

JUDICIAL DISCIPLINE, JUDICIAL INDEPENDENCE AND THE CONSTITUTION: A TEXTUAL AND STRUCTURAL ANALYSIS

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I. Introduction

Both the American Revolution and the nation which grew out of it adopted as their guiding political philosophy the principles of representationalism and accountability: Decisions of governing political and social policy are to be made, for the most part, by those who are both representative of and accountable to the populace.¹ To be sure, those who framed our Constitution never contemplated either a direct or unlimited form of democracy. To the contrary, they inserted numerous republican-like speed bumps to democratic rule.² The fact remains, however, that ultimate accountability to the populace--if only indirectly--served as the sine qua non of American government.

On one level, this fact seemingly should have rendered the framers' conscious and express choice to provide the members of one of the three branches of government with constitutional guarantees of both salary and tenure puzzlingly inconsistent with their overall theoretical plan. For such insulation from the populace naturally raises the possibility that fundamental decisions affecting the citizenry will be made by officials who have not been chosen by the populace and will never have to account for their decisions at the polls. However, the framers were quite clear that they deemed such insulation essential to the maintenance of the judiciary's independence from the political branches of government. This independence, in turn, was deemed essential to

¹ [Gordon Wood, etc.]

² [Brief discussion of separation-of-powers, indirect election of senators, etc.]

maintenance of both the integrity of the judicial process and the vitality of constitutional government.

In part, such independence is necessary in order to preserve the effectiveness of the judicial review process. As Chief Justice Marshall persuasively argued in Marbury v. Madison,³ if the majoritarian branches of government are to sit as final arbiters of the meaning of the countermajoritarian constitutional limits on their power, those constitutional limits are effectively rendered meaningless. But they are just as meaningless if the final arbiters are individuals who are subject to the direct control of those majoritarian branches. Hence, the very concept of judicial review dictates the need for a truly independent judiciary to sit as the final arbiters and enforcers of the Constitution's limitations on the power of the political branches of government.

The salary and tenure protections of Article III, however, are not confined to cases arising under the Constitution. Rather, they apply to all federal judges, regardless of the nature of the case they are adjudicating. Thus, the decision to provide these judges with protections of salary and tenure logically must have been designed to accomplish more than merely the preservation of meaningful judicial review and adherence to constitutional constraints. Instead, the concern must also have extended to the need to preserve the integrity of the judicial process in all of its contexts.

While the Constitution's protection of judicial independence obviously gives rise to important systemic benefits, in what is predominantly a democratic society there are also costs that must be incurred. For one thing, as already noted, judicial independence means that judges may decide cases in a manner that will prove to be unpopular with the polity. Moreover, the life tenure given to judges in order to preserve their decisional independence may cause significant problems when judges--for whatever reason--become unwilling or unable to perform their function in an

³ 5 U.S. 1 (Cranch) 137 (1803).

honest and efficient manner. In other words, either through disability or personal choice, judges on occasion may abuse their office. If the life tenure which they have been afforded were to provide for no safety valves whatsoever, the seemingly salutary constitutional assurance of life tenure would effectively deprive society of any practical means of controlling such renegade government officials. Not only would such a result undermine the democratic principles of accountability and representationalism that are essential to American political theory, it would also undermine the very judicial integrity which the protections of judicial independence were designed to assure.

Yet if the structure of judicial independence were modified to enable society to remove and/or punish judges who fall within this description, the obvious danger would arise that those in power could employ such avenues as a subterfuge, in order to intimidate the judiciary or influence their decision making. Such a result would, of course, render the carefully structured protections of judicial independence largely meaningless, thereby threatening the values of judicial integrity and limited government which those protections were intended to assure.

That the framers themselves may not have fully reckoned with this democratic dilemma is evidenced by the fact that at one point in *The Federalist* Alexander Hamilton spoke eloquently of the necessity of judicial independence as an element of limited democratic government⁴ while at another point he assured the citizenry that insane judges could be removed from office.⁵ At no point did he acknowledge the possibility that the assumed power of government to remove judges whom it chooses to characterize as insane could, with minimal difficulty, be employed to void the judicial independence on which he had simultaneously placed such great value.

⁴ [Federalist No. 78].

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One need not search very far in order to find examples of political attempts to circumvent the constitutional protections of judicial independence in order to intimidate or improperly influence the decision making process of federal judges. Early in the nation's history, the Republicans' impeachment of the controversial Federalist Supreme Court Justice Samuel Chase constituted an instance of just such a political attempt.⁶ As recently as two years ago, widespread negative political reaction to the decision of Federal District Court Judge Harold Baer to exclude evidence in a criminal trial on the grounds that it had been obtained unconstitutionally led to numerous calls by powerful governmental leaders for Judge Baer's impeachment.⁷ Subsequently, Judge Baer reversed his own decision.⁸

This Article is intended to explore the competing societal concerns of judicial independence and judicial responsibility, from the perspective of constitutional analysis. In so doing, it will attempt to view these issues as a matter of textual and structural interpretation. By this I mean that the Article will seek to develop coherent constructions of the various constitutional provisions which deal with either judicial independence or judicial discipline. Because, for reasons explored in detail elsewhere, I consider myself at a fundamental level to be a textualist,⁹ I consider these questions in the first instance by seeking rational constructions of the words that appear in the Constitution. However, because there often exist both ambiguities in individual provisions and potential tension among different provisions, I also recognize the need to employ an analysis

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7 [N.Y. Times article cites.]

8 Id.

9 Redish, *The Constitution as Political Structure* (1995).

which seeks to weave the various relevant constitutional provisions into a viable and coherent textual structure. It is only by means of such an attempt to link seemingly unrelated portions of text, I believe, that one can effectively understand the Constitution's often intricate structural web of judicial protections and judicial limitations.

The first textual and structural inquiries are, quite naturally, into the Constitution's network of judicial independence protections.¹⁰ Once the structure of judicial independence is explored, the Article turns to an analysis of the Constitution's authorization of judicial discipline. In so doing, it will consider the conceivable means by which government may constitutionally remove or discipline federal judges, and measure those options against the constitutional guarantees of judicial independence.

The Constitution itself provides two potential avenues of removal: The impeachment power of Article II¹¹ and the "good behavior" qualification on the life tenure guarantee of Article III.¹² Potential sub-constitutional avenues of judicial discipline--which in order to be valid, must of course both find a source in constitutionally authorized powers and avoid conflict with the constitutionally dictated protections of judicial independence--include legislatively imposed disciplinary schemes¹³ or judicially created self-disciplinary structures.¹⁴

My ultimate conclusion on the appropriate reconciliation between judicial independence and

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¹³See, e.g., 1980 Act.

¹⁴See Edwards; discussion *infra* at .

judicial discipline will quite probably manage to generate all-but universal disagreement, because it simultaneously construes the protections of judicial independence in both extremely broad and narrow manners. On the one hand, I conclude that whenever either salary or tenure may be affected, the constitutionally available methods of judicial discipline are necessarily narrowly circumscribed. The only conceivable method of discipline under such circumstances, I believe, is through resort to the impeachment process, and the availability of even that process is to be narrowly confined to situations in which the judge has engaged in criminal behavior that threatens the integrity of the judicial role.¹⁵ Moreover, I conclude that the political question doctrine should have absolutely no applicability as a bar to the judicial review of the legislative determination that the challenged judicial behavior does, in fact, constitute an impeachable offense under the Constitution.¹⁶

The necessary implication of my conclusion concerning the exclusivity of the impeachment remedy is that no form of judicially self-imposed discipline that affects either salary or tenure¹⁷ may constitutionally be employed.¹⁸ I reach these conclusions, because I believe that any more expansive constructions of the disciplinary power would, indirectly but inescapably, contravene Article III's salary and tenure protections, and effectively render those prophylactic protections of

¹⁵See discussion *infra* at .

¹⁶See discussion *infra* at .

¹⁷It should be noted that an important ambiguity exists concerning the extent to which either temporary suspensions or diversions of caseloads are properly thought to affect tenure for purposes of Article III, as long as the affected judge continues to retain both her official status and salary. See discussion *infra* at .

¹⁸See discussion *infra* at .

judicial independence all but meaningless.¹⁹

On the other hand, when the penalties imposed in response to judicial behavior do not amount to either direct or constructive interferences with either judicial salary or tenure--the two sub-categories of judicial independence protected expressly by Article III--the nature of the constitutional limitations on the governmental power to impose such penalties changes dramatically. In such contexts, as a matter of the nature of the chosen textual structure, the salary and tenure protections of Article III are rendered irrelevant.²⁰ By its unambiguous terms, Article III does not preclude every conceivable interference with judicial independence. Rather, it prohibits only specified ways in which that independence may be threatened--namely, by reducing salary or affecting tenure. Thus, where government, acting in accordance with its constitutionally authorized authority, seeks to punish or to penalize federal judges in some manner that does not affect salary or tenure, nothing in the terms of Article III can prevent it.²¹

This does not necessarily imply that there exist absolutely no constitutional constraints on congressional power to impose disciplinary measures other than those affecting salary or tenure. Conceivably, post-decision retaliatory discipline could so disrupt the judge's exercise of judgment in the cases before him that the separation-of-powers directive of Article III that the "judicial power" be vested in the federal courts would be violated.²² Moreover, in cases in which a liberty

¹⁹See discussion infra at .

²⁰Indeed, one might even fashion a persuasive interpretational argument that, on the basis of the principle of "expressio unius, exclusio alterius," the Constitution must be construed by implication to authorize legislative imposition of any disciplinary penalties which do not affect either salary or tenure. See discussion infra at .

²¹See discussion infra at .

²²See discussion infra at .

or property right protected by the Due Process Clause²³ is at stake, any attempt by the majoritarian branches of government to intimidate the judge in order to affect her decision making could arguably be deemed to violate the adjudicatory independence required by the guarantee of procedural due process.²⁴ However, both arguments are subject in some way to either substantive or procedural complications that conceivably reduce the force of these constitutional guarantees in such situations.²⁵

To suggest the possibility of constitutional gaps in the guarantee of judicial independence is by no means necessarily to suggest that congressional attempts to interfere with that independence are either wise or advisable as a matter of social policy or political theory. But as Henry Hart once rhetorically inquired, “Whose Constitution are you talking about, Utopia or ours?”²⁶ The Constitution is not simply an empty vessel, to be filled in accordance with the interpreter’s subjective view of the wisest social policy. It is, rather, a legally controlling text that must be interpreted in some principled manner in order to be enforced. In many instances, the terms of the text are sufficiently ambiguous or open ended that any coherent construction will inescapably require the interpreter to infuse his textual interpretation with some externally derived normative principles. In other instances, however, the text will simply not lend itself to such flexible interpretation. Instead, in these situations the infusion of such considerations of social policy will be counter-textual, rather than extra-textual. The Constitution’s provisions which attempt to protect

²³U.S. Const. Amend. V, sec. .

²⁴See generally Martin H. Redish & Lawrence Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, Yale L.J. (1986); discussion *infra* at .

²⁵See discussion *infra* at .

²⁶Henry Hart, [Dialogue].

judicial independence are just such provisions.

The first section of this Article will describe in more detail the interpretive methodology which I employ in construing the constitutional provisions that implicate both judicial independence and judicial discipline. As previously noted, the focus of this methodology is, to the extent reasonably possible, on the text of the individual provisions concerning both judicial independence and judicial discipline, and the structural intersection of those provisions.²⁷ The next section focuses on the constitutional sources of judicial independence protection.²⁸ It explores the implications for judicial independence of three different constitutional precepts: The salary and tenure protections of Article III;²⁹ the Due Process Clause of the Fifth Amendment;³⁰ and the so-called Vesting Clause of Article III, which vests in the federal judiciary the authority to exercise the judicial power.³¹

The following section examines the scope of Congress's impeachment power, in light of the Constitution's guarantees of judicial independence. The analysis considers three distinct issues: The exclusivity of the impeachment remedy as a means of judicial removal, the permissible scope of the category of impeachable offenses of a member of the federal judiciary, and the relevance of the political question doctrine as a bar to the judicial review of the legislative conclusion that the

²⁷See Section II, *infra*.

²⁸See Section III, *infra*.

²⁹U.S. Const. Art. III, sec. 1.

³⁰U.S. Const. Amend. V, sec. .

³¹U.S. Const. Art. III, sec. 1.

challenged behavior actually does constitute an impeachable offense.³²

The next section considers the constitutionality of disciplinary measures short of formal removal from office.³³ That analysis examines in particular whether the judiciary should be deemed to possess broader constitutional power to discipline its own members than does Congress. The section also considers whether Congress possesses unlimited constitutional power to impose on members of the federal judiciary disciplinary measures, even in retaliation for unpopular constitutional decisions, as long as the resulting penalties imposed in no way implicate either the judicial salary or tenure expressly guaranteed by Article III.³⁴

II. A Comment About on Interpretive Methodology

The contribution I hope to make in this paper is to provide a perspective on the issues of judicial independence and judicial discipline that has rarely, if ever, been considered by those who have written on the subject in the past. While most scholarly commentary has, quite naturally, focused directly on the issues of judicial independence, judicial discipline, or both, few have viewed these questions through the lens of constitutional interpretive theory. My goal, in other words, is to apply a generalized theory of constitutional interpretation--one on which I have written extensively in the past³⁵--to the specific constitutional issues of judicial discipline and independence, in order, hopefully, to draw several principled insights about how those seemingly

³²See Section IV, *infra*.

³³See Section V, *infra*.

³⁴See discussion *infra* at .

³⁵ See Martin H. Redish, *The constitution as Political Structure* (1995); Martin H. Redish, Penn. article, Duke article, N.Y.U. article; NU jury trial article.

contradictory constitutional values may be reconciled. I begin my inquiry, then, with a brief review of the interpretive model which I employ.

Initially, I should note that while under my interpretive model, insights, arguments or intentions of those who framed the Constitution may be probative, helpful or persuasive in resolving issues of interpretation where the text is rationally capable of more than one construction, they are in no way deemed dispositive. There simply were too many framers--particularly when one includes those who ratified the document, as well as those who drafted it--and too many different individual agendas and motivations to be able to infer from a variety of individual comments a single, coherent and controlling intent. Moreover, it was the text, not some external or hidden drafters' intention, which was approved through lawful processes. To the extent a modern understanding of intent differs from the natural implications of the text, then, it is the latter that must take precedence. Also, too much has happened, both doctrinally and politically, since the Constitution's framing to be able to predict with any level of certainty how the framers would have wanted certain current ambiguities to be construed today in order to implement their abstract normative goals.³⁶ Finally, it may well have been the case that the framers themselves failed to recognize potential tensions or inconsistencies between seemingly distinct provisions.³⁷ It will therefore be necessary for a modern day interpreter to attempt to construe one set of provisions in order to avoid undermining the obvious social or political purposes sought to be attained by other provisions. In most such situations, the modern day interpreter will be unable to obtain substantial assistance from the words of the framers, because it is apparent that the framers failed or refused to recognize the potential inconsistency.

³⁶See Bennett Penn article.

³⁷ This may well have been true in the case of the judicial independence provisions and the impeachment power. See discussion *infra* at .

Applying these interpretive precepts to the issues surrounding judicial independence and discipline, one must conclude that the fact that pre-Revolutionary English practice defined impeachable offenses in a particular manner or that post-ratification Congresses acted in a manner consistent with a particular understanding of the phrase, “high crimes and misdemeanors”, while both relevant and probative of how the constitutional directives should be construed today, is not binding. The reality is that no matter how much historical evidence we are able to gather, we will not be able to determine exactly what the framers, as a unit, were seeking to accomplish. More importantly, in many ways the framers themselves may not have fully foreseen all of the potential complications in achieving seemingly conflicting goals. In reconciling judicial discipline and judicial independence, for example, it is simply unclear whether the framers themselves ever fully recognized the potential conflicts among Article III’s guarantees of judicial independence, Article II’s creation of the congressional power to impeach, and Article III’s “good behavior” language. Relying on our understanding of their intent in adopting any one of those three provisions in the abstract, then, will prove to be of little help in determining how structurally to reconcile them when they appear to conflict.³⁸

While a modern ascertainment of the intent of the framers should not be dispositive, for reasons of legal process and democratic theory that I have discussed elsewhere³⁹ the outer rational limits of the text are controlling. In a constitutional democracy, an unrepresentative and unaccountable judiciary has no legitimate authority to overrule decisions of the majoritarian branches of government without a grounding in the text of the countermajoritarian document that it

³⁸ [Recall Hamilton’s references to the importance of judicial independence and to the power to remove judges on grounds of insanity, without acknowledging that the availability of the latter could easily be employed to undermine the former.]

³⁹ See Redish & Drizin; Redish & Chung.

is empowered and obligated to enforce. On the other hand, the judiciary has no authority to permit the majoritarian branches to contravene or ignore the constitutional limitations on its authority.

Such textualism is of little help, of course, where as a linguistic matter the relevant text is capable of more than one reasonable construction. Under those circumstances, normative considerations of social policy and political theory will inevitably influence the choice among rational constructions of the text, as a necessary element of the judicial review power.⁴⁰ It is important to emphasize, however, that, in order to prevent the judicial review function from collapsing into the legislative function, such normative considerations must extend beyond the narrow confines of the case before the court.⁴¹ Moreover, such non-textual considerations are, as a matter of interpretive theory, irrelevant where (1) the constitutional text is capable of only one rational construction, or (2) though a number of constructions are rationally conceivable, the construction claimed to be derived from external considerations of social policy or political theory is not among them. Though in a number of ways my interpretive model could be described as “textualist,”⁴² it is important to emphasize that it seeks to view the constitutional text in a wholistic, or structural sense.⁴³ By this I mean that the individual provisions of the text often cannot be considered in a vacuum. Rather, potentially conflicting provisions must be individually construed in a manner that seeks to view them as part of a broader, organic, synthesized textual whole. Such a wholistic form of interpretation is necessary, even if the framers themselves failed to recognize

⁴⁰ See Redish, NU jury trial article.

⁴¹ Wechsler, Neutral Principles.

⁴² Indeed, I have described it in this manner myself. See Redish, NYU article.

⁴³ See Redish, Penn article.

the potential conflicts among the provisions. Otherwise, a slavish adherence to modern perceptions of narrow framers' intent can lead to contradictory, or even nonsensical constructions--hardly a result one could imagine the framers would have chosen had they recognized the dangers.⁴⁴

It should be emphasized that the interpretive model employed here is by no means the only conceivable approach to constitutional construction. Indeed, I readily concede that both originalist approaches⁴⁵ and non-textualist approaches⁴⁶ are far more prevalent among both scholars and jurists. However, this is not an article primarily about the proper methodology of constitutional interpretation. Rather, the Article's focus is on the constitutional ramifications of the tensions between judicial discipline and judicial independence. I include this brief discussion of constitutional methodology--which, for the most part, seeks to incorporate by reference my prior work on issues of interpretive theory⁴⁷--in order to clarify the nature of whatever criticism to which my substantive conclusions are ultimately subjected.

It is conceivable that an observer could differ with some or all of those conclusions because of (1) differences with my description of the relevant constitutional and political values, (2) differences with my interpretations of the text of the relevant constitutional provisions, or (3) differences, at the outset, with my interpretive methodology. Thus, I include the discussion of my constitutional methodology, primarily to enable those who reject my ultimate conclusions to

⁴⁴ See *id.*

⁴⁵ See, e.g., Bork.

⁴⁶ See, e.g., Grey.

⁴⁷ See sources cited in notes ____, *supra*.

determine for themselves whether their differences with my conclusions concern issues of interpretive methodology more than they concern my assessment and understanding of the purposes and values of constitutionally protected judicial independence.

III. Constitutional Sources of Judicial Independence

A. Overview

It should not be difficult to understand why, purely as a matter of constitutional and political theory, a democratic society would choose to place a high value on judicial independence. An independent judiciary is necessary in order to ensure fair treatment of individual litigants, to assure the viability of judicial review, to preserve the integrity of the judicial process, and to provide a means to legitimize the actions of the political branches in the eyes of the electorate. It is thus not surprising that in Article III the framers sought to protect the independence of the federal judiciary.⁴⁸

In delimiting the constitutional authority of the political branches to restrict the independence of the judiciary, however, it is important to distinguish between the political and social value of judicial independence on the one hand and the constitutional guarantee of judicial independence on the other. The two are not necessarily identical. By its terms, Article III does not establish a blanket textual guarantee of judicial independence. Rather, it assures the value of judicial independence in what could be called a “selective instrumental” manner. In other words, the Constitution protects the underlying theoretical value of judicial independence by selectively guaranteeing specific manifestations of judicial independence.

Such a methodological dichotomy is by no means unheard of in constitutional law. For example, the Constitution collapses the broad value of free expression into the protection of the

⁴⁸ U.S. Const. Art. III, §1.

value of free expression, by placing a blanket guarantee of speech and press in the First Amendment.⁴⁹ On the other hand, the Constitution's text protects the broad value of privacy, not by establishing a blanket constitutional guarantee of privacy but rather by instrumentally protecting specific manifestations of privacy--for example, in the Fourth Amendment's guarantee against search and seizure⁵⁰ and the Third Amendment's protection against the required quartering of soldiers.⁵¹ In protecting judicial independence, the Constitution employs the instrumental method, much as it does for the individual's interest in privacy.⁵²

Thus, where the political branches choose, for whatever reason, to restrict or ignore judicial independence, the normative theoretical value of judicial independence, standing alone, will provide an insufficient basis on which to overrule or invalidate such political action. It is, rather, only when such political action contravenes one or more of the constitutional guarantees of judicial independence that a reviewing court can properly invalidate such action.

The Constitution's text seeks to protect various forms of judicial independence in three

⁴⁹U.S. Const. Amend. I, cls. 1, 2, 3.

⁵⁰U.S. Const. Amend. IV.

⁵¹U.S. Const. Amend. III.

⁵²Of course, the Supreme Court has transformed the Constitution's use of the selective instrumental method into the blanket protection method, by recognizing a generally based constitutional guarantee of privacy. See, e.g., *Griswold v. Connecticut*; *Roe v. Wade*. If one were to accept the legitimacy of such a transformation as a matter of interpretive theory, I suppose it would be no more improper to make a similar transformation in delimiting the scope of the constitutional guarantee of judicial independence. For reasons discussed above, however, [see discussion *supra*, Section II] I reject the appropriateness of this mode of constitutional interpretation.

different ways. One, as already noted, is Article III’s guarantee of judicial salary and tenure.⁵³ Another is the Due Process Clause of the Fifth Amendment.⁵⁴ Yet another is the so-called “Vesting Clause” of Article III, which directs that the judicial power “shall be vested” in the federal judiciary. In the sections that follow, I will examine the scope and implications of each of these constitutional sources of judicial independence protection.

B. Article III’s Salary and Tenure Protections

The salary and tenure protections of Article III represent a classic illustration of what I have called the selective instrumental approach to constitutional structure.⁵⁵ Those who drafted Article III obviously chose not to protect judicial independence by the creation of a blanket protection of judicial independence—for example, by providing that “[n]either Congress nor the President may interfere with the independence of the judicial branch in the resolution of cases or controversies before it.” Instead, they chose to single out for seemingly absolute constitutional protection two specific ways in which such independence could conceivably be compromised or threatened by the political branches: The reduction of judicial salaries or the removal of judges from office.

Note that the independence protections of Article III are framed in both absolute and non-contextual terms. They are absolute, in that at least by their terms they cannot be outbalanced by the assertion of competing governmental interests.⁵⁶ They are non-contextual, in that their

⁵³U.S. Const. Art. III, s 1.

⁵⁴U.S. Const. Amend. V, cl .

⁵⁵See discussion *supra* at .

⁵⁶In part because of the unambiguously absolute nature of the salary and tenure protections, the balancing approach to the required use of Article III courts long advocated by Justice White and more recently seemingly adopted by a majority of the Court [see, e.g., *Palmore v. United States*; *Northern Pipeline* (White, J., concurring); *Thomas v. Union Carbide*; *CFTC v Schor*]

applicability appears to turn not at all on a required showing the presence of real threats to judicial independence.

On one level, such non-contextuality should render the salary and tenure guarantees consciously over-protective, in that they presumably bar legislative or executive interference with salary or tenure even when those interferences have neither the intention nor the effect of disrupting or intimidating the judiciary in the exercise of its authority to resolve individual disputes. Over all, the Supreme Court has, in fact, interpreted the guarantees in such a manner.⁵⁷ An arguable exception is that the Court has held that Congress may impose what effectively amount to reductions in judicial salaries, as long as those reductions are both indirect and not specific to the judicial branch. For example, the Court has upheld the imposition of a nationwide income tax increase on the federal judiciary.⁵⁸ Yet the Court will not accept even a non-judicially specific reduction in judicial salaries when it is imposed directly.⁵⁹

One may question whether such distinctions make either textual or practical sense. As a textual matter, at least, it is difficult to distinguish between salary reductions that are imposed selectively on the judiciary from those reductions that affect the federal judiciary as part of a more sweeping measure. Of course, the Court can reasonably conclude that if the reductions are imposed across the board, they cannot have been motivated either by the desire to punish the judiciary in retaliation for past decisions or the desire to influence future judicial decisions. But

represents an incorrect interpretation of Article III. See Martin H. Redish, *Duke Article*; Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* (2d ed. 1990).

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⁵⁸ [Get Cite]

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such a distinction appears inevitably to violate the inherently non-contextual nature of those protections. While a rigid dichotomy between judicially-specific and generally framed reductions may seem to make common sense—it is, after all, difficult to believe that the protections of salary and tenure should insulate federal judges from tax increases--the further distinction between direct and indirect non-specific reductions is puzzling. Although one may, not unreasonably, conclude that non-specific reductions are categorically incapable of threatening judicial independence, it is difficult to understand how such reductions could be deemed such a threat when they are direct but not when they are indirect.

Whether the Supreme Court has correctly interpreted the reach of the salary and tenure protections at the margins, it nevertheless remains clear that these protections are non-contextual, in the sense that the invalidation of what is unambiguously a reduction in judicial salary does not require any additional showing of either a specific congressional intention to affect or actual negative impact on judicial independence. The prophylactic nature of the salary and tenure protections reflects the wise conclusion that it will be both burdensome and dangerous to demand a showing of intimidation of the judiciary in a specific instance. Such showings are simply too difficult to make, and the risks of an erroneous conclusion in a specific case too great.

On the other hand, the non-contextual nature of the Article III protections may on occasion result in under-protection of judicial independence. One can hypothesize numerous ways in which Congress could successfully intimidate members of the federal judiciary without directly threatening either their current salaries or their tenure. For example, Congress could conceivably refuse to enact a proposed salary raise for federal judges, overtly in retaliation for an unpopular decision. Because Article III neither requires nor prohibits salary increases,⁶⁰ the provision places

⁶⁰See *Will v. United States*; Rosenn UCLA article.

no barrier to such overt intimidation of the federal judiciary.

Indeed, even if one were to hypothesize a selective congressional refusal to enact a salary raise for a particular federal court of appeals in retaliation for an unpopular decision issued by that court, the result would not appear to violate the salary and tenure protections. While such a blatant attempt to interfere with judicial independence would surely seem to violate the spirit, if not the letter, of Article III's independence protections,⁶¹ the fact that it does not violate the unambiguous terms of the provision leads inescapably to the conclusion that Article III's salary and tenure protections do not prevent even such an obviously retaliatory refusal to enact a salary increase.

The same conclusion would have to be reached were Congress to reduce the non-salary benefits of the federal judiciary, even if such reduction were blatantly imposed for reasons of retaliation or intimidation. Thus, if Congress were to reduce the number of law clerks or secretaries available either to the federal courts in general or to a specific federal court as an overt retaliation for an unpopular decision, those reductions would have to be deemed not to violate Article III's salary protection, unless such benefits were somehow defined as "salary"--a conclusion which the Internal Revenue Service has surely never reached.

As counterintuitive as such a conclusion may appear to be on a pragmatic level, it flows ineluctably from the unambiguous choice of those who drafted Article III to employ selective instrumentalism as the means of constitutionally protecting judicial independence. In order to protect value A, the framers chose not to constitutionalize the value directly, but rather to protect sub-interests B and C as an indirect means of guaranteeing value A. They presumably also concluded that the guarantee of sub-interests B and C would be easier to enforce than would a blanket protection of value A. Before deciding on this strategy, those who drafted the provision

⁶¹ See Moore & Redish, 15 Moore's Federal Practice (3d ed. 1997).

initially concluded that sub-interests A and B are necessary conditions to the achievement of value A. Thus, they decided to constitutionally protect sub-interests B and C, not for their own ultimate value but rather instrumentally, as likely the most effective means of protecting value A.

Use of the selective instrumentalism approach provides two strategic advantages: First, it establishes concrete, relatively easily understood and applied protections--certainly more easily understood and applied than a blanket constitutional protection of the ultimate value itself. This is so, especially where that value is more ethereal than concrete, as is the case for judicial independence. Second, it protects the ultimate value in a prophylactic manner. This means that it imposes barriers to governmental action, even when it is not certain, *ex ante*, that such action would actually threaten or undermine the ultimate value, as long as that action violates the protected sub-interests. In this manner, selective instrumentalism provides a buffer zone for the ultimate value, effectively erring on the side of over-protection. As a result, the ultimate value sought to be guaranteed is provided a buffer zone of constitutional protection.

By focusing the protection of the ultimate value on narrowly framed, specific instrumental sub-interests, however, the selective instrumentalism model also creates the risk of under-protection. In other words, by seeking to guarantee ultimate value A solely by means of protecting sub-interests B and C, the Constitution leaves open the possibility that value A could still be threatened by congressional interference with, for example, sub-interests D and E. In this sense, the selective instrumental model could be analogized to the French Maginot Line of pre-World War II days: A strong and unbending fortification against enemy invasion through direction one, but leaving directions two, three and four unguarded.

When one examines the salary and tenure protections from the broader perspective of textual and structural analysis, then, the conclusion that the salary and tenure protections are not violated by even overt legislative retaliatory measures against the judiciary when they in no way

implicate either salary or tenure seems considerably more reasonable, despite the undisputed fact that such measures quite obviously threaten the ultimate value of judicial independence--the very value sought to be protected by the salary and tenure protections. It does not necessarily follow, however, that such overtly and punitive retaliatory measures against the federal judiciary are automatically free of constitutional defect. Several other portions of the constitutional text or structure arguably provide alternative methods of judicial independence protection, and it is to a discussion of those alternative protections that the Article now turns.

C. Due Process

While the Due Process Clause of the Fifth Amendment⁶² makes no express mention of judicial independence, it is quite appropriate to infer from that guarantee the requirement that--at least when life, liberty or property are at stake--the adjudicator in a case or controversy in which the government or a government agent is a party must at some level be independent of the government. The argument may be developed in the following manner: The constitutional requirement that "due process" be provided prior to the taking of life, liberty or property is properly construed to dictate a requirement of fundamentally fair procedures.⁶³ While such a requirement could be rationalized, as a theoretical matter, either under a utilitarian perspective (dictating the use of the most efficient procedures necessary to reach an accurate result)⁶⁴ or under a dignitary perspective (requiring use of procedures that preserve the dignity of the individual

⁶²U.S. Const. Amend. V, cl. (Quote). Because the subject at hand concerns congressional attempts to restrict the power of the federal courts, the Fourteenth Amendment's due process limitation on state power is irrelevant.

⁶³ See, e.g., [GET CITES].

⁶⁴See Mashaw.

litigants),⁶⁵ from either normative perspective the concept of fair procedure dictates that the adjudicator be both neutral between and independent of the litigants. This conclusion is necessary, because whatever other procedures are deemed to be required by due process would effectively be rendered meaningless unless the adjudicator is truly independent of the parties before her. Absent such independence, we cannot be confident that the adjudicator will be willing or able to render a fair and accurate judgment on the basis of the law and evidence before her. This is so, regardless of how protective the particular procedures employed may be, because the danger is that the adjudicator will ignore the facts in rendering a decision. Thus, absent a neutral and independent adjudicator, neither the utilitarian concern with efficiency and accuracy nor the dignitary dictate that the litigants be treated with respect could be satisfied.⁶⁶

In certain ways, the due process requirement of an independent adjudicator can be thought to extend beyond the requirement of independence dictated by Article III. Initially, it should be noted that the Due Process Clause's protections extend to any federal revocation of constitutionally protected interests, regardless of who the adjudicator is. For example, due process extends the guarantee of judicial independence beyond that provided by Article III, because it applies to federal adjudicators other than Article III judges, such as Administrative Law Judges. Moreover, in light of the Fourteenth Amendment's extension of due process requirements to states,⁶⁷ the independent adjudicator requirement dictated by due process applies to state adjudicators, while Article III's salary and tenure protections apply solely to federal judges. Finally, because the Due Process

⁶⁵See Michelman. See generally Redish & Marshall Yale article.

⁶⁶See generally Redish & Marshall Yale article

⁶⁷U.S. Const. Amend. XIV, s .

Clause is structured, not in the form of a selective instrumentalism model⁶⁸ but rather in the form of what could be called a direct primary value protection model, the clause's protections of judicial independence limit any legislative or executive interference with that independence, when such interference rises to the level of a due process violation. In contrast, the Article III protections by their terms apply solely to specific types of threats to judicial independence, namely those affecting salary or tenure.

Yet in other important ways, the judicial independence protections of Article III may extend well beyond those provided by due process. For one thing, according to the unambiguous directive of the text, the Due Process Clause's protections are triggered only when life, liberty or property is at stake. While the concepts of liberty and property are subject to a variety of potential interpretations,⁶⁹ it is indisputable that unless those interests--however defined--are at stake the requirements of due process are irrelevant. In contrast, the independence protections of Article III apply to any case which federal judges adjudicate, including those presenting solely issues of sub-constitutional statutory construction.

Even when interests of liberty or property are unambiguously at stake, judicial interpretation has in certain ways extended the Article III protections beyond those provided by due process. While the Supreme Court has quite clearly held that due process requires an "independent" adjudicator,⁷⁰ it has also held that the requirement of independence does not

⁶⁸See discussion supra at .

⁶⁹[GET CITES].

⁷⁰See, e.g., *Toomey v. Ohio*; *Lavoie*.

demand prophylactic protections of salary and tenure.⁷¹ The Court has reasoned that although instances in which governing law can be shown to have created a real and concrete threat to the adjudicator's neutrality will be deemed to violate due process,⁷² the mere abstract possibility that the political branches will retaliate against the judge because of a particular decision is not sufficient to trigger the due process protections.⁷³ Thus, while Article III on its face prohibits any situation in which the federal judge exercising final adjudicatory power lacks the protections of salary and tenure,⁷⁴ whether or not a contextual showing of a concrete threat to judicial independence can be shown, due process provides protection only in contexts in which such a threat is actually shown to exist.

One can raise serious questions about so narrow a construction of judicial independence. For the same instrumental reasons that the salary and tenure protections of Article III were made

⁷¹ See *Ward v. Love*.

⁷² See cases cited in note 61, *supra*.

⁷³ *Ward v. Love*.

⁷⁴ The Supreme Court, it should be noted, has not construed Article III in the manner dictated unambiguously by the constitutional text, instead applying a balancing test to determine whether Congress may circumvent the salary and tenure protections of Article III. See *Palmore v. United States*; *CFTC v. Schor*.

Use of such an unrestrained and unlimited balancing analysis is unwise as a matter of constitutional policy, as well as inescapably inconsistent with unambiguous textual directives. See *CFTC v. Schor* (Brennan, J., dissenting). To the extent such a balancing analysis continues to control, the Article III protections lose their essential non-contextuality [see discussion *supra* at], in direct contradiction to the very nature of the selective instrumentalism model which Article III employs. See discussion *supra* at . It is important to note, however, that the balancing analysis does not allow Congress to selectively revoke the salary or tenure protections of Article III judges in particular cases or in cases arising under particular statutes. Whenever Article III judges act, they remain subject to the unbending, non-contextual protections of salary and tenure. Rather, at most the balancing analysis allows Congress to establish federal adjudicatory bodies whose members lack the protections of salary and tenure provided by Article III.

non-contextual,⁷⁵ the independence dictate of due process should likewise be construed in a non-contextual manner. In other words, because invidious threats to judicial independence may exist without any overt or ascertainable evidence of such threats, meaningful independence protection must be fashioned in a non-contextual--and therefore effectively prophylactic--form. Hence, in order to provide an effective guarantee of judicial independence the Due Process Clause should properly be construed to incorporate protections equivalent to those of Article III's salary and tenure guarantee. The Supreme Court has quite clearly refused to do so, however, and as a result the independence protection established by due process falls short of the protection provided by Article III.

D. The Vesting Clause of Article III

It is at least conceivable that even when protection of judicial independence is provided neither by the salary and tenure guarantees nor by due process, the so-called Vesting Clause of Article III could be construed to provide a certain level of independence protection to the federal judiciary. That language provides, simply, that the "judicial power" "shall be vested" in one Supreme Court and whatever lower federal courts that Congress from time to time chooses to ordain and establishes.⁷⁶ Both scholars⁷⁷ and jurists⁷⁸ have, over the years, occasionally argued that the mandatory nature of the Vesting Clause requires that the federal judicial power extend either to all of the categories of cases enumerated in Article III, section 2 or at least to certain ones, thereby preventing Congress from choosing instead to vest the federal judicial power exclusively

⁷⁵ See discussion *supra* at ____.

⁷⁶U.S. Const. Art. III, s 1.

⁷⁷See Amar.

⁷⁸See Justice Story.

in the state courts. However, such a reading fatally ignores other portions of the very same constitutional provision, which plainly qualify what would otherwise appear to be a mandatory vesting of power in the federal judiciary.⁷⁹ But it does not necessarily follow that the Vesting Clause plays no role whatsoever. When Congress chooses to leave cases in the hands of the Article III federal courts, the Vesting Clause can be construed to prohibit Congress from interfering with the decisional process in a manner that would, either directly or indirectly, deprive those courts of the “judicial power” to render the actual decision.

Several doctrinal illustrations arguably support such a conclusion. For example, the Supreme Court held in United States v. Klein⁸⁰ that while Congress possesses broad power to except cases from the Supreme Court’s appellate jurisdiction pursuant to the Exceptions Clause of Article III,⁸¹ it may not direct the Court how to interpret a provision of the Constitution in the course of an individualized adjudication, because such a task belongs exclusively to the judicial branch.⁸² In Hayburn’s Case⁸³ the Court had earlier invalidated a scheme in which an executive officer was given the power to review and reverse individualized findings of the judicial branch. Most recently, the Court in Plaut v. Spendthrift Farms, Inc.⁸⁴ held unconstitutional a statute which

⁷⁹See [ordain and establish; exceptions clause]. See generally Redish Penn and Villanova articles.

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it construed to legislatively reverse individual final decisions of the federal courts.⁸⁵

Exactly how far such a separation-of-powers protection of judicial independence extends remains unclear. At a minimum, both as a doctrinal and conceptual matter, the provision vesting “the judicial power” in the federal judiciary prohibits the other branches of government from directly interfering with or overruling an individual adjudication. At the other extreme, the mere fact that Congress has legislatively overruled or preempted sub-constitutional statements of law created by the judiciary in the course of an adjudication clearly does not violate the investment of the judicial power in the federal judiciary, for the simple reason that in a predominantly democratic society such sub-constitutional policy making power has never been deemed in the final instance to be a function of the judiciary. Inherent in American political theory is the assumption that sub-constitutional decisions of social policy may ultimately be made by the branches of government most representative of and accountable to the polity.⁸⁶ To construe the constitutional authority of the federal judiciary to exercise the judicial power as a means of insulating judicial lawmaking from legislative revision effectively reverses the democratic inertia that is central to our political structure.

In between these two certainties remains one key unresolved area: Whether the Vesting Clause’s investment of the judicial power in the federal judiciary prevents Congress from attempting to influence judicial holdings indirectly, by means of case-based retaliatory action against either the federal judiciary as a whole or even against an individual federal court or federal

⁸⁵Id. at . Whether the Court was correct in finding that the statute actually did improperly reverse individual decisions, however, is subject to debate. See Martin H. Redish, Mercer article.

⁸⁶See . For a more detailed discussion of what I have previously referred to as the principle of political accountability, see Redish, supra note , at .

judge, when that retaliatory action is not prohibited by the salary and tenure protections of Article III. Before one can properly answer that question, however, it would be helpful to explore the intersection between the constitutional protections of judicial independence and the one form of judicial discipline expressly authorized by the Constitution--the impeachment power. For such an analysis will provide a constitutional baseline, against which one may appropriately measure the constitutionality of less expressly authorized, yet considerably less direct forms of judicial discipline.⁸⁷ It is therefore to an analysis of the impeachment power that the Article now turns.

IV. Judicial Independence Versus the Impeachment Power: Resolving the Constitutional Dilemma

A. Delimiting the Scope of Impeachable Offenses: Application of the Textual and Structural Analysis

The first question one must ask in delimiting the scope of the concept of impeachable offenses is the extent to which that scope should be deemed to vary on the basis of the type of federal officer sought to be impeached. To be sure, by its terms the provision authorizing the impeachment power draws no such distinction.⁸⁸ On that basis, presumably a textualist--as I claim to be— would be forced to conclude that the scope of impeachable offenses must be constant, varying not at all on the basis of of the nature of the officer sought to be impeached. However, an important conceptual distinction must be drawn between a textualist and a literalist.⁸⁹ While a literalist interprets only the actual words of a provision, viewed in a vacuum, a textualist takes a more wholistic interpretive approach, viewing each provision as part of an integrated,

⁸⁷ See discussion *infra* at ____.

⁸⁸[Quote Impeachment Clause.]

⁸⁹For a more detailed explanation of this distinction, see Martin H. Redish, Penn article.

purposefully directed whole, presumed to be designed to achieve a coherent and consistent set of constitutional goals. In short, while the literalist views the linguistic trees, the textualist views the linguistic forest. Hence, in interpreting particular constitutional text, where necessary the textualist will attempt to synthesize related and possibly conflicting provisions in order to discern a coherent textual structure.⁹⁰

Such an effort is intended to achieve two interpretive ends: (1) Wherever possible, to avoid construing the Constitution in a manner that results in including within the same document diametrically opposing provisions, and (2) under any circumstances to avoid a construction of one provision that renders another provision or set of provisions effectively nugatory or meaningless. The former goal is framed in a contingent manner, while the latter is not because although it is at least conceivable that a coherently crafted and structured document could be fashioned in such a manner as simultaneously to contain provisions which point in opposite directions, it is wholly inconceivable that such a document would contain one provision whose inherent and inescapable effect would be to eradicate another provision.

Although this interpretive analysis may not apply with full force to the issue of the unitary nature of the impeachment standard, it most certainly appears to have some relevance in answering that question. A textualist, I believe, would construe the Impeachment Clause in a manner that takes account of the unique position of the federal judiciary within the nation's political system, as unambiguously manifested in Article III's protections of judicial salary and tenure.

As previously mentioned, Article III on its face distinguishes members of the federal

⁹⁰It should be noted that the interpretive need to reconcile seemingly conflicting provisions is inapplicable when one of those provisions is contained in a constitutional amendment. In such situations, since the very purpose of an amendment is to amend, i.e., to alter or change, the existence of such a textual conflict should not be surprising. In these cases, any conflict is naturally resolved in favor of the amendment.

judiciary from members of the other branches, by expressly insulating them from key influences of the political process. The salutary political purposes served by such insulation have also already been noted.⁹¹ Absent an independent judiciary free from basic political pressures and influences, individual rights intended to be insulated from majoritarian interference would be threatened, as would the supremacy of the countermajoritarian Constitution as a whole. These are functions served by no member of the executive branch.

Hence, it is only the judicial branch whose members are both provided life tenure and vested with authority to adjudicate and enforce the countermajoritarian Constitution. A broad construction of the scope of impeachable offenses could easily undermine the vitally important functions manifestly served by Article III's protections of salary and tenure, by giving rise to the very danger of external political influences on the judicial process that those protections were quite clearly intended to prevent. Thus, in order to insure that the salary and tenure protections are allowed to perform the valuable functions which they obviously serve, it is necessary to employ special care in construing the category of impeachable offenses when a member of the federal judiciary is the subject of the impeachment process.

It might be argued that even under a broader construction of the scope of the Impeachment Clause, the salary and tenure protections of Article III still perform an important function because conviction on impeachment can be obtained only by means of a supermajoritarian vote of the Senate. Thus, the salary and tenure protections still assure federal judges of broader guarantees of their position than elected or other appointed federal officials. But while this argument has a superficial appeal, it ignores the key purpose sought to be served by the salary and tenure protections--that is, to remove, or at least significantly reduce, the possibility of external political

⁹¹ See discussion *supra* at .

intimidation designed to offset the judicial decision making process. A broad reading of the scope of the impeachment power may well give rise to the possibility of such intimidation, aimed at the very heart of the interests protected by Article III. By relying on the supermajoritarian conviction requirement, this argument has the dubious advantage of confining the susceptibility of federal judges to political intimidation to those cases in which an extremely large portion of the public or government have been angered by judicial decisions. In any event, this argument completely ignores the fact that the danger of impeachment itself--which can be triggered merely by a simple majority of one house of Congress⁹²--can be sufficient to give rise to the very intimidation that Article III is intended to prevent.

While leading scholars appear to agree that a special impeachment standard is appropriate for members of the federal judiciary, they often tend to go in the completely opposite direction from the interpretation I have suggested. Professor Michael Gerhardt, for example, has argued that because of the unique need to preserve judicial integrity, members of the federal judiciary should actually be held to a higher behavioral standard than are executive officers.⁹³ For example, he notes that a federal judge should be subject to impeachment for such activities as lying about her law school record or publishing a law review article that misrepresents the law, while executive officers should not be deemed subject to impeachment for similar behavior.⁹⁴

On one level, it is certainly possible to sympathize with Professor Gerhardt's concerns over the special need to preserve judicial integrity. For the very reason that federal judges are, in fact, insulated from most forms of external political pressure, it is necessary to maintain the

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⁹³[Gerhardt book cite].

⁹⁴Id. at .

judiciary's high status in the mind of the public. But such an expansive conception of impeachable offenses on the part of the judiciary must nevertheless be rejected, because it would inescapably invite far reaching and even crude political attempts to intimidate members of the judiciary in their decision making--again, the very result sought to be avoided by creation of the salary and tenure protections in the first place.

Before one can conclusively reject Professor Gerhardt's suggested examples of specific impeachable judicial behavior, however, it is first necessary to adopt an overarching doctrinal model of impeachable offenses, and then apply that model to those examples. In fashioning such a model, the task at hand is to glean a coherent textual structure from an interpretive synthesis of what on their face appear to be provisions potentially in tension, namely, the impeachment power of Article II and the salary and tenure protections of Article III. Such a synthesis should seek to reconcile the need to insulate federal judges from political pressures caused by threats to their tenure with the need to provide the political branches with a necessary safety valve in order to preserve judicial integrity.

Any textualist analysis of a constitutional provision must of course begin (though usually not end) with the words of the provision. By its terms, the Impeachment Clause authorizes impeachment for treason, bribery, or "other high crimes or misdemeanors." When viewed apart from any historical context, these words appear to describe solely criminal behavior. For one thing, the words, "crimes" and "misdemeanors" are, of course, exclusively terms which describe criminal behavior--at least when viewed out of the specific context of the Impeachment Clause. Moreover, the fact that the provision initially refers to specific criminal acts and then expressly includes "other" similar acts tends to establish, purely as a textual matter, that the category of impeachable behavior is confined to acts which are in some way criminal. Moreover, under such a narrowly circumscribed category of impeachable offenses there would be no basis on which to

confine such a limited construction to members of the judiciary.

However, when one adds an analysis of broader textual structure to this narrow textualist analysis, one should be able at least to understand the argument in favor of confining the scope of impeachable offenses solely for members of the federal judiciary to such objectively characterizable criminal behavior. Simply put, that argument is that Article III's special protections of salary and life tenure underscore the unique and vital role in our constitutional democratic system played by federal judges in enforcing the countermajoritarian Constitution against the political branches and to preserve the rule of law in what is otherwise a nakedly political system. Article III's provision of life tenure is quite obviously intended to insulate federal judges from undue external political pressures on their decision making, which would undermine and possibly preclude effective performance of the federal judiciary's function in our system. Yet if the scope of impeachable offenses is not confined in some meaningful and largely objective manner, the possibility of impeachment would threaten to eviscerate the salutary impact of the life tenure protection.⁹⁵ In effect, under this construction the impeachment power would be construed in a manner that consumed the tenure protection of Article III.

If a construction of a constitutional provision is available that does not have such a destructive impact on attainment of the purposes served by a separate provision, a structural analysis of constitutional text dictates that such a construction be adopted. Therefore, a construction of the Impeachment Clause confined to objectively definable criminal behavior should be adopted, solely for the reason that it would dramatically reduce the ability of Congress to employ its impeachment power as a tool of intimidation to influence future judicial decision

⁹⁵ It might be thought that this analysis ignores the pressure of the language in Article III confining life tenure to periods of "good behavior." For reasons discussed at a later point, however, the "good behavior" language should not be construed to restraint life tenure above and beyond the manner in which the impeachment power does. See discussion *infra* at .

making or penalize past judicial decision making. In this manner, the two provisions would be interpreted in a manner that preserves the legal and political vitality of both. This argument, premised on an understanding of normative constitutional policy gleaned from a structural analysis of constitutional text, is logically limited to issues involving the impeachment of members of the federal judiciary. Hence, there is no reason to extend its application to the impeachment of executive officials.

It is easy to anticipate the nature of the attacks that can be presented against this structural analysis. Such criticisms can, I believe, be grouped under four broad headings: Historical, theoretical, pragmatic and textual. While these critiques may seem superficially appealing, however, closer examination reveals that they do not successfully refute the structural analysis.

B. The Historical Attack on the Structural Analysis

When one considers the scope of impeachable offenses from a purely historical perspective, one acquires a very different picture from the one dictated by the structural analysis. According to respected scholars, under well established English precedent both impeachment practice and the concept of “high crimes and misdemeanors” extended well beyond behavior that was technically criminal.⁹⁶ Because I claim no expertise in the historical practice of impeachment, I am readily willing to concede, if only for purposes of argument, the accuracy of these scholarly assertions. Even assuming the accuracy of this historical perspective, however, it is by no means clear that that fact dictates a parallel modern construction of the Impeachment Clause.

Initially, even if we assume that modern constitutional interpretation should for some reason be constrained by the modern perception of framers’ intent,⁹⁷ it does not automatically

⁹⁶See Berger; Gerhardt.

⁹⁷But see discussion infra at .

follow that framers' intent necessarily was designed to incorporate by reference all pre-revolutionary English practice. Indeed, while our constitutional structure obviously borrowed much from English political theory, it is also true that much of the political system established in the Constitution was designed specifically to depart from English practice. There is much evidence that the lack of judicial independence that characterized English practice was one of the most offensive aspects of that practice to those who led the Revolution.⁹⁸

True, modern day scholars have also pointed to certain post-ratification practices to support the conclusion that impeachment is not confined to criminal behavior.⁹⁹ But equating post-ratification practice with framers' intent is often a risky undertaking. For example, by such reasoning, presumably modern day First Amendment interpretation would be constrained by the enactment of the Alien and Sedition Acts--a conclusion which the Supreme Court expressly rejected in New York Times Co. v. Sullivan.¹⁰⁰

I find it quite puzzling that scholars who devote their attention to the Impeachment Clause appear almost uniformly to have assumed--without, as far as I can see, the slightest discussion or explanation of their overarching theory of constitutional interpretation--that historical practice is somehow dispositive of modern constitutional doctrine, the only issue involving the task of determining exactly what that practice was.¹⁰¹ Yet in virtually no other area of modern constitutional doctrine has the Supreme Court deemed itself bound by a narrow understanding of

⁹⁸ [Discuss reference to English judges in Declaration of Independence].

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¹⁰⁰ 376 U.S. , (1964).

¹⁰¹ See, e.g., Berger; Gerhardt.

either pre-ratification practice, post-ratification practice, or framers' intent.¹⁰²

If there is any reason that the Impeachment Clause, more than any other constitutional provision, is deserving of such rigid historicism, the scholars who have employed such an approach have utterly failed to explain it. Nothing in the text of the provision directs use of such a uniquely historical mode of interpretation. Indeed, even where a constitutional provision arguably does appear to textually direct such a historical inquiry, as is the case for the Seventh Amendment's directive that the right to jury trial in civil cases "at common law" be "preserved",¹⁰³ the Court has modified modern interpretation in order to take into account modern practices and conditions.¹⁰⁴ Thus, even conclusive evidence of historical practice is not deemed dispositive in modern constitutional interpretation.

Hence, even were we to assume unambiguous and consistent historical practice, in both England and the United States, extending the scope of impeachable offenses for judges beyond criminal behavior, it does not necessarily follow that modern constitutional interpretation must be bound by that practice. If the constitutional goal of attaining and preserving judicial independence, as embodied in Article III, cannot be effectively achieved absent a narrower construction of the category of impeachable offenses for federal judges, then that category must properly be confined to criminal behavior. This is so, whether or not those who ratified the Constitution understood that necessity. Put bluntly, to the extent they did not, it may be either because (1) the framers themselves failed to recognize the significant threat to the constitutionalized value of judicial independence or (2) they were simply incorrect in conducting their calculus.

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¹⁰³U.S. Const. Amend. VII (quote provision).

¹⁰⁴See, e.g., *Beacon Theaters, Inc. v. Westover*; *Dairy Queen, Inc. v. Wood*.

Thus, it is certainly conceivable that the framers themselves did not comprehend the proper implications of their own constitutional structure.

Yet what the framers enacted, what they passed on to subsequent generations, was not their subjective perceptions and assumptions, but rather the text itself. If, either because of subsequent developments or simply the luxury of a broader, more carefully reasoned perspective, we today can apprehend difficulties or problems that the framers apparently did not--that their subjective understanding of one constitutional provision in reality has a dramatically destructive impact on the unambiguous purposes sought to be served by a separate constitutional provision--there is no reason that we must make the same mistakes that they did. Unless the framers tied the hands of subsequent interpreting generations by use of narrow and restrictive wording, there is no reason that we should not be able to benefit from structural and interpretive insights that the framers were either unable or unwilling to see (or, perhaps, to foresee).

C. The Theoretical Attack on the Structural Analysis

Even if one were to accept my response to the historical critique, it is necessary also to deal with the possible contention that I have failed to perceive the important role that the availability of impeachment plays in assuring the ultimate accountability of the judiciary within our democratic system. Absent the availability of such a majoritarian check, the argument proceeds, the unaccountable judiciary would be able to exceed its intended limited role through what amounts to lawless decision making. Pursuant to this reasoning, confining the scope of impeachable offenses to criminal conduct undermines the important political checking function that the availability of impeachment is intended to perform.

Note that this argument turns not at all on assumptions about either historical practice or framers' intent concerning the scope of impeachable offenses. It turns, rather, exclusively on the application of considerations of normative political theory. The primary problem with this

approach, however, is that in seeking to prevent the unaccountable judiciary from usurping political authority, for all practical purposes it removes the judiciary as a countermajoritarian check on the political branches, in contravention of both the foundational premises of American political theory and the implementatitonal device of the salary and tenure protections. The recent example of the political calls for impeachment following Judge Harold Baer's Fourth Amendment ruling and his subsequent reversal of his own decision¹⁰⁵ underscore the point. If one assumes that a federal judge may be impeached because of nothing more than the incorrectness of his constitutional decisions, then a judge will always be potentially subject to external political pressure in his constitutional decision making, in direct contravention of the unambiguous purpose designed to be served by the prophylactic protections of Article III's tenure protection.

For whatever reasons, the fear of a judicial dictatorship that critics often raise has never come to pass. Perhaps because of its lack of independent enforcement and financial power, as well as the constitutional power of Congress to control its jurisdiction,¹⁰⁶ the federal judiciary has never interfered with the long term, fundamental policy choices held by a consensus of the polity. To construe the impeachment power to enable Congress to penalize or threaten federal judges because of nothing more than disagreement with their substantive decisions would thus unnecessarily upset the balance of branch power.

It might be responded that at most this reasoning supports a view of impeachable offenses that excludes decision-based impeachment. In other words, perhaps impeachment should not be permitted because of a particular judicial decision, but it does not necessarily follow that judicial

¹⁰⁵See discussion, *supra* at .

¹⁰⁶U.S. Const. Art. III, ss. 1,2 (congressional discretion to ordain and establish lower federal courts and to make exceptions to Supreme Court's appellate jurisdiction); *Sheldon v. Sill*; *Lockerty v. Phillips*; *Ex parte McCardle*.

impeachment must be confined to criminal behavior. Under this modified approach, Congress would be able to impeach a member of the federal judiciary because of non-criminal behavior, but not because of the alleged inaccuracy or impropriety of a particular decision or series of decisions made by the judge in question.

There can be no doubt that a standard that excludes overtly decision-based grounds of judicial impeachment is far preferable, from a structural perspective, than a standard that contains no limits whatsoever. The problem with this suggested alternative, however, is that it fails to provide sufficient breathing room to the needs of judicial independence. This is because absent restriction to an objectively limited standard, such as one confined to criminal behavior, impeachment will always present a threat of covert and indirect decision-based penalization. Of course, even a standard of criminal behavior could be employed selectively against only those judges whose decisions are found to be wrong or offensive. But the prerequisite that the judge's behavior be properly characterizable as criminal provides an inherent limitation on the power of congressional manipulation that does not exist when the standard is merely one that excludes overtly decision-based impeachment.

D. The Pragmatic Attack on the Structural Analysis

A critic of the structural analysis might contend that confining the scope of impeachable offenses to criminal behavior would give rise to what are, purely as a practical matter of judicial administration, preposterous results. Such a standard, the argument proceeds, would necessarily preclude Congress from removing from office judges who engaged in public drunkenness, sexual harassment, or behavior exhibiting insanity, merely because such behavior could not be characterized as criminal. This result could arguably undermine public respect for the federal judiciary and lead to situations that are pragmatically untenable.

In considering the force of this argument, it is interesting to note that no federal judge in

memory has been impeached on non-criminal grounds. Thus, no practical difficulties would have resulted, even if the scope of impeachment had in the past been confined to criminal behavior.¹⁰⁷ Moreover, it should be emphasized that the unavailability of impeachment does not necessarily imply that government is bereft of methods for dealing with extreme, albeit non-criminal judicial behavior. Judges who are truly incapable of continuing to perform the judicial function due to infirmity may presumably have their caseloads transferred to other judges for the period during which they are incapacitated. Because such a remedy is appropriately viewed as administrative, rather than punitive, impeachment is not implicated. Finally, there is presumably nothing in the Article III independence protections that preclude private civil suits, where legally appropriate, against members of the federal judiciary.

It cannot be denied that a narrow construction of the scope of impeachable offenses at least theoretically leaves open the possibility that extremely questionable judicial behavior will fail to lead to removal of the judge from office. But surely, those who drafted Article III's protections of salary and tenure must have understood that there could be a resulting cost. Life tenure will naturally mean that judges will remain in office, long after the public or the government no longer wants them there. Indeed, that is the very point of the protections: The decision was made to risk this lack of accountability in order to assure judicial independence. Any argument that impeachment must be shaped to allow government to remove judges from office any time their behavior is deemed unacceptable effectively ignores the choice, inherent in the creation of the salary and tenure protections in the first place, to protect federal judges from external political

¹⁰⁷ Of course, one might point to this history in order to demonstrate that the concern I am expressing is more theoretical than real. Even if this were true, however, one must shape constitutional interpretation to deal with problems that theoretically may arise. In any event, Judge Baer's experience arguably demonstrates that the dangers to which I refer are more than theoretical.

influences through threat to their tenure in office.

E. The Textualist Attack on the Structural Analysis: The Relevance of the “Good Behavior” Clause

Even a textualist might suggest that there are problems with my structural analysis of the impeachment power, because it completely ignores the express limitation of Article III’s tenure protection to a period of judicial “good behavior.”¹⁰⁸ Because by its terms this phrase is not confined to criminal conduct, the argument proceeds, it is impossible to employ a textualist-structuralist analysis as a basis for confining impeachable offenses for members of the federal judiciary to criminal behavior.

Purely as a matter of textual construction, it is difficult to deny that the “good behavior” language is capable of a construction much broader than merely criminal behavior. I suggest, however, that while such a construction is permissible under a narrow literalist perspective, when viewed from the broader structural perspective it gives rise to an untenable-- indeed, nonsensical-- result. To construe the good behavior language in such a manner would dictate the following conclusion: Federal judges are given life tenure in order to insulate them from external political pressures on their decision making. However, at the same time, Congress may remove federal judges from office any time it finds their behavior to be “bad”. Such a construction effectively allows one portion of the provision to devour another portion. For under this construction, it would be impossible for federal judges to have the assurances of independence which the salary and tenure protections were placed in Article III to accomplish in the first place.

In order to prevent such an untenable construction, then, the good behavior language must be construed as nothing more than a cross-reference to the availability of impeachment. As such,

¹⁰⁸ U.S. Const. Art. III, §1.

reliance on the good behavior language to support a construction of impeachable offenses effectively begs the question, because as a cross-reference to impeachment it is no more revealing as to the scope of impeachable offenses than is the language of the Impeachment Clause itself.

F. Judicial Review of Impeachments and the Political Question Doctrine

Closely intertwined with the question of the substantive scope of the category of impeachable offenses is the process-based issue concerning the relevance of the political question doctrine to the review of congressional impeachment decisions. When applicable, the political question doctrine creates a self-imposed bar to the judiciary's power to review the constitutionality of federal governmental action. Traditionally, the doctrine has been confined to specified categories of cases involving constitutional issues which, allegedly, either are not susceptible to judicially manageable standards or are textually committed to final resolution by another branch.¹⁰⁹ If the political question doctrine is deemed applicable to the constitutional scope of impeachable offenses, then questions on the meaning of "high crimes and misdemeanors" in the Impeachment Clause is rendered purely academic: Absent judicial review, the congressional determination of impeachable behavior is final.

As one who has strenuously argued that the political question doctrine in all of its procedural manifestations represents a perversion of the proper theory of judicial review,¹¹⁰ I have little trouble rejecting its application in the specific context of the permissible constitutional scope of impeachable offenses. Indeed, even if one were to accept the political question doctrine as a matter of abstract principle, it would be improper to apply it to the issue of the scope of impeachable offenses. If, as I argued in the previous section, it is important from the perspective

¹⁰⁹Baker v. Carr.

¹¹⁰See Martin H. Redish, Judicial Review and the Political Question, *Nu. L. Rev.* (1985). [Cite other Political Question articles.]

of the value of limited government to preserve judicial independence by confining the scope of congressional power to impeach federal judges,¹¹¹ then it would be nonsensical to preclude judicial review of congressional conclusions that certain judicial conduct is impeachable. Such a result would give rise to the very same unconstrained congressional power to intimidate federal judges that had just been rejected as undermining of the values of limited government and judicial independence.

Moreover, determination of the scope of impeachable offenses does not satisfy any of the traditional criteria of the political question doctrine. There is no reason to believe that the words, “high crimes and misdemeanors” in the Impeachment Clause are any less subject to the creation of manageable interpretive judicial standards than is the language of such commonly interpreted constitutional provisions as the First, Fourth, Fifth or Fourteenth Amendments.¹¹² The possibility that judicial impeachments may give rise to substantial political tension--a fact that will in any event often be untrue--surely does not qualify the issue for application of the political question doctrine. Numerous issues of constitutional law which the Supreme Court has not hesitated to resolve on the merits have stimulated considerably more political tension than any individual impeachment decision.¹¹³ Nor is there anything in the constitutional text that even arguably commits this question to final determination by another branch of government. If the language of the Impeachment Clause were construed to give rise to such a commitment to another branch, it

¹¹¹See discussion *supra* at .

¹¹²[Discuss applicability of Choper’s theory.]

¹¹³See, e.g., *Roe v. Wade* (right to abortion); *Engle v. Vitale* (school prayer).

would be difficult to understand why any other provision could be construed any differently.¹¹⁴ Additionally, while the Supreme Court has suggested that the interest in assuring the finality of a decision dictates applicability of the political question doctrine in the impeachment context,¹¹⁵ its reasoning (though apparently not its conclusion) was limited to the special situation of the President, where prolonged uncertainty about his legal status could give rise to obvious political problems.¹¹⁶ This is a problem that is largely irrelevant in the judicial context.

The Supreme Court has further argued that “[j]udicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the ‘important constitutional check’ placed on the Judiciary by the Framers [in the Impeachment Clause]. [This] argument would place final reviewing authority with respect to

¹¹⁴In *Nixon v. United States*, 113 S. Ct. 732 (1993), the Supreme Court found the basis for a textual commitment of the interpretation of the Impeachment Clause to Congress in the words, “The Senate shall have the sole power to try all impeachments.” U.S. Const. Art. I, s 3, cl. 6. 113 U.S. at . At most, however, that language vests the power to try impeachments in the Senate; it says absolutely nothing about the final power to determine the scope of the category of impeachable offenses. In *Nixon*, the issue was the constitutionality of the Senate’s practice of prohibiting the entire Senate from participating in the evidentiary hearings for a judicial impeachment. Arguably, the constitutionality of this practice could, in fact, come under the Senate’s “sole” power to “try” impeachments, because it deals with the specific nature of the trial process. That conclusion, however, should have no relevance whatsoever to the issue of the constitutional scope of impeachable offenses.

¹¹⁵*Nixon v. United States*, 113 S. Ct. 732, (1993).

¹¹⁶*Id.* at (“This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated.”).

The Court, it is true, further noted that uncertainty also plagued “the question of what relief a court mayh give other than simply setting aside the judgment of conviction. Could it order the reinstatement of a convicted federal judge, or order Congress to create an additional judgeship if the seat had been filled in the interim?” The obvious answers to what the Court apparently considered to be rhetorical questions are “yes” and “yes.”

impeachments in the hands of the same body that the impeachment process is meant to regulate.”¹¹⁷

As superficially appealing as this argument may at first appear closer examination reveals its serious flaws. First, it is by no means uncommon for the judiciary to have final power to decide the constitutionality of congressional action that directly affects it. For example, the federal judiciary will, without the slightest hesitation, review the constitutionality of laws that restrict its jurisdiction, even though the federal courts have a special interest in the conclusion.¹¹⁸ Moreover, if one were to hypothesize a law that reduces the salaries of all Article III judges, it would be absurd to believe that the federal judiciary would deem itself too personally interested in the outcome to sit in judgment on the constitutionality of such a law. Indeed, federal judges as a group would undoubtedly have a considerably more acute and direct personal interest in the outcome of this constitutional issue than they would in reviewing the constitutionality of a particular federal judge’s impeachment.

The reason that the federal judiciary would unhesitatingly review the constitutionality of these laws, despite its obvious and indisputable personal interest in the outcome, is that the alternative would be to allow Congress to so abuse its powers as to destroy the effectiveness of judicial review. The exact same logic dictates that the federal judiciary sit in final judgment on the constitutional validity of the impeachable offense in question, because unless the judiciary does so Congress would effectively be given a blank check in subverting the judicial review process.

¹¹⁷Nixon v. United States, 113 S. Ct. 732, (1993).

¹¹⁸See, e.g., United States v. Klein; Lockerty v. Phillips; Yakus v. United States.

Thus, Supreme Court decision¹¹⁹ and respected scholarly commentary¹²⁰ to the contrary notwithstanding, use of the political question doctrine in determining the proper scope of the category of impeachable offenses for federal judges would be both unjustified and extremely harmful to the rule of law and the values of limited government.

G. The Exclusivity of Impeachment as a Removal Device

Whatever the appropriate scope of the category of impeachable offenses, there is of course no question that the effect of a conviction under the impeachment process is removal of the judge from office. Whether the Impeachment Clause provides the exclusive means by which federal judges may be removed from office, however, gives rise to an entirely distinct question.

There are two conceivable arguments, purportedly grounded in textual interpretation and principles of textual structure, to support the position that the Impeachment Clause does not provide the exclusive means of removal: First, that, by its terms, the Impeachment Clause does not itself provide that it is the exclusive means of removal; and second, that the “good behavior” language in Article III expressly provides an alternative basis for removal. Neither argument, however, should prevail. Instead, an analysis of textual structure quite clearly reveals that impeachment must be the sole means of removal of a federal judge from office.

¹¹⁹*Nixon v. United States*. In *Nixon*, argued that judicial review of impeachments is inappropriate, in part because there is “[no] evidence of a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers.” *Id.* at . This reasoning is seriously flawed, however, for two reasons. First, as I have argued, in virtually no other area of constitutional interpretation do we today feel slavishly bound to the framers’ intent, and there is no special reason to do so in the impeachment context. Second, requiring evidence of express framers’ statements supporting the concept of judicial review for every constitutional provision would lead to absurd results. Indeed, the framers did not even place judicial review expressly within the Constitution, so requiring that judicial review for a specific provision find a basis in express framers’ statements before the Court will authorized judicial review would impose an anachronistic and impossible burden on those who advocate judicial review.

¹²⁰See Michael Gerhardt, Duke article.

The response to the first argument is, simply, that recognition of any means of removal other than impeachment would, as a practical matter, severely undermine the limitations inherent in the impeachment process that are designed to control congressional resort to the removal process.¹²¹ If an alternative means of removal without these strict limitations were recognized, then there would have been no point to impose the limitations on impeachment in the first place, because Congress could then so easily circumvent them. If Congress can achieve the ultimate goal of the impeachment process yet simultaneously circumvent the restrictions imposed on its power by the impeachment process, then impeachment becomes both useless and meaningless--hardly a result that the Constitution could reasonably be construed to have intended. Thus, the fact that the Impeachment Clause does not on its face proclaim itself the exclusive means of removal should not be deemed dispositive; by its very structure, the clause inescapably dictates its exclusivity as a removal device.

This reasoning is also relevant in considering the role played by the “good behavior” language in Article III. When viewed in an interpretive vacuum, it seems perfectly appropriate to construe this language as an independent basis for the removal of federal judges from office. If only because of its undermining effect on the limited nature of impeachment, a construction of the good behavior language as an independent means of judicial removal should be rejected.

It might be responded that this argument would be irrelevant were the good behavior language construed, not to authorize Congress to remove federal judges but rather to authorize the federal judiciary as a whole to remove them.¹²² Under this construction, the good behavior

¹²¹It should be noted that the logic of this argument applies as much to the removal of executive officials as it does to the removal of members of the federal judiciary.

¹²²This is the conclusion of Judge Harry Edwards. See Edwards Michigan article; discussion *infra* at .

language would not provide Congress with a means of circumventing the restrictions imposed by the Impeachment Clause. Rather, it would merely authorize another branch to remove federal judges, pursuant to an entirely distinct constitutional standard.

Such a construction of the good behavior language, however, is extremely dubious, for several reasons. Initially, it must be noted that nothing in the text of the good behavior language itself in any way indicates that it provides authorization exclusively to the judicial branch to invoke its terms. Moreover, to the extent one finds such evidence probative,¹²³ it should be noted that no historical data exists to support such a limited construction of the good behavior language. Thus, while as a textual matter it is at least conceivable to construe the good behavior language to create an alternative means of judicial removal, there exists no textual or historical basis to find such a power confined to the judicial branch. Finally, purely as a matter of constitutional policy it is questionable whether any advantage is gained by confining the good behavior removal authority to the judicial branch. One might at first believe that the threat to judicial independence posed by the judicial branch would not be as great as that posed by the legislative branch because the judicial branch is itself insulated from the majoritarian pressures which Congress is structured to reflect. But as commentators have widely recognized,¹²⁴ the judicial branch may itself present significant threats to the independence of individual federal judges. Judges appointed by a different President may well have very different political and ideological outlooks. Thus, there always exists the danger that judges appointed by one President would seek to pressure or intimidate judges

¹²³See discussion *supra* at .

¹²⁴See, e.g., Gerhardt. On occasion, members of the Supreme Court have also recognized these dangers. See Chandler (Douglas, J., dissenting). While Judge Edwards has been the leading advocate for the position that the good behavior language should be construed to provide exclusive removal power in the judicial branch, on other occasions he, too, has recognized the threats to the independence of individual judges posed by the judicial branch. See (Edwards, J., concurring).

appointed by a former President.

The minimalist nature of the good behavior language strongly suggests that it was not fashioned to create an independent means of judicial removal, regardless of which branch is supposedly to exercise that authority. The good behavior language includes not a word about who gets to determine whether the requirements of good behavior have been violated or what conduct actually constitutes a violation of the good behavior requirement. This is in stark contrast to the Impeachment Clause, which provides in meticulous detail the procedure by which the impeachment process is to be conducted and who is to conduct it. That clause also provides considerably more information than does the good behavior provision concerning the substantive standard for removal. It is difficult to believe that the very same framers who were so careful in structuring the standards and process of impeachment would so cavalierly have inserted an alternative mechanism for removal of judges that remains so open ended and unconstrained. Thus, the Supreme Court is undoubtedly correct when it concludes that the good behavior language does nothing more than provide a cross-reference to the impeachment process.¹²⁵

If, as I conclude, impeachment is the sole means of judicial removal, one must ask whether judges who have not been subjected to the impeachment process may nevertheless be subjected to criminal prosecution, at least when the result of that prosecution is imprisonment. As a practical matter, of course, imprisonment precludes a judge from performing the functions of his office. Yet it is widely assumed that federal judges may be subjected to criminal prosecution, even when they have not been previously subjected to the impeachment process.¹²⁶ The rationale appears to be that even though imprisoned, federal judges remain in office. While of course they are unable

¹²⁵See Northern Pipeline (quote).

¹²⁶ See Moore's Federal Practice.

to handle a caseload, presumably they still can be paid their salaries while in prison.¹²⁷

Obvious questions can be raised about this reasoning, since imprisonment may easily be viewed as a form of constructive removal. Perhaps the answer is that criminal prosecution should be deemed appropriate, as long as the criminal law which has been violated does not select out federal judges for uniquely negative treatment. For example, if Congress were to enact a law making it a crime solely for a federal judge to engage in specified behavior, then the imposition of criminal punishment could appropriately be viewed as an impermissible form of constructive removal that circumvents the impeachment process. However, if the federal judge is prosecuted for behavior that would also be a crime when committed by non-federal judges, then imprisonment should not be viewed as an impermissible removal from office.

In support of this suggested distinction, one might argue that the imposition of neutrally fashioned and applied criminal law to federal judges in no way threatens the judicial independence which the restrictions on the availability of impeachment are designed to avoid. In this sense, criminal prosecutions could properly be analogized to the impact of a generally imposed tax increase on federal judges in light of Article III's guarantee against salary reduction.¹²⁸ The Supreme Court has found such tax increases to be constitutional, even though in a certain sense they have the effect of reducing judicial salaries.¹²⁹ Yet if Congress were to impose a special tax solely on federal judges, presumably such a law would be held to be an unconstitutional reduction in judicial salaries. Under this approach, application of generally applicable criminal law to federal judges, not because imprisonment does not amount to constructive removal--in an important

¹²⁷See National Commission on Judicial Discipline, Report.

¹²⁸ See discussion *supra* ____.

¹²⁹[GET CITE.]

practical sense, it most certainly does--but rather because such neutral application does not present the threat to judicial independence that both Article III's guarantee of tenure and the restrictions imposed on the impeachment process were clearly designed to prevent.

This rationale, however, is not free from interpretive difficulties. It should be recalled that the tenure protection is not framed in contextual or conditional terms: A judge's tenure is protected, regardless of whether or not the threat to tenure is either motivated by or has the effect of undermining judicial independence in a particular situation, presumably because it is often impossible to determine in an individual case whether such threats actually exist. Yet the rationale premised on the selective nature of the criminal penalty seems to turn entirely on an attempt to distinguish situations in which constructive removal does present a threat to judicial independence from those in which it does not.

One possible response to this criticism is that the judge-based focus of the criminal penalty does not require use of a case-by-case inquiry into the specific motivations and harm to judicial independence. Instead, it establishes a priori rules: Criminal prosecutions based on laws that single out federal judges are unconstitutional, while those prosecutions of federal judges for violation of generally imposed prohibitions are constitutional.¹³⁰ Ultimately, one may have to accept this arguable departure from the exclusivity of the impeachment device, simply to establish that federal judges are not above the law. However, if it were at some point held that imprisonment does violate the tenure protection of Article III, Congress could possibly avoid the untenable conclusion that federal judges are above the criminal law by simply in the first instance resorting to the

¹³⁰ A possible exception to the non-contextual nature of this analysis would be that even where a federal judge is prosecuted for violation of a generally applicable prohibition, she would be permitted to attempt to establish selective discrimination in her particular prosecution. In such a situation, the aberration from a non-contextual approach would be have the effect of protecting, rather than undermining judicial independence.

impeachment process, as a predicate to ultimate criminal prosecution.

The issue of constructive removal posed by the imprisonment scenario also has relevance to some of the disciplinary remedies authorized by the Judicial Council Improvements Act,¹³¹ which include the possibility of the suspension of a judge's caseload.¹³² If such a remedy is imposed, certainly a strong argument can be made that it is tantamount to removal from office, even though the judge still retains both her official status and her salary. Moreover, for reasons already discussed,¹³³ the fact that it is the Judicial Councils, rather than Congress, that is imposing the loss of tenure¹³⁴ should make no difference for purposes of Article III: Both situations give rise to the very threats to judicial independence that Article III's protection of tenure was designed to avoid.¹³⁵ Hence, the availability of this remedy pursuant to existing federal legislation should be held unconstitutional.¹³⁶

IV. The Constitutionality of Judicial Discipline Not Affecting Salary or Tenure

The analysis of textual structure gives rise to a very different scenario when judicial

¹³¹[Statute cite].

¹³² [Get Cite].

¹³³See discussion supra at .

¹³⁴[Discuss role of Judicial Councils under the Act.]

¹³⁵[Discuss Edwards' Michigan article.]

¹³⁶[Discuss Chandler and dissent.]

discipline affects neither salary nor tenure.¹³⁷ In such situations, the salary and tenure protections of Article III play no role whatsoever in preventing invasions of judicial independence. As previously noted,¹³⁸ because the salary and tenure protections are an example of what I have described as “selective instrumentalism”, they cannot properly be construed to protect all conceivable threats to judicial independence. Thus, unless one of the other constitutional protections of judicial independence--including the Due Process Clause and the Vesting Clause of Article III--¹³⁹ is triggered, even those disciplinary measures which could be deemed to present real threats to judicial independence would have to be considered constitutional, as unwise as they might seem to be on a level of pure policy.

One can posit numerous hypothetical disciplinary measures which cannot be deemed to violate the salary and tenure protections yet which also give rise to consequences that are troubling, if not truly frightening, from the perspective of judicial independence. A law providing that federal judges who decide a constitutional issue in a specified manner will be deprived of their law clerks or their secretaries provides a vivid example. As long as law clerks and secretaries are not deemed to be part of a judge’s salary--and surely the Internal Revenue Service, for one, does not consider them to be such--then their removal cannot possibly be thought to violate the salary protection of Article III.

In any event, one could hypothesize a congressional statute that openly grants a salary

¹³⁷In certain instances, whether a particular form of discipline does, in fact, affect either salary or tenure may be the subject of debate. See discussion *supra*, at . The analysis that follows proceeds on the assumption that the forms of discipline in question do not affect either salary or tenure.

¹³⁸See discussion, *supra* at .

¹³⁹See discussion, *supra* at .

increase only to those federal judges who have decided a constitutional issue in the manner desired by Congress. Because nothing in Article III's protection against salary reduction in any way prohibits either a total congressional refusal to award judicial salary increases or even the award of a decision-based selective salary increase, that protection must be deemed irrelevant to the constitutionality of that legislation. This does not necessarily mean that such legislation should ultimately be held to be constitutional. But if it is to be held unconstitutional, it must be because it is found to violate some protection of judicial independence provided by the Constitution's text. It cannot be merely because we find that such legislation contravenes some abstract political conceptualization of judicial independence.

Whether this legislation would, in fact, violate some other constitutional guarantee of judicial independence is not entirely clear. It likely would violate procedural due process in future federal litigation presenting a parallel issue, because in such cases the judges could not be considered the neutral adjudicator required by the Due Process Clause.¹⁴⁰ This would be true, even of federal judges who had not been directly affected by the legislation. For once such legislation has been enacted, the possibility of undue external influence on the judicial decision making process is considerably more than abstract, hypothetical or potential. Rather, the danger that the judge will be influenced by factors other than her assessment of the merits of the case before her is as real as in cases such as Toomey¹⁴¹ and LaVoie¹⁴², where the judge stood to gain personally more from a decision one way rather than the other.

To be sure, one cannot be certain that, in each case, the judge will, in fact, be improperly

¹⁴⁰See Toomey v. Ohio; Redish & Marshall, *supra*; discussion *supra*, at .

¹⁴¹[Toomey cite].

¹⁴²[LaVoie cite]. See discussion *supra*, at .

influenced. But due process has not been held to require such a showing. Instead, for due process to be violated, there must exist only a temptation that would affect a reasonable decision maker.¹⁴³ No one could reasonably doubt that that would be true had Congress enacted a statute selectively revoking non-salary judicial benefits on the basis of disagreement with substantive decisions of the federal courts.

It is by no means certain, however, that due process would serve the exact same function that the salary and tenure protections would serve had they been applicable. For one thing, while presumably the judges themselves would have standing immediately to challenge the constitutionality of a congressional statute under the salary and tenure protections, the same would not seem to be the case when the Due Process Clause, rather than the salary and tenure protections, provides the constitutional source of the protection of judicial independence. The due process right is that of the future litigants, not the judges themselves. Thus, it may well be that when the Due Process Clause triggers the protection, the determination of constitutionality will have to await a future suit raising the very issue on which Congress premised its selective reduction in non-salary benefits.¹⁴⁴

A second potential difficulty caused by reliance on the Due Process Clause is the clause's prerequisite that either liberty, property or life be at stake. While the Supreme Court has often defined property interests broadly to include statutory entitlements,¹⁴⁵ this is a controversial

¹⁴³[quote from Toomey.]

¹⁴⁴Perhaps one could make an argument that the federal judges should be allowed to exercise third-party standing in order to raise the constitutional issue that would at some point in the future affect private litigants. However, third-party standing is heavily disfavored in the federal courts. [get cites].

¹⁴⁵See, e.g., *Goldberg v. Kelly*.

position on the Court¹⁴⁶ and possibly subject to revision. Thus, due process provides a somewhat limited check on congressional threats to judicial independence that do not implicate either salary or tenure.

It is also conceivable that the selective reduction in non-salary benefits would be considered a violation of the Vesting Clause of Article III. The vesting of the judicial power in the federal judiciary has already been construed to prohibit either executive or legislative reversal of particular decisions by the federal courts.¹⁴⁷ Applied in the present context, the argument would proceed in the following manner: Congressional retaliatory action based on specific decisions of the federal courts so interferes with the individual judge's resolution of the same issue in future parallel litigation that such action effectively removes the judicial power from the federal judge.

The success of this argument is somewhat uncertain. While in previous situations either Congress or an executive official was found to have reviewed and reversed specific decisions of the federal courts,¹⁴⁸ here the interference is not nearly so direct. To be sure, one could fashion a reasonable argument that the exercise of the judicial power requires that the decision maker not be influenced by extraneous forms of intimidation, and that the concrete fear of decision-specific retaliation by Congress constitutes just such extraneous intimidation. However, as a doctrinal matter at least, at best it remains unclear whether such indirect interferences constitute a violation of the Vesting Clause. Moreover, as a conceptual matter one might readily distinguish the situations in which another branch has retained power actually to reverse a holding from those in which the other branch has merely sought to influence the holding. In the former case, in no meaningful

¹⁴⁶See *Arnett v. Kennedy* (Rehnquist, J., dissenting).

¹⁴⁷See *Hayburn's Case*; *Plaut v. Spendthrift Farms, Inc.*

¹⁴⁸See sources cited in note 130.

sense does the actual final decision making power remain in the hands of the judge, while in the latter case the judge still retains ultimate power to decide the case.

V. Conclusion

There has been a great deal of scholarship on the issues of judicial independence, judicial impeachment, and judicial discipline--much of it quite good indeed. To this point, however, very little of it has sought to consider the constitutional implications of those issues primarily from the perspective of constitutional interpretation. For example, some of it has implicitly assumed that historical practice and framers' intent is to be deemed dispositive, without ever seeking to explain why, as a matter of interpretive theory, this should be the case.¹⁴⁹ Moreover, this scholarship has rarely sought to view the relevant provisions of the Constitution from a wholistic perspective, viewing each distinct provision as part of a coherent, organic synthesis of all of the different provisions.

Use of such an interpretive approach, I submit, would give rise to a number of interesting conclusions about the reconciliation of judicial independence with the need for appropriate legislative power to impose judicial discipline. Described in a summary manner, this analysis of constitutional text and textual structure establishes that where judicial discipline threatens either judicial salary or tenure, only impeachment provides a constitutionally valid mechanism of judicial discipline.¹⁵⁰

Additionally, the scope of the category of impeachable offenses must be narrowly confined, lest the threat of impeachment effectively consume the decision making independence

¹⁴⁹See, e.g., Gerhardt; Berger.

¹⁵⁰See discussion *supra*, at .

that Article III's protections of salary and tenure were so clearly designed to preserve.¹⁵¹ At the very least, the impeachment power must be construed to exclude overt decision-based retaliation, and a strong argument can be fashioned to support a view that confines the power's reach to behavior that is objectively criminal. Historical practice appears never to have been confined in such a manner. But the text of the Impeachment Clause easily lends itself to such a construction and if it is ultimately found that such a construction is necessary in order to avoid a significant undermining of the scope of constitutionally dictated judicial independence, then, pursuant to the textual-structural analysis I have advocated, the provision may be so interpreted.¹⁵²

When the inquiry turns to the constitutionality of judicial disciplinary measures which do not affect salary or tenure, the textual-structural analysis dictates a very different set of conclusions. In such cases, by their very nature the salary and tenure protections become irrelevant. Article III imposes not an over-arching protection of judicial independence against all conceivable threats, but instead employs what I have called a form of selective instrumentalism. In other words, the provision selects specific methods of potential invasion of judicial independence for absolute prohibition, as a means of preserving the broader goal of judicial independence in general. When such methods are employed by other branches, the protection forms an impenetrable shield. However, when judicial independence is threatened by other means, the selective instrumentalism model is of no help.¹⁵³

At such a point, other constitutional protections of judicial independence--such as the Due Process Clause or the Vesting Clause of Article III--may come into play. But both forms of

¹⁵¹See discussion *supra*, at .

¹⁵²See discussion *supra*, at .

¹⁵³See discussion *supra*, at .

independence protection suffer from restrictions or limitations that may reduce their effectiveness in protecting against congressional retaliatory or intimidating action.¹⁵⁴

It is certainly conceivable that if we were today writing on an entirely clean slate, we may choose methods of guaranteeing judicial independence that differ from the ones that appear in our Constitution. But this is a choice denied to us as long as the Constitution remains the law of the land. However, as long as an interpreter is willing to view the different portions of the Constitution that concern both judicial independence and judicial discipline as parts of an integrated whole and to interpret those separate parts in order to make common sense when viewed in this synthesized organic manner, the tools that our Constitution has provided us should prove to be sufficient.

¹⁵⁴See discussion *supra*, at .