Time, the Supreme Court, and *The Federalist*

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Professor Eskridge's strikingly original paper poses a most intriguing question: Why do current, self-proclaimed textualists on the Supreme Court eschew reliance on most conventional materials in the category of legislative history and yet rely significantly on *The Federalist* as a source of meaning in constitutional interpretation?[1] Professor Eskridge is surely right that Scalia's Tanner Lectures, published as *A Matter of Interpretation*, do not give a sufficient justification for the practice.[2]

Professor Eskridge, proceeding somewhat *dubitante*, suggests three considerations designed to guide an answer to the question he raises. He first argues that the "economics of research" may support a (prospective only) rule of judicial exclusion of statutory history while not likewise supporting an exclusion of matters of constitutional history.[3] Second, he contends that the discourse reflected in constitutional history in general, and in *The Federalist* in particular, is more reliable than that reflected in contemporary legislative history.[4] Third, he somewhat murkily suggests an analytical connection between abuse of judicial power and some (but not all) uses of constitutional history in the process of adjudication.[5] Ultimately, he argues that (1) concern for the economics of research provides the soundest justification for a (prospective) rule of exclusion of legislative history from judicial consideration, and (2) the analysis of incentive effects that supports such a rule does not apply to constitutional history.[6] Reasoning from these two conclusions, he suggests that the willingness of textualist Justices to cite *The Federalist* but not conventional legislative history may indeed be justifiable.[7]

In what follows, I seek to shed additional light on Professor Eskridge's multiple perspectives on the problem. In Part I, I discuss the economics of research and suggest that Professor Eskridge has overestimated the savings likely to be produced by the proposed rule of exclusion. In Part II, I address the issue of discourse reliability in *The Federalist*. I remark on James Madison's worries about the identical issue, and I survey empirically the Supreme Court's pattern of citation to *The Federalist*. In light of the stark

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1 William N. Eskridge, Jr., *Should the Supreme Court Read* The Federalist *but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998).

2 *See id.* at 1297 (citing Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., 1997)).

3 *See id.* at 1321-23.

4 *See id.* at 1318-21.

5 *See id.* at 1316-18.

6 *See id.* at 1321-23.

7 *See id.* at 1323.

survey results (which may surprise the reader), I suggest an alternative exclusionary rule for the debating history of legal texts—one governed by time elapsed since enactment, rather than by the category of legal text under attention.

In Part III, I tackle Professor Eskridge's analysis of the relationship between judicial reliance on history and abuse of judicial power. Here, the most interesting questions do not arise from conventional distinctions between structure and rights, or between the eighteenth-century Constitution and the Civil War Amendments. Rather, the most crucial distinction in appraising the exercise of judicial power undertaken in reliance on constitutional history is between the settlement of undecided questions and the unsettlement of long decided ones. Viewed through this lens, Justice Clarence Thomas and scholars like Professor Akhil Amar appear as the radical destabilizers of the constitutional regime because of their willingness to undo norms established by precedent and government practice. I conclude by suggesting ways *not* to think about the quite palpable tension between the original understanding and the stability of contemporary constitutional law.

I. The Production and Consumption of Interpretive History

Professor Eskridge argues, economist-like, that reduced judicial consumption of legislative history would significantly alter the legislative incentive to produce it, and thereby lead to conservation of the resources that otherwise would be invested in its production. By contrast, he suggests that the production of constitutional history involves much less total volume of material and reflects limited costs, virtually all of which are sunk and unrecoverable. Accordingly, he champions a prospective rule of exclusion from judicial opinions for legislative history, without a corresponding rule of exclusion for constitutional history like *The Federalist.*

With respect to legislative history, Professor Eskridge's rule may be much less resource conserving than he believes. His argument hinges on the connection between judicial demand and lawmaker supply. A rule of judicial exclusion, however, may reduce overall demand far less than he expects.

First, even judges who tend to follow rules of exclusion may consider some parts of legislative history. As Professor Manning has suggested, the true concern of an exclusionary rule are those statements by legislators that purport to explain what the statute "really mean[s]," or how it might apply to a given set of facts.[8] Those parts of legislative history that describe the relevant legal landscape at the time of enactment—decisional law, or agency regulations on the subject, for example—remain appropriate for judicial consideration.[9] To the extent Professor Manning's view is followed, legislators will try to produce such history, lawyers and others who want to persuade courts will examine legislative history in search of relevant portions, advocates will cite those portions of history that arguably resemble the sorts judges will consult, and judges and clerks will have to read the cited portions

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8 *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 679 (1997).

9 *See id.* at 731-33.

(and perhaps other portions as well) to see if they represent includible rather than excludible material. If the ultimate rule of exclusion for textualists is anything less than complete elimination of the material from judicial cognizance, the total savings of resources invested in producing and consuming legislative history will be considerably less than Professor Eskridge suggests.

Second, and quantitatively more significant, judges are not the only consumers of legislative history. The behavior of other consumers creates independent incentives for production. The lobbying classes are always highly interested in maximizing production of legislative history which expresses favorable views toward their clients' interests; such production helps to justify their employment and its accompanying high fees. Nor is it irrational for interest groups to go on financing the factors of production of legislative history. In the who-knows-how-long-run, judges may change their mind about the admissibility of legislative history. Moreover, in the crucial short run, agencies responsible for administering the relevant statutes are likely to be extremely interested consumers of legislative history.

Indeed, agency interest in legislative history is likely to continue virtually unabated by judicial disinterest. Agencies, their budgets set annually by Congress, have their own incentives to be finely tuned to the particular concerns of legislators with direct and immediate political influence over the agencies. Recent legislative history is certainly one source of information about the expectations and understandings of those legislators. Because the bulk of statutory interpretation will be performed by the agency, rather than by reviewing courts, continued consumption of legislative history by agency members, lawyers, and staff will generate more than sufficient demand for the material to guarantee continued production at very high levels.

II. The Federalist *in Supreme Court History: A Tour and a Modest Proposal*

Professor Eskridge identifies "reliability of the discourse" as the second major consideration in assessing Justice Scalia's treatment of *The Federalist* as compared to statutory history.[10] Professor Eskridge suggests that contemporary legislative history is increasingly marred by the self-conscious attempts of interest groups, legislators, and staff to manipulate the legislative conversation in ways designed to affect subsequent adjudication.[11] By contrast, he contends that constitutional history is not similarly distorted and is therefore a more reliable source of the competing positions truly under active consideration at the time the history is generated.[12]

However accurate his portrait of our early constitutional history, one cannot sustain a continuing, generic distinction between constitutional and legislative history on grounds of discourse reliability. When those involved with proposed constitutional amendments in the twentieth century set about their labors, proponents and opponents both will attempt to create constitutional history that will influence subsequent interpretations. For example,

10 *See* Eskridge, *supra* note 1, at 1318.

11 *See id.*

12 *See id.* at 1320-21.

when the Equal Rights Amendment was proposed, seriously debated, and ratified by a number of states in the 1970s, political sponsors and academic commentators generated substantial amounts of what would have been relevant constitutional history.[13] This material, aimed initially at persuading relevant political audiences in the ratification campaign, was prepared with an eye to subsequent interpretations by judges and other actors in the constitutional system. The discourse is riddled with references to standards of judicial review, considerations of invidious intent as compared with disparate impact of laws, and other matters of particular interest to lawyers and judges.[14]

Unsurprisingly, the Founding Generation (including Publius) had its own doubts concerning the reliability of documentary materials associated with the 1787 Constitution. As recounted by Professor Powell in his germinal piece entitled *The Original Understanding of Original Intent*,[15] Madison himself was a textualist rather than an intentionalist.[16] Professor Powell's account of Madison's interpretive philosophy includes an 1817 letter in which Madison "described his knowledge of the views actually held by the delegates to the Philadelphia [1787] and Virginia [ratification, 1788] conventions as a possible source of 'bias' in [Madison's] constitutional interpretations."[17] Later, in an 1824 letter, Madison "cautioned a correspondent against an uncritical use of *The Federalist*, because 'it is fair to keep in mind that the authors might be sometimes influenced by the zeal of advocates.'"[18]

The judicial practices of Supreme Court Justices in the early years of the Republic were quite consistent with Madison's warning, but his message has waned in force in our own time. As revealed by research in the LEXIS database, patterns of citation to *The Federalist* in Supreme Court opinions[19] have changed dramatically in the latter half of the twentieth century. The following table lists, by decade, the number of Supreme Court decisions in

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13 *See* BARBARA ALLEN BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 129-89 (1975).

14 *See, e.g.*, Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971) (examining the legal changes that are necessary to achieve equality and advocating the adoption of a constitutional amendment guaranteeing equal rights).

15 H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

16 *See id.* at 935-37.

17 *Id.* at 936 (citing Letter from James Madison to Henry St. George Tucker (Dec. 23, 1817), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, 1816-1828 at 53, 54 (J.P. Lippincott & Co. 1865)).

18 *Id.* (quoting Letter from James Madison to Edward Livingston (April 17, 1824), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, 1816-1828 at 435-36 (J.P. Lippincott & Co. 1865)).

19 The research utilized the search term (PUBLIUS) OR (FEDERALIST W/10 NO. OR NUMBER OR NOS. OR PAPER!) OR (FEDERALIST W/P MADISON OR JAY OR HAMILTON). From the 1790s until the 1950s, many Supreme Court opinions were preceded in the various reports by summaries of arguments and authorities presented by counsel. The data that follows in text excludes citations in these summaries, and is limited to citations of *The Federalist* generally, or of a particular paper by number, within opinions of the Justices themselves. In the interests of brevity and simplicity, I have not broken the data further into seriatim opinions, opinions for the Court majority, concurring opinions, or dissenting opinions.

which at least one citation to *The Federalist* has appeared in one or more opinions. Decisions like *Printz v. United States*,[20] in which multiple citations to the Papers appear, thus count only once in the table.[21]

1790-99—1	1860-69—6	1930-39—12
1800-09—0	1870-79—8	1940-49—15
1810-19—2	1880-89—5	1950-59—16
1820-29—5	1890-99—9	1960-69—27
1830-39—5	1900-09—3	1970-79—30
1840-49—7	1910-19—3	1980-89—56
1850-59—9	1920-29—5	1990-98—60

This data is raw, and many refinements might be introduced. More clerks per Justice, for example, might explain a wider pattern of source citation. One variable that does *not* explain the data is the change in frequency of Supreme Court decisions. The rate of decision increased sharply between 1850 and 1920, but that frequency has been declining generally over the past fifty years[22] and has fallen very rapidly in the 1990s.[23] Thus, the citations to *The Federalist* remained low when the decision rate was high, and the citation rate has climbed as the decision rate has dropped. Likewise, the absolute number of constitutionally based decisions, in which the Papers are most likely to be cited, increased in the 1970s and 1980s from the years preceding, and then declined in the 1990s.[24]

The frequency of citation to *The Federalist* in briefs filed with the Supreme Court suggests another perspective on the data.[25] These references

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20 117 S. Ct. 2365 (1997).

21 The list of citations supporting the numbers in this table are on file with the author and *The George Washington Law Review*.

22 Data on the total number of Supreme Court cases disposed of by signed opinion are available from several sources. *See* ALBERT BLAUSTEIN & ROY MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES 137-41 tbl.9 (1978); LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM, DATA, DECISIONS, AND DEVELOPMENTS at 84-85 tbl.2-7 (Congressional Quarterly, Inc., 2d ed. 1996). The data from these sources belie the notion that the twentieth century increases in cites to *The Federalist* is simply a function of an increase in the rate of decision. The rates of decision, in terms of the average number of signed opinions of the Court per year, are as follows:

1790-99—1 per year	1860-69—89 per year	1930-39—152 per year
1800-09—11 per year	1870-79—177 per year	1940-49—134 per year
1810-19—33 per year	1880-89—216 per year	1950-59—90 per year
1820-29—35 per year	1890-99—234 per year	1960-69—100 per year
1830-39—40 per year	1900-09—190 per year	1970-79—130 per year
1840-49—38 per year	1910-19—224 per year	1980-89—140 per year
1850-59—86 per year	1920-29—190 per year	1990-95—95 per year

See BLAUSTEIN & MERSKY, *supra*, at 137-41 tbl.9.

23 The 1990s data for numbers of signed opinions of the Court are 1990 Term (112), 1991 Term (107), 1992 Term (107), 1993 Term (84), 1994 Term (82), 1995 Term (75), 1996 Term (80), and 1997 Term (97). *See* EPSTEIN ET AL., *supra* note 22, at 85; *The Supreme Court, 1996 Term*, 111 HARV. L. REV. 51, 436 tbl.II (1997); *Supreme Court Opinions*, 66 U.S.L.W. 4001-53 (S. Ct. Binder, 1997-98).

24 The number of opinions in which the central issue was one of constitutional law averaged 27 per term in the 1950s, 47 per term in the 1960s, 75 per term in the 1970s, 69 per term in the 1980s, and has fallen to an average of 36 per term in the 1990s. *See* 62-111 HARV. L. REV. (November issues, annual reports of Supreme Court statistics).

25 *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1498 n.285

may influence the Court's decisions even on occasions when the judicial opinions do not cite the Papers themselves. Chief Justice Marshall's opinion in *Marbury v. Madison*[26] appears to have been heavily influenced by Hamilton's argument in *The Federalist* No. 78, though Marshall does not cite the Paper in the opinion.[27]

Whatever qualifications might be appropriate, however, the trend in the citation data is hard to miss. The data reveal (1) a striking paucity of early citations to *The Federalist*, (2) a 100-year plus period (1820-1929) of consistent but low frequency of citation, and (3) a series of doublings and redoublings every twenty to thirty years beginning in the 1930s. For the first three decades after publication of *The Federalist*, only three citations to the Papers appeared in Supreme Court opinions. The first citation was part of a wildly overheated dictum by the Federalist partisan Justice Chase in *Calder v. Bull*.[28] The second was a brief reference in Justice Johnson's dissent in *Fletcher v. Peck*.[29] The third appeared in *McCulloch v. Maryland*,[30] and consisted of Chief Justice Marshall's rejection of a *Federalist*-based argument by counsel for Maryland with respect to state power to tax the National Bank.[31] Thus, from 1789-1819, the Supreme Court rarely cited *The Federalist*, and never relied upon any of the Papers to support an outcome.

For the next eleven decades (1820-1929), citation patterns settled into a highly consistent pattern. In this period, encompassing more than half of our constitutional history, the number of *The Federalist*-citing decisions varied

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(1987). Professor Amar's research shows thirteen citations to *The Federalist* in Supreme Court Reporters between 1789-1825, but he does not distinguish in his case citations between arguments of counsel and opinions of the Justices. *See id.* (citing "cases in which the Papers are invoked as special authority by bench or bar"). The LEXIS search turned up the following numbers of decisions per decade in which *The Federalist* was cited in the published summaries of Supreme Court arguments without citation in any opinions of the Justices:

1800-09—2	1850-59—8	1900-09—9
1810-19—1	1860-69—3	1910-19—10
1820-29—3	1870-79—4	1920-29—9
1830-39—4	1880-89—4	1930-39—5
1840-49—3	1890-99—1	

Moreover, the above numbers are based on argument summaries, rather than actual inspection of the full briefs filed in the cases: accordingly, the number of cases in which counsel, (but not the Justices), cited *The Federalist* may be far higher than the above numbers reveal. *See supra* notes 22 and 23 and accompanying text.

26 5 U.S. (1 Cranch) 137 (1803).

27 *Compare id.* at 176-80, *with* THE FEDERALIST No. 78, at 466-68 (Alexander Hamilton) (Clinton Rossiter ed., 1961). *The Federalist* No. 78 was cited in argument to the Court in *Marbury*. *See* 5 U.S. (1 Cranch) at 151.

28 3 U.S. (3 Dall.) 386, 391 (1798) ("The celebrated and judicious *Sir William Blackstone*, in his commentaries, considers an *ex post facto law* precisely in the *same* light I have done. His opinion is confirmed by his successor, *Mr. Wooddeson*; and by the author of *the Federalist*, who I esteem superior to both, for his extensive and accurate knowledge of the *true principles of Government*.").

29 10 U.S. (6 Cranch) 87, 144 (1810) (Johnson, J., dissenting) ("There is reason to believe, from the letters of Publius, which are well known to be entitled to the highest respect, that the object of the convention was to afford a general protection to individual rights against the acts of the state legislatures.").

30 17 U.S. (4 Wheat.) 316 (1819).

31 *See id.* at 433-35.

from a low of three per decade to a high of nine, with an average of about six per decade.

Thereafter, the rate of *The Federalist* citations per decade increased significantly. Indeed, in the period from the 1930s through the 1950s, the rate per decade jumped to an average of fourteen, more than double the rate of the preceding 100 years. In the next twenty years, the rate doubled again, climbing first to twenty-seven in the 1960s and then to thirty in the 1970s. The next redoubling is virtually complete. Compared to the first three quarters of American constitutional history, the most recent two decades have been positively riotous with citations to *The Federalist*: fifty-four citations in the 1980s, and a record-topping sixty in the yet unfinished 1990s. More than half of all the Supreme Court decisions in which one or more citations to *The Federalist* appear have been rendered since 1970.

What are we to make of the extremes at either end of the citation frequency table? With respect to the most recent proliferation, a number of explanations come to mind. First, the Supreme Court now includes several self-described originalists.[32] It should therefore come as no surprise that such Justices would depend more heavily than their predecessors on the history of drafting and ratification of the Constitution. Second, these and other Justices have put issues of federalism and power separation at center stage. As a result, documentary history of the 1787 Constitution, in which the basic design of both federalism and power separation is first charted, has become increasingly more important over the past several decades. Third, Congress has seemed less mindful of constitutional constraints in this period than in the generations prior. Some Justices may believe that *The Federalist* will be a useful antidote to a political process in which fundamental constitutional norms have been forgotten or abandoned.

Be these recent phenomena as they may—and they unquestionably bear on the issues raised by Professor Eskridge—the citation pattern for *The Federalist* in the first thirty years after the Papers' publication deserves its own account. The textualists, including Justice Scalia, argue that the rule of law (not men) requires judges to limit inquiry to enacted texts, and not to what men happen to say about those texts.[33] But, as Madison recognized in the correspondence cited by Professor Powell, Publius too represented the views of men, albeit a collection of them. The authors of *The Federalist* prepared the Papers for the New York State ratification campaign,[34] but neither the New York convention nor any other political or legal institution ever voted to approve them. Although Hamilton died in 1804, Marshall and others who served as Justices in our early history saw Jay become the first Chief Justice (1789-95) and Madison the fourth President (1809-17). Jay lived until 1829

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32 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 584 (Thomas, J., concurring); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 45 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Common-Law Courts*]; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) [hereinafter Scalia, *Originalism*].

33 *See* Scalia, *Common-Law Courts*, *supra* note 32, at 29-30.

34 THE FEDERALIST, at viii-ix (Clinton Rossiter ed., 1961).

and Madison until 1836. To those who had been politically involved at the Founding, Hamilton, Madison, and Jay were flesh and blood, distinguished statesmen to be sure, but human nevertheless, with political interests, motives, and aspirations.

As the Founding recedes, however, Publius may appear in a different light. Publius is not just merely dead; he is really most sincerely dead,[35] and almost fully depoliticized. Publius has been transformed from an advocate, of whose zeal Madison warned in the 1820s,[36] to a pseudonymous prophet, a towering, disinterested apparition who arises from the mythology of the infant Republic to make increasingly frequent appearances in Court opinions.

This account of why early Justices hesitated to cite *The Federalist*, but contemporary Justices are not similarly restrained, has striking normative implications for the contemporary debate about the legitimacy of historical materials to which textualists may look. The intuitions reflected in the citation pattern are unrelated to the distinction between statutory and constitutional law. Rather, the data suggest an insight into the relation between time elapsed since enactment and the admissibility of historical materials.

In light of *The Federalist* citation rate, and at the risk of not being taken seriously, I tentatively propose that the conventional pre-enactment history of any legal text should be inadmissible in judicial opinions for a full generation—approximately thirty years—after the enactment. I call this the rule of "first generation exclusion," and I believe it offers a number of virtues. First and foremost, it will entirely solve the problem of discourse manipulation by legislators and interest groups trying to distort legislative history to achieve judicial results that they could not obtain in the enactment process.[37] Who will bother to pad legislative history in the hopes of influencing judges three decades into the future? Because no one will know what issues will be presented for adjudication in thirty years, the discounted present value of such efforts at the time they would have to be made would be close to zero. Like the authors of *The Federalist*, legislative history creators will focus their efforts on fellow legislators (and perhaps administrators) rather than judges who will interpret the text of enactments.

Second, a rule of "first generation exclusion" would mean that historical materials first become admissible at a time when judges would begin to be unfamiliar with the contours and crosscurrents of the relevant public debate surrounding the enactment. The Founding Generation did not need *The Federalist* to be aware of the profound constitutional choices made in the late 1780s. By contrast, Justice Story, born in 1779, writes in the Preface to his famous *Commentaries* that his most important sources have been "The Federalist, an incomparable commentary of three of the greatest statesmen of their age; and the extraordinary Judgments of Mr. Chief Justice John Mar-

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35 This is the coroner's verdict on the Wicked Witch of the East in THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

36 *See supra* note 18 and accompanying text.

37 Well, almost entirely. One of my students suggested to me that there should be a "Strom Thurmond corollary" to the rule: legislative history may be admitted thirty years after enactment, or when the legislative spokesperson leaves office, whichever comes later.

shall upon constitutional law."[38] From Story's generation onward, the documentary history of the ratification battle has served the crucial role of filling gaps beyond the reach of human memory.

Of course, not every legislative debate is as well known among educated contemporaries as was the constitutional conversation of 1787-91. Perhaps the rule of "first generation exclusion" should be relaxed slightly for the most technical and arcane subjects, in which contemporary judicial awareness of broad themes will not facilitate sound interpretation. Even in these circumstances, however, the proposed time-limited exclusionary rule reflects an attitude more about the rule of law than about technical questions of interpretive precision, and I would recommend adherence to it on those grounds.

Third, the rule of "first generation exclusion" will prevent the use of legislative and constitutional history for a sufficiently long period that a great many interpretive questions will be resolved before the exclusionary period has ended. Once the history becomes admissible, it should not be used cavalierly to unsettle what has been resolved in the interim. In the second and subsequent generations after enactment, doctrines of stare decisis in textual interpretation presumably will keep history from unraveling whatever coherent gloss on the text has developed in the interim. Accordingly, even the long term influence of enactment history will be reduced considerably under a rule of "first generation exclusion." Of course, the broader and more general the enactment, the more that may remain to be settled after the initial generation. Given the breadth of the Constitution, the rule of "first generation exclusion" leaves a substantial role for constitutional history to play in contemporary adjudication.

III. Settling and Unsettling—The Role of History in Constitutional Adjudication

What part history should play in the resolution of constitutional questions, in courts and elsewhere, involves considerations far more sweeping than those that inform the rule of "first generation exclusion." Even after several generations have passed since the time of enactment, the question remains whether historical considerations are appropriate sources of legal decision.

This question is much larger than the worry about what materials textualists may appropriately cite. Professor Eskridge addresses the broader inquiry, albeit briefly, as an institutionalist. He asks whether the use of constitutional history might sometimes help to provide a "constraint against judicial tyranny."[39] In particular, he notes the enormous breadth of judicial discretion conferred by the Constitution's open-textured provisions, and suggests the possibility that constitutional history might provide a check on the exercise of that discretion, leaving matters of rights creation to more politi-

38 JOSEPH STORY, I COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES v (Fred B. Rothman & Co. 1991) (1833).

39 Eskridge, *supra* note 1, at 1316.

cally accountable institutions.[40] Finally, he argues that reliance on constitutional history might well produce a "stagnant" constitution, with effects both bad (the original constitution was very conservative) and good (rights innovation and overenforcement of rights are hard to correct through ordinary politics).[41]

The linkage between reliance on constitutional history, including *The Federalist*, and abuse of judicial power can be analyzed from many directions. In addition to Professor Eskridge's focus upon history as discretion-confining, one might inquire whether history should have a different role in structural cases than in rights cases. Because of its pre-Bill of Rights vintage, *The Federalist* bears primarily on matters of structure and considerably less on questions of rights. Other historical sources, now much older than one generation but with considerably less stature than *The Federalist*, have to be relied upon in most rights cases. For textualists with a highly constrained sense of the appropriateness of consulting extratextual sources, both the age and prestige of the materials have a great deal of influence over the reliability and legitimacy of their use. Is there *any* document associated with the history of the Civil War Amendments that Justice Scalia would identify as a good guide to their original meaning; that is, in the terms he uses to characterize the relationship between the original Constitution and *The Federalist*?[42]

I want to examine the use of history in constitutional adjudication from a perspective that is associated with the scope of judicial discretion but is nevertheless entirely ignored by Professor Eskridge. There is a cavern of difference between the use of history to settle theretofore undecided questions, and its use to unsettle questions long decided in a particular way. The former practice looks to original constitutional meaning in the resolution of original questions. By contrast, the latter practice relies on constitutional history to alter understandings that have developed over time. *Printz v. United States*[43] seems to me to be a good example of history playing the role of question settler. By contrast, Justice Thomas's opinions in *United States v. Lopez*[44] and *U.S. Term Limits, Inc. v. Thornton*,[45] both of which suggested ways of viewing federalism questions in sharp tension with established twentieth-century understandings, represent the use of history as unsettler *extraordinaire*.[46]

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40 *See id.*

41 *See id.* at 1318.

42 *See* Scalia, *Common-Law Courts*, *supra* note 32, at 38 (*The Federalist* Papers "display how the text of the Constitution was originally understood"). *See also* John F. Manning, *Textualism and the Role of* The Federalist *in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337 (1998) (distinguishing between *The Federalist* and the history of congressional debates on statutes or constitutional amendments).

43 117 S. Ct. 2365 (1997). Justice Scalia's opinions in *Morrison v. Olson*, 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting) and *Mistretta v. United States*, 488 U.S. 361, 416-427 (1989) (Scalia, J., dissenting) are also good examples of judicial reliance on constitutional history to try to settle unresolved questions.

44 514 U.S. 549, 584-602 (1995) (Thomas, J., concurring).

45 514 U.S. 779, 845-926 (1995) (Thomas, J., dissenting).

46 Similarly, then Justice Rehnquist's dissent in *Wallace v. Jaffree*, 472 U.S. 38, 91-107 (1985) calls upon the drafting history of the Establishment Clause in the First Congress, in an attempt to unsettle the Virginia-based history and its doctrinal implications relied upon in *Everson v. Board of Education*, 330 U.S. 1 (1947).

This distinction was familiar to Publius as well. Madison harbored no illusions that the original Constitution could by its text settle all questions that would arise under it. In *The Federalist* No. 37, discussing the difficulty of marking the line between federal and state authority in the proposed Constitution, he wrote:

> All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.[47]

Later in life, Madison reflected more directly on the process of settlement of constitutional issues. As recounted by Professor Powell, Madison "consistently thought that . . . the exposition of the Constitution provided by actual governmental practice and judicial precedents, could 'settle its meaning and the intention of its authors.'"[48] Madison relied on precisely these grounds to justify his support (as President) for the Second Bank of the United States, after having earlier opposed (as House Member) the First Bank on constitutional grounds.[49] Perceiving the increasing tension over time between originalism and stability, Madison wrote in 1821 that he "had decided to delay publication of his notes of the [1787] Philadelphia convention until after his death 'or, at least, . . . till the Constitution should be well settled by practice, and till a knowledge of the controversial part of the proceedings of its framers could be turned to no improper account.'"[50]

As Professor Rosen's paper in this Symposium[51] amply demonstrates, the unsettling possibilities of a sharp return to constitutional history as a decision source have expanded considerably in the twentieth century. As both the Founding and Reconstruction periods have receded in time, increasing numbers of constitutional questions have been resolved by the weight of government practice and prior judicial opinion. Professor Eskridge's image of a stagnant, originalist constitution is turned topsy-turvy when constitutional originalism is relied upon to undo longstanding constitutional norms. When such a process is underway, the appropriate metaphor from nature is eruption rather than stagnation.[52]

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47 THE FEDERALIST No. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961).

48 Powell, *supra* note 15, at 939 & nn.279-81 (citing Madison's letters); *see also id.* at 940-41 & nn.291-92 (quoting assertion by Madison that his view was the "general expectation—the 'interpretive intention'—that prevailed at the time of the Constitution's framing and ratification"). For a contrary view concerning the prevailing interpretive philosophy among the Framers, see Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARY 77 (1988).

49 *See* Powell, *supra*, note 15, at 939-40. For a more elaborate account of Madison's constitutional views and their evolution over time, see JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 339-65 (1996).

50 *See* Powell, *supra*, note 15, at 936 (quoting Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, 1816-1828 at 228 (J.P. Lippincott & Co. 1865)).

51 *See* Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241 (1998).

52 The Madisonian view of the way the Constitution changes over time can be captured in

Of course, no one contends for a rigid view of stare decisis in constitutional law.[53] At the very least, decisions like *Plessy v. Ferguson*,[54] which put the Constitution behind manifest and severe injustice, must be subject to reexamination. Moreover, precedent and actual government practice may diverge, leaving hard questions for the Madisonian in search of the verdict of intervening history. Indeed, the precedent-practice split is at the heart of Justice Scalia's tradition-oriented jurisprudence, which tends to give dispositive weight to government practice rather than to extend judge-made principles to limit such practice.[55] This sort of divergence is particularly likely in federal constitutional matters involving state or local governments rather than the federal government; a single, central government is simpler to bring under judicial control than are multiple state and local governments occasionably answerable to a federal Supreme Court.

These complications in any theory of stare decisis aside, the narrower question raised by strong versions of originalism is whether judicial departure from settled constitutional norms can be justified *solely* by arguments from original understanding, whether manifested by text, documents contemporaneous with the text, or other sources. When such norms have been long established despite their apparent distance from the most credible version of the original understanding, and the settled path is neither demonstrably unjust nor grossly inefficient as compared to the perceived original one, it takes a radical to issue the call to return to the Constitution.

The work of Justice Thomas and of scholars like Professor Amar highlight this question starkly. Justice Thomas has suggested that we return as much as possible to the original conception of the power of Congress to regulate commerce among the states,[56] and to a reading of the federal Constitution that presumes states retain all power not surrendered "expressly or by necessary implication."[57] Justice Thomas's view of the Commerce Clause is explicitly designed to undermine a constitutional norm that has prevailed for

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yet a different geological image. *See* Barry Friedman & Scott Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (forthcoming 1998).

53 *See generally* Michael Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991) (reflecting on the role of precedent in constitutional decisionmaking and advocating that the Justices consider the "substantially countervailing considerations" for no longer preserving the values of their predecessors); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988) (considering whether stare decisis can provide an adequate ground for maintaining the existing constitutional structure without also allowing further departures from original understanding); James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent*, 66 B.U. L. REV. 345 (1986) (arguing that stare decisis has little place in constitutional adjudication and should be abandoned).

54 163 U.S. 537 (1896).

55 *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 631-32 (1992) (Scalia, J., dissenting) (dissenting from majority's holding that the Establishment Clause prohibits invocations and benedictions at public school graduation ceremonies because the majority's decision conflicts with the historic practices).

56 *See* United States v. Lopez, 514 U.S. 549, 584-602 (1995) (Thomas, J., concurring).

57 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 848 (1995) (Thomas, J., dissenting, joined by Rehnquist, C.J., O'Connor, J., and Scalia, J.).

more than fifty years,[58] and his default rule of federalism seems a generic bid in the same direction. Professor Amar has argued, on textual and historical grounds, that the Fourth Amendment's exclusionary rule should be replaced by damage actions, governed by strict liability, against law enforcement officers who violate the Amendment's reasonableness requirements.[59] His view, too, if implemented, would require the wholesale extirpation of remedial arrangements that state and federal courts have long employed.

How are we to evaluate calls for wholesale abandonment of current principle and practice, and corresponding demands for replacement with authentically originalist schemes? I consider myself a Madisonian in this regard; believing that the costs of returning to original principles typically dwarf the benefits, I am generally skeptical of such calls.

I can identify, however, one most dangerous way of evaluating them. A recent Symposium in the *Fordham Law Review*[60] highlighted fidelity as a theme around which to organize the great, methodological concerns of constitutional law. In the struggle between the radicals, who would return the law of the Constitution to original principles despite intervening developments to the contrary, and the Madisonians, who would treat patterns of precedent and practice as having resolved the meaning of the Constitution despite strong evidence of departure from original understanding, is one group to be given credit for fidelity to the Constitution? Are Justice Thomas and Professor Amar faithful restorers of the founding arrangements, or traitors to the evolving constitutional tradition? Are the Madisonians the true constitutionalists, or traitors to the text?

Having put these questions in the Fordham Symposium's terms, I want to renounce most strenuously the social vision and lines of battle such inquiries represent. Radical originalists like Professor Amar and Justice Thomas, and the Madisonians among us who may oppose them, are all engaged in a shared enterprise in which questions of fidelity are dangerously loaded. Fidelity and loyalty are empty notions without conceptions of infidelity and betrayal to set off against them. Those familiar with our Civil War, those who recall the seriousness of domestic ruptures in the United States associated with our prolonged involvement in Vietnam, and—to bring the matter closer to the present and taudry—those who have followed the sordid tales of the President and the women in his orbit all know the same recurring lesson. Whenever large questions of public concern are framed in terms of competing conceptions of fidelity—to the Union, to the Flag, to our fighting forces in the field, to the President, or to the Constitution—bitterness and recrimination are sure to follow.

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58 Justice Thomas would jettison the rule that Congress may regulate, pursuant to the Commerce Power, intrastate activity which in the aggregate exerts a "substantial economic effect" on interstate commerce. *Lopez*, 514 U.S. at 584. This test has been part of our constitutional law at least since *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

59 *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 812-14 (1994).

60 Symposium, *Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247 (1997).