

April 2005

A Constitutional Defense of Legislative History

Paul E. McGreal

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Constitutional Law Commons](#), and the [Supreme Court of the United States Commons](#)

Repository Citation

Paul E. McGreal, *A Constitutional Defense of Legislative History*, 13 Wm. & Mary Bill Rts. J. 1267 (2005), <https://scholarship.law.wm.edu/wmborj/vol13/iss4/6>

Copyright c 2005 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmborj>

A CONSTITUTIONAL DEFENSE OF LEGISLATIVE HISTORY

Paul E. McGreal*

INTRODUCTION

Textualism preaches two unalterable truths regarding statutory interpretation. First, the judge's proper focus is the statute's text.¹ Second, the judge shall not consult legislative history in interpreting that text.² The textualist method largely rests upon these two pillars.

This Article argues that textualists ignore an equally fundamental aspect of the interpretive enterprise: the inseparability of text and context. That is, a text's meaning becomes determinate only when paired with a specific context.³ For example,

* Harry & Helen Hutchens Research Professor and Professor of Law, South Texas College of Law. I wish to thank all those who commented on prior drafts of this Article, including Kathleen Bergin, Bruce Burton, Maxine Goodman, Leandra Lederman, Val Ricks, Dru Stevenson, and Kevin Yamamoto.

¹ See, e.g., CHRISTIAN E. MAMMEN, USING LEGISLATIVE HISTORY IN AMERICAN STATUTORY INTERPRETATION 155 (2002) ("Textualism's central tenet is that the focus of statutory interpretation should be the statutory text that was duly enacted according to constitutional procedures."); Jeffrey G. Miller, *Evolutionary Statutory Interpretation: Mr. Justice Scalia Meets Darwin*, 20 PACE L. REV. 409, 411 (2000) (noting that for new textualists, "[i]nterpreting statutes begins and ends with the text of the statutes"); Stephen A. Plass, *The Illusion and Allure of Textualism*, 40 VILL. L. REV. 93, 94–95 (1995) ("The gist of textualist construction is that judges should be controlled by text and stay away from legislative history at all costs."); Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585, 586 (1994) ("[T]extualism posits that judges should not use extraneous sources, such as legislative history when interpreting ambiguous statutory text, [but] should rely on the texts themselves.").

² See, e.g., William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990) ("The new textualism posits that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant."); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U.L.Q. 351, 351–52 (1994) ("Textualism is not simply a revival of the old plain meaning rule. . . . In practical terms, the principal implication . . . is to banish virtually all consideration of legislative history from statutory interpretation.").

³ Of course, the possible meanings of words are not boundless, and context will help us select among possible meanings given the words' usages and the rules of syntax. One commentator illustrates this point with the following example: "No amount of context will cause me to conclude that 'Bill hit John' really means, 'the air conditioner on the train was broken, and all the passengers were sweating when they got off.' Rather, context makes certain

consider a sign that admonishes, "Keep off the grass."⁴ Hanging on the wall of a drug rehabilitation clinic, the sign implores abstention from drugs,⁵ but when planted in a well-manicured lawn, the sign enjoins passersby from stepping on the turf.⁶ Pairing the same text with different contexts changes the text's meaning.

The text-context link is so fundamental that, even when words appear in isolation, we must hypothesize a context to make sense of those words. Consider a professor who receives an anonymous note that simply reads, "Drop dead."⁷ To fix meaning on these words, the professor must pair them with a hypothetical context.⁸ For example, perhaps a colleague with a sense of humor wrote the note after a light-hearted disagreement.⁹ Or, perhaps the note is from a disgruntled former student who received a failing grade.¹⁰ Paired with the former context, the note is a joke; paired with the latter context, the note is more ominous. Selecting a hypothetical context selects meaning. Similarly, changing context can alter meaning just as radically as changing text, as every text-context pairing potentially has a different meaning.

Yet, the constitutional argument for textualism drives a wedge between text and context. Consider the view of Supreme Court Justice Antonin Scalia, whose extensive judicial and other writings defend the practice.¹¹ He argues from the Constitution's lawmaking process, noting that only a statute's *text* passes through the constitutionally-prescribed lawmaking steps of bicameralism (passage by both chambers of Congress) and presentment (delivery of the bill for the President's signature or veto).¹² Conversely, legislative history materials, such as committee reports and floor debates, do not pass through bicameralism and presentment. Consequently, only the statute's text, and not its legislative history, is constitutionally enacted "law" entitled to interpretive weight.

possible interpretations more salient and others less salient." Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 257.

⁴ I borrow this example from Gerald Graff, "Keep off the Grass," "Drop Dead," and Other Indeterminacies: A Response to Sanford Levinson, 60 TEX. L. REV. 405, 407 (1982).

⁵ See *id.* at 407-08.

⁶ See *id.* at 407.

⁷ See *id.* at 408-09.

⁸ See *id.* at 409.

⁹ See *id.*

¹⁰ See *id.*

¹¹ One commentator notes, "Justice Scalia does not merely advocate a particular interpretive approach — he fairly crusades for it." MAMMEN, *supra* note 1, at 155; see, e.g., *Bank One Chi. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part); 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* (Amy Gutmann ed., 1997).

¹² See U.S. CONST. art. I, § 7, cl. 2. Of course, if the President vetoes a bill, a supermajority of both houses of Congress is needed to override the veto. *Id.*

This bicameralism and presentment argument is both incoherent and incomplete. It is incoherent because statutory interpretation cannot proceed on text alone — text must be paired with a context. The argument is incomplete because it is silent on the proper context with which to pair statutory text. And this silence is ironic. While textualists like Justice Scalia invoke the Constitution to prohibit consideration of legislative history,¹³ faithful adherence to constitutional text and structure actually requires such consideration. This disconnect derives from textualism's misdirected, laser-like focus on the result of the bicameralism and presentment process — statutory text — to the exclusion of the process itself. Yet, the Constitution's text and structure treat bicameralism and presentment as important for its process as well as its result. Thus, legislative deliberation, as reflected in legislative history, is not like so much chafe to be discarded after the final vote.

This Article has two parts. Part I describes the textualist constitutional argument against legislative history in statutory interpretation, focusing on the judicial and other writings of Justice Scalia. Part II then critiques the textualist constitutional argument and explains how constitutional text and structure actually require judges to consider legislative history when interpreting federal statutes.

I. THE TEXTUALIST ARGUMENT AGAINST LEGISLATIVE HISTORY

Justice Scalia's rejection of legislative history and corresponding embrace of textualism is most extensively defended in his essay *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*.¹⁴ As the title suggests, common-law reasoning is the springboard for his criticism. Simply put, Justice Scalia believes that the common-law method is poorly suited to statutory interpretation, and that judicial consideration of legislative history entails many of the same problems as common-law reasoning.¹⁵ Section A explains Justice Scalia's critique of common-law lawmaking. Section B then explains how his critique of common-law lawmaking leads him to reject legislative history.

A. *The Common-Law Attitude*

Justice Scalia begins his essay with a description and critique of the common-law method.¹⁶ The common law is the milieu of most first year law school classes,

¹³ See Scalia, *supra* note 11, at 35; MAMMEN, *supra* note 1, at 161–62.

¹⁴ See Scalia, *supra* note 11. Throughout this discussion, I also refer to the work of Professor John F. Manning, a leading academic advocate of rejecting legislative history. Professor Manning's work shares many arguments and premises with that of Justice Scalia.

¹⁵ *Id.*

¹⁶ *Id.* at 3–9.

where students mostly study judicial decisions, not legislative texts.¹⁷ Those decisions discuss “some policy reasons”¹⁸ and “earlier opinions”¹⁹ of other judges, but “not a single snippet of statutory law,”²⁰ because the common law “was almost entirely the creation and domain of English judges.”²¹ With no controlling statute, common-law judges were the lawmakers, not simply interpreters and appliers of existing rules.

Famous old cases are famous, you see, not because they came out right, but because the rule they announced was the intelligent one. Common-law courts performed two functions: One was to apply the law to the facts. All adjudicators — French judges, arbitrators, even baseball umpires and football referees — do that. But the second function, and the more important one, was to *make* the law.²²

And to truly make law, courts must adhere to a concept like *stare decisis* that requires judges to follow prior decisions.²³ Otherwise, those decisions “would not be making any ‘law’; they would just be resolving the particular dispute before them.”²⁴

Stare decisis, however, permits judges substantial discretion. The decision whether to follow or distinguish precedent is largely unguided, leaving much room for judicial creativity. Indeed, Justice Scalia offers a cynical description of common-law practice, suggesting that the analysis is result-driven.²⁵ The common-law judge first exercises reason and “the brilliance of one’s own mind”²⁶ to identify “the ‘best’ legal rule.”²⁷ Next, she either follows or distinguishes precedent depending on whether it supports her preferred rule.²⁸ Justice Scalia summarizes as follows:

[T]he great judge — the Holmes, the Cardozo — is the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose

¹⁷ See *id.* at 3–6.

¹⁸ *Id.* at 5.

¹⁹ *Id.*

²⁰ *Id.* at 6.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 7.

²⁴ *Id.*

²⁵ See *id.* at 8–9, 13.

²⁶ *Id.* at 7.

²⁷ *Id.*

²⁸ *Id.*

that rule: distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal — good law.²⁹

This is the common-law “attitude” — a judge’s willingness to independently determine the best rule and, through creative manipulation of existing precedent, impose that rule in a given case.³⁰

Justice Scalia next argues that the common-law attitude contradicts three constitutional values. First, judge-made law is inconsistent with separation of powers in our democratic government.³¹ Democracy commands that only accountable decision-makers make law.³² As only Congress and the President are accountable to the people, only those branches, and not the unaccountable judiciary, may make and execute the law.³³

The second and third constitutional values relate to the prohibition of ex post facto laws.³⁴ Generally speaking, a legislature must enact prospective rules that govern post-promulgation conduct. Conversely, common-law rules are made long after the parties’ conduct has occurred, while the case is pending. The ex post facto nature of common-law rules prompts two objections. First, parties have no prior notice of the rule under which their conduct will later be judged. Second, because the common-law judge knows who will benefit from different holdings, she may

²⁹ *Id.* at 9.

³⁰ *Id.* at 13.

³¹ *Id.* at 9–13.

³² See Cass R. Sunstein, *Justice Scalia’s Democratic Formalism*, 107 YALE L.J. 529, 530 (1997) (reviewing Scalia, *supra* note 11, and describing his view as democratic formalism, meaning that the argument “is designed to ensure that judgments are made by those with a superior democratic pedigree”).

³³ See Scalia, *supra* note 11, at 9–13. At this point, Justice Scalia makes an awkward admission — the founding generation believed that common-law judges “discovered” the principles of the common law and thus were not engaging in lawmaking as legislatures do. *Id.* at 10. He nonetheless feels justified in taking the modern, more “realistic view” that common-law judges make law as the appropriate grounds for his separation of powers critique of the common-law attitude. *Id.* This concession has two potential problems. First, it holds one historical assumption constant while changing another without explanation. For example, Justice Scalia changes the Founders’ assumption regarding the nature of common-law lawmaking, but holds constant the Founders’ conception of democracy and separation of powers. Why not do the opposite? Second, his argument assumes that a change in the Founders’ assumption regarding the nature of common-law lawmaking should not affect the proper conception of separation of powers or democracy. If the Founders had held a more realist view of judicial decision making, perhaps their notions of separation of powers and democracy would have been different. Again, he offers no explanation for leaving unmodified the original view of separation of powers and democracy.

³⁴ See *id.* at 11–14; U.S. CONST. art. I, § 9, cl. 3 (“No . . . ex post facto Law shall be passed.”).

indulge her biases and prejudices in reaching a decision. The parties, however, will be none the wiser because of the almost unlimited ability to manipulate precedent to justify any decision.³⁵

B. The Common-Law Attitude and Statutory Interpretation

Next, Justice Scalia turns to legislative history and legislative intent, arguing that judicial consideration of those sources poses the same problems as common-law lawmaking.³⁶ Before examining his arguments, however, it would be helpful to examine precisely what he means by legislative history and legislative intent. As to legislative history, Scalia means the conventional sources that lawyers consult to determine what was said and happened during Congress's consideration and enactment of a statute. As examples, he mentions, "the statements made in the floor debates, committee reports, and even committee testimony."³⁷ Thus, Justice Scalia uses the term in its conventional sense.

As to legislative intent, his meaning is more difficult to discern. Commentators generally acknowledge three versions of legislative intent. First, one might mean subjective legislative intent, focusing on the subjective views of individual legislators regarding the precise interpretive question before the court.³⁸ For example, if the issue is whether a federal statute requires a successful tort plaintiff to include punitive damages in income, we would ask what individual legislators believed

³⁵ Scalia, *supra* note 11, at 9–14. Justice Scalia quotes an early commentator who nicely summarizes the point:

Judge-made law is special legislation. The judge is human, and feels the bias which the coloring of the particular case gives. If he wishes to decide the next case differently, he has only to distinguish, and thereby make a new law. The legislature must act on general views, and prescribe at once for a whole class of cases.

Id. at 11 (citing Robert Rantoul, Oration at Scituate (July 4, 1836), in KERMIT L. HALLET AL., *AMERICAN LEGAL HISTORY* 318 (1991)).

³⁶ See Scalia, *supra* note 11, at 14–23. Scalia argues:

if one accepts the principle that the object of judicial interpretation is to determine the intent of the legislature . . . [then] [t]he practical threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.

Id. at 17–18.

³⁷ *Id.* at 29.

³⁸ See NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 45:06 (6th ed. 2000) (noting the view that intent is inherently subjective because "intention is a mental state [which] . . . only an individual can have This view implies that the concept of a legislative intent is useful only if it is understood as the sum of the individual ideas, views, and attitudes of all of the members of the legislature").

about that specific question.³⁹ Second, one might mean objective legislative intent.⁴⁰ This approach seeks the policies and values that the enacting Congress sought to promote, and then interprets the statute to best achieve those policies and values.⁴¹ On the punitive damages question, that would mean asking what policy or value underlies the applicable provision of the tax code, and whether including punitive damages would better achieve that policy or value. Third, one might mean the purposivist approach to statutory interpretation. This approach asks what evil or problem Congress sought to address, and what interpretation best solves that evil or problem.⁴²

While Justice Scalia never explains which version of legislative intent he is referring to, a fair reading of his essay is that he objects to all three. He implies this in his statement that statutory interpretation ought to focus on the legislature's "'objectified' intent," which he describes as "the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."⁴³ For Justice Scalia, the only legitimate, acknowledged sources of statutory interpretation are the text of the statute to be interpreted as well as the texts of other statutes.⁴⁴

³⁹ The punitive damages example is taken from *O'Gilvie v. United States*, 519 U.S. 79 (1996). For a discussion of the interpretive issues raised by *O'Gilvie*, see Paul E. McGreal, *Slighting Context: On the Illogic of Ordinary Speech in Statutory Interpretation*, 52 U. KAN. L. REV. 325, 358–61 (2004) [hereinafter McGreal, *Slighting Context*].

⁴⁰ McGreal, *Slighting Context*, *supra* note 39, at 375–77 (discussing "purposivism" in determining legislative intent).

⁴¹ Of course, difficulties arise when a statute reflects either a compromise of conflicting values or a decision to pursue a single value only so far.

⁴² See WILLIAM N. ESKRIDGE, JR., & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 220 (3d ed. 2001); see also HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374–80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); EARL T. CRAWFORD, *THE CONSTRUCTION OF STATUTES* § 163, at 247–48 (1940).

[I]n seeking to ascertain legislative purpose, the court will resort, among other things, to the circumstances existing at the time of the law's enactment, to the necessity for the law and the evil intended to be cured by it, to the intended remedy, to the law prior to the new enactment, and to the consequences of the construction urged.

Id. (footnote omitted).

⁴³ Scalia, *supra* note 11, at 17.

⁴⁴ *Id.* at 23 ("I agree with Holmes's other remark, quoted by Justice Jackson: 'We do not inquire what the legislature meant; we ask only what the statute means.'") (quoting OLIVER WENDELL HOLMES, *COLLECTED LEGAL PAPERS* 207 (1920), *quoted in* *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 397 (1951) (Jackson, J., concurring)). *But see* *United States v. Fausto*, 484 U.S. 439, 444–45 (1988) (opining for the Court, Justice Scalia uses a Senate committee report to identify the purpose of the legislation); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 702–05 (1997) (identifying extra-textual sources routinely used by textualists).

Justice Scalia cannot possibly mean what he says. Text has no determinate meaning outside of a context, and he completely ignores the question of which context the interpreter should pair with a statute's text. This is a choice Justice Scalia must make, even implicitly, if he is to give a statute meaning.⁴⁵ For now, though, we will put this point aside, focusing instead on why he believes judicial use of legislative history is as problematic as common-law lawmaking.

1. Separation of Powers

Justice Scalia's separation of powers argument against legislative history rests on three aspects of the Constitution's legislative process. First, he looks to the law-making process set forth in Article I, section 7 of the Constitution: bicameralism and presentment.⁴⁶ According to that provision, "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States."⁴⁷ If the President signs the bill or leaves it unsigned for ten days, the bill becomes law.⁴⁸ If the President objects to the bill, the President can veto the bill by returning it with his objections to the chamber of Congress that originated the bill.⁴⁹ Congress can then enact a law over the President's veto only if two-thirds of both houses thereafter approve the bill.⁵⁰ Only

⁴⁵ See McGreal, *Slighting Context*, *supra* note 39, at 337–39. Professor Manning notes that Justice Scalia routinely applies context derived from outside the legislative process. See Manning, *supra* note 44, at 702–05.

⁴⁶ U. S. CONST. art. I, § 7; see Scalia, *supra* note 11, at 9–10, 35.

⁴⁷ U. S. CONST. art. I, § 7, cl. 2.

⁴⁸ *Id.* There is an important exception to the rule that a bill will become a law if left unsigned by the President for more than ten days — the pocket veto. A pocket veto occurs when a law is passed and Congress adjourns its two-year term before the ten-day limit on a bill has expired. *Id.* The President may use the pocket veto to object to a bill. Under the pocket veto, a bill will not become a law if the President does not sign the bill within ten days of when Congress has adjourned a session after presenting the law to the President, but before the end of the ten-day period. *Id.* (a bill becomes law if not signed within ten days "unless the Congress by their Adjournment prevent its Return in which Case it shall not be a Law"). See John Houston Pope, Note, *The Pocket Veto Reconsidered*, 72 IOWA L. REV. 163, 164 (1986). In the case of a pocket veto, Congress has deprived the President of the ability to "return" the bill to Congress with the President's objections — the veto — and the bill will not become a law even if the President does not act on the bill within the ten days. The pocket veto is recognized by congressional practice and has not been adjudicated by the Supreme Court. While Presidents have used the pocket veto during interim adjournments or adjournments at the end of a session, *id.* at 164–65, one federal court of appeals has held that the pocket veto only operates at the final adjournment of a Congress's two-year term, *id.* at 165; see also *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *vacated sub nom.*, *Burke v. Barnes*, 479 U.S. 361 (1987) (holding that the case was moot).

⁴⁹ U.S. CONST. art. I, § 7, cl. 2.

⁵⁰ *Id.* at § 7.

a bill that runs this gauntlet becomes a “law” entitled to enforcement by the President and application by the federal courts.⁵¹ This is bicameralism and presentment.⁵²

As bicameralism and presentment is the Constitution’s only lawmaking process, it follows (for Justice Scalia) that only materials that pass through each step of that process are law. While the same text must receive a majority vote in both chambers of Congress and be signed by the President (or overcome the President’s veto),⁵³ the materials that constitute legislative history — committee reports, floor statements, etc. — are neither voted on by both chambers of Congress nor submitted to the President.⁵⁴ Thus, text, but not legislative history, satisfies this constitutional criterion of bicameralism and presentment.

Of course, this argument is incomplete. While interpretation requires judges to pair statutory text with some context, Justice Scalia’s bicameralism and presentment argument merely rejects legislative history without identifying another source of context. Presumably, whatever source he uses must satisfy the requirements of bicameralism and presentment.⁵⁵

Justice Scalia’s second separation of powers argument rests on a non-delegation principle. He explains this point in a concurring opinion in *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*,⁵⁶ a case in which the Court’s opinion heavily relied on congressional committee reports. In a separate concurring opinion, Justice Stevens defended the Court’s use of committee reports, arguing that members of

⁵¹ *Id.* art. II, § 3 (The President “shall take Care that the Laws be faithfully executed.”); *id.* art. III, § 2 (“The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States . . .”).

⁵² See *Clinton v. City of New York*, 524 U.S. 417 (1998) (holding that the Line Item Veto Act violates presentment by allowing the President to amend effectively a law without action by both chambers of Congress); *INS v. Chadha*, 462 U.S. 919 (1983) (holding that a legislative veto violates the constitutional requirement of bicameralism and presentment).

⁵³ See MAMMEN, *supra* note 1, at 155 (“Textualism’s central tenet is that the focus of statutory interpretation should be the statutory text that was duly enacted according to constitutional procedures.”).

⁵⁴ Scalia proposed the following example:

If . . . a citizen performs an act — let us say the sale of certain technology to a foreign country — which is prohibited by a widely publicized bill proposed by the administration and passed by both houses of Congress, *but not yet signed by the President*, that sale is lawful. It is of no consequence that everyone knows both houses of Congress and the President wish to prevent the sale. Before the wish becomes a binding law, it must be embodied in a bill that passes both houses and is signed by the President.

Scalia, *supra* note 11, at 25.

⁵⁵ See Manning, *supra* note 44, at 705 (“[T]extualists’ approach to terms of art (as well as other elements of statutory context) further highlights the textualist paradox: why must some, but not all, sources of law elaboration hew to the command of Article I, Section 7?”).

⁵⁶ 516 U.S. 264 (1996).

Congress are “busy people” who will logically rely on the work of their trusted colleagues (e.g., committee members) to shape and define legislation.⁵⁷ Thus, “the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress.”⁵⁸

Justice Scalia’s response is worth quoting in full:

[A]ssuming Justice Stevens is right about this desire to leave details to committees, the very first provision of the Constitution forbids it. Article I, § 1, provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.” It has always been assumed *that these powers are nondelegable* — or, as John Locke put it, that legislative power consists of the power “to make laws, . . . not to make legislators.” No one would think that the House of Representatives could operate in such fashion that only the broad outlines of bills would be adopted by vote of the full House, leaving minor details to be written, adopted, and voted upon only by the cognizant committees. Thus, if legislation consists of forming an “intent” rather than adopting a text (a proposition with which I do not agree), Congress cannot leave the formation of that intent to a small band of its number, but must, as the Constitution says, form an intent of the *Congress*.⁵⁹

Under bicameralism and presentment, material approved by less than the whole Congress is not law;⁶⁰ Congress cannot change this fundamental feature of the Constitution’s design. House or Senate committees, of course, are only subsets of Congress; their reports are not a product of the whole Congress⁶¹ and are not

⁵⁷ *Id.* at 276 (Stevens, J., concurring).

⁵⁸ *Id.* at 276–77 (Stevens, J., concurring); see also Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE L.J. 754, 780–84 (1966) (explaining the delegation view of legislative history).

⁵⁹ *Bank One Chi.*, 516 U.S. at 280 (Scalia, J., concurring in part and concurring in the judgment) (emphasis added and omitted) (internal citations omitted). As discussed earlier, Justice Scalia joins with those commentators who believe that an “intent” of a multi-member body like Congress is an incoherent notion. See *id.* (“There is no escaping the point: Legislative history that does not represent the intent of the whole Congress is nonprobative; and legislative history that does represent the intent of the whole Congress is fanciful.”).

⁶⁰ See U.S. CONST. art. I, § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President . . .”).

⁶¹ Of course, the unitary legislature argument leaves open the possibility that some source

presented to the President. Thus, giving interpretive weight to committee reports delegates lawmaking power to a subset of Congress.⁶²

Note once again how Justice Scalia ignores the necessity of context. Implicit in his argument is that statutory text has some meaning on its face, and that congressional committees may not alter that meaning through legislative history. However, the statute's so-called facial meaning necessarily assumes a context within which that meaning makes sense. Justice Scalia once again neglects the question of what context properly informs the interpretation of a statute. Presumably, given his non-delegation argument, the context must (like text) reflect a constitutional understanding of Congress's proper role.⁶³

A third separation of powers argument derives from Congress's term of office. Under Article I, we elect the entire House and one-third of the Senate every two years.⁶⁴ Each Congress, then, has a two-year lawmaking mandate; after that two-year period, the legislative power devolves upon the next Congress. Each Congress's sole legacy is its statutes, and each statute represents a particular Congress's approach to a problem or issue. Consequently, each statute is a product of its time — of the learning, resources, and ideology (among other things) of the Congress that created it.

As times change, the problem addressed by a statute might also change or disappear; the statute's solution might seem unworkable or ill-conceived, or produce

of legislative history may reflect the intent of Congress as a whole. For example, Justice Scalia acknowledges that such intent might be found in a proposed statutory amendment that was rejected by both houses. *See* Antonin Scalia, Speech at Various Law Schools on the Use of Legislative History 4 (Fall 1985–Spring 1986) (a speech given while he was a judge on the District of Columbia Circuit) (on file with author). If a party later offers an interpretation of the statute consistent with that amendment, one could argue that Congress, acting as a whole, has rejected that interpretation. *Id.* Yet, such arguments are not without problems; perhaps Congress rejected the amendment as redundant. Also, this argument still fails the bicameralism and presentment argument. The rejected amendment is only that — a piece of legislation that never achieved the status of law. If the text passed by Congress is susceptible to an interpretation consistent with the rejected amendment, then so be it — the text is the only source we have with the status of law.

⁶² As Justice Scalia has stated elsewhere, such a delegation creates a “junior-varsity Congress” and is unconstitutional. *See* *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). Professor Manning similarly argues that the Constitution bars congressional delegation of lawmaking power to a subset of that body, and that judicial use of legislative history enables such a delegation. *See* Manning, *supra* note 44, at 696–99.

⁶³ Here, Professor Manning goes beyond Justice Scalia's incomplete approach. *See infra* note 103.

⁶⁴ U.S. CONST. art. I, § 2, cl. 1, § 3, cl. 2.

unexpected consequences.⁶⁵ All of these new matters are the province of later Congresses:

The principle of our democratic system is not that each legislature enacts a purpose, independent of the language in a statute, which the courts must then perpetuate, assuring that it is fully achieved but never overshoot by expanding or ignoring the statutory language as changing circumstances require. To the contrary, it seems to me the prerogative of each currently elected Congress to allow those laws which change has rendered nugatory to die an unobserved death if it no longer thinks their purposes worthwhile; and to allow those laws whose effects have been expanded by change to remain alive if it favors the new effects.⁶⁶

If judges may adjust a statute to meet change, they will do so by adapting the goals of the prior, enacting Congress (long since out of power) to new circumstances. Such interpretive adaptation is a form of constructive amendment. However, the Constitution reserves the power to amend federal statutes to the current Congress. Thus, judges should not aid and abet a prior Congress's bid for political immortality — and usurp the power of future Congresses — by adapting unenacted legislative “intents” or “purposes.”

To illustrate Justice Scalia's point, consider a communications law passed before the age of television or the Internet. If television or the Internet fit within the text of the statute, then the statute applies. If not, judges must not use the purpose of the enacting Congress to determine how that Congress would treat the new technologies. Otherwise, judges would give the enacting Congress legislative power beyond its democratically authorized term. The changed circumstances are a matter for the current Congress to address through bicameralism and presentment.

Again, the argument is incomplete. Justice Scalia gives us reason to focus on a statute's text, but offers no account of the proper context within which to understand that text. Presumably, we should search for the context at the time of enactment, not after the term of the enacting Congress has expired. Beyond that, however, he offers no guidance.

⁶⁵ See generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (providing solutions for dealing with obsolete laws).

⁶⁶ *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 325 (1988) (Scalia, J., concurring in part and dissenting in part).

2. Inadequate Notice

Recall that common-law lawmaking operates in an *ex post facto* manner, with the legal rule announced after the parties' conduct has occurred. This effectively deprives people of notice of the law's requirements, denying them the opportunity to conform their actions to the law. In the following passage, Justice Scalia turns this argument against legislative intent:

[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. That seems to me one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read. Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver.⁶⁷

Legislative intent allows judges to play a game of bait-and-switch. Congress enacts a text with one meaning, upon which people rely in ordering their affairs. Courts then defeat this reliance by using legislative intent to substitute a different meaning.

As with the separation of powers arguments, the notice argument rests on an assumption that the bare text has a different meaning from that suggested by legislative history. Bare text is a misnomer, however, as any reading of a text assumes a corresponding context. Justice Scalia neither identifies which context he favors, nor explains why that context better serves the dictates of fair notice than does legislative history.

3. Disguised Personal Preference

Justice Scalia's third critique of common-law lawmaking was that it allowed judges to indulge personal preferences and biases. Legislative history poses the same problem:

The *practical* threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field. When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*,

⁶⁷ Scalia, *supra* note 11, at 17.

and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean — which is precisely how judges decide things under the common law.⁶⁸

Further, like *stare decisis*, legislative history only weakly constrains judicial discretion:

Legislative history provides, moreover, a uniquely broad playing field. 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. The variety and specificity of result that legislative history can achieve is unparalleled.⁶⁹

Therefore, a judge using legislative history, like her common-law counterpart, sits as a super-legislature, making retroactive legal rules under the guise of interpreting the legislature's intent.

The legislative history judge is not the only villain in this drama. The scene is also populated by lobbyists, legislative staffers, and unscrupulous legislators who cram committee reports, floor speeches, and the like with deceptive statements. "One of the routine tasks of the Washington lawyer-lobbyist is to draft language that sympathetic legislators can recite in a prewritten 'floor debate' — or, even better, insert into a committee report."⁷⁰ The picture painted is of legislators and lobbyists who lost their bid to get preferred language into a bill's text, but then sought a partial victory by inserting favorable legislative history. On this view, much legislative history is the tainted product of political gamesmanship.

⁶⁸ *Id.* at 17–18.

⁶⁹ *Id.* at 36.

⁷⁰ *Id.* at 34. Scalia adds that members of Congress seldom participate in the creation of most legislative history materials:

The floor is rarely crowded for a debate, the members generally being occupied with committee business and reporting to the floor only when a quorum call is demanded or a vote is to be taken. And as for committee reports, it is not even certain that the members of the issuing *committees* have found time to read them

Id. at 32.

As should be familiar by now, Justice Scalia again assumes a sharp distinction between the meaning conveyed by plain text and that conveyed by legislative history. As before, he ignores that text has a determinate meaning only when paired with some context, and he never explains what context he is using and why. Without such an explanation, his textualism is open to the same charge of manipulation as are legislative history and common-law judging. For all we know, bias, prejudice, or personal policy preferences drive the choice of interpretive context.

II. CRITIQUE OF THE TEXTUALIST CONSTITUTIONAL ARGUMENT

A persistent theme of Part I.B is how Justice Scalia's textualist argument separates text and context. He consistently focuses on the statutory text that emerges from the constitutional lawmaking process of bicameralism and presentment, but ignores the equally important choice of the context within which to understand that text. As the next three sections explain, this failure ultimately undermines each of his arguments against legislative history and points the way to a firmer, constitutional role for those materials.

A. Separation of Powers

Each of Justice Scalia's three separation of powers arguments assumes that statutory text — but not legislative history — has unique constitutional significance. His assumption is premised on three grounds: first, that only text survives bicameralism and presentment;⁷¹ second, that only text is the product of the entire legislature rather than the work of a subset, such as a committee;⁷² and third, that only text reflects the specific choices of the enacting Congress, whose term of office has since expired.⁷³ All three of these arguments, however, share a mistaken assumption: that bicameralism and presentment are significant only for their result, i.e., the text that emerges from the process.

Bicameralism and presentment are also significant as a *process* — a series of steps that mold and shape statutory text into the final product that enters the United States Code. Specifically, bicameralism and presentment are a process intentionally constructed to generate public debate about legislation. Consequently, legislative history — which memorializes such debate — is a valued part of the process, not merely a disposable byproduct left over after text takes its final form. Under this

⁷¹ See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 226 (1994).

⁷² See *id.*

⁷³ See *K Mart Corp., v. Cartier, Inc.*, 486 U.S. 281, 327 (1988) (Scalia, J., concurring in part and dissenting in part) (criticizing Brennan's reliance on external factors when interpreting a trademark statute and noting that the prior Congress chose not to create a statutory exemption when drafting the law).

conception, both text (the statute's words) *and* context (the statute's legislative history) constitute the validly enacted law. Thus, judicial use of legislative history derives from and does not violate bicameralism and presentment. Six aspects of the Constitution evidence this design.

First, the Constitution requires members of Congress to meet in one place at the same time.⁷⁴ Further, neither house may do business without a quorum,⁷⁵ and each house may compel absent members to attend a legislative session.⁷⁶ Simply by providing for representatives to meet with one another, the Founders chose a process where debate and discussion would play a role.

Second, the Constitution's designated manner of representation anticipated an exchange of differing views in Congress. In the Senate, where each state has equal representation,⁷⁷ small and large states would exchange views and achieve compromise. In the House, where the people are proportionally represented,⁷⁸ local interests and views would be expressed, with a national consensus emerging. In each case, the goal is to bring various interests to bear on the lawmaking process. And senators and representatives are not merely to register local preferences by voting, but are also to act as filters who "refine and enlarge" those opinions through debate with their colleagues.⁷⁹ The resulting lawmaking would then reflect careful debate and consideration of state and local interests.

⁷⁴ U.S. CONST. art. I, § 4, cl. 2 ("The Congress shall assemble at least once in every Year . . .").

⁷⁵ *Id.* § 5, cl. 1 ("[A] Majority of each [House] shall constitute a Quorum to do Business . . .").

⁷⁶ *Id.* (Congress is "authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.").

⁷⁷ *Id.* § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State . . .").

⁷⁸ *Id.* § 2, cl. 3 ("Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . ."). The method of representation is not strictly proportional, however, because each state is guaranteed at least one representative in the House regardless of population. *Id.* ("[E]ach State shall have at Least one Representative . . .").

⁷⁹ THE FEDERALIST NO. 10, at 62 (James Madison) (Jacob E. Cooke ed. 1961). The purpose of a republican government, where law is made by representatives, is: to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.

Id.

Third, as evidence of the public function of legislative debate, both houses of Congress are to keep a public journal of their proceedings.⁸⁰ Starting with the *Annals of Congress* in 1789, both the House and the Senate have kept records setting forth votes taken and summaries of floor debates. Today, the *Congressional Record* carries on that task. In these journals, senators and representatives give reasons for their actions, hoping to justify those actions to one another and to their constituents.⁸¹ When federal legislators stand for re-election, senators every six years⁸² and representatives every two years,⁸³ the electorate may then hold federal legislators accountable.

Justice Joseph Story's *Commentaries on the Constitution of the United States* described the journal requirement in similar terms:

The object of the [journal requirement] is to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents. And it is founded in sound policy and deep political foresight. Intrigue and cabal are thus deprived of some of their main resources, by plotting and devising measures in secrecy. The public mind is enlightened by an attentive examination of the public measures; patriotism, and integrity, and wisdom obtain their due reward; and votes are ascertained, not by vague conjecture, but by positive facts. . . .

. . . So long as known and open responsibility is valuable as a check, or an incentive among the representatives of a free people, so long a journal of their proceedings and their votes, published in the face of the world, will continue to enjoy public favor, and be demanded by public opinion.⁸⁴

⁸⁰ U.S. CONST. art. I, § 5, cl. 3. Each house is required to: keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Id.

⁸¹ See Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. REV. 1253, 1330–39 (2000) (proposing a public justification theory of legislative interpretation, based on Congress's need to justify its legislative judgments to the electorate).

⁸² U.S. CONST. art. I, § 3, cl. 1.

⁸³ *Id.* § 2, cl. 1.

⁸⁴ 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 840–41 (Lawbook Exchange, Ltd. 2001) (1833).

Further, as a senator or representative needs her colleagues' votes to enact legislation, debate and persuasion are one way to garner support.⁸⁵ It would be strange indeed to ignore these public justifications, offered to persuade the people and their representatives as to a law's propriety, when later applying that same law against the people.⁸⁶ In our republican government premised on accountable legislation, public statements in the legislative record should receive weight in statutory interpretation.⁸⁷

Fourth, the Constitution grants both houses of Congress power over their rules of procedure.⁸⁸ As deliberative bodies, the House and Senate need rules that determine how a subject is raised, who may speak, when and for how long they may speak, how to end discussion of a subject, and similar rules necessary for orderly debate.⁸⁹ The final vote on a bill is only one step in a long and sometimes arduous legislative process. Indeed, steps well before the final vote, such as drafting changes in committee,⁹⁰ struggling to get a bill out of committee,⁹¹ or even the order of voting on alternative proposals,⁹² often prove to be a bill's defining moment.⁹³ These steps provide the context within which a statute derives its meaning; the mechanical act of voting, though essential, offers little additional insight.

⁸⁵ Some commentators discuss this point as the concept of veto-gates. See McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 7 (1994). Certain points in the legislative process provide an opportunity for legislators to effectively stifle (veto) a bill unless they are persuaded to do otherwise. See *id.* at 18–19. Comments or promises made to move the bill through one of these veto-gates should be given special interpretive weight as passage through that gate was a necessary condition of enactment. See *id.* at 37.

⁸⁶ See Bell, *supra* note 81, at 1333–39.

⁸⁷ See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1584–85 (1988).

⁸⁸ U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings . . .”).

⁸⁹ See generally CHARLES W. JOHNSON, *HOW OUR LAWS ARE MADE* (22d ed. 2000), available at <http://thomas.loc.gov/home/lawsmade.toc.html> (last visited Feb. 6, 2005) (providing an overview of the federal legislative process); CHARLES TIEFER, *CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE* (1989).

⁹⁰ See generally Richard L. Doernberg & Fred S. McChesney, *Doing Good or Doing Well?: Congress and the Tax Reform Act of 1986*, 62 N.Y.U. L. REV. 891 (1987).

⁹¹ See ESKRIDGE & FRICKEY, *supra* note 42, at 2–23 (discussing the struggle to get the Civil Rights Act of 1964 out of the House Judiciary Committee).

⁹² See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 2–3 (2d ed. 1963) (explaining that pairwise voting on multiple proposals will not guarantee rational translation of individual preferences to social choice).

⁹³ See, e.g., ESKRIDGE & FRICKEY, *supra* note 42, at 2–36 (describing procedural hurdles in the path of enacting the Civil Rights Act of 1964, including getting the bill out of the House Rules Committee and overcoming a Senate filibuster).

Fifth, the Constitution protects representatives and senators from both arrest while attending a session of Congress and punishment for words spoken on the floors of their respective chambers.⁹⁴ This guarantee allows federal legislators to speak their minds, unafraid of prosecution and conviction by a hostile executive or judiciary, respectively.⁹⁵ To the Framers, this freedom enhanced the separation of powers, leaving legislative debate unconstrained by fear of attack by a coordinate branch.⁹⁶ It seems odd indeed for judges to disregard the fruits of such debates when interpreting statutes, preferring instead a context of their own choosing. In doing

⁹⁴ U.S. CONST. art. I, § 6, cl. 1.

Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Id. For a review of the history of these guarantees, see Alexander J. Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK U. L. REV. 1, 3–16 (1968); Terence M. Fitzpatrick, Comment, *The Speech or Debate Clause: Has the Eighth Circuit Gone Too Far?*, 68 UMKC L. REV. 771, 775–81 (2000). See *Doe v. McMillan*, 412 U.S. 306 (1973) (finding that official immunity does not extend to acts outside the sphere of legitimate legislative activity); *Gravel v. United States*, 408 U.S. 606, 616–17 (1972) (explaining that the privilege applies to both members of Congress and their aides when those aides are performing legislative functions); *United States v. Brewster*, 408 U.S. 501 (1972) (concluding that a senator could be prosecuted for bribery without being shielded by the Speech and Debate Clause because the crime did not necessitate an inquiry into legislative acts or motives); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (stating that legislators “should be protected not only from the consequences of litigation’s results but also from the burden of defending themselves,” but finding the doctrine not clearly applicable to employees); *United States v. Johnson*, 383 U.S. 169 (1966) (holding that judicial evaluation of a speech given on the floor of the House, in determining whether the representative conspired to deliver the speech for pay, was prohibited by Article I).

⁹⁵ See *Johnson*, 383 U.S. at 178–85.

⁹⁶ The Court has explained the separation of powers point as follows:

Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature. In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders. . . . The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the “practical security” for ensuring the independence of the legislature.

Id. at 178–79 (citations omitted).

so, the judiciary would seem to accomplish indirectly that which it could not do directly. While the Constitution prohibits the judiciary from imposing legal punishment on legislative speech, the Court indirectly punishes legislators by ignoring such speech and debate when implementing their handiwork.

Sixth, after a bill passes the House and Senate, it is presented to the President, who has ten days to review the bill with his cabinet.⁹⁷ The President may then ask executive officials for their written advice.⁹⁸ If the President decides to veto a bill, he shall send the bill back to Congress with a public statement explaining the grounds for the veto.⁹⁹ By allowing the President time for reflection and an opportunity for counsel, the Constitution expects the President's decision to be deliberative.¹⁰⁰ Along with the congressional debates, the President's signing or veto statements constitute a statute's public context, and it is that public context that the People will use when judging their representatives and the President at the next election.

These constitutional provisions reveal bicameralism and presentment as a constitutional process, where legislators debate and sometimes produce legislation. This point should be crucial to Justice Scalia. No other context one might use to interpret a federal statute has this constitutional pedigree. Because legislative history is the best evidence of what occurred during the bicameralism and presentment process, that material provides a constitutionally-preferred context for interpreting statutory text.¹⁰¹

⁹⁷ U.S. CONST. art. I, § 7, cl. 2 ("If any Bill shall not be returned by the President within ten days (Sunday excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it . . .").

⁹⁸ *Id.* art. II, § 2, cl. 1 (stating that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices").

⁹⁹ *Id.* art. I, § 7, cl. 2 ("If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.").

¹⁰⁰ For example, before signing the bill that created the first Bank of the United States, President George Washington sought written opinions from Attorney General Edmund Randolph, Secretary of State Thomas Jefferson, and Secretary of the Treasury Alexander Hamilton. See Paul E. McGreal, *Ambition's Playground*, 68 FORDHAM L. REV. 1107, 1120 (2000). And before exercising his first veto, which disapproved a bill apportioning the House of Representatives, President Washington sought written opinions regarding the constitutionality of the law. See George Washington, Veto Message (Apr. 5, 1792), reprinted in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 124 (James D. Richardson ed., 1896); 2 ANNALS OF CONGRESS 119 (1792) (reporting that President Washington's veto message was received by the House, and the House failed to override the veto by the necessary two-thirds vote); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 907 (1989–1990).

¹⁰¹ On the centrality of this context to statutory meaning, see Solan, *supra* note 3, at 256 ("We should not insulate ourselves from the context in which legally significant words were

We can now see how Justice Scalia's non-delegation argument is a red herring. Recall his argument that consulting legislative history, such as committee reports, impermissibly delegates lawmaking power to a subset of Congress.¹⁰² Because the Constitution vests the legislative power in the entire Congress, this delegation is forbidden. This argument, however, poses a false choice between, on the one hand, meaning that resides in the text and, on the other hand, meaning that resides in legislative history. The choice is false because text does not have determinate meaning outside of a context. When Justice Scalia refers to plain text, what he really means is text understood in some context *other than the statute's legislative history*. Thus, the real choice is *not* between text and legislative history, but rather between text understood within its legislative history and text understood within some other context.

This entirely reframes the non-delegation argument as a question of what context ought to control a statute's meaning.¹⁰³ Again, the process of bicameralism

uttered if we care about ascertaining what the speaker intended to convey.”); see also RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 262–69 (1990) (discussing the “[p]lain-[m]eaning [f]allacy” that ignores relevant interpretive context).

¹⁰² See *supra* notes 34–40 and accompanying text.

¹⁰³ Here, Professor Manning's argument offers significantly more than Justice Scalia's by adding a refinement to the bicameralism and presentment argument. Like Justice Scalia, he argues that judicial use of legislative history effectively allows delegation of congressional lawmaking power to the subset of Congress that created the legislative history material. Manning, *supra* note 44, at 718 (“If courts give authoritative weight to committee reports or sponsors' statements, the enactment of vague or ambiguous statutory language transfers the majority's discretion (within the range of possible meanings) to a legislative committee or sponsor.”). Going beyond Justice Scalia's account, he argues that this shift of “law elaboration” from the whole Congress to a subset of Congress impermissibly makes legislating less costly. *Id.* at 719 (“Using legislative history to that end allows Congress to shift law elaboration from the full legislative process to the less cumbersome process of generating legislative history.”). Yet, the Framers intentionally made the legislative process — bicameralism and presentment — so costly that lawmaking would not be too easy. *Id.* If Congress wants to make a cost-saving delegation of the “law elaboration” function, thereby bypassing the costly bicameralism and presentment process, he argues, it must delegate that function to an actor over which it has no control, such as the courts or an administrative agency. *Id.* This leaves Congress with two choices. On the one hand, Congress can use the bicameralism and presentment process to place its preferred meaning in the text. On the other hand, Congress can leave statutory text ambiguous, leaving “law elaboration” to federal actors beyond its control.

In formulating this argument, Professor Manning makes the same analytical move as Justice Scalia — he artificially severs statutory text and context. In doing so, he never adequately answers an important objection: Why not read legislators as adopting a statutory text *as understood against the backdrop of its legislative history*? Congress adopts as law the text in context, with the courts and executive agencies free to interpret and implement that law. This view seems persuasive given three facts about the legislative process: (1) legislators are aware that legislative history materials are created as a matter of course, (2) legislators have

and presentment is the constitutionally-prescribed context of a statute, and legislative history memorializes that context. Any other context lacks this constitutional legitimacy. Only by rejecting legislative history, and thereby selecting a different context for interpreting statutory text, does a judge delegate lawmaking power — the power to choose statutory context — outside of constitutional channels.

B. Inadequate Notice

By rejecting legislative history, Justice Scalia has created his own notice problem. Recall that he criticizes resort to legislative history because it makes statutory interpretation infinitely manipulable and indeterminate.¹⁰⁴ Consequently, we cannot predict which interpretation ultimately will prevail, and we lack advance notice of precisely what the statute requires.

Rejecting legislative history does not solve the notice problem. Without legislative history, a judge must look elsewhere for context to give meaning to statutory text, and the source of that context will necessarily lie outside of the text. Further, because Justice Scalia offers no guidance in selecting an interpretive context, the judge's unguided discretion will determine statutory meaning, i.e., what the law is. Without an explanation or guiding principle, any choice of context is merely the rule of an unexplained judicial hunch, not the rule of law.¹⁰⁵

Further, given Justice Scalia's terms of debate, this rule of law problem cannot be solved. If text is the only aspect of a statute that is law, context is by definition outside law. Because every act of interpretation requires a choice of context, every

regular access to such legislative history materials, and (3) legislators are free to vote against a bill if they disagree with any material in its legislative history. Because legislative history can be a basis for voting against a statute, just as can the text, it is difficult to envision how legislative history is any less subject to the strictures of bicameralism and presentment than text. See Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 262–64. That a given legislator has neither the time nor the desire to read the legislative history should be of no consideration. As with all human beings, legislators decide what level of information gathering is rational for a given decision. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998) (discussing the economics of information). They may read the bill's entire text and legislative history, or they may rely on the judgment of colleagues, staff or committee bill summaries, or their constituents' expressed desires. That is, and should be, their choice. Indeed, if a legislator sees no need to read a bill's final text before voting, both Justice Scalia and Professor Manning honor that decision and nonetheless accept the statute's text. Yet, simply because the legislator exercised the same discretion as to the statute's context (including its legislative history), they reject that source of meaning. Neither Justice Scalia nor Professor Manning adequately meet this argument.

¹⁰⁴ See *supra* Part I.B.3.

¹⁰⁵ For further elaboration of this point, see McGreal, *Slighting Context*, *supra* note 39, at 368–71.

act of interpretation necessarily entails resort to sources beyond law. Thus, under Justice Scalia's argument, the rule of law is hopelessly inconsistent with the endeavor of statutory interpretation.¹⁰⁶

This problem is solved by adopting the expanded conception of bicameralism and presentment defended above. Because bicameralism and presentment are significant as a process, they provide both a text and a context with the constitutional status of law.

C. Disguised Personal Preference

Recall that we treated two related arguments under this heading. First, Justice Scalia argues that legislative history places no limits on judicial discretion.¹⁰⁷ In this way, legislative history disguises the judge's personal preferences and prejudices. Second, he argues that legislative history is unreliable because legislators use it to mislead later readers.¹⁰⁸ In this way, legislative history reflects a legislator's personal preferences, inserted to thwart the will of Congress reflected in statutory text. The next two sections address each argument in turn.

1. Unbounded Judicial Discretion

According to Justice Scalia, legislative history's inherent manipulability allows judges to covertly implement their personal policy preferences under the guise of statutory interpretation.¹⁰⁹ Because legislative history can be bent to support any result, it cannot constrain judicial discretion. And if legislative history cannot decide cases, then something else — something unacknowledged, such as personal ideology — must do so.

Yet again, Justice Scalia's textualism fares no better. Only by ignoring the choice of context does he avoid discretion. For example, as discussed above, the words "Keep off the grass" appear to have a natural meaning when said by a drug counselor or a gardener.¹¹⁰ In each case, we attribute meaning so effortlessly that we may forget that context does much of the analytical heavy lifting.¹¹¹ This becomes apparent when those same words appear outside of a concrete context. Then, choice of context becomes conscious, as we must hypothesize a context

¹⁰⁶ As previously noted, Professor Manning identifies a similar gap in Justice Scalia's textualist argument. See Manning, *supra* note 44. Ultimately, however, his attempt to fill that gap is unpersuasive. *Id.*

¹⁰⁷ See *supra* note 69 and accompanying text.

¹⁰⁸ See *supra* note 70 and accompanying text.

¹⁰⁹ See *supra* notes 69–70 and accompanying text.

¹¹⁰ See *supra* notes 4–7 and accompanying text.

¹¹¹ See Solan, *supra* note 3, at 252–54.

within which to understand the words. The act of hypothesizing a context entails a choice no less than deciding which portion of legislative history to credit.

The question, then, is whether hypothesizing a statutory context is any more constrained than applying legislative history. As Justice Scalia practices the method, hypothesizing context appears less constrained. He neither acknowledges the need to choose a context, nor provides a standard or method for making that choice. Without standards, the decision is wholly unconstrained, leaving maximum discretion. With legislative history, there is at least the need to find and cite some legislative material that supports the judge's preferred interpretation. Whether such material exists is outside of the judge's control; if supportive legislative history does not exist, the judge may not conjure it up on her own. With Justice Scalia's hypothetical contexts, however, both the chosen words and their context spring from the judge's imagination. No external source circumscribes that choice, leaving the judge free to manipulate the hypothetical context to suit her preferred interpretation.

Further, Justice Scalia's choice of hypothetical context goes unacknowledged, increasing the danger of manipulation. Readers of an opinion may miss that a choice has in fact been made, allowing this discretion to go unexamined and thus unchallenged. Even when detected, the choice will be difficult to critique because the judge does not supply her reasons. Without previously recorded reasons, the judge may offer *ex post facto* rationalizations, or simply change the reasons offered depending on the critiques that emerge while drafting her opinion. This is particularly offensive to a court that eschews the practice of rendering decisions with opinions to follow at a later date. The rationale offered for this prohibition is that the need to justify a decision in a contemporaneous writing both affects the ultimate decision and constrains the decision maker's options.¹¹² Leaving the choice of hypothetical conversation unacknowledged increases the decision maker's discretion, thereby increasing the room for manipulation.

2. Tainted Words

Aside from its manipulability, Justice Scalia criticizes legislative history as inherently unreliable.¹¹³ Specifically, he complains that interest groups and legislators

¹¹² See JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND* (1992); Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1, 9-20 (1999) (discussing lawmakers' obligation to explain their decisions); Paul E. McGreal, *Constitutional Illiteracy*, 30 IND. L. REV. 693, 708-14 (1997) (reviewing LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES* (1996)) (arguing that we ought to care whether ordinary citizens can understand our constitutional government).

¹¹³ See *supra* notes 69-70 and accompanying text.

fill the legislative record with language that they could not get into the statute's text.¹¹⁴ They use legislative history to win battles lost in drafting the legislation itself. Consequently, legislative history does not illuminate a statute's meaning so much as deceive later interpreters of the statute.¹¹⁵

Here, Justice Scalia makes an argument without precedent in our constitutional tradition. Namely, he uses the presumed subjective motivation of legislators to question the validity of their work product. While genuine legislative history — legislative history that reflects genuine debate about the meaning and substance of a bill — would be probative of a statute's meaning,¹¹⁶ Justice Scalia takes judicial notice that much legislative history is *not* genuine — that it is inserted in the legislative record to mislead later interpreters.¹¹⁷ Instead of examining such materials on a case-by-case basis, as do some of his colleagues, Justice Scalia irrebuttably presumes that bad motives underlie all legislative history materials.¹¹⁸

Justice Scalia's conclusive impugning of legislative motives contradicts many established practices and principles in constitutional law.¹¹⁹ First, in reviewing federal and state statutes, the Court begins with a presumption of constitutionality,¹²⁰

¹¹⁴ See *supra* note 70 and accompanying text.

¹¹⁵ See *supra* notes 68–70 and accompanying text.

¹¹⁶ See Scalia, *supra* note 11, at 34.

¹¹⁷ See, e.g., *id.* at 36–37 (relying on his experience as “head of the Office of Legal Counsel in the Justice Department” to estimate the amount of time that lawyers spent on researching legislative history). Not surprisingly, other commentators offer different anecdotal accounts. See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 867 (1992) (“My experience running the staff of the Senate Judiciary Committee led me to conclude that elected officials seriously consider public interest arguments and act upon them”); Abner J. Mikva, *Foreword to Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167, 167 (1988) (“The politicians and other people I have known in public life just do not fit the ‘rent-seeking’ egoist model that the public choice theorists offer.”). More importantly, the empirical evidence undercuts Justice Scalia's gestalt impression.

¹¹⁸ Scalia, *supra* note 11, at 34.

¹¹⁹ Professor Charles Tiefer argues that recent political science literature undermines the empirical basis for this argument. See Tiefer, *supra* note 103, at 264–71. Specifically, Professor Tiefer notes that this argument assumes that congressional committees are captured by interest groups and thus their views will diverge from those of Congress as a whole. *Id.* at 264–65. But, after the 1994 turnover in Congress, we saw significant changes in voting patterns even though there was no appreciable change in interest groups. *Id.* at 266. (“Changing the chairs of the congressional committees changed outcomes, often to a large degree, without any necessary shift in interest groups.”). *Id.* Further, analysis of committee and congressional voting patterns reveals that “voting in most committees matched, more or less, voting in their chambers.” *Id.* at 267.

¹²⁰ See, e.g., *Bush v. Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring) (“Statutes are presumed constitutional”); *Mueller v. Allen*, 463 U.S. 388, 394–95 (1983) (noting that the Supreme Court is “reluctan[t] to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from

the challenger bears the burden to establish unconstitutionality.¹²¹ Further, in most areas of constitutional law, the Court refuses to look beyond the legislature's asserted purpose for its legislation.¹²² For example, in Equal Protection Clause cases, the Court has consistently examined the government's asserted purpose in enacting economic regulations, rejecting arguments based on legislators' purported subjective biases.¹²³ And even a law that discriminates based on race may be upheld

the face of the statute."); *Fairbank v. United States*, 181 U.S. 283, 285 (1901) ("The presumptions are in favor of constitutionality, and before a court is justified in holding that the legislative power has been exercised beyond the limits granted, or in conflict with restrictions imposed by the fundamental law, the excess or conflict should be clear."). The Court elaborated on this presumption in the Equal Protection case of *Heller v. Doe*, 509 U.S. 312 (1993), where it upheld a statute that applied a different standard of proof for committing mentally ill and mentally retarded individuals:

A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." A statute is presumed constitutional, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it "is not made with mathematical nicety or because in practice it results in some inequality." "The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific."

Id. at 320–21 (citations omitted).

¹²¹ In some areas, the burden shifts to the government once the challenger has made a threshold showing. For example, once a litigant has shown that a statute discriminates based on race, the government must show that the challenged law is necessary to accomplish a compelling government interest. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that federal affirmative action programs must meet a strict scrutiny standard); *see also* ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 9.3.2 (2d ed. 2002); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-6 (2d ed. 1988).

¹²² *See generally* J. Morris Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 956 (1978); Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 ARIZ. L. REV. 1219 (1998); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

¹²³ *See Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103 (2003); *Nordlinger v. Hahn*, 505 U.S. 1 (1992). The Court explained the appropriate standard of review:

[T]he Equal Protection Clause is satisfied so long as there is a plausible

if the government can satisfy strict scrutiny.¹²⁴ In these areas, the Court consistently assumes a baseline of legislative good faith, either rejecting inquiry into legislative motivation, or placing a heavy burden on those seeking to overturn government action on that basis.

Second, Justice Scalia's assault on legislative motive flies in the face of separation of powers concerns, which counsel judicial restraint when examining the inner-workings of Congress or the Executive Branch.¹²⁵ Consider *Field v. Clark*,¹²⁶ where the Court was asked to decide whether the identical bill text had passed both houses of Congress and been signed by the President. If not, it was argued, the statute was invalid as the same bill had not properly passed the requirements of bicameralism and presentment.¹²⁷ The Court was urged to scrutinize the legislative process, lest "it becomes possible for the Speaker of the House of Representatives

policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Id. at 11 (internal citations omitted); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken."). The Court may use its means-end Equal Protection analysis to determine whether there is a dangerous probability that a specific statute was motivated by bias. See *Romer v. Evans*, 517 U.S. 620 (1996); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); see also Paul E. McGreal, *The Role of Suspicion in Federal Equal Protection*, 8 WM. & MARY BILL RTS. J. 183, 185–88 (1999) [hereinafter McGreal, *Role of Suspicion*]. However, in each of these cases, the Court relied on factors indicating that the statute at issue was impermissibly motivated, rather than impugning legislative motives wholesale. See *Heller*, 509 U.S. at 322–24 (upholding discrimination between the mentally ill and mentally retarded because the record did not contain any indications of impermissible bias against the mentally retarded); see also *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."); *Vance v. Bradley*, 440 U.S. 93, 97 (1979) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.") (footnote omitted).

¹²⁴ See *Adarand*, 515 U.S. 200 (applying strict scrutiny to a federal contracting minority set-aside program); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (applying strict scrutiny to a state contracting minority set-aside program).

¹²⁵ See *Field v. Clark*, 143 U.S. 649, 672–73 (1892).

¹²⁶ 143 U.S. 649 (1892).

¹²⁷ *Id.* at 672.

and the President of the Senate to impose upon the people as a law a bill that was never passed by Congress.”¹²⁸ The Court declined this invitation:

[T]his possibility is too remote to be seriously considered in the present inquiry. It suggests a deliberate conspiracy to which the presiding officers, the committees on enrolled bills and the clerks of the two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the Constitution. *Judicial action based upon such a suggestion is forbidden by the respect due to a coördinate branch of the government.*¹²⁹

Congress’s internal lawmaking processes are entitled to a conclusive presumption of regularity.

Third, the same aversion to questioning legislative motives appears in cases applying the Speech and Debate Clause.¹³⁰ The Clause immunizes members of Congress and their aides¹³¹ from civil and criminal liability for legislative acts, such as voting, drafting legislation and committee reports, and speeches and debates on the floor of Congress.¹³² In *United States v. Johnson*,¹³³ the federal government prosecuted Thomas Johnson, a U.S. Representative, for a speech delivered on the

¹²⁸ *Id.*

¹²⁹ *Id.* at 672–73 (emphasis added).

¹³⁰ U.S. CONST. art. I, § 6, cl. 1 (“[F]or any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place.”).

¹³¹ See *Gravel v. United States*, 408 U.S. 606, 617 (1972) (“It is true that the Clause itself mentions only ‘Senators and Representatives,’ but prior cases have plainly not taken a liberalistic approach in applying the privilege.”).

¹³² While the Clause speaks only of “any Speech or Debate in either House,” U.S. CONST. art. I, § 6, cl. 1, the Court has broadly interpreted this phrase to include “the sphere of legitimate legislative activity,” *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). See *Gravel*, 408 U.S. at 617 (“The Clause also speaks only of ‘Speech or Debate,’ but the Court’s consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view. Committee reports, resolutions, and the act of voting are equally covered”); *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881) (The rule covers “[i]n short, . . . things generally done in a session of the House by one of its members in relation to the business before it.”). Extra-legislative activities are not protected by the Clause, such as selling the publication rights to congressional documents to a private publisher, *Gravel*, 408 U.S. at 625 (“[P]rivate publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence.”), or interfering with the workings of executive agencies, *United States v. Johnson*, 383 U.S. 169, 172 (1966).

¹³³ 383 U.S. 169 (1966).

House floor. The United States alleged that the speech was part of a conspiracy among Johnson, fellow House members, and a savings and loan company whereby the company would pay Johnson and his colleagues to convince the Justice Department to drop mail fraud indictments against the savings and loan company.¹³⁴ One count of the indictment charged Johnson with accepting money in exchange for delivering a congressional speech defending the savings and loan company.¹³⁵ The charge rested on a federal statute that punished any member of Congress who "receives . . . , any compensation for any services rendered or to be rendered, . . . in relation to any proceeding, . . . in which the United States is . . . directly or indirectly interested,"¹³⁶ as well as a federal statute that punished any person who conspires "to defraud the United States."¹³⁷ The Court explained that "[t]he essence of such a charge . . . is that the Congressman's conduct was improperly motivated."¹³⁸ The question, then, was whether the Speech and Debate Clause protected members of Congress from legal proceedings that questioned their motives in making statements before Congress.¹³⁹

The Court rejected any inquiry into a legislator's motives:

However reprehensible such conduct may be, we believe the Speech or Debate Clause extends at least so far as to prevent it

¹³⁴ *Id.* at 171–72.

¹³⁵ *Id.* at 184. The indictment read in relevant part:

It was a part of said conspiracy that the said THOMAS F. JOHNSON should . . . render services, for compensation, . . . to wit, the making of a speech, defending the operations of Maryland's 'independent' savings and loan associations, the financial stability and solvency thereof, and the reliability and integrity of the 'commercial insurance' on investments made by said 'independent' savings and loan associations, on the floor of the House of Representatives.

Id.

¹³⁶ *Id.* at 170–71 n.1.

¹³⁷ *Id.* at 171 n.2.

¹³⁸ *Id.* at 180.

¹³⁹ The Court explained that the trial proceedings deeply probed Representative Johnson's preparation for the speech:

Extensive questioning went on concerning how much of the speech was written by Johnson himself, how much by his administrative assistant, and how much by outsiders representing the loan company. The government attorney asked Johnson specifically about certain sentences in the speech, the reasons for their inclusion and his personal knowledge of the factual material supporting those statements. In closing argument the theory of the prosecution was very clearly dependent upon the wording of the speech. In addition to questioning the manner of preparation and the precise ingredients of the speech, the Government inquired into the motives for giving it.

Id. at 173–76.

from being made the basis of a criminal charge against a member of Congress of conspiracy to defraud the United States by impeding the due discharge of government functions.¹⁴⁰

Allowing judicial inquiry into legislative motive, especially in a proceeding initiated by the Executive Branch, would impermissibly erode legislative independence. Otherwise, "critical or disfavored legislators" could be attacked in "a judicial forum" on vague allegations of improper motive.¹⁴¹ Preventing such attacks "is the predominate thrust of the Speech or Debate Clause."¹⁴²

Fourth, hesitancy to question legislative motives has venerable roots, appearing in Chief Justice Marshall's opinion in *Fletcher v. Peck*.¹⁴³ *Fletcher* involved an attempt to invalidate a private land grant by the Georgia legislature.¹⁴⁴ The challengers alleged that members of the Georgia legislature were promised an interest in the land in exchange for passing the land grant.¹⁴⁵ This alleged promise "unduly influenced" the state legislators, making the resulting legislative land grant, and its purported transfer, "a nullity."¹⁴⁶ Chief Justice Marshall framed the issue as whether "the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice."¹⁴⁷

Chief Justice Marshall denied judicial review on two grounds. First, he noted two practical difficulties with assessing legislative motives: "If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned."¹⁴⁸ On the one hand, courts are powerless to affect a legislature controlled by a corrupt majority. With neither the power of the sword nor the power of the purse, they have little (if any) ammunition to fight such forces.¹⁴⁹ On the other hand, if corruption is confined to a minority of the legislature, courts have no administrable standard to determine when such corruption should invalidate a law. With no basis for deciding, judges should stay out of the controversy.

¹⁴⁰ *Id.* at 180.

¹⁴¹ *Id.* at 182.

¹⁴² *Id.*

¹⁴³ 10 U.S. (6 Cranch) 87 (1810).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 129.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 130.

¹⁴⁸ *Id.*

¹⁴⁹ See McGreal, *Role of Suspicion*, *supra* note 123, at 1147-48 (discussing the relatively weak position of the judiciary).

Second, on principle, judges ought not entertain such challenges to legislative motive. Chief Justice Marshall characterized such suits as “indecent, in the extreme,”¹⁵⁰ as they insult the dignity of a collateral branch of government. If the challenged law is one:

which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.¹⁵¹

The remedy for ill-considered or improperly motivated laws is the political process, where citizens can vote the offending legislators out of office.¹⁵²

Fifth, the Constitution empowers each chamber to regulate its own proceedings.¹⁵³ Under this power, early Congresses established an embryonic form of the legislative process we have today, replete with a committee system and rules of procedure. Unless a chamber’s rules violate some independent constitutional provision,¹⁵⁴ the Court has not second-guessed a chamber’s method of proceeding.¹⁵⁵

These constitutional principles counsel against wholesale rejection of legislative history. As Justice Scalia acknowledges by grounding his textualism on the *constitutional* process of bicameralism and presentment, statutory interpretation is a practice that must make sense *under our Constitution*. As bicameralism and presentment is the constitutionally-appointed context that gives statutes their meaning, and legislative history is evidence of that context, no federal court should ignore legislative history merely because anecdotal evidence suggests that some of those

¹⁵⁰ *Fletcher*, 10 U.S. (6 Cranch) at 131.

¹⁵¹ *Id.*

¹⁵² *Id.* at 144 (Johnson, J., separate opinion).

¹⁵³ U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”).

¹⁵⁴ For example, a House rule barring African Americans from committee service would violate the Equal Protection Clause. *See Nixon v. United States*, 506 U.S. 224, 237–38 (1993) (explaining that while the Senate has the sole power to try impeachments, which is a power that it may exercise free from judicial review, the Court will review whether the Senate has violated other provisions of the Constitution in exercising that power).

¹⁵⁵ *United States v. Ballin*, 144 U.S. 1, 5 (1892) (While Congress may not “ignore constitutional restraints or violate fundamental rights, . . . within these limitations all matters of method are open to the determination of the House [and t]he power to make rules is . . . within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.”).

materials might be suspect. To do so would be to conclusively presume legislative bad faith, which the Supreme Court has steadfastly refused to do.

To be clear, I am not arguing that every scrap of legislative history has equal importance. As with any other aspect of context, each piece must be weighed against the others to consider how well it describes the overall context of enactment. The Supreme Court has done just that in according different weight to different types of legislative history.¹⁵⁶ For example, the Court gives drafting history heavy weight, as it shows the different choices made in crafting statutory language.¹⁵⁷ Similarly, a legislator's or committee's explanation of a "text's pedigree" can offer guidance on interpretation,¹⁵⁸ and a conference committee report may shed significant light on a statute's meaning.¹⁵⁹ This parsimonious approach mirrors the Court's attitude toward Congress in other areas — assume a baseline of legislative good faith, loosening or abandoning that assumption as the circumstances require.

CONCLUSION

Parsing legislative history is not likely to be easy. But as Justice Scalia himself concedes, ease of application is not the Holy Grail of our quest.¹⁶⁰ Rather, we seek an interpretive approach that makes sense both on its own terms and according to the tenets of American constitutional government. Justice Scalia's rejection of legislative history fails these twin demands because it ignores the inseparability of text and context.

¹⁵⁶ See Tiefer, *supra* note 103, at 232–50 (discussing the Court's recent use of various types of legislative history). But see Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1879–81 (1998) (criticizing the Court's hierarchy of legislative history materials).

¹⁵⁷ Tiefer, *supra* note 103, at 233 ("Drafting history consists of the record of when changes occurred in a bill's language, from introduction to final passage. It is distinct from explanations along the way of why those changes occur, or other explanations along the way of the bill."); see, e.g., *Lindh v. Murphy*, 521 U.S. 320, 326–29 (1997) (using drafting history to interpret the federal habeas corpus statute).

¹⁵⁸ Tiefer, *supra* note 103, at 237 ("[T]he text's pedigree, i.e., the text's antecedents, such as prior statutes or other prior public law, which the bill purports to codify or use as a guide for subsequent legal interpreters."); see, e.g., *Jones v. United States*, 526 U.S. 227 (1999) (using a statute's textual pedigree to interpret a federal carjacking statute).

¹⁵⁹ Tiefer, *supra* note 103, at 233.

A conference committee produces a report in two parts: bill language, typically a compromise between the bill language passed by the House and that passed by the Senate, submitted to the House and Senate for final passage; and a "joint explanatory statement of the managers" that explains what the conference committee did.

Id.; see, e.g., *Bank One Chi. v. Midwest Bank & Trust Co.*, 516 U.S. 264 (1996) (using a conference committee report to interpret a banking statute).

¹⁶⁰ Scalia, *supra* note 11, at 45.

On its own terms, rejecting legislative history, without saying more, makes little sense. Text cannot be understood absent a context. Rejecting legislative history simply eliminates one possible interpretive context, without identifying some other context to fill the interpretive void. Thus, the textualist account is incomplete.

Rejecting legislative history also fails the test of consistency with constitutional government. While Justice Scalia offers bicameralism and presentment as the constitutional measuring stick, he follows his logic only half way — he accepts the text produced by that process, but not the context. This separation of text and context cannot be justified. Because legislative history reflects the context of bicameralism and presentment, it provides the constitutionally preferred context for determining statutory meaning.