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TEXTUALISM, THE UNKNOWN IDEAL?

William N. Eskridge, Jr.*

A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW. By Antonin Scalia. Princeton, New Jersey: Princeton University Press. 1997. Pp. xiii, 159. \$19.95.

In May 1997, the New York Knickerbockers basketball team was poised to reach the finals of its division in the National Basketball Association (NBA). The Knicks led the rival Miami Heat by three games to two and needed one more victory to win the best-of-seven semifinal playoff series. Game six would be in New York; with their star center, Patrick Ewing, playing well, victory seemed assured for the Knicks. A fracas during game five changed the odds. During a fight under the basket between Knicks and Heat players, Ewing left the bench and paced in the middle of the court, away from the fight. Rule 12A, Section IX(c), of the NBA Rules provided: "During an altercation, all players not participating in the game must remain in the immediate vicinity of their bench. Violators will be suspended, without pay, for a minimum of one game," commencing "prior to the start of their next game."¹ Applying the rule, NBA Commissioner David Stern suspended Ewing

* Professor, Georgetown University Law Center. M.A. 1974, Harvard; J.D. 1978, Yale. — Ed. I received helpful comments from James Brudney, Peter Byrne, Neal Katyal, Mark Tushnet, Adrian Vermeule, and other participants at a Georgetown University Law Center faculty workshop. Matt Michael provided extremely useful research assistance and can be blamed for my generalizations about Generation X law students, *see infra* note 16. Thanks and apologies to Ayn Rand for the title.

My own complicated biases should be identified at the outset. Although I am something of a skeptic, the new textualism is the best thing that has happened to me professionally. The casebook for Legislation that Phil Frickey and I developed in the mid-1980s focused strongly on statutory interpretation, a then-neglected field. Justice Scalia joined the Court the year before our book was published, and the pizzazz he brought to statutory cases not only filled up our supplements and the second edition with great cases, but stimulated much greater academic as well as public interest in the field. I have published many articles on statutory interpretation, the most cited of which is my friendly critique of Scalia's theory. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1991). I have loved teaching statutory interpretation to students at Georgetown, NYU, Harvard, and Stanford. In the 1990s, Scalia has been a regular visitor to my Georgetown classes, which is exceedingly generous of him and great fun for the students. Finally, there is nothing so enjoyable as teaching Scalia's vividly written, intellectually splendid, normatively outraged dissent in *Johnson v. Santa Clara County Transportation Agency*, 480 U.S. 616, 657 (1987), the Title VII affirmative action case.

1. NBA Rule 12A, Section IX(c) reads in full:

During an altercation, all players not participating in the game must remain in the immediate vicinity of the bench. Violators will be suspended, without pay, for a minimum of one game and fined up to \$20,000.

The suspensions will commence prior to the start of their next game.

and another player for game six in New York, which the Knicks lost; two other players were suspended for game seven in Miami, which the Knicks also lost. Having lost the series, four games to three, the Knicks cried foul: the rule should not have been applied to Ewing because he did not leave the bench to join the altercation. The rule was not intended to apply to Ewing; it was not fair to apply the rule to someone who was not contributing to the fight; "we wuz robbed."

The foregoing argument, made not only by the Knicks but also in print by philosopher Ronald Dworkin and proceduralist Linda Silberman, both law professors at New York University,² reflects good old-fashioned common law reasoning from a rule to a new and perhaps unanticipated fact situation.³ Justice Antonin Scalia's Tanner Lectures at Princeton University, published with commentaries and response by the author as *A Matter of Interpretation*, say humbug to all that. Apply the rule according to its plain meaning. Do not consider the "intent" of its drafters.⁴ Unfairness is irrelevant when the rule applies as a matter of plain textual meaning. Stern did the right thing and for the right reasons. Ewing must be suspended. He and his colleagues will know better than to leave the bench during the next melee.

The statutory analogue to the Case of the Wandering Basketball Player is the Case of the Imported Pastor. In *Church of the Holy Trinity v. United States*,⁵ the Supreme Court, in 1892, interpreted a statute criminally prohibiting anyone from contracting with an "alien" to pay his transportation to the United States "to perform labor or service of any kind."⁶ Although the Church had paid the way for The Reverend E. Walpole Warren to come to the United States to serve as pastor of its congregation, the Supreme Court

A team must have a minimum of eight players dressed and ready to play in every game.

If five or more players leave the bench, the players will serve their suspensions alphabetically, according to the first letters of their last name[s].

If seven players are suspended (assuming no participants are included), four of them would be suspended for the first game following the altercation. The remaining three would be suspended for the second game following the altercation.

NBA OPERATIONS DEPT., OFFICIAL RULES OF THE NATIONAL BASKETBALL ASSOCIATION, 1996-1997, at 41 (1996).

2. See James Traub, *Talk of the Town*, NEW YORKER, June 2, 1997, at 35 (relating Dworkin's analysis); Linda Silberman, N.Y. TIMES, May 24, 1997 (Correspondence), at 18. For a particularly detailed analysis, see Robert A. Hillman, *What the Knicks Debacle of '97 Can Teach Students About the Nature of Rules*, 47 J. LEG. ED. 393 (1997).

3. See HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 68 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (describing the case of the spoiled heir).

4. Stern himself drafted the rule, which had been adopted in 1994. Scalia's point would be that any NBA adjudicative tribunal should apply the rule without calling up Stern and asking, "What did you mean by this rule? Did you have mid-court wanderlust in mind?"

5. 143 U.S. 457 (1892).

6. Act of Feb. 26, 1885, ch. 164, § 1, 23 Stat. 332, 332.

created an exception to the statutory prohibition, common law style, for Christian ministers and, in dictum, for other “brain toilers.” This is the only case discussed in the Tanner Lectures (pp. 18-23). The Court, argues Scalia, interpreted the law contrary to its plain meaning — a minister is performing “labor or service” of some kind — in order to fit what the Court considered the statute’s purpose, or “spirit,” as Justice David Brewer’s evangelical opinion put it (p. 19). Bad. The Court divined the statutory spirit from committee reports accompanying the 1885 legislation; the reports asserted that the proposed law was only aimed at manual workers and not “brain toilers,” and the report of the Senate committee lamented that the limitation would have been more explicit had there been time for amendment (pp. 19-20). Worse. The Court ended its exercise with an ode to the United States as a “Christian Nation,” whose statutes presumptively should not be construed to thwart the exercise of religion (pp. 19-20). This is the worst, according to Scalia. The *Holy Trinity Church* Court got the Case of the Imported Pastor as wrong as the law professors got the Case of the Wandering Basketball Player wrong.

More generally, both the Tanner Lectures and Scalia’s judicial opinions defend a hard-hitting “new textualism”⁷ as the best, and perhaps only, legitimate approach to statutory interpretation. Scalia’s main point is that a statutory text’s apparent plain meaning must be the alpha and the omega in a judge’s interpretation of the statute. The apparent plain meaning is that which an ordinary speaker of the English language — twin sibling to the common law’s reasonable person — would draw from the statutory text. This general principle is not original with Scalia; the British House of Lords and Justice Oliver Wendell Holmes followed the same idea in the late nineteenth and early twentieth centuries.⁸ Yet Scalia’s theory really is a *new* textualism.

Theoretically, Scalia defends his approach based upon a strict formal separation of powers: the constitutional role of the legislature is to enact statutes, not to have intent or purposes, and the role of the courts is to apply the words and only the words, without regard to arguments of fairness or political equilibrium (pp. 9-13). This constitutional basis for the plain meaning rule gives it greater bite and may explain why Scalia tries to find or create a plain meaning for the tersest law. Scalia also invokes institutional reasons for his approach, as one which judges are best trained to accomplish

7. “The new textualism” is my term for statutory Ninoprudence. See Eskridge, *supra* note *. In response to Ronald Dworkin’s comment on his lecture, Scalia characterizes his approach as following the “import” of a statutory text. See p. 144.

8. See *Vacher & Sons v. London Socy. of Compositors*, 1 App. Cas. 107, 121-22 (H.L. 1912); *Hill v. East & West India Dock Co.*, 9 App. Cas. 448, 464-65 (H.L. 1884); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

and which protects against judicial usurpation. Finally, there is an economic dimension to Scalia's thinking: while the temptation to do justice *ex post* in every case is humanly appealing, disciplined judges should resist that temptation, because it *ex ante* sets up wasteful, usurpative incentives for everybody else (pp. 36-37). Scalia's wedding of formalist, institutionalist, and economic thinking in the undertheorized area of statutory interpretation is normatively powerful.

Doctrinally, the new textualism's most distinctive feature is its insistence that judges should almost never consult, and never rely on, the legislative history of a statute (pp. 29-37). The rejection of legislative history and insistence that judges follow plain meanings even when unreasonable contribute to the overall theme of the Tanner Lectures: common law approaches, emphasizing purpose, policy, and history, are not appropriate for statutory interpretation in the modern administrative state (pp. 9-14). Consistent with this theme, Scalia has developed a rigorously text-based methodology that contrasts strikingly with the common law approach in *Holy Trinity Church*. Like Holmes, the new textualist starts with the meaning an ordinary reader would draw from the statutory language but delves more deeply than Holmes usually did into what other textual sources might teach us. Thus, the Scalian interpreter also considers which interpretation is most consistent with the statute as a whole; whether similar language has been used elsewhere in the U.S. Code and, if so, how it has been interpreted; and regular rules of grammar, syntax, and word use.⁹ When textual analysis is done thoroughly, it can actually persuade a hostile audience, a feat hard to accomplish under other approaches to statutory interpretation.

Rhetorically, Scalia makes the stakes of statutory theory and practice well worth thinking and fighting about. The Tanner Lectures ringingly combine an ambitious insistence that statutory interpretation is important for the future of democracy (p. 9) and the rule of law (p. 25) with lively critique of the unsystematic way it is taught in law schools (pp. 14-15), practiced by attorneys and judges (pp. 18-22, 31), and theorized as either reconstructing the probable

9. This proposition is drawn from Scalia's opinions and not from the Tanner Lectures. See *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment). In one respect, the Tanner Lectures are potentially misleading. Scalia warns that "[t]o the honest textualist, all of these preferential rules and presumptions are a lot of trouble," p. 28, and criticizes the substantive canons, pp. 28-29. Yet Scalia himself not only cites but heavily relies on these "substantive" canons. See, e.g., *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992) (relying on a clear statement rule against waivers of federal sovereign immunity); see also 503 U.S. at 39 (Stevens, J., dissenting) (criticizing the majority opinion as bending the statutory language in ways not supported by precedent or modern policy); *supra* Part IV (providing more extensive analysis of this point).

“intent” of the legislature (pp. 16-17) or resolving cases common-law style, so as to reach the most “desirable result” (pp. 12-13, 21-22). Scalia suggests that statutory interpretation can again be an objective “science” (p. 14) if properly done by honest textualists; and that the science of statutory interpretation can assure both democracy and the rule of law. “What intellectual fun all of this is!” (p. 7).

On the one hand, the new textualism has relatively few defenders in academe (a haven for the contextually inclined),¹⁰ is treated skeptically and often dismissively by Scalia’s colleagues on the Court,¹¹ and is appalling to many members of Congress.¹² On the other hand, Scalia’s theory dominates debate about statutory interpretation, is gathering more defenders in academe,¹³ has one other fan on the Court (Justice Thomas) and influences the way all the other justices write their opinions and advocates argue their cases before the Supreme Court,¹⁴ is increasingly popular in the state courts and among many federal judges,¹⁵ and has a strong allure for

10. Leading critiques include Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); George A. Costello, *Average Voting Members and Other “Benign Fictions”: The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39 (1990); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988); Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995); William Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992); Stephen F. Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407 (1989); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990); Nicholas S. Zeppos, *Justice Scalia’s Textualism: The “New” New Legal Process*, 12 CARDOZO L. REV. 1597 (1991).

11. See *Conroy v. Aniskoff*, 507 U.S. 511, 518 n.12 (1993); *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991).

12. See *Statutory Interpretation and the Uses of Legislative History: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990).

13. See Bradley C. Karkkainen, “Plain Meaning”: *Justice Scalia’s Jurisprudence of Strict Construction*, 17 HARV. J.L. & PUB. POLY. 401 (1994); Gregory E. Maggs, *The Secret Decline of Legislative History: Has Someone Heard a Voice Crying in the Wilderness?*, 1994 PUB. INT. L. REV. 57; John Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827 (1991); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231.

14. Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994).

15. This is my opinion, drawn from my ten-year participation in the Institute for Judicial Administration summer program for state and federal judges. The cross section of judges I have met strikes me as much more textualist now than ten years ago. Better evidence for my proposition in the text would be a time-series study of decisions in particular state courts or federal circuits. This would be a great student Note project.

Generation X law students.¹⁶ If most scholars and colleagues are still skeptical that the new textualism “gets it right,” Scalia can boast a postmodern triumph: the new textualism has been agenda-setting and a public relations hit.

The new textualism is successful primarily because it is familiar but simple, on its face neutral and normatively attractive, objective, and relatively nonreflexive. Everyone believes that statutory text is the starting point for construing statutes, but judges and scholars have elaborated upon this familiar rule to create complexities that dilute the rule. Scalia takes what is familiar and cuts away the detritus, such as qualifications to plain meaning when plain meaning is contrary to legislative intent or purpose or constitutional policy. What is left is simplicity itself: when construing statutes, consider the text, the whole text, and nothing but the text. Period. This is refreshingly easy to understand and would seem to be straightforward to apply. Because textualism appears relatively easy to apply and scientific, it strikes one as more objective and determinate. You could tell 100 judges to apply textual plain meaning to a particular statute, and they would all come back with about the same answer — an impossible feat under original intent or more dynamic approaches to statutes. This relative determinacy not only renders statutory interpretation more neutral, but also subserves both the rule of law (we citizens know what is expected of us) and democracy (the legislature can be certain that its statutes will be applied as written, not as judges wish they had been written). If this is true, then honest textualism is all that judges should be doing in statutory interpretation cases.

This is a serious claim, advanced for the first time in a systematic way by the jurist best situated to press it. The gravity of Scalia’s enterprise and the importance of the issues he poses require a correlative seriousness from academics. Although I have both appreciated and questioned Scalia’s new textualism in previous articles, the publication of the Tanner Lectures provides me with an opportunity to evaluate the new textualism in a more systematic way. This review sets forth several problems that complicate Scalia’s important and compelling theses. The problems leave me skeptical that the benefits he claims for an honest textualism are attainable, but offer

16. I cannot speak for “all,” or “any,” Generation X law students, as I am a Baby Boomer. Still, I have taught statutory interpretation to more than 1000 students at five different law schools, and that qualifies me to make some generalizations. Many law students take to the new textualism like rats to a maze. Even some law students who dislike most of the results Scalia reaches find his methodology potentially attractive. Law students particularly enjoy Scalia’s cynical attack on legislative history, pp. 31-34. But students also would like to be able to have something more objective, at least as lawyers, and Scalia’s uncynical devotion to text gives them the most objective-sounding approach they are likely to get in law school.

Scalia and his allied textualists an opportunity to defend their approach more rigorously.

Some of the problems are logical ones. Because Scalia's theory and much of its appeal are formalist, the theory needs to satisfy traditional formalist criteria of coherence and authority. How can Scalia's refusal even to consider statutory legislative history square with his strong reliance on legislative history in construing the Constitution (the problem of coherence)? By what formal constitutional authority does Scalia support his methodology, especially its insistence that legislative history and concepts of equity and reasonableness not be considered (the problem of authority)?

Other problems relate to the primary appeal of formalist method, which is that it produces more determinate answers to hard questions than squishy functionalist methods. Whether the new textualism can deliver on its formalist promise can be tested against the example Scalia runs in the Tanner Lectures, *Holy Trinity Church*, and against his own impressive performance on the Supreme Court. Are text-based or linguistic sources, such as dictionaries, less manipulable than legislative history (the problem of context)? What role do the variegated canons of statutory construction play in a new textualist methodology (the problem of loose canons)?

Yet other problems relate to the claimed neutrality and legitimacy of textualist interpretation. The new textualism makes assumptions about the role of courts and justice in our constitutional system that should be examined. Is Scalia's attack on legislative history properly respectful to the legislature (the problem of democracy)? Can normative considerations be excluded from statutory cases, even for an honest textualist such as Scalia (the problem of normativity)?

This review shall pose more questions than answers. The concrete cases examined, starting with the Case of the Wandering Basketball Player and the Case of the Imported Pastor and supplemented with the Case of the Foreclosure Fire Sale and the Case of the Modifying Agency, will be used as templates against which to test Scalia's theory and to frame my inquiries. At the end of this review, I shall suggest the sort of approach one should take with these cases. Although the Tanner Lectures generously tag me as endorsing the Supreme Court's traditionally dynamic rather than purely textualist approach to statutory interpretation (p. 22), the book Scalia cites is one that is normatively critical of the Court's dynamism in several lines of cases.¹⁷ My prescriptive recommendations are more pragmatic and critical than dynamic, and in the Case

17. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 81-105, 107-09, 139-40, 173, 199-204 (1994).

of the Imported Pastor and the Case of the Foreclosure Fire Sale it is Scalia who endorses dynamic readings of statutes where I would (very reluctantly in the latter case) take a more originalist stance.

I. THE PROBLEM OF COHERENCE

Scalia's Tanner Lectures are not just about statutory interpretation; a brief concluding section criticizes theories of the "Living Constitution" (pp. 41-47). The goal of constitutional interpretation, Scalia says, is to determine "the original meaning of the text" (p. 45). Scalia's position on constitutional interpretation — which rejects an evolving, *au courant* Constitution in favor of an originalist, stagnant one — is subtly and perhaps just tentatively different from his position on statutory interpretation.¹⁸ If the former seeks out the *original* meaning of the text, the latter says, with Holmes, "I don't care what [the legislature's] intention was. I only want to know what the words mean" (pp. 22-23). The former suggests a relatively more historicist inquiry, the latter a relatively more linguistic one. To illustrate this potential nuance, contrast Scalia's constitutional analysis in his recent opinion for the Court in *Printz v. United States*,¹⁹ which struck down the Brady Act's requirement that local law enforcement officers help administer the federal law's background checks of gun buyers, with his statutory analysis of the imported pastor issue in *Holy Trinity Church*.

In *Printz*, Scalia found "no constitutional text speaking to the precise question" of whether the Constitution prohibits the federal government from commandeering state or local law enforcement officers to help administer a federal statutory scheme. Although the normal rule in the absence of a "constitutional text speaking to the precise question" is that Congress can regulate issues within its constitutional jurisdiction (here, interstate commerce) as it chooses, Scalia found a constitutional limitation in "the historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."²⁰ The dead Constitution that Scalia describes in the Tanner Lectures came alive in *Printz* because Scalia cobbled together a constitutional limit from several sources: historical practice, including early congressional assertions of authority and the debates surrounding the Constitution's ratification; the Constitution's overall commitment to the principle of federalism, which would be undermined by national commandeering of state and local officials; and the Court's own decision in *New York*

18. Ronald Dworkin's comment on the Tanner Lectures says Scalia is a "semantic originalist" in statutory cases, but an "expectations originalist" in constitutional ones. P. 119. Scalia accepts the distinction more or less. Pp. 144-45.

19. 117 S. Ct. 2365 (1997).

20. *Printz*, 117 S. Ct. at 2370.

v. *United States*,²¹ which struck down national commandeering of state legislatures and which Scalia extended to commandeering of local law enforcement officers.

The contrast between Scalia's methodology in *Printz* and his analysis of *Holy Trinity Church* is striking and can be generalized. To begin with, *text* plays a different role in the two cases. It is the primary and perhaps even exclusive focus in the statutory case, but only a secondary and indirect focus in the constitutional case. This is characteristic of Scalia's approach in other cases as well. In Scalia's approach to issues of constitutional federalism²² or separation of powers,²³ there is usually little or no analysis of specific constitutional provisions but much emphasis on general principles drawn from the overall structure of the document and its history. This is not so far from the spirit analysis that Brewer deployed in *Holy Trinity Church*, the case in which Scalia insists that the Court should have stuck to the plain meaning of the provision in question. In statutory cases, Scalia is dismissive of appeals to statutory purpose and requires parties to demonstrate a clear text on point before he will deliver the goods. The different role of text for Scalia in constitutional and statutory cases can be defended on the ground that the Constitution is a short document mostly drafted two centuries ago, while statutes are more recent and usually much more detailed. Hence, in the latter cases there is more likely to be text on point. But this defense is in tension with Scalia's belief that the Constitution should not evolve to fulfill abstract principles, and with his view that judicial discretion must be limited by confining judges to the application of plain meanings, not spongy spirits.

Additionally, Scalia's inquiry in *Printz* and other constitutional cases is strongly historical: What did this text signify to people of the time? The Tanner Lectures' analysis of *Holy Trinity Church*, which construed a statute enacted more than 100 years ago, is ahistorical and shows no interest in what the statutory command, not to import aliens for "labor or service of any kind," would have meant to the people of the time against the backdrop of early national

21. 505 U.S. 144 (1992).

22. See *Printz*, 117 S. Ct. at 2376-78; *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (Thomas, J., dissenting); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (Scalia, J., concurring in the judgment); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29 (1989) (Scalia, J., concurring in part and dissenting in part). Although Scalia did not author the *Seminole* majority opinion or the *U.S. Term Limits* dissent, he joined both opinions and they reflect his approach. On the other hand, it is noteworthy that Scalia did *not* join that part of the Court's opinion in *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164-66 (1997), that discussed the drafting history of the Fourteenth Amendment. See 117 S. Ct. at 2159.

23. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Lujan v. Defenders of Wildlife*, 504 U.S. 505 (1992); *Mistretta v. United States*, 488 U.S. 361 (1989) (Scalia, J., dissenting); *Morrison v. Olson*, 487 U.S. 654 (1988) (Scalia, J., dissenting).

immigration policy. In fact, there is reason to think that some ordinary speakers of the English language would have limited the statutory language to manual workers and would not have extended it to brain toilers such as the Holy Trinity Church pastor. The first definition of the term “labor” listed in the 1879 and 1886 editions of *Webster’s Dictionary* was “Physical toil or bodily exertion . . . hard muscular effort directed to some useful end, as agriculture, manufactures, and the like”²⁴ The first, and preferred, definition supports Brewer’s intuition that brain toilers were not targeted by the statute (although Brewer cheerfully conceded that statutory plain meaning cut against his view!). The second listed definition, “intellectual exertion, mental effort,”²⁵ was broad enough to include brain as well as manual toilers, but judges of the period were more likely to follow the primary definition. In the 1880s, judges interpreting the laws and treaties excluding Chinese “laborers” or persons brought over for “labor” held that the terms should be read in their primary popular senses, to mean “physical labor for another for wages,” and therefore not to include actors, teachers, or merchants.²⁶

The contemporary definition of “service” was also narrow. *Webster’s* first, and only relevant, definition of the term was: “The act of serving; the occupation of a servant; the performance of labor for the benefit of another, or at another’s command; attendance of an inferior, or hired helper, or slave, &c., on a superior, employer, master, or the like”²⁷ Legal dictionaries of the period defined “service” more broadly, as “being employed to serve another; duty or labor to be rendered by one person to another.”²⁸ When lawyers spoke of professional work, they appear to have used the term “services” rather than “service.”²⁹

If contemporaries saw “labor or service of any kind” to be physical and helper work, as these sources suggest, Scalia has less cause

24. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 745 (Chauncey A. Goodrich & Noah Porter, eds., rev. ed. 1879). The 1886 edition had precisely the same definitions for all the words discussed in this review.

25. *Id.* The now-authoritative *Black’s Law Dictionary*, published shortly after the statute was executed, focused on the first meaning. See HENRY CAMPBELL BLACK, A DICTIONARY OF LAW 682 (1891) (defining *labor* to mean “[w]ork; toil; service. Continued exertion, of the more onerous and inferior kind, usually and chiefly consisting in the protracted expenditure of muscular force”).

26. See *In re Ho King*, 14 F. 724 (D. Or. 1883); *State v. Rush*, 55 Wis. 465 (1882); see also Brief for Plaintiff in Error at 8-11, *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) (No. 143) (discussing cases construing “laborer” or “labor”).

27. WEBSTER, *supra* note 24, at 1206. The other definitions, including “spiritual obedience and love,” were not relevant to employment.

28. BLACK, *supra* note 25, at 1083; see also BOUVIER’S LAW DICTIONARY (1868).

29. See, e.g., *United States v. Langston*, 118 U.S. 389, 390 (1886) (referring to “services” rendered by public officials); *Boyd v. Gorman*, 157 N.Y. 365, 365 (1898) (referring to lawyer’s “services”).

to reject the result in *Holy Trinity Church*.³⁰ What is significant is that Scalia was not interested enough in contemporary understanding to “look it up.”³¹ While he has shown such interest in some statutory cases,³² Scalia often devotes little or no effort to figuring out how contemporaries actually would have understood the terms used in statutes.

The biggest discontinuity between Scalia’s constitutional and statutory analysis is the role of legislative history. The most doctrinally distinctive feature of his statutory jurisprudence is its sweeping rejection of legislative history. Scalia considers the legislative discussion prior to a statute’s enactment not only subordinate to the statutory text, but not even worthy of consideration. If Scalia were persuaded that “labor or service of any kind” semantically meant only manual or helper work, he would concur in the judgment reached by Brewer in *Holy Trinity Church*. But he would write separately, insisting that the legislative history have no role in deciding or even discussing the issue of the imported pastor. In statutory cases, Scalia will often concur only in the judgment because he rejects the majority opinion’s use of legislative history.³³ In the 1996 Term, he went so far as to refuse to join a footnote of an opinion that merely explained why “[w]e give no weight to the legislative history.”³⁴

Contrast this stance with Scalia’s constitutional opinions, which generally, and sometimes extensively, discuss the debating history of the Constitution. In *Printz*, for example, Scalia’s opinion carefully considered and vigorously disputed the dissenters’ deployment of *The Federalist* to support their view that the Brady Act provision in question was constitutional because the framers and everybody else assumed that the federal government did have the power to

30. Scalia can still object that “labor or service of any kind” should be broader than simple “labor,” including the brain toilers who also, literally, do work, as well as the sweat toilers who were the usual objects of the term. The Tanner Lectures, however, denounce “literalism” almost as much as they denounce evolutive constructions. Pp. 23-24.

31. The Church made this kind of definitional argument in its brief. The United States did not challenge the definitions. Compare Brief for Plaintiff in Error, 11-13, *Holy Trinity*, 143 U.S. 457 (discussing the dictionary and judicial definitions of labor and service) with Brief for Defendant in Error, *Holy Trinity*, 143 U.S. 457 (providing no response).

32. E.g., *Smiley v. Citibank* (S.D.), 116 S. Ct. 1730, 1735-36 (1996).

33. See *Bank One Chicago v. Midwest Bank & Trust Co.*, 116 S. Ct. 637, 645 (1996) (Scalia, J., concurring in part and in the judgment); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 219 (1994) (Scalia, J., concurring in part and in the judgment); *Conroy v. Aniskoff*, 507 U.S. 511, 518 (1993) (Scalia, J., concurring in the judgment); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 519 (1992) (Scalia, J., concurring in the judgment); *Sullivan v. Finkelstein*, 496 U.S. 617, 631 (1990) (Scalia, J., concurring in part); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment); *Blanchard v. Bergeron*, 489 U.S. 87, 97 (1989) (Scalia, J., concurring in part and in the judgment); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in the judgment).

34. See *Associates Commercial Corp. v. Rash*, 117 S. Ct. 1879, 1882 n.* (1997) (noting that Scalia joins the entire opinion except footnote 4).

deploy state officials to carry out federal statutory schemes.³⁵ Scalia's opinion also affirmatively relied on *The Federalist* to establish that the Constitution was meant to prohibit such deployment, both as specifically understood by at least one framer, Madison,³⁶ and as generally understood from the constitutional principle — spirit? — of dual sovereignty.³⁷ *Printz* is a high-water point for Scalia's use of *The Federalist* because specific constitutional texts — the Commerce Clause, the Necessary and Proper Clause, the Supremacy Clause — on the whole support the dissenters and have to be explained away. Nonetheless, Scalia in other opinions has relied on *The Federalist* to support his constitutional constructions.³⁸

The Federalist was a series of propaganda documents penned by supporters of the Constitution to persuade New York to ratify it.³⁹ They are distinguishable from legislative history, of the sort invoked in *Holy Trinity Church*, insofar as they were written by smarter and more far-sighted people, but they are on the whole less reliable sources for figuring out “the objective indication of the words, rather than the intent of the [framers]” (p. 29). All of Scalia's criticisms of legislative history apply to *The Federalist*: the essays are not the “words” of the law, they take positions on issues that the drafters of the Constitution did not think about, and they were read by neither the drafters nor the delegates ratifying the Constitution outside New York (pp. 29-33). To Scalia's criticisms should be added another: because they were written 200 years ago, and because the Constitution and the nation have decisively evolved in ways the authors did not anticipate, *The Federalist* essays operate upon assumptions that long ago died.

How can a jurist who detests statutory legislative history rely on constitutional legislative history that is, if anything, less reliable? The only defense I have ever heard from Scalia is that he does not consider *The Federalist* “authoritative” in the same way the Court has traditionally considered legislative history. This strikes me as little more than a word game. Scalia and other constitutional originalists use *The Federalist* as evidence of how a few of the framers explained the purposes and some of the specific understandings of the Constitution and particular provisions. For the most part, judges have used statutory legislative history in the same way or as

35. See *Printz v. United States*, 117 S. Ct. 2365, 2373-74 (1997).

36. Hamilton may have had a similar understanding, but Scalia dismisses him as an outlier on this issue. See *Printz*, 117 S. Ct. at 2374-75, 2375 n.9.

37. See *Printz*, 117 S. Ct. at 2376-79 (invoking *The Federalist* ten times and quoting the documents four times in determining the “essential postulate[s]” of the Constitution).

38. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 697-99 (1988) (Scalia, J., dissenting).

39. On the essays as propaganda and the problems with generalizing from them to represent objective meaning or subjective intent, see ARTHUR FURTWANGLER, *THE AUTHORITY OF PUBLIUS: A READING OF THE FEDERALIST PAPERS* (1984).

confirmatory evidence of what the text apparently means; and most of this century's major theories of statutory interpretation have approached legislative history as evidence, not as authority.⁴⁰ Although many users of legislative history call it "authoritative" evidence, *The Federalist* is authoritative in the same sense: if those essays had been private letters by Thomas Jefferson (a brilliant man and learned theorist, but not a framer of the Constitution), they would not have the same cachet as public defenses by James Madison (the note-taker at the Philadelphia Convention) and Alexander Hamilton (a once and future leading Federalist). No Justice or leading theoretician has, to my knowledge, confused statutory history (at best, authoritative *evidence* of legal meaning) with statutory text (legal *authority*). Scalia's Supreme Court colleague, Stephen Breyer, has thoughtfully justified legislative history consideration along these lines.⁴¹

Thus, it would appear that a jurist can and should consult both *The Federalist* and statutory legislative history, for what they are worth, in figuring out constitutional or statutory meaning. There is insufficient reason to consider only one and not the other, unless one can defend materially different approaches as to constitutional interpretation and statutory interpretation. Such an argument is possible,⁴² but it would present different kinds of trouble. Scalia charges that the use of statutory legislative history *augments* judicial discretion to read statutes willfully rather than lawfully (p. 36). If that were so, the use of constitutional debating history is more dangerous, especially when the Court uses it, as in *Printz*, to create a constitutional limitation not apparent from the plain language of the Constitution (and arguably at odds with the Supremacy Clause). Congress can, and often does, override willful judicial constructions of statutes, but it usually cannot override willful judicial constructions of the Constitution. If judicial activism (substituting judicial results for legislative ones) is presumptively suspect, as the Tanner Lectures assume, then it is the constitutional and not the statutory interpreter who should be especially chary of relying on debating history. "Harold Leventhal used to say, the trick [in using legislative history] is to look over the heads of the crowd and pick out your friends" (p. 36). That is precisely the charge made by the *Printz* dissenters against Scalia's deployment of *The Federalist* and other background evidence to create a constitutional limit on the

40. See ESKRIDGE, *supra* note 17, ch. 7; William N. Eskridge, Jr., *Legislative History Valued*, 66 CHI.-KENT L. REV. 365 (1992).

41. See Breyer, *supra* note 10.

42. I suggest some arguments along these and other lines in *Textualism and Original Intent: Should the Supreme Court Consult the Federalist Papers but not Statutory Legislative History?*, — GEO. WASH. L. REV. (forthcoming 1998).

national government where none appears on the face of the Constitution.⁴³

Indeed, the debating history would seem more relevant for recently enacted statutes, where the legislative expectations relate to a world we know and sometimes address issues still alive, than for the grand old Constitution, where the expectations relate to a world we know only through a glass darkly and address issues typically dead or altered by circumstances. This point has a substantive dimension. Debating history or general background surrounding the Constitution adds context that is substantively slanted, not just toward the values of federalism in ways that the Reconstruction Amendments sought to offset, but also systematically against the interests of people of color (constitutional slaves in 1789), women (legal servants), poor people (nonvoters), and religious and social nonconformists (social outcasts), in ways that subsequent amendments and judicial constructions have sought to ameliorate. The context of constitutional debating history is slanted in a conservative direction much more so than the debating history of federal statutes, most of which were enacted by Democratic Congresses and therefore slanted too, but in a more regulatory-state direction. In short, a generously purpose-oriented historicist interpretation of the Constitution and an ungenerous approach to statutes are most obviously (but perhaps superficially) reconciled as a politically conservative move by courts. If this were the best explanation, it would be a disturbing feature of the new textualism's incoherent treatment of constitutional and statutory debating history. If much of the appeal of the new textualism is its neutrality and its aspiration to eliminate all judicial activism, then any substantive slant is worrisome.

II. THE PROBLEM OF AUTHORITY

Scalia is an out-of-the-closet formalist (p. 25). He therefore must have a theory by which the Constitution — the ultimate source of formal authority for a federal judge — authorizes or, even better, requires the new textualism as a methodology. Does the Constitution require, encourage, or permit the new textualist approach to statutory interpretation? There is nothing in the text of the Constitution that requires judges to interpret statutes according to their plain meanings. The “judicial Power” that Article III grants to the Supreme Court and to inferior federal courts poses rather

43. See *Printz*, 117 S. Ct. at 2387-94 (Stevens, J., dissenting); *Printz*, 117 S. Ct. at 2401-04 (Souter, J., dissenting). Even some conservative scholars who take original intent seriously and who firmly believe in federalism have found insufficient historical support to extend *New York's* rule against commandeering state legislatures, see *supra* note 21 and accompanying text, to *Printz's* rule against commandeering state law enforcement officers. See, e.g., Sai Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993).

than answers the question: What does “judicial Power” mean? In statutory cases, would such power include only textual readings, or would it include something more?

To answer these questions about the meaning of “judicial Power,” an interpreter following Scalia’s approach to constitutional interpretation, as articulated in *Printz* and other decisions, would consider eighteenth-century practice, constitutional principle and structure, and the ratifying debates. These sources provide more support for a common law, equitable approach to statutory interpretation than for a strict, Scalian textualism. The following discussion is preliminary rather than definitive and invites further scholarly inquiry. My tentative conclusions are the following: (1) the goal of statutory interpretation was understood to implement the “intent” of the legislature; (2) intent was derived from the statutory text, the spirit or purpose of the statute, precedent, the common law and canons of statutory construction, and ideas of equity and reasonableness; (3) statutory text, including the whole statute, was on the whole the most important evidence of intent, but the common law and equity exercised strong influence on how courts read text; (4) it was sometimes acceptable for courts to depart from the letter of a statute, in deference to its spirit, practice, or principles; (5) legislative history, generally not available in published form, was not discussed one way or the other; and (6) the framers would have been receptive to Brewer’s mode of analysis in *Holy Trinity Church*, with a possible exception for a reading of his opinion that emphasized specific, subjective intent rather than general, objective intent.

A. *Constitutional Background: Eighteenth-Century Statutory Theory and Practice*

In determining what import the Framers would have given to “judicial Power” in statutory cases, one might start with then-contemporary practice, as Scalia did in *Printz*. The leading legal treatise discussing statutory interpretation was Blackstone’s *Commentaries*, considered almost as authoritative in the colonies and new states as it was in the United Kingdom.⁴⁴ Blackstone certainly believed that statutory text was important — as the best but not the only evidence of legislative intent.⁴⁵ Following traditional English practice, Blackstone said that “the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it . . . for when this

44. See William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 803 (1985).

45. See 1 WILLIAM BLACKSTONE, *COMMENTARIES* *59-*62, *91. See also Blatt, *supra* note 44, at 802-05.

reason ceases, the law itself ought likewise to cease with it.”⁴⁶ This “mischief rule” paid due regard to statutory plain meaning but emphasized statutory purpose, or “spirit.” Blackstone also recognized that, as time passed, statutes would be applied to new circumstances not contemplated by the legislature.

For, since in laws all cases cannot be foreseen or expressed, it is necessary that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances which (had they been foreseen) the legislator himself would have expressed.⁴⁷

Note the focus on legislative intent. In such cases, he urged judges “to expound the statute by equity” and to reject unreasonable consequences “where some collateral matter arises out of the general words” of the statute.⁴⁸ Blackstone’s willingness to leave room for spirit-based, equitable constructions is closer to Brewer’s rather than Scalia’s approach in *Holy Trinity Church*, and his collateral matter rule seems tailored to *Holy Trinity Church*.

Blackstone was not the only background context for the framers. In his comment on the Tanner Lectures, historian Gordon Wood says that the American states were reconceptualizing the judiciary between 1776 and 1789 (pp. 49-63). The statutory decisions of state courts are relevant to figuring out what “judicial Power” meant to an American audience in 1789. I read most, if not all, of the published state court statutory interpretation decisions of the 1780s and 1790s from Connecticut, Delaware, New Jersey, North Carolina, Pennsylvania, and Virginia. In light of Wood’s statement, I was surprised at how consistent practice in those states was with Blackstonian precepts. Consider *Executors of Barrecliff v. Administrator of Griscom*.⁴⁹ Plaintiff obtained a judgment for £74 10s; after failure of complete payment, plaintiff won a second judgment for the £45 6s 2d balance. The issue was whether plaintiff was entitled to costs on the second action. A 1782 statute gave costs in “any suit for any debt or demand” when the judgment was £50 or more, but an 1847-48 statute provided for costs in “any suit, or action whatsoever” where the sum sought was more than £15. The New Jersey Supreme Court in 1793 framed the inquiry as “guided by the designs and intentions of the legislature, so far as they are to be

46. 1 BLACKSTONE, *supra* note 45, at *61; *see also* Heydon’s Case, 76 Eng. Rep. 637, 638 (Ex. 1584) (urging judges “to make such construction [of the act] as shall suppress the mischief and advance the remedy”). *Heydon’s Case* was a leading English authority whose mischief rule is discussed approvingly in 1 BLACKSTONE, *supra* note 45, at *87.

47. 1 BLACKSTONE, *supra* note 45, at *62.

48. *Id.* at *91. *See also* College of Physician’s (Dr. Bonham’s) Case, 123 Eng. Rep. 928 (C.P. 1609). *Bonham’s Case* was an authority well known to eighteenth-century American jurists. *See* Theodore F.T. Plucknett, *Bonham’s Case and Judicial Review*, 40 HARV. L. REV. 30 (1926).

49. 1 N.J.L. 193 (1793).

gathered from the expressions they have employed.”⁵⁰ Thus, like Blackstone, the court saw statutory text as part of an intentionalist enterprise. More strikingly, the court avoided the plain meaning of the 1782 statute — which would seem to deny plaintiff costs in the second action — by Blackstonian precepts which created an exception for “superior” actions to enforce judgments: (1) the equitable policy of the earlier statute and its applicability to narrow the second; (2) the principle that a generally phrased statute can be narrowed when applied to unanticipated fact situations; and (3) the “inconveniences” that would arise from not giving plaintiff its costs in the second action.⁵¹ The court’s ultimate articulation of its holding was hardly textualist: “as we are not compelled by the letter and perhaps spirit of the acts to adopt such [an inconvenient] construction, we are of opinion that they do not apply to this case and that the plaintiff recover his full costs.”⁵²

Although several of the decisions from this period did seem to follow a simple plain meaning approach to statutory interpretation,⁵³ the typical statement of the interpretive task was this:

We do not consider ourselves bound by the strictly grammatical construction of the words of the act. The intention of the legislature should be our guide, or, rather, in a case of this nature, we should not hesitate to adopt a construction which the words will clearly warrant, free from those inconveniences which must flow from any other interpretation.⁵⁴

Although the statutory interpreter at the time of the framing certainly paid close attention to statutory text, he read the text in light of the Blackstonian ideas that statutes should be narrowly construed when they run up against common law presumptions,⁵⁵ should be construed by reference to their spirits or purposes,⁵⁶ and

50. 1 N.J.L. at 194.

51. *See* 1 N.J.L. at 195.

52. 1 N.J.L. at 196.

53. *See* Jones v. Stokes, 1 N.C. (Mart.) 25 (1796) (adopting a literalist interpretation; *inclusio unius*); Gregory v. Bray, 1 N.C. (Mart.) 29 (1796).

54. Woodbridge v. Amboy, 1 N.J.L. 213, 214 (1794); *see also* Elliott v. Richards, 1 Del. Cas. 87 (C.P. 1796).

55. *See* Smith v. Minor, 1 N.J.L. 16 (1790) (adopting, in dictum, the rule of lenity); Wistar v. Kammerer, 2 Yeates 100 (Pa. 1796) (advocating a narrow construction of a statute so as not to affect property rights); Vanhorne’s Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 317 (1795) (same); Paine v. Ely, D. Chip. 37, 39-40 (Vt. 1789) (observing that statutes creating unusual jurisdiction are to be narrowly construed); Chichester v. Vass, 5 Va. (1 Call) 82, 92-102 (1797). *Compare* White v. Hunt, 6 N.J.L. 415, 417-18 (1798) (Kinsey, C.J.) (advocating a rule against retrospective application) *with* 6 N.J.L. at 419 (Kirkpatrick, J.) (interpreting words “consistent with reason and equity”).

56. *See* Warder v. Arell, 2 Va. (2 Wash.) 282, 299 (Va. 1796) (Carrington, J.) (rejecting “strict rules of grammatical construction” in favor of “the spirit, as well as the just exposition of the words of the law”); Grant’s Lessee v. Eddy, 2 Yeates 147 (Pa. 1796) (adopting a purposive approach); Hancock v. Hovey, 1 N.C. (Tay.) 104 (1799) (advocating an exception to statutory plain meaning where suggested by “mischief” or “spirit” inquiries and advocating

can sometimes be interpreted contrary to their apparent plain meaning, when that is in tension with great principles.⁵⁷

For an example of the last point, consider *Bracken v. Visitors of William and Mary College*.⁵⁸ The Virginia Court of Appeals in that case allowed the governing board of William and Mary to eliminate the chair of grammar, which had been specifically mandated in the decree creating the college. The Court acceded to the position urged by William and Mary's counsel, John Marshall, who argued that the primary intent of the authorizing statutes was to delegate policymaking discretion to the Visitors and that changed circumstances justified the Visitors' adoption of a plan contrary to some of the details of the original statutory grant. "It was proper that this discretion should be given to the Visitors, because a particular branch of science, which at one period of time would be deemed all important, might at another, be thought not worth acquiring," argued Marshall. "In institutions, therefore, which are to be durable, only great leading and general principles ought to be immutable."⁵⁹

B. *Constitutional Implication from Bicameralism and Presentment*

Although he does not consider judicial practice and contemporary understanding of what "judicial Power" meant in statutory cases, Scalia does defend his approach as required by constitutional principle. Specifically, he argues that the new textualism is supported by Article I, Section 7's requirement that a bill does not become a statute unless it has been accepted in the same textual form by both Houses of Congress and presented to the President (pp. 34-35). Because only the statutory text actually becomes law, any unwritten intentions of one house or of one committee or of one member in Congress are not law unless it can be shown that they were understood and accepted by both houses and by the President. According to Scalia, relying on committee reports to determine a statute's meaning is analogous to lawmaking by congressional sub-

implicit judicial notice of legislative deliberation); *Watson & Hartshorne v. Alexander*, 1 Va. (1 Wash.) 340 (1794) (asserting that courts should reconcile textual plain meaning and equity); *Wallace v. Taliaferro*, 6 Va. (2 Call) 445, 456-90 (1800) (similar).

57. See *Anderson's Adms. v. Anderson*, 1 N.C. (Mart.) 3 (1789) (rejecting plain meaning to achieve an equitable result); *Hall v. Feild*, 1 Del. Cas. 54 (1795) (asserting that the practice under the statute at issue required departure from plain meaning); *Woodbridge v. Amboy*, 1 N.J.L. at 213 (asserting fairness reasons for applying a 1740 statute retroactively).

58. 7 Va. (3 Call) 573 (1790).

59. *Bracken*, 7 Va. (3 Call) at 581. For an argument that Marshall was more textualist as Chief Justice, see John Choon Yoo, Note, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607 (1992). Cf. *Marbury v. Madison*, 5 U.S. (3 Cranch) 137 (1803) (applying an untextualist approach to construing the Judiciary Act of 1789); *Hamilton v. Russell*, 5 U.S. (3 Cranch) 309, 318 (1803) (Marshall, C.J.) (applying statutory construction to promote the "intent of the statute").

groups,⁶⁰ which the Court found unconstitutional in *INS v. Chadha*, the legislative veto case.⁶¹

Scalia is right that the Court should not consider legislative background materials to have the authority of law; indeed, no justice or serious scholar advances that proposition. In pressing the argument to deny the relevance of legislative materials to the interpretation of statutes, Scalia reads too much into the bicameralism and presentment requirements, however. *Chadha*, itself quoting a Senate committee report, held that the bicameralism and presentment requirements are only formally applicable when “actions taken by either House . . . ‘contain matter which is properly to be regarded as legislative in its character and effect’” — namely, to alter legal rights and duties.⁶² That is precisely the effect of the legislative veto invalidated in *Chadha*. In contrast, committee reports consulted to explain the meaning of the statute do not themselves alter legal rights and duties. Judicial consideration of committee reports does not violate bicameralism or presentment any more than would a judge’s consulting a dictionary. *Chadha* made this point and emphasized that bicameralism and presentment are only limitations on Congress’ actions — the requirements are in Article I — and not the actions of branches of government regulated by Articles II and III. Bicameralism is formally irrelevant as a limitation on subsequent implementation and interpretation of legislation.⁶³

Even principle (or spirit) derived from Article I, Section 7 is unlikely to support the new textualism. The purpose of the bicameralism requirement, according to *Chadha*, is “[t]he division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and

60. *United States v. Taylor*, 487 U.S. 326, 345 (1988) (Scalia, J., concurring in part); *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring in the judgment); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring in the judgment); Antonin Scalia, *Speech on Use of Legislative History* (delivered during fall 1985 and spring 1986 at various law schools; transcript distributed by the *Virginia Law Review*).

61. 462 U.S. 919 (1983).

62. See *Chadha*, 462 U.S. at 952 (quoting S. REP. NO. 54-1335, at 8 (1897)).

63. See *Chadha*, 462 U.S. at 953 n.116. This footnote addresses administrative “lawmaking” and observes that

[e]xecutive action under legislatively delegated authority that might resemble ‘legislative’ action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution, . . . [namely, Article II, which describes the President’s powers] does not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely. A one-House veto is clearly legislative in both character and effect and is not so checked; the need for the check provided by Art. I, §§ 1, 7, is therefore clear.

This same analysis could be applied to judicial interpretation of statutes.

debate in separate settings.”⁶⁴ The Constitution’s contemplation of deliberative discussion in the legislature suggests an implicit tolerance for reviewing those deliberations on the part of those charged with interpreting and implementing the legislation. Indeed, Madison said as much in *Federalist* 47: “The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though *they may be advised with by the legislative councils*,” by which Madison meant subgroups or committees of Congress.⁶⁵ To the extent that committee reports and other legislative history shed light on the “study and debate” in which Congress is supposed to engage, the constitutional procedures of legislation would seem to support some consultation of legislative history.

It can be argued that any formal delegation by Congress of law-explication authority to congressional committees would be in derogation of Article I, Section 7, as interpreted in *Chadha* and *Bowsher v. Synar*.⁶⁶ That kind of argument would, at most, caution against judicial treatment of “subsequent legislative history” as authoritative in any way but, again, does not speak directly to *judicial* practice or even to committees’ generating reports that they hope will influence judicial construction of statutes.

C. Constitutional Principle and Debating History: Separation of Powers

Scalia draws from the Constitution’s separation of powers in Articles I-III the precepts that Congress should do all of the lawmaking and the Court as little as possible — unless explicitly and broadly delegated by Congress, as in the Sherman Act. According to the new textualists, consideration of legislative history creates greater opportunities for the exercise of judicial discretion, thereby enhancing the risk that the Court will exercise its own “WILL instead of JUDGMENT,” effectively “substitut[ing] [its own] pleasure to that of the legislative body.”⁶⁷ A focus on the text alone, in contrast, is a more concrete inquiry that will better constrain the tendency of judges to substitute their will for that of Congress.

64. *Chadha*, 462 U.S. at 951.

65. THE FEDERALIST NO. 47, at 303 (Madison) (Roy P. Fairfield ed., 1981) (emphasis added).

66. 478 U.S. 714 (1986); see *Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991). The argument in the text is made at some length in Manning, *supra* note 13. Manning does not follow Scalia in arguing for exclusion of legislative history; he mainly argues that it should not be considered authoritative.

67. THE FEDERALIST NO. 78, *supra* note 65, at 230 (Hamilton); see also *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 471 (Kennedy, J., concurring in the judgment) (quoting THE FEDERALIST NO. 78).

The premise of Scalia's position — that separation of powers denies the Court any law-affecting function — is at odds with the way at least some framers understood the import of the Constitution. By separating the power to enact statutes (Article I) from the power to enforce (Article II) or interpret (Article III) statutes, the Constitution contemplates not just a separation of powers, but also a cooperation of different power centers. That is, the constitutional scheme sets up a structure where ongoing policy creation will be interactive and dynamic rather than unitary and static. The framers created separate branches within the federal government, in part to ensure that no one branch would create law and control policy by itself. Madison argued in *Federalist* 47 that tyranny is more likely if state power is concentrated in one department.⁶⁸ In *Federalist* 51, he maintained that segregating different lawmaking functions — enactment, enforcement, interpretation — protects liberty because ambition is made to counter ambition.⁶⁹ For this reason, branches that are separate can still have some “partial agency in” or “control over” one another, and Madison saw the nature of those powers as mutually encroaching, setting up a friendly competition among ambitious officials seeking to protect the public good as the best way to preserve their own authority.⁷⁰ If one body (Congress) enacts the laws, another institution (the Presidency) implements them, and yet another (the Court) interprets them, then it is less likely that tyrannical or unfair policies will result. This philosophy does not insist that courts do nothing but apply textual plain meanings.

The framers of the Constitution were at least as pragmatic as Blackstone in their approach to statutes, and it appears that one specific reason for separating the enactment of statutes from their interpretation is the framers' belief in the productivity of common law, equitable interpretation like that defended by Blackstone. This was the point of John Marshall's argument in *Bracken*, that the governing board have freedom to create new rules “according to their various occasion and circumstances, as to them should seem most fit and expedient,” limited only by “the great outlines marked in the charter.”⁷¹ The Anti-Federalist opponents of the Constitution were critical of Article III's assurance of judicial independence

68. See THE FEDERALIST NO. 47, *supra* note 65, at 139-42 (Madison) (quoting and relying on Charles Montesquieu, *The Spirit of the Laws*, book XI, ch. VI (1748)).

69. See THE FEDERALIST NO. 51, *supra* note 65 (Madison).

70. See THE FEDERALIST NO. 47, *supra* note 65, at 140 (Madison); see also THE FEDERALIST NO. 73 (Hamilton) (offering a similar rationale supporting the presidential veto); THE FEDERALIST NO. 78 (Hamilton) (offering a similar rationale supporting judicial nullification or melioration of “partial and unjust” statutes); see generally DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 130-31 (1984).

71. See *Bracken v. Visitors of William and Mary College*, 7 Va. (3 Call) 573, 580 (1790) (reporting Marshall's argument).

for precisely this reason: following Blackstone, federal courts would apply the spirit and not the letter of the Constitution in ways that neither the states nor even Congress could correct.⁷² The Anti-Federalist objection was usually to judicial review, but The Federal Farmer in particular argued that unelected judges posed a threat to liberty and state authority through their interpretation of statutes as well.⁷³

Alexander Hamilton's *Federalist 78* responded to these attacks; like his opponents, Hamilton focused on judicial review but treated statutory interpretation as well. He followed Blackstone in believing that courts should not only interpret statutes equitably, but might also respond to "unjust and partial laws" by "mitigating the severity and confining the operation of such laws."⁷⁴ Hamilton's reasoning was that interpretive curtailment of unjust laws would force the legislature to "qualify" the severity of statutes it enacted, knowing them to be subject to further review. "[N]o man can be sure that he may not be tomorrow the victim of a spirit of injustice by which he may be a gainer today," and "every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence."⁷⁵

Federalist 78 recognized the danger of "the substitution of [judges'] pleasure to that of the legislative body." Like the Anti-Federalists, Hamilton saw his as mainly a problem for judicial review and not for statutory interpretation.⁷⁶ Responding to the Anti-Federalist fears of unconstrained judges, Hamilton argued that courts were constrained in their interpretation of statutes. His argument was not that statutory interpreters are constrained by the plain meaning of statutory texts — which Hamilton never mentioned — but instead by "strict rules and precedents";⁷⁷ by the purpose of an independent judiciary "to secure a steady, upright, and

72. See Brutus XI, N.Y.J., Jan. 31, 1788, reprinted in *FEDERALISTS AND ANTI-FEDERALISTS: THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION* 121, 123-24 (John P. Kaminski & Richard Leffler eds., 1989); Brutus XV, N.Y.J., Mar. 20, 1788, reprinted in *2 THE COMPLETE ANTI-FEDERALIST* 437 (Herbert J. Storing ed., 1981).

73. See Federal Farmer XV, N.Y.J., Jan. 18, 1788, reprinted in *2 THE COMPLETE ANTI-FEDERALIST*, *supra* note 72, at 315-16.

74. See *THE FEDERALIST NO. 78*, *supra* note 65, at 231 (Hamilton); see also DAVID F. EPSTEIN, *POLITICAL THEORY OF THE FEDERALIST* 188-90 (arguing that Hamilton was suggesting that "courts may be lenient against the lawmakers' intention" and that the framers generally endorsed an equity-based approach to statutory interpretation).

75. *THE FEDERALIST NO. 78*, *supra* note 65, at 232; see also *THE FEDERALIST NO. 73* (Hamilton) (offering a similar argument in favor of the presidential veto).

76. *Federalist 78* mostly deals with judicial review in enforcing the limitations on government imposed by the Constitution, see *THE FEDERALIST NO. 78*, *supra* note 65, at 228-33 (Hamilton), and it is in that discussion that the language quoted in the previous sentence of the text is found. See *id.* at 230. Hamilton's subsequent discussion of statutory interpretation is brief, see *id.* at 231-32, before he concludes generally, see *id.* at 232-33.

77. *Id.* at 233.

impartial administration of the laws";⁷⁸ and by the institutional weakness of the judiciary, whose judgments can be overridden by the two more powerful branches.⁷⁹ Hamilton's criteria for constraining judges are more pragmatic criteria than the plain meaning criterion of the new textualism.

Even if one accepts Scalia's premise that courts are supposed to play a neutral, nondiscretionary, and perhaps even mechanical, role in statutory policy implementation — a premise at some odds with the framers' expectations — it is not clear that his new textualism advances that goal. To begin with, it is mildly counterintuitive that an approach asking a court to consider materials generated by the legislative process, in addition to statutory text (also generated by the legislative process), canons of construction (generated by the judicial process), and statutory precedents (also generated by the judicial process), leaves the court with *more* discretion than an approach that considers just the latter three sources. Scalia responds to this intuition: Because "legislative history is extensive" for most statutes, "there is something for everybody," and that allows the willful judge additional cherry-picking options to justify her preordained position (p. 36). Scalia is in a better position to evaluate judicial behavior than I am, but Scalia's position is surely both too cynical and not cynical enough. It is too cynical to believe most judges are *that* result-oriented. Generally speaking, the average judge does not consider legislative history as authoritative and looks at history to answer questions posed by the text, as applied to the facts. The history informs her about the statute's terminology, goals, and structure.⁸⁰ Conversely, any judge who is determined to be willful is unaffected by methodology. If she cannot shop the legislative history for friendly cites, she will shop dictionaries, canons of statutory construction, or statutory precedents. Keep this point in mind as we explore the next set of problems that the new textualism needs to consider.

* * *

The first two dilemmas for the new textualism arise out of its proudly formalist presentation: a theory insisting that law is the application of formal authority ought to have a coherent presentation for its own formal authorization. This is surprisingly difficult for the new textualism to accomplish, not only because the Blackstonian, common law approach to statutory interpretation the framers would have considered instinct in Article III's "judicial Power" is a chief object of attack in the Tanner Lectures, but also because this

78. *Id.* at 227.

79. *See id.*

80. *See* Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1 (1993).

and other characteristically formalist inquiries are necessarily regressive. That is, a formalist must demonstrate a formal authorization, presumably in the Constitution, for the rules that must be applied in statutory cases, but in making such a demonstration the formalist is relying on rules of constitutional interpretation, which ought themselves to be formally demonstrated, and so on. My initial set of challenges (Parts I and II) press this dilemma. The next set of challenges (Parts III and IV) are regressive in a different way. A formalist not only has to defend *rules* that must be followed, but because rules do not apply themselves, the formalist also has to defend *rules about rules*. This is a separate dilemma for any formalist theory, and Scalia's new textualism never adequately confronts it either.

One consequence of this dilemma is that any formalist theory is ultimately conventional. Scalia's approach, understood this way, simply posits a different set of conventions than the Court's eclectic approach — for example, excluding legislative history and most purposive and justice-based arguments that the Court typically considers and sometimes finds dispositive. Indeed, *Holy Trinity Church* stands for the proposition that plain text can be trumped by contrary legislative history, statutory purpose, and public values; for that reason the case is the natural target for Scalia in the Tanner Lectures. The next two problems I pose for the new textualism relate to the *conventions* Scalia insists upon. Do they better constrain willful judges, assure greater determinacy, and save transaction costs, as Scalia claims? Or are Scalia's conventions no more constraining, determinate, or cheap than those he attacks?

III. THE PROBLEM OF CONTEXT

It is a truism that interpreting a text requires context. Scalia seeks to turn this truth to his advantage. A new textualist considers plenty of context for figuring out the plain meaning of a statutory provision: the whole statute in which the provision is situated, dictionaries and grammar books, at least some canons of statutory construction, and the common sense that God gave us. The new textualist, however, will almost never consider legislative history and usually not general statutory purpose and moral argumentation. Not only is the latter context illegitimate (Scalia's formalist argument), but it expands judicial discretion (Scalia's institutional argument, introduced in the previous Part) and is tremendously wasteful (Scalia's economic argument). As to the last, "[j]udges, lawyers, and clients will be saved an enormous amount of time and expense" because they will not have to research compendious legislative histories, which even under the current system rarely have

payoffs.⁸¹ The formalist argument does not work. Do the institutional and economic arguments make out a better case for the new textualism?

Returning to *Holy Trinity Church*, consider the full panoply of new textualist arguments relating to the statutory prohibition against contracting with an “alien” to pay his transportation to the United States “to perform labor or service of any kind.”⁸² Dictionary definitions of “labor or service,” noted above, do not clearly resolve the issue.⁸³ On the one hand, *labor* and *service* ordinarily meant physical and helper work to American judges, and presumably legislators, in 1885. On the other hand, the term *labor* could also mean brain work, although courts in the Chinese exclusion cases refused to read the term that broadly. And *service* could also mean any work for an employer, although work by professionals was usually deemed *services rendered*. “Labor or service of any kind” might be read more broadly than simple “labor or service,” however. But the title of the statute was narrower: “An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States etc.”⁸⁴

Other provisions of the statute also cut in different directions. The prohibition found in section 1 is enforced by provisions voiding such contracts (section 2) and fining the contractor (section 3). Section 4 enforces the policy of section 1 by holding criminally accountable the master of a ship “who shall knowingly bring within the United States . . . any alien *laborer, mechanic or artisan*” who had contracted to perform “labor or service in the United States.”⁸⁵ Section 4 is in *pari materia* with section 1, as they both regulate the importation of aliens coming to America under contract “to perform labor or service in the United States.” Section 4’s terminology is instructive as to the precise kinds of aliens excluded — laborers, mechanics, and artisans (all manual workers according to contemporaries).⁸⁶ Section 4 regulates just manual workers imported for labor or service. Is there any reason, on the face of the statute, to separate its coverage from that of section 1? If not, section 4’s relatively unambiguous ambit ought to inform the more ambiguous ambit of section 1. On the other hand, section 5 specifically exempts from the ambit of sections 1 and 4 actors, artists, lecturers, singers,

81. P. 36. I was the first, in print, to make the economic argument for the new textualism. See Eskridge, *supra* note *, at 669, 684-85 (drawing the general efficiency point from REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 150-51 (1975)).

82. Act of Feb. 26, 1885, ch. 164, § 1, 23 Stat. 332, 332.

83. See *supra* notes 24-25, 27, and accompanying text.

84. 23 Stat. at 332.

85. § 4, 23 Stat. at 333.

86. See WEBSTER, *supra* note 24, at 79 (artisan); *id.* at 745 (laborer); *id.* at 823 (mechanic).

and domestic servants.⁸⁷ By specifically listing those exempted, the statute can be read as signifying that all other occupations are included in sections 1-4. Note how such a reading of Section 5 imposes a broad reading on section 4 that its words do not readily bear.

The traditional canons of statutory construction also cut in different directions.⁸⁸ The rule of *noscitur a sociis* (a thing shall be known by its associates) suggests that section 4 is applicable only to manual workers — laborers, mechanics, artisans. The whole Act suggests that the prohibitions in sections 1 and 4 be read to the same effect, as two ways of addressing the general problem of aliens imported “to perform labor or service” in the United States. The rule of lenity requires that any ambiguities in this criminal statute be read against the government and in favor of the church’s reading of the law to allow ministers, at least, to be brought into the country by contract. Such an exemption was, in fact, voted by Congress in 1891 when it amended section 5 of the 1885 statute to exempt “ministers of any religious denomination,” as well as “persons belonging to any recognized profession.”⁸⁹

On the other hand, the 1891 amendment provided that its rule should not apply to pending prosecutions⁹⁰ and, hence, would not have applied retroactively to the 1887 prosecution of the church for importing the pastor. Indeed, the amendment underscores the application of the canon *inclusio unius est exclusio alterius* (inclusion of one thing implies exclusion of all others) to section 5: because ministers were not included in the enumerated textual exemptions from the statute, ministers were excluded from the exemptions. The negative implication canon can also be used to argue that because Congress in section 4 specified the aliens imported as manual workers, its failure to use similar terminology in section 1 is significant proof of a broader application.⁹¹ Commenting on the Tanner Lectures, Larry Tribe countered with the canon of avoiding constitutional questions: construe the statute to avoid free exercise

87. See § 5, 23 Stat. at 333.

88. The Tanner Lectures accept some of the canons and criticize others, pp. 25-29, but Scalia himself relies heavily on substantive as well as linguistic canons in his capacity as a justice. See *infra* Part IV.

89. See Act of Mar. 3, 1891, ch. 551, § 5, 26 Stat. 1084, 1085.

90. See § 12, 26 Stat. at 1086.

91. On the other hand, section 5’s exemptions apply to section 4 just as much as to section 1 — yet were completely unnecessary if section 4 applied just to manual workers. At least as to section 4, the *inclusio unius* canon cannot apply because the statute was not drafted coherently. Is there reason to believe that the interaction of sections 1 and 5 was any better considered?

problems, which would allow the minister in as a “lecturer,” one of section 5’s exempted classes.⁹²

Does a textualist methodology demonstrate, objectively and clearly, that the importation of the pastor was “within the statute: end of case” (p. 20)? Does it also therefore demonstrate that the Court in *Holy Trinity Church* got the result as well as the reasoning 100% wrong? I don’t see how. Nor do I see how this sort of methodology narrows the options of Scalia’s *bête noire*, the willful judge. If such a judge wanted to allow importation of the pastor, he could emphasize the primary dictionary meanings (in 1885) of section 1’s terms “labor” and “service,” the title of the statute, the narrow articulation of the statute’s ambit in section 4, and the rule of lenity. If such a judge wanted to disallow the importation, he could emphasize the broader secondary dictionary definitions (in 1885) of “labor” and “service,” section 1’s broad exclusion of labor or service “of any kind,” section 5’s specific exemptions, and the *inclusio unius* canon. The willful judge can “look over the heads of the crowd and pick out his friends” (p. 36). Even “honest textualists” will disagree. I consider Scalia an honest textualist, and he thinks the text supported the prosecution; Scalia would probably return the favor and accept me as an equally honest textualist — I am not just trying to make trouble for him — yet I think the textual arguments cut against the prosecution, on the whole.

I have been less persuaded of the determinacy of the textualist methodology than Scalia has, and *Holy Trinity Church* is simply the most recent illustration of our disagreement on this score.⁹³ I have argued that legislative history in some cases could usefully narrow or correct the judge’s options: ambiguities in text can sometimes be resolved, and resolved correctly, by consulting the legislative history. Immediately after I made that argument, the British House of Lords changed its mind about the meaning of a tax statute after the taxpayer, in petitioning for rehearing, presented the Lordships with the legislative history of a provision the Lords thought had a plain meaning supportive of the government. In *Pepper v. Hart*,⁹⁴ the

92. Pp. 92-93. Tribe makes no analytical argument for the proposition that the term “lecturer” might have been thought, in 1885, to include ministers. That is not the first, or second, or third, meaning that leaps to mind even today. Moreover, in 1885 or 1892, there was no free exercise precedent suggesting that a general exclusionary rule incidentally affecting the free exercise with religion had any constitutional problem. See *Reynolds v. United States*, 98 U.S. 145 (1878) (rejecting a similar free exercise claim by Mormons); see also *Employment Division v. Smith*, 494 U.S. 872 (1990).

93. See Eskridge, *supra* note *, at 675-76; see also ESKRIDGE, *supra* note 17, chs. 1 & 7; William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994).

94. 3 W.L.R. 1032 (H.L. 1992). For American examples, see, for example, *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Midlantic Natl. Bank v. New Jersey Dept. of Env’tl. Protection*, 474 U.S. 494 (1986).

House of Lords not only found the legislative history dramatically persuasive, but in the same case announced that they were abandoning the long-held English equivalent of the new textualism, a rule excluding consideration of legislative debates from statutory interpretation by judges. Is *Holy Trinity Church* such a case where legislative history narrows options and contributes to the right answer?

Brewer's opinion for the Court relied on the Senate committee report statement that it considered "labor or service" to include only "*manual* labor or service." The committee regretted that it had not included such terminology in the bill and could not offer a floor amendment to add the term "manual," but the Congress was ready to adjourn and time did not permit either redrafting or amendment.⁹⁵ Brewer concluded from this evidence, and from more general statements in the House report and a lower court opinion to the same effect, that the statute was only aimed at preventing "cheap unskilled labor" from entering the country, not "brain toilers," and certainly not "Christian ministers."⁹⁶

This evidence would seem to resolve the textual ambiguities in the way I was already leaning, toward lenity: the statute does not clearly enough cover the pastor. My Georgetown colleague Adrian Vermeule, however, has done a thorough legislative archaeology of the 1885 statute that supersedes Brewer's superficial treatment.⁹⁷ As Vermeule points out, the alien contract labor bill was not enacted in 1884, as the Senate committee had hoped, and was brought up in the 1885 session of the 48th Congress, just before the Cleveland administration took office. A lengthy debate was had on the bill in Congress, especially in the Senate, and the bill was amended in various minor ways. Among the amendments were those expanding the exempted classes, but no amendment was even proposed to make clear that "labor" referred only to "manual labor." Indeed, when pressed by an opponent of the bill, who argued that section 5 discriminated against "other classes of professional men" by granting exemptions to singers and lecturers and actors, but not to others similarly useful for the public, Senator Blair, the floor manager, seemed to concede that section 1 applied to brain toilers as well as manual ones.

Mr. MORGAN: . . . [I]f [the alien] happens to be a lawyer, an artist, a painter, an engraver, a sculptor, a great author, or what not, and he comes under employment to write for a newspaper, or to write books,

95. See *Church of the Holy Trinity v. United States*, 143 U.S. 457, 464-65 (1892) (quoting SENATE COMM. ON EDUCATION, 48TH CONG., 1ST SESS., REPORT, reprinted in 15 CONG. REC. 6059 (1884)).

96. *Holy Trinity*, 143 U.S. at 464-65.

97. See Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. (forthcoming 1998).

or to paint pictures . . . he comes under the general provisions of the bill.

Mr. BLAIR: The Senator will observe that it is only the importation of such people under contract to labor that is prohibited.

Mr. MORGAN: . . . I understand.

Mr. BLAIR: *If that class of people are liable to become the subject-matter of such importation, then the bill applies to them. Perhaps the bill ought to be further amended.*

MR. MORGAN: . . . I shall propose when we get to it to put an amendment in there. I want to associate with the lecturers and singers and actors, painters, sculptors [etc.], or any person having special skill in any business, art, trade or profession.⁹⁸

The House floor manager, Representative Hopkins, generally opined, in response to an inquiry about agricultural laborers, that the bill “prohibits the importation under contract of all classes with the exceptions named in the bill.”⁹⁹ Vermeule believes that these exchanges establish that the legislative deal was to apply the statute to brain as well as manual toilers.

If that were so, *Holy Trinity Church* would be like *Pepper v. Hart*, another example of the hypothesis that legislative history will sometimes clearly and helpfully resolve textual ambiguity.¹⁰⁰ But it is not so clear in *Holy Trinity Church*. Even if the justices had looked at the full panoply of legislative history usefully retrieved by Vermeule, I doubt that they would have accepted Vermeule’s reading in 1892. It is important, at the outset, to remember that legislative history can be useful for three different interpretive purposes: (1) specific intent of the legislature, which is most relevant to *intentionalist* theories; (2) general intent or goals of the statute, relevant to *legal process* theories; and (3) meta-intent, or background understandings about language and terminology (relevant to *textualists*) as well as values and norms (relevant to *normativists*).

Start, as Vermeule does, with specific intent. The Morgan-Blair exchange is the closest statement on point, but it is not quite the smoking gun Vermeule makes it out to be. Morgan was baiting Blair, who was vague in his response. Blair’s whine that maybe the bill should be amended to limit its ambit to manual toil was

98. 16 CONG. REC. 1633 (1885) (exchange between Sens. Morgan and Blair) (emphasis added).

99. 16 CONG. REC. 2032 (1885).

100. Vermeule, *supra* note 97, suggests that *Holy Trinity Church* might be evidence that courts are not institutionally competent to handle legislative materials but properly concedes that his suggestion is undercut by the novelty of the Court’s approach as of 1892. Because legislative history had never been so dispositive before 1892, see ESKRIDGE, *supra* note 17, at 208-09, the parties briefed it most unhelpfully (the church giving a misleading fragment of the history, the government ignoring it altogether), and the Court was not inclined to do extra research. Perusal of the Court’s deployment of legislative history in the last generation suggests to me that judges are more thorough, sophisticated, and critical in their use of such materials than Brewer was.

matched by Morgan's counter-whine that he would offer an amendment to include all other professionals. Neither senator offered such an amendment,¹⁰¹ and no one else in the lengthy Senate debate mentioned the issue. More importantly, neither Morgan nor any prominent senator thought it conceivable that the bill would exclude ministers.¹⁰² At least one prominent supporter of the bill, Senator John Sherman, opined that section 1, as written, was aimed at "men who come here under special contracts, mostly in large numbers, to work at largely reduced pay for the benefit of corporations."¹⁰³ It would appear reasonable to think that Sherman, a major supporter of the bill, and not Morgan, the most garrulous opponent of the bill, accurately characterized the import of the bill's ambit. When the federal court in the Southern District of New York construed the act, Scalia-like, to apply to the Holy Trinity Church, Congress immediately amended the law to exempt ministers and professionals generally. The legislative history of the 1891 amendment establishes that it was specifically a response to the lower court opinion in *Holy Trinity Church*.¹⁰⁴ Reversing the lower court in *Holy Trinity Church*, the Supreme Court did not mention the 1891 statute, which by its terms did not apply to "pending proceedings,"¹⁰⁵ but the Court later opined that the 1891 amendment was a clarification rather than a change.¹⁰⁶

The legislative history is also relevant in what it shows about the purpose of the statute, how the sections of the statute fit together, and how language was used by the senators. All the supporters of the bill who spoke during the floor debates saw its purpose to be

101. Contrary to his attack on the bill, Morgan offered an amendment to add "artisans" — not professionals or writers — to the list of those exempted. The amendment was rejected. See 16 CONG. REC. 1837 (1885).

102. Morgan specifically considered exempt those "[p]eople who can instruct us in morals and religion and in every species of elevation by lectures." 16 CONG. REC. 1633 (1885). That statement refers to section 5's exemption of "lecturers," which does not necessarily cover all or any ministers. It is significant, however, that the troublemaking Morgan neglected to torture Blair on that point. Morgan's objection that some classes of artists were exempt, while others were not, could have been much strengthened by the further point that a religious "lecturer" was exempt from the prohibitions, but a minister was not. It seems possible that even Morgan was assuming that ministers were not covered.

103. 16 CONG. REC. 1635 (1885) (statement of Sen. Sherman). Another supporter felt the bill was too broadly drafted, but only because it might thwart foreign firms seeking to relocate in the United States and bring some "laborers" with them. 16 CONG. REC. 1635 (1885) (statement of Sen. McPherson).

104. See 21 CONG. REC. 9439 (1890) (statement of Rep. Buchanan) (specifically advertent to the lower court decision); 21 CONG. REC. 10,466-67 (1890) (discussing the need to exempt ministers).

105. See Act of Mar. 3, 1891, ch. 551, § 12, 26 Stat. 1084, 1086.

106. See *United States v. Laws*, 163 U.S. 258, 265 (1896) (exempting a chemist from the unamended 1885 statute based on *Holy Trinity Church* but invoking the 1891 amendment as support); see also 16 CONG. REC. 1635 (1885) (statement of Sen. Sherman) (arguing the bill may be badly drafted, like the Chinese exclusion statutes, which were clarified by subsequent amendments).

preventing the importation of “laborers” who would undermine the wage position of American wage earners,¹⁰⁷ the precise purpose articulated in the committee reports and in the Supreme Court opinion. The supporters saw the bill as of the same kind as, and in part copied from, the Chinese exclusion statutes,¹⁰⁸ which courts, as noted above, interpreted to exempt actors and the like (that case law probably inspired some of the exemptions listed in section 5). All the senators who spoke on the issue, particularly the sponsor, Senator Blair, saw sections 1 and 4 to be regulating precisely the same classes of immigrants.¹⁰⁹ The sponsor and other senators used the term “labor” to refer only to manual work and “laborers” to refer only to manual workers,¹¹⁰ consistent with the courts’ analysis of the Chinese exclusion statutes and treaties. No one in the extensive debates referred to “service” independently of “labor,” suggesting the focus was on the latter term. On the other hand, the sponsors also realized that “manual labor” would have been a better term to assure the statute would have been limited to the evil it was designed to suppress.¹¹¹ In this respect, it is significant that supporters and opponents alike complained that the bill was badly, indeed loosely, drafted and lamented that Congress did not have time to rewrite it completely.¹¹²

107. *See, e.g.*, 16 CONG. REC. 1781-82 (1885) (Sen. Platt); 16 CONG. REC. 1780 (1885) (Sen. Vest); 16 CONG. REC. 1778 (1885) (Sen. Miller); 16 CONG. REC. 1634 (1885) (Sen. Sherman); 16 CONG. REC. 1626 (1885) (Sen. Blair).

108. *See* 16 CONG. REC. 1630 (1885) (statement of Sen. Blair) (noting that section 4 of the bill was copied from a similar provision in the 1882 Chinese exclusion law); 16 CONG. REC. (1885) (statement of Sen. Blair) (noting that the goal of the bill was to “prevent substantially the cooly practices” to which both Europe and China contributed). Senator Morgan objected to the “cooly” parallel and explained the Chinese exclusion laws as seeking to protect against bringing “any more of the inferior Asiatic or African races into this land” and not just to protect American laborers. *See* 16 CONG. REC. 1631 (1885). Senator Sherman responded to Morgan and supported the class basis, rather than the race basis, for the Chinese legislation. *See* 16 CONG. REC. 1634 (1885); *see also* 16 CONG. REC. 1780 (1885) (statement of Sen. Vest).

109. Senator Blair, the floor manager, said that section 4:

is aimed . . . against the man who knowingly brings an immigrant from foreign shores to our own, who comes here under and by virtue of a contract such as is prohibited by the bill. It seems to me that if we are to legislate on the subject at all it is folly not to reach this man who is the chief agent in the actual perpetration of the crime.

16 CONG. REC. 1630 (1885); *see also* 16 CONG. REC. 1785 (1885) (statement of Sen. Blair); 16 CONG. REC. 1779 (1885) (statement of Sen. Miller); 16 CONG. REC. 1629 (1885) (statement of Sen. McPherson); 16 CONG. REC. 1626 (1885) (statement of Sen. Blair).

110. *See* 16 CONG. REC. 1628 (1885) (statement of Sen. Blair) (explaining a proviso in section 5 that made an allowance for employers to import “skilled workmen in foreign countries to perform labor in the United States” for infant industries); *see also* 16 CONG. REC. 1787 (1885) (statement of Sen. Harrison); 16 CONG. REC. 1785 (1885) (statement of Sen. Call); 16 CONG. REC. 1784 (1885) (statement of Sen. Sherman); 16 CONG. REC. 1783 (1885) (statement of Sen. Dawes); 16 CONG. REC. 1781-82 (1885) (statement of Sen. Platt); 16 CONG. REC. 1779 (1885) (statement of Sen. Miller).

111. 15 CONG. REC. 6059 (1884) (Sen. Blair).

112. *See, e.g.*, 15 CONG. REC. 5354 (1884) (Rep. Kelley); 16 CONG. REC. 1622-23 (1885) (Sen. Hawley); 16 CONG. REC. 1625 (1885) (Sen. Ingalls); 16 CONG. REC. 1635 (1885) (Sen.

On the whole, this latter evidence reinforces my impression that the plain meaning of the statute is ambiguous enough to trigger the rule of lenity in the Case of the Imported Pastor and, further, leaves me open to the possibility in future cases that the statute might be limited, in the way section 4 is limited, to laborers, artisans, and mechanics — manual workers. But I do not find the legislative history one-sided, for I am strongly impressed by the arguments suggested by Vermeule: the Senate sponsor assured the Senate that section 1's prohibition swept beyond the evil addressed by the bill, the sponsors never proposed an amendment that could have clearly narrowed the statute to "manual labor" and "manual service," and everyone considered section 5 to be the repository of exhaustively considered and debated exemptions (greatly strengthening the otherwise dubious *inclusio unius* argument against Brewer's result). Like the arguments from statutory text, the arguments from legislative history provide ammunition for both sides in *Holy Trinity Church*, although my own reading does not refute my impression that the statute is not clearly enough applicable to a minister to escape the rule of lenity.

Holy Trinity Church, therefore, is a case where legislative history does little work, beyond buttressing already-formed impressions. Neither Scalia nor I — nor Brewer nor Vermeule, by the way — would change our text-based votes after examining the legislative history. Although I think as a formal matter of textual construction that Scalia gets it wrong in *Holy Trinity Church*, he would not get it right if I required him to read the legislative history — and he could say the same about me. Thus, although the formalist and institutional arguments for excluding legislative history remain unproven or unfounded, the economic argument is not only plausible, but receives some support from my analysis of *Holy Trinity Church*. Even with the aid of hours of legislative history reading which refutes much of Brewer's opinion in the case, I am left where I was before, as would be the large majority of other interpreters.¹¹³

Sherman); 16 CONG. REC. 1780 (1885) (Sen. Vest). Senator Blair admitted that the bill was drafted outside Congress "by the men whose interests it undertakes to guard and conserve." 16 CONG. REC. 1622 (1885). Senator Platt complained that these drafters were insufficiently "familiar with legal phraseology" and therefore drafted a bill which was "crude" and "not properly drawn to effectuate the purposes of those who believe in the principle of the bill." 16 CONG. REC. 1781 (1885). Some supporters of the bill opined that any imperfections could be corrected by subsequent amendment. 16 CONG. REC. 1635 (1885) (Sen. Sherman).

113. I offer this thought experiment from my 1997 fall term Legislation class at Georgetown. I asked all the students to bring with them to the *Holy Trinity Church* class a statement of their vote and reasons for it. Two-thirds of those enrolled in the class complied (I made the mistake of not making the exercise compulsory); by a margin of 38 to 33 the students followed the statutory plain meaning and dissented from the Court's opinion. I divided the students into two groups and gave each group separate handouts detailing additional textual evidence (dictionary definitions and section 4) and legislative history (Vermeule's smoking guns, plus general statements of purpose and use of the term "labor").

The only potential value — but a big one! — of a rule excluding resort to legislative history is that it might save a lot of wasted effort — expensive research and analysis that have no payoff.

Pause for a moment to review the cost-benefit calculus for Scalia's rule excluding legislative history. The benefits of an exclusionary rule would be:

1. the net savings in research costs by attorneys, law clerks, and others analyzing statutory issues;¹¹⁴
2. the rule of law and democracy benefit, *if* excluding legislative history reduces judicial discretion or uncertainty in statutory cases;
3. the rule of law and democracy benefit, *if* excluding legislative history encourages the legislative process to write statutes that more transparently reveal the deals and rules agreed upon.

My judgment is that benefit (1) involves a very large number of dollars, while benefits (2) and (3) are virtually nil.

Offset against the benefits of an exclusionary rule, of course, must be the costs of such a rule:

1. if the exclusionary rule were applied to existing statutes,¹¹⁵ the rule of law, democracy, and reliance costs of negating deals made clear in the legislative history but not in the statutory text;
2. new errors, if any, that would be introduced by excluding legislative history, including greater need for the legislative process to sacrifice parts of its limited agenda to monitor and respond to textualist decisions;
3. increased willingness of judges to overrule agency interpretations of statutes because the agency is influenced by legislative expectations that judges think contrary to statutory text.¹¹⁶

The handouts were given in reverse order for the two groups — the legislative history one first for one group, the text one first for the other group — but the order of presentation, surprisingly, did not affect the results: 15 of the 38 students dissenting in *Holy Trinity Church* (40% of the dissenters) changed their votes after consulting the textual evidence. Four students changed their votes after consulting the new legislative history evidence, but in cross-cutting directions — two dissenters defected to the Brewer camp, and two of Brewer's disciples defected to dissent. After reviewing all the evidence, the students voted 23 to 46 for the Brewer result, but with increased disdain for the sloppy process by which Brewer reached it.

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

115. I think retroactive application of an exclusionary rule in this way would be unconscionable as a dirty bait and switch on poor Congress. Eskridge, *New Textualism*, *supra* note *. The new textualists and their academic allies all seem to support it, but I have never seen a good reason for their position.

116. Merrill, *supra* note 14. See Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231 (1996); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995); Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 550-55 (1997) (reviewing ANTONIN SCALIA ET AL., *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)).

My judgment is that cost (1) is substantial, while costs (2) and (3) are possibly substantial but, for me, too speculative for even educated guesses. Overall, the cost-benefit calculus is indeterminate, which means that Scalia's approach requires further study.

IV. THE PROBLEM OF LOOSE CANONS

Important to my resolution of the Case of the Imported Pastor is the rule of lenity. Unlike Scalia, I find the text of the alien contract labor law replete with ambiguities. The rule of lenity demands that penal statutes, such as this one (the Church was assessed a \$1000 fine but was not imprisoned), be construed in favor of the accused when its application is ambiguous. The Tanner Lectures grudgingly accept the validity of the rule of lenity, but only by reason of "sheer antiquity" (p. 29). As for the other canons of statutory construction, Scalia offers himself as a skeptic. "To the honest textualist, all of these preferential rules and presumptions are a lot of trouble" and, indeed, "increase the unpredictability, if not arbitrariness of judicial decisions" (p. 28).

Scalia's position reveals deep problems for his philosophy of interpretation. First, as noted above, a formalist theory has got to have *rules about rules*. It is not enough to say, follow the ordinary meaning of plain texts, without providing secondary rules about how to determine such meaning.¹¹⁷ The canons are *rules about rules*. A textualist, therefore, is likely to follow and endorse textual-meaning canons, which Scalia surely does. His criticism must be limited to the substantive canons such as the rule of lenity, which he nonetheless accepts for "antiquity" reasons. This concession is potentially expansive, because the "dice-loading rules" (p. 28) Scalia criticizes are for the most part entrenched in judicial practice and precedent — even more so than the hated use of legislative history. Not only would it be hard for a new textualist to dislodge these rules from their "canonical" place in American law, but the textualist who refuses to consider legislative history will be sorely tempted to rely on those rules to provide necessary context and analysis for deciding issues of interpretation. This latter idea is suggested by the pre-*Pepper v. Hart* practice in the United Kingdom and by the practice in states not having much usable legislative history. But the problem is that the substantive, dice-loading canons risk the normative appeal of the new textualism: they are, as Scalia says, potentially undemocratic because they are judge-made presumptions and rules that Congress has a hard time trumping; potentially lawless because they afford the willful judge a variety of

117. That is, *unless* one simply retreats to an intuitionist "I know it when I see it" approach to plain meaning. That is a possible stance, but I would think not appealing to a formalist who relies on objectivity and neutrality.

sources for massaging different meanings out of the same text; and potentially destabilizing if judges succumb to the temptation of creating new canons or adjusting old ones to their changing tastes.¹¹⁸

Scalia's Tanner Lectures ask: "Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say?" His answer: "I doubt it" (p. 29). "What they *fairly* say" is loaded with convention. Indeed, the most productive use of legislative history is to help judges figure out what conventions Congress was assuming or invoking (see my discussion of the history in *Holy Trinity Church*). The longstanding substantive canons can be viewed as conventions underlying congressional deliberations. Indeed, between 1987 and 1994, the Rehnquist Court had reason to apply no fewer than seventy-nine different substantive presumptions, clear statement rules, and super-strong clear statement rules in literally hundreds of statutory cases.¹¹⁹ This would seem defensible, except that in many of the cases the Court was subtly playing with or altering the conventions — creating new presumptions, elevating old presumptions to the status of clear statement rules, and reconfiguring old clear statement rules as super-strong clear statement rules, requiring *manifest* clarity from Congress.¹²⁰ Scalia joined or wrote the Court's opinion in almost all of the cases where the Court invoked or revised these substantive canons. Most surprising is that he wrote the opinion for the Court in one of the most aggressive and dynamic deployments of a substantive canon in recent memory.

The issue in *BFP v. Resolution Trust Corporation*¹²¹ was under what circumstances the proceeds of a foreclosure sale of mortgaged real estate satisfy the Bankruptcy Code's rule nullifying property transfers by insolvent debtors within a year of bankruptcy, unless they are in exchange for "a reasonably equivalent value."¹²² Based on the statutory requirement of *reasonably equivalent value*, federal appeals courts refused to credit foreclosure transfers without a showing of at least rough market equivalence; disagreeing with its sibling circuits, the Ninth Circuit agreed that such was the plain meaning of the statute but invoked policy reasons to hold the reasonably equivalent value requirement satisfied by whatever price

118. See Eskridge, *supra* note *, at 683-84.

119. The cases are collected in Eskridge & Frickey, *supra* note 93, at 101-08.

120. For examples of reconfigured substantive canons, see, e.g., *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991); *Dellmuth v. Muth*, 491 U.S. 223 (1991); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); see also ESKRIDGE, *supra* note 17, at 275-97; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

121. 511 U.S. 531 (1994).

122. 11 U.S.C. § 548(a)(2) (1988).

the property fetched in a foreclosure sale.¹²³ A closely divided Supreme Court, in a majority opinion by Justice Scalia, affirmed the nontextualist Ninth Circuit and rejected the various equivalence rules created by the textualist circuits. The Court held that, so long as the relevant state procedures were followed, whatever price the sale generated — even \$1 — satisfied the Bankruptcy Code. *BFP* is a surprising decision for a textualist, as Justice Souter's dissenting opinion charged.¹²⁴ Scalia stoically asserted that "reasonable equivalent value" is ambiguous language.¹²⁵ It is ambiguous in some respects, but it unambiguously forecloses a "whatever you got" approach, as the Ninth Circuit opinion cheerfully conceded. For the lower court, the plain meaning needed to be compromised, because it would inject *substantial* uncertainty into the foreclosure sale bidding process and would undermine the smooth functioning of local real estate markets. The lower court also invoked the spirit of federalism, respecting state power in areas of traditional allocative regulation.¹²⁶ Holy Trinity Church, Batman!

Although affirming, Scalia did not defend his choice as an open policy decision, as the Ninth Circuit did. Rather, he read the text in light of the super-strong rule against interpreting federal statutes to invade state governmental decisionmaking that the Court had just created in *Gregory v. Ashcroft*.¹²⁷ Scalia's opinion reasoned that

123. See *In re BFP*, 974 F.2d 1144, 1148 (9th Cir. 1992). The lower court decisions to the contrary are listed in *BFP*, 511 U.S. at 536.

124. See *BFP*, 511 U.S. at 552-57 (Souter, J., dissenting). Compare *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 724 (1994) (Thomas, J., joined by Scalia, J., dissenting) (apparent plain meaning of statute trumped by "larger statutory framework" and statute's balance of federal-state interests) with 511 U.S. at 723 (Stevens, J., concurring) (asserting that the plain meaning of the statute makes this an easy case and that there is no textualist basis for dissenting, as Scalia does).

125. See *BFP*, 511 U.S. at 546-47.

126. See *BFP*, 974 F.2d at 1148-49. I have endorsed this and other values as sound bases for a constitutional policy of federalism. See Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447 (1995).

127. 501 U.S. 452 (1991). The majority opinion in *Gregory*, joined by Justice Scalia, created a new super-strong clear statement rule to interpret the age discrimination law to exempt state appointed judges. The concurring opinion by Justice White showed that the same result flowed from ordinary textualist precepts. The Tanner Lectures are overall more consistent with the White approach.

In the Tanner Lectures, Scalia adds an odd caveat for congressional elimination of state sovereign immunity, and by analogy, for congressional regulation of the states *qua* states: because such legislation is "an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied — so something like a 'clear statement' rule is merely normal interpretation." P. 29. Aside from the fact that such legislation is no longer extraordinary — see the many labor, civil rights, and Indian tribe statutes — an unusual act does not require a clearer statement than a usual act, unless there is also a normative reason to require a more focused, specific statement. For example, it is highly unusual for Congress to enact legislation that helps gay people. Should that be sufficient reason to require a super-clear statement before a statute can be interpreted for the benefit of gay people? See also *Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting) (sharply criticizing statu-

the statute is not sufficiently “clear and manifest” in order to “displace traditional State regulation” of foreclosure sales.¹²⁸ But the whole point of a federal bankruptcy law is to replace normal rules of state contract and property law with the fresh-start and fairness provisions of the Bankruptcy Code.¹²⁹ The fresh-start provisions supplant state law by nullifying outstanding debts and liens. The fairness provisions supplant state law by nullifying transactions taken by the debtor to cheat some creditors out of their fair share. Congress has authority to pass such legislation pursuant to the bankruptcy power of Article I, Section 8, Clause 4, and the Supremacy Clause of Article VI requires the states to enforce such statutes in place of their own. Not only was it clear that Congress intended to displace state law, but *Gregory* was not even formally applicable. Scalia was relying on an expanded version of the prior case: *Gregory* involved federal regulation of state governments themselves; Scalia expanded it to create, for the one case, a rule requiring a super-strong clear statement before the Court would construe the Bankruptcy Code to preempt state property law.¹³⁰ The result in *BFP* came as a surprise to most: all the appellate courts except the Ninth Circuit thought it precluded by the statutory text, Congress had specifically considered and rejected the result, and most of the bankruptcy bar felt a contrary result mandated by the rule of law, even if not by good policy. Scalia’s canonical reasoning in *BFP* came as a surprise to everybody: neither the Ninth Circuit (the court being affirmed) nor the respondent (the winning party) had even cited *Gregory*.

BFP is a dramatic illustration of Scalia’s warning that, “[t]o the honest textualist, all of these preferential rules and presumptions are a lot of trouble” (p. 28). But it also illustrates how a textualism refusing to consider the legislative context of statutes is going to be tempted not only to rely on substantive canons, but also to develop them, common law style. If that happens, as new canons are created or strengthened and old ones narrowed as Supreme Court

tory interpretation inference from Congress’s failure to signal departure from longstanding policy). But Scalia refuses to present normative dimensions to his rules or his practice. Part VI of this review argues that Scalia does not escape normativity, and this canon and the dozens like it that Scalia endorses and vigorously applies are normative presumptions that are not neutral.

128. See *BFP*, 511 U.S. at 544, 544-45 n.8 (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) and discussing *Gregory*).

129. *BFP*, 511 U.S. at 565-69 (Souter, J., dissenting).

130. Scalia had rejected such an aggressive canon for determining statutory preemption in a case involving federal regulation of smoking. See *Cippollone v. Liggett Group, Inc.*, 505 U.S. 504, 544-48 (1992) (Scalia, J., concurring in part and dissenting in part) (arguing against a narrow construction of express federal statutory provisions preempting state police power regulations). *Cippollone*, by the way, recognizes a presumption against federal preemption of state law, but a presumption that can be more easily rebutted than the super-strong clear statement rule of *Gregory*.

composition changes, the honest textualist becomes just as unpredictable as, and may even come to resemble, her doppelganger the willful judge.

The phenomenon of shopping the canons — picking out the friendly ones and ignoring or explaining away the rest — afflicts not only *BFP* and other deployments of the substantive canons, but also deployment of text-based canons as well. Consider the debate in *MCI Telecommunications Corp. v. AT&T*.¹³¹ Section 203(a) of the Communications Act of 1934¹³² requires communications common carriers to file schedules of charges and conditions of service with the FCC; section 203(b)(2) permits the FCC to “modify any requirement made by or under the authority of this section.”¹³³ Responding to the perceived need for more competition in the long distance telephone market, the FCC between 1980 and 1992 issued a series of orders which ultimately allowed nondominant — that is, not-AT&T — companies to avoid the expensive process of filing and amending tariff schedules. The Supreme Court, in an opinion by Justice Scalia, held that the FCC’s policy violates the plain meaning of section 203(b)(2). The FCC argued that its authority to modify *any requirement* of section 203 allows it in appropriate circumstances to exempt companies from the filing requirements. Scalia’s opinion held that the authority to *modify* means only “to change moderately or in minor fashion,” a standard dictionary definition of “modify.”¹³⁴ Because the FCC’s orders worked a “fundamental” rather than “minor” change in section 203’s requirements, it was not a permissible modification. This would seem like a predictable, lawful, objective interpretation — until you read Justice Stevens’s dissenting opinion, which invoked the same linguistic canons to show that “modify” can have a broader meaning.

As Scalia conceded, *Webster’s Third*, the most frequently cited dictionary by the Court, defines “modify” as including “to make a basic or important change in.” That would seem to support the agency’s view, which is supposed to prevail when a regulatory statute is susceptible of two plausible readings, but Scalia dismissed that use as colloquial and idiosyncratic to that dictionary.¹³⁵ Scalia

131. 512 U.S. 218 (1994).

132. 47 U.S.C. § 203(a) (1988).

133. 47 U.S.C. § 203(b)(2) (1988).

134. *MCI*, 512 U.S. at 225.

135. See *MCI*, 512 U.S. at 225-26, 226 n.2, 228 n.3 (explaining the Court’s rejection of the definition in WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY and related Webster’s products). Justice Scalia belittled *Webster’s Third* for its colloquial usages, but the Court itself relies on that dictionary more than any other, see *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 255 (1994) (handed down three days after *MCI*); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1439 n.12 (1994) [hereinafter Note, *Looking It Up*], including decisions written by Justice Scalia, see *Reves v. Ernst & Young*, 507 U.S. 170, 177, 179 (1993); *Wisconsin Dept. of Revenue v. Wrigley*, 507 U.S. 214, 223, 226

was wrong, though. Other dictionaries, including the distinguished *Oxford English Dictionary*, define “modify” in a way that allows exemption of whole categories from a regulatory regime.¹³⁶ Most on point, the 1933 edition of *Black’s Law Dictionary*, published the year before the Communications Act was passed, defined the term as “an alteration which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact.”¹³⁷ As Stevens argued, if section 203 is viewed “as part of a statute whose aim is to constrain monopoly power, the Commission’s decision to exempt nondominant carriers is a rational and ‘measured’ adjustment to novel circumstances.”¹³⁸

It is hard to explain *MCI* as simply an exercise in predictable text application. Instead, it exemplifies the Court’s increasing dictionary shopping and suggests the hypothesis that the linguistic or text-based canons are just as manipulable as the substantive canons.¹³⁹ Like legislative history, the canons and the dictionaries are a “broad playing field,” 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” (p. 36).

* * *

Problems 1 and 2 pose logical dilemmas for Scalia’s particular brand of textualism. Problems 3 and 4 question whether Scalia’s methodology can deliver the greater objectivity, predictability, and determinacy he promises in the Tanner Lectures. A final set of problems relate to the role and capacity of judges. The Tanner Lectures are critical of the common law judge as an anachronism in the modern administrative state. This is a striking and important critique. From Roscoe Pound to Learned Hand to Henry Hart and Albert Sacks to Antonin Scalia, scholars and judges of this century have been asking this question. Now that legislation has displaced

(1992); *California v. Hodari*, 499 U.S. 621, 624 (1991). Moreover, the Court traditionally has followed a word’s “ordinary” meaning rather than its “technical” meaning. See *Liteky v. United States*, 510 U.S. 540, 552 (1994) (Scalia, J.) (insisting upon colloquial meaning of “bias or prejudice,” thereby importing an unstated “invidiousness” requirement into the statute at issue).

136. See 9 OXFORD ENGLISH DICTIONARY 952 (2d ed. 1989) (providing this illustration from 1610: “For so Mariana modifies his Doctrine, that the Prince should not execute any Clergy man, though hee deser[v]e it.”).

137. BLACK’S LAW DICTIONARY 1198 (3d ed. 1933). The Court has been hopelessly inconsistent in its usage of particular dictionaries and has not paid attention to whether the dates of the enactment of the statute and of the publication of the dictionary it uses to construe the statute correspond. See Note, *Looking It Up*, *supra* note 135, at 1447-48 (suggesting that the Court has engaged in dictionary shopping — that is, finding dictionaries to support results being driven by other factors).

138. *MCI*, 512 U.S. at 241 (Stevens, J., dissenting).

139. See Lawrence Solan, *When Judges Use the Dictionary*, 68 AM. SPEECH 50 (1993); Note, *Looking It Up*, *supra* note 135 (providing an excellent critique of the Court’s increasing reliance on dictionaries).

the common law as our main source of authority, is the common law method of incremental case-by-case judgment, working by analogy from authorities and precedents to unanticipated facts — is that method obsolete? Scalia thinks that it is and that the new textualism embodies a better institutional role for the Court. I am more dubious on both scores, for reasons explored in the following problems.

V. THE PROBLEM OF THE JUDICIARY'S INSTITUTIONAL ROLE IN A DEMOCRACY

One criticism of Scalia's approach to statutory interpretation in *BFP*, as well as in *Holy Trinity Church*, is that it disrupts congressionally approved practice. Congress considered the federalism concerns articulated by Scalia and the Ninth Circuit when it amended the Bankruptcy Code in 1984, but was unmoved by the federalism arguments that moved the Court: Congress rejected an amendment which would have guaranteed the integrity of state foreclosure sales.¹⁴⁰ In contrast, the Court in *Holy Trinity Church* interpreted the immigration law precisely as Congress rewrote it in 1891. Because the 1891 amendment was not retroactive,¹⁴¹ Scalia would have considered it irrelevant, but his result would have created an incoherent treatment of imported ministers, with no support from Congress or the political process.

I have criticized Scalia's application of plain meaning above, but assume that he is right about plain meaning in both *BFP* and *Holy Trinity Church* but that I am right about the political equilibrium in both cases. In that event, the new textualism opens up a tension between the rule of law and democracy that softer versions of textualism — follow the text but check it against the legislative history — avoid. Majority-based choices in that event would more often be trumped by dictionary-toting,¹⁴² grammar-minded judges holding Congress to the letter of what it writes. If so, the new textualist is less responsive to democratic desires than the faithful agent, the statutory interpreter who tries to figure out what the principal would have her do under the circumstances.¹⁴³ The faithful agent is

140. See *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 550 n.1, 554 n.6, 555-56, 567-70 (1994) (Souter, J., dissenting).

141. The amendment was by its terms not retroactive. Note, however, that Scalia requires a super-strong clear statement of retroactivity, another example of the substantive canons which he insists on making more rather than less aggressive. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994) (Scalia, J., concurring in the judgment).

142. But tote not *Webster's Third!* See *MCI*, 512 U.S. 218.

143. The faithful agent is developed in William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 322-30 (1989). See also RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 269-73 (1990); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989); Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165 (1993).

a more cooperative partner in the enterprise of statutory interpretation and better reflects the Court's role as a partner with Congress in the process of statutory law elaboration.

Consider this homely example: Scalia, a hotel manager, tells me, his employee, to "gather all the ashtrays in the public areas of the hotel and put them in my office by 2:00 p.m. *today*," while he is dining. I diligently collect the ashtrays until I come to an elevator bank, where a metal ashtray is bolted onto the wall. Should I rip it off? A pragmatic agent would leave it on the wall, construing "all ashtrays" to exclude those whose removal would be unduly costly, a judgment call. It is not clear what the new textualist would do. When I have posed this hypothetical in Legislation classes, some Scalians rip the ashtrays off the wall, and others do not because they consider the textual command "absurd" in those circumstances. The former are honest textualists, but crummy agents. I don't know how Scalia would answer the ashtrays example, but upholding the prosecution in *Holy Trinity Church* in 1892 approaches that level of unreasonableness, assuming the accuracy of Brewer's description of Congress' values, goals, and beliefs. Why shouldn't interpreters be willing to accommodate plain meaning to fit the purpose of the enterprise, other goals pursued by the principal, and common values? Scalia makes three different kinds of arguments against such an approach.

First, Scalia argues that pragmatic approaches are too open-ended, providing increased opportunities for the judge to read her own preferences into directives and undermining the predictability and determinacy of law. The "discretion of judges" argument is a red herring. All interpretive methodologies, including textual ones, present the willful judge with discretionary choices, as discussed above. More importantly, it is less productive to focus on the willful judge and more productive to focus on the cooperative judge, as the prototype: not only are most judges cooperative rather than willful, but the assumption of cooperativeness is more consistent with the philosophy underlying Article III and may itself contribute to a judicial culture where willfulness is stigmatized. Most importantly, judges like other state officials are concretely constrained by *practice* — the feedback they get from Congress, lower courts, agencies, and the citizenry.

Second, Scalia maintains that a strict textual approach is ultimately democracy-enhancing. "What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of language it adopts."¹⁴⁴ Thus, even when the Court interprets a statute contrary to congressional expectations in a particular case, this may not be

144. *Finley v. United States*, 490 U.S. 545, 556 (1989).

countermajoritarian in the longer run if Congress learns a valuable rule which can guide its future statutory drafting efforts. Ultimately, the new textualism might be not only democratic, but also might induce Congress to change its way of writing statutes so that the democratic process actually works better. Specifically, by discouraging lawmaking through plants in the legislative history, Scalia might encourage the legislative process to be more transparent about what deals are struck and what trade-offs are made to obtain statutory enactments.¹⁴⁵

Would the new textualism, if adopted, be the sort of tough love that would impel Congress to write clearer statutes and make more transparent policy choices?¹⁴⁶ It is too early to tell whether the Supreme Court's increasingly, but still far from wholly, textualist methodology has affected or will affect Congress's approach to statute writing. One would expect that Congress would move more material from committee reports to the statute itself. Apart from whatever Article I, Section 7 satisfaction might be derived from that, would it be a beneficial change? What would be the costs?

The main cost would be the Court's imposition on Congress's limited agenda.¹⁴⁷ Textualist decisions are less likely to reflect original congressional preferences and much less likely to reflect ongoing congressional preferences (*BFP* and *Holy Trinity Church*), and so deals and compromises would be harder to reach because of less certainty of enforcement and practical elaboration on the part of a textualist Court.¹⁴⁸ Congress has a severely limited agenda and, even with large staffs, does not have the political energy to adopt more than a fraction of the measures deserving attention. The new textualism would theoretically require more political and technical attention to each bill than do traditional practices, and that phenomenon would diminish Congress's ability to pass statutes. To be sure, this diminished capacity would not be a cost if one viewed congressional statute creation cynically, as Scalia does in the Tanner Lectures (pp. 32-34) and even more explicitly in some judicial deci-

145. See William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, in *THE RULE OF LAW: NOMOS XXXVI* 265 (Ian Shapiro ed., 1994).

146. If these are the goals, why not enforce the nondelegation doctrine? While Scalia eschews this approach because there are no judicially administrable standards for the doctrine, *MCI* can best be read as a nondelegation case: the term *modify* is susceptible of different meanings; the Court chose the narrower meaning, for the broader one would have effected a questionable delegation of undirected lawmaking power to the agency, in contravention of Article I's command that all statutory lawmaking be directed by Congress or by intelligible standards Congress sets.

147. See James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 *MICH. L. REV.* 1 (1994); Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 *S. CAL. L. REV.* 585 (1994).

148. Textualist decisions are the ones most frequently overridden by Congress in recent years. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 347-48 (1991).

sions.¹⁴⁹ Such a view is not fair to Congress, however, and is at odds with the respect that the Constitution insists be afforded to Congress as a formal matter.¹⁵⁰

Nor is it clear that Congress is institutionally capable of responding to the new textualism by anticipating more issues and resolving them more clearly in statutes. The lawmaking process is an extended and frequently chaotic one, involving hundreds of legislators, staff members, executive branch officials, and lobbyists for important proposals. In reaching compromises and holding together fragile coalitions, many issues are not thoroughly considered, and many others are not going to be anticipated even with further deliberation. Even when issues are anticipated and considered, they may not be easy to incorporate clearly into statutory text, for reasons of politics, time, and drafting skill. If this is the case, as it seems to be for at least some major legislation, the new textualism unfairly saddles Congress with obligations it cannot always fulfill.

Perhaps the most important question is what effects diminished congressional lawmaking and enhanced judicial disruption would have on statutory schemes. A literature on the effect of the new textualism on substantive areas of law, especially tax, bankruptcy, and civil rights law is now developing. Because this literature and the new textualism are both in their infancy, firm conclusions cannot yet be drawn. But it is significant that respected scholars in different substantive areas have cautioned that rigidly text-based approaches neglecting practical, political, and purposive features of the enterprise have left lawyers and citizens confused about what is required of them, have destabilized longstanding statutory policies, and have produced wasteful litigation.¹⁵¹ Thus far, scholars have

149. See, e.g., *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring in the judgment). *But see* Brudney, *supra* note 147 (vividly disputing Scalia's account of the legislative process generally); Michael Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEXAS L. REV. 819 (1991).

150. If Congress is supreme in the statutory arena, as the Constitution suggests, why shouldn't it, rather than the Court, call the shots? Congress does not want agents who do nothing but apply plain meanings. It wants agents who make the statutory scheme work over time or who adjust the statutory scheme to reflect new political equilibria. Recall the ashray hypothetical.

151. See T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, *West Virginia University Hospitals, Inc. v. Casey, and Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687 (1992) (civil rights law); William D. Araiza, *Text, Purpose and Facts: The Relationship Between CERCLA Sections 107 and 113*, 72 NOTRE DAME L. REV. 193 (1996) (environmental law); Jack M. Beermann, *The Supreme Court's Narrow View on Civil Rights*, 1993 SUP. CT. REV. 199 (civil rights law); Douglas M. Branson & Karl Shumpei Okamoto, *The Supreme Court's Literalism and the Definition of "Security" in the State Courts*, 50 WASH. & LEE L. REV. 1043 (1993) (securities law); Brudney, *supra* note 147 (labor law); William N. Eskridge, Jr., *Reneging on History? The Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991) (civil rights law); Catherine L. Fisk, *The Last Article about the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35 (1996) (pension law); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78

found that the new textualism has failed to yield greater determinacy in even a single area of law; some of the articles have, surprisingly, found less predictability among judges once an area of law is new textualized.¹⁵²

There is a third reason, not offered in the Tanner Lectures but suggested by Scalia elsewhere, why the Court might avoid openly normative choices in statutory cases. Before presenting this third argument, the general problem of normativity needs to be explored.

VI. THE PROBLEM OF NORMATIVITY

Scalia maintains that the Court must apply statutes as written, without finching. This severe positivism was not the goal of the framers, was not written into the Constitution, was not the practice of early American courts, and has not been the practice of American courts in this century. Legal method has been practical rather than dogmatic, contextual as well as textual, and normative more than neutral.¹⁵³ Has legal method been improperly conceived? Should norms be thoroughly absent in the enterprise of statutory interpretation? The proper interpretation in *Holy Trinity Church*, in the opinion of most, involves precepts that are normative as well as semantic. Brewer invoked the idea of a Christian Nation to inform his reading of the statute, its legislative history, and purpose. Tribe's comment on the Tanner Lectures emphasizes the rule that

CAL. L. REV. 1137 (1990) (Indian law); Deborah A. Geier, *Commentary: Textualism and Tax Cases*, 66 TEMP. L. REV. 445 (1993) (tax law); Gwen T. Handelman, *Zen and the Art of Statutory Construction: A Tax Lawyer's Account of Enlightenment*, 40 DEPAUL L. REV. 611 (1991) (tax law); Michael Herz, *Judicial Textualism Meets Congressional Micromangement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175 (1992) (environmental law); Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy over Immigration*, 71 N.C. L. REV. 413 (1993) (immigration law); Livingston, *supra* note 149 (tax law); Mank, *supra* note 116 (environmental law); C. Robert Morris, *Bankrupt Fantasy: The Site of Missing Words and the Order of Illusory Events*, 45 ARK. L. REV. 265 (1992) (bankruptcy law); James P. Nehf, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1 (1994) (consumer law); Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717 (1995) (evidence law); Charles Jordan Tabb & Robert M. Lawless, *Of Commas, Gerunds, and Conjunctions: The Bankruptcy Jurisprudence of the Rehnquist Court*, 42 SYRACUSE L. REV. 823 (1991) (bankruptcy law); Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. (forthcoming 1998) (treaty interpretation); Lawrence Zelenak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code*, 64 N.C. L. REV. 623 (1986) (tax law). A textualist approach is defended in Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535 (1993), published just before *BFP* was decided.

152. See Eskridge, *supra* note 151 (civil rights law); Herz, *supra* note 151 (environmental law); Nehf, *supra* note 151 (consumer law). For a fascinating case study of this, see Richard J. Lazarus & Claudia M. Newman, *City of Chicago v. Environmental Defense Fund: Searching for Plain Meaning in Unambiguous Ambiguity*, 4 N.Y.U. ENVTL. L.J. 1 (1995).

153. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); DENNIS PATTERSON, *LAW AND TRUTH* (1996) (providing a splendid philosophical exploration of the thesis in the text).

one should read a statute so as to avoid constitutional difficulties such as reading a general statute to burden religious freedom (p. 92). My own interpretation is influenced by the rule of lenity, the narrow statutory purpose, and the longstanding prior (to 1885) practice of freely allowing ministers and other professionals into the country. Only Scalia appears to reject all these normative considerations. But in *BFP*, federalism played the spiritual role for Scalia that the Christian Nation did for Brewer in *Holy Trinity Church*, and in *MCI* the nondelegation idea played the tiebreaking role for Scalia that the rule of lenity does for me in *Holy Trinity Church*.¹⁵⁴ Thus, it appears that norms are not absent from Scalia's interpretation of statutes; he is merely influenced by different norms. This cannot be surprising. Interpretation is always, even if unconsciously, normative — even the most scrupulously neutral decisionmaker reads the evidence through the lens of her own preconceptions.¹⁵⁵

Return to the Case of the Wandering Basketball Player and the question of whether the application of Rule 12A, Section IX(c) requires his suspension from the next game. Reread the rule¹⁵⁶ and consider the following scenarios in which a basketball player leaves the bench during a fight under the basket:

1. The player jumps off the bench and joins the fight.
2. The player jumps off the bench, runs over to the fight, but does not join the fight.
3. The player leaves the bench and wanders in mid-court, making no further move toward the fight.
4. The player leaves the bench and moves as far away from the fight as possible, lest he be tempted to join it.
5. The player leaves the bench because he needs to use the restroom, which is behind the bleachers and well away from the fight.
6. The fight spreads, and two players end up brawling in front of the bench. One player starts to choke the other viciously, and no official is nearby. The choked player passes out, and the attacking player continues choking. A third player leaves the bench and prevents further choking.

All of these variations are within the apparent plain meaning of Rule 12, Section IX(c). Should they all trigger the suspension?

The core violation is scenario 1. This was precisely the scenario that triggered adoption of the rule in 1994 and is one where the bench-clearing conduct is truly dangerous for the players, the referees, and the fans. The antifighting purpose of the Rule all but re-

154. See *supra* note 146. For connections between the nondelegation idea and the rule of lenity, see Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345.

155. See William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990) (reviewing the hermeneutics literature).

156. See *supra* note 1.

quires its application here even if nowhere else, and the NBA has invoked the rule in these circumstances. Scenario 2 is only slightly removed from the core violation, for the player's behavior strongly risks escalating the fight, which is the mischief the rule prophylactically seeks to prevent.

At the other end of the spectrum, scenario 5 strikes me as no less a violation of the letter of the rule but lies completely outside its spirit: the bathroom scenario is far from the core activity the rule was designed to regulate, poses virtually no danger of escalating the fight, has never been the basis of an NBA suspension (that I know of), and carries no normative taint from the perspective of society or the NBA. Scenario 6 is within the antifighting spirit as well as the letter of the rule, but would, in my view, be exempt because the rule-abridging conduct is justified by the larger principle of saving life or preventing serious injury.¹⁵⁷ Note here that a textualist could follow my application of the rule to scenarios 5 and 6. Scalia himself has said that a statutory text need not be applied to *de minimis* violations (scenario 5) or to situations where its application would be absurd (scenario 6).¹⁵⁸ How Scalia himself or any other new textualist would apply these precepts to my variations is, however, as unpredictable as it would be normative.¹⁵⁹

The hard cases are scenarios 3 and 4. I am agnostic as to whether suspension is appropriate for the player in scenario 4. As to scenario 3, the Ewing case, I would interpret the rule to require suspension. Although Ewing was within the letter of the rule, his was not the core case that gave rise to the rule, and according to Linda Silberman the NBA had never suspended a player for leaving the bench and wandering at mid-court. Critical for me, however, is

157. Obviously, scenario 6 can be made much more difficult, as by leaving open the possibility that referees were nearby and could have stopped the choking. But it's my hypothetical!

158. See *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231-23 (1992) (Scalia, J.) (asserting that *de minimis* exceptions to statutory rules are valid, so long as they do not undermine policy of statute); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring in the judgment) (asserting that judges must rewrite statutory texts where the plain meaning applied to the facts is absurd); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 324 n.2 (1988) (Scalia, J., concurring in part and dissenting in part) (asserting that it is absurd to apply a statute requiring inspection of ovens for flames when the oven is electric).

159. Thus, a new textualist could find scenario 5 a *de minimis* violation and hence exempt from Rule 12A, Section IX(c)'s automatic penalty, or he could say it is not *de minimis*, reserving that kind of exemption to situations where, for example, a player accidentally falls off the bench and onto the floor. In that case, the text would probably not be violated because the rule only applies when the player fails to "remain in the immediate vicinity of the bench." What "immediate vicinity" means should depend on where the fight is taking place.

Likewise, a new textualist could find it absurd to apply the rule to scenario 6, where human life or limb might be lost if the player did not act, or he could refuse to do so, reserving the absurdity exception for those cases where an act in violation of Rule 12A, Section IX(c) is required by law or other NBA Rules.

that leaving the bench and going as far as mid-court does create an enhanced risk of violence on the court: players from the other team as well as Ewing's team would be more tempted to leave their respective benches. I concede that Ewing's case is a hard case. Enforcing the rule against Ewing risks *overenforcing* the prophylactic antifighting norm (Silberman's concern), but failing to enforce the Rule risks *underenforcing* the norm (my concern). The NBA rules against fighting, throwing elbows, and unnecessary contact all reflect a strong policy against on-court violence or even the possibility of violence.¹⁶⁰ The NBA's position is unimpeachable. If there is a risk of error, I would err on the side of overenforcing this particular norm if I were advising the Commissioner.¹⁶¹

Probably concurring with my result in scenario 3, Scalia would in theory object to my consideration of the background of the rule, its overall purpose, the risks of over- versus underenforcement, and prior NBA practice. But the jurist doth protest too much. Comparing Scalia's theory, as articulated in the Tanner Lectures, with his practice as demonstrated in his analysis of actual cases, yields this contrast: the former emphasize the mechanical role of judges as passive law finders whose neutrality can be assured by proper methodology, while the latter reveal an active law maker whose methodology bursts with discretionary choices informed by normativity. There is a bit of David Brewer lurking within Nino Scalia,¹⁶² and I originally thought the vehemence of the Tanner Lectures was Scalia's effort to closet or simply deny his Breweresque tendencies.

On reflection, I think the disconnect between lecture and practice reflects a broader problem facing judges generally and the Supreme Court in particular. The Court believes its legitimacy rests

160. NBA Rule 12A, Section VII(d)(6) requires a technical foul to be assessed for throwing an elbow or "any attempted physical act with no contact involved." NBA OPERATIONS DEPT., *supra* note 1, at 42. Rule 12A, Section VIII requires that technical fouls will be automatically imposed against a player or coach for fighting, the offender will be ejected from the game, and the Commissioner may (!) suspend and fine the offender. *See id.* at 41. "[U]nnecessary" contact with another player constitutes a "flagrant foul — penalty 1," which under Rule 12B, Section IV(a) entitles the other team to two free throws and possession of the basketball. *Id.* at 44. "[U]nnecessary and excessive" contact constitutes a "flagrant foul — penalty 2," which entitles the other team to two free throws and possession of the basketball and requires ejection of the fouling player. *Id.* Rule 12B also requires that ordinary fouls must be assessed for all sorts of minor contact, even when unintentional. *See id.* at 42-44.

161. Not being the Commissioner, I would defer to his judgment in the actual Ewing case; if Stern believed Ewing's conduct really was outside the rule's purpose, I would not interfere with that judgment.

162. *See generally* George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990) (theological roots of much of the jurist's philosophy). For a concrete example, Brewer's "Soliloquy on a Christian Nation" in *Holy Trinity Church* finds a parallel in Scalia's "Ode to Blue Collar White Guys" which closes his analytically powerful dissent against voluntary affirmative action in *Johnson v. Santa Clara County Transportation Agency*, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting).

upon a public perception or agreement that most of what the Court does is neutral, technical, even mechanical. So long as the Court does not disturb current consensus and political equilibrium on important public law issues, it will in fact be seen as neutral. But the Court is always tempted to be critical or provocative on some issues (civil rights during the Warren Court, federalism today), and some of the framers expected the Court to mitigate "partial and unjust laws," at least to protect common law or constitutional values. When the Court is being provocative, or politically incorrect, it needs the cover of neutrality. Because the Court needs to be perceived as neutral especially when it is being provocative, it generally needs to avoid the appearance of normativity. That is why one will almost never hear a Supreme Court justice concede in public that the Court makes judgment calls, loads the dice in statutory cases through substantive canons, and has discretion to influence public policy. Scalia is the most politically incorrect of justices and, for that reason of interest as well as reasons of principle, the one most concerned with presenting a neutral image. But as he admitted, once and never thereafter, in a judicial opinion, "I am not so naive (nor do I think our forbears were) as to be unaware that judges in a real sense 'make' law. But they make it *as judges make it*, which is to say *as though* they were 'finding' it — discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be."¹⁶³

The Tanner Lectures can be read as a manifesto for such an "as-though" philosophy of statutory interpretation: the new textualism is a potentially objective method and vocabulary for solidifying the Court's reputation as a protector of the rule of law, and the objectivity and credibility it creates, or gives the illusion of creating, will protect the Court when it confronts rather than acquiesces in the current political equilibrium. That judges say and perhaps believe this, however, must not deter the unaffiliated academic from insisting that what the judges do remains normative rather than mechanical, pragmatic instead of theoretical, and contextual as well as textual.

CONCLUSION: WHAT THE SUPREME COURT OUGHT TO BE DOING IN STATUTORY CASES

Textualism is, alas, an unknown ideal. The new textualism is probably not the salvation of statutory interpretation, which can best be understood and appreciated as a contextual, pragmatic, and normative as well as textual, formalist, and positive enterprise. This

163. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment) (offering a reason why Article III's grant of "judicial Power" does not allow the Court leeway to make its decisions prospective only).

approach is explicated in an article Phil Frickey and I wrote on practical reasoning in statutory interpretation and developed further by each of us in subsequent work.¹⁶⁴ The practical reasoning approach that we found in Supreme Court cases and that has proven robust over time is well-exemplified by the jurisprudence of Justices Stevens, O'Connor, and Souter in particular, but also by several opinions by Justice Scalia, especially his analytically spectacular dissent in the Case of the Used Gun.¹⁶⁵ What the best opinions, and the most judicious approaches, have in common is hard-hitting and candid analysis of a variety of legal sources for figuring out what the text means — the language of the statute and its statutory context, legislative history (for all but Scalia, of course), statutory purpose, canonical policies, the evolution of the statute, and practical consequences. While a practical reasoning approach is more contextually inclined and less mechanical than the approach defended in the Tanner Lectures, it is no less constrained, contrary to Scalia's argument in those lectures. Referring one final time to the Case of the Wandering Basketball Player, consider some general lessons from a practical reasoning approach:

1. *The Primacy of Statutory Text.* All major theories of statutory interpretation consider the statutory text primary. The plain meaning of a text as applied to a set of facts is the focal point for attention, whether one is a textualist, intentionalist, or pragmatic interpreter of statutes. For any of these, there must be a compelling reason to derogate from the meaning the words would convey to an ordinary speaker or reader. Thus, I am confident that the large majority of judges would agree with Scalia and me, and disagree with Linda Silberman and Ronald Dworkin, that Rule 12A, Section IX(c) was properly applied to Patrick Ewing. Text primacy ought not mean text fetishism, however, especially when the texts are normative, as they are with statutes. Few interpreters would suspend

164. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); see also ESKRIDGE, *supra* note 17, ch. 2; Araiza, *supra* note 151; Scallen, *supra* note 151; Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEXAS L. REV. 1073 (1992).

165. I join the chorus of praise for Justice Scalia's classic dissenting opinion in *Smith v. United States*, 508 U.S. 223 (1993) (Scalia, J., dissenting). See, e.g., Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 270-75. Scalia's persuasive approach to a sentence-enhancement statute was essentially and correctly followed by the Court in *Bailey v. United States*, 516 U.S. 137 (1995). Other instructive, hard-hitting, and pragmatically as well as linguistically keen opinions include *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 117 S. Ct. 832, 842 (1997) (Scalia, J., concurring); *Walters v. Metropolitan Educ. Enters.*, 117 S. Ct. 660 (1997) (Scalia, J.); *Smiley v. Citibank (S.D.)*, 116 S. Ct. 1730 (1996) (Scalia, J.); *Blanchard v. Bergeron*, 489 U.S. 87, 97 (1989) (Scalia, J., concurring in part and in judgment); *Pierce v. Underwood*, 487 U.S. 552 (1988) (Scalia, J.); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 318-23 (1988) (Scalia, J., concurring in part and dissenting in part). Sometimes, Scalia's exchanges with other justices produce excellent opinions on either side of a hard issue. See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

Ewing if he had left the bench to save a life (scenario 6) or taken a restroom break (scenario 5), not because the text cannot *literally* apply to those circumstances, but because the text cannot *reasonably* apply, in light of the policy of the Rule (scenario 5) or other important goals (scenario 6). There is no telling how a new textualist would respond to these cases, but my guess is that most would agree with my resolutions.

2. *Constrained Evolution.* The Tanner Lectures scoff at the idea that statutory meaning might change over time, common law style (p. 21-22), but the Case of the Wandering Basketball Player illustrates how this is so, wholly consistent with a rule of law regime. To begin with, judges should defer to agency interpretations of statutes they are charged with enforcing, unless the interpretations are clearly wrong. The same precept surely would apply for the benefit of the NBA Commissioner. Thus, if I were a judge believing, as I do, that Ewing should have been suspended for violating the rule, I should still defer to the Commissioner if he determined that the rule should not be applied to Ewing's case because the mid-court wandering posed no danger to the antifighting policy. One can debate whether there is any play in this particular rule, but it is clear that some rules have fuzzy edges that allow administrators to adopt one interpretation early in the statute's history, and a different one later on. This is the core case of statutory evolution. Most new textualists would not allow an agency this degree of latitude, which Tom Merrill persuasively maintains is a lamentable feature of the new textualist philosophy.¹⁶⁶

Consider another example of statutory evolution: path dependence. Assume that a new textualist thinks Rule 12A, Section IX(c) should require suspension in both scenarios 3 (wandering mid-court) and 4 (going to the other end of the court). But assume that the courts authoritatively hold scenario 3 exempt from the suspension. Not only would the new textualist be bound as a matter of *stare decisis* to scenario 3, but if scenario 4 arose, the honest textualist would probably be constrained by precedent to prevent suspension there as well — unless she can overrule or persuasively narrow the earlier precedent.

Finally, as context changes, the application of Rule 12A, Section IX(c) can be expected to change, even if the terms of the Rule do not. If New York City after the Ewing case enacted an ordinance barring application of this NBA Rule so long as the bench-clearing athlete is more than fifteen feet from any altercation, the NBA Commissioner would be justified in cutting back generally on the application of the plain meaning of Rule 12A, Section IX(c). To

166. See Merrill, *supra* note 14; see also Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 *YALE L.J.* 969 (1992).

take a more interesting variation, assume that the NBA itself adopted a new rule prohibiting players from leaving the bench during a game to use the restroom but without specifying a penalty. Such a rule change would require me to rethink my earlier refusal to suspend a player under the circumstances of scenario 5. The relevant changed context might also be factual. My disinclination to apply the rule to scenario 5 would also be turned around if the NBA reliably found, to my surprise, that players leaving the bench for the bathroom in tense or fight situations were likely to rile fans, thereby increasing the possibility of fights among fans or between fans and players.

Contrary to Scalia, statutory evolution is not the same as willful judges forcing their personal views onto statutes, any more than the new textualism is willful judges forcing regulatory statutes into procrustean beds. The willful judge will tamper with statutes whatever the methodology, and dynamic statutory interpretation as a normative proposition means that statutes ought to change in an orderly common law way, in response to new circumstances and new legal developments.

3. *Judicial Humility and Critical Responsibility.* The humble judge is genuinely interested in the background as well as the text of the statute she is construing: Why was it adopted? What were their assumptions? How did its authors use language? With what terms of art were they familiar? It is relevant to the interpretation of Rule 12A, Section IX(c) that the NBA adopted the measure after a serious bench-clearing brawl between the Knicks and the Bulls in 1994, that the brawl was considered embarrassing to the league and dangerous for the players, and that the mandatory suspension was deliberately chosen in order to send a strong signal that fighting would not be tolerated and that the conditions for fighting were to be avoided. Judicial humility is the main reason that I hesitate to follow Scalia in advocating a firm “never look at legislative history” rule. Reading the legislative history puts the judge better in touch with the values, vocabulary, and policy choices of the authors of the statute — just as *The Federalist* does for the framers of the Constitution. The humility owed by judges is why Souter’s position is the better one in *BFP*: Congress was aware of the federalism issues, resolved the fraudulent conveyance rule to trump state law, and is owed deference in its resolution.

Because judges are constitutional as well as statutory interpreters, they have some critical as well as agency responsibility. According to *Federalist* 78, critique was the reason for judicial independence. This is a responsibility to be exercised rarely, but when exercised it should be open and naked, so that if the judge is wrong she alone will bear responsibility for the error. Consider an

example: If the NBA Commissioner suspended a player for rescuing another player from being choked (scenario 6) and I were a judge in a position to review the issue as a matter of rule interpretation, I would reverse — notwithstanding the rule's plain meaning, notwithstanding the player's violating the antifighting goal, and notwithstanding the humility I am supposed to have and the deference I would ordinarily show to the Commissioner's judgment. I would reverse because the suspension is at odds with the fundamental disparity between the antifighting policy and the preservation of human life. I should like to think that Scalia would agree, as a matter of interpretation.