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Essay

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Adrian Vermeule†

I. INTRODUCTION

Suppose that a case before a lower federal court turns on the interpretation of a disputed precedent of the Supreme Court. As support for their opposed interpretations, the litigants introduce various items of "judicial history": internal drafts of the Supreme Court’s opinion, memoranda circulated among the Justices before publication of the opinion, and other official documents culled from the vast body of publicly available judicial materials. These documents, each litigant argues, demonstrate that

† Assistant Professor, University of Chicago Law School. I am grateful to Brad Clark, David Currie, Viet Dinh, Beth Garrett, Jack Goldsmith, Jill Hasday, Dennis Hutchinson, Joan Larsen, Eric Posner, Richard Posner, Howard Shelanski, David Strauss, Cass Sunstein, and participants at a Chicago faculty workshop for comments and suggestions, and to Brent Glenn and Chris Chow for valuable research assistance. Special thanks to my family for encouragement and support.

1. Justices and judges accumulate two types of papers. "Working papers" are collections of judicial records generated in the course of official business, such as draft opinions, legal memoranda, and so forth. "Private papers" contain personal writings, journals, letters to family and friends, and other documents related to life outside of the Court. See ALEXANDRA K. WIGDOR, THE PERSONAL PAPERS OF SUPREME COURT JUSTICES: A DESCRIPTIVE GUIDE 3 (1986). Here, the term "judicial history" will be used to denote only the subset of working papers that is circulated among or accessible to all the members of a court, thereby including draft opinions and legal memoranda from judges to the whole court, but excluding, for example, memoranda to the judge from law clerks. "Judicial history," which denotes documents generated within legislatures during the process of statutory enactment and legislative business generally, but does not cover private materials that congressmen keep in their office files. The legal rules governing judicial-history materials are simple: Unlike official legislative history and presidential records, which are (in large part) government property subject to statutory restrictions, judicial papers are the property of the judge and may be disposed of as the judge sees fit. Compare 44 U.S.C. §§ 2118-2207 (1991) (regulating congressional and presidential records), with Public Papers of Supreme Court Justices: Assuring Preservation and Access: Hearing Before the Subcomm. on Regulation and Gov’t Info. of the Comm. on Governmental Affairs, 103d Cong. 17 (1993) [hereinafter Hearing] (statement of Sen. Lieberman) (noting that judicial papers are the private property of individual judges).

2. The controversy attendant upon the opening of Justice Thurgood Marshall’s papers has brought wide attention to that collection. See Linda Greenhouse, Justices Guard Mystique; Anger
the opinion's author and the Justices who joined the opinion intended to say one thing rather than another, or that the best reading of the opinion's text would embody that interpretation.

This proposed use of judicial history differs from the typical uses of judicial materials. Historians, biographers, and journalists draw upon judicial history to set an opinion in the context of its time or to illuminate the internal workings of the Court's deliberative processes. Lawyers preparing for argument before the Court have taken to studying the judicial history of relevant recent precedents in order to gauge how sitting Justices

in High Court over Marshall Papers Is Fueled by More than Pomp and Privacy, N.Y. TIMES, May 27, 1993, at A1. But the Marshall Papers are only a small fraction of the whole corpus of judicial materials. See Wigdor, supra note 1, at 32-34 (identifying, as of 1986, 29 large collections of Justices' papers, 12 medium-sized collections, and 28 small collections). There is no central depository for these papers. Many collections are located at the Library of Congress in Washington, D.C. The following Justices have established partially or wholly unrestricted collections at the Library of Congress: Harry Blackmun, Louis D. Brandeis, Warren Burger (with papers at The College of William & Mary as well), Harold H. Burton, Salmon P. Chase, David Davis (also at the Chicago Historical Society), William Rufus Day, William O. Douglas, Gabriel Duvall, Oliver Ellsworth, Felix Frankfurter, Melville W. Fuller, John Marshall Harlan, Oliver Wendell Holmes, Robert H. Jackson, John Jay, Horace H. Lurton, Thurgood Marshall, John McLean, William H. Moody, Rufus W. Peckham, Harlan Fiske Stone, Joseph Story, Noah Haynes Swayne, William Howard Taft, and Earl Warren. The Library of Congress does not necessarily have a complete collection for any of these Justices; for example, the Library's collections of papers from Justices Brandeis and Holmes are small, while Harvard Law School has a large share of their papers and Louisville School of Law has all of Brandeis's non-judicial materials.

Most collections of judicial-history materials are eventually opened to the public under the terms of their donations, but collections of living Justices are in many cases restricted during their lives and for a period of years thereafter. The Justices who have established restricted collections at the Library of Congress are Hugo L. Black, William J. Brennan, William O. Douglas, Robert H. Jackson, Samuel Freeman Miller, Sandra Day O'Connor, Morrison Waite, and Byron R. White. Justice White has said there will be no access during his life and for 10 years after his death, but he has reserved the right to change his mind. Only some of Justice Douglas's papers are restricted and those can be accessed by obtaining permission from his estate. The papers of Justices Black, Jackson, Miller, and Waite are simply listed as "restricted or classified." To obtain access to the Brennan Papers one must request a form and submit it to the executors of his estate, who generally grant access for six-month blocks to those with a scholarly purpose. Justice O'Connor will review requests personally but has noted that she is unlikely to grant them. Her papers will be made available to scholars after her death, but no access will be given until all the Justices involved in the cases covered have retired. In addition to the collections at the Library of Congress, there are significant collections at Harvard Law School and other academic institutions. Justice Tom Clark's papers are at Texas; Justice Abe Fortas's papers are at Yale; Justice Frank Murphy's papers are at Michigan; Justice Lewis Powell's papers are at Washington & Lee; Justice Stanley Reed's papers are at Kentucky; Justice Potter Stewart's papers are at Yale; and Chief Justice Fred Vinson's papers are at Kentucky.

will react to possible lines of argument. These historical and predictive uses of judicial history differ from the distinctively legal use proposed by the litigants. They desire to introduce judicial history as an interpretive source that will become part of the set of interpretive sources admissible to explain an authoritative legal text.

Under current practice, this attempted use of judicial history would receive no hearing. Federal courts do not consider the judiciary’s internal records as interpretive sources bearing on the meaning of published opinions or judicially-promulgated rules. In accord with this entrenched practice, current scholarship assumes that internal judicial materials are useful only as historical documentation, rather than as legally admissible authority. Mark Tushnet, for example, begins a paper on the Supreme Court’s civil rights jurisprudence by stating that “[l]awyers and historians agree that almost everything we need to know about constitutional law is found in the Supreme Court’s published opinions. Internal Court documents, like Justice Thurgood Marshall’s papers, tell us something about the dynamics within the Court but relatively little about constitutional law.”

Yet the twin assumptions that judicial history can provide no interpretive aid and should not be consulted in the interpretation of judicially-promulgated texts ought to be deeply puzzling. The backdrop for these assumptions is a legal system that often interprets controlling legal texts in the light of “official history”: documents generated within the institution that promulgated a disputed legal text during the course of the text’s creation. Courts regularly consult originalist materials to construe

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5. In this Essay, I shall generally confine the discussion to the possible use of judicial history by federal courts to interpret decisions announced by, or rules promulgated by, other federal courts—specifically in two possible situations: (1) the use of judicial history by the Supreme Court to interpret its own prior opinions; and (2) the use of judicial history by lower federal courts to interpret the opinions of the Supreme Court. Possible extensions of the discussion to state courts, foreign jurisdictions, and other settings must await another day.

6. Judicially-promulgated rules fall into two categories: (1) the rules of procedure and evidence that the Supreme Court promulgates under the Rules Enabling Act, 28 U.S.C. §§ 2071-2074 (1994); and (2) rules that federal courts promulgate to govern their operations, such as the Supreme Court Rules. Subsequent references to “rules” refer to the former category; the latter for the most part lack general significance.


8. Whether officials of a particular institution may be asked to testify about the official history of their decisions is a different question altogether. Here too the rules present interesting asymmetries. Under the Speech and Debate Clause, U.S. CONST. art. I, § 6, and its state analogues, legislators may generally not be compelled to testify about their official acts. In many
constitutional text, legislative history to construe statutes, *travaux preparatoires* (negotiating and drafting history) to construe treaties, and so forth. In none of these domains do courts *always* consult internal materials; the practice is in each case intermittent and subject to criticism. Nonetheless, that courts have at some times and under some circumstances consulted internal materials across all of these domains throws the puzzling exclusion of internal judicial history into sharp relief.

And it seems clear that judicial history might, in at least some cases and on some interpretive premises, provide the same sort of aid that the other forms of official history are said to provide. Tushnet gives the example of *United States Postal Service Board of Governors v. Aikens*, in which Justice Rehnquist circulated a draft opinion that would have distinguished white-collar from blue-collar workers for purposes of Title VII's ban on racial discrimination in employment. After Justice Marshall circulated a draft dissent, however, Rehnquist could not gain a majority for his own
draft and eventually retracted it in favor of a fact-specific opinion that was published for the Court. Tushnet says that the Justices' consideration, and arguable rejection of, the proposed distinction between white-collar and blue-collar employees lacks any legal significance. But why? If a lower court were subsequently tempted to interpret the published opinion as implicitly resting on the rejected distinction, shouldn't the internal evidence to the contrary be admissible? One obvious analogy is to the rejected-proposal doctrine in statutory interpretation, under which courts sometimes decline to interpret statutes in a manner identical to proposed bills previously rejected by the legislature. The analogy does not hold in any simple way; judicial opinions are not statutes, and judicial history is not legislative history. Moreover, the rejected-proposal doctrine may well be misguided for any number of formal and functional reasons. But if the doctrine applies in other interpretive settings it requires substantive argument, rather than simple assertion, to show that it should not apply in this setting as well.

The law's distinctive treatment of judicial history is not a topic of current debate. But we ought to be able to give reasons for this major asymmetry in our interpretive practices. The untheorized exclusion of judicial history deserves rational scrutiny, and this is so even if that exclusion can indeed be justified on rational grounds. And the judicial history puzzle may tell us something, perhaps a good deal, about the more familiar debates over legislative history and similar materials. The exclusion of judicial history is precisely the sort of unquestioned assumption that defines the contours of our interpretive practices. Accordingly, I shall both subject the exclusion of judicial history to critical evaluation and use the judicial-history puzzle to illuminate persistent debates over the use of official history in other interpretive domains.

My conclusions are as follows. First, I support the widespread assumption that judicial history should not be used as an interpretive source. But the arguments for that position are surprisingly complex. The

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13. See Tushnet, supra note 7, at 473 n.1.
16. The courts have indeed applied something like the rejected-proposal doctrine when interpreting judicially-promulgated rules. See Whalen v. Ford Motor Credit, 684 F.2d 272, 275-77 (4th Cir. 1982) (en banc) (interpreting Rule 63 of the Federal Rules of Civil Procedure by examining a transcript of a meeting of the judicially-appointed Advisory Committee that drafted the rules; noting that at the relevant meeting the Committee considered, but rejected, a proposed amendment to the rule).
practice of exclusion cannot be derived from any clean formal rule or neutral principle; there is only a cluster of structural and institutional arguments to the effect that consulting judicial history would inflict unacceptable harms upon the federal judiciary’s decisionmaking processes.

Second, I touch upon a range of other official-history debates—principally debates about the use of legislative history, presidential signing statements, and the advisory committee notes to the federal rules of evidence and procedure—and suggest that the judicial history puzzle can illuminate those questions. For example, the exclusion of judicial history reveals grave weaknesses in the most common arguments for judicial resort to legislative history. Those arguments entail that judicial history should be an admissible source as well, a consequence that would contradict settled interpretive practices and commitments.

Part II presents a straightforward argument for consulting judicial history as an aid to the interpretation of judicially created texts. Section A argues that under the interpretive criteria said to justify resort to other types of official history, internal judicial materials might plausibly provide helpful interpretive guidance when a judicial opinion or judicially promulgated rule is ambiguous, opaque, or otherwise creates an interpretive quandary. For example, judicial history could supply either revealing evidence of the intentions of the judges who created the text or helpful context for interpreting the text itself. Section B examines some current judicial practices that support recourse to judicial history. Although courts do not consult internal judicial history, they draw upon external judicial materials such as litigants’ briefs, oral argument transcripts, and the notes of adjunct judicial committees. Those sources are declared relevant on premises that would, if consistently applied, make judicial history admissible either as evidence of judicial intention or as interpretive context.

Part III considers a series of normative arguments that justify the exclusion of judicial history. The justifications are drawn from the text of Article III and its original understanding (Sections A and B) and from considerations of the federal judiciary’s institutional role in the constitutional structure (Sections C and D). The structural and institutional justifications prove the most persuasive. Resort to judicial history would distort the Court’s internal deliberations, render the history unreliable, and undermine various rule of law norms associated with judicial decisionmaking. To be sure, none of the structural arguments, taken by itself, fully justifies the entrenched practice. Rather, that practice is best understood to rest on a complex of rationales, with the practice mapping imperfectly onto any one of those rationales. But it is no objection to a
doctrine that it rests on several imperfect bases rather than on one dominant theory.  

Part IV draws upon the judicial history puzzle to illustrate some of the conditions that plausible arguments about particular categories of official history will satisfy, using the comparison between judicial and legislative history as a running example. The considerations discussed in Parts II and III suggest that plausible arguments about official history will display two features: localism and consistency. First, those arguments will derive not from any global account of the role of official history as such, but from more limited arguments (either formal or institutional) about particular types of official history. Second, plausible positions in any local debate will prove consistent in the minimal sense that the position, if transposed to another debate and accepted there, will not contradict any view that the proponent of the position holds in that other debate. In tandem, these features point to an unexciting but manageable set of local agendas for debates about official history. Arguments about particular categories of official history would be tested against arguments from other contexts in a long series of comparisons, thereby sifting out the plausible positions from the implausible ones.

II. WHY NOT JUDICIAL HISTORY?

The argument for admitting judicial history as an interpretive source is simple. Judicial bodies create a range of authoritative legal texts. These texts—both judicial opinions and rules promulgated by the judiciary—often require interpretation, for the same reasons that other sorts of legal texts require interpretation. The phrasing of critical portions of the text may be ambiguous or otherwise unclear; the text may have to be applied in legal contexts remote from its creation, so that it does not speak directly to the situation at hand; the passage of time may have made the sense of the document obscure. Litigants, courts, and other interpreters thus dispute the meaning of relevant judicially-created texts in a variety of legal settings. Those interpreters craft their arguments by using many sorts of interpretive techniques, such as careful attention to the language and structure of the text, comparison to other texts relevant to the same subject matter, and traditional maxims or canons of construction.

In some disputes, judicial history might prove a helpful supplement to these interpretive tools. Detailed scholarly studies of judicial decisions in  

particular substantive areas have made this clear. In Wilburn Boat Co. v. Fireman’s Fund Insurance Co., for example, the Court held that state law, rather than a uniform federal admiralty rule, would govern the effect of the breach of certain warranties in a marine insurance policy. The decision proved to be of the highest importance to the maritime law, but crucial ambiguities in the opinion left the Court’s ruling unclear. In a thorough study of Wilburn Boat, Joel Goldstein draws upon the internal judicial history of the case to support and to critique possible resolutions of the ambiguities in the opinion. For example, Goldstein asks whether the Court “intended state law to apply: (a) only to the warranties there at issue . . . (b) to breaches of any warranties in a marine insurance policy, or (c) to all issues relating to marine insurance,” and whether “the Court thought the McCarran Act dictated its approach.” Goldstein draws on both the published opinion and internal judicial history to generate answers to both questions.

Goldstein’s approach to Wilburn Boat, while novel, is hardly ridiculous. Resort to judicial history as a legal source fits comfortably with interpretive approaches and sources commonly seen elsewhere in federal public law. Section A below describes two standard interpretive approaches that could justify resort to internal judicial history. Section B describes some external judicial materials that judges currently use to interpret judicially promulgated texts, sources relevant only on premises that, if consistently applied, would counsel the use of internal judicial history as well.

18. Frederick Schauer anticipated the judicial history puzzle by addressing the question of whether draft opinions supply any insights about the Supreme Court’s rulemaking function. See Frederick Schauer, Opinions as Rules, 53 U. CHI. L. REV. 682 (1986) (reviewing Bernard Schwartz, The Unpublished Opinions of the Warren Court (1985)). Schauer found that “[t]he [Warren Court] drafts [published in Schwartz’s book] do not turn substantially on disputes about the specificity of the language to be used, on the kinds of examples, if any, to be included in an opinion, or on whether the holding of the Court should be encapsulated in some rule-like test.” Id. at 686-87. None of this is necessarily inconsistent with the point that judicial history could in some cases provide interpretive aid. It may be, as Schauer notes, that Schwartz’s materials were not sufficiently comprehensive for the purpose. See id. at 687. And the subsequently released Marshall Papers provide a far richer store of judicial history than that to which Schwartz had access.

20. See id. at 320-21.
21. See Joel K. Goldstein, The Life and Times of Wilburn Boat: A Critical Guide (Part I), 28 J. MAR. L. & COM. 395 (1997) (drawing on the published opinion, internal conference notes, and internal correspondence to interpret the opinion). It should be noted, though, that Goldstein is ambivalent about his approach. See id. at 417 (“The Justices’ papers, and the inferences and speculations they support, are interesting and instructive in understanding how the Court operated and decided the case. They should not, however, control judgments about Wilburn. . . . Ultimately, the decision must stand or fall on its merits, on the reasons given for it or which might sustain it.”).
22. Id. at 435 (emphasis omitted).
23. Id. at 440.
A. Judicial History as Evidence of Intent and as Interpretive Context

Two interpretive approaches often said to justify the admission of other forms of official history could support recourse to internal judicial history as well. First, judicial history could be said to provide evidence of the intentions of the judges who wrote (or joined) a published judicial opinion or who drafted a judicially promulgated rule. On this view, the proper way to resolve an ambiguity in a judicially created text is to discover what those who wrote the text intended to say. Second, internal judicial history could be said to provide contextual guidance on the meaning of the judicially created text. On this view, the intentions of the judges who created the text are not controlling; the meaning of the text itself is the touchstone. But internal judicial history could be used to illuminate that meaning.\(^{25}\)

As detailed below, the arguments said to justify the application of intentionalism and contextualism\(^{26}\) in statutory interpretation and other domains also justify their application to judicially promulgated texts. That is so whether the judicial text is a promulgated rule or an opinion;\(^{27}\) whether any particular opinion represents an exercise of interpretation or of common-lawmaking;\(^{28}\) and whether the underlying theory of precedent holds that a judicial opinion merely explains a judgment on particular facts, or rather that the statement of a ratio decidendi in a judicial opinion itself announces a binding rule of law.\(^{29}\) In any of these situations, later interpreters will often desire to figure out how exactly the judicially promulgated text should be read. Two familiar ways to answer that question are to ask what the text’s authors intended to say or, alternatively, how the text itself should be read in light of the context of its creation.

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25. Both of these approaches are interpretive, not predictive. They aim not to forecast the likely behavior of the Court in a future case, but rather to understand the authoritative import of a previous judicial decision. On a predictive theory of adjudication, in which judges properly seek to avoid reversal by a higher court, the case for judicial resort to internal judicial materials would be overwhelming. Those materials would supply excellent, perhaps incomparable, information on which to base predictions about the Justices' future behavior. Cf. Michael C. Dorf, Prediction and the Rule of Law, 42 UCLA L. REV. 651, 693-94 (1995) (suggesting that in the context of Supreme Court stay motions, where a single Circuit Justice must predict how the full Court would vote on a certiorari petition, the Circuit Justice might legitimately consider “unpublished conference votes, or unrecorded statements” of another Justice (footnote omitted)).

26. This pair of terms has been used in the legislative-history literature as well. See, e.g., William N. Eskridge, Jr. & John Ferejohn, Politics, Interpretation, and the Rule of Law, in NOMOS XXXVII: THE RULE OF LAW 265, 285 (1993).

27. See infra notes 33-34 and accompanying text.

28. See infra notes 35-37 and accompanying text.

29. See Lewis A. Kornhauser & Lawrence G. Sager, Unpacking the Court, 96 YALE L.J. 82, 103 n.29 (1986); Thomas W. Merrill, Judicial Opinions as Binding Law and as Explanations for Judgments, 15 CARDOZO L. REV. 43, 43-79 (1993).
1. Intentionalism

The intentionalist rationale for resort to internal judicial history seems jarring upon a first encounter. Interpretive discourse often speaks of the intentions of lawmakers, such as legislators, and justifies reference to various forms of official history, such as legislative history, on the ground that the official history supplies evidence of the lawmakers' intentions. But one response is to say that such notions have no relevance to the interpretation of judicially created texts. On this view, reference to the intentions of the officials who created a legally authoritative text is coherent (whether or not it is compulsory) only when the text represents an act of discretionary lawmaking, rather than of interpretation. Intentionalism in the interpretation of judicially promulgated texts does not comport with this stricture, for most of those texts constitute interpretations of constitutional, statutory, or regulatory provisions enacted elsewhere.

But this view rests upon several confusions. The Court itself sometimes interprets judicial opinions and rulings, both its own and those of other courts, by referring to the intentions of the judges who created them. Whether or not that is the correct criterion by which to interpret judicially created texts, it is no more outlandish than the interpretation of statutes by reference to the intentions of legislators. Federal judges engage in at least some uncontroversial authorized rulemaking, and when they do so, an interpretive strategy suitable to texts enacted by legislators should suit judicially enacted rules as well. And intentionalism, as a general approach to interpretive questions, could also be applied in the ordinary way to texts (such as judicial opinions) that themselves constitute authorized acts of interpretation, rather than of lawmaking.

30. See, e.g., United States v. American Trucking Ass'ns, 310 U.S. 534, 542 (1940) (“In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress.”); Church of the Holy Trinity v. United States, 143 U.S. 457, 464 (1892) (consulting internal legislative history to “throw[] light upon the intent of Congress”).

31. This intuition probably has roots in some version of the declaratory theory of law, associated with Blackstone, which embodies “the strongly held and deeply felt belief that judges are bound by a body of fixed, overriding law, that they apply that law impersonally as well as impartially, that they exercise no individual choice and have no program of their own to advance.” Paul J. Mishkin, The Supreme Court, 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 62 (1965). These jurisprudential waters are too deep to enter here. Suffice it to say that the use of judicial history as an interpretive source is in principle compatible with the declaratory theory of law. Even if one conceived of judges as the oracles of some preexisting body of law, one might turn to judicial history for interpretive assistance when the precise content of their oracular declarations was ambiguous or obscure. For discussion of the related argument that recourse to judicial history would undermine judicial “legitimacy,” see infra note 108.

32. See, e.g., Liberti v. United States, 516 U.S. 29, 40 (1995) (inferring, from context and language, that in disputed precedent “[w]e intended only to suggest” a certain proposition); Melkonyan v. Sullivan, 501 U.S. 89, 102 (1991) (vacating and remanding because “the record before us does not clearly indicate what the District Court intended by its disposition”); Sisson v. Ruby, 497 U.S. 358, 366-67 (1990) (stating that if a previous opinion had “intended” to establish a certain principle, the Court would have said so more clearly).
The Court sometimes acts as an authorized lawmaker, although within a sharply limited domain. The Court, for example, holds delegated statutory authority to promulgate the rules of federal civil, criminal, and appellate procedure, and the federal rules of evidence. The statute that grants this authority expressly provides that the judicially promulgated rules supersede any inconsistent federal statutes. In this domain, the intentionalist argument that statutes may (or must) be interpreted with reference to the intentions of their makers transposes comfortably to rules legislated by judges. There is nothing internal to intentionalism that would prevent its application to judicial officials with respect to areas in which judges are authorized to enact binding rules in much the same way that legislators do.

Intentionalism might be applied in the same fashion to texts that embody an act of interpretation rather than of lawmaking, such as a judicial opinion construing some positive enactment. Constitutional and statutory texts are often sufficiently general that judges must flesh them out by articulating implementing doctrines. These doctrines are interpretive, in the sense that their pedigree can be traced to an authoritative textual command, yet often the Court possesses some discretion to decide what the precise contours of the implementing doctrine will be. As Frederick Schauer has noted, this condition often causes Supreme Court opinions to resemble statutes; the opinion announces rules, or three-part tests, or some other doctrinal structure resembling a codified legal text. If the opinion that

34. See id. § 2072(b) ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.").
35. In addition to conventional interpretation and ex ante rulemaking under the Rules Enabling Act, the Court also engages in some amount of explicit lawmaking through case-by-case adjudication. This "federal common law" is sometimes rooted in an express constitutional or statutory delegation of lawmaking power, see, e.g., Fed. R. Evid. 501 (authorizing federal courts to develop evidentiary privileges "in the light of reason and experience"), but sometimes derives simply from a loose reference to "issues of uniquely federal concern." Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 95 (1981). See generally Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1248-50 (1996) (explaining the principal issues in the federal-common-law debate). The nature and legitimacy of federal common law are hotly controverted, but nothing in the judicial-history problem turns on these questions. To the extent that a lower court wished to understand a Supreme Court opinion, for example, intentionalist and contextualist uses of judicial history would remain plausible interpretive strategies whether that opinion was best classified as an example of interpretation or rather of federal common-lawmaking. Under either classification, judicial history might assist readers in understanding what exactly the opinion meant.
36. See Richard H. Fallon, Jr., The Supreme Court, 1996 Term—Foreword: Implementing the Constitution, 111 Harv. L. Rev. 56, 56 (1997) ("Among the most important functions of the Supreme Court are to craft and apply constitutional doctrine—a term that I use to embrace not only the holdings of the cases, but also the analytical frameworks and tests that the Court's cases establish.") (footnote omitted).
37. See Frederick Schauer, Opinions as Rules, 62 U. Chi. L. Rev. 1455, 1455 (1995) ("It is a routine charge against contemporary judicial opinions that they read more like statutes than like opinions of a court. According to the typical formulation of the charge, the modern judicial opinion, especially the modern Supreme Court constitutional opinion, is excessively divided into sections and subsections [and] relies too heavily on three-part tests . . . ."). The statute-like character of the Court's opinions has probably become more pronounced of late, although there is no way to measure the trend. See Richard A. Posner, The Federal Courts: Challenge and Reform 177, 369 (1996) (describing "new emphasis on 'ruledness'") in federal adjudication,
announces such an implementing doctrine displays crucial ambiguities, why is it mistaken to ask what the judges who announced the doctrine intended to say? The judges, after all, did attempt to communicate one formulation rather than another; asking which formulation they intended seems no more or less exceptionable than it does in other domains of legal interpretation. Even outside the domains in which federal judges possess authorized lawmaking authority, then, the intentions of the judges who create a judicial opinion might be thought a permissible interpretive touchstone.

This application of intentionalism would be vulnerable to standard criticisms of intentionalism generally—well-known puzzles about whose intentions count, differences between motives, intentions, and purposes, and so forth—but no more vulnerable than intentionalism is in any other domain. And maybe less vulnerable. Some of those standard criticisms, such as the claim that it is impossible to aggregate the understandings of multiple relevant actors into a single intention, have less purchase in the judicial context, where the background rules often make the intentions of a single official determinative. An example is the rule that when no one opinion commands the assent of a majority of the Court, the opinion of the Justice who concurs in the judgment on the narrowest grounds supplies the holding. When judges and scholars pore over a concurrence in the judgment by a single named Justice to interpret the Court’s decision in a particular case, the problem of collective intention loses most of its bite.

exemplified by “the Supreme Court’s emphatic modern efforts to lay down increasingly precise rules of constitutional law” and noting “the increasing tendency of appellate courts, especially the Supreme Court, to lay down rules rather than standards”).

38. For a good overview of the conundrums of intentionalism, see ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 159-72 (1992).


41. A familiar example is Justice Powell’s concurrence in Regents of the University of California v. Bakke, 438 U.S. 265, 269-324 (1978), upon which a mountain of analysis has slowly risen. For debate over the significance of Powell’s concurrence, compare Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir. 1996), which holds that the concurrence is not controlling, with Wessmann v. Gittens, 160 F.3d 790, 798 (1st Cir. 1998), which holds that the concurrence is controlling.

42. Cf. Jeremy Waldron, Legislators’ Intentions and Unintentional Legislation, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY (Andrei Marmor ed., 1995) 329, 331-32 (noting that “single-author” legislation avoids the most vexing problems of intentionalism). Even in such contexts, however, it is still fruitful to study the problems of intentionalism that apply to single minds. See MARMOR, supra note 38, at 159-65. And, of course, the problem of collective intention retains its force in the many judicial settings where the background rules make collective voting necessary for the issuance of an authoritative opinion. See, e.g., Frank H. Easterbrook, Ways of Criticizing the Court, 95 HARV. L. REV. 802 (1982) (drawing upon voting theory to argue that the Court is incapable of rendering consistent decisions over time).
To be sure, the intentionalist justification encounters an interesting objection that is itself intentionalist: The judicial history that currently exists was not created with the intention or expectation that it would be used as an interpretive source. On some versions of intentionalism, interpreters are bound not only by the lawmakers' substantive intention to enact rules with certain content, but also by their second-order intentions about how the rules are to be interpreted. This view suggests that resort to judicial history would violate interpreters' obligation to enforce the interpretive intentions of the judges who created judicial history.

This point, while important, hardly constitutes a fatal objection to resorting to judicial history on intentionalist premises. It is not clear that there is a judicial interpretive intention about judicial history to be respected; the judges who have created judicial history may simply have not considered its possible use as an interpretive source. It requires an argument to show that failure to consider the question should be treated as equivalent to an affirmative intention that it not be so used. As in other contexts, moreover, gauging interpretive intentions by reference to the interpretive conventions in place at the time of lawmaking quickly encounters problems of circularity and instability. If judicial history were declared a valid interpretive source, future judges would (on the premises of this account) expect that the judicial history they create would be used in interpretation, and the argument from second-order expectations would have defeated itself—at least prospectively—for judicial history created after the declaration.

But the most difficult problem for the interpretive intentions argument is that courts have ignored it in other domains. In its famous 1892 decision in *Church of the Holy Trinity v. United States,* for example, the Court overturned the nineteenth-century rule barring recourse to legislative history and drew upon a committee report to interpret a difficult statute in light of congressional intention, even though (on similar premises about interpretive intentions) congressmen presumably prepared the legislative history with the expectation that it would not become an interpretive source.

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43. See Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes,* 28 LOY. L.A. L. REV. 1283, 1300 (1995) (rejecting possible analogies between judicial history and the advisory committee notes that courts use to interpret federal procedural rules on the ground that “while the Court’s preliminary memos are never intended for public consumption, the Advisory Committee Notes are expressly intended for that purpose”).


45. 143 U.S. 457 (1892).


47. See *Holy Trinity,* 143 U.S. at 464-65.
source.\textsuperscript{48} Indeed, this sort of retroactive change in official-history rules might prove all the more tempting insofar as the official history generated before the change would, all else equal, possess greater reliability than history generated after the change, assuming that judicial use of the history increases the incentives of its creators to manipulate the record.\textsuperscript{49} In sum, without some broader account of when the interpretive expectations of officials should be honored, interpreters could with some justice decide to apply the \textit{Holy Trinity} model to judicial history.

2. \textit{Contextualism}

Intentionalism is not the only interpretive criterion on which resort to judicial history could be grounded. For a range of reasons, it might well be thought that the intentions of the judges who created a text cannot trump the text itself; textual meaning, rather than authorial intention, is the controlling interpretive criterion. But such a position does not necessarily bar reference to materials beyond the authoritative text itself. The interpreter might take the position that the meaning of a legal text must be understood with reference to the context of its creation and that the official history of the text’s creation supplies just this sort of illuminating context. Judicial history would then be used not to prove an authoritative judicial intention existing apart from the opinion or rule under dispute, but rather to gain persuasive insight into textual meaning by reviewing the setting in which the opinion or rule was created, the problems it addressed, and the linguistic and cultural presuppositions inherent in its language.

Here, too, the legislative history debate supplies helpful analogies. In the 1930s, defenders of legislative history responded to realist attacks on legislative intent with “a plea of confession and avoidance: Legislative history itself is not law, but law’s meaning depends on context, and legislative history is the most authoritative context for determining the probable meaning of the statutory language.”\textsuperscript{50} Justice Holmes had earlier adopted a similar position, saying both that the object of judicial inquiry is “what the statute means” rather than “what the legislators meant,”\textsuperscript{51} and also that recourse to legislative history was permissible to illuminate


\textsuperscript{49} Cf. William N. Eskridge, Jr., \textit{Should the Supreme Court Read The Federalist but Not Statutory Legislative History?}, 66 GEO. WASH. L. REV. 1301, 1320-21 (1998) (arguing that originalist materials are more reliable than legislative history, because the former were prepared without the expectation that judges would systematically use them as an interpretive source).

\textsuperscript{50} WILLIAM N. ESKRIDGE, JR., \textit{DYNAMIC STATUTORY INTERPRETATION} 211 (1994).

\textsuperscript{51} Oliver Wendell Holmes, Jr., \textit{The Theory of Legal Interpretation}, 12 HARV. L. REV. 417, 414-19 (1899).
statutory meaning. More recently, this position has become something like the consensus justification for judicial resort to legislative history. The contextualist position also transposes comfortably to the problem of judicial history. The plausible point that the interpretation of judicially-created texts should seek to ascertain the meaning of the text, rather than judicial intention, is compatible with recourse to context to determine textual meaning; and judicial history might be an important element of that context.

The contextualist approach applies with equal force to judicially-promulgated rules and to judicial opinions. When applied to rules promulgated under the Rules Enabling Act, contextualism makes no more or less sense than it does when applied to statutes; there is nothing internal to contextualism to suggest that rules legislated by judges should be treated differently than rules legislated by elected officials. The contextualist approach would apply in the same way to the interpretation of judicial opinions. Judicial history would supply background against which the authoritative language of the opinion could be better understood.

The contextualist argument for resort to judicial history cannot show that its use is always helpful or ever necessary. Perhaps the lengthy and discursive opinions that judges issue, complete with detailed statements of fact and reasoning, supply enough context to interpret the operative legal rulings in the opinion itself in most cases. On this view, analogies between judicial history and legislative history are misdirected; rather, the judicial opinion itself supplies the context that, in statutory interpretation, courts obtain from the reports of congressional committees.
But why do these points, even if plausible, justify excluding judicial history altogether? If judicial history sometimes provides helpful context, then judges should, on contextualist premises, consult it and accord it the weight that it deserves in the circumstances. Even if a judicial opinion relates to the holding of the case in the same way that a committee report relates to a statute, courts might consult judicial history for the same additional assistance that they seek in broader sources of legislative history, such as floor debate, rejected bills, and the like. Furthermore, resort to judicial history will less often prove affirmatively harmful than resort to legislative history. Judges who are unfamiliar with the legislative process and with the voluminous and unusual materials often found in legislative history will frequently err in their use of those sources. Judges consulting judicial history, by contrast, will generally understand the provenance and significance of the documents and will possess the trained competence needed to give those documents the proper degree of interpretive weight.

Resort to judicial history might also be thought unnecessary when the Supreme Court interprets its own precedents. Those precedents do not bind the Court in later cases, at least not in the strong sense in which statutes (where constitutional) bind the Court. A constitutionally valid statute is a hierarchically superior source of law that the Court must construe and obey. When the meaning of a prior Court precedent is subject to interpretive dispute in a case before the Court, however, the obligation of interpretive fidelity is weaker. In that situation, the institution that created the text is the same institution that interprets the text, and there is no hierarchical obligation of fidelity; there is only the relatively weak and prudential obligation of stare decisis. In hard cases, accordingly, the Court may simply decide that a precedent is unclear and decide the issue afresh (although that fresh decision may itself require the interpretation of a hierarchically superior source).

For these reasons, the Court could decide that recourse to judicial history as interpretive context is unnecessary. If standard techniques for the interpretation of judicial opinions do not disclose the precedent’s meaning, the current Court has the power to decide the issue anew, rather than asking what some of the Court’s members previously said about the issue in judicial history—an especially sensible procedure if the Justices who wrote

by means of a concurring or dissenting opinion, but then again any legislator may speak at will by inserting a statement into legislative history.

56. Cf. Breyer, supra note 53, at 862 ("If the [legislative] history is vague, or seriously conflicting, do not use it. No one claims that history is always useful; only that it sometimes helps." (internal quotation omitted)).


58. See Vermeule, supra note 8, at 1863-77.
the precedent and its internal history are still on the Court at the time of interpretation.

The point, however, holds only within a limited domain. For lower federal courts, for example, a Supreme Court precedent is a binding, hierarchically superior source of law, and the option of declaring the precedent unclear and deciding the issue anew may not obtain. It is hard to see any clean conceptual difference between a lower court’s use of judicial history to interpret a controlling Supreme Court precedent and a lower court’s decision to consult legislative history to interpret a controlling statute. Even with respect to the Supreme Court, the point does not hold for judicially created texts that assume the force of statutes upon promulgation, such as the rules of procedure that the Court promulgates with congressional assent; those rules do bind the Court, at least in principle.

Apart from its restricted scope, the argument that resort to judicial history may be unnecessary when the Court interprets its own precedents does not by itself entail a flat rule excluding internal judicial history as an interpretive source. That the Court need not consult judicial history is quite compatible with the argument that it can, and should, when that history proves helpful. There is a valid core to the necessity argument; if, as argued below, the institutional harms of recourse to judicial history are great, the lack of any necessity to use it provides scope for a cost-benefit calculus that excludes judicial history even if it is indeed helpful in some contexts. But that is a separate question, and the necessity argument cannot carry the point of its own force.


60. Cf. Kladman, supra note 4, at 12 (“Many lawyers say they would never cite the papers explicitly in a Supreme Court brief or oral argument, lest they incur the wrath of Justices who are angry about the papers’ release. But the advisability of using the documents in the lower courts remains an open, intriguing question.”).

61. See 28 U.S.C. § 2072(b) (1994) (“All laws in conflict with such rules [promulgated by the Court] shall be of no further force or effect after such rules have taken effect.”); Mistretta v. United States, 488 U.S. 361, 391 (1989) (“[T]he rules of procedure bind judges and courts in the proper management of the cases before them . . . .”).
Surprisingly, current judicial practice provides indirect support for the intentionalist and contextualist arguments for resort to judicial history. Although the Court itself has (almost) never drawn upon internal judicial history, it sometimes draws upon external judicial materials generated by litigants, judicial adjuncts, and other actors during the process of adjudication or judicial rulemaking. The premises that make these external materials relevant and admissible go far toward making internal judicial history relevant and admissible as well.

The Court occasionally interprets its own opinions, and the rules it adopts, by reference to the briefs (including certiorari petitions), questions and answers during oral argument, the official notes of advisory committees created during the judicial rulemaking process, and other materials generated in the course of judicial business before the issuance of an authoritative final text. The Court’s theory for resorting to these materials has sometimes been intentionalist, and sometimes contextualist; it describes the materials as evidence of intent or as helpful context for ascertaining the meaning of a judicially promulgated rule. If these materials, generated by judicial processes during the course of creation of a judicial text, are admissible, internal judicial history should be admissible as well. After all, internal judicial history is proximate to the promulgation of the authoritative text and is created by the judges themselves; it is thus plausibly a better source of guidance, on either the intentionalist or the contextualist criterion, than more remote materials generated by parties, judicial-branch committees, and the like.

The Court’s resort to judicial materials to interpret judicially-created texts is most familiar from the judicial rule-making process. Under the Rules Enabling Act, the Court possesses statutory authority to promulgate rules of procedure and evidence. The Judicial Conference prepares the preliminary drafts of the rules, with the assistance of adjunct advisory committees composed of academics, practitioners and judges; the committees prepare official notes to the drafts. The drafts are forwarded to the Court, which modifies them as it pleases and then promulgates them.

62. See supra note 11.
63. See infra notes 64-80 and accompanying text. The Court has consulted similar materials—such as pleadings, motions, and trial court rulings—in order to determine whether an opaque state court opinion should be deemed to rest upon an independent and adequate state ground. See Robert L. Stern et al., Supreme Court Practice 144 (7th ed. 1993) (citing Staub v. City of Baxley, 355 U.S. 313, 318 (1958); First Nat'l Bank v. Anderson, 269 U.S. 341, 346 (1926)).
65. See id. § 2072(a).
Unless Congress vetoes the promulgated rules within a fixed deadline (and it rarely does), the rules take effect as law. The Court, then, has an official legislative role as far as these rules are concerned, although in practice the Court often approves the proposals of the advisory committees.

When the rules become subject to interpretive controversy, the Court frequently draws upon the advisory committee notes as both persuasive scholarly commentary and an authoritative interpretive source. The Court cites the advisory committee notes to the federal rules sometimes as evidence of the intent or purpose underlying a rule—referring to the intent of the advisory committee members who initially drafted the rule—and sometimes as general background material, in a manner best understood as a contextualist attempt to read the promulgated text in light of the circumstances of its drafting. Either use might be said to support recourse to judicial history. If materials generated by advisory officials within the judicial branch during the creation of an authoritative text provide indirect evidence of the intentions underlying a rule the Justices promulgate, or indirect interpretive context for construing the rules, then internal history should be admissible as well.

A recent controversy over the Court’s use of the advisory committee notes to the Federal Rules of Evidence illustrates the point. In Tome v. United States, Justice Kennedy’s plurality relied upon the advisory committee notes as both authoritative evidence of the purpose or intent of the rules’ drafters and as “a useful guide in ascertaining the meaning of the Rules.” Justice Scalia’s concurrence asked the right question about this use of the rules:

[The Notes] bear no special authoritativeness as the work of the draftsmen... It is the words of the Rules that have been authoritatively adopted—by this Court, or by Congress if it makes a statutory change. In my view even the adopting Justices’ thoughts, unpromulgated as Rules, have no authoritative (as opposed to


68. See infra notes 70-72 and accompanying text; see also Laurens Walker, Writings on the Margin of American Law: Committee Notes, Comments and Commentary, 29 GA. L. REV. 993, 997-1007 (1995) (surveying the judicial use of advisory committee notes).

69. The situation is slightly more complicated with respect to the current Federal Rules of Evidence in particular. Although the statutory rulemaking process is identical for procedural rules and evidence rules, Congress by special statute modified and affirmatively enacted the Court’s promulgated version of the evidence rules, rather than permitting them to take effect by default; and Congress had the Advisory Committee Notes before it. The Advisory Committee Notes to the evidence rules, then, might be conceived as ordinary legislative history. Nothing in the following discussion, however, is affected by this complication.


71. See, e.g., id. at 163 (“Nothing in the Advisory Committee’s Notes suggests that it intended to alter the common-law presumptive requirement.”); id. at 160 (“The Notes disclose a purpose to adhere to the common law in the application of evidentiary principles...”).

72. Id. at 160.
persuasive) effect, any more than their thoughts regarding an opinion (reflected in exchanges of memoranda before the opinion issues) authoritatively demonstrate the meaning of that opinion. . . . Like a judicial opinion and like a statute, the promulgated Rule says what it says, regardless of the intent of its drafters.\textsuperscript{73}

Justice Scalia's point in this passage sounds in consistency. If the advisory committee notes provide intentionalist or contextualist evidence about a rule promulgated by the Court, why should not internal judicial history—"exchanges of memoranda" and the like—do the same?\textsuperscript{74} The Court's practice of consulting materials generated within the judicial branch, such as the advisory committee notes, to interpret judicially promulgated texts must rest on premises that support the use of internal judicial history.

Where judicial opinions are concerned, the Court also has occasionally resorted to background materials generated during the adjudicative process as evidence of judicial intent or as interpretive context. \textit{Cantor v. Detroit Edison Co.}\textsuperscript{75} required the Court to interpret its own ambiguous opinion in the previous case of \textit{Parker v. Brown}.\textsuperscript{76} \textit{Parker} had held either (depending on one's reading) that the Sherman Act did not apply to the actions of state officials, or that the Sherman Act did not apply to any form of state action in a broader sense, including private action required by state law.\textsuperscript{77} The plurality opinion in \textit{Cantor} announced that "[t]he way the Sherman Act question was presented and argued in that case sheds significant light on the character of the state-action concept embraced by the \textit{Parker} holding"\textsuperscript{78} and thus proceeded to scrutinize the briefs and oral arguments of the litigants in \textit{Parker}, against the background of the question presented for certiorari. As the parties, according to the \textit{Cantor} plurality, had focused solely on the question of action by state officials themselves, this context supported the plurality's narrow interpretation of the opinion.\textsuperscript{79}

Justice Stewart's dissent in \textit{Cantor} sharply criticized the plurality's interpretive methodology—but on grounds that make the exclusion of judicial history seem arbitrary in a regime that does consider other forms of adjudicative context. Stewart wrote:

I would have thought that except in rare instances an analysis of the positions taken by the parties in briefs submitted to this Court

\textsuperscript{73} \textit{Id.} at 167-68 (Scalia, J., concurring in part and in the judgment) (citation omitted).
\textsuperscript{74} For discussion of the argument that the advisory committee notes, unlike internal memoranda, were created for public consumption, see \textit{supra} notes 43-49.
\textsuperscript{75} 428 U.S. 579 (1976).
\textsuperscript{76} 317 U.S. 341 (1943).
\textsuperscript{77} \textit{See id.} at 350-52.
\textsuperscript{78} \textit{See Cantor}, 428 U.S. at 585.
\textsuperscript{79} \textit{See id.} at 587-92.
Judicial History should play no role in interpreting its written opinions. A contrary rule would permit the “plain meaning” of our decisions to be qualified or even overridden by their “legislative history”—i.e., briefs submitted by the contending parties. The legislative history of congressional enactments is useful in discerning legislative intent, because that history emanates from the same source as the legislation itself and is thus directly probative of the intent of the draftsmen. The conflicting views presented in the adversary briefs and arguments submitted to this Court do not bear an analogous relationship to the Court’s final product.80

Justice Stewart’s reason for rejecting the interpretive value of litigant arguments cuts in favor of recourse to internal judicial history. Just as proponents of legislative history describe it as an especially helpful interpretive source because it is generated within the legislature itself,81 so too a proponent of recourse to internal judicial history might argue that a court willing to examine litigant arguments and oral argument transcripts should admit internal judicial history a fortiori, for that history supplies context that is proximate to the final text and is generated wholly within the institution that creates the text. An analogous point was made by critics of the nineteenth-century non-recourse rule of statutory interpretation, which permitted recourse to the “public history of the times” surrounding an enactment to shed light on legislative intent, but barred recourse to internal legislative history documents.82 Attorney General Caleb Cushing, for example, suggested that this combination was internally inconsistent; if the public history of the times was admissible, “how can it be that we are shut out from that field of inquiry [i.e., internal legislative history], which may be the most suggestive of trains of thought or of facts resulting in the discovery of the truth?”83

The argument for admitting judicial history as an interpretive source (rather than as a historical or predictive source) is quite simple. In other fields of legal interpretation, courts consult official history material on both intentionalist and contextualist grounds. That material is thought to provide authoritative evidence of the intentions of the document’s drafters or

80. Id. at 617-18 (Stewart, J., dissenting) (emphasis added and citations omitted).
81. See, e.g., ESKRIDGE, supra note 50, at 231 (“[T]here may be good reasons to prefer the fictions surrounding legislative history to those of the new textualism. At least legislative history is created within the legislative process and is subject to legislative reaction and correction.”); James J. Brudney, Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?, 93 MICH. L. REV. 1, 46 (1994) (arguing that unlike nonstatutory interpretive sources, “explanations offered in committee reports or in bill managers’ statements at least derive from Congress’s own policymaking authority”).
82. See Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845) (“The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.”).
helpful context in which to situate the document’s meaning. It is not a necessary condition for the validity of either approach that the document under interpretation itself be an act of lawmaking, such as a statute. When, for example, judges must interpret an ambiguous judicial opinion that itself construed some primary legal document, it is perfectly coherent (whether or not justified) to ask what the judges who wrote the opinion intended it to mean, and it is also coherent to consult the internal history of the opinion to situate it in context. There is nothing special about judicial history. Arguments from other interpretive settings that support the use of internal materials apply to the judiciary as well.

III. JUSTIFICATIONS FOR EXCLUSION

This straightforward argument for consulting judicial history, however, only skims the surface of the problem. In particular, the point that recourse to judicial history fits comfortably with several commonly invoked interpretive approaches is the beginning, not the end, of analysis. It must also be asked whether an interpretive regime that admits judicial history coheres with the text, history, and structure of the Constitution and produces acceptable institutional consequences for the federal judiciary.

This Part considers a range of normative arguments that justify the practice of excluding judicial history, justifications drawn from the text of Article III, the original understanding of the federal judicial power, and considerations of the judiciary’s institutional role within the constitutional structure. The structural and institutional considerations prove the most

84. These arguments are therefore not intended to explain the historical origins of the current exclusion of judicial history. Such an explanation would require a complex analysis of institutional and jurisprudential developments in American law that would exceed the scope of the present work.

85. Another attempted justification might state the following general principle: Official history may be used as an interpretive source only if the institution or official who generated the history placed it on the public record. On this view, legislative history would be admissible because it is published in the Congressional Record. Some other types of official history would be admissible as well (although perhaps not the notes of the constitutional convention, which Madison suppressed until his death, see James H. Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 Tex. L. Rev. 1, 24 (1986)). Judicial history, on the other hand, would not be admissible unless judges chose to publish it in the law reports.

It is arguable that even by this “public record” test, judicial history should be admissible. It might be said that many Justices have placed their working papers on the public record. See supra note 2 (describing collections of Justices’ papers at the Library of Congress and elsewhere). Why do the U.S. Reports count as the public record but the Library of Congress does not? Both are funded by the government. In addition, the judicial working papers themselves were generated by government officials in the course of their official duties. Granted, judicial working papers are not opened to the public contemporaneously with the opinion, but that is true of so-called “subsequent legislative history” as well. And some judicial history cannot be placed on the public record under any definition. A draft opinion, for example, is replaced by the official opinion in the reports in the same way that a draft bill is replaced by the enacted statute; it would be as unusual to publish a draft opinion in the U.S. Reports as it would be to publish a draft bill in the Statutes at Large.
persuasive. Although neither the text of the Constitution nor the Framers' conception of judicial decisionmaking supplies a clean prohibition of judicial history, there is good reason to fear that its admission would inflict institutional harms that would undermine the judiciary's assigned role in the constitutional structure. Taken together, these structural and institutional concerns justify the exclusion of judicial history.

A. The Text of Article III

In many domains in which official history is potentially useful, opponents of its use point to rules explicit or implicit in constitutional text and structure that are said to require exclusion of that history. The two most obvious examples are the enduring debate over legislative history and the recent debate over presidential signing statements. In the legislative history debate, textualist opponents of legislative history contend that the text and structure of the Constitution, particularly the requirements of bicameralism and presentment for the enactment of federal legislation that are detailed in Article I, Section 7, entail that only statutory text is law. On that premise, the judicial practice of affording authoritative weight to legislative history violates an implicit constitutional prohibition because it treats that history as law.

A different version of the textualist argument suggests that judicial use of legislative history as an authoritative source in effect allows Congress to delegate law-interpreting power to congressional subgroups

But the public-record test itself is flawed. If it assumes that a judge's failure to put judicial history on the record reflects an intention that the history not be used as an interpretive source, then it overlooks that legislators and executive officials place material on the public record partly out of constitutional or statutory compulsion. See infra Section II.C (discussing the Journal Clause, U.S. Const. art. I, § 5, cl. 3, and the Freedom of Information Act, 5 U.S.C. §§ 551-557 (1994)). In any event it assumes—controversially—that an official's intentions about interpretation bind later interpreters. See supra notes 43-49 and accompanying text (questioning this assumption). If that is not the point, then the public-record test just reasserts the current state of legal practice by definitional fiat: Judicial history is not part of the public record because it is not an admissible source. But presumably, if everyone thought judicial history an admissible source, it would constitute part of the public record and might be published in the same way legislative history is. The question is whether that state of affairs would prove beneficial, and definitions of the public record provide no guidance on that question.

Nor do statutory sources supply a clean prohibition of judicial history. Just as there is no general federal statute that regulates judicial resort to legislative history, there is no statute that addresses legal (or for that matter nonlegal) uses of judicial history.

See U.S. Const. art. I, § 7, cl. 2-3 (specifying that a "Bill" may become a "Law" only by approval by both Houses of Congress and presentment to the President, followed by either presidential signature or a presidential veto and repassage by two-thirds majorities in both Houses).

See, e.g., Thompson v. Thompson, 484 U.S. 174, 192 (1987) (Scalia, J., concurring) (stating that legislative history is a "frail substitute[] for [a] bicameral vote upon the text of a law and its presentment to the President" (citing INS v. Chadha, 462 U.S. 919 (1983))).
and agents, in violation of structural constraints on legislative self-delegation.  

Proponents of legislative history, by contrast, argue that the Constitution places few constraints on judicial use of legislative history. The constitutional requirements for the enactment of legislation, they claim, do not speak to judicial interpretation of legislation. As David Strauss puts it, “Article I, section 7 does not say anything explicit about what to do when a controversy arises about what a duly-enacted federal statute requires or permits.” Moreover, judicial resort to legislative history does not elevate legislative history to the status of “law” in any important sense. On this view, judges may consult legislative history simply to illuminate the meaning of authoritative statutory text when that meaning is ambiguous or otherwise unclear.

The debate over presidential signing statements is in part conducted on constitutional grounds as well. Proponents of judicial resort to presidential signing statements argue that the President’s powers under Articles I and II to veto bills and to propose legislation make him a participant in the legislative process and thus make signing statements part of the “legislative” history of the bill. Opponents of resort to signing statements emphasize that Article I vests all federal legislative power in the Congress, and that the President’s defined constitutional powers to participate in the legislative process should not be read to imply any broader role. Judicial use of presidential signing statements as evidence of legislative intent, the argument runs, allows the President to modify or nullify the congressional intent underlying specific provisions in a manner that resembles the constitutionally prohibited line-item veto.


91. See, e.g., Breyer, supra note 53, at 863 (“A judge cannot interpret the words of an ambiguous statute without looking beyond its words for the words have simply ceased to provide univocal guidance to decide the case at hand.”).


93. See id. at art. II, § 3.

94. See Walter Dellinger, Memorandum for Bernard N. Nussbaum Counsel to the President, 48 ARK. L. REV. 333, 339 (1995) (“In support of the view that signing statements can be used to create a species of legislative history, it can be argued that the President as a matter both of constitutional right and of political reality plays a critical role in the legislative process.”).

95. See William D. Popkin, Judicial Use of Presidential Legislative History: A Critique, 66 IND. L.J. 699, 709 (1991) (“The President . . . is not a legislator and therefore cannot create authoritative legislative history.”); see also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (“The Constitution limits [the President’s] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.”).

By analogy, one type of justification for the exclusion of judicial history could point to some specific constitutional rule forbidding resort to judicial history as an interpretive source. If, for example, Article III were thought to mandate that federal courts could exercise the judicial power only through the issuance of judgments accompanied by formal written opinions, arguments akin to those in the legislative-history debate would arise: Opponents of judicial history could argue that resort to material outside the corpus of formal opinions would circumvent the constitutional rule by according authoritative effect to a source not specified as authoritative by the rule itself.

It turns out, though, to be surprisingly difficult to generate persuasive arguments for such a constitutional prohibition; the comparison to the debates over legislative history and presidential signing statements merely emphasizes the puzzle of judicial history. In the legislative-history debate, for example, the textualist argument from Article I infers a prohibition on judicial resort to legislative history from the specification of procedures for the enactment of federal legislation. But the text of Article III is far less detailed than that of Article I and thus provides fewer resources from which to deduce a constitutionally-mandated rule that would exclude judicial history as an interpretive source.

Article I specifies both the substantive reach of federal legislative power and the procedures by which Congress and the President may jointly exercise that power. Article III, by contrast, specifies categories of "cases" and "controversies" to which the federal judicial power extends, but says nothing about the procedures by which courts vested with the judicial power must or may consider and decide cases and announce their decisions. In particular, there is no explicit requirement in Article III that federal courts must decide cases by written opinion—let alone that internal judicial history is an impermissible source of interpretive guidance on any opinions that are issued.

The same point holds for the debate over the use of presidential signing statements. Articles I and II provide material from which to argue that courts ought not to consult such statements as aids to the interpretation of statutes. Although the relevant constitutional texts also provide resources for the contrary argument, there is at least some basis for discussion. By

97. See U.S. CONSTR. art. I, § 7 (specifying procedures for the enactment of valid federal statutes); id. at art. I, § 8 (enumerating substantive grants of federal legislative power).
98. Id. at art. III, § 2.
99. See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 5 (2d ed. 1986) ("[Article III] does not purport to tell the Court how to decide cases; it only specifies which kinds of case the Court shall have jurisdiction to deal with at all. Thus, in giving jurisdiction in [particular categories of] cases . . . , the clause is not read as prescribing the process of decision to be followed.")
contrast, there is no hook in the text of Article III on which a rule excluding judicial history might be hung.\textsuperscript{100}

B. Original Understanding

Article III's silence about the procedures for judicial decisionmaking and the admissibility of judicial history merely prevents the grounding of an exclusionary rule in explicit constitutional text. It does not entail that judicial history must be admissible, for there is no general background rule that permits the consideration of anything the Constitution fails to proscribe explicitly. An independent basis for exclusion could be found in some implicit background rule that makes resort to judicial history illegitimate. The obvious source of such a rule would be the original understanding of Article III's grant of the "judicial Power."\textsuperscript{101} If the framers' conception of judicial decisionmaking required courts to decide cases by official publication of their decisions, the use of internal judicial history to interpret those decisions (whether the interpreter is a judge or a nonjudicial official) might be thought to circumvent that requirement.

The originalist argument for a background rule excluding judicial history, however, proves surprisingly difficult to sustain. Early judicial practice does not conform to the present model, in which judges often (although with diminishing frequency)\textsuperscript{102} decide cases through full-dress published, discursive opinions that are reprinted in a national reporter system. Rather, state courts at the time of the framing and the federal courts in the early years of the republic often followed the traditional practice of English courts by delivering oral opinions or unexplained orders. Court reporters, attorneys, and other interested parties were forced to reconstruct the decisions from the judges' private notes, the recollections of spectators, and other materials not resembling any authoritative text.

In Virginia during the late eighteenth century, for example, one historian recounts:

[T]he judges each gave their individual opinions orally seriatim. These opinions were then noted down by anyone in the courtroom who cared to do so. Sometimes the judges had written notes from which to deliver their opinions; sometimes not. When the judges

\textsuperscript{100} Cf. id. at 1 ("Congress was created very nearly full blown by the Constitution itself. The vast possibilities of the presidency were relatively easy to perceive and soon, inevitably, materialized. But the institution of the judiciary needed to be summoned up out of the constitutional vapors ... ").

\textsuperscript{101} U.S. CONST. art. III, §§ 1, 2 (vesting the "judicial Power of the United States" in particular federal courts and enumerating categories of "Cases" and "Controversies" to which that power shall extend).

\textsuperscript{102} See RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 162-63 (1996) (describing an increase in the number of unpublished opinions and judgment orders in the federal system).
wrote out their opinions, they might gave[sic] them to the reporter of decisions after they had been read in court. . . . It was not until 1820, however, that the Court of Appeals of Virginia was provided with an official salaried reporter of decisions. 103

The reporter sometimes prepared published opinions from the rough notes of the judges themselves: Bushrod Washington, later a Justice of the U.S. Supreme Court, prepared some reports of Virginia cases from notes given to him by Justice Edmund Pendleton. 104

Throughout the end of the eighteenth and beginning of the nineteenth centuries, the U.S. Supreme Court followed similar loosely structured procedures for announcing its decisions. "Until the early 1800s it was apparently the practice of the Court not to reduce its opinions to writing. . . . As late as 1834 the Court had no requirement that its opinions be filed with the Clerk." 105 After announcing their opinions in the courtroom, the Justices of the Marshall Court might give any manuscript or notes they had developed to the reporter, whose duty was, as Justice Story described it, to "abridge arguments, to state facts, [and] to give the opinions of the Court substantially as they [were] delivered." 106 Story's description suggests the loose and discretionary character of the process by which the Justices transmitted their decisions to the public. When Henry Wheaton took up the office of reporter in 1816, for instance, "the Justices, for their part, agreed to furnish him any written opinions they might prepare, or notes they might make in connection with their oral opinions." 107 Such notes, approximating draft manuscripts or internal memoranda, would today count as inadmissible judicial history.

This picture of judicial decisionmaking at the time of the framing, far from providing an originalist argument against judicial history, sharpens the point that Article III contains insufficient resources for a formal argument against the use of judicial history as an interpretive source. The comparison with the original understanding of Article I is illuminating. It is impossible

104. See id. at 101. These practices had deep roots in colonial-era traditions surrounding the creation and dissemination of judicial records. Colonial judges took notes of the cases before them, and the resulting "bench books" became part of the record of the relevant courts. See Erwin C. Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48, 52 (1981). Lawyers also developed judicial records; their notes of arguments and decisions were referenced by other lawyers and sometimes became the basis for printed volumes of reports. See id. at 50-51.
105. 3-4 G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES THE MARSHALL COURT AND CULTURAL CHANGE 1815-35, at 385 n.3 (1988) (citation omitted); see also Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1298 (noting that as of 1806 "the Court apparently failed, even in its most important cases, to reduce its opinions to writing" (footnote omitted)).
106. WHITE, supra note 105, at 183 (quoting letter from Joseph Story to Richard Peters, esq., May 7, 1836, in 2 WILLIAM W. STORY, LIFE AND LETTERS OF JOSEPH STORY 231 (1851)).
to imagine a scene in which legislators of the First Congress delivered their enactments orally, with the text reconstructed and published, if at all, from the legislators' notes and from the recollections of those present in the congressional galleries. As far as practices from the founding era indicate, a statute was considered to be nothing more than its text; a judicial decision, by contrast, was seen as an exercise of institutional judgment that might be embodied in a formal published text, but need not be. Early practice displays a continuum between oral announcements of decisions, draft manuscripts of opinions, and published judicial opinions. Neither the text nor the original understanding of Article III speaks in any explicit way to the question of which items on that continuum were to be considered permissible interpretive sources.

C. Constitutional Structure and Institutional Performance

Although the arguments from the text and original understanding of Article III prove unpersuasive, there is good reason to think that resort to judicial history as a legal source would undermine the judiciary's institutional role in the constitutional structure. The relevant concerns, while related, can be roughly separated into three major points: that recourse to judicial history would reduce the quality of the Court's internal deliberation, that judicial history would become unreliable in a regime that permits its introduction, and that consulting judicial history would undermine a complex of rule of law values that the adjudicative process is structured to promote. 108

1. Deliberation

One serious concern is that the widespread introduction of judicial history as an interpretive source might damage the quality of the Court's internal deliberations. A pervasive issue in structuring mechanisms of official deliberation is the tradeoff between internal candor and external

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108. I do not include any claim that resort to judicial history would damage the judiciary's "legitimacy." If the legitimacy claim means that resort to judicial history as a legal source would bring the judiciary into public disrepute by revealing the indecisiveness, compromise, and error that inevitably accompany judicial deliberation, then the claim overlooks two critical objections. First, the extensive modern use of judicial history for biographical and historical purposes has already brought about that evil, if it is one. The focus here, by contrast, is on the distinct and concrete harms that would flow from the use of judicial history as an interpretive source. See infra notes 127-128 and accompanying text. Second, the invocation of "legitimacy" in this debate is wholly indeterminate. Those who favor fully exposing the judicial process to public scrutiny argue plausibly that openness, not secrecy, is the precondition of judicial legitimacy. See, e.g., Arthur Selwyn Miller & D.S. Sastri, Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain, 22 BUFF. L. REV. 799, 823 (1973) ("We believe that in fact public esteem [for the Court] would rise if there were to be widespread dissemination of the intricacies and difficulties, the workload and the burdens of the nine Justices.").
accountability. The light of publicity permits other institutions, interested professional and civic associations, and the general public to hold officials accountable for the content and results of their deliberations. But the glare of publicity may encourage posturing, insincerity, and calculated silence where candid discussion of possibilities is needed. A variety of doctrines and doctrinal debates recognize this tension. To mention only the most salient example, the deliberative process privilege for presidential advisors, a species of the broader tradition of executive privilege, recognizes that protecting the confidentiality of executive branch deliberation will promote the free exchange of information and ideas as well as better policymaking.¹⁰⁹

Translating these issues into the judicial context yields two theses. First, constitutional structure, judicial tradition, and normative considerations of the judiciary’s institutional role all suggest that there are compelling reasons to protect judicial deliberation from the harms of excessive publicity, and to protect it to a greater extent, or in different ways, than legislative and executive deliberations are protected. Second, declaring judicial history an admissible interpretive source would plausibly inflict just those sorts of harms.

The constitutional text places a distinct emphasis on the publicity and openness of legislative deliberation. The Journal Clause of Article I provides that “[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy.”¹¹⁰ The commitment to openness is only presumptive, for a judgment that particular discussions should be kept secret is permitted, but the direction of the presumption is significant.¹¹¹

The Speech and Debate Clause in the same Article, which provides that “for any Speech or Debate in either House, [congressmen] shall not be questioned in any other Place,”¹¹² should be understood as a corollary of the

¹⁰⁹. See In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997) (“The most frequent form of executive privilege raised in the judicial arena is the deliberative process privilege; it allows the government to withhold documents and other materials that would reveal ‘advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’” (quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), aff’d, 384 F.2d 979 (D.C. Cir. 1967) (per curiam))).

¹¹⁰. U.S. CONST. art. I, § 5, cl. 3.

¹¹¹. A troubling detail for this account is that the Journal Clause does not require that the public be permitted to attend congressional deliberations. In the period immediately following ratification, “the Senate chose to operate behind closed doors for several years despite repeated arguments that the blanket exclusion of the public was inconsistent with the principle of popular government on which the Constitution was based. Moreover, neither chamber interpreted the journal provision to require a verbatim transcript of its proceedings.” DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS 10 (1997) (footnotes omitted). Yet it seems clear that the clause was originally understood to supply a guarantee of democratic accountability. See, e.g., JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 299 (Ronald D. Rotunda & John E. Nowak eds., 1987) (1833) (“The object of the whole clause is to ensure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents.”).

The constitutional commitment to the openness of legislative deliberation. If legislators are expected to deliberate openly, a risk arises that political opponents—particularly the executive—may seek to use their words against them. The Speech and Debate Clause provides a remedy for this ill by offering legislators immunity from legal penalties for their deliberative positions. This is, of course, only a partial remedy for the general problem that the publicity of legislative deliberations may detract from their quality. But that price is justified by elementary tenets of representative democracy that should be understood as implicit in Article I. Because legislators serve not only as policymakers but as elected representatives of the people, public accountability is a requisite of the process by which the people monitor and debate the positions their representatives take.

The picture with respect to the Presidency is more nuanced. The President is subject to several constitutional requirements of reporting and disclosure, including the duty to “from time to time give to the Congress Information of the State of the Union,” and to publish “a regular Statement and Account of the Receipts and Expenditures of all public Money.” Presidents have long asserted various forms of executive privilege, largely on the ground that successful executive deliberation requires it, and the courts have afforded the privilege qualified recognition. Yet important structural statutes like the Freedom of Information Act establish that executive privilege and related protections are properly viewed as exceptions to a general presumption that executive business should be open to public scrutiny.

Neither the text of the Constitution nor its associated traditions evidence a similar concern for the public accountability of judicial operations, leaving aside the historically charged context of the criminal jury trial. In contrast to Congress, the Court has no constitutional obligation to keep an official record of its internal deliberations; in contrast

114. U.S. CONST. art. II, § 3.
115. Id. at art. I, § 9, cl. 7.
116. See, e.g., United States v. Nixon, 418 U.S. 683 (1974) (recognizing the President’s interest in confidentiality of discussions with advisors, but holding that it was outweighed by the pressing need for full presentation of relevant evidence in a criminal case).
118. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a ... public trial ....”); Waller v. Georgia, 467 U.S. 39, 44-47 (1984) (holding that criminal proceedings are presumed open unless the defendant’s right to a fair trial is compromised or the government has a compelling interest in inhibiting the disclosure of sensitive information). The provision probably has less to do with the judiciary as such than it does with the particular gravity of criminal proceedings. Cf. Nixon, 418 U.S. at 713 (holding that a valid claim of executive privilege was outweighed by the need for evidence in a criminal proceeding); Viet D. Dinh, Book Review, 13 CONST. COMMENTARY 346, 355 n.15 (1996) (“[A] case [like Nixon] pits not Congress against the President, but an individual’s rights against governmental interests, and thus raises different, perhaps more easily answered, questions.”).
to the President, the Court is subject to no constitutional requirements of reporting or disclosure. The Court, moreover, has traditionally guarded the confidentiality of its deliberations with the utmost care. An elaborate network of tradition ensures that the Justices' formal deliberations in the Court's Conference Room are attended only by the Justices themselves, and that the content of their informal deliberations is not easily discovered.

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The assumption implicit in these texts and traditions, that judicial deliberation requires extraordinary protection from the harms of publicity, has roots in the same historical concern that animates Article III's guaranty of life tenure and protection of judicial salaries: a concern that judicial deliberation should be resolutely nonpolitical and addressed solely to the merits of judicial business. On this view, the harms that publicity can inflict—insincerity, posturing, cowed silence, and so forth—would be especially damaging to judicial deliberation because other relevant institutional rules and incentives attempt to insulate judicial deliberation from influences, such as the desire to retain office or to receive a salary, that would produce the same type of distortion. To the extent that consulting judicial history produced deliberative distortion, it would work to thwart deeply entrenched constitutional commitments.

But there is an important objection to the concern about deliberation: Historical and journalistic uses of judicial history are already so widespread that any incremental harm to deliberation worked by consulting judicial history as a legal source will be, at most, de minimis. Alexander Bickel articulated a similar point to justify his decision to publish the draft opinions of Justice Brandeis. Although Bickel denied that a general practice

119. In this light, it is revealing that the statutes that open executive proceedings to public scrutiny make exceptions for agency deliberation in an adjudicative capacity. See 5 U.S.C. § 552b(c)(10) (1994) (exempting from disclosure information that concerns "a particular case of formal agency adjudication"); Renegotiation Bd. v. Grumman Aircraft Eng'g, 421 U.S. 168, 186 (1975) (holding that reports used in the deliberations of the Renegotiation Board were "precisely the kind of predecisional deliberative advice and recommendations ... which must remain uninhibited and thus undisclosed"); Time, Inc. v. United States Postal Serv., 667 F.2d 329, 334 (2d Cir. 1981) ("The evident sense of Congress was that when a statute required an agency to act as would a court, its deliberations should be protected from disclosure as a court's would be.").


121. See Fein, supra note 7, at 48 ("Supreme Court confidentiality, at least for a decent interval, is vital to the unconstrained intramural debate that fathers longheaded decisions. It assures Justices that the process of intellectual trial and error before a final ruling will not be a source of embarrassment."); J. Woodford Howard, Jr., Comment on Secrecy and the Supreme Court, 22 BUFF. L. REV. 837, 838-40 (1973) (detailing various deliberative benefits of "decisional privacy"); Erwin N. Griswold, Book Review, 69 A.B.A. J. 1506, 1506 (1983) ("One wonders what effect this sort of presentation of [internal Court] documents, interviews and so on, so soon after the events, has on freedom of exchange, frankness, trust, common understanding, even bonhomie, among present and future Justices. ... Sunshine can be carcinogenic as well as antiseptic."). For a general account of the benefits of deliberation to the Court as an institution, see Kornhauser & Sager, supra note 29, at 100-02.
of publishing internal judicial materials would distort deliberation, he argued as well that any possible distortion had already occurred:

[W]hile we are deficient, by and large, in judicial biographies, enough has long since been gleaned from the private correspondence of some past Justices, so that, if there is danger that free intercourse among present ones may be inhibited by “disclosures” about their predecessors, free intercourse must already be severely inhibited.\(^{123}\)

This argument rings especially true today, when massive biographies of some Justice or other emerge regularly,\(^{124}\) legal scholars collect and print the draft opinions and internal memoranda of the Warren, Burger, and even Rehnquist Courts,\(^{125}\) and the sensitive Marshall Papers provide the centerpiece for many historical treatments of the Court.\(^{126}\) It seems, then, that the widespread use of judicial history for historical, biographical, and predictive uses must already have distorted the Court’s deliberations to the extent such distortion can occur. Any additional distortion arising from the use of judicial history as a legal source would be trivial.\(^{127}\)

But even if the nonlegal uses of judicial history are irremediably entrenched, there is reason to think that the incremental harm arising from legal uses of judicial history would be substantial. In a regime permitting only nonlegal uses of judicial history, judges must posture for the record only insofar as they wish to protect their general reputation among the informed public, present or future. In a regime permitting legal uses of judicial history as well, judges must posture for the internal record in order to maximize their influence over the future content of the law.

That additional motive for distortion may be quite powerful. A judge who is largely unconcerned about his reputation among political officials and journalists—and Article III grants life tenure and salary protection largely to produce such a lack of concern—may be able to resist the


\(^{124}\) See, e.g., JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. (1994).


\(^{127}\) Of course, the consequence of this sort of argument might simply be that nonlegal uses of judicial history should be suppressed as well. But those uses lie partially outside the judiciary’s collective institutional control. While the Court might announce by majority vote that judicial history may not be introduced to interpret an ambiguous opinion, it has thus far proved unable to prevent the publication of confidential material by former law clerks. See, e.g., EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT (1998). Congress, however, could presumably prohibit such publication, and state bars could make it a breach of professional ethics.
temptation to posture in ways that reduce the quality of the Court’s internal deliberation. But a judge who believes that he must posture for the record in order to exercise influence over the outcomes of specific cases and the general content of the law may not resist, for the principal way in which judges *qua* judges can exercise authority is by affecting the content of legal doctrines to be applied in litigation or announced through rulemaking. The pronounced importance of legal influence, among the whole set of goals that judges seek to attain,\(^{128}\) may thus cause judges to attempt to exercise disproportionate influence over the content of the law by strategic action that reduces the quality of the Court’s deliberations and renders judicial history unreliable. And this picture does not assume aggressively self-serving action by all judges; so long as some posture for the record, others may be impelled to do so defensively, in order to protect their share of influence on the content of legal doctrine. Such considerations suggest that admitting judicial history as an interpretive source may inflict noticeably greater harm upon the Court’s deliberative processes than have journalistic and historical uses of judicial history.

2. *Reliability*

In other domains where resort to official history is debated, a principal concern has involved the prospective effect that consulting official history will produce on the official history itself. In the legislative history debate, textualists argue that the Court’s decades-old practice of consulting legislative history has produced incentives for strategic behavior on the part of legislators that undermines the reliability of legislative history as evidence of legislative intent or as interpretive context. Individual legislators and legislative factions may insert misleading material into the legislative record—misleading in the sense that the material does not reflect the intentions of the whole Congress or of the median legislator who voted for the bill—because they are aware that the judiciary will consult legislative history and because they wish to influence that judicial interpretation.\(^ {129}\) The same argument surfaces in the debate over presidential signing statements. Opponents of judicial resort to signing statements argue

\(^{128}\) See *Lawrence Baum, The Puzzle of Judicial Behavior* 37-42 (1997) (reviewing empirical literature showing that the desire to influence the content of legal policy is a powerful, although not exclusive, determinant of judicial behavior); *Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model* 73 (1993) (arguing that Justices decide cases on the basis of substantive policy preferences). *But cf.* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*, 3 Sup. Ct. Econ. Rev. 1, 18 (1993) (stating that the majority of judges “have no great interest in changing (or resisting change in) law or society”).

that Presidents have, and will, make strategic use of signing statements, expressing interpretations of enacted statutes that the President could not persuade the Congress to accept.\textsuperscript{130}

Reliability concerns about judicial history would assume a similar form. Justices who are aware that judicial history would be admissible in subsequent interpretation might seek to influence that interpretation by strategic creation of judicial history materials. Internal memoranda, opinion drafts, and other documents might be shaded, or their contents devised, with a view toward creating an impression that the Justice's preferred disposition or ruling was broadly accepted, even if the majority or plurality coalition rejected those positions. Even dissenters could attempt to influence subsequent interpretation by describing a decision narrowly (or broadly, depending on what sort of strategic advantage is sought) in internal documents; a failure of the controlling coalition specifically to rebut the interpretation could later be argued to represent acquiescence.

The reliability concern appears in some respects weaker when transposed to the institutional setting of the judiciary. A standard rebuttal to textualist concerns about manipulation of legislative history claims that congressional knowledge that legislative history is admissible produces incentives for members of the enacting coalition to monitor, and rebut, attempts to manipulate legislative history on the part of other legislators.\textsuperscript{131} Whatever the persuasive power of the argument, it gains force in the judicial context. The number of Justices, for example, is sufficiently small that each might be able to keep abreast of internal memoranda and opinion drafts and to detect strategic insertions or manipulation as they occur. Moreover, each Justice sits on each case that comes before the Court. Unlike the legislature, where mutual reliance by legislators on committees and other de facto delegates to make policy produces opportunities for manipulation by subsets of the whole body,\textsuperscript{132} the whole Court might be able to monitor the behavior of each of its members in every case.

But, in other respects, the reliability concern appears stronger in the judicial context. Judicial papers are subject to the sole control of the judge who compiles them. There appear to be no institutional checks upon the ability of Justices to insert potentially misleading material into their papers,

\textsuperscript{130} See Popkin, supra note 95, at 713-14 (describing "politically manipulative" signing statements).

\textsuperscript{131} See, e.g., Eskridge & Ferejohn, supra note 26, at 286 ("If speakers and listeners all know that words spoken in the legislative process are accorded weight by courts and agencies, then members have an incentive to ensure that the record reflects his or her interpretation of the statute and that misleading or extreme interpretations do not stand unchallenged."); McNollgast, Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation, LAW & CONTEMP. PROBS., Winter 1994, at 3, 26-28 (describing mechanisms by which legislators can police manipulation of legislative history by committee members and other delegates).

\textsuperscript{132} See generally Manning, supra note 89, at 718-19 (arguing that the delegation to legislative committees or sponsors of the power to make law through legislative history allows other legislators to avoid responsibility and institutionalizes permanent logrolling).
and thus into the judicial history record, even if that material was never exposed to the scrutiny of the whole Court. Conversely, material not placed into a particular Justice's papers must be discovered by cross-checking the papers of others. It is as if each member of Congress were to keep a private version of the Congressional Record; legislative history researchers would face the preliminary difficulty of discovering the full content of the legislative record even before argument about the significance of the record could begin. The point is somewhat overstated, for in a regime that admitted judicial history, institutional mechanisms for compiling and publishing all the relevant documents might arise. But the marked individualism of the internal recordkeeping of the federal courts, in which each judge maintains separate files whose contents are considered private property, might retard the development of those mechanisms considerably, and even if it did not, judges would retain all the possibilities for manipulation of the record that legislators currently possess.

3. Rule of Law Values

A final potential harm arises from the possibility that widespread use of judicial history as an interpretive source would undermine the rule of law ideals of the adjudicative process. Although the "rule of law" is a protean concept, one prominent strand is the idea that the rule of law requires fair public notice of legal requirements. Just as textualists charge that legislative history is an inaccessible source of law, so too judicial history might turn out to be an obscure source of interpretive guidance, one accessible only to legal elites. There is no official system for the

133. See Dennis J. Hutchinson, Judicial Biography: Amicus Curiae, 70 N.Y.U. L. REV. 723, 724 (1995) ("There are numerous instances of self-serving artifacts being created by judges more with an eye to future historians than to the pressure of the moment—Stone, Frankfurter, and Douglas are notorious examples."). For debate over a possible example of such behavior, compare Michael Ariens, A Thrice-Told Tale, or Felix the Cat, 107 HARV. L. REV. 620, 643-51 (1994), which suggests that Justice Felix Frankfurter may have fabricated an internal memorandum and ascribed it to Justice Owen J. Roberts, with Richard D. Friedman, A Reaffirmation: The Authenticity of the Roberts Memorandum, or Felix the Non-Forger, 142 U. PA. L. REV. 1985 (1994), which disputes Ariens's suggestion.

134. See JOSEPH RAZ, THE AUTHORITY OF LAW 214 (arguing that the rule of law requires, inter alia, that "[a]ll laws should be prospective, open, and clear . . . . The law must be open and adequately publicized. If it is to guide people they must be able to find out what it is" (emphasis omitted)).


136. See Hearing, supra note 1, at 19 (statement of E. Barrett Prettyman, Jr.) ("[Judicial-history information] provides an unfair advantage to those of us who live and work in Washington and have easy access to these papers, as opposed to someone in Montana or California who does not."). Before the development of publicly-financed court reporters, judicial decisions themselves
gathering, publication, and distribution of internal judicial materials. Even the system of informal access now in place does not quite provide access to all. Although scholars have issued several compendia of unpublished opinions and internal documents,\textsuperscript{137} some of the Justices’ papers are accessible only to scholars, lawyers, and journalists who meet criteria of reputability established by the papers’ custodians.\textsuperscript{138}

Similar rule-of-law concerns once caused the Court, in the otherwise unremarkable case of \textit{Fayerweather v. Ritch},\textsuperscript{139} to hold that a judge could not be put on the stand to testify about the meaning of his own prior judicial opinion. As the Court put it:

\begin{quote}
[T]he testimony of the trial judge, given six years after the case had been disposed of, in respect to the matters he considered and passed upon, was obviously incompetent. . . . [N]o testimony should be received except of open and tangible facts—matters which are susceptible of evidence on both sides. A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed, and ought never to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision.\textsuperscript{140}
\end{quote}

It is, of course, logically possible to agree with \textit{Fayerweather} and yet say that a written record of judicial history should be admissible. After all, a common combination of rules is to admit legislative history while excluding legislators’ oral testimony, no matter how probative of intention or context that testimony would be.\textsuperscript{141} But that combination may simply be incoherent,\textsuperscript{142} and the Court’s reasons for excluding judges’ testimony also weigh heavily against judicial history. If, as the quoted passage suggests, looking beyond the four corners of the judicial text will undermine reliance and create inaccessible (or unequally accessible) sources of law, it should hardly matter whether the excluded material is pre-decisional judicial history or post-decisional judicial testimony.

Perhaps these concerns about accessibility and reliance have little prospective force, for admission of judicial history as an interpretive source
might itself create an increased demand for access on the part of lawyers and scholars—demand that might produce supply. But the interim unfairness of unequal access during the transitional period should not be overlooked, and the causal chain is itself speculative. The Justices’ papers are considered personal property and are placed on the public record only under conditions set by the donating Justice; there is no guarantee that an official system for gathering and publishing judicial history, akin to the Congressional Record, could lawfully be created. And, as with legislative history, judges aware of its legal effect might create judicial history in sufficient volume to drive the costs of researching it sharply higher, thus conferring a differential advantage upon large law firms, affluent clients, and institutional litigants generally. But such arguments as yet have failed to carry the day in the legislative-history debate.

This concern with authoritative publication as a requisite of fair notice and equal access to the law can be articulated from the Court’s perspective as well: The Court’s ability to provide legal guidance to lower courts, nonjudicial officials, and the citizenry might be hampered by resort to judicial history. If the increasingly rigid and rule-bound character of Supreme Court opinions causes them increasingly to resemble statutes, the development might be explained as an effort by the Court to economize on the instructions it gives to lower courts and other actors. On this view, writing its opinions in statute-like form is a technique by which the Court

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143. The closest analogy is the Presidential Records Act of 1978, 44 U.S.C. § 2201 (1994), which regulates official working papers of the President and his staff, and which would probably survive any separation-of-powers challenges. See Armstrong v. Executive Office of the President, 90 F.3d 553, 579 (D.C. Cir. 1996) (Tatel, J., dissenting) (“Presumably in recognition of Congress’s authority to preserve documents of the United States Government, including the executive branch, the Government does not assert that the Presidential Records Act represents an unconstitutional intrusion upon the President’s exercise of his constitutional duties.”); cf Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) (upholding the Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695 (1974), which applied only to the papers of former President Nixon, against a separation-of-powers challenge). But when in 1993 a Senate subcommittee held hearings on the legal status of the papers of Supreme Court Justices and invited the Justices to express their views, Chief Justice William Rehnquist wrote a letter in return that stated, on behalf of the whole Court, “[W]e have no hesitancy expressing the opinion that legislation [respecting the Justices’ papers]... could raise difficult concerns respecting the appropriate separation that must be maintained between the legislative branch and this Court.” Letter from Chief Justice William Rehnquist to Sen. Joseph I. Lieberman (June 7, 1993), reprinted in Hearing, supra note 1, at 71.

144. See Vermeule, supra note 8, at 1870-71 (describing arguments that judicial resort to legislative history imposes burdensome research costs and creates unequal access to the law).

145. See supra note 37 and accompanying text.

146. Cf. Easterbrook, supra note 42, at 808 (“Longer and more detailed opinions are a rational and desirable response by a Court that cannot significantly increase the number of cases it hears but wants to offer guidance on the increasing number of problems it must address.”); Howard, supra note 122, at 841 (“However much seriatim opinions may appeal to the democratic spirit, effective leadership of a complex legal bureaucracy via case law hinges upon a clear voice from the top.”).
may provide guidance without having to issue reams of fact-bound opinions in particular substantive areas.\footnote{147}{See Schauer, supra note 37, at 1469-70 (suggesting that "if one of the functions of a judicial opinion is guiding lower courts and legally advised actors" then the goal is best achieved by writing opinions with statute-like precision).}

Resort to judicial history could thwart this practice. Judicial history might allow litigants to impeach the formally published rules in favor of different rules mentioned in internal documents, to turn rules into vague considerations or standards by reading them against the background of the purposes the Justices hoped the rules would promote,\footnote{148}{Cf. Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 Harv. J.L. & Pub. Pol'y 61, 68 (1994) ("Rules differ from standards. Sometimes Congress specifies values or ends, things for the executive or judicial branches to achieve, but often it specifies means, creating loopholes but greater certainty. Using legislative history and an imputed 'spirit' to convert one approach into another dishonors the legislative choice as effectively as expressly refusing to follow the law." (emphasis omitted)).} and in general to accomplish with judicial history many of the litigation strategies that parties use legislative history to accomplish. This is a more persuasive functional analogue of the implausible formal argument that resort to judicial history circumvents Article III procedures for judicial decisionmaking.\footnote{149}{See supra notes 87-100 and accompanying text.} If judicial opinions have come to resemble statutes for good functional reasons, then resort to extrinsic material undermines those reasons in the same way that resort to extrinsic material in statutory interpretation has been said to thwart the purposes underlying Article I’s formalities for statutory enactment.\footnote{150}{See Manning, supra note 89, at 707 (arguing that judicial resort to legislative history as an authoritative source disserves the structural objectives promoted by bicameralism and presentment).}

Again, however, legislative history is often used in similar ways, and those who find such uses of legislative history acceptable should not see the same uses in the judicial setting as a matter for great concern.

D. Institutional Harms and Interpretive Benefits

All this describes a contingent, quasi-empirical case against admitting judicial history as an interpretive source. No clean textual or originalist source forbids its use. But allowing litigants and officials to introduce judicial history to support their interpretations would predictably inflict serious harm on the judiciary’s processes of deliberation and upon a complex of rule-of-law values associated with the publication of judicial texts. This conclusion follows despite the recent widespread use of judicial history for journalistic, historical, and predictive ends, because the interpretive use of judicial history would implicate judges’ powerful incentives to influence the future content of the law.

Although it is possible to sketch the nature of these harms to constitutional structure and institutional role, their magnitudes are hardly
clear. Any assessment of those magnitudes would require an inquiry partly empirical (e.g., how accessible are the various collections of judicial history?) and partly predictive (e.g., how much would the admission of judicial history decrease the reliability of judicial history records?). Moreover, even if the magnitudes were completely specified, there remains the normative question whether the occurrence of these harms is an acceptable price to pay for the interpretive benefits that recourse to judicial history would confer. That question turns on difficult assessments of the rate and magnitude of interpretive error and the cost of litigation and adjudication, both in a regime that admits judicial history and in a regime that does not.151

Yet there is no escaping such judgments; to admit judicial history would make them in precisely the same way, just in the opposite direction. And there are several supplementary reasons for thinking that the decision to exclude judicial history is the right one. First, one powerful argument against admitting judicial history is that courts currently do not do so. Despite Holy Trinity’s sharp break with the traditional exclusion of legislative history, courts choosing an interpretive regime under conditions of grave empirical uncertainty ought not to disturb settled rules unless the costs of the status quo appear intolerable. Second, when interpretive benefits are weighed against institutional harms, the point that resort to judicial history may often be unnecessary comes into its own. Judicial opinions, despite their increasingly rule-like character,152 still supply more interpretive context than does statutory text; and even under current practice other adjudicative materials, such as litigants’ briefs, are admissible to supply whatever additional interpretive guidance is needed.153 If for these reasons the need for judicial history is sufficiently small, the potential institutional harms described above need not be very great to support the total exclusion of judicial history. On some such mix of institutional and practical grounds the current untheorized practice of excluding judicial history thus seems defensible.

IV. JUDICIAL HISTORY, LEGISLATIVE HISTORY, AND OFFICIAL HISTORY

The running debates over the use of official history in constitutional, statutory, and treaty interpretation have not yet extended to the internal materials created by the judicial branch. But thinking about the judicial

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151. Cf. Cass. R., Sunstein, Justice Scalia’s Democratic Formalism, 107 YALE L.J. 529, 548 (1997) (book review) (“Whether it makes sense to use legislative history depends on such issues as the simple costs of using the history, the likelihood that it will increase rather than decrease errors, the availability of other more reliable sources of meaning, and the consequences for the legislature itself of using legislative history or not using it.”).
152. See Schauer, supra note 37, at 1407.
153. See supra notes 75-80 and accompanying text.
history puzzle promises to provide some critical traction in those debates. By supplying a doctrinal anomaly against which to test our commitments and intuitions, the judicial history puzzle illuminates the conditions for useful argument about other problems of official history. This Part elaborates upon those conditions and illustrates their application with a comparison between judicial history and legislative history.

Two conditions for useful argument in these areas deserve particular attention. First, plausible arguments about official history problems will be local rather than global. They will stem not from a universal approach to official history as such, but rather from detailed local claims, both formal and institutional, applicable to particular categories of official history. Second, plausible arguments will obey the constraint of consistency: No participant should offer an argument in one official history debate that, if transposed to another debate and accepted there, would contradict the position the participant holds in that other debate. These two conditions are perfectly compatible, indeed complementary. The consistency constraint operates to eliminate official history arguments based upon highly abstract principles that inevitably fail to explain a good portion of the interpretive landscape. In this way, the consistency criterion presses official history debates toward local solutions. Taken together, these conditions suggest an unexciting but attainable picture, one in which positions on particular types of official history will gradually be connected up in a linked series of comparisons that promises to sort the plausible views about official history from the implausible ones.

A. Localism

In principle, any particular official history problem could be resolved by the top-down application of a universal approach to official history, with that approach itself rooted in some general theory of legal interpretation. For example, it might be claimed that legal interpretation is just a species of linguistic interpretation, that linguistic interpretation usually requires extensive consideration of linguistic context, that official history supplies such context, and that official history should therefore be generally admissible. As discussed, similar views about interpretive context would at least presumptively make judicial history a perfectly ordinary and admissible source.

But it seems unlikely in the extreme that any such universal approach will prove plausible—putting aside highly abstract universal criteria that themselves produce a contextual approach, such as the truism that courts should consult official history when the benefits of doing so outweigh the costs. No participant in the current local debates about particular forms of official history adopts such an all-or-nothing stance; those who disfavor resort to legislative history draw heavily upon originalist materials, and everyone thinks that judicial history at least should be excluded. Official history problems arise across an exceedingly broad range of legal domains, ranging from constitutions, statutes, and treaties to presidential orders and judicial opinions and rules. Any global approach to official history would have to be rooted in an interpretive theory nearly as broad as law itself.

The alternative to a global approach to official history is a contextual approach, under which official-history problems would be resolved on the basis of particular claims about particular types of official history, the legal texts to which that history is a precursor, and the institutions or officials who generate both. These contextual judgments might, of course, be implemented through rules about categories of judicial history rather than through case-by-case adjudication. The point is that their derivation would rest, not upon global theories of interpretation, but upon formal, institutional, and empirical claims of a local character.

The judicial history problem illustrates the advantages of this sort of local solution. The law's untheorized exclusion of judicial history contradicts several of the standard global principles, such as intentionalism and contextualism, that are often invoked to resolve official history debates; under those principles judicial history ought to be admissible. The general accounts overlook the previously discussed formal and institutional justifications for the practice of excluding judicial history, justifications generated by detailed analysis of the relevant constitutional provisions and by quasi-empirical assessments of judicial behavior.

B. Consistency

Scholars working in various domains of legal interpretation, in both public and private law, have begun to compare problems of official history across those domains with a view to testing for consistency of position. Recent scholarship asks whether a textualist position that would exclude legislative history from statutory interpretation, or at least deny it any

155. See Eskridge, supra note 49, at 1301 (noting that textualists in statutory interpretation often use originalist materials in constitutional interpretation).
156. See supra notes 5-11 and accompanying text.
157. See supra notes 5-11, 92-96 and accompanying text (supplying examples of judicial resort to these forms of official history).
authoritative weight, is consistent with originalism in constitutional interpretation.\textsuperscript{158} Legislative history has also been compared to other forms of official history, such as the *travaux preparatoires* that courts draw upon to inform treaty interpretation.\textsuperscript{159} The consistency at issue in these comparisons is methodological, not substantive. Localism means that resolutions of particular debates can take account of relevant institutional differences that might well yield different prescriptions about judicial use of originalist materials, legislative history, judicial history, and so forth. Rather, consistency demands only that no participant should offer an argument in one official history debate that, if transposed to another debate and accepted there, would contradict the position the participant holds in that other debate.

While that requirement is minimal, it has sufficient bite to condemn a fair amount of argumentation in several of the particular debates about official history. One example is the comparison between legislative history and judicial history touched upon in Parts I and II. Currently the most popular defense of legislative history is the position that interpreters need contextual material to read legal texts correctly.\textsuperscript{160} But the judicial history puzzle supplies a consistency-based argument against that position. If the arguments adduced to support the admission of legislative history also entail that judicial history ought to be admissible as well, and if the exclusion of judicial history is an entrenched commitment of our interpretive practices, then the only interpretive regime that accords with our commitments is one that excludes both judicial and legislative history.

The supporter of legislative history might choose either of two paths out of this quandary; both illustrate the virtues of localism and consistency. One response might simply be to embrace the use of judicial history as an interpretive source. But it surely counts against such a position that it would effect a sweeping transformation of traditional interpretive practice. And the same reckless logic would undermine other fundamental limits on official history. Legislators or judges, for example, may not take the stand

\textsuperscript{158} See generally Eskridge, supra note 49 (providing an extended comparison of the two categories); see also John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1337-40 (1998) (sketching permissible textualist uses of originalist materials).


\textsuperscript{160} See supra note 53.
to testify about the context of their official proceedings or deliberations, even though such testimony would presumably provide a wealth of interpretive aid. The abstract premises of intentionalism and contextualism make such limitations inexplicable.

A second route out of the quandary would be to add side constraints that explain the disparate treatment of legislative and judicial history. For example, the supporter of legislative history might argue that resort to judicial history will distort judicial deliberation, as previously suggested, and then add that resort to legislative history will not distort legislative deliberation (or at least will not distort it in a normatively unacceptable way). But if the side constraint of concern for deliberation is all that explains a major asymmetry in our interpretive practices, then the side constraint is all that matters, and the requirement of consistency has forced the argument out of the abstract realm of interpretive first principles, such as “context” or “intention,” and down to the details of specific institutions and their deliberative processes.

Consistency arguments run the other way as well. Textualists who would exclude legislative history on the ground that Article I’s restrictions upon legislative self-delegation implicitly preclude its use as an authoritative source, or on the ground that judges lack competence to handle legislative-history materials, must supply some different ground for opposition to judicial history. But this sort of investigation of localized formal and institutional arguments usefully shifts the debate away from abstractions about intent and context. Those abstract grounds for resolving particular debates (such as the “context” argument for legislative history) prove difficult to reconcile with commitments about other forms of official history (such as the exclusion of judicial history) that are too deeply entrenched to abandon.

In many respects this combination of consistency and localism produces an unassuming program for interpretive theory. Rather than supporting a global agenda for developing a top-down account of official history, the two conditions support a set of local agendas for developing arguments about particular categories of history and comparing them against arguments from other debates, in the hopes that a long series of such comparisons will sift the plausible accounts of official history from the

161. See supra note 8 (describing traditional doctrines that exclude legislators’ and judges’ testimony).

162. This position is used as an illustration; I do not endorse it. On the merits of the institutional arguments, there are reasons to fear that judicial recourse to legislative history harms legislative deliberation a great deal. This is an implication of Jeremy Waldron’s observation that a large and diverse group of legislators must rely upon the formal text of a proposed bill, which “provides a focus for the ordering of deliberation at every stage.” Jeremy Waldron, The Dignity of Legislation, 54 MD. L. REV. 633, 663 (1995).

163. See Manning, supra note 89, at 695 (“Textualism, in short, purports to operate as a nondelegation doctrine.”).

164. See Vermeule, supra note 8, at 1860-63.
implausible. Such a process is surely less dramatic than choosing among
global theories of interpretation and of official history. But it also sets a
goal that promises to be attainable, and in the unsettled realm of interpretive
theory that is no mean thing.

V. CONCLUSION

Current interpretive doctrine displays an interesting asymmetry. Courts
and other interpreters sometimes consult the internal official history of the
Constitution, statutes, and treaties as an aid to the interpretation of those
documents. But they do not consult the internal history of judicial opinions
or judicially-promulgated rules, despite the existence of a corpus of
"judicial history" that resembles legislative history and might be used for
some of the same interpretive purposes. While the puzzling exclusion of
judicial history ultimately proves justifiable on structural and institutional
grounds, the judicial history problem illuminates how the law ought to treat
other categories of official history. Interpreters should move beyond
abstract talk about interpretive first principles, such as intention and
interpretive context, for those premises would upset settled interpretive
commitments such as the exclusion of judicial history. Rather, interpreters
should resolve debates over particular categories of official history by
reference to local formal and institutional claims and then test those
resolutions for consistency against commitments in other areas.