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TEXT OVER INTENT AND THE DEMISE OF LEGISLATIVE HISTORY

The following is the transcript of a 2016 Federalist Society panel entitled: Text Over Intent and the Demise of Legislative History. The panel originally occurred on November 17, 2016 during the National Lawyers Convention in Washington, D.C. The participants were: Prof. Thomas W. Merrill, Charles Evans Hughes Professor of Law, Columbia Law School; Prof. Michael S. Paulsen, Distinguished University Chair and Professor, University of St. Thomas School of Law; Prof. Saikrishna Prakash, James Monroe Distinguished Professor of Law, University of Virginia School of Law; Prof. Lawrence B. Solum, Carmack Waterhouse Professor of Law, Georgetown University Law Center. The moderator was the Hon. Sandra Segal Ikuta, Judge on the U.S. Court of Appeals, Ninth Circuit.

[RECORDING BEGINS]

Hon. Judge Sandra Ikuta: My name is Sandra Ikuta, I am a judge from the Ninth Circuit.[1] It's a great pleasure and honor to be here. Justice Scalia once famously compared legislative history to entering a crowded cocktail party and looking for one's friends, and although it's a little bit early to get started on the cocktails, I'm very happy to see many old and new friends here gathering to consider the legacy of a celebrated jurist and a brilliant legal mind.[2] So, first, please join me in welcoming our panel. I have Professor Tom Merrill of the Charles Evans Hughes Professor of Law at Columbia Law School; Professor Sai Prakash, James Monroe Distinguished Professor of Law at the University of Virginia; Professor Lawrence Solum, Carmack Waterhouse Professor of Law at Georgetown University Law Center; and Professor Michael Stokes Paulsen, Distinguished University Chair and Professor at the University of St. Thomas.

As the title of our panel indicates, we're here to discuss text over intent and the demise of legislative history. Let me start with a simple question, what difference does it make whether judges interpret statutes based on their actual text and original public meaning or whether judges take into

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[1] UNITED STATES COURTS FOR THE NINTH CIRCUIT, THE JUDGES OF THIS COURT IN ORDER OF SENIORITY, https://www.ca9.uscourts.gov/content/view_seniority_list.php?pk_id=0000000035 (last visited Sept. 25, 2017).

[2] Michael C. Dorf, *A Unanimous Supreme Court Decision on the Foreign Sovereign Immunities Act Highlights Ongoing Divisions Over Legislative History* (Jun. 2, 2010), http://supreme.findlaw.com/legal-commentary/a-unanimous-supreme-court-decision-on-the-foreign-sovereign-immunities-act-highlights-ongoing-divisions-over-legislative-history.html.

account the law's legislative history? According to Justice Scalia, it makes an enormous difference. Nothing less than the rule of law itself is at stake. For Justice Scalia the text of the statute is the law. He said, "We are bound not by the intent of our legislators, but by the laws which they enacted."[3] By contrast, if judges are free to pursue unexpressed legislative intents, there's an enormous risk that judges will pursue their own objectives and desires. As Justice Scalia the psychologist put it, "When you are told to decide, not on the basis of what the legislature said, but on the basis of what it meant, . . . [surely], your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person should have meant; and that [of course] will [] bring you to the conclusion that the law means what you think it ought to mean."[4] For that reason Justice Scalia argued, "The . . . [use] of legislative history . . . has facilitated rather than deterred decisions that are based upon the courts' policy preferences, rather than neutral principles of law"[5] and this, Justice Scalia concluded, is directly contrary to our great American ideal, a government of law, not of man.[6] And Justice Scalia was not discouraged from this view by the fact that Congress sometimes writes terrible laws. Justice Scalia explained, "If you're dealing with an inane statute you are duty bound to produce an inane result"[7] or as he put it even more succinctly, "garbage in, garbage out."[8]

There is no doubt that Justice Scalia's fierce adherence to this view had a tremendous impact on the Supreme Court. As you heard from Justice Alito, before Justice Scalia took his seat at the court in 1986, justices adhered to what has recently been called, the Holy Trinity approach where the court thought that compelling legislative history was more important than the text of the statute itself.[9] But Justice Scalia's presence on the court would change this longstanding practice. Just a few months after Justice Scalia was elevated from the DC Circuit, he wrote a concurrence in a case called INS v. Cardoza-Fonseca that would ultimately change the framework for statutory interpretation.[10] Justice Scalia agreed with the majority's conclusion that the Ninth Circuit had gotten it right in its interpretation of an immigration statute, but he refused to join the majority's opinion because that included the concept that compelling legislative history could overrule the plain statutory

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[3] Associate Justice Antonin Scalia, *Judicial Adherence to the Text of our Basic Law: A Theory of Constitutional Interpretation*, THE PROGRESSIVE CONSERVATIVE, U.S.A. (Sept. 5, 2003), http://www.proconservative.net/PCVol5Is225ScaliaTheoryConstlInterpretation.shtml.

[4] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 18 (Amy Gutmann ed., 1997).

[5] *Id.* at 35.

[6] Enrique Schaerer, *Justice Scalia and the Proper Role of a Judge*, THE FEDERALIST SOCIETY (Mar. 7, 2016), https://www.fed-soc.org/blog/detail/justice-scalia-and-the-proper-role-of-a-judge.

[7] *Q&A with Justice Antonin Scalia*, C-SPAN (Jul. 9, 2012), https://www.c-span.org/video/transcript/?id=8335.

[8] *Id.*

[9] Holy Trinity v. United States, 143 U.S. 457 (1892).

[10] INS v. Cardoza-Fonseca, 480 U.S. 421, 452–55 (1987) (Scalia, J., concurring).

language.[11] He said, "[w]here the language of the law is clear, we're not free to replace it with unenacted legislative intent"[12] and this pattern that Justice Scalia started in Cardoza-Fonseca continued the rest of his career. I don't mean agreeing with the Ninth Circuit of course. According to a law review article published in 1990, during the period from 1987, when he first wrote Cardoza-Fonseca, until 1989, just two years later, Justice Scalia wrote 14 separate opinions criticizing the majority for relying on legislative history.[13] The 1999 law review article noted that Justice Scalia's approach, if adopted, would represent a significant change in the way the court writes its statutory interpretation decisions and probably even the way the court conceptualizes its role in interpreting statutes.[14] The subsequent decades, of course, showed that Justice Scalia's strong point of view and powerful pen changed statutory interpretation and the course of Court history. As a law review article complained in 2008, in the face of Justice Scalia's fervent opposition to legislative history, liberal justices since 1986 have opted not to rely on that resources for certain types of cases.[15] Terming this the 'Scalia Effect', the article speculated it resulted from Justices drafting their opinion strategically in order to get Justice Scalia to join.[16]

I can actually give some anecdotal support for this speculation. I clerked for Justice O'Connor in OT '89 and I certainly remember flooding the Supreme Court librarians with requests for old dictionaries so we could look up the words and old statutes all to try to get Justice Scalia to join our boss's opinions. The shift from legislative history to statutory texts is one of Justice Scalia's legacies. Just recently Justice Kagan pronounced, "I think we're all textualists now in a way that was just not remotely true when Justice Scalia joined the bench."[17] But is that really true? Didn't the court just hold that the Federal Government is a State in King v. Burwell?[18] For those of you who don't remember, that was the case holding that tax credits were available for health insurance purchased from Federally established exchanges, even though the act itself only allowed tax credit for exchanges established by the State.[19] As Justice Scalia pointed out in his dissent, "[w]ho would ever have dreamt that 'Exchange established by the State' means 'Exchange established by the State or the Federal Government'?"[20] And there are other signs that

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[11] *Id.* at 452.
[12] *Id.* at 453.
[13] William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 651 n.116 (1989).
[14] *Id.* at 624.
[15] James J. Brudney and Corey Distlear, *Liberal Justices' Reliance on Legislative History*, 29 BERKLEY J. EMPL. & LAB. L. 117, 121–22 (2008).
[16] *Id.*
[17] Justice Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, HARVARD LAW TODAY (Nov. 17, 2015, 8:28–39), https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/.
[18] 135 S. Ct. 2480, 2496 (2015).
[19] *Id.*
[20] *Id.* at 2497.

so-called purposive reasoning, another term for legislative intent, is making a comeback. The court recently held that a fish is not a tangible object in Yates v. United States.[21] Similarly, the court held in Bond v. United States that a toxic chemical isn't a toxic chemical when it's used to poison your former best friend who's now your husband's mistress.[22] So, the question arises, will Justice Scalia's textualist legacy endure as the court changes? Or, to paraphrase Justice Scalia's famous remarks in a different context, must we say, "like some ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, [legislative history] stalks our [Supreme Court] jurisprudence once again."[23] I look forward to discussing these questions and more with our panel. We'll start with Professor Merrill and we'll have time for questions at the end.

Prof. Thomas Merrill: Thank you very much Judge. It is indeed a privilege and honor to speak at this convention honoring the memory and the legacy of Justice Scalia. I'm a great admirer of him and certainly he influenced my thinking on a variety of topics. Sometimes I agreed, sometimes I disagreed. But always, he was tremendously important in the development of my own thinking about public law. I think Justice Scalia's great legacy, others have alluded to this already, is that he was very concerned with questions of legal method. Most judges are eclectic, or maybe a better word is ecumenical, when it comes to questions of legal method. They will use one method in one case, a different method in another case. It's a question of what fits or perhaps what produces the correct result. Justice Scalia obviously cared about results. But he also cared very passionately about method, and frequently his concerns about method would override his conception of what one would imagine he thought the best result would be in a case. We've already heard about his influence on constitutional interpretation and administrative law. The focus of this panel is on statutory interpretation, and so, that's what I will focus on as well.

Both Justice Alito in his marvelous speech and Judge Ikuta briefly alluded to the fact that Justice Scalia did not believe in purposive interpretation. I will dissent from that; I don't think that's quite right. Justice Scalia said repeatedly that in interpreting the words of the text, that you always have to take into account the context in which the words are used. Of course, he disagreed with the search for subjective intentions of the legislature. But in saying that you have to consider the context basically what he meant was that you have to take into account the obvious purpose for which the words are being used. As he wrote in his Tanner Lecture at Princeton,

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[21] Yates v. United States, 135 S. Ct. 1074, 1088–89 (2015).
[22] Bond v. United States, 134 S. Ct. 2077, 2093 (2014).
[23] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993).

which I think is his most carefully prepared and thought-out exposition of his views about interpretation, "[t]he import of the language depends upon its context, which includes the occasion for, and hence the evident purpose of, its utterance."[24] So, I think you have to regard Justice Scalia as, ultimately, not disagreeing with purposive interpretation, but rather, disagreeing with the use of legislative history in trying to ascertain the meaning of the text of a statute.

Here, I think his legacy was profound. Others have already described how, before Justice Scalia joined the Court, it was routine to read opinions that rummaged through all sorts of legislative history, looking for little snippets here and there that might support some kind of conception of what Congress intended when it passed the statute. Justice Scalia, as the Judge described, engaged in relentless criticism of this approach, and in so doing, had an enormous effect on reducing the use of legislative history. I think today its appearance in Supreme Court opinions is very episodic, and when it does appear, it appears in an apologetic sort of way. For one person to have had this kind of transformative effect on jurisprudence is truly astonishing.

Justice Scalia gave three reasons, as I see it, for discarding legislative history. I think one of them is unsound; I think one of them is sound but perhaps subject to qualification; and I think the third reason is compelling.

The unsound reason is that using legislative history is unconstitutional. The argument, which is mentioned by Judge Easterbrook in the video tribute, is that snippets of legislative history don't go through the Article I process of bicameral approval and presentment to the President. Hence, it's wrong to elevate these snippets of legislative history to the status of law; they are not law; they are just chatter in the legislative process. This is all true. But, typically, at least when used correctly, legislative history is not used to override the text. I would freely agree that if the text is clear and legislative history is being used to determine a meaning different from what the text says, that's impermissible and that violates the Constitution. But typically, legislative history is used to resolve genuine ambiguities in statutes, situations where it's unclear what the statute means. So, the proper use of legislative history is as an interpretive aid, not something to override Congress's legislated actions. If you think about it, courts use all sorts of interpretive aides to interpret statutes, none of which have gone through the bicameral and presentment process. Justice Scalia, of course, was very fond of dictionaries, but dictionaries have not been approved by Congress and have not been signed by the President. Neither have the canons of interpretation, nor the common law meanings of words, the rules of grammar and so on and so forth. All these things are freely used by Judges, including Justice Scalia,

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[24] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 144 (Amy Gutman ed., 1997).

to interpret ambiguous statutes; none of them have been approved by Congress and the President, and yet no one thinks that they're unconstitutional. So, used properly, as a way of interpreting ambiguous statutes, I don't think that using legislative history violates the Constitution.

The second argument is that legislative history is subject to manipulation. I think this is a sound argument. It's probably the case that Madison's notes or Farrand's collation of the debates on the Constitution are not prone to manipulation, because those deliberations were generated at a time when no one thought that courts would use legislative history or constitutional history in interpreting a text. But, starting in the 1940's, as a recent article by Nick Parrillo at Yale documents in great detail, New Deal lawyers engaged in a process of deliberately inserting commentary in the legislative history of the statutes they were drafting for Congress.[25] Then, they would appear in court and cite this legislative history to tell courts what the statutes meant.[26] This was a form of blatant manipulation, and it was present at the origins of the use of legislative history in statutory interpretation. Justice Scalia rightly perceived that this was a serious concern. Unlike dictionaries, unlike canons of interpretation, unlike rules of grammar, and so forth, over which Congress has no say, subunits of Congress or members of Congress obviously are in control of snippets of legislative history. So, once courts start taking legislative history into account, there's a great temptation to manipulate by planting little dialogues or colloquies, which are designed to influence the courts in the way in which they interpret statutes. So, I think this is a valid point.

To be sure, the point is perhaps overstated or subject to rebuttal. One question is, what is the ratio of sincere attempts by legislators to persuade their colleagues to vote for a particular measure versus blatant attempts to manipulate courts? If the ratio of sincerity to manipulation were very high, then throwing out all legislative history would be a kind of dramatic prophylactic rule that might be questionable. We don't know what the ratio is; no one has been able to do a study of this. So, it's a matter of some speculation as to how much deceit is going on, as opposed to how much sincere advocacy in the legislative process. Another objection to the manipulation concern is that judges are not idiots. If the adversarial process works as it's supposed to work, if one side is trying to manipulate the court by citing legislative history, the other side can point out that the other side is trying to manipulate the court, that the legislative history is really just potted legislative history and that it is not a sincere attempt by one member of Congress to persuade the others. So, there's sort of a built in way in which this manipulation can, perhaps, be dampened down. I don't think that's

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[25] Nick R. Parrillo, *Article: Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 380 (Nov. 2013).
[26] *Id.*

completely reassuring. I think, in the 1970's, we got into a situation where one side was trying to manipulate and the other side was trying to counter-manipulate, and so maybe the manipulation concern is a serious one. Again, it's an empirical question as to whether or not it's worthwhile to throw out all legislative history based on the concern that some successful manipulation is going on. The problem is, we don't know how much.

There is a third argument against legislative history. Justice Scalia did not advance this as often as he talked about the constitutional problem or the manipulation problem, but I think it is both a sound and compelling argument for doing away with legislative history. This is, to put the argument in one word, drawing on legislative history is "inefficient." As Justice Scalia put it in his Tanner lectures, "[t]he most immediate and tangible change the abandonment of legislative history would effect is this: Judges, lawyers, and clients will be saved an enormous amount of time and expense."[27] Now, again, this is an empirical proposition, it's impossible to prove it, and I don't know of any studies that have been able to measure how much time, effort, and money is spent doing legislative history versus the payoff from this effort. But I strongly suspect that Justice Scalia was absolutely right about this. He supported this proposition in his lecture by pointing to his time as Head of the Office of Legal Counsel during the Ford Administration. Back then, of course, legislative history was used in practically every case. So, the Office of Legal Counsel had to devote enormous amounts of time to doing legislative history research. Justice Scalia reported that most of this time was utterly wasted. The attorneys would dredge through the legislative history, and they wouldn't find anything on point. His explanation, which I think is entirely plausible and persuasive, is that if a statute is ambiguous, it's unlikely that the legislature or the staff spotted the ambiguity. Ambiguity usually emerges over the course of time in the implementation of statutes. And so, looking for a resolution of the ambiguity in legislative history is likely to come up with a null set. This happens over and over again, and consequently a lot of time and energy is wasted. I think Justice Scalia was correct about that.

I would go further and say that recent trends in the legislative process have probably made this problem considerably worse. When Justice Scalia was in the Office of Legal Counsel, Congress followed something called "orderly process," in which a bill would be submitted to one house of Congress. There would be hearings; then, there would be a markup by the committee; then, there would be a committee report; then, the other chamber would follow suit; and then, there would be a conference report. So, at least you knew where to look in order to find relevant legislative history that might shed light on the meaning of particular terms. This process has largely broken down. What we now see are mega statutes that are patched together in a

[27] Scalia, *supra* note 4, at 36.

highly idiosyncratic fashion, none of which replicate any other. This makes it extremely hard to do any kind of coherent legislative history research. Let me give you one example: the Dodd Frank Financial Reform Act of 2010,[28] which I had the misfortune of doing a little legislative history research about recently in writing an article, was preceded, according to a compilation of documents put together by the librarian of the Federal Reserve Board, by a conference report. But the conference report says nothing about most of the provisions that were ultimately adopted by the conference. There is no House report and no Senate report. The Act was stitched together from 48 separate bills, the final version of which emerged after 19 different steps in the legislative process. The Senate held 39 relevant hearings, and the House held 55. Anyone who is condemned to trying to figure out the legislative history of particular provisions of the Dodd Frank Act by plowing through this material is to be pitied. Maybe orderly process will return to Congress; maybe this is a transitory situation; but somehow, I doubt it. Part of the problem, of course, is gridlock and the fact that Congress is narrowly divided, and therefore, things like the Senate filibuster make it very difficult to get laws passed through orderly process. But part of it is also the increase in Congressional staff, the devotion of time to fundraising, and the role of social media and interest groups. These and other factors mean that the old fashioned orderly process that Congress followed is unlikely to be resurrected anytime soon. So, I think changes in the way Congress operates that have happened since the time when Justice Scalia was condemned to research legislative history in the Office of Legal Counsel have made it even more compelling that this is simply a gigantic waste of time. I think we should applaud Justice Scalia for trying to put legislative history out of its misery, and hopefully, the little mice that are coming back in these oral arguments, that Justice Alito referred to, will not be allowed to propagate and multiply. Thank you.

Hon. Judge Sandra Ikuta: So, we heard that legislative history use is inefficient. We'll next hear from Professor Prakash.

Prof. Saikrishna Prakash: I want to begin by thanking the Federalist Society for inviting me here today. I'm quite proud to be part of the panel. I deeply admire Justice Scalia, and I was greatly saddened by his passing. For some of my views on the Justice, I encourage you to look at a recent essay posted on the Harvard Law Review forum site entitled A Fool for the Original Constitution.[29] It's a full-throated defense of the Justice's jurisprudence. I

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[28] DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, 12 U.S.C. 5301 (2010).

[29] *See generally*, Saikrishna Bangalore Prakash, *Response: A Fool For The Original Consitution*, 130 HARV. L. REV. 24 (Nov. 2016).

should add that the Justice was always kind and gracious to me, but today, I'm going to follow his admonition to say something that the audience disagrees with: I'm going to defend the use of legislative history. I think if the Justice were here today, I'm sure he would skewer me in various ways, and I would squirm in various ways, but I think the case ought to be made for the use of legislative history.

Let me begin with some data derived from the work of others, particularly David Law and Mr. Zerring. The high mark use of legislative history occurred in 1970's, well before Justice Scalia got on the court; and it's been declining pretty much ever since. So, it started to decline even before Justice Scalia got on the court, and of course, it continued while he was on the court, but it has not declined to zero. Some Justices, quite sympathetic to Justice Scalia's approach, have used legislative history, including Justice Thomas, Justice Alito, and Chief Justice Roberts. The latter two actually defended the use of legislative history before the Senate, despite the withering criticism that Justice Scalia made against its use prior to their ascension to the Supreme Court. So, if we define demise as the utter disuse of legislative history, we're just not there yet, at least not at the Supreme Court. I think it's more accurate to say that there has just been a decline in its use, and I think that's been salutary. I think that Justices were using legislative history too often, perhaps to confirm their preexisting biases or conclusions. I think this amplifies Judge Leventhal's observation that the use of legislative history is "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends."[30] Justices and Judges were looking at legislative history to confirm their conclusions they had already reached for other reasons. Yet, oddly enough, I think Justice Scalia's criticisms made the use of legislative history more defensible because he demanded that everyone make a more compelling case for their use.

Like some others, I think legislative history can provide context of the sort that Professor Merrill mentioned in his remarks. I fully understand that there will be some statements made up just so that they can influence interpretation later on, and if we believe that systematically occurs, that's a good reason for not consulting the legislative history that is results are generated in that sort of environment. It's not necessarily a reason not to consult legislative history generated in prior environments where there was no systematic attempt to cook the record, so to speak, and I think we can see this in other areas. Let's move beyond statutes and consider treaties in the Constitution. With respect to the Constitution, Justice Scalia engaged in a form of legislative history. He cited the Federalist Papers quite frequently. In his famous case called Printz v. United States, involving whether or not the Federal government could commandeer chief State law enforcement officers

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[30] Conroy v. Aniskoff, 507 U.S. 511, 519 (1993).

to enforce Federal law, he cites the Federalist Papers both to make his point that Congress cannot do that and to reject Justice Souter's argument that commandeering of executive branch officials was permissible.[31]

Now, of course, again, the Federalist Papers were never voted on by the Philadelphia Convention; they were never voted on by the various State conventions; in fact, they were written after votes in several state conventions. So, the same sort of argument that's been made, sort of the constitutional argument that's been made against legislative history, could be made against the Federalist Papers, and Farrand's records, and Elliot's Debates, and all the pamphlets and other writings that were written at the time of the Constitution's creation and ratification, and I think the same sort of argument can be made with respect to treaties. In Medellin v. Texas, a case involving whether or not President Bush could order the state courts to reopen certain criminal cases, Chief Justice Roberts declared that the court traditionally looked at text, background, negotiating and drafting history, and post-enactment history, namely, the practices of the nation-states.[32] Justice Scalia wholly joined this opinion, and in fact, this made sense because Chief Justice Roberts was quoting and citing a Justice Scalia opinion on the use of history in the context of treaty making, and that case is Zicherman v. Korean Airlines.[33] In Zicherman, Scalia says, "[w]e have traditionally considered as aids to its interpretation negotiating and drafting history[34] (travaux préparatoirs) and the postratification understanding of the contracting parties."[35] I think that suggests that Justice Scalia did not have a categorical aversion to the use of legislative history, certainly not with respect to Constitutions, certainly not with respect to treaties.

So, I view legislative history as a traditional tool of statutory interpretation, no more problematic as a theoretical matter than the use of dictionaries or the use of nonobvious canons of construction that the courts cite to from time to time. As Tom just pointed out, none of those dictionaries and none of those canons of construction have gone through bicameralism and presentment, but the courts use them, nonetheless, and I think we kind of assume that Congress understands that the courts will use them. I agree, Congress could, tomorrow, require the Court to use conference reports, etc., to understand and so, the real question is just what is the default rule. Is the default rule that you can't use them or that you can? I think Justice Scalia did us a service by ensuring that we weren't as reliant on legislative history as we were in the past. Citizens of Overton Park v. Volpewas, sort of a crazy opinion because it starts with legislative history, but I don't think it makes

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[31] Printz v. United States, 521 U.S. 898, 910–24 (1997).
[32] Medellin v. Texas, 552 U.S. 491, 523 (2008).
[33] Zicherman v. Korean Air Lines Co., 516 U.S. 217 (1996).
[34] *Id.* at 226.
[35] *Id.*

sense to say you should not use it at all, I want to end by saying, that sometimes, it is okay to look out over a room and find your friends.[36] Thank you.

Hon. Judge Sandra Ikuta: We've heard from Professor Prakash that it's okay to use legislative history because all of our friends are using it. Now we'll hear from Professor Solum.

Prof. Lawrence Solum: Thank you so much. It's a great pleasure to be here and an honor to be here on this occasion. So, my remarks will follow directly from ideas expressed by Tom Merrill and Sai Prakash, and I want to investigate the relationship between Justice Scalia's views about constitutional interpretation and his views about statutory interpretation. Professor Randy Barnett, who's in the room, and I, together, run an originalism boot camp each summer, and Justice Scalia was gracious enough to meet with our students at every session of the boot camp, as long as he was alive. We asked him why he said, in the famous OLC speech, that we should move away from original intent and to original public meaning, and he said, "Well, I had a theory of statutory interpretation, and so, I was aware of the problems with trying to divine intent." So, it just seemed obvious to Justice Scalia that our approach to constitutional interpretation should mesh with our approach to statutory interpretation. In preparation for this event, I slogged through the 101 opinions that appear on Westlaw when you search for the phrase, "legislative history" and the author "Judge Antonin Scalia." So, one or two things become apparent: Justice Scalia almost never relied on legislative history in a decisive way in an opinion that he wrote, although he did use legislative history in several opinions; and over and over and over again Justice Scalia said that the use of legislative history is inappropriate in this case because there is no ambiguity to resolve, and that's very important. Now, that brings us to an interesting question, which is, what do we mean by ambiguity? I think there is a hidden ambiguity in the word "ambiguity" that reflects an ambiguity in the way we use legislative history. So, I'm going to come back to that question, but before I do, I want to back up.

There are, I think, three rival approaches to statutory interpretation. One of these we sometimes call "purposivism," but that label is somewhat misleading. It is associated with Professors Hart and Wexler and the legal process school of the 1950's. It refers to objective purposes, or if we are a little less charitable, judge-manufactured purposes. When judges manufacture purposes, they try to give them a pedigree, and they might use legislative history for that purpose. That is not a legitimate use of legislative

[36] *See generally*, Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

history according to Justice Scalia, because that kind of purposivism is just legislation from the bench. Intentionalism... sometimes people talk about intent and purpose as if they were one thing, but intentionalism is the view that we are searching for the will of Congress, for what it was Congress wanted the statute to do in operation, and again, Justice Scalia would say that legislative history is inappropriate if used for those purposes. Why in that way? Why? Because the will of Congress was not enacted as a statute. Congress enacted – went through the formalities of bicameralism and presentment – only the text of the statute, not the mental states of the congressmen.

The third approach, of course, is textualism, plain meaning textualism being Justice Scalia's preferred theory. Does intent have a role to play in a textualist approach to statutory interpretation? I think that it does, and it can, but that role is very, very limited. Sometimes statutes use words that are ambiguous, in the sense that it's a word that can have more than one meaning; famous example, the bank of a river or the bank that serves as a financial institution. It's rare that you can't resolve ambiguity from the text of the statute itself because usually the text itself provides sufficient context to resolve ambiguities, but if it does not, then there is nothing inconsistent with textualism in looking to other evidence of context in order to resolve the ambiguity. That use of legislative history, although very rare, is fully consistent with Justice Scalia's view of textualist statutory interpretation. One last point, and it goes to Professor Merrill's discussion of the argument that some use of legislative history is unconstitutional, unlike Professor Merrill, I think that this argument is correct and that it provides the primary basis for the exclusion of a certain way of using legislative history. So, in order to get at this, we need to distinguish between the activity of discovering the meaning of the constitutional text, the constitutional interpretation, and the activity of putting the constitutional text into legal-effect construction. It is a very old distinction, going back to 1839. Its chief proponent in the 20th century was Corb, and it was used by Wigmore, Williston, and others in the first half of the 20th century. Legislative history can play a role in interpretation if that role is limited to determining the meaning of the text, but when legislative history is used as a tool for adopting constructions that alter or override the meaning of the text, then it is illegitimate; then it is judicial legislation; then it is privileging something that was not enacted as law over that which was enacted as law, and it is perfectly reasonable to view that as unconstitutional. Thank you.

Hon. Judge Sandra Ikuta: Okay. So, we've heard that it's okay to use legislative history to resolve real ambiguities, though I must say that judges are famous for plucking ambiguity out of the jaws of clarity. Now we'll hear

from Professor Michael Stokes Paulsen.

Prof. Michael Stokes Paulsen: Thank you. I'm greatly honored to be part of this conference in honor of Justice Scalia. I've given my own tribute to him in an online article on The Public Discourse website called, "The Supreme Greatness of Justice Antonin Scalia."[37] I really think he is one of the five greatest, most important Supreme Court Justices in the history of the nation and clearly the most influential and important Justice of the past 50 years.

I, unlike some others, didn't know Justice Scalia personally. I shared two meals with him 30 years apart, in group settings. The first was when he was a judge, or one out of a panel of judges, in my final moot court round when I was a law student, and I had the great good fortune of sitting next to him at dinner and bathing in his wit, grace, charm, and intellect. Then, the next meal I shared with him was just last fall, about a year ago, when Justice Scalia came to Minneapolis and spoke at my law school, University of St. Thomas, and just regaled us with stories.

In between those 32 years, I knew Justice Scalia the way most of us came to know him, through his writings. I became something of a "devotee," or even a "disciple," of the great Justice Antonin Scalia. So, I'm greatly honored to be here.

What I'm going to do in my 10 minutes is try to back up and give you two broader propositions that I think are consistent with Justice Scalia's jurisprudence. The title I've given my remarks is "The Interpretive Force of Constitutional and Statutory Legislative History." What is the legitimate force of legislative history in both constitutional and statutory interpretation?

My first point is that the tasks of constitutional interpretation and statutory interpretation are almost exactly the same – or very, very closely analogous – and as a corollary, the rightful role of resort to legislative history is, or should be, almost exactly parallel in constitutional and statutory interpretation. There are some refinements and there are differences, but basically, it is the same enterprise, and Scalia thought it was the same enterprise. The second point I'll make is that there is a simple and logical reason—it's been alluded to already—why certain types of constitutional legislative history (early evidence of the original meaning) tends to be more reliable and useful than statutory legislative history today, and why it is, therefore, more appropriate to resort to constitutional legislative history than modern statutory legislative history. This is a position that I think also is fully consistent with what Justice Scalia said. It explains why you can rely on your

[37] Michael Stokes Paulsen, *The Supreme Greatness of Justice Antonin Scalia*, PUBLIC DISCOURSE, (Mar. 15, 2016), http://www.thepublicdiscourse.com/2016/03/16612/.

well-worn, tattered, much marked-up copy of the Federalist Papers in a way that you cannot rely on committee reports put into bills in the 1970's.

So, my first proposition—that the tasks of constitutional interpretation and statutory interpretation are essentially the same—requires me to back up just a little bit and give you a broad theory of everything you need to know about textual interpretation of written, authoritative legal texts!

I think that any theory of constitutional interpretation and statutory interpretation ultimately addresses four big questions.

The first question is just what is the meaning of the text, the objective original meaning of the words. What does the text actually say? What is its meaning? How do we interpret it? How do we exegete the meaning of a text?

The second question is whether we should follow this text, which in some ways is a pre-political decision as to whether or not you will treat a legal text as authoritative. That's the question of what you do with the meaning of the text once you have found it.

The third big question is, what do we do when meaning, so to speak, runs out. How do you resolve questions of ambiguity or uncertainty? What are your default rules when the text doesn't answer something? Larry Solum is the best in terms of explicating the theory behind that.

Then, the fourth big question in any theory of interpretation is, who interprets the text? Who interprets a provision or clause in the constitutional context? What is the scope of judicial authority? Do the other branches of government have an independent power of independent constitutional interpretation?

In statutory interpretation, again, all of these are closely analogous. Now, the question of the use of constitutional legislative history and legislative-legislative history is basically a question of what is its rightful role in interpreting or aiding in the interpretation of the text itself – the meaning of the text itself. My proposition – which I think is consistent with what several people have said, and is consistent with Justice Scalia's position – is that, in constitutional interpretation, if you're a good originalist-textualist, you do not use legislative history, including the Federalist Papers, in order to displace or modify what would otherwise be the meaning of the text. Instead, you look sometimes to legislative history for its usefulness in displaying or clarifying the meaning of the words of the text. You are not looking for subjective intentions or expectations when you read Madison, Hamilton, or any of the other founding documents. You are, instead, looking to see how they were using words and the meaning of the words. In other words, like a dictionary, the Federalist Papers is sort of a concordance: it operates and serves a dictionary function, explaining the meanings of words and concepts within the historical and linguistic context of the time.

So, legislative history in Constitutional interpretation is potentially-probative, second-best evidence of objective textual meaning. You look to the history, into the historical documents, to provide you with help, with dictionary help, in understanding what is theoretically the objective meaning of the words. Scalia was willing to do this, and he would do this both in a constitutional legislative-history context and in a legislative-legislative history context.

In preparation for this this talk, I went through some of Scalia's law review articles, and one of his more recent ones was one that was sort of a co-authored colloquy with a former clerk of his and friend of mine, John Manning, who's now Dean of the Harvard Law School. It appears in the George Washington Law Review. Scalia said this: "You forget that I don't care what the legislators intended. I care what the fair meaning of this word is."[38] Then he goes on to say, "[a]nd by the way, I don't object to all uses of legislative history. If you want to use it to just show that a word could bear a particular meaning—if you want to bring forward floor debate to show that a word is sometimes used in a certain sense—that's okay. I don't mind using legislative history just to show that a word could mean a certain thing. We are trying to ascertain how a reasonable person uses language, and the way legislators use language is some evidence of that, though perhaps not as persuasive evidence as a dictionary."[39]

That is using legislative history as informative rather than authoritative. You use it to exegete the meaning of words, not to control or spin interpretation. Now, the core problem with the use of legislative history is reliability. That's the core problem—reliability—and that's a problem to a certain extent with both constitutional legislative history and legislative-legislative history, but they are problems of varying degrees because of the different circumstances. The huge problem with the modern use of legislative history in statutory interpretation is that it's massively unreliable—it's all spin; it's all gaming the system—and Scalia was adamant about this, too. In that same interview, he says, "[M]y objection goes beyond that. Legislative history is not just unlikely to reflect the genuine purpose of Congress; it is increasingly likely to portray a phony purpose. The more you use legislative history, the phonier it will become. Downtown Washington law firms make it their business to create legislative history; that is a regular part of their practice. They send up statements that can be read on the floor or statements that can be inserted into committee reports. So the more we use it, the less genuine it is. It's not that we use it because it's there. It's there because we use it."[40]

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[38] The Honorable Antonin Scalia and John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEORGE WASH. L. REV. 1610, 1616 (Nov. 2012), http://www.gwlr.org/wp-content/uploads/2012/11/Scalia_Manning_80_6.pdf.

[39] *Id.*

[40] *Id.* at 1612.

So, I'm going to suggest – building on Scalia's proposition – what I will call, sort of faux-immodestly, "Paulsen's Law," or "Paulsen's Paradox" of legislative history. But it's really "Scalia's Law," and that is this: the more you know that legislative history (either in a constitutional sense or a statutory sense) might count as evidence of a textual meaning; the more that courts over time show a willingness to look to such evidence; and the more sophisticated a gamer you are, the greater the incentives will be to make and manufacture legislative history, and the less reliable that legislative history will be. So, here's Paulsen's Law: the more a legal interpretive system relies on legislative history to determine textual meaning, the less reliable such evidence will become because players learn the game and manipulate the evidence. Similarly, the less aware deliberators, debaters, or drafters of legal language are that they are, by their discussions, furnishing potentially probative evidence of original meaning, textual meaning – the less self-conscious they are that they are making legislative history that will affect interpretation – the more reliable such evidence will tend to be.

Now, that is, in the main, why I think, and I've said in an article with Vasan Kesavan some years ago, that the secret drafting history of the records of the Constitutional Convention—which were not available to the ratifiers; they were confidential and not meant to be published; and Madison's notes weren't published until 1840—is actually, for that very reason, a fairly reliable source of evidence for what the meaning actually was.[41] There are some problems with the documentary evidence and Mary Sarah Bilder has a marvelous book called Madison's Hand, talking about the revisions that James Madison made to his notes over time, and how they reflect evolutions in his thinking.[42] But, to the extent he's faithfully recording the debates, the debaters are not intentionally spinning because they are not thinking that they are making legislative history. For precisely that reason, to the extent that the debates reveal something about what they thought the concepts and meanings of terms actually were, they are more reliable legislative history than statutory legislative history ever can be today.

Hon. Judge Sandra Ikuta: So, now we know legislative history can be mildly informative, but only if the legislators don't know anyone is listening. We'll have some time for some questions, but while you're gathering up your thoughts I'll take the moderator's privilege to start a round of questions, that's particularly interesting to me. Justice Scalia was very concerned about judges using legislative history and other tools—context, purpose, and intent of the legislators—to enact their own policy preferences. I hear from the panelists

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[41] Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 Geo. L. j. 1113 (2003).

[42] *See generally*, MARY SARAH BILDER, *Madison's Hand: Revising the Constitutional Convention* (Harv. Univ. Press, 2015).

that legislative history can be okay if it doesn't go too far, if it's used appropriately. But, how do you stop judges from doing that? Now, after King v. Burwell, we are seeing advocates arguing that if you look at the whole statute, clear language is actually ambiguous, and therefore, you can use legislative history to change the meaning of "left" to "right" or "Federal" to "State."[43] So, let me start with Professor Merrill. Given your view that as long as the legislative history is sincere and not being manipulated, judges can rely on it, where is the stopping place for judges? What is some rule that would actually be enforceable?

Prof. Thomas Merrill: Thanks for that question. My position was not that it's okay to use legislative history because judges can figure out when it's phony and when it's not phony. My point was that the phony manipulation point may be overstated because it's possible that judges might be able to differentiate between phony and non-phony legislative history. My bottom line is that we should not use legislative history at all, certainly in statutory interpretation, simply because it greatly increases the cost of appellate and trial-court litigation for gains that are probably not commensurate with those costs. So, I would, on a kind of consequentialist utilitarian basis, throw it all out. I'm simply saying that the manipulation concern, which a number of the panelists have focused on, is an empirical question, an arguable question, and another reason to throw out legislative history, but perhaps not as powerful as a consequentialist one. I completely agree with you that once we let it in the door, as we did during the 70's, then judges will run with it. It will give judges more putty to play with in trying to reach results that they find congenial on the basis of their own preferences.

Hon. Judge Sandra Ikuta: Professor Prakash.

Prof. Saikrishna Prakash: I think a lot of people criticize originalism and say, look originalist judges can reach results that they want, the text is manipulatable, and I think there is no theory of interpretation that will prevent judges, willful judges, from doing what they want. Judge Ikuta, you mentioned the Burwell case where the text seemed to suggest that the states were the object and not the Federal government and the court ruled otherwise.[44] I think they could have done that whether or not they referenced legislative history. So, I don't really know if legislative history really makes it that much easier for a judge who really wants to get a particular result to

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[43] *See generally*, King v. Burwell, 135 S. Ct. 2480 (2015).
[44] King v. Burwell, 135 S. Ct. 2480, 2492–93 (2015).

reach that result. So, I guess, I question the predicate.

Hon. Judge Sandra Ikuta: Let me ask how you think a Judge would have said that "State" means "State and Federal" without saying, "Here's the context. Here's what Congress intended. That makes it ambiguous."

Prof. Saikrishna Prakash: Any textualist is going to say we've got to look at the whole statute. We're not going to read a provision in isolation and decide what it means. You've put me in the very difficult position of having to defend a decision that I don't agree with. I just think, with all due respect to you Judge Ikuta, judges at the Federal level have life tenure, and they can pretty much do whatever they want while they're on the bench, right. That's why Brutus said that they're independent of heaven and earth, and we shouldn't be surprised if they sometimes flex their muscles and make decisions that we think misread the statutes, treaties, and constitutions of the United States, whether or not they're looking at legislative history. It's not as if we were to banish the use of legislative history tomorrow there wouldn't be manipulation and, sort of, rather odd claims about what the text of the Constitution, statutes, and treaties of the United States mean. I don't want to have to defend that decision to make my point.

Hon. Judge Sandra Ikuta: Well, most of us judges like to think there's a fig leaf of reasoning and not just raw power. Professor Solum.

Prof. Lawrence Solum: So, I think that it is surely the case that a judge who's determined to legislate from the bench can find a way to put a fig leaf on that exercise of legislative will. In fact, in King v. Burwell, on the blogs at least, there was a whole argument about how the plain meaning of the statute supported the interpretation that the Federal government was a State, and that reasoning could have been employed by a judge with a straight face. This is why it is so important to consider character in the selection of judges. In order for originalism and plain meaning textualism to work, the judges who apply those theories have to actually have the virtue of lawfulness. That is, they must care about the law; they must care that their decisions reflect what the statute says or what the Constitution originally meant, and not what they would like to insert into the meaning of the statute. So, when we think about selecting judges, we're not just thinking about competence, and we're not just thinking about what theories the judge allows, even the most alive of living constitutionalists can say at her confirmation hearing, "We are all originalists now." The discernment of character really means you need to pay attention

to the way that people act, and not just what they say.

Prof. Michael Stokes Paulsen: Just briefly, those of you who work on statutory drafting, and if you ever were to engage in constitutional drafting, realize how difficult it is to write a truly judge-proof text—the judge needs to be running a sound interpretive program, a sound interpretive methodology. It is true that the more things you let come into your interpretive model, the greater the opportunities for manipulation. But, that would apply to a number of other things, other doctrines that I've criticized including stare decisis. Sometimes you're not just interpreting the statute, you're interpreting interpretations of the statute, and you're interpreting distinctions of the interpretations of the statute, and you're interpreting manipulations of the distinctions of the interpretations of the statute, and pretty soon, you have essentially unbridled discretion. I think the important thing is that whatever the tools are that they be as clear as possible and that's—gosh—that is the theme of Justice Scalia's 30 years on the court: rules, principles, avoiding judicial discretion, except, to the extent that judicial discretion is actually called for in this context of the authoritative written text.

Hon. Judge Sandra Ikuta: Thank you. Well, I'll throw the questions open to the audience, does anyone have questions? I see one down here, yes.

Audience Question: I wanted to take Saikrishna's challenge to us that, essentially, to have a relatively bright line exclusion of legislative intent or legislative history, might, essentially, require that we break the tablets of the Federalist Papers in the same motion or with the same rule. I'm wondering if there might not be a scale of Burke-ian reliance interests when one looks at the importation of that history and the public debate—although I understand that several States did vote before some of that was published—and if there might not be those interests that would defend the use of, properly or not, venerated text that has long been used versus the idea of present day assailment from the floor of the Senate.

Hon. Judge Sandra Ikuta: So, breaking the tablets of the Federalist Papers goes against the Paulsen principle. Can we start with you?

Prof. Michael Stokes Paulsen: Yeah. I'm not sure that I have the premise of the question exactly correct but I'll say some things that I think are true, and we'll see if they're responsive. Okay. The use of constitutional or

statutory legislative history, what use you make of it, depends on what interpretive program you're running. If you're thinking that the relevant evidence is contractual intentionalism, what people actually subjectively believed, you will place a greater emphasis on these texts. If you are a textualist, you will use the Federalist Papers, Madison's notes, and committee reports on a house or Senate bill as evidence of the meaning of the words. My sole proposition is that the Federalist Papers in general tend to be more reliable evidence of original constitutional meaning than committee reports do of actual statutory meaning. So, it kind of goes back to Tom Merrill's point, that there is a question of the manipulability of the evidence, how probative it actually is in a certain context, and whether there are differences in ability of judges to use different sources and discern when some sort of history is manipulative and when it isn't. Is that sort of responsive?

Audience Member: Yeah.

Prof. Saikrishna Prakash: I guess, I'll say about the tablets: I love the Federalist Papers; and I cite them all the time; and I enjoy when other people cite them. But, I think it's a mistake to think that those papers were written just to expounnd the meaning of the Constitution. They were written to ratify the Constitution. They were the equivalent, in some sense, of floor debates because these guys—they're not just trying to dispassionately say, "Oh, here's what the Constitution means"—they're trying to ratify the Constitution. It is a piece of propaganda meant to convince people to vote for the Constitution. So, they may be better than all the other things written at the time, but they're still pieces of political propaganda, great pieces of political propaganda, and I think I agree with Mike that there's a lot there that's actually true, but I think there's also shading in there. I think Hamilton systematically discounts the executive power; I think he systematically discounts the strength of the Federal judiciary; and other people call him on it, and he tries to respond to them, but it's not always clear that he's right. It's not clear that Mike Paulsen would agree with every single claim about the Constitution that's found in the Federalist Papers. I doubt it.

Hon. Judge Sandra Ikuta: Next question.

Audience Question: My question is primarily for Professor Paulsen but also for the rest of the panel. Picking up on that distinction between Constitutional legislative history and legislative-legislative history, how much is the audience question doing the work in distinguishing between the

sources? So, with traditional legislative-legislative history, the audience typically has to legislate itself, either the whole body of the legislature or some subset, a committee; whereas, with many constitutional legislative history sources, especially the Federalist Papers and the anti-federalist writings to which they responded, the audience was the American public at-large. So, if the inquiry is public meaning, how much does that distinction play a role in justifying the use of constitutional legislative history more frequently than the use of legislative-legislative history?

Hon. Judge Sandra Ikuta: So, how does the audience affect the Paulsen principle?

Prof. Michael Stokes Paulsen: Great question. I think that the audience of much of modern statutory legislative history is not actually persuading other members of Congress but is actually spin doctoring. The purpose for many committee reports, floor statements, colloquies, is to affect interpretation of the statute once it emerges and to get results out of courts. The courts are the true audience; get a result out of courts that you couldn't have gotten through the text of the statute because you didn't get it in the text of the statute. I think that at the time that they were debating the Constitution in Philadelphia and at the time they were writing the Federalist Papers, they knew these documents would eventually become public or may become public and the Federalist Papers were public advocacy pieces, but they're not trying overtly to spin judicial interpretation. And in terms of what we mean when we talk about "original public meaning," I don't think that a document has to have been public at the time in order to be possibly probative evidence of public meaning, in the sense that it's not a private idiosyncratic subjective intention, but this was the public understanding of the meaning of the words. So, the very fact that the Convention Records weren't meant to be looked at—they wanted people to look at the text—actually supports the idea that it's decent evidence of public original meaning because the audience is really the authentic communication to other drafters of what it is they're trying to accomplish.

Audience Question: The public relied on the Federalist Papers to do an action, namely to ratify the Constitution. So, would you be willing to say that the Federalist Papers could be more probative than the notes of Madison, even though they are both probative, that the extent of publication has something to say about the weight, the probative weight?

Prof. Michael Stokes Paulsen: Let me briefly repeat the question. Is the fact that the document was public in part of the debate, does that increase its probative weight because of reliance, that people actually rely on it? The problem: mine is not a reliance based theory. It's not that this is what was said, and therefore, we are taking it as the meaning because someone said it – that's sort of an "intentionalist" approach, and I think Scalia would have resisted it. Mine is original meaning – that both sources are potentially illustrative of the meaning the words would have had in social context to reasonably informed speakers and readers of the English language at the time they're debating it. You can't really rely on the Federalist Papers in saying that people relied on that in deciding the meaning of the Constitution because it's not clear that it changed the results—it was not read in most of the States. It was addressed to the people of New York, and by the time New York got around to ratifying, it was a late hit, and they ratified largely for political reasons. You can't really tell why someone relied on a particular source.

Hon. Judge Sandra Ikuta: Other comments?

Prof. Lawrence Solum: I think audience is really important but just in a slightly different way. The Constitution is written for the public. It begins with the three words, We the People.[45] So, the relevant context and meaning is the meaning of the constitutional text to the public at-large. Some statutes work in exactly that way; some statutes are written for the whole public, but other statutes have a much more specialized audience. Some statutes are primarily written for the agency that will be engaging in the activities authorized by the statute. So then, the relevant context of legislative communication is not what would the public know about these words, it's what would the intended audience, the agency, the lawyers involved in this particular subdomain, make of these words; and that's really important. So, the public documents surrounding the ratification of the Constitution are very good and very direct evidence of public meaning, in the way that the secret drafting history is still evidence, but it's evidence of a less direct sort. In the statutory context, I think you have to analyze who is the audience of this statute.

Hon. Judge Sandra Ikuta: Okay. Next question.

Audience Question: Going to Mr. Prakash's point, I understand that

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a canny or, I guess I would say, a lawless judge can wrestle his or her way around any theory of interpretation, but isn't it the case that it's harder to get around a textual analysis in a plausible way? You can always find a purpose, and you can find it in the context, in the newspaper, in the legislative history, but the words are a little bit less yielding; and I know this will be controversial, but isn't it the case that judges who want statutes to do more tend to be purposive, and those who want them to do less tend to be textualists, and doesn't that suggest that it is, in fact, harder to get around the words? Thanks.

Prof. Saikrishna Prakash: I think that's a question for me. I think it's ultimately an empirical question: whether or not willful judges need the benefit of legislative history to do what they want to do or whether they could do without it. Your comment made me think of the Eighth Amendment.[46] The due process clause references life, liberty and property.[47] Justice Scalia's argument argued and to the death penalty, of course, you can have capital punishment because the Constitution contemplates it, others disagree based on the fact, I think, in part, that what is an "unusual punishment" isn't obvious from the face of the Eighth Amendment. Moreover, the fact that the due process clause permits the taking of life, is no answer to the question of whether it's consistent with the Eighth Amendment. I've always found Justice Scalia's argument convincing, but I take it that others don't, on a textual basis. They think, somehow, the Eighth Amendment may have modified what would be a permissible punishment if we conclude that the death penalty is a cruel, unusual punishment. So, I take your point that there's this question about whether or not people can be inventive enough in the absence of legislative history, and I believe in the ingenuity of mankind, and I really doubt that that's going to stop them.

Hon. Judge Sandra Ikuta: Other comments?

Prof. Thomas Merrill: Yeah. I agree with the premise of the question because it seems to me, that in order to do whatever you want to do based on simply the text, requires a tremendous amount of intellectual dexterity. So, take King v. Burwell, the Affordable Care Act opinion where Chief Justice Roberts writes this very lengthy opinion saying that to give a literal interpretation of this one clause in the Affordable Care Act would violate, what he called, the plan of the statute.[48] He goes through page after page after

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[46] *Id.* at amend. VIII.
[47] *Id.* at amend. V.
[48] *King*, 135 S. Ct. at 2492–96.

page of, sort of, explicating what he thinks the plan of the statute was, which really means what the purpose of the statute was, and it's an impressive effort. You come away reading it, well, this is a really smart guy writing this opinion. But I think that legislative history actually permits a much wider range of judges, with lesser skills than Chief Justice Roberts, to pick and choose those snippets from this bit of legislative history, that bit of legislative history, and conjure up some kind of outcome that may be more congenial. So, I think there is something to the point that using legislative history increases the amount of data that judges have, and therefore, gives them more leeway, particularly if they're not capable of doing some kind of Scalia-like or Roberts-like whole-act kind of interpretation, which is extremely intellectually clever, to achieve the results that they want to achieve. So, I think that's right. One reason to do away with legislative history is it will, at the margins, in cases where we don't have a lot of other interpretive material, damp down on the range of outcomes that judges can reach.

Hon. Judge Sandra Ikuta: So, we actually only have time for one question but since we have two people in line we're going to do speed questions. So, could you please ask quick questions and we'll have a quick answer.

Audience Question: I'm the City Attorney for Coral Gables, Florida. My question was about executive interpretations, executive officers, Attorney Generals, because of the nature of their roles. Since it's not judicial and it's more tied to the democratic process, do you believe that when executive officials interpret the law and apply it, do they have more leeway to look to legislative history, or should they follow the same basic principles that a judge would?

Prof. Lawrence Solum: I have an answer to that question which is that when they're engaged in actual interpretation their role is exactly the same. But we frequently see executive officials and Congress engaging in what Professor Barnett calls—double deference—that is, they say, well, this is my interpretation of the statute and if I'm wrong the courts will correct me, and then the courts say, well, we defer to what's gone on in Congress or the executive branch, and that's really a problem.

Hon. Judge Sandra Ikuta: Last question.

Audience Question: To the extent that legislative history can be used to evince the original meaning of the text? What privilege is legislative history over any other sort of learned debate at the time? Like, why are the Federalist Papers more superior evidence of the meaning of the text at the time than the debates of the Whig-Cliosophic Society or newspaper debates in the New York Times and The Herald, or any other sort of intellectual debate on the meaning of the texts, and if they don't have a privileged status over any other contemporaneous contemporary intellectual learned debate on the meaning of the texts, wouldn't that open up the universe of evidence that could be used to interpret it so wide that, essentially, every blog post on the meaning of "State" in King v. Burwell would have the same stature as the legislative debates at the time?

Hon. Judge Sandra Ikuta: Response.

Prof. Michael Stokes Paulsen: I think that's directed to me. I think if I understand the question correctly, the answer is, it is not privileged over other learned public discussion contemporaneous with the time. I reference this article my co-author Vasan Kasavan and I wrote called, The Interpretive Force of the Constitution's Secret Drafting History. It's in Georgetown Law Journal but one of the examples we raise is a hypothetical letter from John Clergymen to Joel Farmer Parishioner in which there is a learned discussion of the contemporaneous understanding of the meaning of the executive power. We say, in principle, when we're talking a theory of trying to understand the meanings of the words, all of these sources would be potentially usable evidence. What makes the Federalist Papers especially good is that they are especially good. It is a learned, topical concordance of the discussion, very systematic, in the main reliable, and it was part of the public debates. So, I think in principle, if you have an original meaning jurisprudence, you potentially do have the problem of opening the world up to more sources of evidence, of what counts as evidence of original meaning. In that sense, it is less constraining but if you limit the uses to which such evidence can be put, it is, I think, more constraining.

Hon. Judge Sandra Ikuta: This is a great way to end our panel. Could you please join me in thanking a brilliant panel.

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