FCIL resources, research methods, research techniques, and best practices. ILRIG organizes presentations, publishes a newsletter, and maintains a website that reflects the most recent developments in the legal research profession.\(^{39}\)

ILRIG, led by a group of officers who are law librarians, publishes a biannual newsletter, *International Legal Research Informer*.\(^{40}\)

**International Federation of Library Associations and Institutions**

¶18 The International Federation of Library Associations and Institutions (IFLA) was founded in Scotland in 1927 and is headquartered in the Netherlands.\(^{41}\) The Law Libraries Section of IFLA, “an international policy forum for all law

34. Id.
35. Id.
40. Id.
librarians,” has a multifaceted mission: “promot[ing] understanding and cooperation among law libraries,” “encourag[ing] the development of new law libraries,” “foster[ing] the profession of law librarianship and legal research competencies,” “develop[ing] professional standards and practices,” and “provid[ing] leadership in the field of legal information policy.”

Other FCIL-Related Associations

¶19 There are several other national and regional professional associations that focus on their respective geographic areas: the Australian Law Librarians’ Association (ALLA), British and Irish Association of Law Librarians (BIALL), Canadian Association of Law Libraries/Association Canadienne des Bibliothèques de Droit (CALL/ACBD), Caribbean Association of Law Libraries (CARALL), Chinese and American Forum on Legal Information and Law Libraries (CAFLL), European Information Association (unfortunately defunct as of the end of 2012), New Zealand Law Librarians’ Association (NZLLA), and Organisation of South African Law Libraries (OSALL). These associations train and educate law librarians on subjects pertinent to their respective countries and regions.

History of Training in FCIL Librarianship

¶20 One of the primary goals contained in the FCIL-SIS Strategic Plan for 2012–2014 is to improve the education of FCIL specialists, but concern about the issue goes back many years. By the late 1980s and early 1990s, many of the early FCIL librarians in the United States were beginning to retire. It was noted at the time that “the most severe personnel need of the legal information community is for foreign law specialists to replace the postwar emigre lawyer-librarians reaching retirement.”

The shortage of trained and knowledgeable foreign and international law librarians has been a concern for some years. As more and more of the present generation of these specialized law librarians nears retirement, this shortage is becoming more acute. The American Association of Law Librarians has acknowledged responsibility for training the next generation of foreign and international law librarians. The challenge is how to develop and implement a comprehensive training program.

47. CHINESE & AM. FORUM ON LEGAL INFO. & LAW LIBRARIES, supra note 19.
53. Betty Taylor, Foreign and International Law Librarians—Training the Next Generation:
There was a palpable concern about the profession’s ability to fill these positions with librarians who possessed the training to effectively serve their global-minded constituents.\footnote{54} Another factor contributing to the focus on training for FCIL librarianship was the intensifying internationalization of legal discourse and practice.

\textit{AALL FCIL-SIS}

\textsection{21} Within the United States, the impetus to train new professionals came from professional organizations, such as the AALL FCIL-SIS: “The [FCIL] SIS has taken an especially active role in educating the present generation of Foreign and International Law Librarians through institutes, workshops, and programs at the AALL Annual Meeting.”\footnote{55} The FCIL-SIS also sponsors a clearinghouse for international placements, which provides information to AALL members about research, education, travel, and employment on an international level.

\textsection{22} Of particular note is the planning session that took place in New Orleans on July 19, 1991, organized by a subcommittee of the AALL National Legal Resources Committee, consisting of Judith Wright, Shelley Dowling, and Claire Germain. This session, attended by sixty-two participants,\footnote{56} culminated in a plan premised upon a set of issue papers, collectively titled \textit{Training the Future Generation of International and Foreign Law Librarians}.\footnote{57} The draft plan assessed the state of training and education of FCIL law librarians, and, while now twenty years old, it is still useful for providing guidance to members of the field.

\textsection{23} Upon approval by the AALL Executive Board of the National Legal Resources Committee’s plan, a sequence of five intensive institutes was launched, each conducted over a period of a few days, and organized by various FCIL-SIS members. The institutes took place in the mid-1990s and covered a large portion of foreign and international law. A series of influential books resulted from those institutes, but “[a]s the last institute took place in 1996 . . . they do not address the key role of web research, and are outdated in some other respects.”\footnote{58}

\textsection{24} Nearly a decade later, Dan Wade, longtime FCIL librarian at Yale Law Library, led efforts to develop eight one-day FCIL workshops. This initiative culminated in

---

\textit{Responses to a Survey Conducted by the AALL National Legal Resources Committee,} at 1, reprinted in \textit{Training the Future Generation, supra} note 12.

\footnote{54} In 1988, the AALL FCIL-SIS passed a resolution on “taking necessary steps to formalize specific recommendations to the AALL to deal with the problem of the decreasing number of qualified candidates to fill vacancies [for] foreign and international law librarians.” \textit{SIS History, supra} note 30.

\footnote{55} Wade, \textit{supra} note 12, at 5 n.4.

\footnote{56} For a list of participants, see \textit{List of Attendees at the AALL Workshop in Training the Future Generation of International \& Foreign Law Librarians, reprinted in Training the Future Generation, supra} note 12.

\footnote{57} \textit{Training the Future Generation, supra} note 12.

two workshops, on international trade and the European Union, held before the AALL annual meetings in 2004 and 2005, respectively. Unfortunately, AALL did not approve the third workshop Wade proposed, and no other institutes have been held.\textsuperscript{59}

\section*{IALL}

\textsuperscript{¶25} For more than forty years, IALL has sponsored annual courses “to help law librarians worldwide deal with the intricacies of foreign and international legal systems and to understand the ever-changing effects of political and social events on current legal developments.”\textsuperscript{60} Its Annual Course and Conference is IALL’s main meeting and educational event of the year. The annual course is usually a four-day meeting which takes place in a different country each year and “reflects the local legal environment and culture while addressing international issues of importance to all legal information experts. The annual course is also a catalyst for change and improvement in the recognition of the role of law librarians and legal information itself.”\textsuperscript{61}

\textsuperscript{¶26} Like the other professional organizations in the field, IALL is highly invested in the professional growth of its members:

Numerous opportunities exist, from regional programs held in addition to our annual Courses, to exchanging information between libraries, and in funding scholarships and related programs which will allow a wider diversity in membership, not only geographically, but in terms of type of specialization within law librarianship and in differences in age.\textsuperscript{62}

\textsuperscript{¶27} IALL also supports education and professional opportunities for newer legal professionals from developing countries, for example, by offering scholarships to the annual courses. These initiatives facilitate the globalization of law librarianship. IALL “fosters networking and mentoring among legal information professionals on a worldwide basis by creating and maintaining ongoing relationships between IALL and other international, national and regional law library and legal information organizations.”\textsuperscript{63}

\section*{ASIL and the Law Library of Congress}

\textsuperscript{¶28} ASIL provides programing for policy makers and the public.\textsuperscript{64} Although these programs are not specifically focused on law librarianship, they would be invaluable to any FCIL law librarian. Topics include judicial education and train-

\begin{flushleft}
\begin{itemize}
  \item 59. Rumsey, \textit{supra} note 58, at 83. Conducting future training sessions electronically would improve convenience and affordability.
  \item 61. \textit{The International Association of Law Libraries}, \textit{supra} note 33, at 361.
  \item 64. \textit{Programs Overview}, \textit{supra} note 37.
\end{itemize}
\end{flushleft}
ing, continuing international legal education institutes, career development, international law studies, and public education. Another organization of importance to training in FCIL librarianship is the Law Library of Congress. It “has offered inexpensive, valuable, one-day workshops the day before the American Society of International Law meeting opens in Washington D.C. Topics have ranged from Latin-American legal systems to the new UN treaty on persons with disabilities.”

**Joint Study Institutes**

Finally, and most promisingly, there are Joint Study Institutes (JSIs) sponsored by multiple library associations around the world. The seventh JSI was held at Melbourne Law School in February 2013. JSIs are hosted by AALL, ALLA, BIALL, CALL/ACBD, and NZLLA: “JSI programs provide unique opportunities to network and learn about the law, legal research and topical issues of the host jurisdiction that are of interest to law librarians and the legal profession.” JSIs are a step in the right direction toward standardizing training in the field through collaborative initiatives.

**A Survey on FCIL Librarianship**

Because FCIL is rapidly evolving, I conducted a survey in order to discover more about methods employed by academic law librarians in adapting to developments in the field. Building upon prior scholarship and ideas raised at conferences and meetings, the survey focused on how improvements in training can help current and future academic law librarians become better equipped for the challenges of FCIL librarianship. The survey was designed to gather responses from librarians regarding their own training and perceptions of the field.

Although there have been previous surveys covering other subjects relating to FCIL librarianship, this survey was designed to be both more extensive and more inclusive. Preliminary research was conducted by speaking with current and former FCIL librarians and by examining the literature in the field. Based on the information I gleaned, I anticipated that the survey responses would likely reveal a lack of standardization in the training of FCIL librarianship. The survey results

---

65. *Id.*


67. Rumsey, supra note 58, at 83.


70. For a selection of useful readings, see infra appendix B, Essential Reading List on FCIL Librarianship.
confirmed this hypothesis and warrant an ongoing dialogue regarding standardization through core competencies, attainable through a certification process jointly administered by multiple professional organizations.

¶32 The survey, created using Catalyst Web Tools, received 132 responses, mostly from law librarians in the United States. Each participant was presented with a series of questions, which were a mixture of multiple choice, short answer, and open ended questions. Before it was sent to respondents, he survey underwent a rigorous and lengthy review process by multiple law librarians working in the United States as well as by an expert on research methods, who all graciously provided suggestions based on their own experiences and familiarity with the subject.

¶33 The survey covered various aspects of law librarianship and training, including general characteristics of law librarians (questions 1–4), FCIL in their jobs (questions 5–11), FCIL in their education (questions 12–17), their foreign language skills (questions 18–21), their continuing FCIL training and involvement (questions 22–28), and their suggestions for core competencies and their overall perceptions of the field (questions 29–32).

¶34 The survey was disseminated through a variety of electronic forums in order to elicit responses from professionals with varying degrees of familiarity, knowledge, and expertise in FCIL librarianship. A link to the survey was sent to the AALL FCIL-SIS Discussion Forum, INT-LAW, the academic law library directors’ listerv, the AALL Academic Law Libraries SIS Community eGroup, and the AALL Social Responsibilities SIS discussion group. In casting a wide net, I hoped the survey results would represent a cross-section of librarians working, to varying extents, in the realm of FCIL librarianship.

¶35 The survey results make it apparent that librarians of all types engage with FCIL information. Many types of information professionals responded to the sur-

---

71. See infra appendix A, Survey on FCIL Librarianship (all responses are on file with the author).

72. The survey was reviewed by Penny Hazelton, Associate Dean for Library & Computing Services, Professor of Law, University of Washington School of Law; Mary Rumsey, Professor of Legal Research Instruction and FCIL Librarian, University of Minnesota Law School; Mary Whisner, Reference Librarian, University of Washington School of Law; Marci Hoffman, Lecturer in Residence, Associate Director of Law Library, University of California, Berkeley School of Law; Jonathan Pratter, Lecturer, Foreign & International Law Librarian, University of Texas at Austin School of Law; Kristina Alayan, Foreign & International Law Reference Librarian and Lecturing Fellow, Duke University School of Law; Melissa Fung, Foreign and International Law Reference Librarian, University of San Diego School of Law; and Matthew Saxton, Associate Dean for Academics, University of Washington, Information School.


75. Posting of Penny Hazelton to lawlibdir@lists.washlaw.edu (Jan. 24, 2012) (on file with author).


vey: general reference librarians, department heads, library directors, and of course, FCIL librarians. For FCIL specialists, typical position titles are Reference Librarian for Foreign and International Law, FCIL Librarian, Foreign and International Law Librarian, and International Law Librarian.

¶36 The results reflect the opinions of respondents covering a broad range of experience levels. There is a fairly even distribution of respondents, ranging from those just beginning their careers all the way up to librarians with two or more decades of experience. Over a third of the respondents (38%) have been employed as law librarians for more than twenty years. About half of the respondents have practiced law in the United States or abroad. Additionally, FCIL duties are contained in the job descriptions of more than half (56%) of the respondents, to varying degrees. Nearly every respondent spends at least part of his or her time on FCIL librarianship, but only a small number (16%) of the respondents dedicate an overwhelming majority of their time to FCIL librarianship.

¶37 Most of the respondents perform the following nonteaching FCIL duties: providing reference service (77%), participating in collection development (86%), and providing research assistance to faculty and staff (78%). To a slightly lesser extent, the respondents create research guides, bibliographies, or other research materials (58%) and provide research assistance to journal staff or moot court programs (63%).

¶38 Seventy percent of respondents teach FCIL subjects, either as an instructor for an entire course or as an occasional guest lecturer. Of those respondents who teach FCIL subjects, it is most common for them to give presentations in courses on FCIL research, analysis, and writing (82%), followed by giving FCIL presentations to members of a law journal or moot court team (57%), or teaching a course on FCIL research, analysis, and writing (52%). Common methods among the respondents for developing a curriculum for a course on FCIL research include adapting a syllabus utilized by another instructor, consulting the many syllabi posted on the AALL FCIL-SIS web site, and speaking with colleagues.

¶39 Most respondents’ undergraduate education was not particularly focused on international subjects. However, the majority (68%) completed foreign language coursework in their undergraduate education. Nearly every respondent (95%) possesses a graduate degree in library or information science, and a quarter of them have attended programs focused on law librarianship. Interestingly, a vast majority of respondents possess a law degree (88%), almost exclusively a J.D. Of those with a law degree, half did not focus on FCIL during their legal education.

¶40 The primary language of nearly every respondent is English. The most common secondary languages are French, Spanish, and German. In their secondary languages, respondents are most often intermediate readers (46%), basic writers (60%), and basic speakers (57%). The most common method for acquiring foreign language skills was through university coursework.

¶41 Respondents employ a range of methods to continue to learn about FCIL: training seminars or programs; blogs, listservs, and web sites; journal articles, textbooks, and other scholarly publications; speaking with colleagues; and conducting

78. Only a few respondents obtained an FCIL certification as part of their legal education.
FCIL research. Perhaps most surprisingly, half of the respondents are aware of useful FCIL training and participate in the training at their employer’s expense. Additionally, most respondents are members of the FCIL-SIS (70%), and a sizable number are members of IALL (33%) or ASIL (32%). The vast majority of respondents attend the AALL Annual Meeting and Conference. Unfortunately, they infrequently attend the other major conferences in the field.

**Core Competencies in FCIL Librarianship**

¶42 FCIL core competencies will foster consistency in library services and cultivate a shared knowledge base across the profession. For example, AALL’s competencies “seek[] to define the profession of law librarianship and its value to the legal field.”\(^{79}\) According to AALL, there are multiple benefits to establishing competencies:

- Individual librarians may use the AALL Competencies for coordinating their continuing education as they identify areas for professional growth. Employers may use the Competencies to make hiring, evaluation and promotion decisions, and to make recommendations for professional development. The American Association of Law Libraries uses the Competencies as a framework within which to structure professional development programs. This framework provides guidance to ensure that the programs offered will assist librarians in attaining and maintaining the skills or knowledge necessary for their current and future work.\(^{80}\)

The results of the survey reinforce the need for members of the field to develop a set of core competencies in FCIL librarianship. Almost half of the survey respondents (46%) favored the development of universal core competencies that would apply to professionals in various institutions and job roles. Some expressed a preference for regional (17%), national (14%), or geographic-area research (20%) competencies.

¶43 Librarians have developed FCIL skills in their own ways: “The diversity of the educational/experiencial [sic] paths that have led to foreign and international law librarianship cannot be overstated; each of us has a unique biography.”\(^{81}\) While each individual’s narrative is critical to promoting a diversity of perspectives in the field, it is also essential that there be a canon of FCIL knowledge that is understood across library institutions, applicable to every position, and which transcends borders, cultures, and languages.

¶44 FCIL librarianship touches upon every department of the library, including technical services, circulation, and reference services. Generally speaking, technical services staff process FCIL materials, circulation staff disseminate these FCIL materials to patrons, and reference staff help patrons find and use FCIL materials. Even on a reference team with a devoted FCIL librarian, each member should possess a standard of knowledge and a level of facility in FCIL librarianship. A basic level of

---


80. Id.

understanding of FCIL by each staff member will facilitate library services at all levels.

¶45 The development of core competencies and a method for attaining them is a timely pursuit, one that resonates with the recently adopted AALL FCIL-SIS Strategic Plan for 2012–2014. Its first goal is to “[a]ctively promote education in Foreign, Comparative and International Law and Law Librarianship for specialists and non-specialists.”82 To that end, the plan strategizes about ways to identify core competencies for FCIL librarianship, including “[s]ubmit[ting] to the AALL Annual Meeting Program Committee and to local chapters proposals for programs, institutes and workshops designed to help both new FCIL librarians and non-specialist librarians master these competencies.”83

¶46 The breadth of FCIL librarianship is a function of its wide array of subjects, types of professional positions, geographic scope, and of course, the growing relevance of FCIL in today’s world. Because there are so many areas of FCIL work in law libraries, it is important to consider carefully the criteria for developing core competencies and whether they should relate to librarians working within a geographic area, specializing in a geographic region, or focusing on a particular subject.

¶47 Because there is a fundamental body of FCIL subject matter that is essential for librarians, at all levels and in any role, it would be most effective to develop universal competencies applicable to an array of librarians dealing with FCIL information. These competencies, to some degree, might be modeled after the core competencies that have already been developed by professional organizations such as AALL.84

Geographic Competencies

¶48 The geographic element of FCIL librarianship can be divided into two categories that are not mutually exclusive. One is defined by the country or region in which librarians work, and the other relates to the practical need for librarians to specialize in the law of a specific geographic area. The professional organizations related to FCIL librarianship reflect these two aspects of geography-related work. For example, FCIL-SIS is a group of librarians, mostly working in the United States, who focus on FCIL issues for U.S. law librarians; IALL comprises law librarians from around the world who focus on FCIL issues in all countries and regions. National organizations outside the United States have members and subgroups interested in FCIL research, although, again like AALL, their main focus is the law of the country where most of their members reside.

¶49 A key task here is to determine whether core competencies should be attained through specific training developed by these geographic associations. According to IALL, research questions paramount to this issue include “What other national or regional law library associations have developed similar competencies and performance measures for law librarians? Are they comparable? Is there a need

83. Id.
84. See Competencies of Law Librarianship, supra note 79.
to develop competencies and performance measures for international law librarianship on a global scale?”

¶50 As a preliminary matter, we must acknowledge that the complexity and unique attributes of each foreign legal system require the development of core competencies in particular geographic areas. The legal systems of all countries are intricately shaped by their individual historical and cultural experiences. Even when dealing with countries of the same region, such as those in the European Union (EU), it would be difficult to master one legal system based on competencies attained in another:

The legal systems of the EU Member States vary a great deal more than the legal systems of the states in the U.S.A. There exists not only a fundamental difference between the common law in England and Ireland and the continental civil law but also divergences between the civil law systems. The Member States have been independent countries for centuries and, therefore, their legal cultures—originally based on Roman law—pursue different paths. This is true, of course, in regard to the “legal families” e.g., the Germanic and the Romance families. But even between the legal systems of the German speaking countries, there are decisive differences.

The considerable variation among legal systems, even within legal “families,” presents a significant challenge to law librarians.

¶51 Although it may seem sufficient to develop competencies applicable to the laws of each individual country, the ubiquity of many aspects of FCIL in law libraries renders it far more necessary, and urgent, to develop broad-based competencies attainable by any librarian, working anywhere and in virtually any position. The survey results underscore this, with far more support for universal competencies than for either regional or national ones.

¶52 Competencies therefore should not be limited to the scope of the individual national or regional associations. These organizations do not currently have their own competencies, and so may be most effective by combining their efforts toward developing universal competencies, while further cultivating their respective communities of librarians interested in FCIL.

¶53 Competencies should reflect a universal understanding of FCIL and be flexible enough to meet the needs of librarians in every country. Individuals could attain the competencies by participating in training programs, as well as through publishing, giving presentations, and acquiring hands-on experience in the library. Developing standards in the field will further promote cohesion and solidarity throughout this interconnected, yet fragmentary, community of librarians working with FCIL information.

---

87. Rumsey, supra note 2, at 139 (“Training in FCIL librarianship can be difficult to obtain. The best way to learn is by working with an experienced FCIL librarian . . . . More commonly, law librarians learn FCIL librarianship by combining on-the-job experience and attending educational programs.”).
Universal Subject Matter Competencies

54 In the survey, respondents were asked to identify the universal core competencies that should exist in the field. The majority of respondents offered a list of core competencies that define FCIL librarianship around the globe. Many of these subject matter competencies have been addressed in training programs offered by IALL and the FCIL-SIS, relating to the following areas of FCIL librarianship: (1) foreign\textsuperscript{88} and comparative legal research,\textsuperscript{89} (2) international legal research,\textsuperscript{90} (3) FCIL reference,\textsuperscript{91} (4) FCIL technical services,\textsuperscript{92} (5) FCIL collection development,\textsuperscript{93} (6) FCIL information management and trends,\textsuperscript{94} and (7) FCIL job skills.\textsuperscript{95}

55 Universal competencies would, in effect, standardize the field and create a shared discourse among librarians around FCIL librarianship. Core competencies would greatly increase the scope of information-related services offered to FCIL patrons and also create organizational benefits for managers, middle managers, and FCIL librarians. Staff members in every law library department could rely on an

\textsuperscript{88} Respondents often cited the need for knowledge of the various legal systems throughout the world, including civil law systems, religious law, and customary law. “[N]o matter how similar another country’s laws might be, each state has a cultural and social milieu that shapes and defines its laws.” Aaron B. Aft, \textit{Respect My Authority: Analyzing Claims of Diminished U.S. Supreme Court Influence Abroad}, \textit{18 Ind. J. Global Legal Stud.} 421, 430 (2011).

\textsuperscript{89} Respondents identified the understanding of comparative law as a universal subject matter competency.

\textsuperscript{90} Respondents identified as essential the knowledge of the structure, function, and operation of international organizations (such as the UN and the EU); international relations; the hierarchy of authority in international law; private and public international law; the international legal structure; \textit{jus cogens}; jurisdiction of international tribunals; and the U.S. role in international law.

\textsuperscript{91} Some respondents identified the need for competencies in FCIL reference, research, and collection development. Many of the training programs on various topics focus on research, strategy, and sources but, surprisingly, not on FCIL reference skills.

\textsuperscript{92} Librarians should be knowledgeable of the practical considerations regarding the acquisition and handling of FCIL materials: purchasing materials, classifying, indexing, cataloging, and preservation. See Pamela Bluh, \textit{The Acquisition and Handling of Foreign Legal Serials: The Practical Aspects}, \textit{79 Law Libr. J.} 115 (1987). This is an area of FCIL librarianship where there has been a shortage of training opportunities.


\textsuperscript{94} Understanding the many aspects of FCIL information is critical. IALL courses commonly focus on the intersection of substantive FCIL issues and legal information trends with regard to materials, sources, legal information, and information services.

\textsuperscript{95} There is a large repertoire of skills that are useful in FCIL librarianship. Respondents identified the following core competencies relating to skills, some of which also relate to other subject matter competencies: foreign language skills, learning a new topic or a new legal research technique in a short amount of time, teaching complex FCIL subjects, awareness of available legal information and how to find it, familiarity with relevant online services, and familiarity with prominent publishers in the field.
authoritative statement on core competencies. Furthermore, librarians would be able to select, design, and implement programs that hone the skills necessary to attain these core competencies. Establishing core competencies in FCIL librarianship would strengthen the overall quality of FCIL services. The emphasis on collaboration in FCIL librarianship necessitates an increased standardization in services, which in turn would be advanced through the development of competencies.

Certification in FCIL Librarianship

¶56 The need for core competencies is a function of the lack of standardization of training in FCIL librarianship. The survey results underscore three notions: (1) FCIL is the domain of librarians in every role; (2) there is not a typical path to acquiring training; and (3) librarians interested in FCIL span a wide range of knowledge and skills in the field. Presumably then, the range of FCIL services provided by librarians and libraries lacks uniformity across the field. This lack of standardization can be remedied by certifying individuals who attain core competencies. AALL instituted a certification program between 1965 and 1983:

Law librarians have always been profoundly concerned about the definition of the law librarian in educational terms. An effort to formulate some professionwide educational standards began as early as 1935, but it was not until 1965 that AALL created a voluntary certification program. These standards permitted nearly any combination of education and experience to qualify a person as a Certified Law Librarian.96

Likewise, a voluntary certification program in FCIL librarianship, available to a wide spectrum of information professionals, should be flexible enough to be obtained through various training programs and experiences around the world.

¶57 A crucial step toward acknowledging expertise in FCIL librarianship is creating a program through which librarians can obtain certification as well as recertification.97 One way to accomplish this would be to have a series of online training modules. For example, the Duke and Berkeley law libraries collaborated to produce an online tutorial for FCIL training containing the following sections: Introduction: Definition of Terms; Introduction to International Law; Treaties & Agreements; Customary International Law; International Organizations; Final Review; and Essential Sources.98

¶58 Additionally, the Center for Computer-Assisted Legal Instruction (CALI) has a library of twenty-four FCIL research tutorials on topics such as foreign legal research, international environmental law, researching foreign constitutions, tribunals and truth commissions, and human rights research.99 Online training, because

of its convenience and affordability, is critical to the viability of certification in FCIL librarianship.

Conclusion: Future Possibilities in FCIL Librarianship Training

¶59 In 1962, Morris Cohen proposed five courses in law librarianship leading to a master’s degree: law library administration, law and its literature, selection and acquisition of legal materials, cataloging of legal materials, and foreign law sources and international documents. From early on, there was a respect for FCIL librarianship as central to the work of all librarians.

¶60 Unfortunately, FCIL librarianship has yet to be incorporated into the curriculum of law librarianship programs across the country. Prominent programs in law librarianship, such as the University of Washington, University of Arizona, University of Denver, and Catholic University of America, do not require their students to complete any FCIL coursework. However, with a sense of focus during library school, it is possible to acquire a good deal of FCIL experience by working on FCIL research and reference questions, writing blogs on FCIL topics, conducting presentations on FCIL materials, publishing in newsletters, and attending FCIL-related events at the law school.

¶61 This article attempts to advance the discourse around training in FCIL librarianship by addressing questions such as “What opportunities are available worldwide for the education and training of law librarians? . . . [What is] the nature and availability of formal and informal courses and other training for law librarianship on an international basis[?]” Further deliberation and coordination are needed in order to develop core competencies, training programs, and certification. Creativity is integral to spearheading future training programs that are accessible to librarians around the world. Current technology affords many options for dissemination, so that librarians could easily obtain certification credits by watching an online video presentation by a law professor on international intellectual property law or by participating in a webinar by a law librarian on FCIL research strategies. Technological solutions like this also make it more feasible for FCIL organizations to develop joint programs for obtaining an M.L.S. and an LL.M. in foreign or international law. An additional consideration is that, due to the continually expanding reach of FCIL education and practice, diversity training will be crucial to equipping FCIL librarians with the skills to serve people from many backgrounds.

105. Garavaglia & IALL Bd., supra note 20, at 351.
Survey respondents identified future challenges in all facets of the field. These include electronic access, digitization, resources and budgets, foreign language skills, educating the next generation of FCIL librarians, continuing education, research support, collection development, cataloging, recruitment of new FCIL librarians, and specialization. To meet these impending challenges, we must leverage our resources in order to develop an inclusive training model that will further assist librarians in building a better world through the facilitation of access to global legal information.

Ultimately, improving training in FCIL librarianship is contingent upon the collaboration between various professional organizations and stakeholders. This requires vision and leadership and, of course, cooperation between groups. We can learn from the example of the Joint Study Institutes conducted by multiple professional organizations spanning three continents. In building from these collaborative endeavors, training in the field can be enhanced through inclusive and widely accessible programming.

Expanding competencies to a global level presents a significant challenge. A flaw of the survey employed in this study is its inherent bias toward U.S. law librarians and their concerns. Extending the reach of competencies and training toward a universal model will require even greater cooperative work between the members of various organizations around the world. The growth of this model will take time, not to mention everyone’s effort. But the gains are palpable and worthwhile. We are not far from achieving these goals. With sustained dialogue and dedication, we can better train librarians of all types, across the globe, to be better equipped to work in the area of foreign, comparative, and international law.
Appendix A
Survey on FCIL Librarianship

1. What country do you reside in?

2. How many years have you been employed as a law librarian?

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency ((n=132))</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 3</td>
<td>11</td>
<td>8.33</td>
</tr>
<tr>
<td>3–5</td>
<td>21</td>
<td>15.91</td>
</tr>
<tr>
<td>6–10</td>
<td>21</td>
<td>15.91</td>
</tr>
<tr>
<td>11–15</td>
<td>14</td>
<td>10.61</td>
</tr>
<tr>
<td>16–20</td>
<td>15</td>
<td>11.36</td>
</tr>
<tr>
<td>More than 20</td>
<td>50</td>
<td>37.88</td>
</tr>
</tbody>
</table>

3. What is your official job title?

4. Have you ever practiced law?

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency ((n=132))</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>67</td>
<td>50.76</td>
</tr>
<tr>
<td>No</td>
<td>65</td>
<td>49.24</td>
</tr>
</tbody>
</table>

5. Are any aspects of FCIL librarianship specifically contained as duties within your job description?

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency ((n=132))</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>74</td>
<td>56.06</td>
</tr>
<tr>
<td>No</td>
<td>58</td>
<td>43.94</td>
</tr>
</tbody>
</table>

6. Based on your job description, what percentage of time is dedicated to FCIL librarianship?

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency ((n=74))</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>0%</td>
<td>1</td>
<td>1.35</td>
</tr>
<tr>
<td>1%–20%</td>
<td>21</td>
<td>28.38</td>
</tr>
<tr>
<td>21%–40%</td>
<td>10</td>
<td>13.51</td>
</tr>
<tr>
<td>41%–60%</td>
<td>11</td>
<td>14.86</td>
</tr>
<tr>
<td>61%–80%</td>
<td>12</td>
<td>16.22</td>
</tr>
<tr>
<td>81%–100%</td>
<td>12</td>
<td>16.22</td>
</tr>
<tr>
<td>No answer</td>
<td>7</td>
<td>9.46</td>
</tr>
</tbody>
</table>

7. What percentage of time in your job do you spend on FCIL librarianship?

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency ((n=132))</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>0%</td>
<td>1</td>
<td>0.76</td>
</tr>
<tr>
<td>1%–20%</td>
<td>69</td>
<td>52.27</td>
</tr>
<tr>
<td>21%–40%</td>
<td>19</td>
<td>14.39</td>
</tr>
<tr>
<td>41%–60%</td>
<td>18</td>
<td>13.64</td>
</tr>
<tr>
<td>61%–80%</td>
<td>12</td>
<td>9.09</td>
</tr>
<tr>
<td>81%–100%</td>
<td>13</td>
<td>9.85</td>
</tr>
</tbody>
</table>
8. In your FCIL role, which of the following nonteaching duties do you perform? (Select all that apply.)

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency (n=132)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provide FCIL reference services</td>
<td>102</td>
<td>77.27</td>
</tr>
<tr>
<td>Create FCIL research guides, bibliographies, or other research materials</td>
<td>77</td>
<td>58.33</td>
</tr>
<tr>
<td>Participate in FCIL collection development or selection of FCIL materials</td>
<td>114</td>
<td>86.36</td>
</tr>
<tr>
<td>Provide FCIL research assistance to faculty or staff</td>
<td>103</td>
<td>78.03</td>
</tr>
<tr>
<td>Provide FCIL research assistance to journal staff or moot court programs</td>
<td>83</td>
<td>62.88</td>
</tr>
<tr>
<td>None of the above</td>
<td>1</td>
<td>0.76</td>
</tr>
<tr>
<td>Other</td>
<td>21</td>
<td>15.91</td>
</tr>
</tbody>
</table>

9. Do you teach any FCIL subjects, either as an instructor/professor for an entire course or as an occasional guest lecturer in a course?

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency (n=132)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>93</td>
<td>70.45</td>
</tr>
<tr>
<td>No</td>
<td>39</td>
<td>29.55</td>
</tr>
</tbody>
</table>

10. Please select all applicable option(s) regarding your FCIL teaching experience.

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency (n=93)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>I periodically give presentations in courses on FCIL research, analysis, and writing.</td>
<td>76</td>
<td>81.72</td>
</tr>
<tr>
<td>I periodically give FCIL presentations to members of a law journal or moot court.</td>
<td>53</td>
<td>56.99</td>
</tr>
<tr>
<td>I periodically give FCIL training seminars to professional organizations.</td>
<td>15</td>
<td>16.13</td>
</tr>
<tr>
<td>I teach or have taught a course on FCIL research, analysis, and writing.</td>
<td>48</td>
<td>51.61</td>
</tr>
<tr>
<td>Other</td>
<td>10</td>
<td>10.75</td>
</tr>
</tbody>
</table>

11. If you teach or have taught an entire course on FCIL research, how have you developed your curriculum?
12. In your undergraduate education, please select the option(s) that relate to FCIL.

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency ($n=132$)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>My curriculum was focused in foreign or international studies.</td>
<td>18</td>
<td>13.64</td>
</tr>
<tr>
<td>I studied abroad or interned outside of the United States.</td>
<td>42</td>
<td>31.82</td>
</tr>
<tr>
<td>I completed foreign language coursework.</td>
<td>90</td>
<td>68.18</td>
</tr>
<tr>
<td>I completed coursework in international law or international relations.</td>
<td>29</td>
<td>21.97</td>
</tr>
<tr>
<td>Other</td>
<td>36</td>
<td>27.27</td>
</tr>
</tbody>
</table>

13. Do you possess a graduate degree in library or information science?

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency ($n=132$)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>126</td>
<td>95.45</td>
</tr>
<tr>
<td>No</td>
<td>6</td>
<td>4.55</td>
</tr>
</tbody>
</table>

14. Please select the option(s) that best represent your focus in law librarianship during your graduate studies in library or information science.

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency ($n=126$)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>I did not focus on law librarianship.</td>
<td>43</td>
<td>34.13</td>
</tr>
<tr>
<td>I worked in a law library as an employee or intern.</td>
<td>78</td>
<td>61.90</td>
</tr>
<tr>
<td>I completed coursework in law librarianship.</td>
<td>61</td>
<td>48.41</td>
</tr>
<tr>
<td>I attended a graduate program focused on law librarianship.</td>
<td>31</td>
<td>24.60</td>
</tr>
</tbody>
</table>

15. Do you possess a degree in law or legal studies?

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency ($n=132$)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>116</td>
<td>87.88</td>
</tr>
<tr>
<td>No</td>
<td>16</td>
<td>12.12</td>
</tr>
</tbody>
</table>

16. What degree(s) do you possess in law or legal studies?

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency ($n=116$)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>JD</td>
<td>113</td>
<td>97.41</td>
</tr>
<tr>
<td>LLB</td>
<td>1</td>
<td>0.86</td>
</tr>
<tr>
<td>LLM</td>
<td>7</td>
<td>6.03</td>
</tr>
<tr>
<td>SJD</td>
<td>0</td>
<td>0.00</td>
</tr>
<tr>
<td>Other</td>
<td>3</td>
<td>2.59</td>
</tr>
</tbody>
</table>
17. Please select any of the options below regarding the relationship between your legal education and FCIL.

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency (n=116)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>I completed FCIL coursework.</td>
<td>50</td>
<td>43.10</td>
</tr>
<tr>
<td>I obtained a certificate or concentration in FCIL.</td>
<td>3</td>
<td>2.59</td>
</tr>
<tr>
<td>I participated in international moot court.</td>
<td>6</td>
<td>5.17</td>
</tr>
<tr>
<td>I studied or interned abroad.</td>
<td>24</td>
<td>20.69</td>
</tr>
<tr>
<td>I worked on an FCIL journal.</td>
<td>7</td>
<td>6.03</td>
</tr>
<tr>
<td>None of the above</td>
<td>59</td>
<td>50.86</td>
</tr>
</tbody>
</table>

18. What is/are your primary language(s)?

19. What is your strongest secondary language? Please select N/A if you do not possess any skills in a secondary language.

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency (n=132)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>French</td>
<td>49</td>
<td>37.12</td>
</tr>
<tr>
<td>Spanish</td>
<td>29</td>
<td>21.97</td>
</tr>
<tr>
<td>German</td>
<td>18</td>
<td>13.64</td>
</tr>
<tr>
<td>Arabic</td>
<td>1</td>
<td>0.76</td>
</tr>
<tr>
<td>Chinese (Mandarin)</td>
<td>2</td>
<td>1.52</td>
</tr>
<tr>
<td>Russian</td>
<td>2</td>
<td>1.52</td>
</tr>
<tr>
<td>Other</td>
<td>10</td>
<td>7.58</td>
</tr>
<tr>
<td>N/A</td>
<td>21</td>
<td>15.91</td>
</tr>
</tbody>
</table>

20. Please evaluate your level of competence in your strongest secondary language.

<table>
<thead>
<tr>
<th>Reading</th>
<th>Frequency (n=111)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basic</td>
<td>35</td>
<td>31.53</td>
</tr>
<tr>
<td>Intermediate</td>
<td>51</td>
<td>45.95</td>
</tr>
<tr>
<td>Advanced</td>
<td>28</td>
<td>25.23</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Writing</th>
<th>Frequency (n=111)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basic</td>
<td>67</td>
<td>60.36</td>
</tr>
<tr>
<td>Intermediate</td>
<td>31</td>
<td>27.93</td>
</tr>
<tr>
<td>Advanced</td>
<td>13</td>
<td>11.71</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Speaking</th>
<th>Frequency (n=111)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basic</td>
<td>63</td>
<td>56.76</td>
</tr>
<tr>
<td>Intermediate</td>
<td>32</td>
<td>28.83</td>
</tr>
<tr>
<td>Advanced</td>
<td>16</td>
<td>14.41</td>
</tr>
</tbody>
</table>
Comprehension

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency (n=111)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basic</td>
<td>43</td>
<td>38.74</td>
</tr>
<tr>
<td>Intermediate</td>
<td>41</td>
<td>36.94</td>
</tr>
<tr>
<td>Advanced</td>
<td>27</td>
<td>24.32</td>
</tr>
</tbody>
</table>

21. Which way(s) have you acquired any of your foreign language skills?

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency (n=111)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>University coursework</td>
<td>96</td>
<td>86.49</td>
</tr>
<tr>
<td>Private instruction</td>
<td>23</td>
<td>20.72</td>
</tr>
<tr>
<td>Immersion program(s)</td>
<td>20</td>
<td>18.02</td>
</tr>
<tr>
<td>Rosetta Stone or other software</td>
<td>13</td>
<td>11.71</td>
</tr>
<tr>
<td>Internet</td>
<td>8</td>
<td>7.21</td>
</tr>
<tr>
<td>Films or music</td>
<td>25</td>
<td>22.52</td>
</tr>
<tr>
<td>Family or friends</td>
<td>25</td>
<td>22.52</td>
</tr>
<tr>
<td>None of the above</td>
<td>1</td>
<td>0.90</td>
</tr>
<tr>
<td>Other</td>
<td>47</td>
<td>42.34</td>
</tr>
</tbody>
</table>

22. How do you continue to learn about FCIL?

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency (n=132)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Training seminars or programs</td>
<td>91</td>
<td>68.94</td>
</tr>
<tr>
<td>Blogs, listservs, or web sites</td>
<td>110</td>
<td>83.33</td>
</tr>
<tr>
<td>Journal articles, textbooks, or other scholarly publications</td>
<td>104</td>
<td>78.79</td>
</tr>
<tr>
<td>Speaking with colleagues</td>
<td>86</td>
<td>65.15</td>
</tr>
<tr>
<td>Presentations at your place of work</td>
<td>35</td>
<td>26.52</td>
</tr>
<tr>
<td>Conducting FCIL research</td>
<td>103</td>
<td>78.03</td>
</tr>
<tr>
<td>None of the above</td>
<td>1</td>
<td>0.76</td>
</tr>
<tr>
<td>Other</td>
<td>12</td>
<td>9.09</td>
</tr>
</tbody>
</table>

23. Which option(s) describe your perceptions of FCIL training programs such as seminars, institutes, courses, etc.?

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency (n=132)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>I am aware of useful training but do not have the time for it.</td>
<td>30</td>
<td>22.73</td>
</tr>
<tr>
<td>I am aware of useful training but do not have the money for it.</td>
<td>18</td>
<td>13.64</td>
</tr>
<tr>
<td>There is no useful training available.</td>
<td>7</td>
<td>5.30</td>
</tr>
<tr>
<td>I am unaware of useful training.</td>
<td>22</td>
<td>16.67</td>
</tr>
<tr>
<td>I am aware of useful training and participate in the training at my own expense.</td>
<td>17</td>
<td>12.88</td>
</tr>
<tr>
<td>I am aware of useful training and participate in the training at my employer’s expense.</td>
<td>65</td>
<td>49.24</td>
</tr>
</tbody>
</table>
24. Which FCIL professional organization(s) are you a member of?

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency (n=132)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>AALL FCIL-SIS</td>
<td>93</td>
<td>70.45</td>
</tr>
<tr>
<td>IALL</td>
<td>43</td>
<td>32.58</td>
</tr>
<tr>
<td>IFLA</td>
<td>4</td>
<td>3.03</td>
</tr>
<tr>
<td>ASIL</td>
<td>42</td>
<td>31.82</td>
</tr>
<tr>
<td>Int'l Law Ass'n</td>
<td>2</td>
<td>1.52</td>
</tr>
<tr>
<td>None of the above</td>
<td>34</td>
<td>25.76</td>
</tr>
<tr>
<td>Other</td>
<td>5</td>
<td>3.79</td>
</tr>
</tbody>
</table>

25. Which annual conference(s) do you most frequently attend?

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency (n=132)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>AALL</td>
<td>117</td>
<td>88.64</td>
</tr>
<tr>
<td>IALL</td>
<td>20</td>
<td>15.15</td>
</tr>
<tr>
<td>IFLA</td>
<td>2</td>
<td>1.52</td>
</tr>
<tr>
<td>ASIL</td>
<td>21</td>
<td>15.91</td>
</tr>
<tr>
<td>None of the above</td>
<td>10</td>
<td>7.58</td>
</tr>
<tr>
<td>Other</td>
<td>11</td>
<td>8.33</td>
</tr>
</tbody>
</table>

26. How can the field improve training in FCIL librarianship?

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency (n=132)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Offer more training programs at the AALL Annual Meeting</td>
<td>78</td>
<td>59.09</td>
</tr>
<tr>
<td>Offer a 2–3 day FCIL librarianship institute</td>
<td>85</td>
<td>64.39</td>
</tr>
<tr>
<td>Increase funding in order to attend FCIL training programs</td>
<td>41</td>
<td>31.06</td>
</tr>
<tr>
<td>Offer training sessions through podcasts, streaming, or YouTube</td>
<td>88</td>
<td>66.67</td>
</tr>
<tr>
<td>Offer mentorship programs</td>
<td>45</td>
<td>34.09</td>
</tr>
<tr>
<td>Offer more training programs at the IALL Annual Conference</td>
<td>19</td>
<td>14.39</td>
</tr>
<tr>
<td>Other</td>
<td>9</td>
<td>6.82</td>
</tr>
</tbody>
</table>
27. What job skill(s) or area(s) of subject matter expertise do you feel like you need to improve upon in relation to FCIL librarianship?

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency (n=132)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>FCIL analysis skills</td>
<td>41</td>
<td>31.06</td>
</tr>
<tr>
<td>Foreign language competence</td>
<td>69</td>
<td>52.27</td>
</tr>
<tr>
<td>FCIL research skills</td>
<td>51</td>
<td>38.64</td>
</tr>
<tr>
<td>Teaching FCIL research or writing</td>
<td>52</td>
<td>39.39</td>
</tr>
<tr>
<td>FCIL collection development</td>
<td>46</td>
<td>34.85</td>
</tr>
<tr>
<td>Knowledge of foreign law</td>
<td>49</td>
<td>37.12</td>
</tr>
<tr>
<td>Knowledge of foreign legal systems</td>
<td>67</td>
<td>50.76</td>
</tr>
<tr>
<td>Knowledge of international law</td>
<td>44</td>
<td>33.33</td>
</tr>
<tr>
<td>Knowledge of the international legal system</td>
<td>45</td>
<td>34.09</td>
</tr>
<tr>
<td>Knowledge of global current events</td>
<td>26</td>
<td>19.70</td>
</tr>
<tr>
<td>Other</td>
<td>6</td>
<td>4.55</td>
</tr>
</tbody>
</table>

28. Have you published any scholarly works on FCIL subject matters or FCIL librarianship?

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency (n=132)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>38</td>
<td>28.79</td>
</tr>
<tr>
<td>No</td>
<td>94</td>
<td>71.21</td>
</tr>
</tbody>
</table>

29. If the FCIL librarianship field is to develop a list of core competencies, should the competencies be universal? Or should the competencies differ based on factors such as geography or subject matter? Please select the best option(s).

<table>
<thead>
<tr>
<th>Answer</th>
<th>Frequency (n=132)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Universal FCIL librarianship core competencies</td>
<td>61</td>
<td>46.21</td>
</tr>
<tr>
<td>Regional FCIL librarianship core competencies for those working in a certain region</td>
<td>22</td>
<td>16.67</td>
</tr>
<tr>
<td>National FCIL librarianship core competencies for those working in a certain country</td>
<td>19</td>
<td>14.39</td>
</tr>
<tr>
<td>Core competencies for those whose work focuses on a certain geographic area</td>
<td>27</td>
<td>20.45</td>
</tr>
<tr>
<td>Core competencies for those working in foreign law</td>
<td>64</td>
<td>48.48</td>
</tr>
<tr>
<td>Core competencies for those working in comparative law</td>
<td>57</td>
<td>43.18</td>
</tr>
<tr>
<td>Core competencies for those working in international law</td>
<td>66</td>
<td>50.00</td>
</tr>
</tbody>
</table>

30. Please list what you believe are universal FCIL librarianship core competencies, if any.

31. Do you believe FCIL librarianship is important? Why?

32. What are the future challenges in the field?
Appendix B

Essential Reading List on FCIL Librarianship

Overview of FCIL Librarianship


History of FCIL Librarianship


Globalization and FCIL Librarianship


Training in FCIL Librarianship


FCIL Reference and Instruction


FCIL Collection Development and Management, Selection, and Acquisition


**Technical Services and Preservation**


**FCIL Publishing**


**Law Firm and Corporate FCIL Librarianship**


**FCIL Collections**


**Law Libraries, Librarians, and Librarianship Around the World**


**International Legal Document Exchange**


Keeping Up with New Legal Titles*

Compiled by Benjamin J. Keele** and Nick Sexton***

Contents

Seduction by Contract: Law, Economics, and Psychology in Consumer Markets by Oren Bar-Gill reviewed by Catherine M. Biondo 232

From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage by Michael J. Klarman reviewed by Cory M. Lenz 233

Politics of Parking: Rights, Identity, and Property by Sarah Marusek reviewed by Nicole P. Dyszlewski 235

The Treason Trial of Aaron Burr: Law, Politics, and the Character Wars of the New Nation by R. Kent Newmyer reviewed by Franklin L. Runge 236

Music & Copyright in America: Toward the Celestial Jukebox by Kevin Parks reviewed by Michelle M. Botek 237

The Knockoff Economy: How Imitation Sparks Innovation by Kal Raustiala and Christopher Sprigman reviewed by Michelle Humphries 239

Making Laws for Cyberspace by Chris Reed reviewed by Aperna M. Sherman 240

* The books reviewed in this issue were published in 2012 and 2013. If you would like to review books for “Keeping Up with New Legal Titles,” please send an e-mail to bkeele@indiana.edu and nsexton@email.unc.edu.

** Research and Instructional Services Librarian, Ruth Lilly Law Library, Indiana University Robert H. McKinney School of Law, Indianapolis, Indiana.

*** Clinical Assistant Professor of Law and Reference Librarian, Kathrine R. Everett Law Library, University of North Carolina School of Law, Chapel Hill, North Carolina.

Reviewed by Catherine M. Biondo*

¶1 Social psychology and behavioral economics are subjects that seem to fascinate many people. For those seeking a better understanding of why we do what we do and think what we think, there is no shortage of reading material. Popular nonfiction authors, including Malcolm Gladwell, Ori and Rom Brafman, and Charles Duhigg, have explored how we make choices in the blink of an eye,¹ let irrational forces sway our decision making,² and allow ingrained habits to determine our actions.³ Oren Bar-Gill continues in this vein, but for a more scholarly audience.

¶2 In Seduction by Contract: Law, Economics, and Psychology in Consumer Markets, Bar-Gill examines the pull of the consumer contract—from credit cards and cell phones to sporting events and health clubs—and discusses why we are routinely “seduced” into entering agreements that ultimately do not benefit us. “[T]he design of consumer contracts,” he asserts, “can be explained as the result of the interaction between market forces and consumer psychology” (p.2). Sellers create and exploit complex contracts because we consumers are “imperfectly rational” and operate on “bias and misperception” (id.). Competition in the marketplace only perpetuates this, because the seller who takes the “high road” with a contract beneficial to consumers tends to lose out to the one who “aligns contract design with [consumer] psychology” but offers a less consumer-friendly deal (id.). The way to change the system, Bar-Gill posits, is through an improved legal policy that allows for more effective disclosure mandates. Requiring sellers to give consumers simple “aggregate, one-dimensional disclosures that facilitate comparison between competing products” (p.4) and allowing “sophisticated intermediaries” (p.5) greater access to information to help them advise consumers will both help open our eyes to the seductive nature of our contracts and decrease seller incentive to create and exploit inefficient ones.

¶3 Bar-Gill knows whereof he speaks. A professor of law and codirector of the Center for Law, Economics and Organization at the New York University School of Law, and one of the first winners of the American Law Institute’s Young Scholars Medal, Bar-Gill has studied and written extensively on consumer contracts.

¶4 Seduction by Contract is organized into four chapters. The first introduces the law, economics, and psychology of consumer contracts. This is where Bar-Gill highlights common themes: the behavioral-economics theory of consumer contracts, the welfare costs of hindered competition created by complex contracts, the market solutions that try to educate consumers about their misperceptions and biases, and the policy implications of disclosure regulations. Chapters 2 through 4 analyze specific consumer markets—credit cards, mortgages (namely subprime),

---
* © Catherine M. Biondo, 2013. Legal Reference Librarian, Northeastern University School of Law Library, Boston, Massachusetts.
and mobile phones—with detailed case studies, and then apply the framework for
the study of consumer contracts and regulation as established in chapter 1. Bar-Gill
concludes by calling for legal policy to “minimize the costs, while preserving the
benefits” of consumer contracts (p.248), and suggests that future research should
be extended to other consumer markets (such as insurance contracts and contracts
for transportation services) and to other regulatory strategies beyond disclosure
mandates.

§5 At fewer than 250 pages (not including the bibliography and index),
Seduction by Contract is a fairly compact text on a subject to which any purchaser
of consumer goods can easily relate, especially those who have been vexed by a
phone contract or obscure credit card terms and felt powerless to understand why.
Bar-Gill’s prose is highly readable, and both the chapters and the book as a whole
are clearly mapped to help the reader appreciate his logical progression. Graphs and
tables are used throughout. However, for the noneconomists among us, some of the
technical language may occasionally be confusing.

§6 Seduction by Contract would make a fine addition to an academic law library
collection, and it could be incorporated into contracts, consumer law/consumer
protection, and commercial transactions courses. Legal scholars in court or govern-
ment libraries examining the intersection of law and economics with ethics and
public policy will similarly find it valuable.

Klarman, Michael J. From the Closet to the Altar: Courts, Backlash, and the Struggle
Reviewed by Cory M. Lenz*

§7 Gay marriage is inevitable, according to Harvard Law School professor
Michael J. Klarman in his book From the Closet to the Altar: Courts, Backlash, and
the Struggle for Same-Sex Marriage. He makes this claim because young people
today, who are more likely either to know someone who is gay or to have grown up
in a gay-friendly environment, support same-sex marriage by as much as forty
percentage points over older adults, who tend to oppose it. Klarman suggests that
having a gay friend or family member correlates to supporting gay rights, so the
coming out of every gay and lesbian and every same-sex couple means more votes
for gay equality “[b]ecause few people favor discrimination against those whom
they know and love” (p.197). This more welcoming social environment has ushered
same-sex marriage into state and federal courts. Klarman includes a helpful time
line of all major court decisions and legislation relating to same-sex marriage (prior
to the 2012 ballot measures and the U.S. Supreme Court’s granting of certiorari in
two same-sex marriage cases4).

§8 At the beginning of the book, Klarman defines the historical context of the
gay rights struggle. Before the mid-1980s, most gays and lesbians were not open

* © Cory M. Lenz, 2013. Reference Librarian, Charlotte School of Law, Charlotte, North
Carolina.

4. Perry v. Schwarzenegger, 591 F.3d 1147 (9th Cir. 2010), cert. granted sub nom. Hollingsworth
about their sexuality for fear of losing their jobs and families and having no legal recourse when such things happened. Gay rights organizations worked strategically, with little money and few members, to convince some municipalities to adopt gay rights ordinances, only to see them defeated by local referenda. Klarman points to this historical context to explain the surprise that both gay rights and conservative organizations felt when, in 1993, the Hawaii Supreme Court opened the door to same-sex marriage, holding in *Baehr v. Lewin* that a law restricting marriage to one man and one woman constituted a sex classification and thus required the strictest judicial review.\(^5\) Klarman provides only a brief analysis of the constitutional arguments for same-sex marriage: that discrimination against same-sex couples is not rationally related to the objectives that states have proffered thus far (i.e., protecting traditional marriage, promoting optimal environments for child rearing, and encouraging procreation). He makes an intriguing argument, however, that *Baehr* became a turning point in gay rights policy only because the AIDS epidemic—which refocused the younger gay community on committed relationships and estate planning issues—had created the social environment that would champion *Baehr* and subsequent similar decisions. This brought more financial resources and allies to the gay community for the fight for same-sex marriage.

\(^9\) The discussion of the backlash after *Baehr* monopolizes the book’s narrative, but the episodes blur into one another because the political maneuvering of conservative and religious groups after each same-sex marriage win follows the same pattern: same-sex marriage opponents rallied behind defense of marriage laws or constitutional amendment initiatives to ban same-sex marriage after a state supreme court from an outside jurisdiction found its state constitution gave same-sex couples the right to marry. The federal Defense of Marriage Act\(^6\) and defense of marriage laws in more than thirty states sprang from the backlash against *Baehr*. Constitutional amendments banning same-sex marriage and, in most instances, civil unions and domestic partnerships, passed in twenty-seven states after *Goodrich v. Department of Public Health*.\(^7\) Klarman might have avoided the rote reporting in this section had he chosen to highlight the lives of plaintiffs, advocates, or opponents in the same-sex marriage struggle. He does, however, raise the intriguing suggestion that the push for same-sex marriage may have hurt the gay rights movement in conservative states where gays and lesbians have yet to win even “basic legal protections against violence and discrimination in employment, housing, and public accommodations” (p.179).

\(^10\) With insightful explanations for the legislation against same-sex marriage, Klarman rebounds strongly in the book’s final pages. He clearly notes that political backlash is more likely “[w]hen public opinion on judicial rulings divides heavily along regional or geographic lines” (p.186). For instance, *Goodrich* generated little political opposition in Massachusetts because a majority of residents supported same-sex marriage. However, in Ohio, *Goodrich* likely cost John Kerry the presi-

---

dential election as George W. Bush increased his percentage of the 2004 popular vote in Ohio by double digits among groups who disproportionately oppose gay marriage (the religious, the elderly, the working class, and African Americans).

¶11 Klarman concludes that same-sex marriage is inevitable, not least because polls measuring shifts in attitudes are tracking similarly to those from the Civil Rights movement. A majority of Americans now support same-sex marriage (p.196) and, according to variables measured by statistician Nate Silver, this trend will continue until same-sex marriage is recognized in every state except those in the Deep South by 2016, and in every state but Mississippi by 2024 (p.202).

¶12 From the Closet to the Altar fastidiously reports on the litigation and legislative winners and losers in the same-sex marriage struggle. This work will interest academics and law students alike, particularly those delving deeper into the more intriguing issues that Klarman raises.


Reviewed by Nicole P. Dyszlewski*

¶13 Parking bans and meters have been around for quite some time. In fact, chariot parking bans existed in Assyria during the reign of Sennacherib. Fortunately, parking penalties have changed so that an infringer is no longer “slain and his body impaled on a stake before his house.” Politics of Parking: Rights, Identity, and Property, by Sarah Marusek, is a modern reflection on how American law works every day to enforce rights and order social interactions in the context of parking.

¶14 The book examines the concept of parking according to constitutive legal theory, which Marusek defines as a relational approach to law that considers “the social ramifications of legality unaddressed by the stated scope of policy” (p.137). Parking is not the subject of the book, but instead an illustrative theme. Marusek, an assistant professor of political science at the University of Hawaii at Hilo, excels at providing relatable examples of social interactions between legal and nonlegal actors from personal experience, the media, and popular culture, with special emphasis on the concepts of rights, property, and semiotics.

¶15 Marusek’s work is arranged as an orderly journey though the legal landscape of parking: parking space as a property right, parking signs as legal signals, law personified by parking enforcement officers, parking ticket appeals as texts of “folk legality” (Marusek’s term for “a local relationship to law that embraces everyday interactions with the law” (p.129)), and handicapped parking policy as a vehicle for constitutive theory. Along the way, the book uses real-world examples to discuss gender, disability, privacy, and the public good. The book is conceptually fascinating and easy to read, but lacks certain formalities that would engender trust in it. For example, the writing lacks polish, there are citations to URLs that no longer work, and the index is rather thin. These important details detract from the innovative way the author treats the mundane.

9. Id.
¶16 Despite technical weaknesses, the book is valuable if only because of its quirky subject matter. The text has a peculiar and narrow focus, yet it remains accessible to the reader. The author refuses to take for granted any aspect of parking—on its face an ordinary, albeit universal, subject—and delivers a thought-provoking text. Overall, Marusek succeeds in using the overarching theme of parking to engage the reader in discussion of social and legal policy.

¶17 Politics of Parking is appropriate, but not essential, for academic law libraries. The ideas and specific examples in the book are well suited to sparking discussion in first-year and upper-level law classes. Many of the examples are drawn from Massachusetts and Hawaii, so the book may be especially useful in those states. It may also be useful to scholars of constitutive legal theory.


*Reviewed by Franklin L. Runge*

¶18 In exercising his unalienable rights to “Life, Liberty and the pursuit of Happiness,” Aaron Burr concocted a land-and-gold-grabbing scheme to conquer parts of Mexico. Upon learning of Burr’s machinations, Thomas Jefferson, then President of the United States, painted Burr as a traitor and moved heaven and earth to have him hanged. This melodrama spilled into John Marshall’s trial court in Richmond, Virginia. Marshall set out an interpretation of the law of treason that would last for the next two centuries, fortified the common law rules regarding relevant evidence, and laid the foundation for the rule of law in the United States. The story of Burr’s western adventure, as captured in R. Kent Newmyer’s book, *The Treason Trial of Aaron Burr: Law, Politics, and the Character Wars of the New Nation*, is rich in dramatic episodes, ironic twists, and thought-provoking jurisprudential concepts.

¶19 How could the national political scene find itself with the President desperately wanting to execute his former vice president? As Newmyer astutely notes, “[c]ontext as always is the starting point of interpretation” (p.15). The book effectively paints a picture of what it meant to live in a brand-new nation. The Southwest was largely ungoverned and subject to disputes between the United States and Spain. Looking westward, many Americans (including Burr) saw the possibility of gold and glory. This ambitious spirit successfully expanded national borders, but a quest motivated by vanity and avarice also produced casualties. Additionally, after defeating the British in the Revolutionary War, Americans were obsessed with loyalty to the new nation and the crime of treason. These realities crafted the political environment in which Burr, who had distinguished himself as a combat officer in the Continental Army, would stand trial for treason against the country he fought to create.

* © Franklin L. Runge, 2013. Faculty Services Librarian, Alvin E. Evans Law Library, University of Kentucky College of Law, Lexington, Kentucky.

10. The Declaration of Independence para. 2 (U.S. 1776).
On January 22, 1807, Jefferson declared Burr guilty of treason in an address to Congress. Through this pronouncement, Jefferson “usurped the role of both the grand jury and the trial jury” (p.177). Instead of marching victorious with a band of hearty soldiers through the Southwest and Mexico, in February 1807 Burr was arrested in the Mississippi Territory. He did not stand trial where his alleged crime took place; he was whisked to Richmond, Virginia, by armed guards. The subsequent trial, *United States v. Burr*, generated a series of curious dichotomies in which Newmyer revels. Jefferson’s party, the Democratic-Republicans, opposed an overbearing executive branch, yet here was Jefferson directing Burr’s prosecution from Washington, D.C.; attempting to suspend the writ of habeas corpus; manipulating witnesses with the promise of pardons; and ensuring that Burr did not receive a fair trial by enflaming the partisan press. As a Federalist, Marshall had his own prejudices and intellectual obstacles to overcome. First and foremost, Marshall greatly respected Alexander Hamilton, a Federalist leader whom Burr had killed in a duel. Marshall’s decision defined treason in a manner that limited the government’s prosecutorial reach and, in a very Jeffersonian move, rejected the English common law on this crime.

In addition to recounting one of the most important trials of the nineteenth century, this book offers up jurisprudential meditations on treason, evidence, and the rule of law. Marshall’s writing style “made no effort to placate the ordinary reader” (p.206); fortunately, that is where Newmyer ably steps in. I was consistently impressed by Newmyer’s ability to transition from historical details to larger issues that reverberated through our legal system over the next two hundred years. The trial was political theater, but it also set this country on a path on which the crime of treason could not be used by political powers to snuff out dissent, defendants would not be tried on their character but on the evidence presented, and the President of the United States was not above the law when it came to a *subpoena duces tecum* issued by a court of competent jurisdiction.

As a practical matter, this book is well constructed with useful footnotes, helpful illustrations, and an engaging tone. It should be considered for acquisition by academic libraries (both law and general), especially if they serve patrons who focus on early American trials, lawyers, or federalism.


Reviewed by Michelle M. Botek*

*Music & Copyright in America: Toward the Celestial Jukebox* is intellectual property attorney Kevin Parks’s debut book. As much a history of American music as a legal resource, the work chronicles the evolution of music and copyright law over the last two hundred years. The work is divided into seven parts, which, like orchestral movements, thematically and temporally build off one another. The
culmination of each part is marked by a transformative development that made a profound impact on the music industry. Parts 1 and 2 cover the period from the nation’s inception through the early 1900s, while parts 3 through 5 discuss the middle decades of the twentieth century. The culminating chapters, parts 6 and 7, trace events from the mid-1990s through the Supreme Court’s decision in *Golan v. Holder* in 2012.12

¶24 Part 1 starts with the inclusion of the Copyright Clause in the United States Constitution and a discussion of early property law notions in America. It goes on to describe the fledgling American music industry, characterized by folk songs and sheet-music peddlers. Highlights of this section include an in-depth discussion of the 1831 recognition of musical compositions as copyrightable subject matter and an analysis of how this fostered a surge of entrepreneurialism (and litigation) within the industry. The segment concludes with an exploration of two major pieces of copyright legislation: the International Copyright Act of 189113 and the Cummings Copyright Bill.14

¶25 Parks then shifts his focus to the exciting technological developments in instrumentation and recording of the twentieth century. These advances include the mechanization of musical performance, like the player piano, and early recording techniques, such as the double phonograph. He exquisitely details the physical machinery and operation of these new technologies. For example, describing the mechanism by which player pianos work, he writes: “The high-tech contraptions magically made music on their own by ‘reading’ the chad-like perforations, triggering a mechanism that depressed a piano key and rendered a note, all without the touch of a human hand” (p.51). This vividness is representative of Parks’s style and beautiful prose throughout the book.

¶26 Part 3 begins with a recap of the substantial revisions to copyright law in the early 1900s, including a revised public performance right. Next, the book looks at the social, legal, and music industry factors leading to the formation of well-known and highly influential licensing organizations such as the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). Parks then examines the ascendency of the performers’ rights movement of the 1960s and 1970s. As chronologically appropriate, he integrates discussions regarding the increase in technology-enabled infringement, like radio, and piracy risks—through dubbing, sampling, and brick-and-mortar rental clubs—and their effects on copyright policy making. He also covers the explosion of seminal copyright cases between 1920 and 1980 and the impact of the watershed 1976 Copyright Act.15 The final portion of the text, parts 6 and 7, ushers in a time exceedingly familiar to the vast majority of contemporary readers: the new millennium and the rapid proliferation of technological advances, including the rise of digital music, with its potential for limitless duplication of songs and for file-sharing capabilities, and the ensuing challenges facing traditional copyright conventions.

Ultimately, *Music & Copyright in America* is a fascinating read for those with an interest in copyright, as well as music lovers and history buffs. The depth of discussion varies, but the text is generally thorough and comprehensible, even for the novice reader. Parks skillfully covers all major legislation, cases, and technical and commercial developments in the field, while allowing his passion for music and law to permeate the text. He relies on reputable sources and frequently cites the preeminent legal scholars in the copyright field. Further, his deft use of statistics and attention-grabbing factoids throughout the book make the material gripping and accessible. References to primary source legal materials are appropriately footnoted, although the origins of his colorful historical references and facts are occasionally unclear. The book’s chapter headings range from the pedestrian to the clever; however, on the whole they want for utility, offering scant indication of each portion’s content and lacking sufficient descriptiveness to be of meaningful assistance.

The author incorporates a number of useful features, including a time line denoting key events and a robust index containing important figures, cases, and legislation from the text. Yet there are several unfortunate structural oversights; chiefly, there is no bibliography, and text in the footnotes has not been included in the index. An experienced researcher or scholar may find these omissions both frustrating and limiting. This publication is available only in paperback and suffers from the inherent limitations of its format when it comes to durability. Coupled with its relatively high cost, this should be a consideration for potential purchasers. Its minor shortcomings notwithstanding, with its lively prose and cross-disciplinary focus *Music & Copyright in America* is suitable for any academic library, and its popular appeal should not be overlooked.


Reviewed by Michelle Humphries*

In *The Knockoff Economy: How Imitation Sparks Innovation*, Kal Raustiala, a professor at UCLA Law School who specializes in intellectual property and international law, and Christopher Sprigman, a professor at the University of Virginia School of Law who specializes in intellectual property, antitrust, and constitutional law, argue that copying is not necessarily the evil that it is made out to be.

Copyright law protects against some copying by others. Raustiala and Sprigman describe this basic tenet as “the monopoly theory of innovation” (p.6): copyright law protects against copying because copying would “destroy the incentive to innovate in the first place” (p.168). However, the authors argue that it is not quite that simple. In some situations, copying has little or no effect on innovation, or it can actually cause more innovation. The big question is “when—and why—this is true” (id.).

To answer this question, Raustiala and Sprigman analyze fashion, cooking, comedy, and other creative industries where copyright protection is not available.

and thus others can freely copy, but where innovation still thrives. They find that there are often forces outside of copyright law that restrict copying by others, such as social norms, or the market for the good itself. They also determine that there are incentives for innovation besides the monopoly that intellectual property provides. In fact, in some cases copying promotes innovation because openness allows more people to work on a product in smaller increments, leading to an overall better product and more competition in the marketplace.

¶32 In the end, Raustiala and Sprigman argue, it is all about the economics of innovation: if the benefits of innovation outweigh the costs, then innovation will continue. And while intellectual property law creates benefits for creativity, it is not the only inducement. The authors point out how technology is usually viewed as the enemy because it allows easier and faster copying. But it can also help to induce innovation, because with the increase in technological developments, the cost of innovation in many fields has declined.

¶33 Raustiala and Sprigman conclude with a case study on the music industry. They apply to music what they have learned from the industries that continue to thrive creatively without copyright protection. They find that “it is often not copying per se that is a problem, but how copying is understood and addressed” (p.215). The authors then compare the music labels’ reactions to the response of movie producers, and conclude that the music labels hurt themselves by taking a strict stance on copying and by using only copyright law to address the issue.

¶34 The Knockoff Economy provides an intriguing perspective on intellectual property law. Each industry gets its own chapter filled with somewhat lengthy background information. The authors employ storytelling to emphasize the relationship between copying and innovation in each industry, which makes reading the text both enjoyable and memorable. The book does feel overly long, however, and the authors could have made their points in fewer pages. But the concluding chapter provides an excellent summary, and the case study on the music industry is very interesting. The book would have benefited from other similar chapters. The Knockoff Economy is well suited for academic law libraries and general academic libraries.


Reviewed by Aperna M. Sherman*

¶35 In Making Laws for Cyberspace, Chris Reed questions whether the laws that are intended to regulate the Internet actually do so. Looking at the United Kingdom, European countries, the European Union, and the United States, he provides an in-depth analysis of the current state of laws relating to cyberspace and how to improve them. Reed concludes that the best way to regulate cyberspace is to focus on human behavior instead of enforcement or technology.

* © Aperna M. Sherman, 2013. Electronic and Student Services Librarian, Texas Tech University School of Law Library, Lubbock, Texas.
¶36 Reed splits his argument into four parts. First, he considers whether or not cyberspace is an actual place to be governed. Second, he discusses lawmaking and how lawmaking organizations get their authority. Third, he considers what makes laws worthy of being followed or respected. Finally, he uses the conclusions from the first three parts to modify existing laws into ones that cyberspace users will follow.

¶37 Reed focuses his arguments on the cyberspace user and not the technology, and states that if the user does not consider the law to be worthy of respect, the user will not follow the law. For example, Reed suggests that instead of targeting copying, copyright infringement law should be reframed in terms of the use of the work; by basing laws on behavior instead of enforcement, laws can then become technology neutral. This means that laws would not have to be amended every time the technology changes, which Reed calls “future-proofing” (p.25).

¶38 The arguments and ideas that Reed puts forth are well researched and detailed. However, the book is very dense, and Reed has a tendency to repeat his arguments, along with their attendant citations to laws. Although this repetition may be necessary, it detracts from the arguments, and the reader may find it somewhat wearing.

¶39 Reed used an extensive number of resources for the book, and he provides a table of cases, a table of legislation organized by jurisdiction, and an index. Reed also uses copious footnotes to reference books, periodicals, and web sites.

¶40 Overall, the author presents a clear view of the current laws governing cyberspace. He does an excellent job of presenting the basics of lawmaking authority and theory. He develops his arguments so that even if a reader disagrees, she cannot quarrel with the logic used to reach the conclusions. Reed has written a thought-provoking book that advances the discussion of cyberspace law. This book would be a good addition to any academic law library, particularly those that collect in legal theory or comparative law.
Practicing Reference . . .

Other Uses of Legislative History*

Mary Whisner**

Although we usually think of using legislative history to determine legislative intent when interpreting statutes, Ms. Whisner shows that legislative documents can be useful for other, less controversial purposes as well.

I am rumored to believe that the only legitimate use of legislative history is to prop open heavy doors or to put under the seats of little children not quite tall enough to reach the table.

— Hon. Alex Kozinski¹

¶1 Debate swirls around the use of legislative history for interpreting statutes.² Recognizing this, many of our presentations on how to research legislative history begin with a caveat that some judges and scholars think it shouldn’t be used at all.³ After the caveat, we go on to describe the documents that legislatures produce and how to find them—but the whole enterprise is clouded by the uncertainty about their use. Meanwhile, no one seems to talk about the other uses of legislative history (and, more broadly, legislative documents).

¶2 This column is not an attempt to wade into the fracas over using legislative history to divine the meaning of statutes.⁴ My goal here is to illustrate a variety of other uses for legislative history. The examples are drawn from real legal work and

---

* © Mary Whisner, 2013. I am grateful to Mary A. Hotchkiss and Nancy C. Unger for their assistance with this piece.


1. Interbranch Relations: Hearings Before the Joint Comm. on the Organization of Congress, 103d Cong. 83 (1993) (statement of Judge Alex Kozinski). While cautioning against courts “allow[ing] legislative history to do too much of the work of interpretation,” Kozinski states that it “can be an immensely valuable tool for resolving certain types of problems in statutory interpretation.” Id.


3. See, e.g., Georgetown Law Library, Legislative History Research: A Tutorial, at slide 6, http://www.law.georgetown.edu/library/research/tutorials/lh/upload/leghist-slide01.pdf (Jan. 2, 2013) (“Can be controversial!”). See also Barkan et al., supra note 2, at 158–59 (“This conflict has led to a re-examination of legislative histories as a subject in law school legal research courses.”).

4. I can’t resist sharing something I learned during my research: a number of state legislatures have enacted statutes instructing courts to use legislative history as an interpretive aid. The statutes are listed in the appendix, infra, for readers who, like me, might have heard talk about the use of federal legislative history in the federal courts without considering whether there might be different rules in the states.
scholarship. Together they provide many reasons to learn to find legislative history materials.

**Legislative Advocacy**

¶3 The students in my law school’s legislative advocacy clinic try to persuade the state legislature to enact or amend laws to address perceived problems. In recent years, students have worked on measures concerning juvenile records, juvenile runaways, and compensation for people released from prison after wrongful convictions. When the clinic’s instructors asked me to speak to the students about legislative history research, I realized they needed to think about how to mine legislative history for different nuggets than the appellate lawyer who wants to argue for a particular interpretation of ambiguous statutory language. If the students hope to advocate amending an existing statute, they might ask

- Which legislators pushed for it?
- What did they say they wanted to accomplish? Can we go back and argue that the law didn’t do what they hoped?
- Which citizens groups and government agencies testified for and against it? What were their concerns? Can we find potential allies for our efforts today? Are there potential opponents we should be aware of?
- Has the legislature’s makeup changed in a way that will help us or hurt us?

Whatever measures the students are promoting, they should look at measures on related topics in the last few legislative sessions:

- Which legislators have proposed bills? Who is interested in our issues?
- Which committees considered the bills? Were hearings held? Who testified?
- How far did the bills go?

Gathering all this information can help students plan their own efforts in more ways than one. When they view committee hearings, not only can they look at the substance of what legislators and witnesses say, but they can also see what the committee room is like and anticipate the experience they will have when they travel to Olympia to testify. Now that the clinic is a few years old, the students can even watch webcasts of former students testifying.5

¶4 Clearly, these students can learn a lot from legislative history research. In fact, the process is generally more fruitful for them than for the researcher who is trying to find a key sentence to unlock the mystery of an ambiguous phrase in a statute (preferably to the advantage of the researcher’s client). We all know that those keys are rare and hard to find.

---

¶5 Of course, clinic students are not the only ones for whom this research would be helpful. Practicing lawyers, lobbyists, public interest groups, and citizens can also benefit from being able to find information about the workings of the legislature.

**Current Awareness**

¶6 To advise their clients well, lawyers often need to anticipate changes in the law, so it is useful to be aware of measures that are introduced and how they are faring. It is not unusual to see coverage of pending legislation in legal newsletters. For instance, *Interpreter Releases*, a newsletter for immigration lawyers, has a regular feature titled “Newly Introduced Legislation.”\(^6\) A recent government contracting newsletter notes: “Bills Would Expand Contractor Whistleblower Protections.”\(^7\) Another newsletter reports on a Senate bill, the Prepaid Card Consumer Protection Act, that would add some consumer protections and require the Consumer Finance Protection Board and the Federal Deposit Insurance Corporation to issue appropriate regulations.\(^8\)

¶7 Litigators also need to keep up with new legislation. When the Protection of Lawful Commerce in Arms Act was enacted,\(^9\) the gun manufacturers who had been sued by the City of New York moved to dismiss the case or alternatively to stay the proceedings and vacate the approaching trial date. The city argued that the act did not apply and, if it did, it was unconstitutional. But Judge Jack Weinstein didn’t want to move the trial date, and he thought the recent passage of the law was hardly a reason for delay:

> The bill embodied in the Act has been pending for a long time. . . . It can reasonably be assumed that the parties have already given a great deal of thought—supported by legal and other research—to its application and validity. They should be capable of promptly briefing both the constitutional and other statutory issues now raised.\(^10\)

---

6. *Interpreter Releases* is published forty-eight times per year and is available on Westlaw.
10. City of New York v. Beretta U.S.A. Corp., 2005 WL 2979104, *1 (E.D.N.Y. Nov. 7, 2005) (citing the Congressional Record and news stories). On interlocutory appeal, the Second Circuit held that the statute did apply. City of New York v. Beretta U.S.A. Corp., 524 F.3d 384 (2d Cir. 2008). So, as it turned out, the trial did not begin on schedule after all. But the point remains: the judge believed that the lawyers must have been following legislation that could have such a big impact on their business and the case. Indeed, the general counsel of the named defendant, Beretta U.S.A. Corp., had testified at a hearing on a bill with the same name in an earlier Congress. *Protection of Lawful Commerce in Arms Act; Hearing on H.R. 2037 Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 107th Cong. 79 (2002) (statement of Jeff Reh).
Facts

¶ 8 A recent student-written law review article about sex trafficking opens with the story of Sonia, a teenager from El Salvador who was forced to work in a brothel in the United States and then faced the Department of Homeland Security, the Department of Health and Human Services, and the Department of Justice. Using a story is one way to capture the reader’s attention and set the scene for an article, and this story does its job well. Where did the student author find Sonia’s story? It was in a witness’s statement in a congressional hearing. Later in the article, the author uses legislative history materials to support the propositions that the sex trade is a quick way to make money, that sex trafficking is a “human calamity,” that the Trafficking Victims Protection Act was “part of an ambitious endeavor to combat human trafficking,” and that the act “took a decidedly victim-centered approach.” The author does not use legislative history to argue for an interpretation of the law. Instead, he uses the materials to provide context for his discussion of the law and his eventual recommendation that Congress amend it.

¶ 9 Many authors use legislative materials as sources for facts and stories. For instance, two academics used committee reports alongside journalistic accounts to summarize insider-trading scandals. A judge cited two committee reports to support his assertion that “the declining fortunes of the nation’s rail industry came to a crucial focus in the 1970’s, when the collapse of several major carriers necessitated a substantial federal effort to ensure the continuation of vital service and to restore the rail industry to a level of financial health.” A student drew facts about the danger of algae blooms from committee reports. Another student used legislative materials as sources for statistics about the number of people with disabilities, their high rate of unemployment, and their low incomes. A judge reviewing
an asylum denial cited NGO human rights reports that had been published in the
Congressional Record. Another judge used statistics from the Congressional Record
to support a claim of tepid enforcement by the Department of Justice under the

¶10 Two more examples come from state search and seizure cases. In a Vermont
case, the issue was whether officers had reasonable suspicion to pull over a car after
seeing a thin red beam, which the officers thought might be a laser-sighting device
for a gun but was in fact a laser pointer. The majority found that the officers’ inference
that it was a sighting device—and that a sighting device was of concern—was
reasonable, citing introduced bills, statements in the Congressional Record, and
a committee report to support the claim that laser sights are becoming prevalent and
are used in committing crimes. In a Florida case, the issue was whether officers
had reasonable suspicion to stop and frisk a young man at a bus stop, based on an
anonymous tip that he had a gun. The majority held that the officers did not, and
hence suppressed the evidence they found. A dissenter believed that the anonymous
tip was sufficient, bolstering his position with a description of the prevalence
doctrine violence and citations from the Congressional Record about violent crimes
committed by juveniles.

¶11 Why use legislative materials as a source for facts? First, they’re widely avail-
able. It’s easier for a law student to find a committee report that summarizes the
hazards of algae blooms than to sort through marine biology journals. If a judge
wants support for his assertion that juvenile crime is on the rise, the Congressional
Record is handier than formal criminology journals and texts.

¶12 Second, the materials probably seem like good, credible sources. But are
they? Maybe, maybe not. On the one hand, many people preparing to testify before
a congressional committee take great care to get their facts straight and to present
careful, well-reasoned arguments. Reliability might be increased by the setting,
since their assertions could be probed by committee members, other witnesses, or
the press. On the other hand, a wide variety of people, representing many interests
and views, testify. Even without intending to deceive, they could present “facts” that
are less than rock solid. Likewise, the assertions senators and representatives make
in the Congressional Record, many of them motivated by politics, might not be
entirely reliable. Despite these cautions, legislative materials are a useful, practical
source for many facts.

---

22. Marcu v. I.N.S., 147 F.3d 1078, 1082 (9th Cir. 1998). The dissenting judge also cited reports
and statements in the Congressional Record. Id. at 1087.
23. United States v. Mussari, 168 F.3d 1141, 1145 (9th Cir. 1999) (Kozinski, J., dissenting from
denial of rehearing en banc).
other states.
26. Id. at 211 n.8 (Overton, J., dissenting).
27. This point is weaker now than it was twenty or thirty years ago. I suspect that most law stu-
dents are more comfortable searching Google Scholar, newspaper archives, or periodical indexes
from other disciplines than they are working with legislative history materials. See, e.g., Frederick Schauer &
(“[I]n previously barely imagined ways the universe of nonlegal information is now easily and cheaply
available to lawyers, judges, and other legal decision makers.”).
28. For a discussion of judges’ use of outside research, see Elizabeth F. Judge, Curious Judge:
Overview and Perspective

¶13 It is often hard to make sense of a statute by jumping into it section by section. It helps to get an overview and some sense of what motivated the legislature. Here, legislative history can be very useful. (Note that I’m not saying that the reports and so on would trump the clear words of the statute—just that they can provide a context.)

¶14 If you wanted to learn about the Child Protection Act of 2012, you could go directly to the statute. After Section 1 (Short Title), you would find:

SEC. 2. ENHANCED PENALTIES FOR POSSESSION OF CHILD PORNOGRAPHY.

(a) CERTAIN ACTIVITIES RELATING TO MATERIAL INVOLVING THE SEXUAL EXPLOITATION OF MINORS.—Section 2252(b)(2) of title 18, United States Code, is amended by inserting after “but if” the following: “any visual depiction involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if.”

(b) CERTAIN ACTIVITIES RELATING TO MATERIAL CONSTITUTING OR CONTAINING CHILD PORNOGRAPHY.—Section 2252A(b)(2) of title 18, United States Code, is amended by inserting after “but, if” the following: “any image of child pornography involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if.”

Unless you are already steeped in the statutory framework, you would have some trouble figuring out what the old law was, how the new law changes it, and how it fits into the bigger picture. Is the twenty-year penalty new? Or is it changing a penalty that was in the statute being amended?

¶15 The Congressional Research Service summary (available on THOMAS) says of this portion of the law: “Amends the federal criminal code to impose a fine and/or prison term of up to 20 years for transporting, receiving, distributing, selling, or possessing pornographic images of a child under the age of 12.” It’s quicker and easier to understand than section 2 of the statute itself. The section-by-section analysis in the bill’s committee report summarizes: “This section increases the maximum penalty from 10 to 20 years for offenses under sections 2252(b)(2) and 2252A(b)(2) of Title 18 involving prepubescent minors or minors under the age of 12.” That gives us important information (the penalty is doubling) in a concise statement.

¶16 Reports are also valuable for the context of the legislation. In this situation you aren’t looking for something short (the report on the Child Protection Act is more than six times as long as the act), but rather for something that explains the

Judicial Notice of Facts, Independent Judicial Research, and the Impact of the Internet, 2012 ANN. REV. CIV. LITIG. 325. In the cases I’ve mentioned, judges are generally using the Congressional Record and other materials for “legislative and social framework facts” rather than “adjudicative facts.” See id. at 331.

32. The report is thirty-two pages, while the session law is barely five pages long.
prior state of the law, the problem the law is supposed to address, and how the law’s sponsors think it will help. The report includes a discussion headed “Background and Need for the Legislation.” You’ll also find “Dissenting Views,” which contains a discussion of the bill, its background, and the reasons three of the committee members opposed it. If you are interested in the due process concerns raised, you can use this section as a starting point for further research, since the dissenters cite and discuss two Supreme Court cases.

¶17 The authors of treatises and practice guides recognize the value of context and often include a discussion of legislative history when they outline a statutory scheme. For example, the Bankruptcy Desk Guide uses committee reports to compare the Bankruptcy Code with the Securities Investor Protection Act. Securities Litigation: Damages uses legislative history to give context for the provisions concerning lead plaintiffs and lead counsel in the Private Securities Litigation Reform Act of 1995. The Department of Justice Manual uses legislative history for the background of the Freedom of Access to Clinic Entrances Act. Hazen and Markham cite hearings from the 1920s through the 1980s to demonstrate the long history of broker-dealer regulation. The Health Law Handbook cites hearings in explaining the statutory framework for the Stark Act’s specialty hospital loophole. And Food and Drug Administration uses a variety of materials to discuss the history of premarket approval of medical devices.

**Critique and Analysis**

¶18 Sifting through legislative history is also useful for commentators who want to step back to analyze the work of the legislative body. For example, a student author carefully traced the history of legislation protecting the domestic catfish industry. A central provision defines “catfish” in such a way that Asian fish resembling the North American catfish cannot be labeled “catfish.” The author does not argue that the statute should be interpreted otherwise. Her point, rather, is that the definition was written as it was because of the influence of the catfish industry.

¶19 A researcher can look at a very specific provision—like the definition of “catfish”—or at a broad class of legislation. When William Eskridge wanted to

---

34. Id. at 24–32.
35. Id. at 27 (citing Sandstrom v. Montana, 442 U.S. 510 (1979), and Francis v. Franklin, 471 U.S. 307 (1985)).
38. 4 Department of Justice Manual, at tit. 8, no. 6 (Westlaw 2013).
39. Hazen & Markham, supra note 18, at § 8:15.
43. Id. at 417.
determine how often Congress overrides the Supreme Court’s interpretation of a statute—and what sorts of decisions are most often affected—he and his research assistants reviewed all the reports published in *United States Code Congressional and Administrative News* to spot occasions when the committee indicated that a statute “overruled,” “modified,” or “clarified” a federal judicial interpretation of a statute.  

Like the catfish piece, this article did not use the legislative history to interpret the statutes, but rather to explore how the legislation came about.

Eskridge’s work looking at the institutional roles of Congress and the courts could be seen as a work of political science as well as legal scholarship. Another field that draws from the rich body of legislative material is history, including legal history. Biographers of federal judges, political scientists, and legal scholars can all find useful material in judicial confirmation hearings and debates.

Legislative history materials can also be used as raw material for rhetorical analysis. For instance, John Nagle looked at “endangered species” as a trope, citing instances from the *Congressional Record* of politicians using the term to include “the fine people of San Antonio,” the public lands states, the middle-class taxpayer, small gas stations, “our maritime industries,” the American-made typewriter, and—hold onto your hats—the legal profession. Another author examined the emotionally charged language used in discussing sex offender laws. Someone else analyzed the rhetoric in the debates on the Detainee Treatment Act of 2005, placing the debates “within broader American cultural narratives about the law and lawyers’ roles in society.”

---

44. William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 336 (1991). They weeded out some references and also searched other reports, selected hearings, and secondary sources. *Id.* at 336–37.

45. Eskridge found, among other things, that “decisions that were overridden were more likely to have relied on a statute’s plain meaning or the canons of construction than either decisions not scrutinized or decision[s] scrutinized but not overridden.” *Id.* at 351.


One reviewer of the eleventh edition of the Bluebook said, “Use e.g. when there are other examples you are too lazy to find or are skeptical of unearthing.” Peter Lushing, Book Review, 67 Colum. L. Rev. 599, 601 (1967). I am not at all skeptical of being able to unearth many more examples of historians using legislative history material.

47. In a sense, these aren’t “legislative history” because they don’t relate to legislation. But they are documents produced by the legislature, and they are researched using many of the same tools used for legislative history documents.


49. *Id.* at 237 n.18.

50. *Id.*

51. *Id.* at 237 n.19.

52. *Id.* at 238 n.21.

53. *Id.* at 239 n.25.

54. *Id.* at 239 n.24.

55. *Id.* at 240 n.27.


Conclusion

¶22 None of the examples discussed here is startling. As I’ve gone through each set of examples—legislative advocacy, current awareness, facts, overview and perspective, critique and analysis—I’m sure that readers have nodded their heads, thinking that each use was familiar.

¶23 If we are aware of all these uses, why do we focus only on using legislative history to interpret statutory provisions? Perhaps because first-year law students spend so much time reading appellate cases and often compete in an appellate moot court, we emphasize research that is important in appellate work. And because all eyes are on the U.S. Supreme Court, we pay attention to research tools that are important in appellate work. That’s important and students should learn about using legislative history in statutory interpretation (or not, depending on jurisdiction and interpretive approach). But let’s remember the many other uses for legislative history.

58. Maybe I’m wrong about this. I haven’t sat in on the hundreds of presentations about legislative history that are offered across the country each year. Maybe lots of people go beyond statutory interpretation.
Appendix

State Statutes on Using Legislative History in Statutory Interpretation

1. Explicit Direction to Use Legislative History

Colorado

If a statute is ambiguous, the court, in determining the intention of the general assembly, may consider . . .

(c) The legislative history, if any;


Iowa

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider . . .

(3) The legislative history.

Iowa Code Ann. § 4.6 (West, Westlaw 2012 reg. sess.).

Louisiana

A. When the meaning of a law cannot be ascertained by [code provisions concerning plain language and interpretive rules], the court shall consider the intent of the legislature.

B. (1) The text of a law is the best evidence of legislative intent.

(2)(a) The occasion and necessity for the law, the circumstances under which it was enacted, concepts of reasonableness, and contemporaneous legislative history may also be considered in determining legislative intent.


Minnesota

When the words of a law are not explicit, the intention of the legislature may be ascertained by considering . . .

(7) the contemporaneous legislative history;

Minn. Stat. Ann. § 645.16 (West, Westlaw through 2012 1st spec. sess.).

New Mexico

C. [T]he following aids to construction may be considered in ascertaining the meaning of the text: . . .

(2) the purpose of a statute or rule as determined from the legislative or administrative history of the statute or rule;

New York

The courts may in a proper case indulge in a departure from literal construction and will sustain the legislative intention although it is contrary to the literal letter of the statute.

Where there is doubt as to the meaning of the language of a statute, various extrinsic matters throwing light on the legislative intent may be considered by the courts.

In ascertaining the purpose and applicability of a statute, it is proper to consider the legislative history of the act, the circumstances surrounding the statute’s passage, and the history of the time.

If the interpretation to be attached to a statute is doubtful, the courts may utilize legislative proceedings to determine legislative intent.


North Dakota

If a statute is ambiguous, the court, in determining the intention of the legislation, may consider...

3. The legislative history.


Ohio

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider...

(C) The legislative history;


Oregon

(1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.

(b) To assist a court in its construction of a statute, a party may offer the legislative history of the statute.

(3) A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate.


Pennsylvania

(c) When the words of a statute are not explicit, the intention of the General Assembly may be ascertained by considering...

(7) The contemporaneous legislative history.

Texas
In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider . . .
(3) legislative history;

TEX. GOV’T CODE ANN. § 311.023 (West, Westlaw through 2011 reg. sess. & 1st called sess. of 82d legis.).

2. Arguable Acceptance of Use of Legislative History

Georgia
(a) In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy.

GA. CODE ANN. § 1-3-1 (West, Westlaw through 2012 reg. sess.).

Hawaii
Where the words of a law are ambiguous:
. . . .
(2) The reason and spirit of the law, and the cause which induced the legislature to enact it, may be considered to discover its true meaning.

HAW. REV. STAT. ANN. § 1-15 (West, Westlaw through 2012 reg. and spec. sess.).

Massachusetts
(b) A court may take judicial notice of . . . legislative history . . . .

MASS. GEN. LAWS ANN. § 202 (West, Westlaw through ch. 464 of 2012 2d ann. sess.).
Did your law library make the “Great Place to Work” list in 2012? How about 2011? Ever? Don’t feel bad. Mine hasn’t either—yet. Currently the list is confined to the corporate world, but why should we be excluded? And how can we change our status? More immediately, how can we improve the culture of our own libraries, so that we can at least begin to practice the principles of those organizations that have successfully captured the “Great Place to Work” award? Let’s begin by examining the role of leaders in creating a great workplace.

In a soon-to-be-classic book, *The Great Workplace: How to Build It, How to Keep It, and Why It Matters*¹ authors Michael Burchell and Jennifer Robin, members of the Great Place to Work Institute, ably articulate the institute’s prescription for excellence in the workplace. They advocate a number of virtues that leaders should cultivate in themselves and their employees. Credibility, respect, fairness, pride, and camaraderie are the keystones of a great workplace, according to these authors. Does this sound intuitively obvious? You bet! Paying lip service to commonsense principles is easy; implementing and cultivating them is another story entirely. Fortunately, *The Great Workplace* is here to coach managers and to impart precious information and advice to novice and experienced leaders alike.

How can your library emulate Great Places to Work such as Google (#1), SAS (#2), or Wegman’s (#5)?² It all begins with you, as you exercise your leadership skills. *The Great Workplace* contains eight useful chapters, five of which directly articulate the desirable attributes advanced in the book: “Credibility: ‘I Believe in My Leaders,’” “Respect: ‘I Am a Valued Member of This Organization,’” “Fairness: ‘Everyone Plays by the Same Rules,’” “Pride: ‘I Contribute to Something Really Meaningful,’” and “Camaraderie: ‘The People Here Are Great!’” Notice that these chapter titles begin with the prerequisite cardinal virtue for managers to cultivate, but that the principal component of each title explains the results of the practice from an employee perspective. Immediately, then, authors Burchell and Robin remind leaders of the true purpose of managerial strategies: to create a culture and environment that generates employee satisfaction and productivity. Such an

---


approach demonstrates the need for leaders to orchestrate and inspire employee investment in the organization’s goals.

¶4 Burchell and Robin begin with credibility, without which the other qualities cannot exist. Not surprisingly, communication provides the very foundation of credibility. As the authors aver: “Communication influences not just the employee’s perception of your credibility but his or her entire experience of the workplace.” 3 Communication, then, is all-pervasive, creating a comprehensive, positive culture in the workplace at large. Communication, however, is not a simple process. Instead, in the authors’ schema, two overarching types of communication exist: informative and accessible. 4 Informative communication prescribes that leaders provide necessary information and clearly articulate expectations. Accessible communication, on the other hand, demands that leaders supply honest answers to employee questions and signal their accessibility. 5 Accordingly, effective leaders create a climate in which employees feel comfortable approaching their managers. 6

¶5 Library leaders can create and nurture the culture of communication within their libraries by offering an open-door policy, inviting library staff to drop by informally to propose ideas and express concerns. In order to foster communication and credibility, the library leader must truly listen to the library staff and act accordingly, having been informed about library matters by employees who offer valuable perspectives—or who can at least vent in a safe place where concerns will be taken seriously and discussed appropriately.

¶6 Library leaders can also advance the library’s culture of communication by holding regularly scheduled staff meetings. They can use these meetings as a platform for communicating relevant information gleaned from law school administration. Employees appreciate, and benefit from, being “kept in the loop” about what is occurring in the institution beyond the library walls.

¶7 Another purpose of staff meetings is to enable each employee to communicate to the entire library the nature of current and ongoing projects for which she is responsible. This is especially important in bringing together all departments of the library, so that everyone can appreciate the reality that “the library” is an organic whole powered by individual contributions and teamwork. These meetings can help heal the traditional rift between public and technical services. This, in itself, is an invaluable function of communication within the context of the group meeting.

¶8 For any of this to function effectively, a leader must demonstrate competence—or, at the very least, be perceived to be competent. 7 If employees feel that the boss doesn’t know what they, the employees, are doing, confidence vanishes and attempts to communicate are moot. 8 Good leaders must also communicate their visions and values in order to create organizational excellence. 9 When they do,

3. BURCHELL & ROBIN, supra note 1, at 29.
4. Id. at 30.
5. Id.
6. Id. at 34.
7. Id. at 38.
8. See id.
9. Id. at 42.
“employees feel both grounded in the heritage of the organization’s values and driven to achieve the operating goals of the present moment.”\(^\text{10}\) Clearly, employee buy-in is essential for successful implementation of an organization’s goals. Additionally, leaders must demonstrate integrity, reliability, and honesty, and be able to take responsibility when events fail to unfold as planned. If you are curious about the full set of qualifications for developing and cultivating credibility, you can consult the authors’ comprehensive checklist at the end of the chapter.\(^\text{11}\) This checklist constitutes a formidable compendium of values and practices to which administrators should aspire.

¶9 In the library context, leaders can establish their competence by regularly visiting every department in the library and conversing with library staff members. This enables library leaders to understand and fully appreciate the nature of individual jobs and workflow, all of which enables them to competently oversee the library as a whole. In addition, it enables the library leader to intelligently support and advocate for library staff internally and externally to the larger institution.

¶10 Conjoined with credibility is respect, the authors’ second major focus. It is hardly surprising that respect accompanies—indeed, emanates from—credibility. Leaders may foster respect by clearly communicating goals and by providing employees with the means to contribute to the accomplishment of these goals. In short, the employee “is empowered to take risks, innovate and create” in furtherance of the organization’s goals, “has the ability to make choices and be involved with meaningful work,” and is “able to stretch herself, grow and develop in her career, and provide substantive value back to the organization.”\(^\text{12}\) Leaders must be sure to provide opportunities for professional development to support the employee in his professional growth.\(^\text{13}\) A leader’s collaboration with, and caring for, employees is the capstone of crafting respect. Concurrently, a respectful and respected manager will create a pleasant work environment and a genuine understanding that employees need to sustain a work-life balance. In summation, as the chapter checklist emphasizes, successful leaders provide support, caring, and a collaborative environment in their workplaces.\(^\text{14}\)

¶11 In order to facilitate a culture of mutual respect, library leaders can again meet regularly with staff members, offering a forum in which ideas can be discussed in the presence, and for the benefit, of the entire library team. Additionally, leaders can promote professional development opportunities for their employees. Leaders can suggest conferences, meetings, or training that might provide staff with the chance to learn more about their jobs and library operations, as well as afford employees the opportunity to meet library staff from other venues. Staff development serves to energize employees, as they absorb and share new ideas sparked by their interactions with library workers from other institutions. At the very least,
library leaders can generate mutual respect and appreciation by approving staff requests for conference attendance whenever feasible and appropriate.

¶12 The third essential value for leaders to cultivate is fairness. Again, this fundamental managerial precept demands that “[e]veryone plays by the same rules.”15 According to Burchell and Robin, “Fairness is the employees’ sense that a level playing field exists with regard to decisions that affect them.”16 Moreover, fairness is “equitable and impartial.”17 Fairness, however simple and intuitive it may sound, is by no means easily practiced. Not only must managers actively incorporate the notion and practice of fairness in the workplace, but they must also grapple with the reality that not all employees are created equal—in terms of duties, responsibilities, and job requirements.18

¶13 I am sure that all of us have encountered difficulties when the delicate topic of equality arises in our libraries. Burchell and Robin address this sort of issue head-on when they state that “fair treatment does not mean equal treatment.”19 They continue by elaborating that “[i]f it did, the leader’s job would be a lot easier. Instead, “decisions must be made in ways that acknowledge the individual while honoring the organization as a whole (and the other people within it).”20 Their solution is perhaps not readily transferrable to our academic world. To us, profit-sharing and bonuses are phenomena that seem to occur in some alternate universe, certainly not in the library (with the possible exception of law firm libraries). But we can employ another strategy suggested by the authors, namely, the reward of membership. They understand that the feeling of membership in an organization can be quite powerful. Indeed, “[m]embership is more intangible than pay, but just as powerful.”21 If employees are treated equitably and their value demonstrably recognized, investment in the organization’s mission and goals will likely follow.22

¶14 All of this is a tall order indeed, but the authors remind us that fairness, involvement, and zero tolerance toward inequity will send a strong message to employees that they are valued and indispensable contributors to the overall optimal operation of the organization.23 Once again, at chapter’s end, the authors proffer a helpful checklist to remind us to implement fairness as we pursue leadership roles in our libraries and, hopefully, institutions as a whole.24

¶15 Next in our armament of managerial strategies is instilling a sense of pride in our employees. Burchell and Robin denote this as “the underlying sense of pride that employees have in their job, team, and company.”25 How can managers accomplish this seemingly gargantuan task? The authors contend that employees should feel that their work makes a difference to the organization’s achievements. Personal

15. Id. at 97.
16. Id.
17. Id.
18. See id. at 99.
19. Id.
20. Id.
21. Id. at 104.
22. Id.
23. Id. at 116–17.
24. Id. at 119–20.
25. Id. at 127.
pride in one’s job is the key to engendering teamwork. After all, employees “want to feel as though they are making a positive impact in the world.”\textsuperscript{26} Meaningful work contributes to this existential goal. Pride involves “employees’ belief that their work has special meaning.”\textsuperscript{27} Employees should feel that, by utilizing their special skills, they are also making unique contributions to the organization and the world at large.\textsuperscript{28} When employees embrace this sense of investment, they will make certain that they get the job done—and done well.\textsuperscript{29}

\textsuperscript{¶}16 How do leaders fashion such pride and loyalty? According to the authors, leaders should “Build Pride at Every Turn,” perhaps by sharing lunch with employees, or by publicizing the achievements of individuals.\textsuperscript{30} In addition, administrators can “Support a Boundary-Less Organization” by emphasizing the collective good.\textsuperscript{31} Consequently, leaders must “set the tone” so that the personal pride of employees may be realized.\textsuperscript{32} If you just think “Google,” you will understand ways in which personal pride can be cultivated and displayed in a nurturing workplace. In addition to its marvelous campus and free employee lunches, Google encourages and values employee creativity. After all, the employees are the true masterminds behind the organization; they generate the ideas and products for which Google is deservedly famous. Google employees are the company, and they take great pride in it.\textsuperscript{33}

\textsuperscript{¶}17 Finally, the fifth, easily recognizable attribute in the authors’ schema is camaraderie. Burchell and Robin summarize camaraderie as the sense that “[t]he people here are great!”\textsuperscript{34} What, more precisely, does this mean? The authors describe it in this way: “In great workplaces, people believe their coworkers see them as complete individuals, with families and hobbies and passions outside of work,” saying that employees “see themselves as one large team, and they go out of their way to cooperate and help.”\textsuperscript{35} The leader’s role here is to foster the relationships that lead to camaraderie. There are three principal components to this task: intimacy, hospitality, and community. “Intimacy” suggests that coworkers feel that they can be genuine and dispense with false workplace personae. When a cohort is cohesive, it follows that coworkers will want to spend time together and to celebrate significant events.\textsuperscript{36} Leaders can contribute to this camaraderie by celebrating along with their employees.\textsuperscript{37}

\textsuperscript{¶}18 “Hospitality” is the next step in creating camaraderie in the workplace. Hospitality consists of “friendliness and fun in the work environment.”\textsuperscript{38} Employees

\begin{enumerate}
\item \textsuperscript{26} \textit{Id.} at 129.
\item \textsuperscript{27} \textit{Id.} at 131.
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} \textit{Id.} at 137.
\item \textsuperscript{30} \textit{Id.} at 145.
\item \textsuperscript{31} \textit{Id.} at 146.
\item \textsuperscript{32} \textit{Id.} at 147.
\item \textsuperscript{33} \textit{Id.} at 131.
\item \textsuperscript{34} \textit{Id.} at 155.
\item \textsuperscript{35} \textit{Id.}
\item \textsuperscript{36} \textit{Id.} at 158
\item \textsuperscript{37} \textit{Id.} at 159.
\item \textsuperscript{38} \textit{Id.} at 162.
\end{enumerate}
should enjoy their environment and feel welcome in it. Administrators can facilitate these components of a “Great Place to Work” by providing a welcoming orientation program for new employees. Moreover, managers can encourage existing employees to welcome new colleagues by inviting them to lunch or spending extra time with them.

¶19 To create and extend hospitality in the context of the law library, leaders can regularly sponsor informal gatherings in the library, in addition to conducting orientation for new employees. Light breakfasts and lunches promote camaraderie, as do frequent parties. Library leaders can encourage celebrations of birthdays and “fun” holidays such as Halloween and Mardi Gras. Gatherings such as these enable library employees and leaders to relax and enjoy one another’s company. Furthermore, such get-togethers promote a valuable sense of community, which promulgates employee investment in the library’s and institution’s missions.

¶20 Finally, a sense of community is essential in a desirable workplace. While I am not altogether certain that this category adds anything new to the argument advanced thus far, the authors clearly think it does, and so they explain once again the nature and function of community. They insist that employees “feel a broader sense of team, and that everyone is working together to create a great product or provide a great service.”

Leaders can encourage community by introducing employees to members of other departments within the organization, and, in this way, provide a sense of the organic operation of the organization. “The more employees understand the work of different departments, divisions, and locations, the more they are able to view them as part of an organization-wide team, instead of groups competing for resources and recognition.” To encapsulate all of this managerial wisdom, Burchell and Robin again offer a useful checklist of implementation strategies to assist leaders in their endeavors to transfer these skills from the page to the organization itself. As previously noted, the checklists are invaluable because they distill concepts and provide practical measures for administrative success.

¶21 Having unpacked the precepts set forth by Burchell and Robin in The Great Workplace, I must say that there are no surprises here. As appears to be the case in many, if not all, management books, the analysis seems to be a function of common sense. After all, what leader or employee would argue against the need for credibility, respect, fairness, pride in doing one’s job well, and camaraderie in well-nigh every workplace? But the devil is in the details, and what Burchell and Robin manage to do brilliantly is to draw our attention to the ideals toward which we should aspire, but also to some practical means of cultivating them in our own organizations—libraries.

39. Id.
40. Id. at 164.
41. Id.
42. Id. at 169–70.
43. Id. at 168.
44. Id. at 169–70.
45. Id. at 174–75.
At the very least, during our quest for nirvana, we can take practical steps, such as spending more quality time with our professional and staff colleagues, perhaps by providing formal recognition of their accomplishments, or, better still, by offering free food! We can also easily promote enhanced understanding of how the overall library functions and what we might do collectively in order to augment that functionality. None of this can be accomplished, however, without deliberate and consistent understanding of our goals and enlightened behavior contributing to their fruition. Library leaders, you have nothing to lose but personnel problems!
Ms. Gabriel reflects on a recent article discussing the failure of the law librarian profession to affirmatively address the lack of diversity within its ranks. Despite overall efforts to diversify legal education and the practice of law, the continuing systemic inaction of the law librarian profession to address the lack of diversity among law librarians may pose a risk to the future relevancy of the profession within the larger changing world of the practice of law.

¶1 Alyssa Thurston’s recent article on diversity in law librarianship revisited several reasons for the continuing lack of ethnic diversity in the profession.¹ Many of the reasons she articulated echoed larger problems within the legal profession. Unfortunately, part of me believes that diversity will continue to be an ongoing struggle for the foreseeable future; statistical projections do not indicate any significant change in the number of diverse individuals entering the field of law librarianship.

¶2 I suspect that much of what Thurston addressed in her article regarding the lack of diversity in job candidates,² the issues faced in trying to establish a formalized diversity recruitment program within AALL,³ and several other factors surprised very few librarians of color. As I have noted before, there is no way to ascertain precisely how many law librarians of color there are.⁴ While academic law librarians overall are a small group, significantly smaller is the number of librarians who are part of the historically designated categories classified as “minority” librarians. For example, in the 2011–2012 directory of members, only 238 self-selected into the list of minority librarians.⁵
¶3 There is no denying that we keep coming back to the same themes that were stated so openly in Thurston’s article and that have been discussed for more than a decade by others. ⁶ There has not been a substantial shift in the profession reflecting the larger diversity of the U.S. population as a whole. I agree with Thurston’s assessment that a variety of factors have led us to the state of the profession as it is today, and perhaps the publication of her article may reenergize the conversation around diversity. A frank discussion about how diversity could be improved within the profession is imperative, and a conviction to commit the resources to address the issue by the AALL would be a welcome accompaniment.

¶4 In her conclusion, Thurston touches upon the idea that “[p]romoting racial and ethnic diversity in law librarianship is just one way to help shape the profession’s future.” ⁷ I would add that diversity should not only be promoted, but also incorporated into the foundation of values that AALL adopts going forward. Thurston’s article discussed racial and ethnic diversity, which can certainly help frame the conversation. But I would suggest that diversity in the broadest sense, of including minority voices of all types that are not defined simply by singular traits of race or gender, may be critical to shaping the future of the profession as a whole.

¶5 This may seem a radical idea to some, but it is worthwhile to step back and consider it within the context of the larger state of affairs in the United States in 2013. We have had the groundbreaking election—and reelectio of an African American President, an increasing turn toward globalization concerns in the legal marketplace, recent economic hardships, and statistical evidence that the racial “minorities” in the United States will become the majority within a generation. All of those elements have certainly played a part in refocusing attention on diversity. Add to them a generation of Millennials who have grown up with the concept and language of diversity as part of their everyday lives, ⁸ and the necessity of contending with issues surrounding acceptance and tolerance of individuals from a variety of backgrounds becomes clearer.

¶6 Besides the inevitable change of the future workforce, why is it so important that we push forward a broad idea of diversity? People tend naturally to drift toward people they recognize, or seek out those whom they may have gotten to know through personal or professional activities. But absent those options, people will look for others with whom they have something in common, something that they can see. I have to confess that it is a bit disheartening to walk into a ballroom full of members of our profession and to see very few people who look like me. Having people there who look similar to me, even if I don’t know them, is akin to walking into the ALL-SIS reception, where I know that everyone present is involved in academic law libraries. Before I even walk into the reception I have the feeling that I am part of that group, based on where I work and how I have identified

---

264 LAW LIBRARY JOURNAL Vol. 105:2 [2013-13]

---

2013, 12:08 p.m.) (on file with author). Thus, self-selecting minority librarians constitute 5.68% of active membership.


7. Thurston, supra note 1, at 381, ¶ 60.

myself, which reassures me that I can reach out and find something in common with any individual there.

¶7 More often, though, I walk into sessions and meetings at the Annual Meeting, and it is readily apparent how few librarians of color there are—a distinct contrast with my experiences in my life outside of work. It is even more jarring when the Annual Meeting takes place in a city I know is diverse, such as Philadelphia—immediately upon entering the convention center I have a very real sense that diversity stops at the door.

¶8 With one exception, everywhere I have ever worked or studied prior to my current place of employment has provided this same experience. The exception was the historically black law school I attended. I realized a few months into the program how grateful I was to be there. With a critical mass of minority students, there were no constant reminders that I was different from everyone else in class. I wasn’t always censoring myself to ensure I wasn’t misunderstood, or fearful that I might be. It didn’t matter that the shades of color were different in the classroom; what mattered was that I was always surrounded by them. I could see people pursuing a variety of interests and causes that fascinated and inspired me, which was especially crucial because I had had limited experience with lawyers of color. Studying, working, and connecting with so many folks who were not mirror images of the larger group of lawyers I saw outside of the school’s walls was comforting in a way I didn’t fully understand until years later.

¶9 By seeing what other persons of color are doing in their lives professionally, and perhaps also personally, to succeed in their chosen arenas gives others the impetus to explore those same options. It is certainly not a phenomenon unique to minority communities, as every day each of us finds ourselves part of different groups gathered around a common theme, whether it is based on a social, cultural, or other type of interest.

¶10 The feeling of community based on diversity is a powerful one and one that I hope majority librarians and the profession start to understand, just as legal education is finally starting to see the merits of diversity—if for no other reason than that the globalization of the practice of law demands it. In addition, the growing minority, which within a generation will be the majority, will likely force a recognition of the power of the nonwhite population.

¶11 The growing interest in diversity in legal education is reflected in the establishment of initiatives aimed at increasing the number of minority candidates within law schools. Such initiatives will likely be given even more attention in the coming decade as law schools try to recover from a devastating economic downturn that has brought smaller class sizes and increasing scrutiny of how attorneys are trained. Many schools will rework their programs to increase the number of indi-

---

9. See Thurston, supra note 1, at 375, ¶ 45.
individuals coming to their institution and to address criticisms that they are still failing to train lawyers who are ready to practice upon graduation. Law schools are also being expected to educate students about jobs that exist beyond the traditional niches of law firms or government, including many in underserved minority communities with a tremendous need for legal services. Law schools will need to find new and more effective ways to recruit and train minority candidates, as such candidates may not attend law school with the traditional career path in mind.

§12 When these minority students arrive, will they be comfortable coming to a library where no one they see looks like them? Will they see the work being done by a librarian and consider it a possible option as a career if the traditional practice of law doesn’t appeal to them? In my work, I have noticed that new students of color will often approach me even when there is another competent librarian on reference duty.

§13 Seeing me working in the library gives these students someone they can relate to because I look like them, making that first step in an unfamiliar process easier to take. Once a relationship has been established, it then becomes easier to introduce them to other librarians and reassure them that their research needs can be met by any of us. In that sense, diversity among librarians helps to build the value of the library, of the services we offer, and of the profession. My presence makes it possible for them to seek assistance from someone who has visible commonalities with them, reminds them of a potential career option, and reinforces our profession’s value to them in their future as practicing attorneys.

§14 It is fairly easy to visualize the negative impressions that might arise about a law school that has a sizable minority student population and no faculty members of color. For those of us who teach legal research either formally or informally, I believe that the arguments for having diverse individuals working with student populations within the library are just as compelling as the ones that justify diversity among the larger faculty, or within the legal profession as a whole.11

§15 Given the current increase in minority populations and the stagnant efforts to systemically recruit diverse candidates into the law librarian profession, I think our profession is in danger of ceasing to be relevant to future lawyers and law students who come from diverse backgrounds. Perhaps just as significantly, law librarians may come to be viewed negatively by their institutions, who may see a library that does not reflect their new reality in the makeup of its staff or in the approach it takes to services.

§16 If there is one maxim I have tried to communicate across my columns, it is that the value that embracing diversity can add to the workplace is not simply one

11. Significant legal scholarship exists addressing the need for diversity within legal education as well as the legal profession. See, e.g., Michelle J. Anderson, Legal Education Reform, Diversity and Access to Justice, 61 Rutgers L. Rev. 1011 (2009) (discussing the “whiteness” of the legal profession and the efforts to address the issue at CUNY School of Law); Kevin R. Johnson, The Importance of Student and Faculty Diversity in Law School: One Dean’s Perspective, 96 Iowa L. Rev. 1549, 1550 (2011) (“[D]iversity and excellence are inextricably interrelated, mutually reinforcing, and well worth striving for by any law school worth its salt.”); Sarah E. Redfield, The Educational Pipeline to Law School—Too Broken and Too Narrow to Provide Diversity, 8 Pierce L. Rev. 347 (2010); Eli Wald, A Primer on Diversity, Discrimination, and Equality in the Legal Profession, or Who Is Responsible for Pursuing Diversity and Why, 24 Geo. J. Legal Ethics 1079 (2011).
that is reflected in statistical numbers, and it is not just a goal to strive for because it is politically correct. Rather, diversity is worth pursuing for the broad range of experiences, ideas, and approaches it gives a group. Thinking about, acknowledging, and applying ideas from a multitude of approaches to incorporating diversity allows us to gather more potential solutions to a problem, opportunities to offer a service, or ways to promote the intrinsic worth of the library as a whole. Discussions about how to include awareness about diversity do not just assist in managing diverse candidates, but also help to manage all individuals in a manner that recognizes the differences and strengths of each employee.

¶17 Librarians as a whole frequently bemoan the lack of respect for the profession, and law librarians are no exception. We worry about whether or not we can survive layoffs and the movement of services overseas. We continue to complain about vendors, decreasing budgets, and increasing responsibilities. We worry about myriad future possibilities and constantly try to figure out how we can be more relevant to our organizations.

¶18 I suggest that we turn some of that considerable energy to a problem we have known about for decades and that we have collectively chosen to ignore for a long time. We should make a concerted effort to improve diversity in the profession, thereby bringing law librarianship into line with what legal education is trying to do as well. We should embrace the notion that a diversity of ideas within law librarianship, represented by individuals or groups or new ways of thinking, is healthy to the profession and, in fact, needs to be pursued in order to refresh it.

¶19 As the practice of legal education changes, we should demonstrate that we are willing to change as well. We should rewrite traditional definitions of what a law librarian should or should not do to better reflect the changing demographics of the country as well as how and where legal services may be needed, and we should take a closer look at how we are perceived by the legal profession and within the overall field of librarianship.

¶20 For example, scholars in other professional fields have looked into why there has been a shortage of minorities within their professions, and several have found that the ability of minority students to identify with role models or mentors who look like them has a positive effect on students’ development. In turn, this may lead students to consider pursuing a particular professional field. These types of in-depth reviews by scholars show an approach that has rarely been examined with sustained interest within the law librarianship profession.

¶21 It may very well be that the low number of minority librarians within the profession as a whole has prevented any momentum beyond what has already been discussed in bits and pieces throughout the professional literature and which very often repeats the same refrain. Or it could be that without sustained financial support by AALL to fund exploration of ways to increase minority membership, the advancements that can be achieved are severely limited.

¶22 AALL must take a leadership role in encouraging the type of scholarship that has been undertaken in other fields to examine how minority librarians entered the profession and what factors influenced their decisions. It would be useful to know how many minority librarians hold middle or senior management positions at their organizations, and to compare their job descriptions, levels of compensation, and satisfaction at their place of employment. It might be just as helpful to determine which factors minority librarians feel impede their professional growth at their place of employment, or within AALL. At the very least, AALL should take steps to determine how many members of minority groups belong to the organization. Doing so will allow AALL to establish how the percentage of minority law librarians compares to the percentage of minorities in the library profession as a whole, in the population of lawyers, and in the population of law students, in order to learn how large a gap there may be between law librarians and other groups. All of these factors could help structure potential research for future scholars. If the information were gathered by AALL, this would also signal a more concrete commitment to increasing the number of minority librarians within the profession.

¶23 Diversity is not something that should be vested in a single committee, advocated for in a few papers, or symbolized by select individuals. It is more than making weak periodic attempts to revisit it in various ways that are comfortable for the majority simply because that is the way it has always been done. An approach to diversity and an active recognition of it should be woven throughout how we approach staffing or working within our organizations, what we as a community make a priority, and how we recruit the next generation of law librarians. By understanding that a worthwhile goal for the profession is to promote and accept diversity by challenging the status quo, we open ourselves to a reexamination of what we do, why we do it, and how we can make it better.

¶24 Diversity, as I mentioned in my first column, is a collective effort.13 I am hoping it is finally time, three years after I began writing this column, for us to start moving.

---