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Textualism and the Role of *The Federalist* in Constitutional Adjudication

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In a characteristically thoughtful essay, William Eskridge asks whether textualists can reconcile their exclusion of legislative history from statutory cases with their often-extensive reliance on *The Federalist* in constitutional adjudication. He believes that textualists have yet to offer a persuasive justification for the distinction. But he tentatively identifies several factors that may justify their disparate treatment of these sources.¹ Among other reasons, Professor Eskridge maintains that once post-New Deal legislators assimilated the idea that judges use legislative history in interpretation, the production of legislative history may have devolved into a “self-conscious” mechanism “to influence judges and perhaps agency heads in their subsequent interpretation of statutes.”² No similar concern, he adds, could have characterized the writing of *The Federalist*.

This Comment will focus on Professor Eskridge’s strategic behavior hypothesis; although that hypothesis distinguishes legislative history from *The Federalist* in important respects, it ultimately does not justify textualist judges’ “authoritative”³ reliance on *The Federalist* in constitutional adjudica-

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¹ For example, because the Constitution is older, more open-ended, and more difficult to amend than statutes, Professor Eskridge argues that reliance on historical context may supply an important constraint on judicial discretion. He also relies on the economics of research, suggesting that “constitutional history ought to be cheaper to research than the ever-escalating legislative history of major statutory schemes.” William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1316-17, 1321 (1998).

² *Id.* at 1305.

³ For purposes of this Comment, I use the term “authoritative” in the sense often used by the Court when referring to legislative history as “authoritative” evidence of legislative intent. As I have noted elsewhere, the Court has at times treated certain legislative history as authoritative evidence of intent simply because of the identity of its source—a committee report or sponsor’s statement. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 681-84 (1997). In such cases, the Court attributes a committee’s or sponsor’s declarations of intent or understanding to Congress as a whole. See, e.g., *Steadman v. SEC*, 450 U.S. 91, 101 (1981) (holding that “[a]ny doubt as to the intent of Congress is removed by the House Report”); *J.W. Bateson Co. v. United States ex rel. Bd. of Trustees of the Nat’l Automatic Sprinkler Indus. Pension Fund*, 434 U.S. 586, 591 (1978) (noting that “the authoritative Committee Reports . . . squarely focus on the question” and “leave[] no room for doubt about Congress[’s] intent”). This conception of authoritativeness is consistent with Professor Eskridge’s understanding. See Eskridge, *supra* note 1, at 1312-13 (arguing that Justice Thomas’s dissent in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 (1995), treated Madison’s views on sovereignty as “authoritative” because Thomas “cited no one else beyond Madison and gave no reason to believe anyone else of the time accepted [his] view” on the point in issue). As discussed below, I

tion. The strategic behavior hypothesis is important, in general, because it offers a coherent alternative to the most conventional textualist critique of legislative history. Until recently, textualists generally have not emphasized that hypothesis. Instead, they commonly have rejected legislative history for reasons that appear equally pertinent to *The Federalist*: both sets of materials are unenacted, and neither necessarily reflects the actual intent, if any, of the relevant lawgivers. Yet those concerns ultimately have insufficient explanatory power, even with respect to statutory cases. Textualists often rely on extratextual sources such as treatises and common law cases to define statutory terms of art. Those sources are vulnerable to the same objections that textualists direct at legislative history, and that Professor Eskridge attributes to *The Federalist*. If textualists draw precise legal connotations from pre-enactment treatises or cases, their objection to legislative history *cannot* be that it is unenacted or that we have no way to determine which legislators, if any, actually read or agreed with it.

Rather, textualism, properly understood, implements a special application of the nondelegation doctrine.⁴ Under that view, textualism serves only to keep Congress from delegating to its own agents or members the *de facto* authority to “say what the law is” outside the process of bicameralism and presentment—a concern that is not present with other extratextual sources of meaning. Consistent with Professor Eskridge’s strategic behavior thesis, the nondelegation theory assumes that if the Court treats certain kinds of legislative history—committee reports and sponsors’ statements—as “authoritative” evidence of legislative intent, certain legislative actors—committees and sponsors—would secure effective authority to declare *Congress’s* intent in cases of statutory ambiguity. That result contradicts a crucial structural premise of the Constitution: lawmaking and law-elaboration must be distinct so that legislators will have a structural incentive not to enact vague or ambiguous laws. If Congress must rely on the executive and judiciary, rather than its own agents, to resolve statutory ambiguity, it cedes policymaking discretion to the other branches when it enacts such laws. In the absence of meaningful, direct judicial enforcement of the nondelegation doctrine, that structural constraint acts as an important deterrent against the legislature’s filling in the details of statutes without adhering to the constitutionally prescribed process of bicameralism and presentment.

This Comment argues that if nondelegation concerns supply the true basis for the textualist critique of modern legislative history, that critique is simply inapposite to *The Federalist*. Because the historical record offers no evidence that *The Federalist* was written or received with the understanding that Publius was declaring the intent of the framers or ratifiers, it could not have been the product of an implicit delegation to Publius to specify meaning

agree with Professor Eskridge’s position that the Justices sometimes treat *The Federalist* in a similar manner. See *infra* note 82 and accompanying text.

⁴ See *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., concurring in part and concurring in the judgment); Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 35 (Amy Gutmann ed., 1997).

outside the process prescribed by Article VII. At the same time, however, the strategic behavior or nondelegation thesis does not exhaust potential textualist objections to the use of *The Federalist* as authoritative evidence of constitutional meaning. Textualists subscribe to an objective theory of interpretation, pursuant to which interpreters ask what a reasonable lawmaker, familiar with the relevant context, would have believed that he or she was voting for. If a reasonable ratifier would not have understood *The Federalist* to be an authoritative expression of constitutional intent or meaning,⁵ a reasonable interpreter, under textualist assumptions, may not read it that way either. *The Federalist's* interpretive relevance, if any, must lie elsewhere.

This Comment thus argues that modern readers should approach *The Federalist* the same way a reasonable ratifier would have. A textualist judge must never simply conclude that "the Constitution means *X* because this or that number of *The Federalist* said that it means *X*." To be sure, *The Federalist* has significant interpretive value as a detailed, contemporaneous exposition of the Constitution by authors who were intimately familiar with its legal and political background. *The Federalist* is nonetheless a piece of political advocacy, whose contents may at times reflect the exigencies of debate, rather than a dispassionate account of constitutional meaning. Just as a reasonable ratifier would have, the principled textualist must also ask whether a given essay, examined in light of all the surrounding contextual evidence, offers a *persuasive* account of likely constitutional meaning. To borrow from another context, when a textualist judge relies on *The Federalist* in constitutional adjudication, he or she must give serious attention to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."⁶

Drawing upon arguments that I have developed more extensively elsewhere,⁷ Part I examines the textualist approach to statutory interpretation, with an eye toward establishing that textualism, properly understood, functions as a special application of the nondelegation doctrine. Starting from that conception of textualism, Part II explains why the precise textualist objection to modern legislative history is beside the point where *The Federalist* is concerned. After suggesting independent grounds for textualists to be skeptical of *The Federalist* as a dispositive source of constitutional intent or meaning, Part II outlines an alternative approach that treats *The Federalist* as

5 The terms "intent" and "meaning" often refer to the same concept, and will be used interchangeably in this Comment. See, e.g., Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 371 (1947) (noting that in one sense, "the metaphor [of intent] carries the more immediate concept of *meaning* and indicates the specific, particularized application which the statute was 'intended' to be given"); James M. Landis, *A "Note" on Statutory Interpretation*, 43 HARV. L. REV. 886, 888 (1930) (arguing that "intent" can be equated with "the more immediate concept of meaning—the assumption that one or more determinates are embraced within a given determinable").

6 *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (standard of review when an agency has interpreted a statute that does not delegate interpretive lawmaking authority).

7 See generally Manning, *supra* note 3.

a potential source of especially persuasive arguments about constitutional meaning.⁸

I. *The Textualist Critique of Legislative History in Statutory Interpretation*

Textualists often cite several related grounds for excluding legislative history from statutory interpretation: legislative history is unenacted; a multi-member legislature does not have any actual intent on matters that it has not clearly expressed; and even if a legislature possessed such an intent, judges cannot know whether a constitutionally sufficient proportion of legislators read or agreed with the legislative history.⁹ Professor Eskridge correctly notes that upon preliminary examination, *The Federalist* appears vulnerable to the same objections. As he puts it, the essays are "not the 'words' of the law, take[] positions on issues that the drafters of the Constitution did not think about, and [were] not read by either the drafters or most of the delegates ratifying the Constitution outside New York."¹⁰ Hence, judges have no basis for thinking that a constitutionally sufficient number of ratifiers assented to its intricate and often-lengthy essays, in whole or in part. Because such concerns, however, ultimately do not explain why textualist judges reject the authority of modern legislative history, they offer no independent reason for those judges to treat *The Federalist* and modern legislative history alike.

⁸ At the outset, a word of caution is appropriate. This Comment does not seek to advance a comprehensive account of *The Federalist's* proper role in constitutional adjudication. Rather, it seeks only to address the way textualists should use this source if they are to apply their core interpretive assumptions consistently.

⁹ See Manning, *supra* note 3, at 684-89, 697. Modern textualists are heirs of Max Radin and interpretive legal realism. See, e.g., William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 372 (1990); Bradley C. Karkkainen, "Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 HARV. J.L. & PUB. POL'Y 401, 415 n.50 (1994); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1307 n.50 (1990) (noting that the "social choice critique of legislative intent can be traced to the writings of legal realists, particularly Max Radin[]"). As Radin explained:

The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinate, are infinitesimally small. The chance is still smaller that a given determinate, the litigated issue, will not only be within the minds of all these men but will be certain to be selected by all of them as the present limit to which the determinate should be narrowed. . . . Even if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by the external utterances or behavior of these hundreds of men, and in almost every case the only external act is the extremely ambiguous one of acquiescence, which may be motivated in literally hundreds of ways, and which by itself indicates little or nothing of the pictures which the statutory descriptions imply.

Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 871-72 (1930).

¹⁰ Eskridge, *supra* note 1, at 1308.

A. Textualism and "Objective Intent"

To understand why textualists reject legislative history, it is necessary first to understand the textualist theory of intent. Although textualists deny the very existence of "actual" legislative intent,¹¹ they do not believe that the concept of "intent" is irrelevant to interpretation. Nor could they. Although textualists have not explicitly made the connection, their assumptions about legislative "intent" correspond significantly to those of modern positivism. For example, while acknowledging that *actual* legislative intent is an incoherent concept,¹² Joseph Raz emphasizes that "[i]t makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make."¹³ As he explains:

[T]o assume that the law made by legislation is not the one intended by the legislator, we must assume that he cannot predict what law he is making when the legislature passes any piece of legislation. But if so, why does it matter who the members of the legislature are, whether they are democratically elected or not, whether they represent different regions in the country, or classes in the population, whether they are adults or children, sane or insane? Since the law they will end by making does not represent their intentions, the fact that their intentions are foolish or wise, partial or impartial, self-serving or public-spirited, makes no difference.¹⁴

If *actual* legislative intent is meaningless, but *some* conception of legislative intent is essential to a system of government marked by legislative supremacy, then an alternative conception of intent is needed. Raz explains that the minimum condition for meaningful legislative supremacy is satisfied if legislators intend to enact a law that will be decoded according to prevailing interpretive conventions.¹⁵ Even if we cannot know the actual intent of the legislature, we can at least charge each legislator with the intention "to say what one would be normally understood as saying, given the circumstances in which one said it."¹⁶ Ascribing that sort of objectified intent to legislators offers an intelligible way to hold legislators accountable for the laws they have passed, whether or not they have *any* actual intent, singly or collectively, respecting its details.¹⁷

¹¹ See, e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994) (contending that intent "is elusive for a natural person, fictive for a collective body"); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 ("[T]he quest for the 'genuine' legislative intent is probably a wild-goose chase . . .").

¹² See Joseph Raz, *Intention in Interpretation*, in THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 264-65, 266 (Robert George ed., 1996).

¹³ *Id.* at 258.

¹⁴ *Id.* at 258-59.

¹⁵ See *id.* at 268-71.

¹⁶ See *id.* at 268.

¹⁷ See *id.* at 267 ("Legislators who have the minimal intention know that they are, if they carry the majority, making law, and they know how to find out what law they are making. All they have to do is establish the meaning of the text in front of them, when understood as it will be according to their legal culture assuming that it will be promulgated on that occasion."); Jeremy Waldron, *Legislators' Intention and Unintentional Legislation*, in LAW AND INTERPRETA-

Textualists subscribe to this theory of intent. In his Tanner Lectures two years ago, Justice Scalia was explicit: "We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."¹⁸ Judge Easterbrook, the other leading judicial textualist, has been equally clear: "We should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words."¹⁹ This approach suggests that judges should search for legislative intent or meaning in the common points of reference and assumptions that a reasonable speaker and interpreter would share, without regard to whether they reflect the speaker's *actual* intent.

B. Why Textualists Use Extratextual Materials

Under an objective theory of intent, certain extratextual sources may count as "authoritative" evidence of original understanding because a reasonable speaker, familiar with the interpretive conventions of the day, would have consulted those sources to determine the meaning of the text for which he or she was voting. This approach often leads textualists to consult extratextual sources—such as pre-enactment treatises, cases defining common law terms of art, and the like—that have many of the characteristics that Professor Eskridge attributes to both *The Federalist* and modern legislative history. These extratextual sources of statutory meaning are not enacted by Congress. If Congress has no "actual" intent, one can hardly conclude that Congress "intended" to use a phrase in its specialized, rather than its ordinary, sense. Nor can a judge reliably conclude that any member of Congress knew of, much less assented to, the cluster of technical connotations often reflected in a dusty treatise or obscure common law decision. Finally, it is unclear whether any such source reflects a wholly disinterested account of meaning; it is not unheard of for treatise writers and judges to shade their understanding of a complex doctrine to reflect their view of what the law should be.²⁰ Textualists, however, embrace such sources, presumably because a reasonable legislator would have consulted them to determine the meaning of the law for which he or she was voting.²¹

TION: ESSAYS IN LEGAL PHILOSOPHY 339 (Andrei Marmor ed., 1995) ("A legislator who votes for (or against) a provision like 'No vehicle shall be permitted to enter any state or municipal park' does so on the assumption that—to put it crudely—what the words mean to him is identical to what they will mean to those to whom they are addressed (in the event that the provision is passed). That such assumptions pervade the legislative process shows how much law depends on language, on the shared conventions that constitute a language, and on the reciprocity of intentions that conventions comprise.").

¹⁸ Scalia, *supra* note 4, at 17.

¹⁹ Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988).

²⁰ See *infra* notes 88-89 and accompanying text.

²¹ Professor Eskridge thus is not entirely accurate in suggesting that Justice Scalia's "many opinions interpreting older statutes show only occasional interest in how contemporaries would have understood the statutory terms." Eskridge, *supra* note 1, at 1305-06. As this section will suggest, Justice Scalia seeks that contemporary understanding, but uses sources other than the legislative history.

Consider *Moskal v. United States*.²² In relevant part, the statute at issue imposed criminal liability upon any person who, "with unlawful or fraudulent intent, transport[ed] in interstate or foreign commerce any *falsely made*, forged, altered, or counterfeited securities . . . knowing the same to have been falsely made, forged, altered, or counterfeited."²³ The defendant, a used car dealer, had rolled back the mileage on the odometers and on the titles of automobiles he sold.²⁴ Because an automobile title was concededly a "security" within the meaning of the statute, the Court had only to decide the narrow question whether a security containing misrepresentations of fact was "falsely made."²⁵ Interpreting that phrase in light of its "'ordinary meaning,'" Justice Marshall's opinion for the Court held that the titles were "'falsely made' in the sense that they [were] made to contain false, or incorrect, information."²⁶

Justice Scalia dissented, concluding that the "specialized legal meaning" of "falsely made" did not reach authentic documents containing false information.²⁷ Quoting Robert Jackson, he emphasized that when "Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken."²⁸ He found the term's specialized meaning in various sources: Blackstone's *Commentaries*; the "most prominent" 19th-century treatise on criminal law (Bishop's Criminal Law); numerous state forgery statutes that had used the term "falsely make" as a synonym for forgery; the decisions of several federal courts (including *dicta* in Supreme Court opinions); the decisions of eight state courts; and the "apparently unanimous" understanding of all major criminal law treatises published prior to the relevant enactment.²⁹ To be sure, the evidence of specialized meaning upon which Justice Scalia relied was overwhelming. Nonetheless, the fact remains that we do not know whether any particular legislator voted for the bill based on the conventional meaning of the operative phrase, on its specialized legal meaning, or, indeed, on any well-formed assumption about its meaning. If,

²² 498 U.S. 103 (1990).

²³ 18 U.S.C. § 2314 (1988) (emphasis added).

²⁴ See *Moskal*, 498 U.S. at 105.

²⁵ See *id.* at 107.

²⁶ *Id.* at 108-09 (quoting *Richards v. United States*, 369 U.S. 1, 9 (1961)).

²⁷ See *id.* at 121 (Scalia, J., dissenting).

²⁸ *Id.* (Scalia, J., dissenting) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

²⁹ See *id.* at 122-25 (Scalia, J., dissenting). Although Justice Scalia conceded that in a minority of jurisdictions, "forgery" itself included the concept of a genuine document containing false information, he noted that in those states the governing statutes did not employ the term "falsely made." See *id.* at 124-25 (Scalia, J., dissenting). In his dissent in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 714-36 (1995), Justice Scalia used a similar approach in construing the Endangered Species Act of 1973, which makes it unlawful to "take any [endangered] species." 16 U.S.C. § 1538(a)(1) (1994) (emphasis added). He interpreted the term "take" in light of the usage reflected in a 1896 Supreme Court decision, Blackstone's *Commentaries*, a statute implementing a migratory bird treaty, and a 1973 treaty governing the conservation of polar bears. See *Sweet Home*, 515 U.S. at 717 (Scalia, J., dissenting).

however, one applies the textualists' objective interpreter standard, a reasonable legislator knew or should have known that he or she was voting for a law that embodied a term of art, with all the connotations of the relevant art.

If textualists find it appropriate to credit a pre-enactment treatise or judicial precedent defining a term of art, but inappropriate to rely on a committee report or sponsor's statement,³⁰ their objection to legislative history cannot be that it is unreliable evidence of actual legislative intent. Of equal importance, their objection cannot rest on textualist assumptions about objective intent. If legislative history is published in advance of a vote, it is available as a common point of reference for legislators and interpreters. Be-

³⁰ A comparison of two attorney's fees cases sharply illustrates the textualists' disparate treatment of legislative history and other extratextual sources of context. *Pierce v. Underwood*, 487 U.S. 552 (1988), involved the Equal Access to Justice Act ("EAJA"), which authorizes an attorney's fee award against a federal agency unless its litigation position was "substantially justified." 28 U.S.C. § 2412(d)(1)(A) (1982). The claimant argued that "substantially justified" meant more than mere reasonableness, requiring "a strong showing" that the government's position was well founded. *Pierce*, 487 U.S. at 564. While acknowledging that the claimant's reading was linguistically possible, Justice Scalia's opinion for the Court held that the government's position was "substantially justified" if it was "justified to a degree that could satisfy a reasonable person." *Id.* at 565. In so holding, Justice Scalia noted that a related statute, the Administrative Procedure Act ("APA"), prescribed "substantial evidence" review of certain agency action. *Id.* at 564 (discussing 5 U.S.C. § 706(2)(E) (1982)). Quoting a common law decision handed down by the Supreme Court eight years before the APA's enactment, he reasoned that "substantial evidence" "does not mean a large or considerable amount of evidence, but rather 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 564-65 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). He assumed that "substantial" had a similar meaning in the EAJA, also a statute dealing with administrative agencies. *See id.* at 564-66. He treated that pre-APA case as authoritative even though he had no way of knowing whether those who passed the EAJA intended to give the word "substantial" the same meaning as in the APA or whether the APA's enactors intended to adopt the understanding of "substantial evidence" reflected in a single pre-APA decision. *Cf.* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 852-53 (1992) (similar analysis of Justice Scalia's opinion in *Pierce*).

Justice Scalia's reasoning in *Pierce* contrasts sharply with his concurring opinion in another attorney's fee case, *Blanchard v. Bergeron*, 489 U.S. 87 (1989). *Blanchard* involved the meaning of "a reasonable attorney's fee" as used in the Civil Rights Attorney's Fees Awards Act of 1976. *See id.* at 91. The Court held that the terms of a contingent fee agreement entered by the prevailing party did not set an upper limit on the "reasonable attorney's fee" recoverable by that party. *See id.* at 97. In so holding, the Court relied on an accompanying Senate Report's analysis parsing four lower court decisions that had previously construed an identically worded statute. *See id.* at 91-94. Although Justice Scalia agreed with the Court's ultimate interpretation of the statute, he wrote separately to criticize the Court's reliance on the cases cited in the committee reports:

I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote; [and] that very few of those who did read them set off for the nearest law library to check out what was actually said in the four cases at issue (or in the more than 50 other cases cited by the House and Senate Reports)

Id. at 98 (Scalia, J., concurring). Thus, Justice Scalia was willing in *Pierce* to rely on a pre-enactment case, without any indication that the legislators who enacted either the APA or the EAJA had read or relied on that case. In *Blanchard*, however, he refused to consider the case analysis reflected in a pre-enactment committee report, citing a lack of confidence that any legislator had read or relied on its contents.

cause the Court assumes that "Congress legislates with knowledge of our basic rules of statutory construction,"³¹ the Court's long-standing practice of relying on legislative history suggests that a reasonable legislator should treat legislative history as an authoritative source of meaning. To justify the distinction between legislative history and nonlegislative sources of statutory context, textualists therefore must look beyond concepts of intent, subjective or objective, to ground their objection to legislative history.

C. *The Constitutional Prohibition Against Legislative Self-Delegation*

For textualists, legislative history is uniquely problematic because it permits *legislators* to create their own context, and thus to influence the details of meaning outside the process of bicameralism and presentment. This problem results from two different realities. First, bicameralism and presentment form a central element of the constitutional structure, designed to check factional influence, promote caution and deliberation, and provoke public discussion.³² Second, because Congress cannot anticipate and express all the contingencies that arise in the life of a generally worded statute, many significant details of statutory meaning are inevitably determined outside that process.³³

In response to these conditions, the Court has drawn a clear constitutional line that gives Congress wide latitude to delegate law-elaboration authority to the coordinate branches, but not to its own agents or members. Even the strictest textualist will accept that Congress may delegate to administrative agencies substantial authority to flesh out the details of vague or ambiguous statutory terms.³⁴ At the same time, the Court has consistently

³¹ *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991).

³² See Manning, *supra* note 3, at 708-09; John F. Manning, *Constitutional Structure and Agency Interpretations of Judicial Deference to Agency Rules*, 96 COLUM. L. REV. 612, 649-50 (1996).

³³ By the late eighteenth century, the open texture of general rules was already widely understood. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES *61 (noting that "all cases cannot be foreseen or expressed" in a statute's "general decrees"); JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT ¶ 160, at 92 (Thomas P. Peardon ed., Bubbs-Merrill-Co, Inc. 1952) (1690) (explaining that "it is impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public"); THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961) ("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.").

³⁴ Justice Scalia, for example, has joined a number of opinions approving broad delegations to agencies. See, e.g., *Touby v. United States*, 500 U.S. 160 (1991) (regulation of controlled substances); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989) (taxes). He has explained his generally forgiving posture as follows:

Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree. . . . Since Congress is no less endowed with common sense than we are, and better equipped to inform itself of the "necessities" of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political[,]. . . it is small wonder that we have

forbidden Congress from reserving delegated authority for its own components, agents, or members.³⁵ Congress has the choice of "formulat[ing] the details" of statutory policy itself or "assign[ing] to the Executive Branch the responsibility" for doing so.³⁶ The rationale for this distinction is straightforward: If Congress enacts a vague or ambiguous statute that leaves the details of meaning to an executive agency, it cedes substantial control over policymaking to a constitutional rival.³⁷ If prevailing rules of interpretation enable Congress to enact vague statutes while subdelegating policy details to its own agents or members, an important structural incentive against delegation is compromised.³⁸

Increasingly, textualists have justified their rejection of legislative history on nondelegation principles. Once the Court made clear that it placed special emphasis on certain kinds of legislative history (committee reports and sponsors' statements) to resolve statutory ambiguity,³⁹ it signaled that certain key actors (committees and sponsors) could decisively influence the resolution of ambiguity by declaring their understanding of legislative intent.⁴⁰ As

almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law. *Mistretta v. United States*, 488 U.S. 361, 415-16 (1988) (Scalia, J., dissenting).

³⁵ See *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274-75 (1991) ("*MWAA*") (individual Members of Congress may not serve on tribunals exercising delegated power); *Bowsher v. Synar*, 478 U.S. 714, 726-27 (1986) (Congress may not reserve power to remove an officer exercising delegated lawmaking authority); *INS v. Chadha*, 462 U.S. 919, 944-59 (1983) (one-House legislative veto is unconstitutional).

³⁶ *MWAA*, 501 U.S. at 272.

³⁷ This premise reflected an important strain of pre-constitutional political theory underlying the separation of powers. Influential theorists such as Montesquieu and Blackstone had argued that the separation of lawmaking from law-elaboration would give the lawmaker an important incentive not to enact vague laws. See Manning, *supra* note 32, at 647-48 (discussing theories of Montesquieu and Blackstone).

³⁸ As Justice Stevens once wrote:

If Congress were free to delegate its policymaking authority to one of its components, or to one of its agents, it would be able to evade "the carefully crafted restraints spelled out in the Constitution." That danger—congressional action that evades constitutional restraints—is not present when Congress delegates lawmaking power to the executive or to an independent agency.

Bowsher, 478 U.S. at 755 (Stevens, J., concurring) (footnote omitted) (quoting *Chadha*, 462 U.S. at 959); see also Peter L. Strauss & Andrew R. Rutten, *The Game of Politics and Law: A Response to Eskridge and Ferejohn*, 8 J.L. ECON. & ORG. 205, 207 (1992) (arguing that the legislative veto would "encourage less precise and less frequent legislation by depriving Congress of motivation to solve its substantial communications problems at the time of enactment").

³⁹ See 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, 41-42; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 637-38 & nn.60-65 (1990).

⁴⁰ To be sure, the Court has never deemed committee reports or sponsors' statements controlling in the same sense as an agency's exercise of delegated lawmaking authority. See, e.g., *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (noting that "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute"). The fact remains, however, that, at times, the Court has treated a committee's or sponsor's mere declaration of intent as authoritative evidence of statutory meaning. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986) (Brennan, J., plurality opinion) ("We have repeatedly recognized that the authoritative source for legislative intent lies

prominent proponents of legislative history have long recognized, this judicial practice effectively permits the delegation of statutory details to key legislative agents or members.⁴¹ As Justice Scalia recently made clear, the resulting potential for strategic behavior underlies the textualist objection to legislative history:

[A]ssuming [that Congress] desire[s] to leave details to the committees, the very first provision of the Constitution forbids it. Article I, § 1 provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” It has always been assumed that these powers are nondelegable—or, as John Locke put it, that legislative power consists of the power “to make laws, . . . not to make legislators.” J. Locke, *Second Treatise of Government* 87 (R. Cox ed. 1982). No one would think that the House of Representatives could operate in such fashion that only the broad outlines of bills would be adopted by vote of the full House, leaving minor details to be written, adopted, and voted upon, only by the cognizant committees. Thus, if legislation consists of forming an “intent” rather than adopting a text (a proposition with which I do not agree), Congress cannot leave the formation of that intent to a small band of its number, but must, as the Constitution says, form an intent of the *Congress*.⁴²

Hence, to guard against the evasion of bicameralism and presentment, the prohibition against strategic behavior assumes that “[w]hatever Congress has

in the Committee Reports on the bill.”) (citing *Garcia v. United States*, 469 U.S. 70, 76 & n.3 (1984), and *Zuber v. Allen*, 396 U.S. 168, 186 (1969)); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) (“Although the statements of one legislator made during debate may not be controlling, Senator Bayh’s remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute’s construction.”) (citation omitted); *Commissioner of Internal Revenue v. Estate of Church*, 335 U.S. 632, 650-51 n.11 (1949) (noting the “well known fact” that legislative history is often “decisive” in statutory construction).

⁴¹ See, e.g., *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276-77 (1996) (Stevens, J., concurring) (“If a statute . . . has bipartisan support and has been carefully considered by committees familiar with the subject matter, Representatives and Senators may appropriately rely on the views of the committee members in casting their votes. In such circumstances, since most members are content to endorse the views of the responsible committees, the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress.”); *SEC v. Robert Collier & Co.*, 76 F.2d 939, 941 (2d Cir. 1935) (Hand, J.) (recognizing that “while members [of Congress] deliberately express their personal position upon the general purposes of the legislation, as to the details of its articulation they accept the work of the committees; so much they delegate because legislation could not go in any other way”); 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, 306 (1990) (“[T]o the extent that Congress performs its responsibilities through committees and delegates to staff the writing of its reports, it is Congress[s] evident intention that an explanation of what it has done be obtained from these extrinsic materials.”).

⁴² *Bank One Chicago, N.A.*, 516 U.S. at 280 (Scalia, J., concurring in part and concurring in the judgment); see also Scalia, *supra* note 4, at 35 (“The legislative power is the power to make laws, not the power to make legislators. It is nondelegable.”).

not *itself* prescribed is left to be resolved by the executive or (ultimately) the judicial branch.”⁴³

II. Implications for The Federalist

If textualists object to the use of legislative history on nondelegation grounds, their concerns surely have no application to *The Federalist*, which was published against a vastly different set of background expectations. There is no reason to believe that anyone in the 1780s would have taken *The Federalist* to be an authoritative or prescriptive expression of constitutional meaning. There is no ground for concern that its publication reflected a design, implicit or explicit, to subdelegate constitutional lawmaking authority to its authors. At the same time, if textualists focus on the way a “reasonable person” would have interpreted the Constitution in context, there is little reason to suppose that a reasonable ratifier would have understood *The Federalist* to be anything more than it was—a freelance piece of advocacy by intelligent, well-informed individuals on the scene. Although *The Federalist* does not run afoul of the textualist critique of legislative history, textualists must calibrate its interpretive authority to reflect the sense in which a reasonable person would have read it.

This Part will first distinguish *The Federalist* from legislative history. Next it will suggest independent concerns about the use of that document as interpretive authority. Finally, it will propose an alternative framework for treating *The Federalist* as a source of persuasion, rather than authoritative evidence of meaning.

A. Legislative History and The Federalist

As Professor Eskridge notes, *The Federalist* did not involve the same strategic concerns that characterize modern legislative history. “The currently reflexive and self-conscious nature of ‘making legislative history,’” he emphasizes, “was largely absent from *The Federalist*.”⁴⁴ Put another way, background interpretive assumptions of the eighteenth-century give no reason to believe that *The Federalist* was the product of a design by the ratifiers to specify meaning outside the processes prescribed for them by Article VII. This claim and its implications merit brief elaboration.

Whatever the precise state of eighteenth-century interpretive expectations,⁴⁵ it is far-fetched to assume that a reasonable ratifier would have

⁴³ Scalia, *supra* note 4, at 35.

⁴⁴ Eskridge, *supra* note 1, at 1319.

⁴⁵ There is some diversity of view on the founders’ interpretive expectations. Focusing on the ratification debates and *The Federalist*, Jefferson Powell maintains that the Federalists emphasized the objective intent of the document itself, and not the subjective intent of its framers. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 902-13 (1985); see also H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1534 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987), and arguing that founders would have sought “the meaning an interpreter was entitled to derive from the document using the common law’s techniques of construction,” which “might or might not be the meaning consciously intended by the document’s makers”). Charles Lofgren, in contrast, stresses that the constitutional debates of the early Congresses indicate

viewed *The Federalist* as an authoritative or prescriptive declaration of constitutional intent in the sense that a post-New Deal legislator might have regarded a committee report. Whatever canonical status *The Federalist* subsequently may have achieved,⁴⁶ it cannot seriously be maintained that the essays were written or received with the expectation that their anonymous author(s) somehow spoke as designated agents of the framers who proposed the Constitution, much less the ratifiers who alone had the authority to give it force.

Two considerations support this conclusion. First, in the remote event that the ratifiers had believed that the *framers'* subjective intent was decisive,⁴⁷ there is no reason to believe that they would have taken *The Federalist* as an unchallengeable expression of such intent. At the most basic level, because the essays were anonymous, the ratifiers would not have known that two of its authors had attended the Philadelphia Convention.⁴⁸ Even if the authors' identities had been widely known, ratifiers surely would have had no reason to believe that Madison, Hamilton, or Jay were authorized to speak for the Convention, rather than expressing their individual views.⁴⁹ In contrast, given the prevailing interpretative practice of the post-New Deal era (at least until the rise of textualism), a reasonable legislator would have been

some adherence to the idea that the expressed understanding of the ratifiers had relevance for constitutional meaning. See Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARY 77, 93-102 (1988). Jack Rakove more skeptically maintains that in the formative years of the 1790s, expressed understandings of the appropriate role, if any, of framers' and ratifiers' intent coalesced around the political controversies of the moment. Statesmen like Madison were prone to tailor their views on the probativeness of extraconstitutional sources to serve their immediate constitutional objectives. See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 342-64 (1996). For an excellent essay questioning the relevance of Rakove's claims, see Christopher L. Eisgruber, *Early Interpretations & Original Sins*, 95 MICH. L. REV. 2005, 2016-20 (1997) (reviewing JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996)).

⁴⁶ See *infra* note 69.

⁴⁷ See, e.g., Powell, *The Original Understanding of Original Intent*, *supra* note 45, at 902-13 (stating that the framers did not expect future interpreters to examine their intent when they drafted the Constitution). Madison, for example, expressed strong skepticism of framers' intent in the debate over the Jay Treaty in 1796:

[W]hatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.

5 ANNALS OF CONG. 776 (1796) (James Madison).

⁴⁸ Hamilton and Madison apparently "kept its authorship hidden from some of their closest friends, and promoted its influence very obliquely." ALBERT FURTWANGLER, *The Authority of Publius* 25-26 (1984).

⁴⁹ Indeed, one of the two main authors, Alexander Hamilton, was silent for the bulk of the Convention. See CLINTON ROSSITER, *ALEXANDER HAMILTON AND THE CONSTITUTION* 43 (1964). Jay was not even among the delegates sent to the Convention by New York. See MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 28-30 (1913) (discussing the New York delegation).

remiss to skip the committee reports if he or she wanted to consult what an administrator or judge would later count as authoritative evidence of legislative intent. The same cannot be said of a reasonable ratifier's attitude toward *The Federalist*.

Second, in the more likely event that at least some late eighteenth-century Americans considered ratifiers' intent relevant,⁵⁰ there is even less reason to regard *The Federalist* as the product of an implicit agency relationship between its authors and the thirteen independent ratifying conventions. However authoritative *The Federalist* became shortly after the ratification,⁵¹ its authors published their essays without any claim to the *de facto* authority enjoyed by modern committee reports and sponsors' statements. Because neither Publius nor the ratifiers would have regarded *The Federalist* as speaking for the latter, the publication of *The Federalist* cannot be understood as a mechanism to circumvent the constitutional processes prescribed by Article VII.

B. The Federalist as a Source of "Objective" Intent

Distinguishing *The Federalist* from modern legislative history does not end the inquiry into its interpretive authority. The distinction merely suggests that the textualists' objection, if any, must rest on other grounds. Basic textualist assumptions about interpretation should give them pause about using *The Federalist*. As discussed, textualists seek "the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."⁵² Given the genre of *The Federalist*, it is most unlikely that a reasonable ratifier would have viewed it as an authoritative source from which to gather constitutional meaning. Although the scope of this Comment does not permit an extended examination of the history of that form of publication, a brief discussion will help suggest some of its limitations.

The Federalist was almost surely understood for what it was—an anonymous piece of political advocacy. *The Federalist* was merely the most famous of a vast array of anonymous political writings published during the ratification campaign.⁵³ The genre was already familiar.⁵⁴ Political writing on both

⁵⁰ See Lofgren, *supra* note 45, at 85-102.

⁵¹ See *infra* note 69.

⁵² Scalia, *supra* note 4, at 17.

⁵³ See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring) ("The essays in the Federalist Papers, published under the pseudonym of 'Publius,' are only the most famous example of the outpouring of anonymous political writing that occurred during the ratification of the Constitution."); Richard B. Bernstein, *Charting the Bicentennial*, 87 COLUM. L. REV. 1565, 1575 (1987) (criticizing modern compilations for their "implicit assumption that *The Federalist* is the only pro-Constitution polemic worthy of study"); Charles Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 582 (1995) (emphasizing "the dozens, if not hundreds, of writers who debated the Constitution along with 'Publius'"); FURTWANGLER, *supra* note 48, at 20 ("Elsewhere these writings were eclipsed by the essays of local authors.").

⁵⁴ See, e.g., *Talley v. California*, 362 U.S. 60, 65 (1960) (describing pre-revolutionary tradition of anonymous publications); *McIntyre*, 514 U.S. at 361-63 (Thomas, J., concurring in the

sides played a significant role in the campaign for ratification in New York, *The Federalist's* primary venue of publication:

Initially, [New York newspapers] were filled with essays and published speeches from other states, including, on the Federalist side, ones by "An American Citizen," "A Countryman," "Landholder," James Wilson, and John Sullivan and, on the Antifederalist side, "Centinel," "An Old Whig," "Cincinnatus," Elbridge Gerry, George Mason, and Richard Henry Lee. From the middle of October 1787 to the conclusion of the New York ratification convention in July 1788, the newspapers ran essays, speeches, satire, letters, poems, fillers, and convention debates. Extended essays that were produced in New York included, for the Federalists, ones by "Caesar" and "Publius," while the Antifederalists responded with "Cato," "Brutus," and the "Federal Farmer."⁵⁵

Since provincial times, such publications in New York had been bound up in a complex and factious political life.⁵⁶ The ratification controversy mirrored the state's Byzantine politics, which involved sharp divisions between the more populist Whigs led by Governor George Clinton and the more propertied nationalists clustered around Alexander Hamilton.⁵⁷ During the economic depression of the Confederation period, Governor Clinton had laid imposts on goods imported through New York for citizens of other states and had confiscated the property of loyalists, much to the alarm of propertied nationalists such as Hamilton.⁵⁸ *The Federalist's* emphasis on a government capable of preserving the social order and controlling popular impulses reflected one element, however important, of a decidedly political debate over ratification.⁵⁹

However revered it may have become in retrospect, *The Federalist* hardly would have been considered a neutral observer's detached exposition of constitutional meaning. To be sure, *The Federalist* had the capacity to

judgment) (noting that anonymity and the freedom of the press were intertwined in the early American mind).

⁵⁵ Cecil L. Eubanks, *New York: Federalism and the Political Economy of Union*, in *RATIFYING THE CONSTITUTION* 300, 310 (Michael Allen Gillespie & Michael Lienesch eds., 1989) (citations omitted).

⁵⁶ See, e.g., PATRICIA U. BONOMI, *A FACTIOUS PEOPLE: POLITICS AND SOCIETY IN COLONIAL NEW YORK* 120 (1971) ("[T]he New York press reflected a society periodically sundered by political factions. Those factions attempted, by the printed word and by every other means at their disposal, to justify their opposition and to expand the base of their popular support."). For discussions of New York politics in colonial and revolutionary times, see Eubanks, *supra* note 55, at 303 (arguing that revolutionary New York politics "consisted of conflicts between the northern middle-class Patriot counties and the southern Loyalist counties, between rural interests and commercial interests, and between those who advocated state sovereignty . . . and those who supported a stronger central government that would have direct and coercive power over individual citizens of all the states"); Eben Moglen, *Considering Zenger: Partisan Politics and the Legal Profession in Provincial New York*, 94 COLUM. L. REV. 1495, 1499 (1994) (arguing that the "labyrinthine and occasionally violent divisions in [provincial] New York were famous both to contemporary observers and later historians").

⁵⁷ See Eubanks, *supra* note 55, at 310.

⁵⁸ See *id.* at 305-06.

⁵⁹ See *id.* at 314-16.

achieve its explicit purpose—to persuade the ratifiers through the force of its own reasoning about the purpose and anticipated effects of particular constitutional provisions. But modern textualist judges must keep in mind that it was merely an exercise in political persuasion. It would, therefore, be far-fetched for textualists to conclude that a reasonable ratifier would have consulted *The Federalist*, as positivist theories would require, to “establish the meaning of the text in front of them, when understood as it will be according to their legal culture.”⁶⁰

To sharpen the point, reasonable ratifiers surely would have brought distinct expectations to their reading of *The Federalist* and, for example, an established eighteenth-century treatise such as Blackstone’s *Commentaries*.⁶¹ The Constitution draws upon many common law concepts (*ex post facto* laws, jury trials, etc.), and as Justice Frankfurter once wrote, “if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”⁶² Where the Court has acted on that assumption, as it often has,⁶³ it has frequently consulted Blackstone on the ground that the founders presumably would have done so themselves.⁶⁴ Judi-

⁶⁰ Raz, *supra* note 12, at 267 (emphasis added) (explaining the positivist theory of legislative intent in statutory cases).

⁶¹ The precise interpretive force of Blackstone’s *Commentaries* is a complex topic that lies beyond the scope of this Comment. Rather than addressing that issue exhaustively, this discussion merely seeks to point out some potentially clarifying distinctions between *The Federalist* and Blackstone.

⁶² Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

⁶³ For example, in *Ex Parte Grossman*, 267 U.S. 87 (1925) (Taft, C.J.), the Court emphasized:

The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. . . . [W]hen they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.

Id. at 108-09.

⁶⁴ See, e.g., *Washington v. Glucksberg*, 117 S. Ct. 2258, 2264 (1997) (arguing that Blackstone’s *Commentaries* “not only provided a definitive summary of the common law but was also a primary legal authority for 18th and 19th century American lawyers”); *United States v. Wood*, 299 U.S. 123, 138 (1936) (Hughes, C.J.) (“Undoubtedly, as we have frequently said, the framers of the Constitution were familiar with Blackstone’s *Commentaries*. Many copies of the work had been sold here and it was generally regarded as the most satisfactory exposition of the common law of England.”); *Schick v. United States*, 195 U.S. 65, 69 (1904) (“Blackstone’s *Commentaries* are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England; so that undoubtedly the framers of the Constitution were familiar with it.”); *Carpenter v. Pennsylvania*, 58 U.S. (17 How.) 456, 463 (1854) (“The debates in the federal convention upon the constitution show that the terms ‘ex post facto laws’ were understood in a restricted sense, relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning.”); see also *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 151 (1943) (Stone, C.J.) (noting that Blackstone’s *Commentaries* were “more read before the Revolution than any other law book”).

cial use of this source, it should be emphasized, requires careful discernment. In many respects, the Constitution departed from, rather than embraced, British governmental practice,⁶⁵ and Robert Cover has persuasively argued that St. George Tucker's 1803 edition of Blackstone reflected contemporary American dissatisfaction with some of the monarchical tendencies of the *Commentaries*.⁶⁶ Where those concerns do not apply, however, the Court has often used Blackstone as one source for determining the relevant common law background.⁶⁷ In contrast with *The Federalist*, which reasonable ratifiers

65 See, e.g., *Clinton v. Jones*, 117 S. Ct. 1636, 1646 n.24 (1997) (Blackstone's common-law assumption that "[t]he king . . . is not only incapable of doing wrong, but even of *thinking* wrong," was rejected at the birth of the Republic") (quoting 1 BLACKSTONE, *supra* note 33, at *246); *Near v. Minnesota*, 283 U.S. 697, 714 (1931) ("The criticism upon Blackstone's statement [about the common law status of prior restraints] has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of liberty guaranteed by state and federal Constitutions."); *Fleming v. Page*, 50 U.S. (9 How.) 603, 618 (1850) (Taney, C.J.) ("[W]hen [individual] rights are in question, we habitually refer to the English decisions, not only with respect, but in many cases as authoritative. But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question."). Thus, a modern Court first must ask whether the English practice as described by Blackstone contradicts the text and history of the Constitution. See, e.g., *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (plurality opinion) (noting that the principle of legislative supremacy described by Blackstone is modified by the premise that "the power of American legislative bodies . . . is subject to the overriding dictates of the Constitution and the obligations that it authorizes"); *Solorio v. United States*, 483 U.S. 435, 446 n.12 (1987) ("Although we do not doubt that Blackstone's views on military law were known to the Framers, we are not persuaded that their relevance is sufficiently compelling to overcome the unqualified language of Art. I, § 8, cl. 14.") (citation omitted).

66 Robert M. Cover, *Book Review*, 70 Colum. L. Rev. 1475 (1970) (reviewing ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA* (William Y. Birch & Abraham Small eds., Philadelphia 1969) (1803)). As Professor Cover noted:

Tucker . . . remained troubled not so much by the content of the *Commentaries* as a treatise, but by its jurisprudence and political philosophy. The American Revolution had, in large measure, been ideologically justified by the repudiation of two basic British tenets: first, the rejection of British views concerning the nature and locus of sovereignty; second, the rejection of the British Constitution as a near-perfect, or even a relatively good, embodiment of political philosophy.

Id. at 1477-78.

67 See, e.g., *Austin v. United States*, 509 U.S. 602, 611-12 (1993) (citing Blackstone's definition of various forms of common-law forfeiture at the time of the Eighth Amendment's ratification); *Medina v. California*, 505 U.S. 437, 446 (1992) (using Blackstone to establish that the rule against trying an incompetent criminal defendant "has deep roots in our common-law heritage"); *United States v. Williams*, 504 U.S. 36, 51 (1992) (relying in part on Blackstone to determine "prevailing [grand jury] practice in 18th-century England"); *Beavers v. Henkel*, 194 U.S. 73, 84 (1904) (relying on Blackstone's definition of the grand jury's function at common law); *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) (Marshall, C.J.) ("As [the pardon] power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules

read (if at all) for the arguments it made, such ratifiers presumably would have read Blackstone (if at all) to ascertain the established understanding of the common law concepts relevant to a proper understanding of the text for which they were voting. To that extent, a modern textualist judge might legitimately consult Blackstone for similar contextual purposes. Of course, such a judge would not be justified in treating Blackstone as an unassailable expression of the common law. For example, if other prominent eighteenth-century sources, including common law cases and competing treatises, suggest that Blackstone had a contested, mistaken, or anachronistic view of a given point of law, a modern judge must take these sources into account, just as a reasonable ratifier concerned with carefully ascertaining the common law presumably would have. An important consideration, however, is that Blackstone's *Commentaries* supply at least a starting point—a common point of reference—for constitutional lawmakers and originalist interpreters seeking the meaning of the legal terms of art used in the Constitution. Blackstone's *Commentaries* are helpful precisely because they comprise a potential source of “the popular understanding” of legal concepts current at the time of ratification.⁶⁸

As a piece of advocacy—and an anonymous one at that—*The Federalist* lacks similar usefulness as a window into the reasonable ratifier's likely understanding. Given the legendary status that its authors have acquired in modern times, this conclusion may strike the modern reader as surprising. Imagine, however, that Senator Humphrey had published a series of anonymous op-ed pieces in *The Washington Post* defending Title VII against the charge that it would require preferential hiring. Because the Court surely has no established practice of treating *Post* editorials as authoritative sources of legislative intent, a reasonable legislator would have had no reason to believe that judges would later use these op-ed pieces to determine the Act's meaning. However influential *The Post* might be within the beltway, no legislator would reasonably believe that its editorial page necessarily reflects the understood meaning of the laws upon which its contributors opine. Even if it later became known that Senator Humphrey, a sponsor of Title VII, had written analyses published by *The Post*, a textualist judge applying a reasonable interpreter standard would be unable to use them as authoritative evidence of Congress's objective intent. *The Federalist* should be understood in a similar spirit.

C. The Federalist As a Source of Persuasion

If one accepts the previous analysis, do textualists betray their own principles by consulting *The Federalist* in constitutional cases? Although one might attempt to justify the modern authority of *The Federalist* on the ground that its essays acquired a certain authoritativeness by tradition or prescrip-

prescribing the manner in which it is to be used by the person who would avail himself of it.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 168-69 (1803) (citing Blackstone for definition of mandamus); see also *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 107 (1993) (Scalia, J., concurring) (“That original and enduring American perception of the judicial role sprang not from the philosophy of Nietzsche but from the jurisprudence of Blackstone . . .”).

⁶⁸ *Schick*, 195 U.S. at 70.

tion,⁶⁹ it seems more relevant, for purposes of this Comment, to assess the appropriate textualist methodology from an originalist perspective, because the leading textualists typically subscribe to premises of originalism as well.⁷⁰ Viewing the question in that light, textualists should not treat *The Federalist* as an authoritative source of constitutional intent speaking for the framers or ratifiers at large. Given their conviction that genuine legislative intent is a chimera, and previously discussed concerns about *The Federalist's* apparently limited circulation, textualists surely would not assume that a constitutionally sufficient number of ratifiers were influenced by its arguments. But that hardly means that textualist judges must exclude *The Federalist* from their constitutional decision making. Focusing on the textualists' "reasonable person" standard, it becomes significant that textualist judges can seek a reasonable person's likely understanding of legal words in at least two ways. First, as discussed, textualist judges might reconstruct the meaning of a text by examining the sources that a reasonable lawmaker, applying the interpretive conventions of the day, would have used—the approach rejected in the previous section. Second, they might examine the way reasonable persons *actually* understood a text, giving such evidence particular force if those persons had special familiarity with the temper and events of the times that produced that text.⁷¹ The latter approach appears to supply a legitimate framework for textualists' invocation of *The Federalist*.

Consulting a skilled *interpreter's* understanding is a deeply-rooted interpretive tradition. The Court generally, and textualist Justices in particular,

⁶⁹ Indeed, there is evidence that *The Federalist* attained canonical status in the early days of the Republic. See James W. Ducayet, Note, *Publius and Federalism: On the Use and Abuse of The Federalist in Constitutional Interpretation*, 68 N.Y.U. L. REV. 821, 822 (1993). By 1825, Thomas Jefferson referred to it as "an authority to which appeal is habitually made by all, and rarely declined or denied by any as evidence of the general opinion of those who framed, and of those who accepted the Constitution of the United States, on questions as to its genuine meaning." THOMAS JEFFERSON, *From the Minutes of the Board of Visitors, University of Virginia, 1822-1825: Report to the President and Directors of the Literary Fund (Oct. 7, 1822)* in WRITINGS 479 (Merrill D. Peterson ed., 1984). Starting with Justice Chase's seriatim opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798), hundreds of majority and separate opinions of the Supreme Court have cited *The Federalist* for various purposes. See Buckner F. Melton, Jr. *The Supreme Court and The Federalist: A Citation List and Analysis, 1789-1996*, 85 KY. L. J. 243, 257-327 (1996-1997) (listing citations). Thus, as Clinton Rossiter once suggested, "[i]t would not be stretching the truth more than a few inches to say that *The Federalist* stands third only to the Declaration of Independence and the Constitution itself among the sacred writings of American political history." ROSSITER, *supra* note 49, at 52. Whatever its original status, some might argue that we should continue to consult *The Federalist* because it has become an important part of a long-standing constitutional culture that "continues to shape our existing political institutions." Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1803 (1997). The question whether the accumulated force of such tradition independently justifies treating *The Federalist* as an authoritative source of constitutional meaning is beyond the scope of this Comment.

⁷⁰ See, e.g., Frank H. Easterbrook, *Alternatives to Originalism?*, 19 HARV. J.L. & PUB. POL'Y 479, 486 (1996) ("Judicial review came from a theory of meaning that supposed the possibility of right answers—from an originalist theory rooted in text."); Scalia, *supra* note 4, at 37-47 (arguing in favor of a static, rather than evolving, understanding of the Constitution).

⁷¹ See Kent Greenawalt, *The Nature of Rules and the Meaning of Meaning*, 72 NOTRE DAME L. REV. 1449, 1451 (1997) (discussing the evidentiary value of interpreters' understandings).

often cite the nineteenth-century commentaries of St. George Tucker, Joseph Story, and James Kent,⁷² not because those sources could have informed the ratifiers' constitutional intent or understanding, but presumably because they reflect the considered analyses of intelligent observers far closer to the relevant events than we are today.⁷³ In addition, textualists subscribe to the Court's traditional practice of consulting the early Congresses' practical interpretations of the Constitution,⁷⁴ even though the interpretations could not possibly have informed a reasonable ratifier's understanding of the document. As Judge Easterbrook once explained, because "[a]lterations in the legal and cultural landscape may make [original] meaning hard to recover," an "interpretation adopted soon after the [law's] enactment may be the best evidence of the meaning the words carried in the legal profession at the time."⁷⁵ Or as the Court observed almost a century ago, the Nation's earliest statutes were "adopted at a time when the . . . framers of our Constitution were actively participating in public affairs, thus giving a practical construc-

⁷² See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 799 (1995) (citing Kent, Story, and Tucker); *Harmelin v. Michigan*, 501 U.S. 957, 982 (1991) (plurality opinion of Scalia, J.) (Kent and Story); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring in the judgment) (Kent, Story, and Tucker); *Kaiser Aluminum & Chem. Corp. v. Bongorno*, 494 U.S. 827, 855-56 (1990) (Scalia, J., concurring in the judgment) (Kent and Story); *Williams v. North Carolina*, 325 U.S. 226, 228 & n.3 (1945) (Kent and Story); *Surplus Trading Co. v. Cook*, 281 U.S. 647, 655 (1930) (Kent and Story); *Myers v. United States*, 272 U.S. 52, 149-50 (1926) (Taft, C.J.) (Kent and Story); *Pacific Ins. Co. v. Soule*, 74 U.S. 433, 445 (1868) (Kent, Story, and Tucker); see also JAMES KENT, COMMENTARIES ON AMERICAN LAW (1826); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION (1833); ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA (Dennis & Co. 1965) (1803).

⁷³ For example, in his concurring opinion in *New York Times v. Sullivan*, 376 U.S. 254 (1964) (Black, J., concurring), Justice Black cited St. George Tucker's position on the First Amendment. He assumed that Tucker's edition of Blackstone had relevant insights because Tucker had been a contemporary observer to the events surrounding the Constitution's adoption. See *id.* at 296 n.2 (Black, J., concurring) (noting that Tucker was "a distinguished Virginia jurist, took part in the Annapolis Convention of 1786, sat on both state and federal courts, and was widely known for his writings on judicial and constitutional subjects").

⁷⁴ See, e.g., *Printz v. United States*, 117 S. Ct. 2365, 2370 (1997) (Scalia, J.) (noting that "early congressional enactments provid[e] contemporaneous and weighty evidence of the Constitution's meaning") (citations and internal quotation marks omitted); *Lee v. Weissman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting) (emphasizing the importance of historical practice in determining the import of the Establishment Clause). For additional decisions relying on that technique, see *Myers*, 272 U.S. at 136, 174-76 (relying on contemporaneous practical interpretations of the Constitution); *The Laura*, 114 U.S. 411, 416 (1885) (same); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821) (same); and *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (same). Similarly, even when an administrative agency does not have delegated authority to issue controlling interpretations of a statute, the Court gives weight to its contemporaneous interpretation of a statute that it administers. See, e.g., *Davis v. United States*, 495 U.S. 472, 484 (1990) ("[W]e give an agency's interpretations and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use."); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933) (holding that an administrative practice "has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new").

⁷⁵ *Atchison, Topeka & Santa Fe Ry. v. Pena*, 44 F.3d 437, 445 (7th Cir. 1994) (Easterbrook, J., concurring).

tion to the Constitution which they had helped to establish.”⁷⁶ Indeed, even those early legislators who had not actively participated in the document’s framing or ratification “must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds.”⁷⁷ However adept a Justice may be at placing him- or herself into an eighteenth-century mind set, such efforts are scarcely a substitute for the real thing.

A similar rationale may justify consulting *The Federalist*.⁷⁸ *The Federalist* supplies a detailed *analysis* of the Constitution, written by eighteenth-century Americans who were steeped in the assumptions of contemporary law and politics, and who were intimately familiar with the arguments that dominated the debate over the Constitution. Far from being unadorned assertions of its authors’ private intent or understanding,⁷⁹ *The Federalist* typically consists of “sustained, systematic, and levelheaded” analyses by statesmen who played “a preeminent role . . . in the movement that led to the adoption of the Constitution.”⁸⁰ Their familiarity with the relevant contest surely transcends anything that modern Americans could hope to replicate, even if they had the luxury and capacity to immerse themselves in constitutional history

⁷⁶ *Knowlton v. Moore*, 178 U.S. 41, 56 (1900); *accord Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (“That act . . . was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning.”).

⁷⁷ *Knowlton*, 178 U.S. at 56.

⁷⁸ This is not to suggest that *The Federalist* should have the same interpretive weight as a contemporaneous legislative, executive, or judicial interpretation of the Constitution. Besides the evidentiary value of such interpretations, judicial reliance on long-standing practical interpretations of the Constitution partially reflects the impulse to treat the law as settled. When the Constitution is ambiguous, the Court has sometimes given ancient practice the status of precedent. For example, in rejecting a claim that it was unconstitutional for Congress to require the Justices to ride circuit, Chief Justice Marshall’s opinion for the Court in *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803), emphasized:

[I]t is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.

Id. at 309. That approach apparently rests, in part, on the premise that if all three branches share official responsibility for interpreting the Constitution, judges should be reluctant to disturb the other branches’ settled judgments about ambiguous texts. See *Schell’s Executor v. Fauche*, 138 U.S. 562, 572 (1891). Whatever one might think of that interpretive convention, it has no application to *The Federalist*, whose authors had no official authority to implement the text upon which they commented.

⁷⁹ Cf. *infra* notes 115-119 and accompanying text.

⁸⁰ Jack N. Rakove, *Early Uses of The Federalist*, in *SAVING THE REVOLUTION: The Federalist Papers and the American Founding* 234, 234 (Charles R. Kessler ed., 1987); see also FURTWANGLER, *supra* note 48, at 81 (noting that the essays were “thoughtful, well-informed, public answers to the large range of doubts that the new Constitution was raising”). Along similar lines, Chancellor Kent once wrote that *The Federalist* “is equally admirable in the depth of its wisdom, the comprehensiveness of its views, the sagacity of its reflections, and the fearlessness, patriotism, candour, simplicity, and elegance with which its truths are uttered and recommended.” JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 241 n.2 (1836).

in a way that no judge does. Its value lies in the fact that Madison, Hamilton, and Jay undertook to engage the issues in a serious way, casting important light on the way three highly knowledgeable eighteenth-century Americans who actively participated in the making of the Constitution understood the text in context.

Yet judges using these materials must exercise no small degree of caution. Because history is hard—particularly, it seems, for lawyers⁸¹—there is surely the temptation to equate the expressions of Publius with the understanding of the ratifiers, perhaps on the implicit assumption that Hamilton, Jay, and Madison were themselves reasonable ratifiers.⁸² Professor Eskridge correctly observes, however, that *The Federalist* must be understood in terms of its strategic objectives.⁸³ Alpheus Thomas Mason put it well when he said that, “in the struggle over ratification, strategic considerations drove the contestants on both sides to minimize and to exaggerate.”⁸⁴ As Mason elaborated:

To quiet the fears of opponents, advocates of ratification said things which, in later years, proved embarrassing to themselves and misleading to scholars. On the other hand, certain of the Constitution's enemies turned alarmist, portraying the proposed national charter in the most extreme terms. The strategy obscured positions on all sides and made the Constitution's meaning less than crystal clear.⁸⁵

Of course, as Professor Eskridge aptly observes, the room for strategic maneuvering might have been circumscribed by the need to make plausible arguments that could persuade the intended audience.⁸⁶ Within that range, however, the exposition of particular understandings or provisions might well reflect the shadings of political strategy.⁸⁷ If modern judges are interested in

⁸¹ See Flaherty, *supra* note 53, at 525 (arguing that “constitutional discourse is replete with historical assertions that are at best deeply problematic and at worst, howlers”).

⁸² See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 869 (1995) (Thomas, J., dissenting) (citing *The Federalist* No. 56 for the proposition that “[t]he inhabitation requirement [of Article I, § 2, cl. 2] was intended to produce a National Legislature whose Members, collectively, had a local knowledge of all the States”); *Missouri v. Jenkins*, 495 U.S. 33, 65 (1990) (Kennedy, J., concurring in the judgment) (“The description of the judicial power nowhere includes the word ‘tax’ or anything that resembles it. This reflects the Framers’ understanding that taxation was not a proper area for judicial involvement. ‘The judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever.’”) (quoting *THE FEDERALIST* No. 78, at 523 (Alexander Hamilton) (J. Cooke ed., 1961)); cf. *Loving v. United States*, 517 U.S. 748, 779 (1996) (Thomas, J., concurring in the judgment) (“Nor does the majority cite any historical evidence, whether from the constitutional debates, the Federalist Papers, or some other source, that demonstrates that the Framers sought to embrace, or at least actively considered, the English system of shared power over the military.”); Ducayet, *supra* note 69, at 842 (“[I]t is common to see *The Federalist* treated as a proxy or placeholder for the Framers themselves, or at least those privy to their ‘intent.’”).

⁸³ See Eskridge, *supra* note 1, at 1309.

⁸⁴ Alpheus T. Mason, *The Federalist—A Split Personality, in ORIGINS OF AMERICAN POLITICAL THOUGHT* 163, 168 (John P. Roche ed., 1967).

⁸⁵ *Id.*

⁸⁶ See Eskridge, *supra* note 1, at 1318.

⁸⁷ In this respect, the records of the Philadelphia Convention may differ somewhat from *The Federalist*. At the most basic level, those records lack authoritative status. The delegates to

the way skilled eighteenth-century Americans understood the Constitution, they must be conscious of the fact that *The Federalist* may not genuinely reflect such an understanding.

Nonetheless, that conclusion does not require textualist judges to apply an exclusionary rule. If it did, the same judges would be hard-pressed to rely on virtually any contemporaneous interpretations. The potential for strategic behavior is hardly unique to the authors of *The Federalist*. St. George Tucker was "a confirmed Jeffersonian, writing at the zenith of Jeffersonianism."⁸⁸ Joseph Story turned out to be an ardent nationalist.⁸⁹ And recent scholarship has suggested that members of the early Congresses may have had a far more nationalist tilt than the ratifiers,⁹⁰ casting doubt on the objectivity of their practical constructions of the Constitution.⁹¹

This concern, however, merely suggests that textualist judges should not take sources such as *The Federalist* at face value, treating them as *independently* probative evidence of constitutional meaning. Rather, textualists

the Convention overwhelmingly voted not to publish its Journals, choosing instead to deposit them with George Washington, "subject to the order of Congress, if ever formed under the Constitution." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 648 (Max Farrand ed., 1937). The Convention's deliberations, therefore, could not even have informed the ratifiers' views of the Constitution. And a number of constitutional scholars have concluded that the framers did not intend their secret deliberations to be an authoritative source of meaning for future interpreters. See, e.g., Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 725 (1988) ("[T]he Framers themselves did not intend that their secret deliberations at the constitutional convention would provide authoritative guidance . . ."); Powell, *The Original Understanding of Original Intent*, *supra* note 45, at 903-04. ("The framers shared the traditional common law view—so foreign to much hermeneutical thought in more recent years—that the import of the document they were framing would be determined by reference to the intrinsic meaning of its words or through the usual judicial process of case-by-case interpretation."); CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 793-94 (1928) (discussing the framers' attitudes). At the same time, as compared with *The Federalist*, the debates of the Convention may offer more reliable insights into the politics and attitudes of the times. Whereas *The Federalist* was self-consciously a piece of political advocacy, designed to sell a finished proposal to the ratifiers, the Convention's deliberations involved a nonpublic struggle to craft the most acceptable proposal for a new government. As such, they might provide useful insights into the political and intellectual principles that genuinely divided the leading statesmen of the era, as well as helpful assessments of the likely political acceptability of varying proposals. A full consideration of the interpretive force of the records of the Philadelphia Convention, however, is beyond the scope of this Comment.

⁸⁸ Cover, *supra* note 66, at 1475.

⁸⁹ See 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 419 (rev. ed. 1926) ("Jefferson's foreboding lest the new Judge should prove unsound on Republican political doctrines was justified; for within five years from the time of his appointment, Story had become an ardent supporter of the constitutional doctrines laid down by Chief Justice Marshall, and no Judge on the Court was more devoted to a liberal and Nationalistic interpretation of the Constitution and to the maintenance of National supremacy.").

⁹⁰ See THORNTON ANDERSON, *CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS* 174-83 (1993).

⁹¹ More idiosyncratic factors arguably played a role in the early statutes as well. See, e.g., Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 132 (1995) (contending that the Second Congress designed the first presidential succession act, in part, to avoid a factional dispute between Jefferson's and Hamilton's supporters over the relative rank of cabinet officers in the line of succession).

should heed the admonition that Chief Justice Marshall announced for the Court in *McCulloch v. Maryland*:⁹²

In the course of the argument, the *Federalist* has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to *great respect* in expounding the constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, *a right to judge of their correctness must be retained*; and to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed.⁹³

In other words, *The Federalist* is a brand of "originalism helper." As self-conscious advocacy, its arguments must be evaluated carefully on their merits. But with that caution, *The Federalist* may still offer judges a valuable resource for making sense of other evidence of meaning. Because it was written by intelligent, well-informed observers with an eye toward persuasion, one should hardly be surprised to find that it often is *persuasive* when considered in conjunction with the text, structure, and context of the Constitution. In short, textualist judges may legitimately consult *The Federalist* as an important contemporaneous exposition of the Constitution, but they should always consider, to borrow an apt phrase from another setting, "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."⁹⁴

For reasoning that largely exemplifies, but also to some degree neglects, this qualification, consider Justice Scalia's opinion for the Court in *Plaut v. Spendthrift Farms, Inc.*⁹⁵ In establishing that the constitutional structure prohibits legislative revision of final judgments, Justice Scalia cited historical evidence of strong and growing pre-1787 concerns about the exercise of state

⁹² 17 U.S. (4 Wheat.) 316 (1819).

⁹³ *Id.* at 433 (emphasis added).

⁹⁴ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (Jackson, J.) (establishing the standard of review when an agency has interpreted a statute that does not delegate interpretive lawmaking authority). Chief Justice Taft's opinion for the Court in *Myers v. United States*, 272 U.S. 52 (1926), suggests a similar, though not identical, basis for considering the decisions of the First Congress. Following an extensive analysis of early congressional debates on the President's removal power (the central issue in the case), Chief Justice Taft offered the following rationale for consulting that evidence:

We have devoted much space to this discussion and decision of the question of the Presidential power of removal in the First Congress, not because a Congressional conclusion on a constitutional issue is conclusive, but, first, because of our agreement with the reasons upon which it was avowedly based; second because this was the decision of the First Congress on a question of primary importance in the organization of the Government, made within two years after the Constitutional Convention and within a much shorter time after its ratification; and, third, because that Congress numbered among its leaders those who had been members of the Convention.

Id. at 136. Significantly, the first reason for the Court's reliance was its "agreement" with the arguments made by those most familiar with the relevant historical context. *See id.*

⁹⁵ 514 U.S. 211 (1995).

legislative control over judicial judgments, reflected in part in the famous reports of the Pennsylvania Council of Censors and its analogue in Vermont.⁹⁶ He also analyzed the apparent structural import of Article III itself.⁹⁷ Only then did he turn to *The Federalist*, which he used mainly to support his other historical and structural inferences.⁹⁸ Justice Scalia noted, for example, that *The Federalist* No. 48 cited the Pennsylvania Council of Censors' report to illustrate the danger of legislative encroachment upon the judiciary.⁹⁹ He also cited *The Federalist* No. 48 for its reference to Jefferson's *Notes on the State of Virginia*, a prominent publication condemning, *inter alia*, legislative encroachment on the judiciary under the constitution of that Commonwealth.¹⁰⁰ Consistent with these broader historical themes, Justice Scalia cited Hamilton's admonition from *The Federalist* that "'the general liberty of the people can never be endangered from any quarter: . . . so long as the judiciary remains truly distinct from both the legislative and executive.'" ¹⁰¹ Finally, to buttress his reliance on those sources, Justice Scalia cited post-ratification judicial decisions, state and federal, which in his view "confirm[ed] the understanding that [the separation of powers] forbade interference with the final judgments of courts."¹⁰²

Such reliance on *The Federalist* conforms to the standards outlined by John Marshall. In the passages discussed above, Justice Scalia used *The Federalist* because it offered a persuasive account of the other contemporaneous evidence identifying the problems at which the relevant constitutional struc-

⁹⁶ See *id.* at 219-25. Thus, Justice Scalia's opinion emphasized that the founders "lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression." *Id.* at 219. This problem took partial form in the common practice of state legislative revision of judicial judgments. See *id.* (citing, *inter alia*, M. CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 49-51 (1943); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 154-55 (1969); *Judicial Action by the Provincial Legislature of Massachusetts*, 15 HARV. L. REV. 208 (1902); 5 LAWS OF NEW HAMPSHIRE, INCLUDING PUBLIC AND PRIVATE ACTS, RESOLVES, VOTES, ETC., 1784-1792 (Metcalf ed., 1916)). Citing the historical work of Professor Corwin, Justice Scalia referred to a growing negative reaction to this practice in the years leading up to the Philadelphia Convention. See *id.* at 220 (citing EDWIN S. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 37 (1914)). Justice Scalia relied specifically on the 1784 report of the Pennsylvania Council of Censors and the 1786 report of its Vermont counterpart, both of which had prominently decried the legislative practice of vacating judicial judgments. See *id.* at 220-21.

⁹⁷ Justice Scalia observed that Article III embodied a "critical decision to establish a judicial department independent of the Legislative Branch by providing that 'the judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'" *Id.* at 221 (quoting U.S. CONST. art. III, § 1).

⁹⁸ See *id.*

⁹⁹ See *id.* at 221-22 (citing THE FEDERALIST NO. 48, at 333, 337 (James Madison) (Jacob Cooke ed., 1961)).

¹⁰⁰ See *id.* at 222 (citing THE FEDERALIST NO. 48, at 336 (James Madison) (Jacob Cooke ed., 1961)); see also THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (William Peden ed., 1954) (1787) (noting that the legislature had, "in many instances, decided rights which should have been left to judiciary controversy").

¹⁰¹ *Plaut*, 514 U.S. at 223 (quoting THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob Cooke ed., 1961)).

¹⁰² *Id.*

tures were directed. At its most persuasive, *The Federalist* supplied its own basis for verification, citing external historical events that supported its analysis (the history of the Pennsylvania Council of Censors and the publication of Jefferson's *Notes on the State of Virginia*). In other areas (Hamilton's observations about liberty), *The Federalist's* analysis of the Constitution seemed to explain the apparent structural import of the careful separation of the judicial power from the other governmental powers. Finally, Justice Scalia's opinion took pains to consult the relevant post-ratification practice, seeking confirmation that *The Federalist's* authors understood the Constitution in the same way as other contemporaries. *The Federalist* was not cited merely to show what Madison and Hamilton thought, but rather to show that their thinking proved a persuasive account of the circumstances that they purported to address.¹⁰³

In one respect, however, Justice Scalia's opinion in *Plaut* gave *The Federalist* a prominence that appears unwarranted. He cited Hamilton's essay in *The Federalist* No. 81 for the specific proposition that British and state constitutional theory authorized legislatures to "prescribe a new rule for future cases," but not to "reverse a determination once made."¹⁰⁴ Hamilton offered no independent verification of that precise claim, which goes a step beyond *The Federalist's* more general assertions about the felt imperative to separate legislative and judicial powers. Perhaps Hamilton's distinction finds support in the history of the times. The important point is that Hamilton's discussion in *The Federalist* reduces to an unverified assertion by an advocate in a political debate. Justice Scalia relied on that assertion without any visi-

¹⁰³ *Plaut* is not an isolated instance of this approach. For example, in his concurring opinion in *Missouri v. Jenkins*, 515 U.S. 70, 115-38 (1995), Justice Thomas concluded that federal courts lacked broad equitable powers. Although he cited *The Federalist* No. 78 for Hamilton's views on federal equity, he considered that essay only in the broader context of a long-standing common law debate concerning equity powers and the wider contentions of the Anti-Federalists and the Federalists. Justice Thomas then emphasized that "[i]n light of this historical evidence, it should come as no surprise that there is no early record of the exercise of broad remedial powers." *Id.* at 130. Citing *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212 (1818), he added that the American courts apparently "continued to follow English equity practice well after the Ratification." *Jenkins*, 515 U.S. at 131 (Thomas, J., concurring). At times, judges have cited *The Federalist* for the apparent common sense of its exegesis. Thus, in discussing the purpose of the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, in his opinion for the Court in *Edmond v. United States*, 117 S. Ct. 1573 (1997), Justice Scalia cited *The Federalist* No. 76 for the proposition that advice and consent was meant "to 'promote a judicious choice of [persons] for fulfilling the offices of the union.'" *Id.* at 1579 (quoting THE FEDERALIST No. 76, at 386-87 (Alexander Hamilton) (M. Beloff ed., 1987)). Justice Scalia further relied on *The Federalist* in concluding that the constitutional division of the appointment power between the President and the Senate "was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one." *Id.* (citing THE FEDERALIST No. 77, at 392 (Alexander Hamilton) (M. Beloff ed., 1987)). Although Justice Scalia offered little else in the way of surrounding historical context, *The Federalist* appears to reflect a highly persuasive account of the constitutional purposes apparent in the structure of the clause itself. Cf. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 875-76 (1930) ("[T]he purpose of many entities may be . . . something which is evident in the character of the thing itself . . .").

¹⁰⁴ *Plaut*, 514 U.S. at 222 (quoting THE FEDERALIST No. 81, at 545 (Alexander Hamilton) (Jacob Cooke ed., 1961)).

ble attempt to substantiate its accuracy. He did not exercise the judicial prerogative, emphasized by Marshall, "to judge of [its] correctness."¹⁰⁵

A more recent opinion suggests, however, that this apparent omission does not describe Justice Scalia's general attitude toward *The Federalist*. In fact, his opinion for the Court in *Printz v. United States*¹⁰⁶ indicates the opposite conclusion—that he consciously seeks to assign *The Federalist* only such weight as its analysis merits.¹⁰⁷ *Printz* held that the constitutional structure precludes Congress from "commandeering" state officials to execute federal law.¹⁰⁸ To be sure, Justice Scalia's majority opinion is replete with citations of *The Federalist*. Most of that analysis, however, is defensive, responding to numerous citations of *The Federalist* in the government's brief and Justice Souter's dissent.¹⁰⁹ Indeed, Justice Scalia's opinion affirmatively warns against overreliance on that source. In particular, he criticized Justice Souter's strong emphasis on Hamilton's nationalist remarks in *The Federalist* No. 27, noting that Hamilton's views had "no clear support in Madison's writings, or as far as we are aware, in text, history, or early commentary elsewhere."¹¹⁰ Justice Scalia went on to suggest that it was "most peculiar [for Justice Souter] to give the view expressed in that one piece, not clearly confirmed by any other writer, the determinative weight he does."¹¹¹ Justice Scalia observed that "it is widely recognized that 'The Federalist reads with a split personality' on matters of federalism."¹¹² Although Madison and Hamilton appeared to divide on the question of commandeering, Justice Scalia concluded that "it was Madison's—not Hamilton's—[view] that prevailed, not only at the Constitutional Convention and in popular sentiment, but in the subsequent struggle to fix the meaning of the Constitution by early congressional practice."¹¹³ Whether or not one agrees with the historical support invoked for this claim, the crucial point is that Justice Scalia recognized the theoretical illegitimacy of taking *The Federalist* at face value, rather than assessing its persuasiveness in light of other contextual evidence.¹¹⁴

105 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 433 (1819).

106 117 S. Ct. 2365 (1997).

107 *But see* Eskridge, *supra* note 1, at 1307 (arguing that Justice Scalia's opinion "affirmatively relied on *The Federalist*" to establish constitutional meaning).

108 *See Printz*, 117 S. Ct. at 2383.

109 *See id.* at 2372-75.

110 *Id.* at 2375.

111 *Id.* at 2375 n.9.

112 *Id.* (citation omitted).

113 *Id.* (citations omitted).

114 *The Federalist* may be informative not only for the arguments that it makes, but also for the facts that emerge incidentally from the arguments. For example, when Madison discussed the separation of powers in *The Federalist* No. 47, he compared the provisions of the thirteen state constitutions. *See THE FEDERALIST* No. 47, at 303-07 (James Madison) (Clinton Rossiter ed., 1961). That incidental fact supplies some support for the reasonable assumption that participants in the ratification debates naturally would have consulted state constitutions. *See Harmelin v. Michigan*, 501 U.S. 957, 977 (1991) (arguing that the "cruel and unusual" punishment clause of the Eighth Amendment does not track state constitutions having an explicit proportionality requirement). Because Madison's reference to the state constitutions was purely incidental to his affirmative argument, it is less susceptible to claims of shading for strategic advantage. This consideration, in turn, supports Professor Eskridge's contention that *The Feder-*

D. The Federalist and Modern Legislative History

If textualists can use *The Federalist* as a persuasive account of the relevant text, structure, and history, why should they not do the same with legislative history? I have argued elsewhere that they sometimes do,¹¹⁵ and will not rehearse that analysis here. In practice, however, the legislative history is less apt to have the same utility as *The Federalist*. As Professor Eskridge emphasizes, *The Federalist* was designed to persuade; once judges began treating legislative declarations of intent as authoritative evidence of meaning, a great deal of legislative history deteriorated into simple declarations that "we intend *X*" or that "provision *A* will have effect *Q*." A lengthy recitation of *The Federalist* is unnecessary to remind the reader of the intricacy and depth of its exegesis. More revealing is a sampling of quotes that come from the pages of modern legislative materials:

* [W]here a party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted. In any case the agency must decide "in accordance with the evidence." Where there is evidence pro and con, the agency must weigh it and decide in accordance with the preponderance.¹¹⁶

* The test of whether the Government position is substantially justified is essentially one of reasonableness in law and fact.¹¹⁷

* [T]he Committee intends that the mandatory sentence under the revised subsection 924(c) be served prior to the start of the sentence for the underlying or any other offense.¹¹⁸

* The [House] Committee carefully considered arguments that the new definition might expand the numbers of refugees eligible to come to the United States and force substantially greater refugee admissions than the country could absorb. However, merely because an individual or group of refugees comes within the definition will not guarantee resettlement in the United States.¹¹⁹

Many more examples of this sort could be cited, just as many examples of more thoughtful legislative history surely could. The point is that much of what passes as legislative history is not history at all; it is the simple assertion of understanding by a presumptively authoritative legislative actor. That kind of legislative history had substantial currency in the pre-textualist era.

alist may have semantic value insofar as it reveals the way informed eighteenth-century Americans used legal language. See Eskridge, *supra* note 1, at 1315.

¹¹⁵ See Manning, *supra* note 3, at 731-37.

¹¹⁶ H.R. REP. NO. 79-1980 (1946) (Judiciary Committee report pertaining to the Administrative Procedure Act); see *Steadman v. SEC*, 450 U.S. 91, 98-102 (1981) (treating House Report as "authoritative").

¹¹⁷ H.R. CONF. REP. NO. 96-1434 (1980) (explaining a provision derived from the Equal Access to Justice Act); see *Pierce v. Underwood*, 487 U.S. 552, 562-64 (1988) (discussing language used in the Equal Access to Justice Act).

¹¹⁸ S. REP. NO. 98-225 (1983) (discussing provisions of the Comprehensive Crime Control Act of 1983); see *United States v. Gonzales*, 520 U.S. 1, 6 (1997) (rejecting legislative history).

¹¹⁹ H.R. REP. NO. 96-608 (1979) (report accompanying the Refugee Act of 1980); see *INS v. Cardoza-Fonseca*, 480 U.S. 421, 444-45 (1987) (crediting legislative history).

One may say many things about such history. In contrast with *The Federalist*, one thing that cannot be said is that it has the power to persuade.

Conclusion

Conceived as a form of persuasion, does *The Federalist* add anything to constitutional adjudication?¹²⁰ If the other evidence points in a particular direction, why should we care that Madison, Hamilton, or Jay wrote a persuasive essay telling us what we could have figured out ourselves? We should care precisely because constitutional interpretation thrusts modern judges into the difficult, if not impossible, task of reconstructing the import of a document more than two centuries old. To the extent that it is possible for twentieth-century judges to make sense of the implications of the text, structure, and history of so old a document, the task, done well, is not a simple one. (Should there be any doubt, Chief Justice Taft's opinion in *Myers v. United States*¹²¹ offers a vivid reminder of how difficult the task of historical reconstruction can be.) If a judge believes that a particular conclusion is suggested by available textual and historical materials, it adds value to know that Madison, Hamilton, or Jay drew the same conclusion from the same materials, viewing them from a perspective much closer to the relevant events than we are today. Using these materials requires discipline, for the temptation to rely uncritically on Publius's understanding cannot be denied. In the end, interpretive rules can do little more than try to capture the mood that a properly oriented judge brings to the task. Given the historical status of *The Federalist*, a textualist judge must treat Publius's essays as a source of highly informed persuasion—to be evaluated critically on the merits, but never to be taken at face value as an authoritative exposition of constitutional meaning.

¹²⁰ Cf. Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 565 (1985) ("Of course, the 'weight' assigned to any advocate's position is presumably dependent upon the 'thoroughness evident in its consideration' and the 'validity of its reasoning.' Deference in this sense is no more than 'courteous regard.'") (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)).

¹²¹ 272 U.S. 52 (1926).