Should the Supreme Court Read *The Federalist* but Not Statutory Legislative History?

William N. Eskridge, Jr.*

A key doctrinal debate in statutory interpretation today revolves around the claim that courts should almost never consult and never rely on internal "legislative history" when they construe statutes.[1] A key doctrinal debate in constitutional interpretation today revolves around the claim that courts are bound by the original understanding of the Framers when they construe the Constitution.[2] An oddity about these parallel debates is that the Supreme Court Justices most critical of considering pre-enactment legislative debates in statutory cases are the most insistent that ratification debates be considered, and often be decisive, in constitutional cases. Those Justices are Antonin Scalia and Clarence Thomas, semanticists in statutory cases, but historicists in constitutional cases.[3] In contrast, Justices John Paul Stevens, Sandra Day O'Connor, and David Souter examine historical debating materials in both kinds of cases.

Justices Scalia and Thomas operate under an approach to public law that is philosophically positivist and doctrinally textualist. They claim that courts are duty-bound to apply the plain meaning of statutory and constitutional texts, and not to depart one iota from their commands, even when to do so would appear fair and just. Because theirs is a freshly articulated and innova-

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* Professor of Law, Georgetown Law Center. I am grateful to Stephen Williams, John Manning, and Ira Lupu for their oral comments on this paper at *The George Washington Law Review's* Symposium on Textualism and the Constitution, and to Robert Condlin, William Reynolds, Jana Singer, Marley Weiss, and other participants at a University of Maryland School of Law workshop where I presented an earlier draft of this article. This article does not respond to the written commentaries by Williams, Manning, and Lupu, however.

1 Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 16-23, 29-37 (Amy Gutmann ed., 1997).

2 *See id.* at 37-47.

3 Although this Article treats Justices Scalia and Thomas as agreeing on the general precepts in text, they are not in full agreement, as Judge Stephen Williams pointed out at the Symposium on Textualism and the Constitution at the George Washington University Law School. Audio tape of Symposium on Textualism and the Constitution, held by *The George Washington Law Review* (Feb. 13-14, 1998) (on file with *The George Washington Law Review*). Justice Thomas, for example, does not join Justice Scalia's insistence that legislative history be expunged completely from public law. *See, e.g.*, Lexicon Inc. v. Milberg Weiss Bershad Lynes & Lerach, 66 U.S.L.W. 4158, 4159 n.* (U.S. Mar. 3, 1998) (No. 96-1482) (Justice Thomas, but not Justice Scalia, joining the Court's discussion of legislative history); National Credit Union Admin. v. First Nat'l Bank & Trust Co., 66 U.S.L.W. 4134, 4135 n.* (U.S. Feb. 25, 1998) (Nos. 96-843 and 96-847) (Justice Thomas authoring footnote discussing legislative history which Justice Scalia refused to join). Notably, Justice Scalia, but not Justice Thomas, declined to join that part of the Court's opinion in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), that discussed the drafting history of the Fourteenth Amendment. *See id.* at 2164-66 (holding the Religious Freedom Restoration Act to exceed Congress's enforcement powers).

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tively defended version of a traditional approach to law, I refer to these Justices as the "new textualists."[4] Although their approach to public law is unquestionably text-based, Justices Scalia and Thomas freely recognize that context is important to the proper interpretation of text. The puzzle posed by this Article is that the new textualists, particularly Justice Scalia, refuse to consider the debating history of statutes as relevant context but do consider such history of the Constitution and its amendments, sometimes in great detail.[5] Because the new textualists are formalists, the apparent incoherence of this use of context requires particular justification. The remainder of the Article is an examination of possible justifications.

For example, Justice Scalia argues that *The Federalist* can inform constitutional interpretation by enabling judges to understand the context in which the Constitution was adopted. *The Federalist*, however, may not be taken as authoritative statements of the Framers' intent. Because received meaning (the original understanding, which in Justice Scalia's view is appropriate) is hard to distinguish in practice from intended meaning (intent, which Justice Scalia views as inappropriate), this distinction is not practically useful. Nor does this argument distinguish constitutional drafting and debating history from statutory drafting and debating history.[6] Both kinds of debating history can be used as evidence of various kinds of original intent or, in the term preferred by the new textualists, meaning—specific, general, and semantic. Are the new textualists consigned to formalist hell because they can point to no authoritative reason for their discriminating practice toward historical materials?

Several other bases, not yet invoked by the new textualists, potentially support their practice of ignoring statutory legislative history but carefully considering constitutional drafting history and ratification debates.[7] These reasons are suggested by the structural differences between ordinary statutes and the extraordinary Constitution: the former are much easier to amend than the latter, and an ongoing institution, namely Congress, is charged with the former's updating.

Because constitutive documents deliberately are made hard to change, the Constitution is more open-textured, abstract, and process-oriented than statutes. Original context is more useful, and even necessary, for interpretation of such an ancient document than for interpretations of the more targeted, concrete, and substantive statutes, most of which have been enacted or comprehensively revised in the last couple of generations. Moreover, because statutes are easier to change than the Constitution, a judicial interpretation that slights legislative expectations does potentially less harm than one that slights constitutional expectations.

Both legislative history and constitutional history are strategic: players make statements with an eye on how other people will respond to them. In this century, legislative history has become strategic in another way: players

4 *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 666 (1991).

5 *See infra* notes 10-59 and accompanying text.

6 *See infra* notes 60-85 and accompanying text.

7 *See infra* notes 86-106 and accompanying text.

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make statements with an eye on how judges will construe their statutes. Legislative history, therefore, has become less revealing of original deals. Moreover, the Court has an obligation to create rules of interpretation that discourage this second-order strategic behavior in future Congresses. A rule of total exclusion is the only kind of rule that might do the trick.

Because the Constitution is harder to amend and the Framers were not an ongoing institution like Congress, constitutional history is more static than legislative history. The cost of legislative history for our system of law is enormous and continues to grow. Once judges started citing legislative history, agencies, academics, and counsel for private parties felt compelled to research the history. This practice in turn fuels the impulse to stuff more and more legislative history into legislation. An exclusionary rule may be the best way to halt this spiraling inefficiency.

These arguments are tentative, and Part III suggests problems with each argument. All I claim is that these kinds of defenses are the best justifications for the new textualists' willingness to credit *The Federalist*, even as they scorn legislative history.

I. The Apparent Inconsistency: The Federalist, *Yes; Legislative History, No*

Justice Scalia's Tanner Lectures at Princeton University articulate a textualist approach to statutory interpretation that is subtly but discernibly different from the same jurist's textualist approach to constitutional interpretation.[8] Scalia vigorously criticizes approaches to statutory interpretation that focus on "legislative intent" or "just results" as their lodestar.[9] He agrees with Justice Oliver Wendell Holmes's comment on statutes: "I don't care what their [the legislators'] intention was. I only want to know what the words mean."[10]

Justice Scalia contrasts his textualist philosophy with the Supreme Court's decision in *Church of the Holy Trinity v. United States*.[11] In *Holy Trinity Church*, an 1885 statute prohibited anyone from contracting with an "alien" to pay his transportation to the United States "to perform labor or service of any kind."[12] The statute excepted from its prohibition actors, lecturers, and domestic servants.[13] Although Holy Trinity Church had paid the way for Reverend E. Walpole Warren to come to the United States to serve as pastor of its congregation, the Supreme Court in 1892 created an additional exception to the statutory prohibition for Christian ministers and, in dictum, for other "brain toilers."[14] The Court conceded that the church's

8 Justice Scalia's Tanner Lectures were published with commentaries and responses by the author as ANTONIN SCALIA ET AL., A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

9 Scalia, *supra* note 1, at 16-23.

10 *See id.* at 22-23 (Scalia endorsing Oliver Wendell Holmes' view of statutory interpretation).

11 143 U.S. 457 (1892).

12 *Id.* at 458.

13 *See id.* at 458-59.

14 *See id.* at 464.

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importation of Warren fell within the plain meaning of the statute, accepting arguendo that a minister is performing "labor" or "service" of some kind.[15] The Court departed from the statutory plain meaning to accommodate the statute's purpose, or "spirit," as Justice David Brewer's evangelical opinion put it.[16] Scalia argues that this reasoning was backwards: "Well of course I think that the act was within the letter of the statute, and was therefore within the statute: end of case."[17]

The Court in *Holy Trinity Church* divined the statutory spirit, in part, from committee reports accompanying the 1885 legislation.[18] The reports asserted that the proposed law was only aimed at manual workers and not "brain toilers."[19] The report of the Senate committee lamented that the limitation would have been more explicit had there been time for amendment.[20] From Scalia's point of view, the Court's invocation of legislative history compounds the Court's error in departing from textual plain meaning. "My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning."[21]

Elsewhere in the lecture, Scalia argues that statutory legislative history is an unreliable and excessively costly basis for gauging legislative intent.[22] Even if there were such a thing as "legislative intent," the debating history of statutes would not accurately reflect it. Even if legislative history could sometimes reveal a legislative intent not revealed by the text of the statute, the overall costs of such research to the legal system greatly outweigh its potential benefits. Scalia indicates that one of the costs of legislative history is that it increases the range of judicial discretion. "In any major piece of legislation, the legislative history is extensive, and there is something for everybody. As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends."[23]

In a brief concluding section, the Tanner Lectures criticize theories of the "Living Constitution."[24] The goal of constitutional interpretation, Scalia says, is to determine "the original meaning of the text."[25] To accomplish that, Scalia insists that contemporary sources, including and especially Hamilton's and Madison's writings in *The Federalist*, be consulted.[26] Although he denies any material difference, Scalia's position on constitutional interpretation is differently focused from his position on statutory interpretation. If the for-

15 *See id.* at 458-59.

16 *See id.* at 459 ("It is a familiar rule, that a thing may be within the letter of the statute, because not within its spirit, nor within the intention of its makers.").

17 Scalia, *supra* note 1, at 20.

18 *See Holy Trinity Church*, 143 U.S. at 464-65.

19 *See id.*

20 *See id.* at 464.

21 Scalia, *supra* note 1, at 29-30.

22 *See id.* at 31-37.

23 *Id.* at 36.

24 *See id.* at 41-47.

25 *Id.* at 45.

26 *See id.* at 38.

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mer seeks out the "original meaning of the text" and emphasizes then-contemporary understanding of the words of the Framers, the latter denies relevance to contemporary legislative debates and says, "I don't care what [the legislators'] intention was. I only want to know what the words mean." Although both are text-based approaches, the former suggests a more historicist focus in constitutional cases, the latter a more semantic one in statutory cases.

This close examination of the Tanner Lectures suggests the hypothesis that Scalia's textualism is more semantic and less historicist in statutory cases than it is in constitutional cases. To illustrate this potential nuance, it is helpful to contrast Scalia's constitutional analysis in *Printz v. United States*,[27] where he wrote for the Court to invalidate the Brady Act's requirement that local law enforcement officers help administer the federal law's background checks, with his statutory analysis of the imported pastor issue in *Holy Trinity Church*.

In *Printz*, Scalia found "no constitutional text speaking to this precise question," whether the federal government was prohibited from commandeering state or local law enforcement officers to help administer a federal statutory scheme.[28] Although the normal rule in the absence of a "constitutional text speaking to this precise question" is that Congress can regulate issues within its constitutional jurisdiction, such as interstate commerce, Scalia found a constitutional limitation in "the historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."[29] To determine the historical understanding and practice, Scalia relied strongly on *The Federalist*.[30] The contrast between Scalia's methodology in *Printz* and his analysis of *Holy Trinity Church* is striking and can be generalized.

Scalia's inquiry in *Printz* is strongly historical, asking the question, What did this text signify to people of the time? In contrast, Scalia's analysis of *Holy Trinity Church*, which construed a 100-year-old statute, is completely ahistorical and shows no interest in what the statutory command—not to import aliens for "labor or service of any kind"—would have meant to the people of the time in the context of national immigration policy.[31] Scholars should be tentative about generalizations, but this contrast thus far has been typical of Scalia's jurisprudence. His many opinions interpreting older statutes show only occasional interest in how contemporaries would have under-

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27 117 S. Ct. 2365 (1997).

28 *Id.* at 2370 (Scalia, J.).

29 *Id.*

30 *See id.* at 2372-79.

31 In fact, there is good reason to think that such language in 1885 might have suggested manual workers and not brain toilers such as the Holy Trinity pastor. *Compare* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. (forthcoming May 1998) (arguing that there is some semantic ambiguity in the alien contract labor statute, given dictionary definitions and semantic practice in 1885, when the statute was enacted), *with* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. (forthcoming July 1998) (arguing that there is little or no textual ambiguity in the alien contract labor statute).

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stood the statutory terms,[32] while those interpreting the Constitution relentlessly focus on historical understanding.[33]

The most striking discontinuity between Scalia's constitutional and statutory analyses is the role of a provision's drafting and debating history. The most doctrinally distinctive feature of Scalia's statutory jurisprudence is the sweeping rejection of legislative history. Scalia almost always considers the legislative discussion prior to a statute's enactment unworthy of discussion or consideration. This is apparent not only in cases where Scalia writes for the Court or dissents from the Court's judgment, but is particularly prominent in cases where Scalia agrees with the Court's judgment. If the opinion for the Court relies on legislative history *in any way*, Scalia will typically concur only in the judgment, often with a pointed critique of the majority's misguided reliance on legislative history. "The text's the thing. We should therefore ignore [statutory] drafting history without discussing it, instead of after discussing it."[34] Because Scalia takes this approach even when the majority is not invoking legislative history as authoritative, his practice is sometimes a more thorough rejection of legislative history than that advocated in the Tanner Lectures. In the 1996 Term, for example, Scalia went so far as to refuse to join a footnote of an opinion that he otherwise joined completely. This offending footnote merely said "[w]e give no weight to the legislative history" and briefly explained why.[35]

In contrast to this dismissive stance, Scalia in constitutional cases generally, and sometimes extensively, discusses the debating history of the Constitution. In *Printz*, Scalia's opinion carefully considered and vigorously

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32 Most of Scalia's celebrated statutory interpretation opinions reveal a substantial disinterest in historical inquiry. *Compare* MCI v. AT&T, 512 U.S. 218, 225-29 (1994) (Scalia, J.) (mainly discussing current dictionary definitions of the term "modify" used in the Communications Act of 1934 but mentioning a pre-1934 dictionary as well), *with* Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 657-77 (1987) (Scalia, J., dissenting) (strongly dogmatic view that "discriminate" as used in Civil Rights Act of 1964 includes affirmative action, but referring to no contemporary (circa 1964) source supporting that view). Other opinions, however, are substantially interested in such historical inquiry. *See, e.g.*, Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 744-47 (1996) (Scalia, J.).

33 *See, e.g.*, City of Boerne v. Flores, 117 S. Ct. 2172-76 (1997) (Scalia, J., concurring in part); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (Scalia, J.); Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting); Morrison v. Olson, 487 U.S. 654, 697-99 (1988) (Scalia, J., dissenting).

34 Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 283 (1996) (Scalia, J., concurring in part and concurring in the judgment) (recognizing federal court jurisdiction over interbank disputes). For additional concurring opinions authored by Justice Scalia, see, for example., Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 219 (1994) (Scalia, J., concurring); Conroy v. Aniskoff, 507 U.S. 511, 518 (1993) (Scalia, J., concurring); United States v. Thompson/Center Arms Co., 504 U.S. 505, 519 (1992) (Scalia, J., concurring); Begier v. IRS, 496 U.S. 53, 67 (1990) (Scalia, J., concurring); Sullivan v. Finkelstein, 496 U.S. 617, 631 (1990) (Scalia, J., concurring); Blanchard v. Bergeron, 489 U.S. 87, 97 (1989) (Scalia, J., concurring); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring); United States v. Taylor, 487 U.S. 326, 344 (1988) (Scalia, J., concurring); INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring).

35 Associates Commercial Corp. v. Rash, 117 S. Ct. 1879, 1882 n.* (1997) (holding creditor's bankruptcy claim was limited to value of collateral). Scalia joined the entire opinion except for footnote four. Note that Thomas joined the Court's opinion without this reservation.

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disputed the dissenters' deployment of *The Federalist* to support their view that the Constitution says nothing about commandeering, even in the much-invoked but ultimately truistic Tenth Amendment, and also requires federal statutes to be the "supreme law of the land," binding directives for state administrators as well as state judges.[36] In Scalia's view, the Framers and most of the public assumed that the federal government did not have the power to deploy state officials to carry out federal statutory schemes.[37] Scalia's opinion affirmatively relied on *The Federalist* to establish that the Constitution was meant to prohibit such deployment, both as specifically understood by at least one framer[38] and as generally understood from the constitutional principle or spirit of dual sovereignty.[39] *Printz* is a high-water point for Scalia's use of *The Federalist*, because the specific constitutional texts of the Commerce Clause, the Necessary and Proper Clause, and the Supremacy Clause supported the dissenters and had to be explained away. Scalia's previous constitutional opinions have often and enthusiastically invoked those sources.[40]

The views and practices I have attributed to Justice Scalia are not completely applicable to Justice Thomas, who has often but not always joined Scalia's attacks on statutory legislative history. Thomas is, moreover, an even more enthusiastic consumer of pre-enactment sources in constitutional cases. For an example of the former point, Thomas recently wrote the opinion for the Court in *National Credit Union Administration v. First National Bank & Trust Company*.[41] As to the issue of whether the respondent banks fell within the "zone of interests" meant to be protected by the Federal Credit Union Act, Thomas focused on the statutory plain meaning, which he found supported by the legislative history.[42] Scalia joined the rest of the opinion but pointedly refused to join the footnote relying on legislative history as secondary support for the Court's holding.[43] As to the merits of the case, Thomas emphasized only textual arguments and found the legislative history too "murky" to be relevant.[44]

The best example of Thomas's enthusiasm for pre-enactment constitutional materials is his dissenting opinion in *U.S. Term Limits, Inc. v. Thornton*.[45] Thomas canvassed *The Federalist* and other sources of the Constitution's drafting and ratification debates to argue that Arkansas retained the authority to impose term limits on its representatives to Con-

36 Printz v. United States, 117 S. Ct. 2365, 2373-75 (1997) (Scalia, J.).

37 *See id.*

38 Scalia named Madison even if not Hamilton, who was an unrepresentative Framer on this issue, in Scalia's view.

39 *See id.* at 2376-79 (determining "essential postulate[s]" of the Constitution, Justice Scalia invoked *The Federalist* ten times, five of which were direct quotes).

40 *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (Scalia, J.); Morrison v. Olson, 487 U.S. 654, 697-99 (1988) (Scalia, J., dissenting).

41 66 U.S.L.W. 4134 (U.S. Feb. 25, 1998) (Nos. 96-843 and 96-847)

42 *See id.* at 4138 n.6.

43 *See id.* at 4135 n.*. Because the Court was divided 5-4, Scalia's refusal to join the footnote meant that Thomas delivered the opinion of the Court for all issues except for those addressed in footnote six. *See id.* at 4135.

44 *See id.* at 4141 n.10. Scalia joined note 10.

45 514 U.S. 779, 845-926 (1995) (Thomas, J., dissenting). Scalia joined this dissent. *See id.* at 845 (Thomas, J., dissenting).

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gress.[46] The opening portion of the dissenting opinion argued that, because the national government exists only with the consent of the state governments, the states presumptively retain any sovereign authority not expressly denied them by the Constitution itself.[47] Although this argument was said to be derived from the structure of the Constitution, Thomas's key evidence—his smoking gun—was Madison's *The Federalist* No. 39, which said that the consent upon which the Constitution's authority rests was "given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong."[48] Throughout his dissenting opinion, Thomas relied on *The Federalist* and other reports of the state ratification debates to make his case for the retention of state authority and to refute the majority's use of such evidence to suggest that the Framers assumed the states did not retain such authority.[49]

Particularly for Scalia and more weakly for Thomas, the new textualist practice reveals more strikingly the tension suggested in the Tanner Lectures: the biggest consumers of *The Federalist* and other pre-enactment constitutional history will not even read pre-enactment legislative history of statutes. This initially strikes me as a serious inconsistency. All of Scalia's criticisms of legislative history apply, at least superficially, to *The Federalist*, which (like legislative history) is not the "words" of the law, takes positions on issues that the drafters of the Constitution did not think about, and was not read by either the drafters or most of the delegates ratifying the Constitution outside New York. Indeed, the skeptical approach Scalia takes to statutory drafting and debating history would at first glance appear to justify a much more skeptical approach to constitutional drafting and debating history. Upon more systematic consideration of Scalia's approach, the problem becomes even clearer.

1. If the collective "intent" of the bicameral legislature is an incoherent concept, as the new textualists argue, the collective "understanding" of an entire nation during a constitutional moment must be even more so. After all, a statute running the legislative gauntlet only has to satisfy some portion of the 536 participants (President, 100 Senators, 435 House Members) in the process. The Constitution itself ran the gauntlet of the Philadelphia Convention and thirteen state ratifying conventions, involving thousands of people. The national "understanding" of what the Constitution meant involved millions.[50] Many of these millions were illiterate; and, even during constitutional moments, many of them were uninterested in what was transpiring in Philadelphia. How can a doubting Thomas (or Scalia) as to coherent legislative intent be a true believer in the collective understanding at the national level?

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46 *See id.* at 845-926 (Thomas, J., dissenting).

47 *See id.* at 845-46 (Thomas, J., dissenting).

48 *Id.* at 846 (Thomas, J., dissenting) (quoting THE FEDERALIST NO. 39, at 243 (James Madison) (Clinton Rossiter ed., 1961)). To support this key evidence, Thomas also invoked Madison's comments at the Virginia ratifying convention and the drafting history of the Constitution itself. *See id.* at 846 n.1 (Thomas, J., dissenting).

49 *See id.* at 878-81, 881 nn.17-18, 887-90, 890 n.20, 892-95, 898 n.23, 899-904, 909-13 (Thomas, J., dissenting).

50 Even if you don't count women, people of color, and people without property.

2. *The Federalist* is not necessarily more reliable than statutory legislative history in discerning usable collective understanding; in some respects, it may be less reliable.

(a) *The Federalist's* assertions are not necessarily representative of the views of others or even of their own authors. The authors of *The Federalist* wrote the essays for just one state's ratifying convention, New York's. No historian has rigorously established that the arguments therein were known and accepted in any other state, or even for that matter in New York.[51] Although Madison, whom Scalia and Thomas overwhelmingly cite, was also a key player at the Philadelphia Convention and the Virginia ratifying convention, his views are not any more representative of a collective understanding than the views of a legislative sponsor or a committee during congressional deliberations prior to enactment of a statute—unless Madison receives some special status because he was a Framer.[52] Because they were propaganda documents, seeking (often disingenuously) to rebut the arguments of the Anti-Federalists, some historians are reluctant to conclude that *The Federalist* even honestly reflects the views of Madison and Hamilton themselves.[53]

(b) *The Federalist* cannot be understood without exploring the larger historical context. Even if Madison's and Hamilton's essays were not strategic documents and were representative views of citizens at the time, scholars must refer to other contemporary documents and current theories of the ideological debate during the founding period to understand the essays' meanings. This would involve mastery of a massive body of scholarship that is not evidenced by either judges or many law professors at this time.[54] In *Printz*, for example, Justices Scalia and Souter sparred over the proper construction of Hamilton's *The Federalist* No. 27. Souter read this essay to defend the proposition that state officials would be "incorporated" into national programs at the discretion of Congress,[55] a reading disputed by Scalia.[56] Missing in the heated exchange was any historical context: To what Anti-Federalist argument was Hamilton responding? How did the argument mesh with Hamilton's theory of state versus national sovereignty (a terribly complicated issue but one critical to one's reading of *The Federalist* No. 27)? How widely was Hamilton's theory of sovereignty held? His views about national

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51 For a discussion on the essays as propaganda and the problems with generalizing them to represent objective meaning or subjective intent, see ARTHUR FURTWANGLER, THE AUTHORITY OF PUBLIUS: A READING OF THE FEDERALIST PAPERS (1984).

52 Scalia objects to Madison's receiving any special status. *See* Scalia, *supra* note 1, at 38. He says Jay is just as credible as Madison even though Jay was not at Philadelphia. *See id.* Although he has cited Jay's essays occasionally, I cannot name a single case in which Scalia used Jay as key support.

53 Typically in the hard constitutional cases, like *Printz* and *U.S. Term Limits*, the debating documents lead in many different directions because they were drafted by different people who saw matters differently. As to the issue of retained state power and governmental autonomy, for example, Hamilton and Madison disagreed, as Scalia suggested in *Printz*. *See* Printz v. United States, 117 S. Ct. 2365, 2375 n.9 (1997).

54 The scholarship is impressively surveyed, analyzed, and made relevant to originalist debates in Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

55 *See Printz*, 117 S. Ct. at 2402 & n.1 (Souter, J., dissenting).

56 *See id.* at 2375 n.9 (Scalia, J.).

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supremacy? The Justices did not address the primary documents and historiographical literature addressing these issues.

(c) The issues the authors of *The Federalist* need to address tend to be counterfactual situations the authors did not anticipate. Because it was written 200 years ago, and because the Constitution and the nation have decisively evolved in ways the authors did not anticipate, *The Federalist* operates upon assumptions that long ago died. To take the *Printz* issue, why should the views of Madison, who would have found the modern regulatory state inconceivable, offer guidance as to issues of modern administration, once the nature of government has changed so much?

3. To support firm normative conclusions based on history is attractive, but it is often impossible to do so in ways that satisfy professional standards of historiography. For this reason, the originalist evidence does not provide any greater interpretive closure—and hence does not constrain willful judges—in constitutional cases than it does in statutory cases. The majority opinion in *U.S. Term Limits* and the chief dissenting opinion in *Printz,* both written by Justice John Paul Stevens, the new textualists' leading counterpoint on the current Court, meet and arguably refute every historical argument made by Justice Thomas in *U.S. Term Limits* and Justice Scalia in *Printz.*[57] As the commandeering and term limits cases reveal, *The Federalist,* the records of the Philadelphia Convention, the records of the state ratifying conventions, and other sources still being published, provide "a uniquely broad playing field" of evidence as to contemporary understandings, and "there is something for everybody. As Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends."[58] Legal historians have passed harsh judgment on the Court's ability to approach historical, founding-era materials with the degree of professional detachment and thoroughness that would allow Scalia and Thomas to escape the Leventhal observation.[59]

II. False Start: The New Textualists' Unpersuasive Justification for Treating Background History Differently in Constitutional and Statutory Cases

From the foregoing discussion, it might appear that a jurist can and should consult both *The Federalist* and statutory legislative history cautiously and nondogmatically,[60] *or* should refuse to consider either because they are

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57 *See Printz*, 117 S. Ct. at 2387-94 (Stevens, J., dissenting); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995). I take no position as to who got it "right" in those cases, but the academic commentary generally agrees with Stevens and Souter. *See, e.g.,* Vicki C. Jackson, *Federalism and the Uses and Limits of Law: A Matter of Printziple?*, 111 HARV. L. REV. (forthcoming June 1998). Even some strongly conservative originalists have agreed with Souter's and Stevens' reading of the evidence. *See* Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993) (closely anticipating Souter's dissent).

58 Scalia, *supra* note 1, at 36.

59 *See, e.g.*, Flaherty, *supra* note 54, at 552-54.

60 *See, e.g.*, John Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) (posing sophisticated formalist argument for a textual approach to statutory interpretation, but one that only denies legislative history "authoritative" value).

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too unreliable or manipulable. There is no initially apparent functional reason to consider only one and not the other. Nor does a plausible formalist reason leap to my mind. As to this latter point, the Constitution may require a different approach to statutory interpretation than it requires for its own construction. Such a view faces one formal obstacle: the Court's authority to interpret statutes and to invalidate unconstitutional laws derives from the same constitutional source—Article III's conferring of the "judicial Power" on the Court to hear various kinds of cases and controversies. It is not immediately apparent how a constitutional formalist can justify reading the "judicial Power" differently in statutory interpretation and in constitutional cases. It is also unclear that contemporaries viewed statutory and constitutional methodologies as materially different.[61] Although Scalia has argued that his methodology is supported by the constitutional principle against delegation of lawmaking authority to legislative subgroups, that argument cannot be sustained generally.[62] Even friendly commentators find Scalia's reasoning to be an insufficient basis to prohibit all reference to legislative history.[63]

Scalia has also suggested that the Constitution's separation of powers and the need to control judicial discretion supports his never-look-at-legislative-history position,[64] but such an argument applies with greater force to question the new textualists' use of *The Federalist*. If the use of background history tends to increase judicial discretion, as Scalia charges, it is more worrisome in constitutional cases than in statutory cases. It is most dangerous when Justices invoke background history to create a constitutional limitation not apparent from the plain language of the Constitution, as Scalia did in *Printz*. Congress can and often does override willful judicial constructions of statutes, but it usually cannot override willful judicial constructions of the Constitution. If judicial activism—substituting judicial for legislative results—is presumptively suspect, then it is the constitutional and not the statutory interpreter who should be especially chary of relying on debating history.

Indeed, the debating history seems more relevant for interpreting recently enacted statutes, in which the legislative expectations relate to our current world. The history addresses issues sometimes still alive. By contrast, the expectations for the grand old Constitution relate to a long-departed world and address issues typically dead or altered by changed circumstances. This point has a normative dimension as well. Debating history or general

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61 *See, e.g.*, THE FEDERALIST No. 78 (Alexander Hamilton).

62 *See* Eskridge, *supra* note 4, at 650-56 (refuting Antonin Scalia, Speech on Use of Legislative History Presented at Various Law Schools, 1985-86 (unpublished speech, on file with the *University of Virginia Law Review*)). Scalia argues from Article I, § 7 and *INS v. Chadha*, 462 U.S. 919 (1983), that the views of legislative committees and sponsors cannot be viewed as binding on Congress as a whole. This argument fails for various reasons, including the fact that the limitations in Article I do not prohibit the Supreme Court from considering internal legislative materials under Article III.

63 *See* Manning, *supra* note 60, at 731-33 ("Even if the constitutional structure precludes legislative agents from declaring legislative intent, nothing prohibits them, in principle, from using legislative history to record evidence of meaning that they have not concocted simply to influence judicial interpretation and determine statutory meaning.").

64 *See* Scalia, *supra* note 1, at 35.

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background surrounding the Constitution adds context that is substantively slanted, not just toward federalism values in ways that the Reconstruction Amendments sought to offset, but also systematically against the interests of people of color (constitutional slaves in 1789), women (legal servants), poor people (nonvoters), and religious and social nonconformists (social outcasts). Subsequent amendments and judicial constructions have sought to ameliorate these contexts of constitutional law. This is a disturbing feature of the new textualism's seemingly incoherent treatment of constitutional and statutory debating history and makes it all the more urgent that they justify their stance.

The closest the new textualists have come to defending the apparent incoherence is Scalia's assertion in the Tanner Lectures that he consults Madison's and Hamilton's essays in *The Federalist* "not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood."[65] Scalia's reasoning is a weak justification for consulting *The Federalist* and is no reason to distinguish *The Federalist* and other pre-ratification constitutional sources from committee reports and other pre-enactment statutory sources.

Scalia's sharp distinction between consulting background history such as *The Federalist* because it is "authoritative" (not permissible) as opposed to because it "displays how the text of the Constitution was originally understood" (permissible and indeed required) is questionable. If there is any practical distinction between an "authoritative" source and a source that "displays how the text of the Constitution was originally understood," it is a fine one.[66] Thomas's use of Madison's *The Federalist* No. 39 at the beginning of his *U.S. Term Limits* dissent appears to be using Madison as an authority, just as it appears to Scalia, who joined the dissent without cavil, to have been evidence of original understanding. Thomas argued that the Constitution was not a social contract among the people of the *United States*, but among the *United States*.[67] The Preamble and the Tenth Amendment to the Constitution refer to "the people," which Thomas read to mean only "the people of the respective states."[68] His most direct argument for that proposition was his quotation from *The Federalist* No. 39.[69] For this proposition, central to his dissenting opinion, he cited no one else beyond Madison and gave no reason

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65 Scalia, *supra* note 1, at 38.

66 If Scalia means to say that he will not treat *The Federalist* as "law," he is making a trivial point that no one disputes. In addition, defenders of legislative history, who treat committee reports and the like as evidence of how the "law" (the statute) should be applied in a particular case concede this point.

67 *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 845-926 (1995) (Thomas, J., dissenting).

68 *See id.* at 846 & n.1 (Thomas, J., dissenting).

69 Thomas led with another argument, that Article VII provided for the Constitution to take effect among only the States that ratified it, so that it did not bind the people of North Carolina until the state ratified the Constitution. *See id.* at 846 (Thomas, J., dissenting). This point is not as direct an argument as *The Federalist* No. 39. Article VII also precluded the Constitution from having any force until nine States ratified it, suggesting that there was a na-

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to believe anyone else of the time accepted this view, aside from the implicit argument that if Madison believed it it must be right.[70]

As the foregoing example suggests, the best and perhaps only persuasive reason to suppose that Madison's *Federalist* essays provide any evidence as to "how the text of the Constitution was originally understood" derive from the "authority" of Madison as a key framer: what he said is uniquely well-informed, because he was a frequent and influential speaker at the Philadelphia Convention, took extensive notes which have been our best evidence of the Convention debates, and participated in the ratification debates of New York and Virginia; and what he said was of special significance because he was a spokesman for the Federalists seeking ratification of the Constitution. For precisely the same reasons—unique knowledge and representativeness—committee reports and sponsor statements are the most useful legislative history of statutes.

Scalia's effort to differentiate the use of legislative history when interpreting statutes from the use of *The Federalist* when interpreting the Constitution amounts to little more than a language game: the former is assertedly used as *authority*, which is questionable, and the latter is used as only *evidence,* which is okay. In practice, legislative history and *The Federalist* are deployed in similar ways: as persuasive evidence of original understanding. Conventions that make it reasonable to suppose that certain focal speakers reflect more than their own views when they make statements in the course of public constitutional or statutory debates contribute to the persuasive quality of this evidence.

Holy Trinity Church, which Scalia criticizes for relying on legislative history as evidence of legislative intent, and *Printz*, in which Scalia relies heavily on *The Federalist* as evidence of the original understanding, can be viewed as analytically similar. In both cases, the authoritative text did not readily support the result reached by the Court. Brewer conceded—too readily, in my view—that the broadly drafted exclusionary statute contained no exception for ministers.[71] Scalia pointed to no provision of the Constitution that prohibits the national government from commandeering state officials.[72] In both cases, the Court looked to contextual evidence to tease out a limitation not found in the plain language of the document. Brewer invoked the title of the act, contemporary accounts of the statute's goal, and committee reports lamenting that the bill was drafted more broadly than was needed to get at the evil addressed as evidence of legislative "intent."[73] Scalia invoked *The Federalist* and early practice as evidence of "original understanding."[74] In both cases, the Court clinched its argument with invocation of constitutional principle: Brewer's ode to the Christian Nation and Scalia's ode to federalism.[75]

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tional as well as state feature to "the people." This stipulation violated the Articles of Confederation, which required unanimous state consent for amendment or, presumably, supersession.

70 *See id.* (Thomas, J., dissenting).

71 *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 458-59 (1892).

72 *See* Printz v. United States, 117 S. Ct. 2365, 2370 (1997).

73 *See Holy Trinity Church*, 143 U.S. at 462-65.

74 *Printz*, 117 S. Ct. at 2372-74.

75 *See Holy Trinity Church*, 143 U.S. at 465-71; *Printz*, 117 S. Ct. at 2376-79.

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Scalia deploys a language game in which users of legislative history are looking for a "legislative intent," which is labeled subjective and unknowable, while users of *The Federalist* are looking for an "original understanding," which is labeled objective and knowable. What Brewer called legislative intent in *Holy Trinity Church* and Scalia called original understanding in *Printz* is much the same inquiry. Both consider how a reasonable participant in the process would have expected the inquiry to be resolved given the values, representations, and deals made in the process of adopting the legal document. The reasonable participant is himself a product of conventions linking *received meaning* to *intended meaning*. If a key member of the majority coalition, such as Senator Blair or James Madison, defended the text propounded by the coalition in a certain way, we conventionally presume that the import of what he was saying was widely understood to reflect the import of the text adopted once the majority won enactment of its legal document. Whether one terms the statement evidence as "legislative or Framers' intent" or as "original understanding," the core idea is essentially the same.

Perhaps it is contentious to quibble with my friend Scalia[76] over language and characterization. Assume that there is an important practical distinction between considering historical materials as authoritative and considering them only as evidence of original meaning. That distinction still would not support the new textualists' more severe distinction between constitutional history, which they readily consider, and legislative history, which Thomas considers generally beside the point and Scalia will not even read. Legislative history's value is neither limited to, nor focused on, its authoritativeness and can be valuable in no fewer than three different ways.[77]

1. Background history has an *authority value* when the materials are cited as independent authority for the legitimacy of a particular proposition. The fact that a key player said thus and so is independent evidence support-

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76 Although Justice Scalia and I disagree about particular issues of public law—from the value of legislative history to the dynamics of statutory interpretation to the legitimacy of state discriminations against lesbians, gay men, and bisexuals—neither of us views the other as dishonest or disingenuous, the usual charges in this contentious era. I think Scalia calls his constitutional and statutory shots as he sees them, and I appreciate his impolitic candor and scintillating writing style as a welcome contrast to the public reasoning of other denizens in Spin City. Also, I admire Scalia's devotion to and brilliant articulation of fundamental public law values, including the importance of the rule of law, the value of following text and precedent to subserve the rule of law, and the critical and positive role of federalism and separation of powers in our constitutional system. Finally, it has been my pleasure to work with Scalia on a few public-regarding projects, including a public ABA debate over the use of legislative history and a series of annual presentations Scalia has made to my Legislation classes at Georgetown University School of Law. The Justice is a delightful person to work with, is exceedingly generous with his time in speaking with groups of law students and in class formats, and is analytically engaging and refreshingly candid on legal issues of all sorts.

77 My own historical work has demonstrated that Justices have invoked legislative history to provide linguistic context for ambiguous statutory language, to assure themselves that they were not reading harsh consequences into statutory text without warrant, and to reinforce arguments made from statutory text or precedent. *See* William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365 (1992). Scalia's Supreme Court colleague, Stephen Breyer, has justified legislative history consideration along precisely the same lines. *See* Stephen Breyer, *On the Uses of Legislative History in Construing Statutes*, 65 S. CAL. L. REV. 845 (1992).

ing the proposition that the document meant thus and so. Brewer in *Holy Trinity Church* relied on the Senate committee report for the proposition that the general language of the alien contract statute did not apply to contracts bringing "brain toilers" into this country.[78] Thomas in *U.S. Term Limits* relied on *The Federalist* No. 39 for the proposition that the union was formed from people of the several states and not the people generally.[79] Both Brewer and Thomas used background materials as authority for drawing particular inferences from legal documents.

2. Background history has a *policy or principle value* when the materials are cited as evidence of the principles and policies subserved by the legal document. Brewer in *Holy Trinity Church* relied on the House and Senate committee reports and a judicial decision as evidence of the general purpose of the statute, namely to prevent the flooding of domestic labor markets with alien laborers who would undercut American wage-earners.[80] Scalia in *Printz* and Thomas in *U.S. Term Limits* relied on *The Federalist* as evidence of the principle of state sovereign autonomy inherent in the structure of the Constitution.[81] To the extent that there is room for interpretive play or ambiguity in a statutory or constitutional provision, the play or ambiguity should be resolved consistent with the policy or principle animating the document.

3. Background history has a *semantic value* when the materials are cited as evidence of how terms were used and what assumptions were made in the time of the Framers. Although Brewer in *Holy Trinity Church* did not examine the legislative materials for this reason, I found that the legislative debaters used the statutory term "labor or service" more narrowly than modern speakers would.[82] Both the majority and dissenting Justices in *Term Limits* invoked *The Federalist* as evidence as to how contemporaries would have viewed the semantic import of the Qualifications Clauses of Article I.

The new textualists maintain that *The Federalist* and other background constitutional materials are valuable for only reasons (2) and (3). They are inadmissible if deployed for reason (1). This theory applies just as well to statutory legislative history as to constitutional legislative history. Indeed, Henry Hart and Albert Sacks propounded a similar theory in their influential materials on *The Legal Process*.[83] These scholars argued that the interpreter should never read legislative history in isolation from the text and other legal materials. The interpreter should consult this history only to determine the general purpose of the statute and not to assure himself that legislators had

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78 *See Holy Trinity Church*, 143 U.S. at 464-65.

79 *See U.S. Term Limits*, 514 U.S. at 846.

80 *See Holy Trinity Church*, 143 U.S. at 463-65 (relying on district court's opinion addressing the importation of cheap labor and legislative reports indicating that foreign manual labor was the problem the statute addressed).

81 *See Printz*, 117 S. Ct. at 2372; *U.S. Term Limits*, 514 U.S. at 846.

82 The legislators' discussion of the workers affected by the statute focused only on blue collar or manual workers and never referred to professional or religious workers. *See, e.g.*, 16 CONG. REC. 1781-82 (1885) (statement of Sen. Platt); *id.* at 1634 (statement of Sen. Sherman); *id.* at 1676 (statement of Sen. Blair).

83 HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW 1253-54 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

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anticipated the precise interpretive problem and resolved it in a particular way.[84] Under such a theory, the legislative materials were admissible in *Holy Trinity Church* and could support the Court's interpretation to allow an exception for the minister.[85]

III. A Better Justification, Based Upon Structural Difference Between the Constitution and Statutes

The new textualists are out-of-the-closet formalists, but their formalist reasons for distinguishing between legislative history and *The Federalist* are unpersuasive. The new textualists are also amateur historians. Professional historians, however, are not supportive of the new textualist project of focusing constitutional but not statutory law on drafting and debating histories. At least one of the new textualists, Scalia, is a dedicated institutionalist,[86] and it is with institutionalist theory that the new textualists have their best arguments for distinguishing *The Federalist* from legislative history.

Ordinary statutes and the extraordinary Constitution are structurally different legal instruments. Statutes are much easier to amend than the Constitution, and an ongoing institution, Congress, is charged with statutory maintenance. From this simple structural difference flow other differences that might justify the Court's taking a different approach to background documents, and perhaps even adopting an exclusionary approach to legislative history simultaneous with an embracing approach to *The Federalist*. I am not completely persuaded of the new textualist position even under this better line of analysis, but neither am I persuaded that it is wrong.

A. The Level of Actual or Potential Constraint Against Judicial Tyranny

Because the Constitution is a constitutive document deliberately made hard to change, the language is more open-textured, abstract, and process-oriented than that of statutes. Although detail and micromanagement are not beneath the Constitution, the details that have lasted are those relating to the structure, procedure, and rules of government, but not to its substance.[87] The Constitution's precise resolution of substantive issues, especially slavery and the sale of alcohol, has been notoriously unsuccessful. More successful have been the open-textured constitutional provisions assuring us of due process, equal protection, and free speech and religion.

The open-textured provisions of the Constitution have all the virtues of flexibility. They do not box the country into substantive policies that become ruinous as the world and the country change. These provisions also have all the vices of flexibility. They provide neither guidance to the citizenry as to exactly what our rights are, nor any obvious limit on judicial discretion to implement judges' own personal policies. If the constitutional text is not particularly constraining, what is available to prevent tyranny from an unelected

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84 *See* HART & SACKS, *supra* note 83, at 1253-54.

85 *See* Eskridge, *supra* note 31.

86 Scalia is one of the Court's five alumni of Henry Hart's and Albert Sacks's course on "The Legal Process," and enjoyed a warm friendship with Sacks after law school.

87 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

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judiciary? One candidate, and the one emphasized in *The Federalist* No. 78, is common law style precedent. This constraint is not only soft[88] but is generated by the very judiciary the law needs to limit. Another candidate is original intent or original meaning.[89] If it is true, as originalists believe, that these materials can narrow the range of interpretive debate, the materials can constrain judges. Although some statutes such as the Sherman Act and section 1983 are open-textured like the Constitution, most are relatively detailed. The most detailed statutes are usually implemented by executive or independent agencies charged with their updating. Congress then keeps an eye on agency evolution of statutes and their continuing fit with the nation's problems. For detailed statutes, there is plenty of text for the Court to figure out what the rule of law requires. For vague or ambiguous statutes implemented by agencies, the Court defers to agency implementation, which usually yields better and more legitimate policies than the Court could. For vague or ambiguous statutes implemented by the Court, the common law is usually available to fill in details.

The baseline rule might be that drafting and debating history should be avoided in the interpretation of public law. Statutes, agency rules, and constitutions should all presumptively be construed according to their plain meanings, with the common law and other specialized practice available for gap-filling. A rule of necessity offers a reason to depart from this presumption when interpreting the open-textured constitutional provisions, for otherwise these sources of law that offer the greatest risk of judicial mischief would be limited by the fewest sources of legal constraint.

There are several troubling objections to such a rule-of-necessity argument. One argument is Scalia's own position that allowing reference to extrinsic materials increases the discretion of willful judges.[90] The proposition strikes me as generally unsupportable, though it may sometimes be true. The truly willful judge will be unconstrained in most contexts, and the moderately willful judge surely will not be less constrained by the vague constitutional texts than she would be by those texts plus constitutional ratification history.[91] Stephen Ross and Daniel Tranen argue, from the experience of considering parole evidence in contract law, that extrinsic evidence is both valuable and constraining in construing legal documents.[92] I should presumptively think their point equally valid in constitutional as well as statutory cases.

Another objection is more weighty, in my view. Judicial consideration of originalist materials would seem to have a conservative bias, and the bias is especially apparent in constitutional cases, because the key provisions are all

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88 Every first year law student can distinguish any precedent.

89 Recall that Scalia and Thomas object to original intent and only recognize original meaning. Other originalists prefer original intent or original understanding. I have no preference as to terminology.

90 *See* Scalia, *supra* note 1, at 36.

91 *See, e.g.*, Patricia Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the U.S. Supreme Court*, 39 AM. U. L. REV. 277, 304-05 (1990).

92 Stephen F. Ross & Daniel Tranen, *The Modern Parole Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. (forthcoming Oct. 1998).

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more than 100 years old and were adopted by politics that excluded most American citizens from political participation. I am personally undecided as to the importance of this objection,[93] but note at least one potentially powerful response to it. New textualism offers the possibility that statutes will be freer than constitutional provisions to evolve dynamically. Dynamic evolution of statutes is defensible, especially where the dynamism is at the hands of agencies, which are more democratically accountable to the President and Congress than are courts. A stagnant Constitution might be safer than a dynamic one. Too much rights enforcement is hard for the political process to correct because correction requires a constitutional amendment. Too little rights enforcement is easier to correct and usually can be achieved through ordinary legislation. Also, if the United States truly is a well-functioning democracy, a less frequently deployed Constitution places more serious responsibility on the political process to consider rights when it imposes duties.

B. Reliability of the Discourse

Both legislative history, such as committee reports and sponsor statements, and constitutional history, such as *The Federalist*, are strategic. Public actors make statements with an eye on how other people will respond to the statements. This strategic dimension of background history contributes to the reliability of statements by key players that are made on the public record in the course of debate. When key players make statements describing the purpose and effect of the proposed law or constitutional provision, they realize that people will believe they are speaking for the coalition seeking adoption of the provision, and are representing all members of the coalition. The key players, therefore, have incentives to represent the commonly held views as faithfully as they can, lest they lose parts of the coalition.

When the debate over adoption or ratification is sharply divided, opponents also make statements attacking the proposed provision. Their strategic statements are worth little in understanding the provision if it is adopted, because their incentives are to exaggerate and distort the meaning and effect of the provision. But responses by key supporters to opponents' attacks, such as *The Federalist* and sponsor colloquies in Congress, are potentially worth a great deal because of their strategic posture. When key supporters respond to attacks, they are motivated to win over undecided players, without alienating fellow supporters of the measure. Thus, the key players seek out enough common ground that the proposed measure will garner majority support. Opponents are alert to any potential inconsistency between the sponsors' statements and the plain meaning of the proposed measure.

The foregoing scenario shows how public dialogue of the sort engaged in by the authors of *The Federalist* and the Anti-Federalists is potentially quite reliable for figuring out original constitutional understanding or meaning. Whatever the man actually believed, Madison's public statements are useful

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93 *Compare* Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085 (1998), *with* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127 (1998).

because he was a master politician, presenting articulate arguments that persuaded fence-sitters, deflated his opponents, and invigorated his allies. Although his arguments remain useful in part because they are brilliant insights into political philosophy, they are also useful because they provide a firmer basis for understanding the ideals instinct in the Constitution that was ultimately adopted. Hence, the willingness of Justices Stevens, Scalia, Souter, and Thomas to debate the insights of Madison and Hamilton about commandeering in *Printz* is well-founded.

This same analysis supports the Court's consultation of statutory legislative history in *Holy Trinity Church*, however. Statements by sponsors and the responsible committees were publicly available and were the basis for vigorous debate, especially in the Senate during February 1885. Although the senators did not foresee the Christian minister issue, the legislative history strikes me as reliable and useful, albeit not nearly as determinative as the Court deemed it.[94] Although legislative history was useful in *Holy Trinity Church*, it might have outlived its usefulness, and for a structural reason that was not divined by the *Holy Trinity* Justices.

In the wake of *Holy Trinity Church* and subsequent decisions expanding the kinds of pre-enactment materials the Supreme Court is willing to consider, legislative history has grown like weeds in a vacant lot. Legislators came to realize that the audience for their public statements was not just the other members of Congress deliberating a measure at the time, but also judges who would interpret the measure in the future. Legislative history became a cottage industry, and as it did so it lost some of its reliability and usefulness. I am unable to gauge how pervasive this phenomenon has become. Insiders freely acknowledge it, but most think that the new textualists exaggerate the scope of the manipulation.[95]

Legislative history in the post-New Deal era became strategic in a way it was not before the New Deal, and in a way the pre-enactment history of the Constitution, the Bill of Rights, and the Reconstruction Amendments were not. Key players now make statements not only to persuade the undecided and to reassure their allies, but also to influence judges and perhaps agency heads in their subsequent interpretations of statutes. The currently reflexive and self-conscious nature of "making legislative history" was largely absent from *The Federalist*, the congressional discussion of the Bill of Rights, and the debates surrounding the Reconstruction Amendments. This phenomenon would justify a greater judicial willingness to consider constitutional background history than to consider statutory background history. The phe-

94 The Court did no independent research into the legislative history of the 1885 statute in that case. Its opinion simply repeated the history presented in the Church's brief, which had not been refuted by the government's brief. My Georgetown colleague Adrian Vermeule has demonstrated that the actual history of the legislation is much less supportive of the Court's holding. *See* Vermeule, *supra* note 31; *cf.* Eskridge, *supra* note 31 (celebrating Vermeule's evidence but finding more ambiguity in the "complete" legislative history).

95 *See, e.g.*, James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 55 (1994) ("In sum, neither the role played by nonlegislators nor the preeminence of committees is sufficient to establish that legislative history—including the commentary on judicial decisions—should be regarded as systematically unreliable.").

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nomenon alone would not justify a rule completely excluding the latter, however.

The best defense for the new textualists' rule of almost total exclusion also derives from institutional structure. Because statute-writing is an ongoing enterprise by a continuous institution, Congress, the Court's approach to interpreting previous statutes ought to have some effect on the way new statutes are drafted. By considering statutory legislative history as authoritative in *Holy Trinity Church* and subsequent cases, the Supreme Court induced Congress not only to create more of it, but induced, or helped induce, this new level of strategic behavior, in which legislative history is manufactured by interest groups and their legislative allies, not to persuade legislators during their deliberation, but to persuade judges down the line. Again, I cannot gauge the significance of this phenomenon, but it has the potential for debasing legislative deliberation and reducing the reliability of all legislative history. The new textualists can argue, with considerable power, that the Court has contributed to wasteful, counterproductive, and (perhaps) even unconstitutional practices in congressional deliberation. The best way for the Court to correct the mess it has helped create would be to adopt some kind of exclusionary rule, either Thomas's rule that judges construing statutes cannot credit any particular statement as authority for a particular proposition or Scalia's rule that judges construing statutes cannot credit legislative history for any positive proposition. If either exclusionary rule were decisively adopted by the Court,[96] legislative history might return to normal, where statements would be made as part of a deliberative process of putting together deals, reassuring allies, and winning over undecided legislators.

Because serious constitutional amending seems to have dried up after the Progressive Era, the body of constitutional debaters exists only in the past. Thus, for the time being, the Court's willingness to credit the explications in *The Federalist* poses little if any risk of corrupting future constitutional conventioneers the way the Court's willingness to credit legislative history has corrupted the ongoing process of ordinary legislation. If the assumptions of the foregoing discussion are in fact true,[97] the difference between constitutional discourse and legislative discourse powerfully supports a

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96 As Professor Ira Lupu observed in his comment on my paper, *see* Ira C. Lupu, *Time, the Supreme Court, and* The Federalist, 66 GEO. WASH. L. REV. 1310, 1324, 1325-26 (1998), the exclusionary rule would have to be supported by a Court majority—and maybe a supermajority—for the political process to get the clear message. It would help if the exclusionary rule were announced in a "major case" that would receive media attention in any event.

97 These assumptions are plausible but not conclusively demonstrated:

1. The Court's willingness to consider pre-enactment legislative history has materially contributed not only to the explosion in the amount of legislative history, but also to the debasement of legislative history by interest groups seeking to influence judicial interpretation.

2. The legislative process does not adequately monitor the potential corruption of legislative history by unrepresentative interest groups and allied legislators.

3. A dramatic change in the rules of statutory interpretation—from a judicial willingness to consider almost any kind of legislative history as potentially authoritative, to a judicial exclusion of all such evidence—would significantly ameliorate or roll back the objectionable features of the process of second-order strategic behavior.

Some doubt about these assumptions is cast by Brudney, *supra* note 95, at 40-66; Ross & Tranen, *supra* note 92.

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drastically different source rule for constitutional and statutory cases. The different source rule might not be the practice of almost total exclusion as urged by Scalia, although such a rule would send a stronger signal. A more nuanced rule such as the one suggested at the end of Part II—that legislative history cannot be used as authority for a particular statutory application, but it might be guidance for the interpreter to determine the statute's purpose or mix of purposes and to suggest how words and terms of art were used by the contemporary regulatory community—might be more plausible.[98]

C. *The Economics of Research*

Because the Constitution is harder to amend than statutes and the Framers are not part of an ongoing institution like Congress, constitutional history is more static than legislative history. Hence, constitutional history ought to be cheaper to research than the ever-escalating legislative history of major statutory schemes. For example, Title VII of the Civil Rights Act of 1964 carried with it an enormous legislative history, and one that grew with substantial amendments to the statute in 1972, 1978, and 1991.[99] For a Justice interested in background evidence, such as Stevens, the legislative history of the original statute, the 1972 amendments, the 1978 amendments, and the 1991 amendments are relevant to issues arising around disparate impact liability and affirmative action. Because Stevens and other Justices find the history relevant, lower court judges in addition to the EEOC, Department of Justice lawyers, corporate counsel, law professors, and private attorneys must as well. When these issues are in play, these figures have to do much more than read the statute; they must attain some level of competence in the ever-expanding legislative history. Thus the question arises: Is the rule of law or democracy benefit of legislative history worth the costs of so many people researching and arguing about it?[100]

Although I originally posed the question, joined by Scalia in his Tanner Lectures, I do not know what the answer is. A tentative cost-benefit calculus is as follows. The benefits of an exclusionary rule would be:

1. the net savings in research costs by attorneys arguing or opining about statutory issues;[101]

2. the rule of law and democracy benefit, if excluding legislative history reduces judicial discretion in statutory cases;

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98 *Cf.* Manning, *supra* note 60, at 731 (articulating a textualist position similar to the one in this Article).

99 *See* 42 U.S.C. § 2000e (1994).

100 *See* Eskridge, *supra* note 4. The costs of legislative history are pervasive and potentially large, for they include not only the effort expended by the parties and decisionmaker during litigation, but also research by private attorneys rendering routine client letters, agencies deciding what regulatory options they have, and legislative staff trying to figure out what has been resolved in prior statutes.

101 By net savings, I mean the following: the amount of time attorneys spend on legislative history research and argumentation that they would not spend under an exclusionary rule, less the additional time (if any) they would spend doing other kinds of statutory research, such as dictionary shopping and consulting professional linguists.

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3. the rule of law and democracy benefit, if excluding legislative history encourages the legislative process to write statutes that more transparently reveal the deals and rules agreed upon.

Benefit (1) is potentially a very large number of dollars, because the modern game of tracking down smoking guns in legislative history is both widespread and expensive.[102] I do not know how widespread the practice is, though, and am open to Professor William Reynolds's comment that mining legislative history is mostly an inside-the-beltway game. Also, if lawyers for agencies and big companies cannot mine legislative history, they will mine dictionaries, the United States Code, and other textualist sources, thereby offsetting some of the gains of Benefit (1).[103] Benefits (2) and (3) strike me as virtually nil for reasons developed by Professors Abner Mikva, James Brudney, and Stephen Ross, all of whom have participated in both the judicial and legislative processes.[104]

Offset against the potential benefits of an exclusionary rule are the potential costs of such a rule:

1. if the new exclusionary rule were applied to existing statutes,[105] the rule of law, democracy, and reliance costs of negating deals made clear in the legislative history but not in the statutory text;

2. new errors, if any, that would be introduced by excluding legislative history, including greater need for the legislative process to sacrifice parts of its limited agenda to monitor and respond to textualist decisions;

3. increased willingness of judges to overrule agency interpretations of statutes, because the agency is influenced by legislative expectations that judges think contrary to statutory text.[106]

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102 Professor Ira Lupu originally challenged the substantiality of benefit (1), on the ground that agencies would still look at legislative history in order to please their congressional overseers, and private attorneys would follow agency practice. *See* Lupu, *supra* note 96.

This objection is overstated. Agencies are politically interested in the views of the current, rather than the enacting, Congress, as only the current Congress can give them trouble in the oversight or appropriations process. If the Court tells agencies that original legislative history is irrelevant, agencies lose most incentives to consider it in formulating their statutory rules and applications and all incentives to rely on such materials when private parties challenge their interpretations. Private parties would operate under the same incentives, citing current, but usually not original legislative sentiments to politically sensitive agencies and ignoring legislative history in their judicial challenges. By the way, notwithstanding my partial disagreement with Lupu's objection, I do think private attorneys would continue to look at committee reports, which are both easy to find and useful in providing context for statutory language.

103 If this is so, however, the *worst* (most costly) regime is the current one, where the federal appellate advocate must research all the textualist sources to please Scalian judges *and* all the legislative history sources to please Stevensesque judges. This is doubly expensive, as Adrian Vermeule pointed out to me.

104 *See* Brudney, *supra* note 95, at 40-66. Abner Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627 (1987); Ross & Tranen, *supra* note 92.

105 Retroactive application of an exclusionary rule in this way would be unconscionable as an unfair bait and switch on Congress. *See* Eskridge, *supra* note 4, at 683-84. The new textualists and their academic allies seem to support it, however.

106 *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 354 (1994) (examining the relationship between the *Chevron* doctrine and textualism and determining that "textualism poses a threat to the future of the deference doctrine").

My judgment is that cost (1) is substantial, (but could be avoided by making the new exclusionary rule prospective in operation), and costs (2) and (3) too speculative for even educated guesses.

For statutory legislative history the cost/benefit analysis boils down, for now, to the following question: Are there many cases where statutory legislative history allows us to reach correct results that cannot be reached without legislative history? There are some cases that would not have been correctly decided without a thorough examination of legislative history, such as the House of Lords' recent decision in *Pepper v. Hart*.[107] My judgment is that these cases are exceptional, a judgment others should explore more systematically to determine whether our legal system would save a lot of money by jettisoning legislative history (*prospectively*). Because constitutional texts are not as detailed as statutory ones, the same calculus does not apply to constitutional ratifying history.

Conclusion

Based on the second (reliability) reason adduced above, I am inclined to the view that the Supreme Court can read and consider *The Federalist* even if it refuses to do the same for statutory legislative history. The new textualists are on firm ground in thinking that constitutional ratifying debates can be treated differently by the Court than statutory pre-enactment debates. One reason is the rule of necessity idea that the open-textured Constitution cries out for more context, but I am uncertain whether *The Federalist*, written long ago to a more exclusive audience, is the most appropriate source of constraint (though they do strike me as a *most* appropriate source of *wisdom*). The best reason has to do with the different incentives of the speakers. Long-departed constitutional debaters had strong incentives to represent political consensus or equilibrium accurately. Current statutory debaters have the same incentives, but an additional, and perhaps countervailing, incentive created by the Court itself to bend future statutory construction toward their preferred, rather than the actual, political equilibrium on some issues.

Because the third (cost-benefit) reason adduced above is indeterminate, I have no firm view as to the precise approach the Court should take to legislative history. Justices Scalia and Thomas themselves take slightly and perhaps increasingly divergent approaches to legislative history. Thomas's willingness to consider legislative history as background evidence is more consistent with traditional practice, but Scalia's campaign against any reference to legislative history holds open the tantalizing possibility of saving the legal system untold millions of dollars in research costs.[108] This possibility cannot rigorously be pursued without further empirical work by the new textualists in the academy, and I urge professors and law review note writers to pursue this agenda.

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107 3 W.L.R. 1032 (H.L. 1992) (adopting use of certain legislative history in limited specified circumstances, a break with traditional English practice).

108 Costs borne, of course, by corporate clients and then consumers of their products.

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