

NOTES

**INTERPRETIVE FREEDOM: A NECESSARY
COMPONENT OF ARTICLE III JUDGING**

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ABSTRACT

As judges have debated the best method of constitutional and statutory interpretation, scholars have begun calling for increased constraints on the methodological freedoms of Article III judges. This Note rejects such proposals on constitutional grounds. Drawing upon the jurisprudence and scholarship on inherent powers, I argue that interpretive choice is an inherent judicial power. The drafting and ratification history of Article III demonstrates that the Framers expected federal judges to interpret the law. To accomplish this task, however, judges must have some methodological approach to help them prioritize interpretive evidence. Thus, imposition of a binding interpretive methodology upon federal judges would pose two constitutional problems. First, it would infringe the essential judicial function of interpretive deliberation. Second, it would prevent the judiciary as a whole from engaging in its most powerful constitutional check on the excesses of the political branches. Because interpretive freedom is necessary to the fulfillment of the Article III judicial function, that freedom must be considered an inherent power vested in all federal judges.

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INTRODUCTION

Though ostensibly the weakest branch, the federal judiciary is only growing in importance as the expositor of federal law. The expansion of modern regulatory programs, in particular, has generated an increasing number of questions of statutory interpretation for federal judges¹ to answer. Judicial review of such statutes traces its roots back to Chief Justice Marshall's famous statement in *Marbury v. Madison*² that "[i]t is emphatically the province and duty of the judicial department to say what the law is."³ To "say what the law is," judges rely on a number of interpretive tools, including not only the text, legislative history, and purpose of a statute, but also canons of construction and even the consequences of their decisions.⁴ To guide their use of these tools, many judges have adopted personal philosophies of interpretation that privilege some tools at the expense of others.⁵ The ensuing debate has found its way into case law, scholarly literature, and the mainstream media.

Despite popular trust in the judiciary,⁶ a growing number of scholars have begun advocating limits on the methodological freedom of federal judges engaged in constitutional and statutory interpretation.⁷ The proposals vary, but they share the common goal of preventing arguments among federal judges about the best or most appropriate method of interpretation and, at the same time,

1. I use "federal judges" interchangeably with "Article III judges" throughout this Note. Because non-Article III judges are of questionable constitutional stature, none of the opinions I express in this piece should be construed to apply to them.

2. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

3. *Id.* at 177.

4. *See infra* Part I.A.

5. *See infra* Part I.A.

6. Polls repeatedly show public confidence in the judiciary far surpassing trust in the president and Congress. According to one Gallup poll, the judicial branch has steadily outstripped the other two branches in Americans' trust and confidence since 1974. Frank Newport, *Trust in Legislative Branch Falls to Record-Low 36%*, GALLUP (Sept. 24, 2010), <http://www.gallup.com/poll/143225/Trust-Legislative-Branch-Falls-Record-Low.aspx>.

7. *See, e.g.*, Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1856 (2010) ("[T]he search may be for a theory of the 'second best.' This is important because it shifts the inquiry away from the idea that there is a single 'ideal' way to ascertain the meaning of a statute—a question much more likely to divide judges and scholars—to, instead, the question of whether there is a sufficiently satisfying theoretical compromise that will also enhance coordination and stability in a complex and (for lower courts) overworked legal system." (footnote omitted) (citing Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 232)).

increasing predictability for litigants and legislators. Although greater uniformity and predictability in the system offer rule-of-law benefits, the Constitution imposes structural barriers to achieving that predictability. One such barrier is the division of powers, which vests some powers *exclusively* in particular branches. If an action intended to bring uniformity of interpretation trespasses on the judiciary's core inherent powers, it cannot stand—no matter how well intentioned the actor may have been. Whether one styles these powers as inherent, essential, or necessary, they exist to preserve the tripartite system of government that the Framers established.⁸

This Note argues that binding frameworks of interpretation are inconsistent with the essence of the Article III judicial function and with judicial independence. My analysis proceeds in three Parts. Part I provides background information on the scholarship surrounding interpretive methodologies and the inherent powers of the judiciary. Part II offers historical evidence that the Framers intended Article III judges to be independent interpreters of the Constitution and federal statutes. Part III ties the prior two Parts together by arguing that every federal judge enjoys a reasonable zone of inherent power to choose a method of interpretation. This power is a function of both the federal judge's task of interpretation and the judiciary's role as an independent check on the political branches.

I. BACKGROUND

Scholarship on the “judicial Power”⁹ is broad and diverse, as scholars have attempted to derive meaning from the ambiguous text of Article III.¹⁰ Rather than tread too far afield from the aim of this Note, this Part focuses on the literature regarding inherent judicial power and interpretive methodologies. Although these areas of scholarship have developed independently of each other, I believe they ought to be considered in tandem. Section A discusses the debate over methods of interpretation and some reactionary

8. See Joseph J. Anclien, *Broader Is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 74 (2009) (“A key feature of our Constitution’s separation of powers is that ‘a branch [may] not impair another in the performance of its constitutional duties.’ Hence, Congress may not behave in a manner that seriously impairs courts’ abilities to exercise the judicial power, and to exercise that power effectively.” (alteration in original) (footnote omitted) (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996))).

9. U.S. CONST. art. III, § 1.

10. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 205–06 (1985).

proposals to limit the power of federal judges to engage in that debate. Section B considers the scope of inherent judicial power, which consists of those powers incidental to or necessary for the discharge of the judiciary's constitutional duties.¹¹ Bridging the gap between these two bodies of work, this Note argues that federal judges have inherent power to develop and implement their own reasonable philosophies of interpretation.

A. *Interpretive Methodologies*

Methods of interpretation¹² are a hot topic in legal scholarship, spurring even Supreme Court Justices to weigh in on the correct way to interpret a statutory or constitutional text.¹³ Though major cases of constitutional or statutory interpretation account for only a small portion of the federal judiciary's workload, they offer some of the most substantively interesting challenges. Even after hundreds of years of jurisprudence, judges face open questions about the scope of rights protected in the Constitution and the proper balance of power between the federal government and the states. The United States' common-law system requires judges to decide these important questions through case-by-case analysis. Methodology matters. This Section provides a brief outline of the modern debate over methodology and then introduces the scholarship that seeks to bind judges in methodological choice.

1. *The Methodological Debate.* Legal scholarship proffers many interpretive methods, but the modern debate is framed by the dialogue between Supreme Court Justices Scalia and Breyer. In several books,¹⁴ essays,¹⁵ and debates,¹⁶ these Justices have advocated

11. 16A AM. JUR. 2D *Constitutional Law* § 264 (2010).

12. Throughout this Note, I use "methods of interpretation" or "interpretive methodologies" to refer to broader theories of interpretation such as textualism, originalism, or purposivism, rather than the methodological tests applied to specific legal issues like First Amendment challenges.

13. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY* 7–8 (2005) (articulating six factors upon which he and other judges may rely in answering questions of interpretation—text, history, tradition, precedent, purposes or values, and consequences); ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 23 (1997) (arguing that judges should look only to a reasonable interpretation of the text).

14. BREYER, *supra* note 13; STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK* (2010); SCALIA, *supra* note 13.

15. E.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992); Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV.

divergent approaches to the task of judging. Justice Scalia suggests a textualist approach with limited interpretive tools,¹⁷ whereas Justice Breyer proposes a more fluid, purposivist method.¹⁸ This Subsection describes the methods of these Justices in detail and then briefly discusses some of the other methodological options.

Justice Scalia is perhaps the most well-known advocate of textualism. In his influential essay, *A Matter of Interpretation*, Justice Scalia writes, “A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.”¹⁹ Yet this statement alone does not separate him from his purposivist colleagues, who also acknowledge being constrained by text. Rather, what separates him from the purposivists is his focus on the original understanding of a text²⁰ to the exclusion of other evidence of its meaning. He is particularly averse to the use of legislative history, not only because he believes it is an unreliable measure of congressional intent,²¹ but also because he fundamentally rejects the entire project of seeking legislative intent.²² To Justice Scalia, only the words of a statute have gone through the legislative process, and thus only the words are law.²³ Recognizing that ambiguity might nevertheless exist on the face of a statute, Justice Scalia must use some tools of interpretation. Thus, he often

245, 246 (2002); Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 99 (2006); Antonin Scalia, Keynote Address, *Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305, 307 (2004); Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989).

16. E.g., *Justices Breyer and Scalia Converse on the Constitution*, AM. CONSTITUTION SOC'Y (Dec. 6, 2006), <http://www.acslaw.org/acsblog/justices-breyer-and-scalia-converse-on-the-constitution>; *Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer—AU Washington College of Law, Jan. 13*, AU NEWS (Jan. 14, 2005), <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0>.

17. SCALIA, *supra* note 13, at 23.

18. BREYER, *supra* note 13, at 85.

19. SCALIA, *supra* note 13, at 23.

20. *Id.* at 38.

21. *See id.* at 31–32 (“What is most exasperating about the use of legislative history, however, is that it does not even make sense for those who *accept* legislative intent as the criterion. It is much more likely to produce a false or contrived legislative intent than a genuine one. The first and most obvious reason for this is that, with respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent, so that any clues provided by the legislative history are bound to be false.”).

22. *Id.* at 31.

23. *Id.* at 30.

turns to dictionaries,²⁴ canons of interpretation,²⁵ and history²⁶ in his analysis. He states, “In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.”²⁷

Justice Breyer approaches interpretation from a very different vantage point. Although he recognizes the importance of the text, he also unabashedly embraces a broader role for the interpreting judge.²⁸ If the text would lead a court away from the established purpose of the law, Justice Breyer would expect a judge to reject the literal meaning of the words.²⁹ He explains,

[J]udicial use of the ‘will of the reasonable legislator’—even if at times it is a fiction—helps statutes match their means to their overall public policy objectives, a match that helps translate the popular will into sound policy. An overly literal reading of a text can too often stand in the way.³⁰

To effectuate the will of the legislature, Justice Breyer endorses a set of six interpretive tools including text, history, tradition, precedent, purposes, and consequences.³¹ He quotes Justice Frankfurter,³² who

24. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2791 (2008) (using dictionaries to determine the meaning of “keep and bear Arms” in the Second Amendment).

25. See SCALIA, *supra* note 13, at 26 (“All of this is so commonsensical that, were the canons not couched in Latin, you would find it hard to believe anyone could criticize them.”).

26. See *Heller*, 128 S. Ct. at 2801 (invoking history to support the conclusion that the prefatory clause of the Second Amendment does not limit the operative clause to militia matters).

27. SCALIA, *supra* note 13, at 37.

28. See BREYER, *supra* note 13, at 109–10 (“The discussion has suggested that I, a judge who has a role in playing the complex score provided me in the form of constitutional and statutory text, history, structure, and precedent, can perform my role with less discord, more faithfully to the entire enterprise, and with stronger justification for the power I wield in a government that is of, by, and for the people, by paying close attention to the Constitution’s democratic active liberty objective.”).

29. See *id.* at 85 (“The fifth example . . . shows how overemphasis on text can lead courts astray, divorcing law from life—indeed, creating law that harms those whom Congress meant to help. And it explains why a purposive approach is more consistent with the framework for a ‘delegated democracy’ that the Constitution creates.” (quoting Ahron Barak, Foreword, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 28–29 (2002))).

30. *Id.* at 101.

31. *Id.* at 7–8.

32. *Id.* at 18.

states, “If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded.”³³ Thus, Justice Breyer’s strain of purposivism focuses on understanding the law in relation to both the people who passed it and the people who must live with it.

Although textualism and purposivism loosely represent the major positions in the methodological debate, judicial philosophies vary considerably within these groups. Some textualists adhere to a strict constructionist approach, whereas others focus on a more history-driven originalist methodology.³⁴ Some purposivists may weigh the tools advanced by Justice Breyer differently, focusing more on legislative history or on their own evaluations of consequences.³⁵ For the purposes of this Note, however, one need only understand the broad strokes of the textualist-purposivist debate that is playing out in legal scholarship, in Supreme Court cases, and on the political stage.

2. *The Desire To Bind Judges.* As the debate over interpretive methodology has continued, some scholars have called for greater constraints on judges.³⁶ This call may reflect a growing understanding that methodology can be outcome determinative on important questions of law. Justices Scalia and Breyer, for example, are known

33. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 541 (1947).

34. See William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1516 (1998) (“Scalia’s position on constitutional interpretation—which rejects an evolving, *au courant* Constitution in favor of an originalist, stagnant one—is subtly and perhaps just tentatively different from his position on statutory interpretation. If the former seeks out the *original* meaning of the text, the latter says, with Holmes, ‘I don’t care what [the legislature’s] intention was. I only want to know what the words mean.’ The former suggests a relatively more historicist inquiry, the latter a relatively more linguistic one.” (alteration in original) (footnote omitted) (citation omitted) (quoting SCALIA, *supra* note 13, at 22–23)).

35. Justices Ginsburg and Breyer, for example, would generally be considered purposivists. Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 186 (2001). But they actually have meaningful differences in jurisprudence. See Saby Ghoshray, *To Understand Foreign Court Citation*, 69 ALB. L. REV. 709, 728 (2006) (“[J]urisprudence empowered by comparative dialogue, emboldened by sharing and learning from across the globe, is the very basis of Justice Ginsburg’s constitutional interpretation”); *id.* at 741 (“Justice Breyer’s jurisprudence sits at the confluence of contrasting intellectual and philosophical developments. . . . But, in the end, it is firmly anchored in pragmatic consequentialism, which will continue to be the hallmark of his jurisprudence.”).

36. See, e.g., Donald L. Beschle, *Uniformity in Constitutional Interpretation and the Background Right to Effective Democratic Governance*, 63 IND. L.J. 539, 542 (1988) (“It is this background right to an effective democracy within constitutional limits, the explicit recognition of which would have a significant effect on constitutional interpretation as a whole, which provides the foundation for the value of uniformity in constitutional interpretation.”).

for reaching opposite conclusions on many of the most important constitutional issues that have been presented during their time together on the Court.³⁷ Similarly, the ninety-four district courts and twelve circuit courts routinely produce conflicting decisions. Professors Henry M. Hart Jr. and Albert M. Sacks crystallize the problem, noting that “[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”³⁸ Justices can argue over interpretation, but there appears to be very little conversion going on at the Supreme Court.

Scholars have responded to this challenge with different proposals to establish one methodological framework for interpretation in the federal courts.³⁹ This solution would not guarantee uniformity of interpretation in all cases, but it might improve consistency and predictability in the system as a whole. Professor Sydney Foster argues that this outcome could be achieved by applying an “extra-strong” version of stare decisis to doctrines of statutory interpretation adopted by the courts.⁴⁰ Foster builds her argument by analogizing methods of interpretation to choice-of-law rules.⁴¹ Some federal courts have held that when interpreting state

37. See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (disagreeing over the extent to which the Second Amendment protects an individual right to bear arms); *Giles v. California*, 128 S. Ct. 2678 (2008) (reaching opposite conclusions as to whether a defendant forfeits his Sixth Amendment right to confront a witness against him when his own actions made the witness unavailable to testify at trial); *Indiana v. Edwards*, 128 S. Ct. 2379 (2008) (disputing whether a state violates the Constitution by refusing a criminal defendant’s request to represent himself on the ground that he suffered from a mental illness, even though he was found otherwise competent to stand trial); *Hudson v. Michigan*, 547 U.S. 586 (2006) (arriving at different conclusions on whether the Fourth Amendment requires the exclusion of evidence obtained in violation of the knock-and-announce rule). These citations reflect only those cases in which Justices Scalia and Breyer filed opposing opinions. They joined opposing opinions in many other cases, but their own opinions demonstrate most clearly their dueling doctrines.

38. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

39. See, e.g., Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 4 (2010) (“The Court must therefore make the most of the cases it does hear by issuing broad (maximal) decisions that guide the lower courts in the many cases that it lacks the capacity to review.”); Gary E. O’Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 333, 334 (2004) (arguing that a Restatement of Statutory Interpretation would provide helpful guidelines for judges confronted with interpretive questions, much like the Restatement of Contracts has done for judges interpreting contracts).

40. Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1870 (2008).

41. *Id.* at 1884.

statutes pursuant to the Rules of Decision Act⁴² and *Erie Railroad Co. v. Tompkins*,⁴³ those courts must follow state methods of interpretation.⁴⁴ The rationales for this move, Foster argues, also support giving stare decisis effect to methods of interpretation in the federal courts.⁴⁵ She suggests that this practice would increase uniformity in the federal system, force judges to take greater care in selecting methodology, and make it more difficult for judges to be driven by substantive-law preferences.⁴⁶

Professor Nicholas Quinn Rosenkranz takes a different tack—suggesting that Congress should establish a set of federal rules for statutory interpretation as a public-policy matter.⁴⁷ Before offering this proposal, however, Rosenkranz engages the question whether particular methods of interpretation may be constitutionally required. He summarily dismisses the argument of this Note that interpretive freedom may be an inherent judicial power by stating, “whatever judicial power exists over interpretive methodology must be common lawmaking power, which may be trumped by Congress.”⁴⁸ But Rosenkranz misconceptualizes interpretive methodology. It is not common lawmaking, particularly because it has no stare decisis effect—one of the hallmarks of a working common-law system. Rather, interpretive methodology is a judge’s method of prioritizing evidence to come to a decision about the meaning of a statute. This approach is, I argue, the very essence of what it means to be a judge.⁴⁹

Professor Abbe R. Gluck goes one step further than Rosenkranz, looking to the states as laboratories of experimentation to determine

42. Rules of Decision Act, 28 U.S.C. § 1652 (2006).

43. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

44. Foster, *supra* note 40, at 1884–85. As Professor Foster herself notes, however, the Supreme Court precedent on this issue is mixed, *id.* at 1884 n.119, and Professor Abbe R. Gluck treats this principle as an open question of law, see *infra* Section III.A.

45. *Id.*

46. *Id.* at 1907–10.

47. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2090 (2002).

48. *Id.* at 2103.

49. Professor Linda Jellum also disagrees with Professor Rosenkranz, offering a similar argument to the one advanced in this Note. In a brief discussion, she suggests that general “interpretive directives” are likely to impose an unconstitutional burden on the judiciary’s deliberative process but that specific directives may be less problematic. Linda Jellum, “Which Is To Be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 895 (2009). This Note significantly expands that analysis.

the workability of such proposals.⁵⁰ Perhaps most interesting is her Oregon case study, which she calls an “unparalleled example of a judicially imposed, consistently applied interpretive regime for statutory cases that remained in place unaltered for a sixteen-year period.”⁵¹ In a unanimous opinion in *Portland General Electric Co. v. Bureau of Labor and Industries (PGE)*,⁵² the Oregon Supreme Court imposed a three-step methodology for all questions of interpretation and then proceeded to follow it strictly for the next sixteen years.⁵³ The case set up three tiers of approved sources: first, courts could look to the text to solve an ambiguity; second, “[i]f, but only if,” the text failed to provide an answer, courts could look to legislative history; and third, “[i]f after consideration of text, context, and legislative history,” the legislative intent is unclear, a court could use general maxims of statutory construction.⁵⁴ Several studies indicate that this methodology successfully curtailed the use of legislative history, as courts resolved almost all statutory issues on a textual basis.⁵⁵ It also brought more cohesion to the Oregon Supreme Court; between January 2005 and May 2009, fifty-three of the fifty-nine interpretation cases decided by the court were decided unanimously.⁵⁶

Although Oregon seemed to have done the impossible—seamlessly transition to one coherent system of interpretation for the state—the Oregon Supreme Court’s efforts did not last. In 2001, eight years after *PGE*, the state legislature took steps to bring legislative history into the first step of the *PGE* framework.⁵⁷ The supreme court, however, ignored the statute and continued to apply *PGE* for another eight years.⁵⁸ Finally, in *State v. Gaines*,⁵⁹ the court requested briefing on the framework.⁶⁰ The court ultimately produced a

50. Gluck, *supra* note 7, at 1756. Her five major case studies were Oregon, Texas, Connecticut, Wisconsin, and Michigan. *Id.*

51. *Id.* at 1776.

52. *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 859 P.2d 1143 (Or. 1993).

53. Gluck, *supra* note 7, at 1775.

54. *Id.* at 1777 (emphasis omitted).

55. From 1993 to 1998, the Court looked at 137 statutory-interpretation cases, reaching legislative history thirty-three times and substantive canons only eleven times. *Id.* at 1779. From 1999 to 2006, the court applied the statutory-interpretation framework 150 times, reaching legislative history nine times and never reaching the canons of construction. *Id.*

56. *Id.* at 1780–81.

57. *Id.* at 1783.

58. *Id.*

59. *State v. Gaines*, 206 P.3d 1042 (Or. 2009).

60. Gluck, *supra* note 7, at 1784.

confusing opinion suggesting that legislative history might have a greater role to play in future interpretive decisions.⁶¹ Thus, what was nearly a tremendous success for a judicially imposed state interpretive framework displayed its weakness: a need for constant reaffirmation by the highest court, especially in the face of legislative pressure or changes in the court's personnel.

Texas and Connecticut were even less successful in their attempts at establishing a reliable method of interpretation. Both states experienced discord between the legislature and the judiciary over which branch should control methods of interpretation. In Texas, the legislature passed an act specifically authorizing state courts to use traditionally purposivist tools—legislative history, consequences, and objectives.⁶² Yet the Texas Court of Criminal Appeals actively defied this legislative decision, implementing a rule *prohibiting* courts from resorting to tools beyond the text unless the text proved insufficient to resolve the ambiguity.⁶³ The Texas Supreme Court has also declined to follow the act when the text is unambiguous.⁶⁴ In Connecticut, the state supreme court banned plain-meaning methodology, prompting the legislature to pass a bill expressly requiring its use.⁶⁵ Like the high courts in Texas, however,

61. *Id.*

62. *See* Code Construction Act, TEX. GOV'T CODE ANN. § 311.023 (West 2005) (noting that courts, when engaged in statutory interpretation, may look to extrinsic factors like purpose, consequences, and legislative history even when the statute's language is unambiguous).

63. *See, e.g.,* Boykin v. State, 818 S.W.2d 782, 785–86 (Tex. Crim. App. 1991) (“If the plain language of a statute would lead to absurd results, or if the language is not plain but rather ambiguous, then *and only then*, out of absolute necessity, is it constitutionally permissible for a court to consider, in arriving at a sensible interpretation, such *extratextual* factors as executive or administrative interpretations of the statute or legislative history. This method of statutory interpretation is of ancient origin and is, in fact, the only method that does not unnecessarily invade the lawmaking province of the Legislature. The courts of this and other jurisdictions, as well as many commentators, have long recognized and accepted this method as constitutionally and logically compelled.” (footnote omitted)); *id.* at 786 n.4 (“Although Section 311.023 of the Texas Government Code invites, but does not require, courts to consider extratextual factors when the statutes in question are *not* ambiguous, such an invitation should be declined for the reasons stated in the body of this opinion.”).

64. *See, e.g.,* Alex Sheshunoff Mgmt. Servs. v. Johnson, 209 S.W.3d 644, 652 n.4 (Tex. 2006) (“[W]hile the Code Construction Act expressly authorizes courts to use a range of construction aids, including legislative history we are mindful that over-reliance on secondary materials should be avoided, particularly where a statute's language is clear. If the text is unambiguous, we must take the Legislature at its word and not rummage around in legislative minutiae.” (citation omitted)).

65. CONN. GEN. STAT. § 1-2z (2003) (“The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and

the Connecticut Supreme Court has continued to treat its precedent as binding and has interpreted the statute loosely, enabling the court to consult extratextual sources.⁶⁶ The courts in these states were unwilling to suffer legislative interference with their interpretive role.⁶⁷

Additionally, the supreme courts of Wisconsin and Michigan have introduced interpretive revolutions. In Wisconsin, the court created a textualist framework—not unlike the one established in Oregon—to which the state’s purposivist justices have acquiesced and which lower courts have treated as binding precedent.⁶⁸ Although judges have occasionally disputed whether the framework should apply, the high court led the way to a more consistent interpretive approach.⁶⁹ In Michigan, the governor appointed four explicitly textualist justices to a seven-member court.⁷⁰ The new majority began establishing a textualist framework in a series of decisions that have

unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.”).

66. See, e.g., *Bell Atl. Nynex Mobile, Inc. v. Comm’r of Revenue Servs.*, 869 A.2d 611, 617–18 & n.13 (Conn. 2005) (“[W]e begin with a searching examination of the language of the statute, because that is the most important factor to be considered. In doing so, we attempt to determine its range of plausible meanings and, if possible, narrow that range to those that appear most plausible. We do not, however, end with the language. We recognize, further, that the purpose or purposes of the legislation, and the context of the language, broadly understood, are directly relevant to the meaning of the language of the statute.”).

67. See, e.g., *Boykin*, 818 S.W.2d at 786 n.4 (“[I]nterpretation statutes that ‘seek[] to control the attitude or the subjective thoughts of the judiciary’ violate the separation of powers doctrine.” (second alteration in original) (quoting James C. Thomas, *Statutory Construction When Legislation Is Viewed as a Legal Institution*, 3 HARV. J. ON LEGIS. 191, 211 n.85 (1966))); see also Gluck, *supra* note 7, at 1796–97 (“Indeed, because the court rarely deems that section 1-2z applies, it has been able to avoid, for the full six years since its enactment, the question whether the statute unconstitutionally infringes on judicial authority, despite various hints in dicta that it might.”).

68. Gluck, *supra* note 7, at 1800–02; see also *State v. Doss*, 754 N.W.2d 150, 158 (Wis. 2008) (“[Q]uestions of statutory interpretation . . . are reviewed de novo under the standards set forth by [*State ex rel. Kalal v. Circuit Court*, 681 N.W.2d 110 (Wis. 2004)].”); *Kalal*, 681 N.W.2d at 125 (“What is clear, however, is that Wisconsin courts ordinarily do not consult extrinsic sources of statutory interpretation unless the language of the statute is ambiguous. By ‘extrinsic sources’ we mean interpretive resources outside the statutory text—typically items of legislative history.”).

69. Gluck, *supra* note 7, at 1802; see also *Lornson v. Siddiqui*, 735 N.W.2d 55, 76 (Wis. 2007) (Crooks, J., concurring) (disagreeing with the majority’s determination that the statute was ambiguous and thus subject to extrinsic evidence of its meaning under *Kalal*).

70. Gluck, *supra* note 7, at 1803–04.

been treated as precedential,⁷¹ but the project's political aura may prove to weaken its stature in the long term.⁷²

Relying on the general willingness of states to consider the possibility that judges can bind other judges' methodologies,⁷³ Professor Gluck suggests that these experiences provide valuable lessons for the federal system.⁷⁴ She emphasizes the benefits of increased uniformity⁷⁵ and a sense that judges are "*act[ing] like judges.*"⁷⁶ This comment raises the question, however, of what it means to act as a judge in the federal system. The next Section explores one answer to this question through the doctrine of inherent powers.

B. *Inherent Powers*

The Supreme Court has recognized, at least in dicta, that each branch of the U.S. government possesses some inherent powers.⁷⁷ The judiciary's inherent power has been defined as "[a]ll powers, even

71. *Id.* at 1807; *see also, e.g., In re Consumers Energy Co.*, 761 N.W.2d 346, 349 (Mich. Ct. App. 2008) (citing the Michigan Supreme Court's decision in *In re Complaint of Rovas Against SBC Michigan*, 754 N.W.2d 259 (2008), which rejected application of the *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), framework in state administrative decisions).

72. Gluck, *supra* note 7, at 1808–09.

73. *Id.* at 1823.

74. *Id.* at 1848.

75. *See id.* at 1818 ("But why stop at *Chevron*? The same need for federal law uniformity in a world of limited Supreme Court review exists with respect to *all* statutory questions, not just statutory questions in which there is an administrative agency involved.").

76. *Id.* at 1854.

77. *See, e.g., Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) ("Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.' While Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers, in foreign affairs the President has a degree of independent authority to act." (citation omitted) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)); *Marshall v. Gordon*, 243 U.S. 521, 542 (1917) ("Without undertaking to inclusively mention the subjects embraced in the implied power, we think from the very nature of that power it is clear that it . . . rests only upon the right of self-preservation, that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed."); *Ex Parte United States*, 242 U.S. 27, 41–42 (1916) ("Indisputably under our constitutional system the right to try offences against the criminal laws and upon conviction to impose the punishment provided by law is judicial, and it is equally to be conceded that in exerting the powers vested in them on such subject, courts inherently possess ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority.").

though not judicial in their nature, which are incident to the discharge by the courts of their judicial functions.”⁷⁸ Professor Joseph Anclien, however, argues that the judiciary’s inherent powers are significantly broader—encompassing not only those that are necessary to the exercise of the judicial power, but also all those that possess a “natural relation” to it.⁷⁹

This Section loosely groups the recognized inherent judicial powers into three categories.⁸⁰ First, courts have the inherent power to control their dockets, complete general housekeeping tasks, and perform a wide range of procedural matters during trial.⁸¹ Second, the Supreme Court relies on its inherent authority as the head of the Article III judicial hierarchy to impose procedural rules on the lower federal courts.⁸² Third, federal courts have broad discretion to craft equitable remedies, a discretion that derives from their constitutional and common-law equity jurisdiction, as well as from their inherent power.⁸³ Although these are the major categories of inherent powers that have been officially invoked by the courts, they do not necessarily present an exhaustive list.⁸⁴

1. *Control over Procedure Within a Judge’s Own Courtroom.*

The first category of recognized inherent power is the authority to control the day-to-day procedural aspects of one’s courtroom. Judges exercise this power when they set their dockets, manage parties, control discovery requests, and even when they stay proceedings. As

78. 16 C.J.S. *Constitutional Law* § 305 (2005).

79. Anclien, *supra* note 8, at 42.

80. Some scholars have identified alternate groupings. See, e.g., Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 760 (2001) (“Instead of considering inherent authority generally and its relationship to structural constitutional principles, the Court has examined the exercise of inherent power involved in each case—usually one aspect of judicial administration, sanctions, or the supervision of criminal justice.” (footnote omitted)).

81. Anclien, *supra* note 8, at 44–48.

82. *Frazier v. Heebe*, 482 U.S. 641, 645 (1987) (“This Court may exercise its inherent supervisory power to ensure that these local rules are consistent with ‘the principles of right and justice.’” (quoting *In re Ruffalo*, 390 U.S. 544, 554 (1968) (White, J., concurring)) (internal quotation marks omitted)).

83. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991) (“The imposition of sanctions in this instance transcends a court’s equitable power concerning relations between the parties and reaches a court’s inherent power to police itself, thus serving the dual purpose of ‘vindicat[ing] judicial authority without resort to the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses caused by his opponent’s obstinacy.’” (alterations in original) (quoting *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1977))).

84. See *infra* Part II.

the Supreme Court has acknowledged, “[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”⁸⁵ Professor Anclien summarizes a number of cases in which courts have invoked these powers, including the power to consolidate cases, set the calendar, dismiss an action under *forum non conveniens*, and promote settlement by requiring that parties have someone authorized to settle the case at every pretrial conference.⁸⁶ Judges also exercise authority over evidentiary issues when they set the number of expert witnesses who may testify, control the admission of exhibits, decide whether to accept post-trial depositions, and use discovery procedures in habeas cases.⁸⁷ As even this brief list demonstrates, courts invoke their inherent authority to cover a wide range of day-to-day decisions made in the process of judging.

This category of power rests on the necessity rationale first enunciated in *United States v. Hudson & Goodwin*.⁸⁸ There, the Court said,

Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others⁸⁹

In presiding over a courtroom, judges must make many decisions without guidance from a binding statute. They are expected to manage not only their dockets, but also the parties and actions before them. The principle is so well established that courts do not even need to explicitly invoke their inherent power to take these actions, though many do.⁹⁰

85. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

86. Anclien, *supra* note 8, at 44–45.

87. *Id.* at 46–47.

88. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

89. *Id.*

90. *See Marinechance Shipping v. Sebastian*, 143 F.3d 216, 218 (5th Cir. 1998) (“The district court possesses the inherent power to control its docket. This power includes the authority to decide the order in which to hear and decide pending issues.” (citations omitted)); *In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1012 (5th Cir. 1977) (“[T]he traditional exercise of the court’s inherent powers over the administration and supervision of its own business’ . . . is not merely desirable. It is a critical necessity. The demands upon the federal courts are at least heavy, at most crushing.” (quoting *MacAlister v. Guterma*, 263 F.2d

Unsurprisingly, these limited powers have generated little scholarly comment beyond the recognition that they serve valuable functions in the judicial system. Professor Robert Pushaw, for example, calls them “implied indispensable powers” because courts need them to function competently.⁹¹ He argues that these powers are so central to the judicial process that the Constitution permits only legislation that would facilitate the exercise of these powers.⁹² Similarly, Professor William Van Alstyne expresses concern about the expansion of judicial authority, but he acknowledges a “core of powers that are indispensable . . . to the performance of [judges’] express duties under [Article III] of the Constitution.”⁹³

2. *Supervisory Authority.* A more controversial zone of inherent powers is the Supreme Court’s supervisory authority over lower court procedure. The Court first claimed the power to review inferior court procedure in 1943, stating that “[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.”⁹⁴ Since that time, the Court has varied its definition of this power. As the Court framed it in *Frazier v. Heebe*,⁹⁵ “This Court may exercise its inherent supervisory power to ensure that these local rules are consistent with ‘the principles of right and justice.’”⁹⁶ In *Dickerson v. United States*,⁹⁷ however, the Court moved beyond mere oversight of local rules, using its supervisory authority to justify the creation of binding rules of evidence and procedure for lower federal courts.⁹⁸

65, 69 (2d Cir. 1958)); *MacAlister*, 263 F.2d at 68 (“But even if the rule were more restricted in its scope we would be most reluctant to deny such inherent power to the district courts. The power to order consolidation prior to trial falls within the broad inherent authority of every court . . .”).

91. Pushaw, *supra* note 80, at 847.

92. *Id.* at 742.

93. William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS. 102, 107 (1976).

94. *McNabb v. United States*, 318 U.S. 332, 340 (1942).

95. *Frazier v. Heebe*, 482 U.S. 641 (1986).

96. *Id.* at 645 (quoting *In re Ruffalo*, 390 U.S. 544, 554 (1968) (White, J., concurring)) (internal quotation marks omitted).

97. *Dickerson v. United States*, 530 U.S. 428 (2000).

98. *Id.* at 437.

The major justification for supervisory authority rests on the Supreme Court's position in the judicial hierarchy. In a compromise at the Constitutional Convention, Article III established one "supreme" court and left the creation of future "inferior" courts to the discretion of Congress.⁹⁹ The Constitution does not describe this division further, but the Supreme Court has developed into a powerful and prestigious body that serves as the final arbiter of federal law.

Although the Supreme Court has been vague about the justification for its supervisory authority, Professor Sara Sun Beale argues that the justification likely rests with the implied or ancillary powers of the courts.¹⁰⁰ She analogizes these powers to the implied or ancillary powers of the executive, noting that

the textual differences between articles II and III suggest, if anything, that the argument for a generous interpretation of the judiciary's implied powers is stronger than the President's claim under article II. The narrow Madisonian view of the President's powers can readily be implied from the enumeration of detailed powers in article II. No similar enumeration of judicial powers is found in article III¹⁰¹

Beale would not call this power an "inherent" power because it can be abrogated by congressional statute.¹⁰² The Supreme Court, however, has invoked the term "inherent" to describe this power.¹⁰³

Several Supreme Court Justices have explicitly questioned what appears to be a growing exercise of supervisory authority. In *Frazier*, a case involving district court rules of admission to the bar, then-Justice Rehnquist called the reliance on supervisory authority "newfound and quite unwarranted."¹⁰⁴ In another case reviewing a lower court's exercise of supervisory authority to dismiss an

99. U.S. CONST. art. III, § 1.

100. Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1471–72 (1984).

101. *Id.* (footnote omitted).

102. *Id.* at 1467–68.

103. See *Frazier v. Heebe*, 482 U.S. 641, 645 (1986) ("This Court may exercise its inherent supervisory power to ensure that these local rules are consistent with 'the principles of right and justice.'" (quoting *In re Ruffalo*, 390 U.S. 544, 554 (1968) (White, J., concurring)) (internal quotation marks omitted)).

104. *Id.* at 655 (Rehnquist, J., dissenting).

indictment for misconduct, Justice Scalia stated that he did not “see the basis for any direct authority to supervise lower courts.”¹⁰⁵

Relatedly, some scholars have challenged the prudence and constitutionality of supervisory authority. Professor Beale concludes that “supervisory authority,” as invoked by the Supreme Court, actually refers to a number of different forms of authority, not all of which are within the Court’s constitutional competence.¹⁰⁶ When the Court acts without statutory authority, Beale argues that it should exercise its supervisory authority narrowly, establishing rules only for “matters relating to the efficiency and reliability of the judicial process.”¹⁰⁷ Professor Amy Coney Barrett has also explored the constitutional basis for supervisory authority, ultimately concluding that it is in “significant tension” with the structure of Article III.¹⁰⁸ She notes that even if one could reasonably conclude that the supreme-inferior distinction called for a judicial hierarchy, and that the word “supreme” conveyed inherent authority,¹⁰⁹ one must also find that this inherent authority extended to the control of inferior court procedure.¹¹⁰ Barrett argues that the ambiguity of the text, combined with a sparse historical record, weighs heavily against supervisory authority’s claim to constitutional legitimacy.¹¹¹

Though he does not specifically address the supervisory-power doctrine, Professor David Engdahl also challenges its underpinnings by arguing that the constitutional text does not mandate the current judicial hierarchy.¹¹² Relying heavily on the history of state judiciaries and the ratification compromise, Engdahl argues that the supreme-inferior distinction implies no hierarchy at all, requiring only that the Supreme Court have the widest geographic and subject-matter jurisdiction.¹¹³ In his view, the “supreme Court” could theoretically be reviewed by “inferior Courts” and still meet its constitutional

105. *Bank of N.S. v. United States*, 487 U.S. 250, 264 (1987) (Scalia, J., concurring).

106. Beale, *supra* note 100, at 1520.

107. *Id.*

108. Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 364 (2006).

109. This claim is dubious, according to Professor Barrett, who sees the distinction between “supreme” and “inferior” courts as a limit on congressional establishment of further courts rather than as a grant of special supervisory power to the Supreme Court. *Id.* at 387.

110. *Id.* at 365.

111. *Id.* at 371.

112. David E. Engdahl, *What’s in a Name? The Constitutionality of Multiple “Supreme” Courts*, 66 IND. L.J. 457, 491 (1991).

113. *Id.* at 467–68.

requirements.¹¹⁴ If accepted, this argument would effectively erode the hierarchical justification for supervisory authority. Despite the existence of scholarship challenging the supervisory-power doctrine, the Court continues to rely upon it when promulgating procedural rules for the lower federal courts.

3. *Equitable Powers.* The third major category of inherent or implied Article III powers is equitable power. As the Supreme Court has defined it, “The essence of a court’s equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by the unlawful action.”¹¹⁵ Several good arguments exist, however, for rejecting the categorization of equitable powers as “inherent.” First, the judiciary’s equitable powers are explicitly authorized by the text of the Constitution. Article III, Section 2 declares that “[t]he judicial Power shall extend to all Cases, *in Law and Equity*, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”¹¹⁶ Second, equitable powers are not per se necessary to the resolution of a great many cases. Nevertheless, federal courts have cited “inherent” equitable powers to justify a number of procedural and remedial decisions.¹¹⁷

The justification for inherent equitable powers is grounded in the English tradition of equity courts. Rather than establish separate courts of law and equity under Article III, the Framers adopted a unified approach in which all federal courts could sit in either law or

114. See *id.* at 468–72 (noting that Virginia, Delaware, New Jersey, Pennsylvania, Maryland, North Carolina, and Georgia lacked pyramid-style judicial systems at the time of ratification).

115. *Freeman v. Pitts*, 503 U.S. 467, 487 (1992).

116. U.S. CONST. art. III, § 2 (emphasis added).

117. See, e.g., *Hall v. Cole*, 412 U.S. 1, 4–5 (1972) (“Although the traditional American rule ordinarily disfavors the allowance of attorneys’ fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys’ fees when the interests of justice so require. Indeed, the power to award such fees ‘is part of the original authority of the chancellor to do equity in a particular situation,’ and federal courts do not hesitate to exercise this inherent equitable power” (footnotes omitted) (citation omitted) (quoting *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 166 (1939))); *Inland Steel Co. v. United States*, 306 U.S. 153, 156 (1938) (“A court of equity ‘in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court, as a court of equity, and has been exercised from time immemorial.” (quoting *Russell v. Farley*, 105 U.S. 433, 438 (1881))); *Calloway v. Dobson*, 4 F. Cas. 1082, 1083 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 2325) (citing the circuit court’s equitable power to permit parties to amend pleadings).

equity.¹¹⁸ This choice effectively imported some English notions of equitable powers into the American judicial system. The Supreme Court explicitly recognized this fact in *Atlas Life Insurance Co. v. W.I. Southern, Inc.*¹¹⁹:

The “jurisdiction” thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.¹²⁰

These equitable powers became universally available—and thus more pervasive—when the systems of law and equity were merged in 1938.¹²¹ But jurists disagree over the extent to which equitable principles have continued to develop in American history or remain as frozen-in-time testaments to the English system circa 1783.¹²² For this Note’s purposes, it is sufficient to note that equitable judicial powers enjoy a long and respected history within the judiciary.

Given this well-established relationship between judges and equity, it is perhaps unsurprising that the Supreme Court has been extremely reluctant to find its equitable powers constrained. Professor William Eskridge notes that the Supreme Court, when engaging in statutory interpretation, “may . . . presume that Congress does not intend to strip federal courts of their inherent powers, especially their power to fashion creative relief in equity.”¹²³ The Court has also repeatedly affirmed the breadth of its powers to fashion equitable remedies.¹²⁴ In the course of jealously guarding its equitable powers, the Court has made a powerful statement of its

118. See U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity . . .”).

119. *Atlas Life Ins. Co. v. W.I.S., Inc.*, 306 U.S. 563 (1938).

120. *Id.* at 568.

121. See Rhonda Wasserman, *Equity Transformed: Preliminary Injunctions To Require the Payment of Money*, 70 B.U. L. REV. 623, 653–54 (1990) (“Like their English counterparts, early American courts refrained from granting equitable remedies if adequate remedies at law existed. When law and equity were merged into a unitary system in 1938, the historical reason for judicial restraint in granting equitable relief disappeared: two competing judicial systems no longer existed.” (footnotes omitted)).

122. Richard H.W. Maloy, *Expansive Equity Jurisprudence: A Court Divided*, 40 SUFFOLK U. L. REV. 641, 642 (2007).

123. William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1023 (1989) (omission in original).

124. John Choon Yoo, *Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1132 (1996).

resistance to infringements on authority it views as inherent to its office.

II. THE FRAMERS' VISION OF INDEPENDENT JUDGES ENGAGED IN INTERPRETATION

Inherent judicial powers have been defined in an ad hoc manner, elaborated whenever such powers prove necessary to protect a judge's role in the system. Despite the growing push for control over methodology, courts have not had occasion to consider whether a judge's methodological choices might be considered an inherent power and, if so, the extent to which they can be abrogated. This Part begins to answer this question by considering the Framers' vision of the function of federal judges. First, I argue that the Framers sought to insulate federal judges from outside pressure that could affect the independent adjudication of cases and controversies. Second, I describe the expectation of the Framers that these judges would engage in constitutional and statutory interpretation.

A. *Federal Judges as Independent Arbiters*

The text of the Constitution establishes important protections for the independence of judges. Article III, Section 1 provides, "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."¹²⁵ These provisions ensure both financial and job security for federal judges. They were aimed at combating the undue influence of the executive and legislative branches on federal judges.

Although the Framers agreed on the major proposals,¹²⁶ they disagreed over the possibility of locking salaries at the level of appointment. The initial draft of the Constitution took this tack, but Gouverneur Morris submitted a proposal to strike that provision to allow salaries to increase with the changing circumstances of the nation.¹²⁷ James Madison dissented, suggesting that this proposal

125. U.S. CONST. art. III, § 1.

126. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 38 (Max Farrand ed., 2d. ed. 1937) (noting that the amendments to permit judges to serve in "good Behaviour" and with a fixed salary passed unanimously).

127. *Id.* at 44.

made judges dependent upon the legislature.¹²⁸ He preferred to tie judicial salaries to a specific standard such as the price of wheat to remove even the possibility of legislative control.¹²⁹ The Framers shared Madison's concern regarding the independence of the new federal judges, but they were worried that tying judicial salaries to the price of wheat might actually backfire as the country changed.¹³⁰ Although Madison lost the battle to tie salaries to a fixed standard,¹³¹ the exchange nevertheless reveals the Framers' efforts to craft constitutional provisions that would insulate judges from undue influence over their work.¹³²

Many of the Framers were trained in the law,¹³³ so unsurprisingly, the Constitution's protections of judicial independence reflect broader legal opinions of the time. Timothy Cunningham's 1771 law dictionary shared the following anecdote:

The *judge* at his creation takes an oath that he shall indifferently minister justice to all them that shall have any fruit or plea before him, and this he shall not forbear to do, though the King by his letters, or by express word of mouth, should command the contrary . . . King *Henry* the Fourth, when his eldest son the Prince was by the Lord Chief Justice, for some great misdemeanors, committed to prison, thanked God that he had a son of that

128. *Id.* at 45.

129. *Id.*

130. *See id.* (recording Morris's reply that there should be flexibility to increase judges' salaries as their workload grew and society changed, a flexibility that could not be achieved by a salary tied to the price of wheat).

131. *Id.* On the motion for striking the words "or increase" from the drafted salary protections, there were six "[a]yes," two "noes," and one abstention. *Id.*

132. For further historical analysis and support on this point, see generally James S. Liebman & William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998); and Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061 (2007). For a textual analysis of the independence protections, see generally Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673 (1999).

133. Thirty-five of the fifty-five delegates to the Constitutional Convention were lawyers, though not all of them practiced law as their main occupation. Some of the Framers were even judges themselves. *The Founding Fathers: A Brief Overview*, NAT'L ARCHIVES, http://www.archives.gov/exhibits/charters/constitution_founding_fathers_overview.html (last visited Nov. 9, 2011).

obedience, and a judge so impartial, and of such undaunted courage¹³⁴

This commentary emphasizes the importance of a judge's independent decisionmaking, especially in the face of external pressures. Giles Jacob's English law dictionary—published in London in 1729 and in America in 1811—similarly describes an independent judiciary with tenure in good behavior, salary protections, and insulation from injury or punishment.¹³⁵ These dictionaries demonstrate a growing consensus that the independence of judges was a critical feature of a working judiciary.

During the ratification period, Alexander Hamilton touted the benefits of these judicial protections. In Federalist No. 78, Hamilton wrote,

The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. . . . And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.¹³⁶

Hamilton's words appear to echo a consensus at the Constitutional Convention and among the broader legal community at the time that judges should have sufficient insulation from the other branches of government.

B. Federal Judges as Interpreters of Federal Law

Although the Framers were explicit about judicial protections, they did not clearly outline the duties of a federal judge. The closest analogue to the enumeration of powers and duties of Congress in Article I is the jurisdictional grant of Article III, Section 2.¹³⁷ This provision defines only the scope of judicial power, however, not the functions of federal judges. Despite this lack of textual instruction, the Constitution's drafting records and ratification history provide strong support for the conclusion that the Framers expected the

134. 2 T. CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY, at JUB JUD (London, His Majesty's Law Printers 2d ed. 1771).

135. 2 GILES JACOB, THE LAW-DICTIONARY: EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE, OF THE ENGLISH LAW, IN THEORY AND PRACTICE, at ISSUE. JUDGES. – JUDGES. JUDGMENT. (T.E. Tomlins ed., London, His Majesty's Law Printers 1797).

136. THE FEDERALIST NO. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009).

137. See U.S. CONST. art. III, § 2 (outlining nine jurisdictional grants for the federal judiciary).

federal judiciary to engage in constitutional and statutory interpretation.¹³⁸

The records of the Constitutional Convention reveal repeated invocations of the judiciary's power to interpret. When debating the potential for a "Council of Revision" made up of the executive and judiciary to "overrule" legislative acts, Elbridge Gerry noted that the judiciary did not need to be a part of such a council.¹³⁹ According to Madison's notes from June 4, 1787, Gerry asserted that the judiciary "[would] have a sufficient check [against] encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. In some States the Judges had actually set aside laws as being [against] the Constitution. This was done too with general approbation."¹⁴⁰ Similar comments were made in later discussions on the subject throughout the summer.¹⁴¹

While discussing the Council of Revision, the Framers repeatedly raised two objections to judicial participation that reflect a widespread assumption that judges would engage in statutory interpretation. First, the council's opponents contended that the judiciary did not need to participate in the proposed legislative "negative" because they could declare laws unconstitutional later.¹⁴² Second, they maintained that participation in such a council would bias the judges in their later adjudicatory duties.¹⁴³ The thrust of these arguments was that the judiciary's evaluation of legislation would take place at a later time. Once the judiciary's position in the Council

138. THE FEDERALIST NO. 78, *supra* note 136, at 394.

139. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 126, at 97–98.

140. *Id.* at 97 (emphasis omitted).

141. *See id.* at 108–09 (recording John Dickinson's commentary that "[t]here is a Difference—the Judges must interpret the Laws[;] they ought not to be legislators"); *id.* at 109 ("Mr. King was of opinion that the Judicial ought not to join in the negative of a Law, because the Judges will have the expounding of those Laws when they come before them; and they will no doubt stop the operation of such as shall appear repugnant to the constitution."); 2 *id.* at 73–80 (summarizing further objections raised to having the expositor of laws participate in a Council of Revision).

142. *See, e.g., id.* at 76 ("And as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative.").

143. *See, e.g., id.* at 75 ("Mr. Strong thought with Mr. Gerry that the power of making ought to be kept distinct from that of expounding, the laws. No maxim was better established. The Judges in exercising the function of expositors might be influenced by the part they had taken, in framing the laws.").

of Revision failed,¹⁴⁴ the president's veto took the place of a Council of Revision as a way to disapprove congressional action.¹⁴⁵

Ratification history also supports the conclusion that those ratifying the Constitution were aware that the judiciary was expected to engage in both constitutional and statutory interpretation. Writing as Publius in *The Federalist Papers*, Hamilton said, "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is . . . a fundamental law. It therefore belongs to [judges] to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body."¹⁴⁶ Similarly, James Wilson, one of Pennsylvania's delegates to the Constitutional Convention, told his home state's ratification convention:

[I]t is possible that the legislature . . . may transgress the bounds assigned to it, and an act may pass, in the usual *mode*, notwithstanding that transgression; but when it comes to be discussed before *the judges*,—when they consider its principles, and find it to be incompatible with the superior power of the Constitution,—it is their duty to pronounce it *void*; and judges independent, and not obliged to look to every session for a continuance of their salaries, will behave with intrepidity, and refuse to the act the sanction of judicial authority.¹⁴⁷

Such statements were made to the public and to the legislators who would vote on a state's ratification of the proposed Constitution. Thus, those voting on the Constitution were unlikely to be in doubt about the intentions of the Framers on the matter of judicial interpretation of the laws.

The critique of this position generally centered on the lack of textual support for the power, rather than on concerns about the judiciary's exercise of the power. In the Virginia ratification debates, Patrick Henry lauded Virginia's judges for standing against the unconstitutional acts of the state legislature, but he expressed concern that the Constitution lacked a textual landmark for the exercise of

144. *Id.* at 80 (recording the failure of the motion, with three "[a]yes," four "noes," and two states divided).

145. See U.S. CONST. art. I, § 7, cl. 2 (requiring a presidential signature for a bill to become law, or a two-thirds vote of both houses of Congress to override a presidential veto).

146. THE FEDERALIST NO. 78, *supra* note 136, at 394.

147. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 446 (photo. reprint 1996) (Jonathan Elliot ed., 2d ed. 1891).

this power at the federal level.¹⁴⁸ He asked rhetorically if Madison was sure that the judiciary would stand against the legislature, without any explicit authority to do so.¹⁴⁹ Despite some legislators' unease with the lack of textual support, the ratification debates reveal repeated assertions by the pro-Constitution drafters that constitutional and statutory interpretation would indeed be a task for the judiciary.

Under these circumstances, it might seem surprising that there is no evidence that the Framers discussed which tools would be appropriate for judges engaging in interpretation. After all, the task asks judges to make subjective judgments about what evidence is relevant and what persuasive value one should attach to it. This approach was not a unique concept in law, as the English common-law system relied on a similar process for statutory interpretation.¹⁵⁰ The Framers did not, however, define parameters or rules for the interpretation of the Constitution and federal statutes. The conspicuous absence of any debate on the subject suggests the Framers assumed that judges would continue to use the same tools and procedures traditionally invoked under English law in such cases.¹⁵¹

III. ARTICLE III JUDICIAL POWER AS A SOURCE OF AUTHORITY OVER METHODOLOGY

The preceding Part described the Framers' vision for Article III judges as independent arbiters ready to stand against the more dangerous political branches on questions of interpretation. The next step is to consider this vision's compatibility with constraints on judicial methodology. This Part argues that courts cannot

148. 3 *id.* at 325.

149. *Id.*

150. See 2 WILLIAM BLACKSTONE, COMMENTARIES *430–32 (“But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges in the courts, both of law and equity : the construction must in both be the same : or, if they differ, it is only as one court of law may also happen to differ from another. Each endeavours to fix and adopt the true sense of the law in question . . .”).

151. Professor William Eskridge Jr. has conducted a lengthy historical analysis of Founding-era understandings of interpretive tools. William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001). He writes that the Framers were at least familiar with, and understood the importance of, the canons of statutory construction. *Id.* at 1099–1100. This conclusion lends further support to my argument that the Framers would have expected judges to proceed as judges had always done, with substantial freedom to employ the varied tools of statutory construction.

meaningfully implement the structure established by the Framers if judges are constrained in their methodological choices.¹⁵² This thesis encompasses two arguments. First, methods of interpretation are intimately connected to the deliberation that is essential to judging. Second, judicial independence from the other branches cannot tolerate a binding methodological framework. Because a reasonable zone of freedom is necessary to the fulfillment of the constitutionally established judicial role, this freedom must be considered an inherent power of all federal judges.

A. Interpretive Deliberation as an Essential Judicial Function

Interpretation of the laws is one of the judiciary's most important constitutional duties. Although all governmental actors may, and should, consider the constitutionality of the tasks they undertake, the judiciary has always served as the final interpreter. The supporters of the Constitution argued during the ratification debates¹⁵³ that it was appropriate for Article III judges to assume this role, and judges have steadily maintained this function ever since. Perhaps the most famous defense of this power came in Hamilton's Federalist No. 78. After assuring the public that the judiciary would always be the least dangerous branch,¹⁵⁴ Hamilton proceeded to argue that judicial review was necessary not only to ensure the constitutionality of the laws but also to check those who would make mischief.¹⁵⁵ The subsequent history is well known: the Constitution was ratified and, fifteen years later, Chief Justice Marshall took up the mantle of judicial review in *Marbury*. In order to engage in this essential judicial task, judges must adopt some method of interpretation. This Section demonstrates the ways in which interpretive methodology is distinct from procedural rules and substantive laws but is intimately connected to the heart of the judicial interpretive function.

152. I do not suggest that a judge experiences *no* constraint on his choices. The "good Behaviour" shield could easily become a sword to be used against a judge whose methodology defies legal conventions or craft.

153. *See supra* Part II.B.

154. THE FEDERALIST NO. 78, *supra* note 136, at 392.

155. *Id.* at 396 ("[T]he firmness of the judicial magistracy . . . not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts.").

Interpretation is best conceptualized as a matter of judicial “craft.”¹⁵⁶ Immanuel Kant’s theory understands judgment as “learned but not defined.”¹⁵⁷ Perhaps it is unsurprising, then, that so many judges have compared their role to that of the artist.¹⁵⁸ The interpretive task involves aggregating, processing, and prioritizing information, but it also involves a great deal of judgment.¹⁵⁹ As then-Professor—later Second Circuit judge—Jerome Frank explains, “The law is not a machine and the judges not machine-tenders.”¹⁶⁰ Rather, judges must bring to bear their experience, their thoughtfulness, and even their instincts.¹⁶¹ Evaluating judgment in the context of business lawyering, Professor Jeffrey Lipshaw notes that judgment is an exercise of the mind that is mysterious precisely because it is neither

156. See Gluck, *supra* note 7, at 1849 (dismissing objections to methodological frameworks based on arguments of judicial “craft” as susceptible to the rejoinder that all law is craft).

157. Jeffrey M. Lipshaw, *The Venn Diagram of Business Lawyering Judgments*, 41 SETON HALL L. REV. 1, 3 (2011) (citing IMMANUEL KANT, CRITIQUE OF PURE REASON 268–69 (Paul Guyer & Allen Wood trans., Cambridge Univ. Press 1999) (1787)).

158. See, e.g., RICHARD A. POSNER, HOW JUDGES THINK 63 (2008) (“Norms govern the various art genres, just as norms govern judicial decisions—and in both cases the norms are contestable. Manet could not paint as well, in the conventional sense, as his teacher, Couture; but in the fullness of time Manet became regarded as much the greater painter. Holmes, Brandeis, Cardozo, and Hand are examples of judges who succeeded by their example in altering the norms of opinion writing.”); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 530 (1947) (“When one wants to understand or at least get the feeling of great painting, one does not go to books on the art of painting. One goes to the great masters. And so I have gone to great masters to get a sense of their practise of the art of interpretation. However, the art of painting and the art of interpretation are very different arts.”).

159. Then-Professor Easterbrook suggests that judges should be more willing to admit that there is no answer—that a given statute cannot be construed to answer the same question, thus returning the problem back to the legislature. Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL’Y 87, 99 (1984). Easterbrook says that interpretation of words is hard even with years to study a document written by a single person, but that the challenges are only magnified by the legislative process. *Id.* at 87–88. According to Easterbrook, judges should refuse to offer an interpretation unless the statute clearly transfers authority to the courts to make common law on the issue. *Id.* at 92–94.

160. JEROME N. FRANK, LAW AND THE MODERN MIND 120 (1930).

161. See, e.g., Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1929) (“I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.”). Hutcheson Jr. served as a federal district judge for the Southern District of Texas from 1918 to 1931, when he became a Fifth Circuit judge—a position he held until his death in 1973. *Biographical Directory of Federal Judges: Hutcheson, Joseph Chappell Jr.*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1136&cid=999&ctype=na&instat=na> (last visited Nov. 9, 2011).

algorithmic nor random.¹⁶² Over time, a judge will gain a wealth of experience to assist in this endeavor. He may also develop a philosophy about the type of evidence that most accurately reflects a judge's role in the system.¹⁶³

The mechanism of applying a methodology may look procedural, but the philosophical considerations entwined with the procedural aspects make that label an ill fit. A judge's philosophy of interpretation is inextricably connected to his processing of information and his determination of its persuasiveness. Justice Scalia privileges text, history, and precedent when interpreting law *because* he views himself as lacking the authority to look beyond those tools.¹⁶⁴ Similarly, Justice Breyer looks to purposes, consequences, and other tools less bound to text *because* he believes that the Constitution's democratic imperative mandates his doing so.¹⁶⁵ Other judges have similarly tied their methods of interpretation to broader ideas about the role of judges in the system.¹⁶⁶

162. Lipshaw, *supra* note 157, at 12–14.

163. For an interesting theoretical article about how rational judges select their interpretive methods, see Alexander Volokh, *Choosing Interpretive Methods*, 83 N.Y.U. L. REV. 769 (2008). Professor Volokh suggests that interpretive methods are only constraining to the extent that judges must stay within the bounds of plausibility. *Id.* at 795.

164. See SCALIA, *supra* note 13, at 23 (“To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hidebound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws.”).

165. See BREYER, *supra* note 13, at 6 (“But my thesis reaches beyond these classic arguments. It finds in the Constitution's democratic objective not simply restraint on judicial power or an ancient counterpart of more modern protection, but also a source of judicial authority and an interpretive aid to more effective protection of ancient and modern liberty alike.”).

166. See, e.g., Frankfurter, *supra* note 158, at 533–34 (“[Judges] are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. . . . There are varying shades of compulsion for judges behind different words, differences that are due to the words themselves, their setting in a text, their setting in history. In short, judges are not unfettered glossators.”); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) (“The judge who recognizes the degree to which he is free rather than constrained in the interpretation of statutes, and who refuses to make a pretense of constraint by parading the canons of construction in his opinions, is less likely to act wilfully than the judge who either mistakes freedom for constraint or has no compunctions about misrepresenting his will as that of the Congress.”); see also Albert M. Sacks, *Felix Frankfurter*, in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1199, 1200 (Leon Friedman & Fred L. Israel eds., 1997) (“The nature of the issues which are involved in the legal controversies that are inevitable under our constitutional system does not warrant the nation to expect identity of views among the members of the Court regarding such issues, *nor even agreement on the routes of thought by*

To order a judge to consider—or not to consider—particular types of evidence is to mandate a philosophy of interpretation. Doing so would make it impossible for some judges to fulfill their oath to uphold the Constitution.¹⁶⁷ Textualists like Justice Scalia, if forced to focus on purposes and consequences, would believe that they were exceeding their constitutional authority.¹⁶⁸ Purposivists like Justice Breyer, if forced to abandon their traditional tools, would feel that they were ignoring their constitutional mandate to interpret laws to fulfill congressional purpose.¹⁶⁹ Considered in this light, methodology is best viewed not as a procedural rule but rather as a theoretical approach that cannot and should not be reduced to a codified “Federal Rules of Statutory Interpretation.”¹⁷⁰

Some critics might argue that methodological constraints would not produce a constitutional dilemma because all of the proffered approaches to statutory construction are constitutional. Given that no one has attempted to impeach a Supreme Court Justice for looking or not looking at particular pieces of evidence, it seems likely that all of the major methods of interpretation are indeed constitutional. But the key here is not whether all of these methodologies are, in fact, legitimate, but whether the judge himself views his actions as legitimate. If not, the judge cannot be considered to have upheld his oath. Oaths are individual affirmations, relying upon one’s conscience and personal judgment, in addition to one’s awareness of the broader societal consensus on a matter. Even if a judge could not be impeached for violating his personal view of the Constitution—as opposed to the public view—one might expect outright defiance or

which decisions are reached. The nation is merely warranted in expecting harmony of aims among those who have been called to the Court.” (emphasis added) (quoting Retirement of Mr. Justice Frankfurter, 371 U.S. vii, x (1962))).

167. See 28 U.S.C. § 453 (2006) (“I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.”).

168. See *supra* note 164 and accompanying text.

169. See *supra* note 165 and accompanying text.

170. *But see* Rosenkranz, *supra* note 47, at 2157 (“This Article endorses a Canons Enabling Act on the same model and a coherent set of canons to bring order to statutory interpretation, just as the Rules have brought order to procedure and to evidence. This set of canons may be written by the Supreme Court, but should be subject to searching inquiry and disapproval or amendment by Congress. The result of this joint effort—which at long last may render statutory interpretation consistent and predictable—should be called the Federal Rules of Statutory Interpretation.”).

resignations from those who felt uncomfortable with the mandated methodological framework.

Methodology can be conceptualized in two alternative ways: one that treats methods as substantive rules of decision and one that treats methods as akin to the procedural rules already codified by Congress.¹⁷¹ Both have significant weaknesses, which I address in this Note to further highlight the benefits of thinking about methods of interpretation as part of the art of judging.¹⁷²

First, if federal judges' methods of interpretation were mainly substantive in nature, they might be unconstitutional under *Erie* principles.¹⁷³ Federal judges sit on courts of limited jurisdiction, with a mandate of restraint. Outside of a few specific areas, federal courts do not have the authority to create general common law.¹⁷⁴ Suits brought pursuant to "arising under" jurisdiction generally ask judges to interpret and apply the federal laws that form the basis of the claim. The interpretive methodologies used to accomplish this task, however, are not equivalent to the substantive laws being interpreted. Judges have never treated interpretive methodology as substantive law. Although the Supreme Court has occasionally laid down a narrow test for discerning an Establishment Clause violation,¹⁷⁵ a First Amendment violation,¹⁷⁶ or the like, it has never called for stare

171. The question of how to conceptualize the discrete acts of judging is critical not only because it may determine the constraints put upon judging, but also because it affects the "attitude" of judging. See Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 246 (1990) ("[C]alling a rule 'procedural' is a rhetorical strategy . . . to bring about changed attitudes on the part of judges.").

172. See Frankfurter, *supra* note 166, at 530 (analogizing interpretation to an art that required his emulation of the "great masters").

173. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1937) ("There is no federal general common law . . . [T]he doctrine of [*Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842),] is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.'" (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting))).

174. *Id.* at 78.

175. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1970) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" (citation omitted) (quoting *Waltz v. Tax Comm'n*, 397 U.S. 664, 674 (1970))).

176. See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1918) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.").

decisis effect for interpretive methodologies.¹⁷⁷ This traditional understanding of interpretive methodologies undermines any claim that methodologies are substantive lawmaking, even if they have an effect on the substantive outcome in a case.

Despite the federal courts' reluctance to treat interpretive rules as substantive "law" for the purposes of *Erie*, Professor Gluck argues that perhaps they should.¹⁷⁸ At a minimum, she argues, *Erie* should be read to require Article III courts to apply state interpretive methodologies to state statutory questions.¹⁷⁹ She notes, "The possibility that certain constitutional considerations might justify a federal court's refusal to apply a specific state interpretive rule (or all of them) does not undermine the argument that, when not preempted, the baseline established by *Erie* is that federal courts will apply state legal principles in state-law cases."¹⁸⁰ Although Professor Gluck's point is undoubtedly true, this Note argues that constitutional principles *do* preempt any application of state interpretive principles. If that constitutional argument is correct, then the potential application of *Erie* becomes irrelevant.

It would be good practice for federal judges engaged in statutory interpretation to consider a state's interpretive-methodological choices as embodied in a decision from the state's highest court or an act from the state's legislature. If a state has adopted a particular method of interpretation, then that methodological choice forms a background principle against which the state legislature acts. Such information is relevant to a judge's task of statutory interpretation.¹⁸¹ That a methodological choice is relevant, however, does not mean that one can constitutionally mandate Article III judges to follow it, if—as I suggest—methodology is an inherent power guaranteed by the Constitution.

177. Cf. Jordan Wilder Connors, Note, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 COLUM. L. REV. 681, 709 (2008) ("The Court would improve predictability in the same way that it enhances predictability in traditional applications of stare decisis by solidifying statutory interpretation subdecisions with stare decisis.").

178. Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898, 1997 (2011).

179. *Id.*

180. *Id.* at 1959.

181. See, e.g., *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (noting that Congress legislates against a background of legal principles and is assumed to incorporate those principles when it acts, an analysis that the Supreme Court would also likely apply in the context of state legislation).

Second, if one views interpretive methodologies as mere procedural mechanisms,¹⁸² then Congress must be able to abrogate these methodologies in favor of a legislatively endorsed framework. Professor Rosenkranz takes this position. He proposes the creation of “Federal Rules of Statutory Interpretation” analogous to the codified Federal Rules of Evidence.¹⁸³ Like canons of statutory interpretation, common-law evidence rules were developed by the federal courts to promote public policy in judicial resolution of cases—rules that were eventually codified, with some modifications, by Congress.¹⁸⁴ Although individual canons of statutory construction may resemble rules of evidence, a textualist or purposivist methodology as a whole does not. A methodology provides tools—in the form of canons of construction—to prioritize information, but it also relies heavily on judges to provide the discerning eye and judgment call. Importantly, it requires a broader vision of a judge’s role in the legal system than does the average Federal Rule of Evidence. Thus, the comparison is inapposite.

If one accepts this Note’s view of interpretive freedom, it becomes evident that interpretation is part and parcel of this essential judicial function.¹⁸⁵ As discussed in Part I, “Under the doctrine of inherent powers, the courts have the power, in addition to those powers expressly enumerated in constitutional and statutory provisions, to do all things reasonably necessary for the exercise of their functions as courts.”¹⁸⁶ A key function of the federal courts is to serve as interpreters of ambiguous provisions in federal law.¹⁸⁷ Interpretive deliberation is a major part of the decisionmaking process of judges, a process that scholars and judges struggle to

182. Often, those who view methodologies as merely procedural find the judicial-craft view I advance to be overly romantic or naïve. *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 891 (2003) (“Our critique . . . is that the common law style of interpretation presupposes a fanciful, even romantic account of judicial capacities, and also fails to ask questions about likely legislative responses to different judicial approaches.”).

183. Rosenkranz, *supra* note 47, at 2107–08.

184. *Id.*

185. *See* Jellum, *supra* note 49, at 895–96 (“Assume that Congress enacted a general interpretive directive that required the rule of lenity to be ignored for all statutes in the penal code. Again, Congress is not trying to influence interpretation to further specific policy choices that it reached only after a deliberative process. Instead, Congress’s main motivation with such a statute is to control the interpretive process . . .”).

186. 16 C.J.S. *Constitutional Law*, *supra* note 78, § 305.

187. *See supra* Part II.A–B.

reduce to a formula.¹⁸⁸ Efforts to rein in the methodological freedom of federal judges burden their exposition of the law. Though judges could conceivably follow a methodological framework established by someone else, to impose this kind of restriction would be to replace their role with the role of the very “machine-tenders” that they were not intended to be.¹⁸⁹

Although efforts to infringe on judges’ inherent powers are not per se unconstitutional,¹⁹⁰ methodological choices are so intimately connected with judges’ thought processes that limits on them raise serious constitutional questions. In *Michaelson v. United States*,¹⁹¹ the Supreme Court held: “[T]he attributes which inhere in [the inherent judicial] power and are inseparable from it can neither be abrogated nor rendered practically inoperative. That it may be regulated within limits not precisely defined may not be doubted.”¹⁹² The *Michaelson* Court examined the inherent judicial power of contempt and ultimately upheld a regulation requiring jury trials for some cases of contempt.¹⁹³ Contempt is more closely analogous to the power of interpretation than many of the other powers recognized as “inherent” to the judiciary because it involves a subjective determination made to further the judge’s exercise of his constitutional power. It is hard to imagine, however, that any of the proposals to restrict methodology would satisfy the *Michaelson* standard. The very act of interfering with a judge’s consideration of evidence strikes at the heart of the judicial power in a way that goes beyond a mere limitation. Interpretation cannot easily be regulated without essentially abrogating the freedom that is critical to the judge’s independent decisionmaking.

188. See Lipshaw, *supra* note 157, at 11–14 (“Nobody outside the mind of the being knows . . . what the basis of the judgment really is. . . . Something is going on in there, but we have no way of knowing precisely what it is.”).

189. See *supra* note 160 and accompanying text.

190. Evidence rules, for example, infringe on a judge’s ability to control the admission of evidence but are permissible to the extent that they merely supplement—rather than supplant—judicial interpretations of the Constitution. See *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (“Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution. But Congress may not legislatively supersede our decisions interpreting and applying the Constitution.” (citations omitted)).

191. *Michaelson v. United States*, 266 U.S. 42 (1924).

192. *Id.* at 66.

193. *Id.* at 70–71.

As this Section has shown, the task of constitutional interpretation is an essentially judicial task—an art of sorts. It requires judges to bring their experience and judgment to bear upon open questions of federal law. The methods of interpretation they use to decide the case are neither wholly procedural nor wholly substantive. They are best thought of as philosophical approaches to the art of interpretation. The Framers entrusted this task to judges, protecting judges’ ability to act without personal pressure from politicians in the other branches. Yet even more is in jeopardy than an individual judge’s power to fulfill his constitutional functions: methodological constraints threaten the ability of the judiciary as a whole to serve its constitutional role.¹⁹⁴ As the next Section discusses, courts must guard those powers that are essential to their broader function as a member of a tripartite government.¹⁹⁵

B. Independent Interpretation as the Most Powerful Judicial Check

The previous Section focused on the nature of the judicial function. This Section advances a companion argument: that proposed methodological constraints are a threat to judicial independence. This independence is important not only to maintain judicial integrity, but also to enable judges to serve their constitutional checking function. The strength of federal protections for judicial independence is fairly unique when compared to the protections for state judiciaries.¹⁹⁶ As Part II.A described, the Framers were acutely aware of the problems caused by political influences on judges.¹⁹⁷ Such influences could corrode the strength of the decisions themselves, in addition to affecting the judiciary’s ability to resist tyrannical whims of the political branches.¹⁹⁸ Independence is thus the

194. Justice Breyer gave an address on the importance of judicial independence. He noted,

Constitutional guarantees of tenure and compensation may well help secure judicial independence, but they can by no means assure it. Ultimately independence is a matter of custom, habit, and institutional expectation. To build those customs, habits, and expectations requires time and support—not only from the bench and bar but from the community where the judges serve.

Stephen Breyer, *Judicial Independence*, 95 GEO. L.J. 903, 904 (2007).

195. See 16 C.J.S. *Constitutional Law*, *supra* note 78, § 305 (“The courts have, and should maintain vigorously, all the inherent and implied powers necessary and effectively to function as a separate department of government.”).

196. See Adam Liptak, *Rendering Justice, with One Eye on Re-election*, N.Y. TIMES, May 25, 2008, at A1 (reporting that “thirty-nine states elect at least some of their judges”).

197. See *supra* Part II.A.

198. See *supra* Part II.A.

hook on which the Framers decided to hang their judicial hat. Efforts to rein in interpretive freedom threaten this quality of the federal judiciary.

The freedom to adopt a method of interpretation is necessary to the independent interpretation of the laws. As the last Section explained, methodologies are intimately connected to the decisionmaking process. Independence ensures that those methodologies are employed without external influence. This is particularly important in hard cases, when methodological choices will likely affect the outcome. Judges must be free to focus on adjudicating such cases within the constraints of their visions of the Constitution. Meddling with methodology would be just as detrimental to judicial integrity as the salary-based threats that preoccupied the Framers.

The scholarship on judicial independence demonstrates overwhelming support for this concept, though much of it focuses on more obvious threats to the judiciary.¹⁹⁹ Interpretation may not be the

199. See, e.g., David J. Beck, *Judicial Independence: Woe to the Generation That Judges the Judges*, 71 TEX. B.J. 572, 575 (2008) (“To preserve the integrity of our independent judiciary, we must ensure that they are given the tools to do their job. We owe it to our judiciary and the many men and women who have made a financial sacrifice to serve, to preserve for future generations a system in which judges decide cases *free* of bias or intimidation.”); Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 927 (2007) (“For, if judges forget that their independence exists for the benefit of the judiciary as a whole—and ultimately, of course, for the benefit of our system of government—they may discover that, in the world of power politics, the reality of judicial independence does not match the rhetoric.”); Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 1007–08 (2007) (“The strong institutional independence of Article III judges anchors the legal infrastructure that accommodates elected judges in the state courts with the rule of law. This anchoring role of the Article III judiciary provides added reason why proposals to jettison central features of the traditional structure of federal judicial independence should be evaluated with great caution.”); Pamela S. Karlan, *Judicial Independences*, 95 GEO. L.J. 1041, 1059 (2007) (“Put more generally, judicial independence is not an end in itself; rather, it is a means of ensuring freedom and the rule of law. Thus, in explaining and arguing for ‘judicial independence,’ we need to ask quite carefully what constraints judges ought to be free from, and what constraints judges ought to be bound by.”); Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 700–01 (1980) (“If we are to remain true to the Framers’ plan for a government bound at all levels by the rule of law, we must resist even well-intentioned legislation that would chill the capacity of the judge to render impartial justice. Judicial independence is not a cliché conjured up by those who seek to prevent encroachments by the other branches of government. The term is one of art, defined to achieve the essential objective of the separation of powers that justice be rendered without fear or bias, and free of prejudice.”). *But see* Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 589–90 (2009) (“It is unlikely that any judge ever sat on a law court enjoying more independence than the present Justices themselves have enjoyed. . . . [T]he

first subject one considers when attempting to cabin judicial power. In 2009, District Court Judge Lee West gave an address about threats to judicial independence, focusing his remarks on threats in the form of a court-packing plan,²⁰⁰ efforts to overturn or denigrate judicial decisions in the public sphere,²⁰¹ executive refusals to follow established law,²⁰² and the politicization of the Department of Justice.²⁰³ But constraints on methodology are more insidious and equally pernicious threats to judicial independence. Methodologies can and do affect case outcomes,²⁰⁴ so a binding methodological framework would necessarily prevent judges from deciding cases as their philosophies and experiences might otherwise dictate. This phenomenon would fundamentally alter federal judges' constitutionally created isolation, making them subordinate to the legislature or the fellow judges who created the framework.

Although Part I identified inherent powers to include the full scope of implied or ancillary powers discussed in the literature, not all of these powers enjoy the same constitutional protection.²⁰⁵ Many powers deemed inherent by the courts create only the first-mover advantage, leaving another branch with the final say.²⁰⁶ Nevertheless,

Justices have indulged their independence to make law that has seriously impaired the independence of the many judges sitting on state courts.”); William H. Pryor, Jr., *Not-So-Serious Threats to Judicial Independence*, 93 VA. L. REV. 1759, 1762–63 (2007) (“I submit that the independence of the federal judiciary today is as secure as ever. The current criticisms of the judiciary are relatively mild and, on balance, a benefit to the judiciary.”).

200. Lee R. West, Speech, *Judicial Independence: Our Fragile Fortress Against Elective Tyranny*, 34 OKLA. CITY U. L. REV. 59, 62–63 (2009).

201. *See id.* at 63–65 (explaining how Congress attempted to bypass state court decisions regarding Terri Schiavo’s life).

202. *See id.* at 67 (“[I]n the landmark case of [*Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)], the Supreme Court held that the military commissions created by President Bush to try Guantanamo detainees failed to comply with the Uniform Code of Military Justice and the Geneva Conventions.” (footnote omitted)).

203. *Id.* at 72.

204. *See* Francisco J. Benzoni & Christopher S. Dodrill, *Does Judicial Philosophy Matter? A Case Study*, 113 W. VA. L. REV. 287, 330 (2011) (“The very structure of this study . . . demonstrates that these judges were likely driven to their diverse conclusions at least in part because they adhere to diverse judicial philosophies.”).

205. *See* Beale, *supra* note 100, at 1472 (asserting that Congress has the final say over courts’ formulations of procedural rules through its power under the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 8, and its Article III authority to establish the lower federal courts); *id.* at 1472–73 (suggesting that the executive may also have a say in procedural rules to “preserve[] the essential functions of each branch” (quoting *United States v. Nixon*, 418 U.S. 683, 707 (1974)) (internal quotation mark omitted)).

206. *See id.* at 1472 (“If the implied ancillary authority of the executive and the judiciary under articles II and III is given a generous interpretation, it will overlap with the legislative

some inherent powers may be so essential to the function of the judicial branch that neither Congress nor the executive can supersede them.²⁰⁷ Although rarely deciding these cases under the inherent-power doctrine, the courts have repeatedly rejected legislative infringements on their essential function.²⁰⁸ The classic justification for these decisions is the maintenance of the separation of powers.

For judicial review to serve as a check on the other branches, the judiciary must be able to act separately and independently.²⁰⁹ If Congress can dictate favorable outcomes in the courts through legislation, then the courts are no bulwark against the excesses of that branch, nor are they a deterrent. As Justice Jackson said 160 years after ratification,

[W]hen a ruling majority has put its commands in statutory form, we have considered that the interpretation of their fair meaning and their application to individual cases should be made by judges as independent of politics as humanly possible and not serving the interests of the class for whom, or a majority by whom, legislation is enacted.²¹⁰

Though the lack of consensus in the federal system may have drawbacks,²¹¹ the erosion of the judiciary's independence has greater

authority under the necessary and proper clause. This does not pose a substantial problem, however. In the case of a conflict, the text of the necessary and proper clause reflects the expectation that Congress would enact laws to govern the other branches of government.”).

207. A law or executive action which substantially prevents the judiciary from performing its constitutional function will always be a threat to the separation of powers.

208. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (“[The Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997)] was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court’s precedent, not RFRA, which must control. . . . Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.”).

209. This point echoes Madison’s refrain at the Constitutional Convention: “If it be a fundamental principle of free Govt. that the Legislative, Executive & Judiciary powers should be *separately* exercised; it is equally so that they be *independently* exercised.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 126, at 56.

210. Robert J. Jackson, *Problems of Statutory Interpretation*, 8 F.R.D. 121, 123 (1949).

211. For an argument that the lack of consensus in the federal system is actually a positive attribute, see generally Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47 (2010), http://yalelawjournal.org/2010/7/30/leib_serota.html. That essay suggests that the tension among methodological philosophies promotes more deliberative decisionmaking and opinion writing, two practices that greatly benefit the law that emerges from American courts. *Id.* at 50.

costs. In common-law England, the judiciary was subservient to the king, who had delegated his power to its use. Under the U.S. system, however, the judiciary ought not to be subservient to either of its coequal branches. Thus, at a minimum, neither of the political branches should be able to impose a methodological framework on the judicial branch. The establishment of such frameworks by higher courts may burden the independence of particular judges—which of course is what the salary and life-tenure privileges protect—but it does not implicate the major concern of the Framers with preventing political influence. Rather, such intrabranch efforts to bind judges are inconsistent with the arguments advanced in the previous Section.

C. *Some Objections*

Several objections to my thesis can be raised. One criticism is that the very novelty of the argument may indicate its frailty. After all, Professor Gluck cites states that have had at least some success implementing binding methodological frameworks. Many of these states have constitutions with provisions analogous to those in the federal Constitution. Why should federal judges be different from state judges? To this question I have two responses. First, the struggles over the creation of these methodologies, and particularly over their legislative introduction in Texas and Connecticut, are consonant with my thesis. The state judges in those case studies made statements objecting to the infringement of their judicial power.²¹² Second, the “success” stories all rested on the introduction of the methodology by the state supreme court, a path that may not be feasible in the federal system. The Madisonian Compromise left open the possibility that all Article III power would remain vested in the Supreme Court, but it also vested that power in those Article III courts yet to be created.²¹³ Thus, Article III judges may have a different set of rights and responsibilities than the judges in Professor Gluck’s case studies, derived not only from the Constitution’s Vesting Clause,²¹⁴ but also from the historical mandate described in Part II.B.

Another criticism may be that if the vast majority of other inherent judicial powers can be constrained, then methodology

212. See *supra* notes 62–67 and accompanying text.

213. See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

214. *Id.*

should also be subject to such restrictions. As this Note has shown, however, methodology is different. Although, at first blush, methods of interpretation might seem analogous to the Federal Rules of Evidence, their origins and context set them apart. Most methods of interpretation originate in a judge's view of the proper role for federal judges in the constitutional scheme. They are necessary for one of the most important tasks that federal judges undertake—providing the definitive statement of a law's meaning. The intimate connection between judicial philosophy and interpretive outcomes suggests that interpretive methodology reaches to the very essence of what it means to be a federal judge.

The Supreme Court has not had occasion to confront legislative abrogation of methodological freedom directly, but the issues raised by such abrogation bear many parallels to the issues addressed in the Court's 1996 decision in *City of Boerne v. Flores*.²¹⁵ In that case, Congress passed the Religious Freedom Restoration Act (RFRA)²¹⁶ aimed at essentially overruling the Supreme Court's test for Free Exercise Clause violations.²¹⁷ RFRA attempted to reintroduce the substantial-burden balancing test of *Sherbert v. Verner*.²¹⁸ The Court rejected this effort as both beyond the scope of the Section Five enforcement power of the Fourteenth Amendment and a violation of the separation of powers.²¹⁹ Although Congress could limit its own zone of action based upon a strict interpretation of the Free Exercise Clause—at least until some future Congress amended the Statute—it could not declare that interpretation to be constitutionally required and impose it upon state and local governments. If the Court rebuffed this more targeted attempt to infringe judicial deliberation, then it would likely also reject a broader attempt to impose a binding method of interpretation on the courts.

CONCLUSION

As the U.S. Code expands, the interpretive role of Article III judges only continues to grow in scope and importance. Though there may be rule-of-law benefits to greater methodological uniformity,

215. *City of Boerne v. Flores*, 521 U.S. 507 (1996).

216. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* *Boerne v. Flores*, 521 U.S. 507 (1997).

217. *Boerne*, 521 U.S. at 512–13.

218. *Sherbert v. Verner*, 374 U.S. 398 (1963).

219. *Boerne*, 521 U.S. at 536.

those benefits cannot be pursued at the cost of the Constitution. As this Note has shown, the Framers included several constitutional provisions to insulate judges from the machinations of the other branches. They believed that judicial independence was important for the integrity of the system and focused on the two ways that a judge's independence would most likely be infringed. But threatening a judge's job or salary is not the only way to infringe his independence. One can also burden the judge's ability to fulfill his role through methodological constraints. Such constraints threaten the ability of judges to independently arrive at a conclusion about what the words in a statute mean and about what Congress thought the statute would mean. In a very real sense, proposals that dictate a particular methodological framework strike at the heart of what the Framers intended federal judges to do.

If fulfilling the constitutional vision of Article III judging requires some freedom of interpretation, then the next question is, How big is this zone of freedom? Is there no overlap of authority for Congress or the Supreme Court to create uniformity in the system? Though a full consideration of such authority is beyond the scope of this Note, the principles I advance suggest that neither of those bodies should be in the business of establishing a general framework of interpretation for federal judges.

This Note thus puts in writing what has long been understood. One of the most fundamental tasks of federal judges is to bring their independent wisdom and judgment to bear in interpretation. The imposition of a rigid methodological framework is an interesting idea for academic scholarship, but it raises serious constitutional difficulties that should not be ignored for the sake of a theoretically appealing proposal. The essence of judging, at least on the federal level, requires freedom of interpretation.