

NOTE

**TEXT(PLUS-OTHER-STUFF)UALISM:
TEXTUALISTS' PERPLEXING USE OF
THE ATTORNEY GENERAL'S
MANUAL ON THE ADMINISTRATIVE
PROCEDURE ACT**

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Textualist judges, such as U.S. Supreme Court Justice Antonin Scalia, are well known for their outspoken, adamant refusal to consult legislative history and its analogues when interpreting ambiguous provisions of statutory terms. Nevertheless, in administrative law cases, textualist judges regularly quote the Attorney General's Manual on the Administrative Procedure Act, an un-enacted Department of Justice document that shares all the characteristics of legislative history that textualists find odious: unreliability, bias, and failure to pass through the bicameralism and presentment processes mandated by the U.S. Constitution. As a result, judges that rely on the Manual in administrative law cases arguably reach inaccurate results that aggrandize the Executive Branch. This Note canvasses the possible explanations for this phenomenon and ultimately concludes that there is no principled way that textualist judges can reconcile their use of the Manual with their jurisprudential philosophy. In other words, there is no principled reason to rely on the Manual while simultaneously rejecting more traditional forms of legislative history.

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INTRODUCTION

The textualist critique of legislative history is well documented.¹ Legislative history and its analogues² are not authoritative, the argument goes, because unlike the text of the statute, the history has not passed through the bicameralism and presentment process mandated by the U.S. Constitution.³ Textualists likewise argue that legislative history is often inconsistent and frequently manipulated for political ends.⁴

1. E.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws* 16, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann et al eds., 1997); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988) [hereinafter Easterbrook, *Original Intent*]; Alex Kozinski, *Should Reading Legislative History be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807 (1998); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) [hereinafter Manning, *Nondelegation*]; see *infra* Part I.

2. For instance, the Advisory Committee Notes to the Federal Rules of Evidence, discussed in further detail *infra* notes 7, 30–32, 60 and accompanying text, may be considered analogous to legislative history.

3. E.g., Manning, *Nondelegation*, *supra* note 1, at 675 (internal citations omitted).

4. E.g., Kozinski, *supra* note 1, at 810, 813.

Given this critique, it seems anomalous that even the most ardent textualists use the unenacted *Attorney General's Manual on the Administrative Procedure Act*⁵ as a guide to interpreting the Administrative Procedure Act (APA),⁶ especially given textualists' refusal to use legislative history and its analogues in other contexts, such as when interpreting the Federal Rules of Evidence.⁷

It is argued that the *Manual* is reliable and authoritative due to the "role played by the Department of Justice in drafting the legislation,"⁸ and because Congress arguably "sought to simply adopt the prevailing practices of judicial review at the time the APA was enacted."⁹ A closer examination, however, reveals that the same textualist critiques of legislative history apply to the *Manual*.¹⁰ The asserted rationales for the *Manual's* reliability and authoritative status are also applicable to the legislative history of numerous other statutes and rules, but textualists do not resort to legislative history and its analogues in those contexts. Moreover, the *Manual* has not passed through the bicameralism and presentment process; worse, the *Manual* was published *after* the APA was enacted.¹¹ Finally, there is evidence that the *Manual* may also offer a biased and politicized, and therefore dubious, interpretation of the APA.¹² It therefore appears that textualist judges who rely upon the *Manual* are acting in an inconsistent or unprincipled

5. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) [hereinafter MANUAL].

6. 5 U.S.C. §§ 500–706 (2006); *see infra* Part IV.

7. *See* *Tome v. United States*, 513 U.S. 150, 167–68 (1995) (Scalia, J., concurring) (refusing to join majority opinion in its entirety due to the opinion's reliance on the Advisory Committee Notes to the Federal Rules of Evidence); *see also* discussion *infra* Part II.

8. Robin J. Arzt, *Adjudications by Administrative Law Judges Pursuant to the Social Security Act Are Adjudications Pursuant to the Administrative Procedure Act*, 22 J. NAT'L ASS'N ADMIN. L. JUDGES 279, 288 (2002) (citations omitted).

9. Christopher M. Buell, *Norton v. Southern Utah Wilderness Alliance: The U.S. Supreme Court Fails to Act on Agency Inaction*, 67 U. PITT. L. REV. 641, 645 (2006).

10. *See infra* Parts III–V.

11. Dean Smith, *Lawmaking on Federal Lands: Criminal Liability and the Public Property Exception of the Administrative Procedure Act*, 23 J. LAND RESOURCES & ENVTL. L. 313, 321 (2003).

12. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 119 (1998) (describing the *Manual* as "a highly political document designed to minimize the impact of the new statute on executive agencies"); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1682–83 (1996) (describing the *Manual* as "a transparently one-sided, post hoc interpretation of a done deal" that fails to accurately "present the true nature of the APA compromise"); *cf.* Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron has Failed and Why it Can and Should be Overruled*, 42 CONN. L. REV. 779, 790 (2010) ("[A]lthough the *Attorney General's Manual* should be considered when trying to understand the APA, especially in those cases in which the *Manual's* interpretation is contrary to the Executive Branch's interests, it may be unreliable when it advances a pro-executive point of view.").

manner; they should either refuse to use the *Manual* as an interpretive tool, or abandon strict textualism and treat all legislative history as potentially persuasive if sufficient indicia of reliability are present.¹³

In Part I of this Note, I summarize the textualist critique of legislative history and its analogues. Part II briefly describes the APA and the *Manual* and also explains why the *Manual* may not be a reliable guide to the APA. Part III catalogues examples of textualist judges using the *Manual*, and explains why this phenomenon is anomalous. Part IV surveys several possible justifications for textualist use of the *Manual*, but ultimately deems them all unsatisfactory. Part V speculates as to why textualists utilize the *Manual* despite the apparent theoretical inconsistency. I conclude that there is no principled reason for textualist judges to consult the *Manual* but not legislative history proper.

This Note is not intended to argue for or against textualism as an interpretive method generally; plenty has been written on both sides of that debate.¹⁴ Nor do I attempt to demonstrate whether interpretations of the APA that eschewed references to the *Manual* would produce normatively desirable or undesirable results.¹⁵ I merely argue that use of the *Manual* is analytically inconsistent with the jurisprudential philosophy of textualism.

13. Some scholars have argued that textualism

does not require the blanket exclusion of legislative history from judicial consideration. When a party prepares a brief in litigation or a professor writes a law review article, a court is capable of evaluating the persuasiveness of the author's contentions on the merits, even though that author may have an agenda. When the court examines a committee report or sponsor's statement, its critical capacity is no less. The court must give serious consideration to the information found in the legislative history, but it must assess the persuasiveness of its representations, quite apart from the congressional source of the history's assertions.

Manning, *Nondelegation*, *supra* note 1, at 732–37.

14. *E.g.*, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 1 (containing an essay on the merits of textualism by Justice Antonin Scalia, relevant critiques by Laurence H. Tribe and Ronald Dworkin, and Justice Scalia's response to these critiques); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1991) (defending judicial use of legislative history); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 625 (1990) [hereinafter Eskridge, *New Textualism*] (arguing that the textualist critique "is quite powerful but not completely persuasive"); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); Lars Noah, *Divining Regulatory Intent: The Place for a 'Legislative History' of Agency Rules*, 51 HASTINGS L.J. 255, 266–74 (2000) (summarizing the conflicts between "The Textualist Critique," "The Intentionalist Response," and "Dynamic Interpretation").

15. I do note that citations to the *Manual* will likely produce results that favor the Executive Branch in ways that do not necessarily match the intent of Congress when enacting the APA, but I leave for future scholarly exploration whether or not this pro-executive approach to administrative law would be preferable.

I. TEXTUALISM AND THE CRITIQUE OF LEGISLATIVE HISTORY AND ITS ANALOGUES

Textualism is a school of statutory interpretation with numerous high-profile adherents in the Judicial Branch, including Justice Scalia and Justice Thomas of the U.S. Supreme Court,¹⁶ Judge Easterbrook of the Seventh Circuit, and Judge Kozinski of the Ninth Circuit.¹⁷ Although there are arguably many distinct subgenres of textualism, each with their own interpretive and theoretical nuances,¹⁸ textualism generally holds that judges, when interpreting a legal text, should draw meaning only from the “*objectified*’ intent” of the legislature as expressed in the enacted text of the law, rather than conjectures about what the legislature *subjectively* meant and intended.¹⁹ Textualists find absurd the idea that a collective body composed of ideologically opposed partisan factions could have a discernible, monolithic “intent” that can be attributed to Congress as a whole, especially regarding the meaning of statutory ambiguities.²⁰ The textualist method is aptly described by Judge Easterbrook as follows:

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 The meaning of statutes is to be found not in the subjective, multiple mind of Congress but in the understanding of the objectively reasonable person.

If this method yields no confident answer, we may put the statute down—the question is not within its domain.²¹

Therefore, say textualists, judges should not refer to legislative history and its analogues when determining the meaning of a legal text. Legislative

16. William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist But Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1301–02 (1998) [hereinafter Eskridge, *Federalist*].

17. Eskridge, *New Textualism*, *supra* note 14, at 646–47.

18. See, e.g., Eskridge, *Federalist*, *supra* note 16, at 1306–08 (comparing and contrasting the textualist philosophies of Justice Scalia and Justice Thomas); James P. Nehf, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1, 8–9, 53–54 (1994) (identifying “four different approaches to textual interpretation” and claiming that the differences between “various forms of textualism” yield “highly unpredictable and inconsistent results”).

19. E.g., Scalia, *supra* note 1, at 16–18 (emphasis added).

20. E.g., Manning, *Nondelegation*, *supra* note 1, at 675, 684–86 (citations omitted) (“[T]extualist judges argue that a 535-member legislature has no ‘genuine’ collective intent with respect to matters left ambiguous by the statute itself. Even if Congress did have a collective intent, they add, courts act improperly when they equate the views of a committee or sponsor with the intent of the entire Congress and the President.”).

21. Easterbrook, *Original Intent*, *supra* note 1, at 65.

history has not passed through the “bicameralism, presentment, and veto provisions of Article I” of the U.S. Constitution;²² thus, “recourse to legislative history improperly accords the force of law to statements that have not satisfied the explicit constitutional provisions specifying how a bill becomes law.”²³ Textualists argue that consulting legislative history is not only unconstitutional, but also undemocratic and tyrannical. Basing “the meaning of a law” on “what the lawgiver meant, rather than what the lawgiver promulgated,” is analogous to the insidious “trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not be easily read.”²⁴

Textualists also argue that “legislative history is often contradictory,” and therefore unreliable as an interpretive tool.²⁵ The legislative process is inherently competitive and adversarial. Each legislator has incentives to sneak statements into the legislative history that support his or her ideological agenda.²⁶ As a result, argue textualists, judges can find legislative history that supports almost any proposition they seek to establish. In the immortal words of Judge Harold Leventhal, “consulting legislative history is like ‘looking over a crowd of people and picking out your friends.’”²⁷

A good example of textualists’ reluctance to utilize legislative history and its analogues is *Tome v. United States*.²⁸ The U.S. Supreme Court based its holding²⁹ in part on “an examination of the Advisory Committee’s Notes to the Federal Rules of Evidence.”³⁰ Justice Scalia joined the

22. Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1007 (1992).

23. *Id.*; see U.S. CONST. art. I, § 7; Easterbrook, *Original Intent*, *supra* note 1, at 64 (“If we took an opinion poll of Congress today on a raft of issues and found out its views, would those views become the law? Certainly not. They must run the gamut of the process—and process is the essence of legislation. That means committees, fighting for time on the floor, compromise because other members want some unrelated objective, passage, exposure to veto, and so on.”); Manning, *Nondelegation*, *supra* note 1, at 675.

24. Scalia, *supra* note 1, at 17.

25. Kozinski, *supra* note 1, at 813.

26. The incentives are bolstered by the unlikelihood of getting caught. Oftentimes congresspersons have not read a pending bill’s voluminous legislative history, and thus cannot detect and correct alleged attempts to influence the judiciary. See Scalia, *supra* note 1, at 32–34.

27. Kozinski, *supra* note 1, at 813 (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)).

28. *Tome v. United States*, 513 U.S. 150 (1995).

29. The holding of *Tome* is irrelevant for the purposes of this Note and is therefore not discussed.

30. *Tome*, 513 U.S. at 160. The Advisory Committee was composed of preeminent lawyers and legal scholars appointed to draft the Federal Rules of Evidence. The Advisory Committee Notes, which describe in greater detail the Committee’s intent and understanding of the rules, are widely used by courts to interpret the Federal Rules of Evidence. See

Court's opinion except for the Part "devoted entirely to a discussion of the Advisory Committee's Notes."³¹ Despite wholly agreeing with the Court's result, Justice Scalia wrote a separate concurrence criticizing the majority's use of those Notes. Although Justice Scalia first admitted, "I have previously acquiesced in, . . . and indeed myself engaged in, . . . similar use of the Advisory Committee Notes,"³² he then argued:

More mature consideration has persuaded me that is wrong. Having been prepared by a body of experts, the Notes are assuredly persuasive scholarly commentaries But they bear no special authoritativeness as the work of the draftsmen It is the words of the Rules that have been authoritatively adopted Like a judicial opinion and like a statute, the promulgated Rule says what it says, regardless of the intent of its drafters.³³

Justice Scalia's concurrence in *Tome* illustrates both the theoretical objections and aversion that textualist judges have to legislative history.

II. THE ADMINISTRATIVE PROCEDURE ACT AND THE ATTORNEY GENERAL'S MANUAL

A. Brief Overview of the Administrative Procedure Act

The APA is perhaps the most important statute in U.S. administrative law.³⁴ Enacted in 1946, the APA is "designed to govern both internal agency procedure and judicial review" of agency actions.³⁵ Among other things, the APA establishes default presumptions regarding what procedures agencies need to follow when engaging in rulemaking and adjudication proceedings of various levels of formality, and what criteria courts should use to assess agency decisions.³⁶ Along similar lines, the APA "affords interested parties

DAVID ALAN SKLANSKY, EVIDENCE: CASES, COMMENTARY, AND PROBLEMS 6–8 (2d ed. 2008).

31. *Tome*, 513 U.S. at 167 (Scalia, J., concurring).

32. *Id.* (citations omitted).

33. *Id.* at 167–68.

34. See, e.g., Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 254 (1986) (describing the APA as the "centerpiece of administrative procedure"); Shepherd, *supra* note 12, at 1158–59 (citations omitted) (calling the APA a "landmark" piece of legislation that "permitted the growth of the modern regulatory state").

35. Duffy, *supra* note 12, at 114.

36. See 5 U.S.C. §§ 551–559, 701–706 (2006); Buell, *supra* note 9, at 644–45; Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 930 n.32 (1998).

the right to participate in an agency's rulemaking process."³⁷ The APA also contains provisions regarding the appointment, discipline, and decisional independence of Administrative Law Judges.³⁸

B. *The Attorney General's Manual*

The *Manual*, considered "one of the most comprehensive and respected reports on the APA,"³⁹ was "written shortly after passage of the APA in response to numerous inquiries about the intended meanings of various APA provisions."⁴⁰ The *Manual* "was originally issued 'as a guide to the agencies in adjusting their procedures to the requirements of the Act.'"⁴¹ Among numerous other things, the *Manual* attempts to clarify the difference between rulemaking and adjudication and to delineate what types of agency actions fall within each category,⁴² who may preside over which types of administrative hearings,⁴³ the scope of various exceptions within the Act,⁴⁴ and the extent to which courts should defer to agency discretion.⁴⁵ Additionally, the *Manual* explains that "the judicial review provisions of the APA were meant to codify" the administrative common law extant at the time of enactment.⁴⁶ Because the *Manual* "was prepared by the Department of Justice contemporaneously with the APA's enactment," the Supreme Court "has indicated that the manual merits interpretive weight."⁴⁷ Courts therefore frequently review the *Manual* when interpreting ambiguous provisions of the APA.⁴⁸ Estimates indicate that federal courts have cited the *Manual* in roughly 250 cases since its publication,⁴⁹ and

37. Nagy, *supra* note 36, at 930 n.32 (citing 5 U.S.C. §§ 551–559, 701–706).

38. 5 U.S.C. §§ 1305, 3105, 3344, 5372, 7521 (2010).

39. Catherine Zaller, *The Case for Strict Statutory Construction of Mandatory Agency Deadlines Under Section 706(1)*, 42 WM. & MARY L. REV. 1545, 1550 (2001).

40. Smith, *supra* note 11, at 321.

41. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (Scalia, J., concurring) (quoting MANUAL, *supra* note 5, at 6).

42. Arzt, *supra* note 8, at 290–91 (citing MANUAL, *supra* note 5, at 14–15).

43. *See id.* at 307–09 (citing MANUAL, *supra* note 5, at 72, 132, app. B).

44. *See* Smith, *supra* note 11, at 320–21 (citing MANUAL, *supra* note 6, at 27).

45. *See* Zaller, *supra* note 39, 1550–52.

46. Beermann, *supra* note 12, at 790 (citing MANUAL, *supra* note 5, at 108).

47. John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 918 n.129 (2004).

48. *E.g.*, *Steadman v. Sec. Exch. Comm'n*, 450 U.S. 91, 102 n.22 (1981) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978)).

49. A Westlaw search in the "ALLFEDS" database with the search terms "(“attorney general's manual” “ag's manual” “ag manual”) /p (“administrative procedure act” “apa”)" performed on March 19, 2011 returned 227 documents. Although these search results admittedly include cases that only cite the *Manual* indirectly (e.g., citing precedent that quotes or

judges of all ideological and jurisprudential stripes have relied on the *Manual* to support various propositions in high-profile cases.⁵⁰

C. Questions Regarding the Manual's Reliability

There is reason to doubt, however, whether judicial deference to the *Manual* is warranted. As Professor Shepherd argues in his extensively-researched article on the heated legislative battle that led to the APA:

The legislative compromise that produced the APA built many ambiguous provisions into the statute. Each party to the negotiations then attempted to create legislative history: to create a record that would cause future reviewing courts to interpret the ambiguities in a manner that would favor the party. Conservative congressional committees published conservative interpretations. The administration offered its much different description in its *Attorney General's Manual On The Administrative Procedure Act* Neither account may present the true nature of the APA compromise. Instead, each account is a transparently one-sided, post hoc interpretation of a done deal.⁵¹

If this assertion is correct, then the *Manual* is neither an authoritative nor accurate guide to the meaning of contested provisions of the APA. Given that the *Manual* was written to advance the interests of the Executive Branch, the *Manual* is arguably “unreliable when it advances a pro-executive point of view.”⁵²

Similarly, there is reason to doubt whether the *Manual* accurately describes the preexisting common law of judicial review of administrative actions. Although the *Manual* asserts that the APA merely codified the common law, Professor Beermann explains that “existing law was so unclear on many important issues, especially with regard to judicial review of legal interpretations, that codification would have meant that the APA provision had basically no discernible content.”⁵³ Professor Duffy goes further, describing the *Manual* as “a highly political document[,] designed to minimize the impact of the new statute on executive agencies,” and stating that it

cites the *Manual*), my experience running numerous searches for cases relevant to this Note suggests that this particular search is more underinclusive than overinclusive.

50. See *Shinseki v. Sanders*, 129 S.Ct. 1696, 1704 (2009) (Breyer, J.); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63–64 (2004) (Scalia, J.); *Darby v. Cisneros*, 509 U.S. 137, 148 n.10 (1993) (Blackmun, J.); *Vermont Yankee*, 435 U.S. at 546. For a timeline of the Supreme Court's use of the *Manual* since the 1960s, see *infra* note 148.

51. Shepherd, *supra* note 12, at 1682–83 (citations omitted).

52. Beermann, *supra* note 12, at 790.

53. *Id.*

“shrewdly characterized the APA provisions governing judicial review as merely a ‘restatement’ and thereby invited courts and the bar to treat the Act as something less than a statute, as subservient to judge-made doctrine.”⁵⁴ Judicial reliance on the *Manual* for interpreting these provisions therefore appears misplaced.

Moreover, unlike traditional legislative history, the *Manual* was written after, not before, the APA was enacted.⁵⁵ This casts further doubt on the *Manual*'s status as an authoritative guide to the APA. Presumably, if a congressional committee that sponsored a bill issued a statement subsequent to the bill's enactment describing its understanding of the law's intended meaning, even judges sympathetic to the use of legislative history would look askance at the document. As the Supreme Court once stated:

[A]s time passes memories fade and a person's perception of his earlier intention may change. Thus, even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.⁵⁶

This fact makes the *Manual* look even more like a post hoc attempt by the Executive Branch to interpret the APA in a manner beneficial to its interests.

In short, the *Manual* commits the selfsame sins that relegate other forms of legislative history to textualist hell. It has not passed through the constitutionally-mandated bicameralism and presentment process. Indeed, it was prepared *after* the legislation was enacted. It lacks sufficient indicia of objectivity, reliability, and probative value. It was prepared by an interested party with a large stake in the outcome of the legislation. The *Manual* seems to fall squarely within the crosshairs of the textualist critique.

III. TEXTUALIST USE OF THE ATTORNEY GENERAL'S MANUAL

Nevertheless, textualist judges have often cited and quoted the *Manual* to support numerous claims about the APA's provisions.

For instance, Justice Scalia's unanimous opinion in *Norton v. Southern Utah Wilderness Alliance*⁵⁷ favorably quoted the *Manual*, calling it “a document whose reasoning we have often found persuasive.”⁵⁸ Justice Thomas,

54. Duffy, *supra* note 12, at 119.

55. Smith, *supra* note 11, at 321.

56. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980).

57. 542 U.S. 55 (2004).

58. *Id.* at 63.

another one of the Supreme Court's prominent textualists,⁵⁹ joined the majority opinion without objecting to the Court's use of the *Manual*. It is worth noting that *Norton* was decided nearly a decade after *Tome*, in which Justice Scalia admitted that "[m]ore mature consideration" persuaded him that use of the Advisory Committee Notes on the Federal Rules of Evidence "is wrong," and broke from and chided the majority despite wholly agreeing with the Court's final result.⁶⁰ There is not much qualitative difference between the Advisory Committee Notes and the *Manual*; both were interpretive guidelines issued by an entity charged with drafting the law in question. It is therefore unclear why the Court's leading textualist would cite one but not the other.

Likewise, Justice Scalia's concurring opinion in *Bowen v. Georgetown University Hospital* cited the *Manual* to demonstrate that the Secretary of Health and Human Services' litigation position was "out of accord" with the APA's requirements, and referred to the *Manual* as the "most authoritative interpretation of the APA" and worthy of "great weight."⁶¹

Justice Scalia also quoted the *Manual* when he delivered the opinion of the Court in *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*,⁶² which Justice Thomas also joined.⁶³ Additionally, Justice Scalia favorably cited the *Manual* in his dissenting opinions in *Bowen v. Massachusetts*⁶⁴ and *Webster v.*

59. See Eskridge, *Federalist*, *supra* note 16, at 1301–02. I should note, however, that although Justice Thomas may accurately be described as a textualist "who has often . . . joined Scalia's attacks on statutory legislative history," *id.* at 1307, he "does not join Justice Scalia's insistence that legislative history be expunged completely from public law." *Id.* at 1301 n.3.

60. *Tome v. United States*, 513 U.S. 150, 167–68 (1995) (Scalia, J., concurring).

61. 488 U.S. 204, 218–19 (1988) (Scalia, J., concurring). Oddly enough, this same portion of Justice Scalia's concurrence also favorably cites legislative history in the form of a house report. One might therefore counter that *Bowen* and the Scalia opinions that precede it chronologically are false positives—cases that represent Justice Scalia's jurisprudence before he committed fully to the tenets of textualism—and consequently do not provide support for my thesis. Justice Scalia has not always exhibited the same level of aversion to legislative history and its analogues. See *Tome*, 513 U.S. at 167 (Scalia, J., concurring) ("I have previously acquiesced in, . . . and indeed myself engaged in, . . . use of the Advisory Committee Notes."). While this argument carries some weight, it cannot overcome the strong support created by Justice Scalia's ringing endorsement of the *Manual* in *Norton*. *But see* Manning, *Nondelegation*, *supra* note 1, at 731–37 (describing that a few textualist uses of legislative history may be defensible, particularly "the use of legislative history to identify the events that precipitated the enactment of legislation," but "only after a full and independent verification of the accuracy and persuasiveness of its contents").

62. 514 U.S. 122, 126–27 (1995).

63. *Id.* at 123.

64. 487 U.S. 879, 922 (1988) (Scalia, J., dissenting).

Doe.⁶⁵ Justice Scalia similarly cited the *Manual* before his elevation to the Supreme Court.⁶⁶

Moreover, despite the fact that if an “opinion for the Court relies on legislative history in any way, Scalia will typically concur only in the judgment, often with a pointed critique of the majority’s misguided reliance on legislative history,”⁶⁷ Justice Scalia has also joined several opinions written by other judges that utilize the *Manual*.⁶⁸

It is admittedly true that Justices Scalia and Thomas joined all but Part III of the Court’s opinion in *Darby v. Cisneros*, which engaged in a lengthy

65. 486 U.S. 592, 609 (1988) (Scalia, J., dissenting). Relatedly, Justice Scalia’s opinions have also referred to other post-enactment documents penned by the Attorney General purporting to give agencies guidance in response to then-recent amendments to the Administrative Procedure Act. *E.g.*, U.S. Dep’t of Justice v. Julian, 486 U.S. 1, 17–19 (1988) (Scalia, J., dissenting) (citing Memorandum from Ramsey Clark, Attorney Gen., U.S. Dep’t of Justice, for the Exec. Dep’t and Agencies on the Pub. Info. Section of the Admin. Procedure Act, at iv (June 1967)). Justice Scalia also joined Justice Kennedy’s unanimous opinion in *National Archives and Records Administration v. Favish*, 541 U.S. 157, 169 (2003) (citing Memorandum from Ramsey Clark, Attorney Gen., U.S. Dep’t of Justice, for the Exec. Dep’t & Agencies on the Pub. Info. Section of the Admin. Procedure Act 36 (June 1967) and Memorandum from Edward H. Levi, Attorney Gen., U.S. Dep’t of Justice, for the Exec. Dep’t & Agencies on the 1974 Amendments to the Freedom of Info. Act 9–10 (Feb. 1975), reprinted in H. Comm. on Gov’t Operations & S. Comm. on the Judiciary, 94th Cong., Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Source Book: Legislative History, Texts, and Other Documents 519-20 (Joint Comm. Print 1975)).

66. See *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 (D.C. Cir. 1986).

67. Eskridge, *Federalist*, *supra* note 16, at 1306 (citing, as examples, *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 283 (1996) (Scalia, J., concurring in part and concurring in the judgment); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 219 (1994) (Scalia, J., concurring); *Conroy v. Aniskoff*, 507 U.S. 511, 518 (1993) (Scalia, J., concurring); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 519 (1992) (Scalia, J., concurring); *Begier v. IRS*, 496 U.S. 53, 67 (1990) (Scalia, J., concurring); *Sullivan v. Finkelstein*, 496 U.S. 617, 631 (1990) (Scalia, J., concurring); *Blanchard v. Bergeron*, 489 U.S. 87, 97 (1989) (Scalia, J., concurring); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring); *United States v. Taylor*, 487 U.S. 326, 344 (1988) (Scalia, J., concurring); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring)); *see, e.g.*, *Carr v. United States*, 130 S.Ct. 2229, 2241–42 (2010) (Sotomayor, J., writing the opinion of the Court, which Justice Scalia joined except for Part III.C); *Lamie v. U.S. Trustee*, 540 U.S. 526, 528 (2005) (Kennedy, J., writing the Opinion for the Court, which Justice Scalia joined except for Part III). Indeed, Justice Scalia has gone “so far as to refuse to join a footnote of an opinion that he otherwise joined completely. This offending footnote merely said ‘[w]e give no weight to the legislative history’ and briefly explained why.” Eskridge, *Federalist*, *supra* note 16, at 1306 (citing *Assocs. Commercial Corp. v. Rash*, 117 S. Ct. 1879, 1882 (1997)).

68. See *Shinseki v. Sanders*, 129 S.Ct. 1696, 1704 (2009) (Breyer, J.); *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (Souter, J., writing for a unanimous court) (citing precedent quoting the *Manual* verbatim). Justice Thomas also joined both these opinions. 129 S.Ct. at 1699; 508 U.S. at 184.

analysis of the legislative history of the APA, including the *Manual*.⁶⁹ However, it is likely that their refusal to join this part of the opinion was due to its mention of other forbidden sources, including a Senate Judiciary Committee report, letters written by the Attorney General and his subordinates to various congressional committees, and the legislative history of the 1976 amendments to the APA,⁷⁰ rather than due to the Court's reliance on the *Manual*. Indeed, in *Norton*, Justice Scalia cited *Darby* for the proposition that the *Manual* is "a document whose reasoning we have often found persuasive."⁷¹ I have found no cases or scholarly articles in which Justice Scalia chides judges for their reliance on the *Manual* or recants his prior use of the *Manual*, as he did for the Advisory Committee Notes in *Tome*.

Justice Scalia's use of the *Manual* is perhaps the most striking example of this phenomenon, given his unflagging zealotry for textualism. He is not, however, the only textualist judge to write or join opinions that utilize the *Manual*. Judge James Buckley of the D.C. Circuit, another critic of legislative history,⁷² has joined opinions that cite the *Manual*⁷³ and has consulted the *Manual* in his own opinions.⁷⁴ Former D.C. Circuit judge, Solicitor General, and Independent Counsel Kenneth Starr, who has authored impassioned critiques of judicial use of legislative history,⁷⁵ has also

69. 509 U.S. 137, 138 (1993) (Blackmun, J., writing for a unanimous Court except for Part III, which Justices Rehnquist, Scalia, and Thomas refused to join).

70. See *id.* at 147-53.

71. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004) (citing *Darby v. Cisneros*, 509 U.S. 137, 148 n.10 (1993)).

72. See *Overseas Educ. Ass'n, Inc. v. Fed. Labor Relations Auth.*, 876 F.2d 960, 974-75 (D.C. Cir. 1989) (Buckley, J., concurring in part, joined by Starr, J.) ("We find [the majority's] references to legislative history unnecessary, and we cannot accept the use of these extra-statutory materials to place a restrictive gloss on the plain meaning of [the statutory provision at issue]."); *IBEW Local 474 v. NLRB*, 814 F.2d 697, 715-20 (D.C. Cir. 1987) (Buckley, J., concurring) ("When one undertakes to use legislative history as a tool of statutory construction, surely the first part of wisdom is to remember that Congress is a political as well as a legislative body, and that its members will put the privileges and facilities of their respective chambers to political as well as legislative uses. Thus not every utterance to be found in committee reports or the *Congressional Record* may be assumed to represent statutory gold."); Eskridge, *New Textualism*, *supra* note 14, at 647.

73. *3M Co. v. Browner*, 17 F.3d 1453, 1456 (D.C. Cir. 1994) (Randolph, J., writing the opinion of the court).

74. *Indep. U.S. Tanker Owners Comm. v. Skinner*, 884 F.2d 587, 591-92 (D.C. Cir. 1989) (consulting the *Manual* and finding that it "contradicts appellees' position").

75. E.g., *FEC v. Rose*, 806 F.2d 1081, 1090 (D.C. Cir. 1986) (Starr, J.); see also Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 379 ("[T]he benefits accruing from the use of legislative history are marginal when weighed against the potential for abuse and the enormous effort involved.").

joined judicial opinions that favorably cite the *Manual*⁷⁶ and has described the *Manual* in laudatory terms.⁷⁷ Other notable examples abound.⁷⁸

IV. CAN THIS ANOMALOUS PHENOMENON BE EXPLAINED?

Why, then, do textualists use the *Manual* when it shares so many of the characteristics with legislative history that they find odious? In this section, I canvass the five most promising explanations for textualist use of the *Manual*. All ultimately fall short.

76. *Atlantic Richfield Co. v. United States*, 774 F.2d 1193, 1200 n.33 (D.C. Cir. 1985) (Edwards, J., writing the opinion of the court).

77. *Ass'n for Regulatory Reform v. Pierce*, 849 F.2d 649, 652–53 (D.C. Cir. 1988) (stating that the District Court Judge's "opinion below aptly returned to" the *Manual*, which he described as "one of the original guides to judicial understanding" (emphasis added)).

78. Many judges who have expressed marked skepticism about the value of legislative history have nonetheless cited the *Manual* in their opinions. Such judges include (1) Judge Rogers of the Sixth Circuit, *compare* *United States v. Cain*, 583 F.3d 408, 418–19 (6th Cir. 2009) (Rogers, J.) ("Divining anything from unenacted legislation is always a risky business '[T]he statements of individual legislators . . . during the course of the enactment process' may not 'expand[] or contract[]' legislation when 'the statutory text adopted by both Houses of Congress and submitted to the President' is 'unambiguous.'" (internal citations omitted)) and *City of Cookeville, Tenn. v. Upper Cumberland Elec. Membership Corp.*, 484 F.3d 380, 390, n.6 (6th Cir. 2007) (Rogers, J.) ("We are mindful of the limited utility and reliability of legislative history. In this regard, 'the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.'" (internal citations omitted)) with *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 679 (6th Cir. 2005) (Rogers, J.) (describing the *Manual* as "persuasive authority on the meaning of the APA" and using the *Manual* to give content to the phrase "interpretative rules," a term that is undefined in the APA (discussed in Part IV.A and footnote 90, *infra*)); (2) Judge Becker of the Third Circuit, *compare* *United States v. Bowers*, 432 F.3d 518, 522–24 (3d Cir. 2005) (Becker, J.) ("[O]rdinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." (internal citations omitted)) with *Dir., Office of Workers' Comp. Programs v. Mangifest*, 826 F.2d 1318, 1331–32 (3d Cir. 1987) (Becker, J.) (quoting the *Manual* for the proposition that "nothing in section 7(c) [556] is intended to preclude an agency from imposing reasonable requirements as to how particular facts must be established"); and (3) Judge Silberman of the D.C. Circuit, *compare* *United States v. SCS Bus. & Technical Inst., Inc.*, 173 F.3d 870, 878–79 (D.C. Cir. 1999) (Silberman, J.) ("Courts sensibly accord such 'postenactment legislative history,' arguably an outright 'contradiction in terms,' only marginal, if any, value. Post-enactment legislative history—perhaps better referred to as 'legislative future'—becomes of absolutely no significance when the subsequent Congress (or more precisely, a committee of one House) takes on the role of a court and in its reports asserts the meaning of a prior statute." (internal citations omitted)) with *Conn. Dep't of Children & Youth Servs. v. Dep't Health & Human Servs.*, 9 F.3d 981, 984 (D.C. Cir. 1993) (Silberman, J.) (relying on the *Manual* to define "policy statements").

A. Possible Analogies to The Federalist Papers

Perhaps the apparent inconsistency may be explained by analogizing the *Manual* to *The Federalist Papers*. Ardent textualists frequently refer to *The Federalist* when interpreting the U.S. Constitution,⁷⁹ despite the fact that the standard textualist “criticisms of legislative history apply, at least superficially, to *The Federalist*,”⁸⁰ just as they do to the *Manual*. Indeed, textualist judges have, on occasion, invoked *The Federalist* “to create a constitutional limitation not apparent from the plain language of the Constitution,”⁸¹ which appears analogous to the impermissible use of drafting history to render an otherwise clear provision ambiguous.⁸²

The phenomenon of textualists using *The Federalist* may not be as anomalous as it initially seems. Professor Eskridge has argued that a textualist judge who spurns legislative history may still be acting in a principled

79. Eskridge, *Federalist*, *supra* note 16, at 1301–08 (noting that “the biggest consumers of *The Federalist* and other pre-enactment constitutional history,” namely Justices Thomas and Scalia, “will not even read pre-enactment legislative history of statutes,” and that “the Supreme Court Justices most critical of considering pre-enactment legislative debates in statutory cases are the most insistent that ratification debates be considered, and often be decisive, in constitutional cases”); Scalia, *supra* note 1, at 38 (explaining that he consults *The Federalist* because “their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood”). For cases in which textualist judges heavily rely upon *The Federalist Papers*, see, for example, *Printz v. United States*, 521 U.S. 898, 910–15, 919–24 (1997) (Scalia, J., writing the opinion of the Court); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 221–23 (1995) (Scalia, J.); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 845–926 (1995) (Thomas, J., dissenting, joined by Justice Scalia); and *Morrison v. Olson*, 487 U.S. 654, 697–99 (1988) (Scalia, J., dissenting).

80. Eskridge, *Federalist*, *supra* note 16, at 1308–16. Some of the criticisms of *The Federalist* Eskridge identifies are: “[i]f the collective ‘intent’ of the bicameral legislature is an incoherent concept,” then “the collective ‘understanding’ of an entire nation during a constitutional moment must be even more so;” “*The Federalist* is not necessarily more reliable than statutory legislative history in discerning usable collective understanding, [but rather] in some respects, it may be less reliable;” *The Federalist* is, in some cases, every bit as ambiguous and indeterminate as statutory legislative history and therefore suffers equally from the “look over the heads of the crowd and pick out your friends” problem. *Id.* But see John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1348–50 (1998) [hereinafter Manning, *Federalist*] (distinguishing *The Federalist* from legislative history).

81. Eskridge, *Federalist*, *supra* note 16, at 1311 (referring to *Printz*, 521 U.S. at 909–24 (Scalia, J., writing the opinion of the Court)). “*Printz* is a high-water point for Scalia’s use of *The Federalist*, because the specific constitutional texts of the Commerce Clause, the Necessary and Proper Clause, and the Supremacy Clause supported the dissenters and had to be explained away.” *Id.* at 1307.

82. See, e.g., *Zedner v. United States*, 547 U.S. 489 (2006) (Scalia, J., concurring) (arguing that legislative history should not be used to render plain statutory language ambiguous); *Overseas Educ. Ass’n, Inc. v. Fed. Labor Relations Auth.*, 876 F.2d 960, 974–76 (1989) (Buckley, J., concurring, joined by Starr, J.) (“As the Act speaks for itself, reference to legislative history is unnecessary, and we cannot agree with our colleague’s use of legislative materials to modify the plain meaning of the statute.”).

manner if he or she consults *The Federalist Papers* because “the open-textured Constitution cries out for more context” than that needed to interpret most statutes, and “[l]ong-departed constitutional debaters had strong incentives to represent political consensus or equilibrium accurately.”⁸³ In other words, constitutional interpretation is a qualitatively different task than most statutory interpretation; it is a context where the originalist, historicist strain of textualism triumphs over its trenchant semanticist critique of drafting history.⁸⁴

Obviously, the APA is a statute, not a constitution; thus, analogies to *The Federalist* may initially seem inapposite. However, many commentators have argued that “the APA is more like a constitution than a statute” because

[i]t provides for flexibility in decision-making; it can be changed through interpretation without the need for amendment; its movements are more pendulum-like than linear. Its fundamental role is to shape the relationship between the people and their government, giving the government considerable leeway in carrying out the substantive laws that Congress has enacted, while at the same time providing the governed with a considerable degree of procedural protection.⁸⁵

If this is correct, then textualists may have a principled reason to rely upon both the *Manual* and *The Federalist* but not other forms of legislative history: the *Manual*, like *The Federalist*, provides crucial interpretive guidance

83. Eskridge, *Federalist*, *supra* note 16, at 1323. It should be noted that while Professor Eskridge believes the distinction between *The Federalist* and ordinary legislative history is at least plausible, he does not appear convinced that the distinction completely resolves the apparent inconsistency. *Id.* at 1316 (“I am not completely persuaded of the new textualist position even under this better line of analysis, but neither am I persuaded that it is wrong.”); *id.* at 1323 (“I am uncertain whether *The Federalist*, written long ago to a more exclusive audience, is the most appropriate source of constraint . . .”).

84. See *id.* at 1301–07; see also Manning, *Federalist*, *supra* note 80, at 1355 (noting that “the leading textualists typically subscribe to premises of originalism as well”) (citing Scalia, *supra* note 1, at 35 and Frank H. Easterbrook, *Alternatives to Originalism?*, 19 HARV. J.L. & PUB. POL’Y 479, 486 (1996)); Manning, *Nondelegation*, *supra* note 1, at 731–32 (“[T]extualists readily acknowledge the importance of statutory context in determining meaning.”).

85. Morrison, *supra* note 34, at 253; see, e.g., Sasha Samberg-Champion, *How to Read Gonzaga: The Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838, 1867 n.195 (2003); Shepherd, *supra* note 12, at 1558 (dubbing the APA “the bill of rights for the new regulatory state”); Michal Tamir, *Public Law as a Whole and Normative Duality: Reclaiming Administrative Insights in Enforcement Review*, 12 TEX. J. C.L. & C.R. 43, 51 (2006) (describing the APA as “a ‘quasi-constitutional statute’ whose foundations are in the Due Process Clause of the Constitution”) (citing PETER H. SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW 53 (1994); BERNARD SCHWARTZ & H.W.R. WADE, LEGAL CONTROL OF GOVERNMENT: ADMINISTRATIVE LAW IN BRITAIN AND THE UNITED STATES 8 (1972)).

and historical context regarding an extremely important, open-textured document that balances the conflicting needs of flexibility and stasis.

At first blush, this comparison appears attractive. The *Manual*, like *The Federalist*, provides interpretive guidance when the law to be interpreted does not explicitly provide an answer to a legal question. For example, just as *The Federalist* helps clarify whether it is constitutional to require state officers to assist the execution of federal laws by conducting background checks on potential handgun buyers,⁸⁶ the *Manual* offers a helpful definition of “interpretive rules,” a term defined in neither the text of the APA nor the legislative history created by Congress.⁸⁷ The *Manual* therefore appears to provide much-needed “[o]riginal context” for this “open-textured, abstract, and process-oriented” term.⁸⁸

However, this analogy is convincing only up to a point. Many of the most persuasive arguments that purportedly absolve textualists of their reliance on *The Federalist* in the constitutional context simply do not apply in the context of the APA. “The best reason” to consult *The Federalist* but not ordinary legislative history is “the different incentives of the speakers”: whereas “[l]ong-departed constitutional debaters” arguably “had strong incentives to represent political consensus or equilibrium accurately,” political actors who create statutory legislative history, such as the Department of Justice during the APA’s drafting, have the “countervailing” incentive “to bend future statutory construction toward their preferred, rather than the actual, political equilibrium on some issues.”⁸⁹ As detailed earlier in this Note,⁹⁰ there is strong evidence that the Department of Justice drafted the *Manual* in the hopes that future courts would interpret the APA in a manner that favored the Executive Branch. Thus, it appears that even those textualists who consult *The Federalist* should have second thoughts before cracking open the *Manual*.

Professor Eskridge also argues that, because “the Constitution is more open-textured” and “abstract . . . than statutes,” the “[o]riginal context” that sources like *The Federalist* provide “is more useful, and even necessary, for interpretation of such an ancient document” than it is for “more targeted” and “concrete” statutes like the APA, “most of which have been enacted or comprehensively revised in the last couple of generations.”⁹¹ Notwithstanding

86. Printz v. United States, 521 U.S. 898, 909–24 (1997).

87. Nagy, *supra* note 36, at 932 n.41. Since I have mentioned interpretive rules several times throughout this Note, it is worth noting to avoid confusion that jurists use the phrases “interpretive rules” and “interpretative rules” interchangeably. *Id.* at 930 n.32 (emphasis added).

88. Cf. Eskridge, *Federalist*, *supra* note 16, at 1302 (referring to the U.S. Constitution).

89. *Id.* at 1323.

90. See *supra* Part II.C.

91. *Id.* at 1302.

the APA's "quasi-constitutional" status, even the APA's most abstract provisions⁹² are arguably not as notoriously open-textured as constitutional phrases like "necessary and proper," "unreasonable searches and seizures," "due process of law," "cruel and unusual punishments," or "equal protection of the laws." Obviously, *The Federalist* does not address the meaning of all of these constitutional provisions; that would be a chronological impossibility. I mention them merely as a point of comparison to demonstrate that the APA is not so abstract that textualists would be utterly lost were they not to refer to contemporaneous historical materials like the *Manual*. The APA was enacted only a few decades ago and is therefore not an ancient document that requires intense historical analysis to understand, at least presently. Unlike the Founding Fathers, many persons born before the 1946 enactment are still alive; the political and linguistic culture of the time is not wholly out of our grasp.⁹³ Textualists do not need to rely on the *Manual* to obtain an accurate historical picture of the APA in the same way that they rely on *The Federalist* to interpret the Constitution.

Additionally, Professor Eskridge notes that "because statutes are easier to change than the Constitution, a judicial interpretation that slights legislative expectations does potentially less harm than one that slights constitutional expectations."⁹⁴ In other words, because the costs of neglecting to consult documents like *The Federalist* are so much greater than the cost of failing to refer to statutory legislative history, even those who spurn the latter are justified in using the former. Again, in this respect, the APA is much more like a statute than a constitution. The process of amending the APA is no more onerous than the process of amending any other statute.⁹⁵ I concede that amendments to the APA are rare and unlikely given "that the APA is not a high visibility political issue,"⁹⁶ but major amendments to the APA are not unheard of.⁹⁷ Thus, an argument based on the cost of errors of failing to consult the *Manual* does not support the *Manual's* use.

92. Notoriously abstract provisions of the APA include section 706, which provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (emphasis added).

93. Cf. Manning, *Federalist*, *supra* note 80, at 1357–58 (explaining that the Constitution was written so long ago that the context *The Federalist* supplies "transcends anything that modern Americans could hope to replicate, even if they had the luxury and capacity to immerse themselves in constitutional history in a way that no judge does"). *But see In re Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989) (Easterbrook, J.) ("Legislation speaks across the decades, during which legal institutions and linguistic conventions change. To decode words one must frequently reconstruct the legal and political culture of the drafters." (emphasis added)).

94. Eskridge, *Federalist*, *supra* note 16, at 1302.

95. Morrison, *supra* note 34, at 268.

96. *Id.* at 268–69.

97. *Id.* at 269 ("There has been . . . one major set of changes to the APA. Beginning in 1966 with the Freedom of Information Act, continuing in 1972 with the Federal Advisory

Moreover, even assuming *arguendo* that *The Federalist* and the *Manual* are perfectly analogous, it is not altogether certain that textualists are justified in using *The Federalist Papers* at all. *The Federalist*, like legislative history, may be described as “a piece of political advocacy, whose contents may at times reflect the exigencies of debate, rather than a dispassionate account of constitutional meaning.”⁹⁸ Indeed, “in the struggle over ratification, strategic considerations drove the contestants on both sides to minimize and to exaggerate.”⁹⁹ Likewise, as mentioned previously, *The Federalist* shares many other characteristics with legislative history that cast doubt on *The Federalist*’s reliability as an interpretive tool. If this is correct, then analogizing *The Federalist* to the *Manual* would not fully resolve the textualists’ dilemma even if the analogy were persuasive.

For all of these reasons, a comparison to *The Federalist Papers* does not provide a convincing explanation of the *Manual*’s use by textualists.

B. *The Manual May Be Reliable When Its Interpretation Is Contrary to Executive Branch Interests*

According to Professor Beermann, although there are undoubtedly concerns about the *Manual*’s neutrality, the fact that the *Manual* was drafted with the Executive Branch’s interests in mind indicates that the *Manual* may serve as an accurate interpretive guide “in those cases in which the *Manual*’s interpretation is contrary to the Executive Branch’s interests.”¹⁰⁰ Presumably the Attorney General would not have conceded to those interpretations if they were incorrect. This appears to offer textualists another possible justification for their use of the *Manual*: insofar as the textualist

Committee Act and concluding in 1976 with the Government in the Sunshine Act and the amendment to the APA adjudication provisions limiting *ex parte* contacts, Congress has opened up the processes of administrative agencies to public scrutiny. In addition, these sunshine statutes have altered the ground rules for resolving disputes between the people and the agencies. Although courts still grant agencies a substantial degree of deference, Congress has explicitly made agency decisions to withhold documents requested under the FOIA subject to *de novo* review in the courts, with the government carrying the burden of proof.” (internal citations omitted).

98. Manning, *Federalist*, *supra* note 80, at 1339. It should be noted, however, that although Professor Manning believes that textualists should utilize caution when consulting *The Federalist*, he does not believe that *The Federalist* is totally off limits: “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’ . . . 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.” *Id.*; *see id.* at 1359–60 (discussing how judges should use *The Federalist*).

99. *Id.* at 1358 (quoting Alpheus T. Mason, *The Federalist—A Split Personality*, in *ORIGINS OF AMERICAN POLITICAL THOUGHT* 163, 168 (John P. Roche ed., 1967)).

100. Beermann, *supra* note 12, at 790.

critique of legislative history is based on a perceived lack of reliability, reliance on sources that resemble legislative history, but demonstrate greater indicia of accuracy in specific contexts, may be defensible.

This argument also proves unavailing. Textualists regularly select quotes from the *Manual* that advance, rather than stymie, executive interests. In other words, textualists are largely consulting the parts of the *Manual* they should view most skeptically.

In *Norton v. Southern Utah Wilderness Alliance*, for example, Justice Scalia cited the *Manual* for the proposition that the judiciary only has the power “to compel an agency ‘to perform a ministerial or non-discretionary act,’ or ‘to take action upon a matter, without directing *how* it shall act’” under section 706(1) of the APA.¹⁰¹ In other words, executive branch agencies retain wide policy discretion which section 706(1) only curtails when the agency has “failed to take a *discrete* agency action that it is *required to take*.”¹⁰² This standard is clearly not contrary to the Executive Branch’s interests.

Likewise, in his dissent in *Bowen v. Massachusetts*, Justice Scalia used the *Manual* to support his contention that a state could not challenge a particular federal executive agency’s decision in a federal district court, but rather could only bring suit in a claims court.¹⁰³ Had Justice Scalia’s opinion carried the day, it would expand executive power by circumscribing the fora in which some agency decisions can be challenged.

Justice Scalia also cited the *Manual* in a pro-executive manner in his dissent in *Webster v. Doe*.¹⁰⁴ He quoted the *Manual*’s assertion that the APA intended “to restate the existing law as to the area of reviewable agency action” to argue that the decision by the Director of the Central Intelligence Agency to terminate an employee was a discretionary act that could not be reviewed for compliance with either the APA or the U.S. Constitution.¹⁰⁵ This opinion also would have granted the Executive Branch great

101. 542 U.S. 55, 63–64 (2004) (emphasis in original) (quoting MANUAL, *supra* note 5, at 108). Section 706(1) of the APA provides that a reviewing court shall “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1) (2006).

102. *Norton*, 542 U.S. at 64 (emphasis in original).

103. 487 U.S. 879, 922–25 (1988) (Scalia, J., dissenting) (“I do not agree, however, that respondent can pursue these suits in district court, as it has sought to, under the provisions of the APA, since in my view they are barred by 5 U.S.C. § 704 The purpose and effect of this provision is to establish that the APA ‘does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures.’ Attorney General’s Manual on the Administrative Procedure Act § 10(c), p. 101 (1947) Respondent has an adequate remedy in a court and may not proceed under the APA in the District Court because (1) an action for reimbursement may be brought in the Claims Court pursuant to the Tucker Act, and (2) that action provides all the relief respondent seeks.”).

104. 486 U.S. 592, 609 (1988) (Scalia, J., dissenting).

105. *Id.* at 606–11 (Scalia, J., dissenting) (quoting MANUAL, *supra* note 5, at 94).

discretion had it commanded a majority. Moreover, the fact that Justice Scalia cited the *Manual* for its characterization of preexisting administrative law is problematic; as mentioned previously, the existing law “was so unclear on many important issues, especially with regard to judicial review of legal interpretations, that codification would have meant that the APA provision had basically no discernible content.”¹⁰⁶ This problem compounds the criticism that textualists are citing unreliable portions of the *Manual*.

*Brock v. Cathedral Bluffs Shale Oil Co.*¹⁰⁷ represents another example of then-Judge Scalia using the *Manual* in ways that advance executive interests. He quoted the *Manual*’s definition of “general statements of policy” to establish that the Secretary of Labor’s enforcement policy was not “a binding regulation which the Secretary was required strictly to observe.”¹⁰⁸ Again, this decision preserved the flexibility of executive branch agencies to give guidance to private actors without locking the agency’s policies into place.

Justice Scalia is not the only textualist to use portions of the *Manual* that further executive interests. Judge Buckley quoted a provision of the *Manual* that explains that “[t]he fact that an interested person may object to such issuance, amendment, or repeal of a rule does not change the character of the rule as being one” that exempts the agency from the requirement that a rule be published no less than thirty days from the date it becomes effective.¹⁰⁹ A statement that a certain condition is insufficient to disqualify an agency from an exemption from the APA’s procedural requirements undoubtedly favors the Executive Branch.

Admittedly, there are counterexamples. For instance, in *Bowen v. Georgetown University Hospital*, Justice Scalia’s concurrence used the *Manual* to establish that executive agencies cannot make rules with retroactive effect.¹¹⁰ This portion of the *Manual* provides an interpretation of the APA that cabins executive power, and therefore may be reliable enough to survive textualist criticism.

That said, on the whole, textualists appear to use provisions of the *Manual* that benefit the executive. Professor Beermann’s observation regarding the potential accuracy of provisions of the *Manual* that hinder executive interests therefore fails to satisfactorily resolve the anomaly in most instances.

106. Beermann, *supra* note 12, at 790.

107. 796 F.2d 533 (D.C. Cir. 1986) (Scalia, J., writing the Opinion for the Court).

108. *Id.* at 536–39 (quoting MANUAL, *supra* note 5, at 30 n.3).

109. *Indep. U.S. Tanker Owners Comm. v. Skinner*, 884 F.2d 587, 590–92 (D.C. Cir. 1989) (Buckley, J.) (quoting MANUAL, *supra* note 5, at 37, in turn interpreting section 553(d)(1) of the APA).

110. 488 U.S. 204, 218–19 (1988) (Scalia, J., concurring) (noting that the *Manual* states that rules “must be of *future effect*, implementing or prescribing future law” (quoting MANUAL, *supra* note 5, at 13–14)).

C. Textualism as a Nondelegation Doctrine

Conceiving of textualism as a nondelegation doctrine may provide an escape hatch for textualists who utilize the *Manual*. Professor Manning argues that textualism does not derive its justification solely from invocations of the bicameralism and presentment provisions of Article I, Section 7 of the U.S. Constitution and the practical and theoretical critiques of legislative history.¹¹¹ Textualists regularly rely on case law, dictionaries, and treatises (and, in the context of administrative law, agency interpretations of ambiguous statutory provisions¹¹²) as guides to interpreting specialized legal language, even though, like legislative history, these sources have not passed through the bicameralism and presentment process.¹¹³ Rather, textualism's ultimate justification may be the separation of powers established by the U.S. Constitution. To Professor Manning, textualism is best understood as a bar to legislative self-delegation.¹¹⁴ In other words, reliance on legislative history grants the legislative branch the power to both make and interpret the laws, a combination that separation of powers jurisprudence abhors.¹¹⁵ According to Professor Manning, "lawmaking and law-elaboration must be distinct so that legislators will have a structural incentive not to enact vague or ambiguous laws."¹¹⁶ "[B]ecause all laws leave open spaces, legislation necessarily entails an incidental" and permissible "delegation of law elaboration authority to the agencies and courts that implement it." However, if Congress is permitted to "effectively delegate law elaboration authority to its own committees or members," then the "structural incentive" to "resolve important issues in the enacted text" is "substantially undermined; issues left unresolved by a duly enacted statute will be clarified in accordance with the views of actors firmly under congressional control, operating outside the constraints of bicameralism and presentment."¹¹⁷

111. Manning, *Federalist*, *supra* note 80, at 1338; Manning, *Nondelegation*, *supra* note 1, at 675.

112. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

113. Manning, *Federalist*, *supra* note 80, at 1338; Manning, *Nondelegation*, *supra* note 1, at 695–707. Additionally, textualists may also "embrace such sources" because "a reasonable legislator would have consulted them to determine the meaning of the law for which he or she was voting." Manning, *Federalist*, *supra* note 80, at 1342.

114. Manning, *Nondelegation*, *supra* note 1, at 706–07.

115. *Id.*; see also U.S. CONST. art. I, § 1 ("All legislative Powers . . . shall be vested in . . . Congress . . . " (emphasis added)); Manning, *Nondelegation*, *supra* note 1, at 711 ("[T]he federal Constitution includes measures expressly designed to give Congress imperfect control over those who implement, and thus interpret, its laws.").

116. Manning, *Federalist*, *supra* note 80, at 1338.

117. Manning, *Nondelegation*, *supra* note 1, at 706–07.

This observation initially affords textualists some justification for their apparent contradiction. The *Manual* may be best analogized to a common law treatise,¹¹⁸ which Professor Manning deems an acceptable tool for textualists in certain circumstances.¹¹⁹ Unlike legislative history, the *Manual* was written by the Executive Branch. Even though the Department of Justice played an important role in the APA's drafting, it did not adopt the role of a legislator per se, and it does not remain under direct congressional control. Thus, a textualist might argue, judicial use of the *Manual* does not amount to legislative self-delegation, because it does not afford the legislature the power to both make and interpret the laws.

While judicial use of the *Manual* does not amount to legislative self-delegation, it still appears to offend separation of powers principles as an example of excessive executive aggrandizement or encroachment. Some degree of delegation to the Executive Branch to interpret the laws is expected, necessary, and desirable.¹²⁰ However, if the Department of Justice is allowed to affect judicial interpretation of duly-enacted statutory provisions merely by issuing an official manual, without express congressional authorization to do so, then the Executive Branch has enormous power to unilaterally change the meaning of statutes in ways that benefit the executive. To be sure, executive agencies, as a result of their policy-making expertise, often receive judicial deference to reasonable interpretations of ambiguous provisions in the statutes they administer.¹²¹ That said, agencies like the Department of Justice have no interpretive authority over statutes they are not authorized to administer, like the APA.¹²² Additionally, the

118. See Beermann, *supra* note 12, at 790 (“*The Attorney General’s Manual on the Administrative Procedure Act* stated simply that the judicial review provisions of the APA were meant to *codify existing law*.” (emphasis added)). But see the difficulties with characterizing the APA as codifying existing law discussed *supra* Part II.C.

119. Manning, *Federalist*, *supra* note 80, at 1352–54.

120. See Manning, *Nondelegation*, *supra* note 1, at 710–11, 725–26 (“In contrast with legislative self-delegation, the transfer of some policymaking discretion to agencies and courts is more readily understood as a matter of constitutional necessity, and as less amenable to control through judicially administrable standards. To that extent, textualists tolerate executory delegation because it is preferable to the alternative—unchanneled judicial application of an assertive nondelegation doctrine.”).

121. *E.g.*, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); see also *Bowsher v. Synar*, 478 U.S. 714, 726 (1986); Manning, *Nondelegation*, *supra* note 1, at 715 (citing *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 275 (1991)) (“The [Supreme] Court has sustained sharp distinctions between conventional delegations of lawmaking power to administrative agencies and attempts by Congress to delegate power to its own components or agents.”).

122. *E.g.*, William S. Jordan, III, *Chevron and Hearing Rights: An Unintended Combination*, 61 ADMIN. L. REV. 249, 254 (2009) (“[I]t is well established that interpretations of the APA are not subject to Chevron deference.”) (citing Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 896–97 (2001)).

informality with which the *Manual* was drafted and released strongly implies that the Attorney General's interpretation should not be treated authoritatively.¹²³ Consequently, under Professor Manning's analytical framework, in which judicial reference to extra-textual sources implicates the separation of powers, judicial use of the *Manual* appears to grant the Executive Branch the mutant cousin of the unconstitutional line item veto:¹²⁴ the ability to effectively alter the content of a law outside the confines of the bicameralism and presentment process. Thus, conceiving of textualism as a nondelegation doctrine fails to excuse textualist use of the *Manual*.

D. Some Textualist Use of Legislative History May Be Acceptable

Some, including Professor Manning, have argued that one can still be a principled, orthodox textualist without adopting an exclusionary rule completely barring all reference to legislative history. Although one should not consult legislative history to divine an unexpressed legislative intent, it may be permissible to use legislative history to "suppl[y] an objective, unmanufactured history of a statute's context,"¹²⁵ as long as the judge first performs "a full and independent verification of the accuracy and persuasiveness of [the legislative history's] contents."¹²⁶ Doing so would arguably not implicate the same constitutional concerns that animate textualism. This argument is somewhat comparable to the analogy to *The Federalist*, but has some key differences. It is therefore worth quoting Professor Manning at length on this subject:

If, for example, a statute codifies an established term of art, and the committee creates a historical document (the committee report) that recites evidence (perhaps the leading cases) establishing the settled meaning of that term, judicial examination of that evidence does not assign the committee the power to determine the meaning of the law enacted by Congress as a whole. Rather, such a committee report may simply offer the Court insight into the way in which any reasonable person, skilled in the legal arts, would have understood the relevant phrase, independent of the committee's subjective understanding of statutory meaning. In those circumstances, the committee serves as a persuasive relator of statutory context, rather than the actual creator of that context through its own idiosyncratic expression of intent. And the resulting legislative

123. *E.g.*, *United States v. Mead Corp.*, 533 U.S. 218 (2001).

124. *See Clinton v. City of New York*, 524 U.S. 417 (1998).

125. Manning, *Nondelegation*, *supra* note 1, at 731.

126. *Id.* at 733.

history may add substantial value to the interpretive process by supplying a well-informed, contemporaneous account of the relevant background to the enactment. Because textualists readily acknowledge the importance of statutory context in determining meaning, such uses of legislative history should present little theoretical difficulty for textualist judges.¹²⁷

If the *Manual* had the same characteristics as these permissible, contextual forms of legislative history, then perhaps textualist use of the *Manual* would not pose theoretical difficulties.

At first the analogy seems attractive. The *Manual* was written against a background of administrative common law that, to some extent, was purportedly imported into the APA. The Department of Justice sought to catalog, for the benefit of executive branch agencies, which administrative law practices survived the APA and which Congress found problematic and sought to excise. Thus, the *Manual* may merely be affording helpful historical context.

However, forcing the *Manual* into this category appears akin to shoving a square peg into a round hole. The *Manual* does far more than merely capture the objective, shared understanding of terms of art or discuss the developments that led to the APA's adoption for historical context. The *Manual* provides definitions of statutory terms of art, but often does so with such specificity that it would be absurd to say that "any reasonable person, skilled in the legal arts, would have understood the relevant phrase" in that manner.¹²⁸ For instance, it is unlikely that "any reasonable person" in the 1940s would inevitably conclude that "[t]he phrase 'foreign affairs functions,' used" in section 553(a)(1) "is not to be loosely interpreted to mean any function extending beyond the borders of the United States but only those 'affairs' which so affect relations with other governments that, for example, public rule making provisions would clearly provoke definitely undesirable international consequences,"¹²⁹ and that "the exemption is not limited to strictly diplomatic functions."¹³⁰ This ultra-specific statement is an expression of legislative and executive intent, not an objective definition that would have been shared by all participants in the heated legislative battle. Indeed, the Department of Justice extracted this insight from the

127. *Id.* at 731–32.

128. *See id.*

129. *MANUAL*, *supra* note 5, at 26 (quoting S. REP. NO. 752, at 13 (1945) and H.R. REP. NO. 1980, at 23 (1945)) (citing Representative Walter's statement in ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, at 358 (2d Sess. 1946)).

130. *MANUAL*, *supra* note 5, at 27 (citing Representative Walter's statement in ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, at 157 (2d Sess. 1946)).

legislative history of the APA, thereby doubly compounding the theoretical difficulty of textualist use of the *Manual*.¹³¹ A similar argument can be made about the *Manual*'s definition of "interpretative rules" in section 553(b)(A).¹³²

Thus, the *Manual* goes far beyond "recit[ing] evidence (perhaps the leading cases) establishing the settled meaning of" statutory terms and "identify[ing] the events that precipitated the enactment of" the APA.¹³³ To the contrary, the *Manual* fulfills the same functions of legislative history that textualists deem impermissible, namely the creation of context by interested participants in the legislative process.

Moreover, the concerns raised previously about the *Manual*'s accuracy and reliability imply that the *Manual* would fail the "full and independent verification of the [document's] accuracy and persuasiveness" that Professor Manning prescribes.¹³⁴ Again, there is doubt that the *Manual* codified existing administrative law practice because there likely was no uniform practice to codify, and the Department of Justice had great incentives to manipulate the *Manual*'s contents.¹³⁵ The Attorney General has performed the impermissible task of creating, rather than restating, context, and thus the *Manual* may not be conceived as an acceptable form of legislative history.

E. The Manual as a Mere Corroborating Authority

The final possibility is that textualists do not use the *Manual* as a controlling authority; rather, they merely use the *Manual* to confirm that their understanding of the APA is correct. Admittedly, I have not come across any cases in which a textualist judge uses the *Manual* to override the interpretation he or she would otherwise ascribe to the APA or joins an opinion that does so.¹³⁶ Similarly, I have not found any textualist opinions in which the *Manual* is the sole authority cited for a proposition; use of the *Manual* is always accompanied by citation to precedent, learned treatises, and other statutes and is supported by some degree of independent analysis of the

131. *Id.*

132. *See supra* Part IV.A.

133. *Cf.* Manning, *Nondelegation*, *supra* note 1, at 731–33.

134. *Id.* at 732–33.

135. *See supra* Part III.

136. *See, e.g.*, *Shinseki v. Sanders*, 129 S. Ct. 1696, 1700–08 (2009) (Breyer, J., joined by Justices Scalia and Thomas); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004) (Scalia, J.); *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 123–36 (1995) (Scalia, J.); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986) (Scalia, J.); *Lincoln v. Vigil*, 508 U.S. 182 (1993) (Souter, J., writing for a unanimous court, including Justices Scalia and Thomas); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216–25 (1988) (Scalia, J., concurring); *Bowen v. Massachusetts*, 487 U.S. 879, 913–30 (1988) (Scalia, J., dissenting); *Webster v. Doe*, 486 U.S. 592, 606–21 (1988) (Scalia, J., dissenting).

statutory text and historical context.¹³⁷ Textualists are far from using the *Manual* to effect “the triumph of supposed ‘legislative intent’ . . . over the text of the law.”¹³⁸ Thus, one might reply that this is all much ado about nothing.

Such a conclusion would be incorrect. In close cases, arguably any amount of corroboration can tip the balance.¹³⁹ Judges rarely, if ever, explicitly rest their holdings on a single dispositive source. Each citation, be it the *Manual*, *The Federalist Papers*, a case, statutory text, or the Advisory Committee Notes to the Federal Rules of Evidence, buttresses the overall architecture of a judicial opinion.¹⁴⁰ As Justice Scalia himself has stated in another context, “[a]cknowledgment’ of [a particular source cited in a judicial opinion] has no place in the legal opinion of this Court *unless it is part of the basis for the Court’s judgment*.”¹⁴¹ In other words, every citation counts. Removing any single source will probably not cause the structure to collapse like a house of cards, but it will at least make the opinion more precarious. Moreover, the probative value of any individual cited authority is affected by every other corroborative or contradictory source before the Court; the landscape of sources must be viewed holistically. Judges therefore ultimately make an all-things-considered judgment, based on the totality of legal authority before the Court, where every citation in the opinion works in concert to affect the end result.¹⁴² Put differently, quotations from the *Manual* arguably color the entire analysis and therefore drive end results more than the text of judicial opinions initially suggest. Relatedly,

137. See *supra* note 136.

138. Scalia, *supra* note 1, at 18–23 (discussing *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), a case loathed by textualists for allowing legislative history to trump statutory text).

139. A substantial number of cases in which textualists cite the *Manual* were arguably close cases about which reasonable jurists could disagree. The Court splintered and/or reached a different result than the court below in: *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (reversing the Court of Appeals); *Bowen v. Massachusetts*, 487 U.S. 879, 913–30 (1988) (splitting 5-1-3 and reversing the court of appeals in part); *Webster v. Doe*, 486 U.S. 592, 606–21 (1988) (reversing the court of appeals in part); and *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986) (reversing the district court).

140. Moreover, the judicial decision-making process is not a quantitative task; there is no objective scale on which a judge may place each source she cites and divine whether or not her opinion would be rendered legally correct by the addition or subtraction of any single authority. See Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1462 (2003) (“Though the classical legal theory of decisionmaking assumes a formal process, this process cannot be reduced to an algorithm.”). A judge will necessarily approach all available sources in a holistic manner.

141. *Roper v. Simmons*, 543 U.S. 551, 628 (2005) (Scalia, J., dissenting) (emphasis in original) (attacking the majority’s argument that “[t]he opinion of the world community [on the death penalty], while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.” *Id.* at 578 (Kennedy, J.)).

142. See *supra* note 140.

although it is impossible to divine from the text of the opinions, citations of the *Manual* may have helped textualists attract nontextualist votes for their opinions. Thus, there is arguably no such thing as a merely confirmatory citation.

Alternatively, even if one assumes it is possible for a source to be merely confirmatory, theoretical difficulties still arise. If it is acceptable to use the *Manual* as a merely confirmatory authority, then there appears to be no reason for textualists to break from opinions that use ordinary legislative history in a manner that purports to simply corroborate the analysis in the remainder of the opinion, as Justice Scalia did in *Tome* and countless other opinions.¹⁴³ It seems that one should either use both legislative history and the *Manual*, or neither.

A textualist might retort that, while his or her nontextualist counterparts use other forms of legislative history as controlling authorities even when they simply corroborate the accompanying analysis, a textualist uses the *Manual* because it merely “displays how the text of the [APA] was originally understood.”¹⁴⁴ In other words, perhaps textualists use documents like the *Manual* in a qualitatively different fashion than the way nontextualists use legislative history. However, as Professor Eskridge argues, this distinction “amounts to little more than a language game.”¹⁴⁵ Whereas users of legislative history are portrayed as “looking for a ‘legislative intent,’ which is labeled subjective and unknowable,” textualists using documents like the *Manual* claim they “are looking for an ‘original understanding,’ which is labeled objective and knowable.”¹⁴⁶ “In practice,” says Professor Eskridge, “legislative history and [documents like the *Manual*] are deployed in similar ways: as persuasive evidence of original understanding.”¹⁴⁷

In short, none of these avenues offer salvation to the textualist who uses the *Manual*.

V. WHY?

Why, then, have textualists come to rely so heavily on the *Manual* while they spurn more traditional forms of legislative history? I offer several possible explanations below, but concede that they are understandably speculative.

143. See *supra* Parts III–IV.

144. Eskridge, *Federalist*, *supra* note 16, at 1312–14 (quoting Scalia, *supra* note 1, at 38) (describing a distinction attempted by some textualists to justify their use of *The Federalist* in constitutional interpretation).

145. *Id.* at 1313.

146. *Id.* at 1314.

147. *Id.* at 1313.

One possibility is that courts have been citing the *Manual* for so long¹⁴⁸ that the practice has become ingrained in the judiciary's collective unconscious. Perhaps quoting the *Manual* has evolved into an unthinking habit. This explanation is not entirely satisfactory, however, for use of traditional legislative history was also a deeply-ingrained habit for practitioners and judges that was nonetheless broken by the textualist revolt of the 1980s.¹⁴⁹ It is therefore improbable, although certainly not impossible, that mere inertia continues to drive textualist use of the *Manual*.

A more convincing possibility is as follows: because many (although not all) contemporary textualists are political conservatives,¹⁵⁰ and because many (although not all) political conservatives favor strong executive power,¹⁵¹ perhaps textualists have not fully appreciated the ramifications of their use of the *Manual* because the pro-executive slant of the *Manual*¹⁵² confirms their instincts as to what the correct legal result should be in any particular case. This explanation would not necessarily entail that textualists are adjudicating in bad faith. Rather, it suggests that textualists view the *Manual* as merely corroborative.¹⁵³ If the *Manual* suggested results contrary to textualists' perceptions of what the correct outcome of a case should be as a legal matter, they would arguably subject the *Manual* to greater scrutiny.

A related but more controversial argument is that textualists are indeed acting in bad faith by capriciously abandoning their jurisprudential methodology whenever doing so would produce ideologically preferable results. This theory suggests that textualists intentionally or recklessly ignore the *Manual's* analogousness to legislative history, and therefore create an

148. The Supreme Court, for example, has been regularly citing the *Manual* since at least the 1960s. See *Shinseki v. Sanders*, 129 S. Ct. 1696, 1704 (2009); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63–64 (2004); *Darby v. Cisneros*, 509 U.S. 137, 148 n.10 (1993); *Bowen v. Massachusetts*, 487 U.S. 879, 903, 903 n.36 (1988); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979); *Int'l Tel. & Tel. Corp. v. Local 134, Int'l Bhd. of Elec. Workers*, 419 U.S. 428, 442–43 (1975); *FCC v. Schreiber*, 381 U.S. 279, 293 n.20 (1965).

149. See Eskridge, *New Textualism*, *supra* note 14, at 621, 623–24.

150. See, e.g., Francisco J. Benzoni & Christopher S. Dodrill, *Does Judicial Philosophy Matter?: A Case Study*, 113 W. VA. L. REV. 287, 295 (2011). But see *id.* at 295 n.26 (noting the counterexample of Justice Hugo Black, arguably both a liberal and a textualist); Paul Killebrew, *Where Are All The Left-Wing Textualists?*, 82 N.Y.U. L. REV. 1895, 1898–1900 (2007) (arguing that there is no necessary connection between textualism and conservative ideology).

151. E.g., Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 DUKE L.J. 307, 310 n.12 (citing Christopher H. Schroeder, *A Conservative Court? Yes*, 1993 PUB. INT. L. REV. 127, 130–46). But see Molly McDonough, *Pitching to a New Lineup*, A.B.A. J. EREPORT, Feb. 3, 2006 (“[B]eing conservative . . . doesn't necessarily mean that a justice will be ‘a handmaiden of a strong executive’” (quoting Bruce Fein)).

152. See *supra* Part II.C.

153. But see the difficulties with dubbing sources “merely corroborative” discussed *supra* Part IV.E.

arbitrary and indefensible distinction in order to produce results that favor the Executive Branch. Scholars of many ideological stripes have argued that textualists often abandon textualism when convenient in other contexts.¹⁵⁴ However, sophisticated theoretical and empirical accounts of judicial behavior suggest that, while judges are undoubtedly influenced, be it consciously or unconsciously, by their political ideologies, they are ultimately constrained to some extent by traditional modes of legal reasoning.¹⁵⁵ Textualism, and the desire to remain consistent with it, provides such a constraint.

Therefore, while it is possible textualists are simply acting in bad faith, the most convincing explanation is that textualists truly believe they are being consistent with textualism as they cite the *Manual*. It is likely that textualists erroneously believe that the *Manual* is qualitatively different from, and more akin to *The Federalist* or a learned treatise than, the forbidden fruit of legislative history. They are probably unfamiliar with the aforementioned articles that cast doubt on the *Manual*'s reliability. Thus, it is likely that the originalist strain of textualism leads them to view the *Manual* as a helpful guide to the APA's original meaning.

154. See, e.g., Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 893 (2000) (“[T]extualism (at least in the bankruptcy caselaw) appears to be a method only of convenience for the Court majority and abandoned at will.”); Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 736 n.105 (2002) (“Justice Scalia and Justice Thomas, among the Supreme Court’s most ardent supporters of textualism and originalism in interpreting the Constitution, abandon their loyalty to these interpretive schools when Takings Clause questions appear at bar [O]ne would be hard pressed to refute an inference that these Justices simply refuse to follow their ostensibly preferred interpretive rules in this context because, in Takings Clause cases, such an approach simply will not support the substantive outcomes that they prefer.”); Miranda McGowan, *Do As I Do, Not As I Say: An Empirical Investigation of Justice Scalia’s Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L.J. 129 (2008); *The Roberts Court and Federalism: Minutes from a Convention of The Federalist Society*, 4 N.Y.U. J.L. & LIBERTY 330, 346 (2009) (statement of Professor Jeffrey Rosen) (suggesting that Justice Scalia “will relax or abandon” textualism “in cases like the sovereign immunity and Eleventh Amendment cases, when he’s more interested in limiting access to the courts,” but stopping short of suggesting “that Justice Scalia is nakedly unprincipled in any way”).

155. See, e.g., Cross, *supra* note 140, at 1460-61 (explaining that empirical analysis reveals that judicial decision making is best explained and predicted by a combination of traditional “legal and ideological variables,” rather than either law or ideology alone); Matthew C. Stephenson, *Legal Realism for Economists*, 23 J. ECON. PERSP. 191, 208 (2009) (characterizing the “Formalism vs. Skepticism dichotomy” as “stale” and suggesting a more “nuanced” Realist “account of judicial decision making . . . based on a belief that judges care about outcomes, but that legal doctrine also exerts an influence on legal decisions because judges feel the need to justify their conclusions in acceptable legal terms. Judges must therefore consider the relative costs and benefits of investing effort in following something other than the path of least (legal) resistance”).

CONCLUSION

A. Why Does All This Matter?

This phenomenon is more than a curiosity of theoretical interest. As discussed previously, the *Manual* presents a pro-executive slant that may not accurately represent the legislative compromise reached by Congress when enacting the APA.¹⁵⁶ Textualism is derived from a model of the judiciary as a “faithful agent[] of Congress” that “must ascertain and enforce Congress’s commands as accurately as possible.”¹⁵⁷ Thus, when textualists utilize the *Manual*, they may be aggrandizing the Executive Branch while simultaneously failing to act as faithful agents to the Congress. This shifts the balance struck by the constitutionally-mandated separation of powers, and thereby may lead to different results in administrative law and policy than would otherwise obtain.

B. Epilogue

Thus, if a judge claims she is a textualist, she should be a textualist all the way down. She should eschew all references to legislative history and its analogues, including the *Manual*, which presents textualists with all the same theoretical and practical objections as more common forms of legislative history. Otherwise, she should confess her heresy and convert. This would not mean she would have to utilize legislative history blindly and unthinkingly. Textualists make excellent points about the reasons to be skeptical of legislative history as a guide to congressional intent, and even nontextualists have come to acknowledge these criticisms. Rather, our hypothetical judge would afford legislative history weight commensurate with its persuasiveness. Again, I take no position in this Note about which side she should choose as a normative, theoretical, or practical matter. Both sides of the debate make compelling points, which explains why the debate over statutory interpretation has raged on for decades. However, a textualist judge cannot have her proverbial cake and eat it too; she must choose one or the other.

156. See *supra* Part II.C.

157. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71 (2006).