

A Constitutional Defense of Legislative History

by

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

This Essay 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.² For example, consider a sign that admonishes, "Keep off the grass."³ Hanging on the wall of a drug rehabilitation clinic, the sign implores abstention from drugs. Planted in a well-manicured lawn, the sign enjoins passersby from stepping on the turf. Pairing the same text with different contexts changes the meaning.⁴

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. He argues from the Constitution's law-making process, noting that only a statute's *text* passes through the constitutionally-prescribed law-making steps of bicameralism (passage by both chambers of Congress) and presentment (delivery of the bill for

² 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 makes the 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, the context makes certain interpretations more salient than others." Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 Wis. L. Rev. 235, at 257.

³ I borrow this example from Gerald Graff, "Keep of the Grass," "Drop Dead," and Other Indeterminacies: *A Response to Sanford Levinson*, 60 Tex. L. Rev. 405, 407-08 (1982).

⁴ 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 says, "Drop dead." (This example is also taken from Graff, *supra* note 3, at 409.) To fix meaning on these words, the professor must pair them with a hypothetical context. For example, perhaps a colleague with a sense of humor wrote the note after a light-hearted disagreement. Or, perhaps the note is from a disgruntled former student who received a failing grade. 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. Further, changing context can alter meaning just as radically as changing text, as every text-context pairing potentially has a different meaning.

the President's signature or veto).⁵ 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.

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, faithful adherence to constitutional text and structure actually *requires* such consideration. This disconnect derives from textualism's misdirected, laser-like focuses on the *result* of the bicameralism and presentment process—statutory text—to the exclusion of the *process* itself. 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 so much chafe to be discarded after the final vote.

This Essay has two parts. Part I describes the textualist constitutional argument against legislative history in statutory interpretation. In doing so, I focus 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.

⁵ See U.S. Const. art. I, § 7, c. 2. Of course, if the President vetoes a bill, a super-majority of both houses of Congress is needed to override the veto.

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*.⁶ As the title suggests, common-law reasoning is the springboard for his criticism. Simply put, he 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. Section A explains Justice Scalia's critique of common-law law making. Section B then explains how his critique of common-law law making lead 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.⁷ The common law is the milieu of most first year law school classes, where students study mostly judicial decisions and not legislative texts.⁸ Those decisions discuss "some policy reasons" and "earlier opinions" of other judges, but "not a single snippet of statutory law," because the common law "was almost entirely the creation and domain of English judges."⁹ With no controlling statute, common-law judges were the law *makers*, 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,

⁶ See 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) [hereinafter *Scalia, A Matter of Interpretation*]. Throughout this discussion, I also make margin references to the work of Professor John Manning, a leading academic advocate of rejecting legislative history. Professor Manning's work shares many arguments and premises with that of Justice Scalia.

⁷ *Id.* at 3-9.

⁸ *Id.* at 4-6.

arbitrators, even baseball umpires and football referees—do that. But the second function, and the more important one, was to *make* the law.¹⁰

And to truly “make law,” courts must adhere to a concept like *stare decisis* that requires judges to follow prior decisions. Otherwise, those decisions “would not be making any ‘law’; they would just be resolving the particular dispute before them.”¹¹

Stare decisis, however, leaves 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, calling the analysis result-driven. The common-law judge first exercises “reason” and “the brilliance of one’s own mind” to identify “the ‘best’ legal rule.”¹² Next, she follows or distinguishes precedent depending on whether it supports her preferred rule. 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 though earlier cases that leaves him free to impose that rule: distinguishing one prior case to the left, straight-arming another one on the right, high-stepping away from precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law.¹³

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.

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

⁹ *Id.* at 6.

¹⁰ *Id.*

¹¹ *Id.* at 7.

¹² *Id.*

government. Democracy commands that only accountable decision makers make law.¹⁴ As only Congress and the President are accountable to the People, our constitutional commitment to democracy and separation of powers dictates that those branches, not the unaccountable judiciary, make law.¹⁵

The second and third constitutional values relate to the prohibition on *ex post facto* laws.¹⁶ Generally speaking, the 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. This *ex post* 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 decisions, she may indulge her biases and prejudices in reaching that decision. The parties, however, will be none the wiser: The almost unlimited ability to manipulate precedent allows the common-law judge to publicly justify any decision as the "best rule" for the case.¹⁷

¹³ *Id.* at 9.

¹⁴ See Cass R. Sunstein, Book Review, *Justice Scalia's Formalism*, 107 Yale L.J. 529, 530 (1997) (describing Justice Scalia's view as democratic formalism, meaning that the argument "is designed to ensure that judgments are made by those with superior democratic pedigree.").

¹⁵ Scalia, *A Matter of Interpretation*, *supra* note 6, at 9. At this point, Justice Scalia makes an awkward admission—the founding generation believed that common law judges "found" the principles of the common law and thus were not engaging in lawmaking as legislatures do. 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. This concession has two potential problems. First, it holds one historical assumption constant while changing another, without explaining that choice. For example, here, 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.

¹⁶ U.S. Const., art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed.").

¹⁷ Justice Scalia quotes an early commentator who sums the point nicely:

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 new law. The legislature must act on general views, and prescribe at once for whole class of cases.

Scalia, *A Matter of Interpretation*, *supra* note 6, at 11 (quoting Robert Rantoul, Oration at Scituate (July 4, 1836), in Kermit L. Hall et al., *American Legal History* 317-18 (1991)).

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 law making. 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, he means the conventional sources that lawyers consult to determine what was said and happened during Congress' consideration and enactment of a statute. As examples, he mentions, "the statements made in the floor debates, committee reports, and even committee testimony."¹⁸ Thus, Justice Scalia uses the term in its conventional sense.

As to legislative intent, his meaning is harder to discern. Commentators generally acknowledge at least three versions of legislative intent. First, one might mean subjective legislative intent, meaning the subjective views of individual legislators regarding the precise interpretive question before the court. For example, if the issue is whether a federal statute requires a successful tort plaintiff to include punitive damages in income, we would examine legislative history to determine what individual legislators believed about that specific question.

Second, one might mean objective legislative intent. Under this approach, we seek the policies and values that the enacting Congress sought to promote through its legislation, and then interpret the statute to best achieve those policies and values.¹⁹ On the punitive damages question, that would mean asking what policy or value underlay 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. That approach asks

¹⁸ Scalia, *A Matter of Interpretation*, *supra* note 6, at 29.

¹⁹ 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.

what evil or problem Congress sought to address, and what interpretation best solves that evil or problem.²⁰

While Justice Scalia never explains which of these views he includes in legislative intent, 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*."²¹ 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.²²

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. And this is a choice Justice Scalia must make, if implicitly, if he is to give a statute meaning.²³ 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 law making.

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

²⁰ See William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, *Legislation: Statutes and the Creation of Public Policy* 220 (3d ed. 2001); see also Henry Hart, Jr. & Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1374-80 (William N. Eskridge, Jr. & Philip Frickey eds., 1994); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case* 71 Harv. L. Rev. 1, 15-17 (1957). The punitive damages example is taken from the case *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: The Illogic of Ordinary Speech in Statutory Interpretation*, 52 Kan. L. Rev. 325, 358-61 (2004).

²¹ Scalia, *A Matter of Interpretation*, *supra* note 6, at 17.

²² But see *United States v. Fausto*, 484 U.S. 439, 444-45 (1988) (in opinion for the Court, Justice Scalia uses Senate committee report to identify the object 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).

²³ See McGreal, *supra* note 21, at 337-39. Prof. Manning notes that Justice Scalia routinely applies context derived outside of the legislative process. See Manning, *supra* note 22, at 702-05.

forth in Article I, section 7 of the Constitution: bicameralism and presentment.²⁴ According to that provision, “Every 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.”²⁵ If the President signs the bill or leaves it unsigned for ten days, the bill becomes law.²⁶ 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. Congress can then enact a law over the President’s veto only if two thirds of both houses thereafter approve the bill.²⁷ Only a bill that runs this gauntlet becomes a “Law” entitled to enforcement by the President and application by the federal courts.²⁸ This is bicameralism and presentment.²⁹

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. Text, but not legislative history, satisfies this constitutional criterion. The *same text* must receive

²⁴ U. S. Const. art. I, § 7; see Scalia, *A Matter of Interpretation*, *supra* note 6, at 34-35.

²⁵ U. S. Const. art. I, § 7, cl. 2.

²⁶ *Id.* There is an important exception to the rule that a bill will become 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 a Congress finally adjourns its two-year term before the ten-day limit on a bill has expired. U.S. Const. art. I, § 7, cl. 2. The President also may use a “pocket veto” to object to a bill. Under the pocket veto, a bill will not become law if the President does not sign the bill within 10 days of when Congress has adjourned a session after presenting the law to the President but before the end of the 10-day period. U.S. Const. art. I, § 7 (a bill becomes law if not signed within 10 days “unless 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 that case, 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 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’ two-year term. *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *vacated sub nom.*, *Burke v. Barnes*, 479 U.S. 361 (1987).

²⁷ U.S. Const. art. I, § 7.

²⁸ *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 . . . the laws of the United States . . .”).

²⁹ See *New York v. Clinton*, 524 U.S. 417, 438-41 (1998) (Line Item Veto Act violates bicameralism and presentment by allowing the President to effectively amend a law without action by both chambers of Congress);

a majority vote in both chambers of Congress and be signed by the President, or overcome the President's veto. Conversely, the materials that constitute legislative history—committee reports, floor statements, *etc.*—are neither voted on by the full Congress nor submitted to the President.³⁰

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.³¹

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.*,³² a case in which the Court's opinion relied heavily on congressional committee reports. In a separate concurring opinion, Justice Stevens defended the Court's use of committee reports, arguing that members of Congress are "busy people" who will logically rely on the work of their trusted colleagues (*e.g.*, committee members) to shape and define legislation.³³ Thus, "the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress."³⁴

INS v. Chadha, 462 U.S. 919, 948-57 (1983) (legislative veto violates the constitutional requirement of bicameralism and presentment).

³⁰

If, for example, 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, *A Matter of Interpretation*, *supra* note 6, at 25.

³¹ See Manning, *supra* note 22, at 705 ("textualists' 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?").

³² 516 U.S. 264 (1996).

³³ *Id.* at 644 (Stevens, J., concurring).

³⁴ *Id.* (Stevens, J., concurring); see also Gerald C. MacCallum, *Legislative Intent*, 75 Yale L.J. 754, 765-66 (1966) (advocating a delegation view of legislative history).

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, Section 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.³⁵

Under the requirements of bicameralism and presentment,³⁶ material approved by *less than the whole Congress* is not law; Congress cannot change this fundamental feature of the Constitution’s design. A House or Senate committee, of course, is only a subset of Congress; their reports are not a product of the whole Congress³⁷ and are not presented to the President.

³⁵ *Bank One Chicago*, 516 U.S. at 645 (Scalia, J., concurring in part and concurring in the judgment). 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. *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.”).

³⁶ U.S. Const. art. I, § 7.

³⁷ Of course, the unitary legislature argument leaves open the possibility that some source 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 on

Thus, giving interpretive weight to committee reports delegates law making power to a subset of Congress.³⁸

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. But, 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 interpretation of a statute. Presumably, given his non-delegation argument, the context must (like text) reflect a constitutional understanding of Congress' proper role.³⁹

A third separation of powers argument derives from Congress' term of office. Under Article I, we elect the entire House and one-third of the Senate every two years.⁴⁰ Each Congress, then, has a two-year lawmaking mandate; after that two-year period, the legislative power devolves upon the next Congress. A given Congress' sole legacy is its statutes, and each statute represents a particular Congress' approach to a problem or issue. Consequently, each

Use of Legislative History Delivered between Fall 1985 and Spring 1986 at Various Law Schools, at 4 (a speech given while he was a judge on the District of Columbia Circuit) (on file with author) [hereinafter "Scalia, Speech"]. 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.

³⁸ As Justice Scalia has said elsewhere, such a delegation creates a "junior varsity Congress" and is unconstitutional. *See* 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). Prof. 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 22, at 696-99.

³⁹ Here, Prof. Manning goes beyond Justice Scalia's incomplete approach. *See infra* note .

⁴⁰ U. S. Const. art. I, §§ 2 & 3.

statute is necessarily a product of its time—of the learning, resources, and ideology (among other things) of the Congress that created it.⁴¹

As times change, the problem addressed by a statute might also change, or even disappear. Or, the statute’s solution might seem unworkable or ill-conceived, or produce unexpected consequences. 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.⁴²

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. But, the Constitution reserves the power to amend federal statutes to the *current Congress*. Thus, judges should not aid and abet a prior Congress’ bid for political immortality—and to 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

⁴¹ See generally Guido Calabresi, *A Common Law for the Age of Statutes* (1982); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (19).

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 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, and not after the term of the enacting Congress has expired. But, beyond that, he offers no guidance.

2. Inadequate Notice

Recall that common-law law making 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.⁴³

⁴² K Mart Corporation v. Cartier, Inc., 486 U.S. 281, 325 (1988) (Scalia, J., concurring in part and dissenting in part).

⁴³ Scalia, *A Matter of Interpretation*, *supra* note 6, at 17.

Appeal to 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. Then, courts 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. But, bare text is a misnomer, as *any* reading of a text assumes a corresponding context. And 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 law making 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*, and you 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.⁴⁴

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

Legislative history provides 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.⁴⁵

The 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 pre-written 'floor debate'—or, even better, insert into a committee report."⁴⁶ The picture painted is of legislative actors and lobbyists who lost their bid to get preferred language into the 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.

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 determinate meaning only when paired with some context, and he never explains what context he is using and why. Of course, without such an explanation, his textualism is open to the same charge of manipulation as is legislative history and common-law judging. For all we know, bias, prejudice, or personal policy preferences drive the choice of interpretive context.

⁴⁴ *Id.* at 17-18.

⁴⁵ *Id.* at 36.

⁴⁶ *Id.* at 34. He adds that members of Congress seldom participate in 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.

II. Critique of the Textualist Constitutional Argument

A persistent theme of Part I.B was how Justice Scalia's textualist argument separates text and context. He consistently focuses on the statutory text that emerges from the constitutional law making 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 failing 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 has unique constitutional significance. First, only text survives bicameralism and presentment. Second, only text is the product of the *entire* legislature, and not simply the work of a subset such as a committee. Third, only text reflects the specific choices of the enacting Congress, whose term of office has since expired. All three of these arguments share a mistaken assumption: Bicameralism and presentment is significant only for its *result*—*i.e.*, the text that emerges from the process.

I argue that bicameralism and presentment is 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 is a process intentionally constructed to generate public debate about legislation. Consequently, legislative history—which memorializes such debate—is a valued part of the process, and not merely a disposable byproduct left over after text take its final form. Under this 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 bicameralism and presentment, and does not violate it. Six aspects of the Constitution evidence this design.

First, the Constitution requires members of Congress to meet in one place at the same time.⁴⁷ Further, neither house may do business without a quorum,⁴⁸ and each house may compel absent members to attend a legislative session.⁴⁹ While seemingly obvious today, centralized meeting of law makers was not always the practice. In England, at one time localities would simply send their voting proxies to be tallied at a central location.⁵⁰ The vote was not preceded by a central meeting of representatives where ideas were exchanged and debated.⁵¹ So, 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, small and large states would exchange views and achieve compromise. In the House, where the people are represented proportionally,⁵² 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 law making process. Senators and representatives are not merely to register local preferences, but rather to act as filters who would "refine and enlarge" those opinions through debate with their

⁴⁷ U.S. Const. art. I, § 4, cl. 2 ("The Congress shall assemble at least once in every year").

⁴⁸ *Id.* § 5, cl. 1 ("a Majority of each [House] shall constitute a Quorum to do Business").

⁴⁹ *Id.* (Congress is "authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide").

⁵⁰ See Rosemarie Zagari, *The Politics of Size: Representation in the United States, 1776-1850*, at 12-15 (1987).

⁵¹ *Id.*

⁵² U.S. Const. art. I, § 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.*

colleagues.⁵³ The resulting law making would then reflect careful debate and consideration of state and local interests.

Third, as evidence of the public function of legislative debate, both houses of Congress are to keep a public journal of their proceedings.⁵⁴ 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 in each chamber, hoping to justify those actions to one another and their constituents.⁵⁵ Such justifications are necessary as each federal legislator stands for re-election periodically, senators every six years and representatives every two years.⁵⁶ In this way, the electorate may hold federal legislators accountable for their actions. In his *Commentaries on the Constitution*, Justice Joseph Story put the point this way:

[T]he 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

⁵³ The Federalist No. 10 (James Madison) (Clinton Rossiter ed. 1961) (a purpose of 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.”).

⁵⁴ U.S. Const., art. I, § 5 (“each house shall keep a journal of its proceedings, and from time to time publish the same, except 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.”).

⁵⁵ See Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. Rev. 1253 (2000) (proposing a public justification theory of legislative interpretation, based on Congress’ need to justify its legislative judgments to the electorate).

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.⁵⁷

Further, as a senator or representative needs her colleagues' votes to enact legislation, debate and persuasion are one way to garner support.⁵⁸ 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 law against the People.⁵⁹ Thus, in our republican government premised on accountable legislation, the public statements in the legislative record should receive weight in statutory interpretation.⁶⁰

Fourth, the Constitution grants both houses of Congress power over their rules of procedure.⁶¹ As deliberative bodies, the House and Senate need rules that determine how a subject is raised, who may speak, when they may speak and for how long, how to end discussion of a subject, and similar rules necessary for orderly debate.⁶² The final vote on a bill is only one step in a long and sometimes arduous legislative process. Indeed, sometimes steps well before the final vote, such as drafting changes in committee,⁶³ struggles to get a bill out of committee,⁶⁴

⁵⁶ U.S. Const. art. I, § 2, cl. 1 (House term of office); *id.* § 3, cl. 1 (Senate term of office).

⁵⁷ 2 Joseph Story, *Commentaries on the Constitution of the United States* 840-41 (4th ed. 1873).

⁵⁸ Some commentators discuss this point as the concept of veto gates. *See* Eskridge, *supra* note 20, at 817-1098; McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 *L. & 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. McNollgast, *supra*, at 16-21. 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. *Id.*

⁵⁹ *See* Bell, *supra* note 55, at 1333-39.

⁶⁰ *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 *Yale L.J.* 1539, 1581-85 (1988).

⁶¹ U.S. Const. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . .").

⁶² *See generally* Charles W. Johnson, *How Our Laws Are Made* (22d ed. 2000), <http://thomas.loc.gov/home/lawsmade.toc.html> (last visited Aug. 18, 2003) (overview of the federal legislative process); Charles Tiefer, *Congressional Practice and Procedure: A Reference, Research and Legislative Guide* (1989).

⁶³ *See generally* Richard Doernberg & Fred McChesney, *Doing Good or Doing Well?: Congress and the Tax Reform Act of 1986*, 62 *N.Y.U. L. Rev.* 891 (1987).

⁶⁴ *See* Eskridge *et al.*, *supra* note 20, at 2-23 (discussing the struggle to the Civil Rights Act of 1964 out of the House Judiciary Committee).

or even the order of voting on alternative proposals,⁶⁵ prove to be a bill's defining moment.⁶⁶

Again, it is these steps in the process that provide the context within which a statute derives its meaning. The mechanical act of voting on the bill, though an essential step, offers little insight into the statute's meaning.

Fifth, the Constitution protects representatives and senators both from arrest while attending a session of Congress and from punishment for words spoken on the floors of their respective chambers.⁶⁷ This guarantee allows federal legislators to speak their minds, unafraid of prosecution and conviction by a hostile executive and judiciary respectively.⁶⁸ To the framers, this freedom enhanced the separation of powers, leaving legislative debate unconstrained by fear of attack by a coordinate branch.⁶⁹ 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 so, the judiciary would seem to accomplish indirectly that which it could not do directly. While

⁶⁵ See Kenneth J. Arrow, *Social Choice and Individual Values* 2-3 (2d ed. 1963) (pairwise voting on multiple proposals will not guarantee rational translation of individual preferences to social choice).

⁶⁶ See, e.g., Eskridge *et al.*, *supra* note 20, at 2-23 (describing procedural hurdles in path of enacting Civil Rights Act of 1964, including getting the bill out of the House Rules Committee and overcoming a Senate filibuster).

⁶⁷ U.S. Const. art. I, § 6, cl. 1 ("They 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."). 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 (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). For cases applying the clause, see *United States v. Johnson*, 383 U.S. 169 (1966); *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *United States v. Brewster*, 408 U.S. 501, (1972); *Gravel v. United States*, 408 U.S. 606, 616-17 (1972) (privilege applies to both members of Congress and their aides when those aides are performing legislative functions); *Doe v. McMillan*, 412 U.S. 306 (1973).

⁶⁸ See *Johnson*, 383 U.S. at 178-85.

⁶⁹ 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.

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.⁷⁰ In doing so, the President may ask executive officials for their written advice.⁷¹ And 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.⁷² By allowing the President time for reflection and an opportunity for counsel, the Constitution expects the President's decision to be deliberative.⁷³ 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 Congress and the President's actions at the next election.

These constitutional provisions reveal bicameralism and presentment as a constitutional *process*, where legislators debate and sometimes produce legislation. And this point should be crucial to Justice Scalia. No other context one might use to interpret a statute has this constitutional pedigree. Because legislative history is the best evidence of what occurred during

⁷⁰ U.S. Const. art. I, § 7, cl. 2 (“If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it”).

⁷¹ *Id.* art. II, § 2, cl. 1 (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”).

⁷² *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”).

⁷³ 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 is 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 (1990).

the bicameralism and presentment process, that material provides a constitutionally-preferred context for interpreting statutory text.⁷⁴

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 law making power to a subset of Congress. 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 *whose context ought to control a statute’s meaning*.⁷⁵ Again, bicameralism and presentment is *the* constitutionally-

⁷⁴ On the centrality of this context to statutory meaning, see Solan, *supra* note 20, at 256 (“We should not insulate ourselves from the context within which legally significant words were 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 “plain meaning fallacy” that ignores relevant interpretive context).

⁷⁵ Here, Prof. Manning’s argument offers a significant advance over that of Justice Scalia 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 law making power to the subset of Congress who created the legislative history material. Manning, *supra* note 22, 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 allowing 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—costly so that law making 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 the discretion of others.

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 statutory text, does a judge delegate law making 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. Consequently, we cannot predict which interpretation will ultimately 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. 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

In making, this argument, Prof. 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 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 hard to see 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 either has no time or desire to read the legislative history should be of no moment. As with all human beings, legislators decide what level of information gathering is rational for a given decision. See Richard Posner, *Economic Analysis of Law* (5th ed. 2000) (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 Prof. 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 Prof. Manning adequately meet this argument.

statutory meaning—*i.e.*, what the law is. Without an explanation or guiding principle, any choice of context is merely rule of unexplained judicial hunch, not the rule of law.⁷⁶

Further, given Justice Scalia’s terms of debate, this rule of law problem cannot be solved. If text is the only thing that is law, context is by definition outside law. Because every act of interpretation requires a choice of context, every 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.⁷⁷

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

C. Disguised Personal Preference

Recall that we treated two related arguments under this heading. First, Justice Scalia argued that legislative history placed no limits on judicial discretion. In this way, legislative history disguises the judge’s personal preferences and prejudices. Second, he argued that legislative history is unreliable because legislators use it to mislead later readers. In this way, legislative history reflects a legislator’s personal preferences, inserted to thwart the will of Congress reflected in statutory text. I 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.⁷⁸ Because legislative history can be bent to support any result, that source cannot constrain judicial

⁷⁶ For further elaboration of this point, see McGreal, *supra* note 21, at 368-71.

⁷⁷ As noted previously, Prof. Manning identifies a similar gap in Justice Scalia’s textualism. *See supra* note 75. Ultimately, however, his attempt to fill that gap is unpersuasive. *Id.*

⁷⁸ *See supra* notes 44-46 and accompanying text.

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.⁷⁹ In each case, we attribute meaning so effortlessly that we sometimes forget that context does much of the heavy lifting.⁸⁰ This becomes apparent when those same words appear out of a concrete context. Then, choice of context becomes conscious, as we must hypothesize a context within which to understand the words. The act of hypothesizing a context is 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 never acknowledges the need to choose a context, nonetheless 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 one’s preferred interpretation. And whether such material exists is outside the judge’s control; if supportive legislative history does not exist, the judge may not conjure it on her own. With 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.

⁷⁹ See *supra* note 2 and accompanying text.

⁸⁰ See Solan, *supra* note 20, at 252-54

Further, Justice Scalia's choice of hypothetical context goes unacknowledged, increasing the danger of manipulation. Readers 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 hard to critique because he does not supply reasons for the choice. Without previously recorded reasons, the writer may offer *ex post* rationalizations, or simply change the reasons offered depending on the critiques that emerge. This is particularly offensive on 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.⁸¹ 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 materials as inherently unreliable. Specifically, he complains that interest groups and legislators fill the legislative record with language that they could not get into the statute's text. These actors use legislative history to win battles they lost in drafting the legislation itself. Consequently, legislative history is not a good faith effort to illuminate a statute's meaning, but rather an attempt to deceive later interpreters of the statute.⁸²

Here, Justice Scalia makes an argument without parallel in our constitutional tradition. Namely, he uses the presumed subjective motivation of legislators to question the validity of

⁸¹ See Joseph Goldstein, *The Intelligible Constitution: The Supreme Court's Obligation to Maintain the Constitution as Something We the People Can Understand* 5-6 (1992); Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 *Ohio St. L.J.* 1, 11-12 (1999) (discussing law makers' obligation to explain its decisions); Paul E. McGreal, *Constitutional Illiteracy*, 30 *Ind. L. Rev.* 693, 709-14 (1997) (arguing that we ought to care whether ordinary citizens can understand our constitutional government).

⁸² See *supra* note 46 and accompanying text.

their work product. In this argument, Justice Scalia says that *genuine* legislative history—that is, legislative history that reflects genuine debate about the meaning and substance of a bill—would be probative of a statute’s meaning. But, drawing on his personal experience,⁸³ he takes judicial notice that much legislative history is *not* genuine—that it is inserted in the legislative record to mislead later interpreters as to the statute’s meaning. Instead of examining such materials on a case-by case basis, as do some of his colleagues, Justice Scalia uses this observation to irrebuttably presume that bad motives underlie *all* legislative history materials.

Justice Scalia’s conclusive impugning of legislative motives contradicts many established practices and principles in constitutional law.⁸⁴ First, in exercising the power of judicial review over federal and state statutes, the Court begins with a presumption of constitutionality,⁸⁵ with

⁸³ See, e.g., Scalia, *A Matter of Interpretation*, *supra* note 6, 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 generally spend on researching legislative history). Not surprisingly, another commentator offers a different anecdotal account. See Stephen Breyer, *On the Use of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 867 (1992); Abner J. Mikva, *Foreword*, 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.

⁸⁴ Professor Charles Tiefer argues that recent political science literature undermines the empirical basis for this argument. See Tiefer, *supra* note 75, 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 266. 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.* (“Changing the chairs of the congressional committees changed outcomes, often to a large degree, without any necessary shift in interest groups.”). 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.

⁸⁵ See, e.g., *Bush v. Vera*, 517 U.S. 952, 992 (1996) (“Statutes are presumed constitutional”) (O’Connor, J., concurring); *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (“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 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 *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

the burden on the challenger to establish unconstitutionality.⁸⁶ Further, in most areas of constitutional law, the Court refuses to look beyond the legislature's asserted purpose for its legislation.⁸⁷ 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.⁸⁸ And even a law that discriminates based on race may be upheld, if the government can pass strict scrutiny.⁸⁹ In these areas, the Court consistently assumes a baseline of legislative good faith, either rejecting inquiry into

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).

⁸⁶ 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 to 9.3.3, at 668-69 (2d ed. 2002); Laurence H. Tribe, *American Constitutional Law* § 16-6, at 1451-54 (2d ed. 1988).

⁸⁷ *See generally* J. Morris Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 San Diego L. Rev. 953, 956 (1978); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205 (1970); Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. Rev. 36 (1977); Jill E. Evans, *Challenging the Racism in Environmental Racism*, 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).

⁸⁸ *See* *Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103 (2003); *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992) (“[T]he Equal Protection Clause is satisfied so long as there is a plausible 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.”); *Minnesota v. Clover Leaf Creamery*, U.S. 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*, U.S. (1996); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *see also* Paul E. McGreal, *Suspicion in Federal Equal Protection*, 8 Wm. & Mary Bill of Rts. J. 183, 185-88 (1999). But, 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 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 (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.”).

⁸⁹ *See Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to federal contracting minority set-aside program); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (applying strict scrutiny to state contracting minority set-aside program).

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.⁹⁰ To see this point, consider *Field v. Clark*,⁹¹ where the Court was asked to decide whether the same bill text had passed both houses of Congress and been signed by the President. If not, it was argued, the statute was invalid as it had not properly passed the requirements of bicameralism and presentment.⁹² The Court was urged to undertake such judicial review of the legislative process, lest “it becomes possible for the speaker of the house of representatives and the president of the senate to impose upon the people as a law a bill that was never passed by congress.”⁹³ The Court declined this invitation, citing the need for respect among coordinate branches:

[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 co-ordinate branch of the government.*⁹⁴

Congress’ internal law making processes were entitled to a conclusive presumption of regularity.

⁹⁰ See *Field v. Clark*, 143 U.S. 649, 673 (1892).

⁹¹ 143 U.S. 649 (1892).

⁹² *Id.* at 672.

⁹³ *Id.*

⁹⁴ *Id.* at 673 (emphasis added).

Third, the same aversion to questioning legislative motives appears in cases applying the Speech and Debate Clause.⁹⁵ The Clause immunizes⁹⁶ members of Congress and their aides⁹⁶ 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.⁹⁷ In *United States v. Johnson*,⁹⁸ the federal government prosecuted Thomas Johnson, a United States Representative, for a speech delivered on the House floor. The United States alleged that the speech was part of a conspiracy among Johnson, other 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.⁹⁹ One count of the indictment charged Johnson with accepting money in exchange for delivering a congressional speech defending the savings and loan company.¹⁰⁰ 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

⁹⁵ U.S. Const. art. I, § 6, cl. 1 (“for any speech or debate in either House, [Members of Congress] shall not be questioned in any other place.”).

⁹⁶ 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.”).

⁹⁷ While the Clause speaks only of “any speech or debate in either House,” the Court has interpreted this phrase broadly to include “the sphere of legitimate legislative activity,” *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); such as writing committee reports. 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) (“In 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, such as selling the publication rights to congressional documents to a private publisher, *Gravel*, 408 U.S. at 625 (“private 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); are not protected by the Clause.

⁹⁸ 383 U.S. 169 (1966).

⁹⁹ *Id.* at 171-72.

¹⁰⁰ *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.”).

indirectly interested,”¹⁰¹ as well as a federal statute that punished any person who conspires “to defraud the United States.”¹⁰² The Court explained that “the essence of such a charge is that the Congressman’s conduct was improperly motivated.”¹⁰³ The question, then, was whether the Speech and Debate Clause protected members of Congress from legal proceedings that questioned their motive in making statements before Congress.¹⁰⁴

The Court strongly rejected such an inquiry into legislative motives: “However reprehensible such conduct may be, we believe the Speech or Debate Clause extends at least so far as to prevent it 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.”¹⁰⁵ 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.¹⁰⁶ Preventing such attacks “is the predominate thrust of the Speech or Debate Clause.”¹⁰⁷

¹⁰¹ *Id.* at 170 n.1.

¹⁰² *Id.* at 171 n.2.

¹⁰³ *Id.* at 180.

¹⁰⁴ The Court explained that the trial proceedings probed deeply into Rep. 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 173-74.

¹⁰⁵ *Id.* at 180.

¹⁰⁶ *Id.* at 181.

¹⁰⁷ *Id.*

Fourth, hesitation to question legislative motives has venerable roots, appearing in Chief Justice Marshall’s opinion in *Fletcher v. Peck*.¹⁰⁸ *Fletcher* involved an attempt to invalidate a land grant by the Georgia legislature to private parties. One challenge to the grant was that members of the Georgia legislature were promised an interest in the land if the legislature ultimately passed the land grant.¹⁰⁹ It was argued that this promise “unduly influenced” the state legislators, making the resulting legislative land grant, and its purported transfer, “a nullity.”¹¹⁰ 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.”¹¹¹

Chief Justice Marshall refused 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.”¹¹² On the one hand, courts would be powerless to affect a legislature controlled by a corrupt majority. As courts have neither the power of the sword nor the power of the purse, they have little if any ammunition to fight such forces.¹¹³ On the other hand, if corruption is confined to a minority of the legislature, courts have no administrable standard to decide when such corruption should invalidate a law. When judges have no judicially-applicable standards, they should stay out of the controversy.

¹⁰⁸ 10 U.S. (6 Cranch) 87 (1810).

¹⁰⁹ *Id.* at 129.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 130.

¹¹² *Id.*

¹¹³ See McGreal, *supra* note 73, 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,”¹¹⁴ 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.”¹¹⁵ The remedy for ill-considered or improperly motivated laws is the political process, where the people can turn the offending legislators out of office.¹¹⁶

Fifth, the Constitution commits to each house the power to regulate its own proceedings.¹¹⁷ Pursuant to that 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,¹¹⁸ the Court has not second-guessed a chamber’s method of proceeding.¹¹⁹

These constitutional principles counsel against wholesale rejection of legislative history. As Justice Scalia admits by grounding his textualism on bicameralism and presentment, statutory interpretation is a constitutional function that must make sense as a practice under our Constitution. As previous sections have argued, bicameralism and presentment is the

¹¹⁴ *Fletcher*, 10 U.S. (6 Cranch) at 131.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 144 (separate opinion of Johnson, J.).

¹¹⁷ 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.”).

¹¹⁸ 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 Senate has the sole power to try impeachments, which power 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).

¹¹⁹ *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

constitutionally-appointed context that gives statutes their meaning, and legislative history is evidence of that context. No federal court should ignore this context merely because anecdotal evidence suggests that some of these materials are suspect. To do so would be to conclusively presume legislative bad faith regardless of the underlying circumstances, 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. And the Supreme Court has done just that in according different weight to different types of legislative history.¹²⁰ For example, the Court weighs drafting history heavily, as it shows the different choices made in crafting statutory language.¹²¹ Similarly, a legislator’s or committee’s explanation of a “text’s pedigree” can offer guidance on interpretation.¹²² And a conference committee report may shed significant light on a statute’s meaning.¹²³ This 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.

House [and t]he power to make rules is[,] within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.”).

¹²⁰ See Tiefer, *supra* note 75, 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*, 15 *Stan. L. Rev.* 1879-81 (1998) (criticizing the Court’s hierarchy of legislative history materials).

¹²¹ Tiefer, *supra* note 75, 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 federal habeas corpus statute).

¹²² Tiefer, *supra* note 75, at 237 (“the 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 statute’s textual pedigree to interpret federal carjacking statute).

¹²³ Tiefer, *supra* note 75, at 237 (“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.”); *see, e.g.*, *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264 (1996) (using conference committee report to interpret a banking statute).

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.¹²⁴ Rather, we seek an approach to statutory interpretation that both makes sense on its own terms and makes sense of American constitutional government. Justice Scalia's rejection of legislative history fails these twin demands because it ignores the inseparability of text and context.

On its own terms, rejecting legislative history, without saying more, makes no 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 gap. Thus, the textualist account is incomplete.

Rejecting legislative history also fails the test of consistency with constitutional government. Justice Scalia offers bicameralism and presentment as the constitutional measuring stick. Yet, he follows his logic only half way—he accepts the text produced by that process, but not the context. As argued here, 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.

¹²⁴ Scalia, *A Matter of Interpretation*, *supra* note 6, at 45.