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# JUDICIAL INDEPENDENCE: PLAYING POLITICS WITH THE CONSTITUTION

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## INTRODUCTION

I begin with a question: why have a conference on judicial independence? To find the answer, one need only read the newspapers. Judicial independence—as well as its political counterpart, judicial impeachment—is a hot topic these days because some in Congress have threatened to impeach judges for delivering unpopular decisions. So I take as my subject in this Essay the question of whether the constitutional provisions safeguarding judicial independence protect judges against impeachment for issuing rulings that Congress considers erroneous or even loathsome.

When we talk about judicial independence, we have to separate two questions. The first question is the extent to which judges are or ought to be independent of the political branches of government. May Congress impeach judges simply because it disagrees with their rulings? Despite the current popular inclination toward limiting this kind of judicial independence, I think this first issue involves a constitutional rarity—an easy question with a clear answer. Indeed, there is a fairly large body of literature that reaches the same conclusion. I will therefore begin my remarks with a relatively brief explanation of that clear answer.

Regardless of whether judges ought to be independent of the political branches, however, judges must still remain faithful to “the law.” In interpreting the Constitution, for example, judges cannot claim to be independent of that document. Nevertheless, there is a great deal of dispute about what it *means* to be faithful to the Constitution.<sup>1</sup> This second question is in fact linked to the first: much of the controversy about the extent to which the political branches can or should control federal judges stems from

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1. For an extended discussion of this question, see *Symposium: Fidelity in Constitutional Theory*, 65 *FORDHAM L. REV.* 1247 (1997).

disagreement with the way in which those judges have interpreted the Constitution.

Sometimes this latter debate is framed in terms of an attack on (or a defense of) judicial activism. As Professor Friedman suggests in his contribution to this Symposium, attacks on judicial activism have a long history. The most recent version of the debate has raged, basically unabated, for more than forty years. I cannot imagine that after forty years I—or anyone else for that matter—have anything very new to add, but that is apparently what I was invited here to do. So I will give you a brief summary of my views on appropriate methods of constitutional interpretation. Again, however, I will only be echoing what has been said before.

Now you might think that I would be content to discuss one easy question and one hard question, both of which have been extensively discussed in the legal literature, and leave it at that. Unfortunately, as a law professor, I am constitutionally incapable of taking the easy route. At the end of my remarks, therefore, I will return to the linkage between the two questions, and suggest that the answer to the easy question in fact points us toward an answer to the harder one.

## I.

We start with something of a conundrum. If we do not yet know the appropriate method for interpreting the Constitution, how can we determine whether the Constitution creates a politically independent judiciary? To sidestep that problem, I will examine the question using each of the three primary contenders for the title of “best interpretive method.” Those methods are textualism, originalism, and pragmatism, and it turns out that all three produce the same answer: federal judges are constitutionally designed to be almost completely independent of the political branches. While the meaning of the Constitution is unclear with regard to a number of questions about judicial independence—including, for example, whether impeachment is limited to indictable offenses and whether the judiciary can remove or otherwise discipline its own members<sup>2</sup>—there is little

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2. See, e.g., RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 78-79 & n.131 (1973) (stating that impeachment is not limited to indictable offenses); IRVING BRANT, *IMPEACHMENT: TRIALS AND ERRORS* 8 (1972) (stating that impeachment

doubt that the Constitution severely limits the political branches' control over the judiciary.

### A. *Textualism*

Textualism is a simple doctrine. A text, including the Constitution, means what it says—no more, no less. The text of Article III of the Constitution states:

The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.<sup>3</sup>

Federal judges need not stand for reelection or reappointment, no one can dock their pay in punishment for anything they do, and they cannot be fired—the Constitution calls it impeachment—as long as they remain on good behavior.

What does this text tell us? It tells us quite clearly that judges, once appointed, are largely independent of the political branches. The only ambiguity lies in the term “good behavior.” One might read that term to mean that a federal judge can be impeached whenever the Congress dislikes or disagrees with something that judge does; such an interpretation would, of course, significantly diminish judicial independence. On the other hand, one might read “good behavior” to limit impeachment to extreme cases of judicial misconduct. Which of these two readings of the text one adopts determines whether, under the Constitution, judges are independent of the political branches.

Textualism is notorious for its inability to decide between two plausible interpretations. As we will see when we turn to the more difficult question of interpretive approach, the Constitution is written in broad, vague, and sometimes archaic language. It cannot be read like a shopping list. (My colleague Dan Farber has written a charming essay showing that even a shopping list

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is limited to indictable offenses); Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 213-14 (1993) (explaining that judiciary can remove its own members); Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 152-53 (explaining that judiciary cannot remove its own members). See generally MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (1996) (reviewing these and other disputes).

3. U.S. CONST. art. III, § 1.

cannot be read like a shopping list; it, too, must be interpreted.<sup>4</sup>) “Good behavior” is exactly such language—common in the late Eighteenth Century and almost impenetrable in the late Twentieth.

Nevertheless, in this case there are good (textualist) reasons to prefer the interpretation which better protects judicial independence. For one thing, such an interpretation is more consistent with the surrounding text: why prohibit Congress from diminishing judicial salaries and simultaneously permit Congress to impeach at will?

It is also more consistent with other provisions of the Constitution. The text of Article II indicates that all “civil Officers” of the United States may be impeached only for “Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>5</sup> Scholars have almost uniformly concluded that, because judges are civil officers, judges cannot be removed except under the provisions of Article II.<sup>6</sup> Thus, judicial misbehavior cannot include anything that does not fall into the category of “high crimes and misdemeanors.” While this still leaves two questions—might “good behavior” create an even *stricter* standard for impeachment, and are “high crimes and misdemeanors” limited to indictable offenses?—I need not answer either of them. Neither a good faith but erroneous interpretation of the Constitution, nor an unpopular judicial philosophy, can possibly be considered a high crime or misdemeanor.

In addition, Article I provides that all impeachments, including the impeachments of judges, are to be “tried” in the Senate.<sup>7</sup> While we cannot be sure what is meant by requiring that impeachments be tried,<sup>8</sup> it does connote a seriousness that counsels against reading good behavior elastically. Finally, an explanation for the use of the term “good behavior” may be found by comparing it to the terms of office of elected officials. The

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4. Daniel A. Farber, *The Deconstructed Grocery List*, 7 CONST. COMMENTARY 213 (1990).

5. U.S. CONST. art II, § 4.

6. See, e.g., Maria Simon, *Bribery and Other Not So “Good Behavior”: Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 COLUM. L. REV. 1617, 1621 n.14 (1994) (citing sources); GERHARDT, *supra* note 2, at 83-86; Shane, *supra* note 2, at 241; Ziskind, *supra* note 2, at 151. *But see* BERGER, *supra* note 2, at 122-80.

7. U.S. CONST. art. I, § 3.

8. See *Nixon v. United States*, 506 U.S. 224 (1993).

Constitution provides that the President, Vice President, and members of Congress all serve for fixed terms.<sup>9</sup> Good behavior was an Eighteenth Century signal that the terms of office of judges were not fixed, but permanent. Thus, we would be misinterpreting the words if we took them to provide broad congressional oversight of judges' "behavior."

Moreover, contemporaneous documents use the term "good behavior"—or its opposite, "misbehavior"—in contexts that strongly point toward very limited political control. The Maryland Constitution of 1776, for example, grants judges and other officials a right to hold office "during good behavior," and makes them "removable only for misbehavior, on conviction in a Court of law."<sup>10</sup> Here good behavior is equated with avoiding criminal convictions, a standard very protective of judicial independence.

The Massachusetts Constitution of 1780—which, incidentally, although significantly amended, is still in effect—contrasts "good behavior" with a more flexible length of tenure. It provides that judges shall hold their offices during good behavior, but it notes that "nevertheless" they may be removed by the governor acting in concert with "the council" and "both houses of the legislature."<sup>11</sup> The "nevertheless" is telling: the drafters of the Massachusetts Constitution knew that by providing for discretionary removal they were contradicting the usual meaning of tenure for good behavior. It also confirms that good behavior served primarily as a signal that the term of office was not fixed. Both the language of the Massachusetts Constitution and the contrast between it and Article III of the U.S. Constitution suggest, again, that we should read good behavior in Article III as limiting judicial impeachment to egregious wrongdoing.

Finally, we might interpret good behavior by looking at potential alternative formulations. There are many much better and clearer ways to provide Congress with discretion to remove judges it does not like, including the language in the Massachusetts Constitution. Indeed, language very much like

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9. See U.S. CONST. art. I, § 3; *id.* art. II, § 1.

10. MD. CONST. art. XL, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 1696-97 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

11. MASS. CONST. of 1780, ch. 3, art. I, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 10, at 1905. The "council" is an advisory body to the governor. See *id.* at ch. 2, art. I.

that of the Massachusetts Constitution was proposed during the Constitutional Convention, and was soundly defeated. If absolute congressional discretion was considered too broad, different mechanisms could have been adopted to limit congressional discretion somewhat, including supermajority requirements, recall provisions, and the like. We can find many examples of similar devices in state constitutions or elsewhere in the federal Constitution, but not in Article III. It therefore seems unlikely that good behavior is a synonym for either limited or unlimited discretion.

On the other hand, it is difficult to envision language—other than the good behavior language actually used—that would simultaneously protect judicial independence and yet allow for the removal of seriously criminal or corrupt judges. Listing offenses for which judges might be impeached is dangerous, for, as James Iredell said in another context, “[l]et any one make what collection or enumeration . . . he pleases, I will immediately mention twenty or thirty more . . . not contained in it.”<sup>12</sup> Corruption, as the founding generation well knew, is infinitely ingenious, always taking new forms to evade old strictures. Better not to make a list, lest it be thought exhaustive, allowing some scoundrel to escape impeachment for a deed not on the list.

Thus, while there exist much better textual means to ensure congressional discretion at various levels, there is no better way than good behavior to create judicial independence while still protecting against judicial corruption. From a textualist perspective, then, it looks as if the Constitution deliberately creates a federal judiciary that is as independent as possible of the political branches. Impeachment is limited to serious judicial misconduct.

### *B. Originalism*

Originalists recognize that ambiguities cannot always be resolved by pure textual analysis and suggest that the Constitution should mean what its framers intended it to mean. There are, of course, serious questions about the identity of “the

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12. 4 THE DEBATE IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 167 (Jonathan Elliot ed., 2d ed., J.B. Lippincott Co. 1941) (1836) [hereinafter ELLIOT'S DEBATES] (remarks of James Iredell in the North Carolina Ratifying Convention, July 29, 1788).

Framers”—those who drafted the Constitution, those who ratified it, or the population at large—but fortunately it makes little difference to the current question. There is no doubt that the entire founding generation interpreted the Constitution as making federal judges independent of the political branches. Indeed, one point of contention between those who supported the Constitution and those who opposed it was whether an independent federal judiciary was wise or necessary in a republic.

Even for originalists, of course, the text itself provides good evidence of the original meaning. Thus, the analysis in the previous section should go a long way toward demonstrating that an originalist approach yields an independent judiciary.

But beyond the text, there is also other evidence that the founding generation thought the Constitution created a fully independent judiciary that would not be subject to control by the elected branches. Indeed, the evidence for this proposition is so voluminous that I can only present a few examples here.

Let us begin with the Constitutional Convention itself. Late in the Convention, John Dickinson of Delaware moved to amend what became Article III by adding, after “‘good behavior,’” “‘provided that they may be removed by the Executive on the application by the Senate and House of Representatives.’”<sup>13</sup> In the course of the brief debate over the proposed amendment, Gouverneur Morris of Pennsylvania made explicit the reading of good behavior that I suggested a few moments ago: he said that he “thought it a contradiction in terms to say that the Judges should hold their offices during good behavior, and yet be removeable without a trial.”<sup>14</sup> Confirming the idea that Article III as written protects judges from political control, Edmund Randolph of Virginia opposed Dickinson’s motion “as weakening too much the independence of the Judges.”<sup>15</sup> The motion was defeated by a vote of seven to one.

A separate discussion of Article III also indicates that the delegates to the Convention meant to protect judicial independence. The original draft of the judiciary article prohibited Congress from either decreasing or *increasing* the

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13. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 536 (Ohio Univ. Press 1966).

14. *Id.* at 537.

15. *Id.*



salaries of judges while in office. In mid-July, Gouverneur Morris moved to eliminate the ban on increasing salaries.<sup>16</sup> The entire debate over the motion turned on whether allowing Congress to increase judicial salaries—which all delegates agreed might become necessary due to currency fluctuations—endangered the independence of the judiciary.<sup>17</sup> Although the delegates ultimately voted in favor of Morris's motion, every delegate who spoke denied that the judiciary should be in any way dependent on the political branches.<sup>18</sup> The dispute turned on the factual question of whether the proposed deletion did make them dependent.

During the debates over ratification, both proponents and opponents of the Constitution assumed that it protected judges from the political branches. The most extensive discussion of the tenure and removal of judges is found in Alexander Hamilton's *Federalist*, Nos. 78 and 79. In these papers, Hamilton frequently described judges as holding "permanent" tenure, and spoke of the "permanency" of both their offices and their salaries.<sup>19</sup> Both types of permanence, he said, are necessary to ensure the independence of the judiciary. The only "precautions for [judicial] responsibility," Hamilton continued, are to be found in "the article respecting impeachments."<sup>20</sup> And only "malconduct" justified impeachment.

Other participants in the debates over ratification agreed. James Wilson, in the Pennsylvania ratifying convention, compared the proposed federal Constitution to that of Pennsylvania. He suggested that in Pennsylvania, "the independence of the judges is not properly secured, . . . [but that t]his is not the case with regard to those appointed under the general government; for the judges here shall hold their offices during good behavior."<sup>21</sup> Brutus, an Antifederalist writer, objected to Article III on the ground that it made judges *too* independent: "There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of

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16. *See id.* at 317-18.

17. *See id.* at 317-18.

18. *See id.*

19. THE FEDERALIST Nos. 78, 79 (Alexander Hamilton).

20. *Id.* at No. 79.

21. 2 ELLIOT'S DEBATES, *supra* note 12, at 480.

every power under heaven.”<sup>22</sup> Although not technically part of the ratification debate, James Wilson’s 1791 lectures on law—a seminal analysis by a delegate to the Philadelphia convention who was also a major participant in the debates over the Constitution—also defended judicial independence.<sup>23</sup>

It is not surprising that the intent of the founding generation seems so obvious and uniform. Eighteenth Century Americans were reacting against the abuses of an English system that viewed removal of judges as a wholly political matter. Although the 1701 Act of Settlement gave British judges some independence, the King frequently removed judges with whom he was displeased, especially in the colonies.<sup>24</sup> Needless to say, this led to a rather cowardly judiciary, and the founding generation was determined to avoid the same result.<sup>25</sup>

Even after 1789, there seemed to be little doubt that judges were wholly independent of the legislature, and could not be removed because of disagreements. The debate over the 1802 repeal of the 1801 Circuit Courts Act would have been a great deal briefer had the participants thought that Article III allowed easy congressional removal of federal judges. Instead, Congress spent the better part of a month discussing whether the total abolition of particular inferior courts—in this case, courts of appeals—could constitutionally end the tenure of the judges who sat in them. One comment in that debate is especially enlightening. Senator John Ewing Colhoun of South Carolina defined good behavior: it is, he said, “to act with justice, integrity, ability and honor, and to administer justice speedily and impartially . . . .”<sup>26</sup> There is not a hint in the debate that

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22. *Essays of Brutus*, in 2 THE COMPLETE ANTI-FEDERALIST 438, § 2.9.189 (Herbert J. Storing ed., 1981).

23. See James Wilson, *Lectures on Law* (1791), in 1 THE WORKS OF JAMES WILSON 296-97 (Robert G. McCloskey ed., 1967). In addition to his participation in the drafting and ratification of the Constitution, of course, Wilson served on the United States Supreme Court.

24. See generally PETER CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805* (1984); Ziskind, *supra* note 2, at 135.

25. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* 159-61 (1969); John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 10-12 (1970).

26. ANNALS OF CONGRESS, Jan. 19, 1802, at 140 (Dec. 7, 1801-Mar. 3, 1803) (Gales & Seaton, eds. 1851). Colhoun was a Republican and, thus, would have been unhappy with the new Federalist judges appointed under the 1801 Act. He was also John C. Calhoun’s cousin. See BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-1989, at 809 (1989).

misbehavior includes good faith misinterpretations of the law. (The Supreme Court ultimately upheld the 1802 statute, but without considering the question of what to do with the judges whose offices had been abolished.<sup>27</sup>)

The first two judicial impeachment trials under the United States Constitution add some admittedly ambiguous evidence. Federal District Judge John Pickering of New Hampshire was impeached in 1803 and convicted in 1804. Supreme Court Associate Justice Samuel Chase was impeached in 1804 and acquitted by the Senate in 1805.<sup>28</sup> Both were outspoken Federalists who had angered the Republican Congress by their behavior on and off the bench. Moreover, the official charges against both men were fluid enough to encompass broad political disagreement.

Chase was particularly despised. He had—in the view of most Republicans—delayed justice in order to campaign for Federalist John Adams. He had (and again, this is the Republican point of view) malevolently issued erroneous legal rulings in order to ensure convictions in cases involving two of the Federalist statutes Republicans most despised: the Sedition Act of 1798 and the federal property tax which sparked minor rebellions in Pennsylvania. The enactment of these two statutes, in fact, probably ultimately led to the Federalist defeat in 1800. Chase had also frequently and intemperately castigated the Republicans, their recently enacted judiciary bill, and their state counterparts' move toward universal suffrage. In a charge to a Baltimore grand jury, Chase had accused Republicans of moving the nation toward a "mobocracy, the worst of all possible governments," arguing that "the bulk of mankind are governed by their passions and not by reason."<sup>29</sup> Such sentiments were an anathema to the Jeffersonian Republicans.

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27. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

28. The impeachments of Chase and Pickering are described and discussed in the following sources, among others: JAMES HAW ET AL., *STORMY PATRIOT: THE LIFE OF SAMUEL CHASE* 209-41 (1980); STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* (1991); WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 1-113, 127-28 (1992); Lynn W. Turner, *The Impeachment of John Pickering*, 54 *AM. HIST. REV.* 485 (1949); HOFFER & HULL, *supra* note 24, at 206-20, 228-55.

29. STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY* 224-27 (West 3d ed. 1995).

Thus, some have argued that the impeachments of Chase and Pickering were primarily political in nature, and that both men were impeached for their views, not their misconduct.<sup>30</sup> In this, they echo John Quincy Adams, who wrote in his diary a week after Chase's acquittal: "[T]his was a party prosecution . . . [and] a systematic attempt upon the independence and powers of the Judicial Department."<sup>31</sup>

Nevertheless, there are some difficulties with such a conclusion. Pickering, while a thorn in the Republicans' side, was also undeniably mentally incompetent by the time he was impeached. Even the most impartial and principled Senator would have been justified in voting to remove him. Chase, who was the more hated of the two, was ultimately acquitted by the Republican-controlled Senate. Apparently, not enough Republicans could bring themselves to convict on politics alone. Every Republican Senator voted not guilty on at least one charge, and six voted not guilty on all eight. A number of the six had voted the previous year to convict Pickering: they must have seen a difference between an insane judge and an independent one. Early on, then, the Senate balked at using impeachment as a tool to control judges who were merely errant, rather than criminal, corrupt, or incompetent.

Finally, there is the evidence from over two hundred years of American practice. Since the Constitution was ratified, only twelve judges have been impeached by the House and only seven of the twelve convicted by the Senate. All of those actually convicted were impeached for serious misconduct, ranging from habitual drunkenness and senility to conviction for criminal offenses.<sup>32</sup> While historical evidence does not conclusively establish whether impeachment is limited to indictable offenses—and the House has impeached for considerably less serious misconduct—the Senate is much less likely to convict if no indictable offense is charged.<sup>33</sup> One scholar concludes that, with one arguable exception, "no conviction . . . has yet been based solely on partisan grounds or at least along the lines of a

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30. See, e.g., CHARLES WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY 282 (1922); HAW ET AL., *supra* note 28, at 240-41; see also BERGER, *supra* note 2, at 95-97.

31. JOHN QUINCY ADAMS, MEMOIRS 370-71 (1874).

32. See GERHARDT, *supra* note 2, at 185 n.4.

33. See *id.* at 53.

strictly partisan vote."<sup>34</sup> Moreover, other than Chase, who was ultimately acquitted, no federal judge has ever been impeached for his or her judicial philosophy or opinions.<sup>35</sup>

While not strictly evidence of the intent of the Founders, two hundred years of practice suggests that generations of Americans have viewed impeachment as an extremely limited option. Had impeachment for constitutional misinterpretation been thought appropriate, John Marshall would have been impeached for *Marbury v. Madison*,<sup>36</sup> Roger Taney would have been impeached for *Dred Scott*,<sup>37</sup> and all Four Horsemen as well as both Earl Warren and William O. Douglas would have been impeached several times over (albeit by different factions!). That the numerous proposals to impeach these often unpopular Justices never garnered sufficient support is further evidence that our constitutional traditions do not contemplate judicial rulings or philosophy as grounds for impeachment.

Thus, an originalist approach yields the same answer as a textualist approach: judges are constitutionally independent of the political branches, and may not be impeached merely for objectionable decisions.

### C. Pragmatism

Legal pragmatism is a more eclectic approach to constitutional interpretation than textualism or originalism. Pragmatists consult a broad array of considerations in order to interpret the Constitution. A pragmatist finds no formula by which to decide difficult constitutional questions, but instead internalizes legal precedents, cultural traditions, moral values, and social consequences, creatively synthesizing them into the new patterns that best suit the question at hand. Pragmatist judging is an act of controlled creativity. Like writing at its best, it both draws on

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34. *Id.* at 54. The arguable exception is Judge Halsted Ritter, who was impeached and convicted in 1936. Some scholars argue that the House fabricated impeachable offenses to mask political disagreement with Judge Ritter's rulings. Others disagree. Compare ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 286 (1992) (stating that Ritter may have been impeached for political reasons), and Jacobus ten Broek, *Partisan Politics and Federal Judgeship Impeachment Since 1903*, 23 MINN. L. REV. 185, 198-99 (1939) (discussing national politics and Ritter's removal), with GERHARDT, *supra* note 2, at 54, 56.

35. See GERHARDT, *supra* note 2, at 164.

36. 5 U.S. (1 Cranch) 137 (1803).

37. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

and evokes memories of what has gone before, but by innovation rather than by mimicry. It simultaneously acknowledges our debt to the past and denies that the past should control the present. The task of the pragmatist judge is to reconcile a flawed tradition with an imperfect world so as to improve both and do damage to neither. If this sounds impossible, you might compare it to the best advice I have heard on raising children: be consistent and be flexible. It sounds impossible, but parents do it every day. And judges make pragmatist decisions every day.

Since both the text and the original intent of the Founders are among the relevant considerations, the foregoing discussion would help point a pragmatist in the direction of judicial independence. Pragmatists would go further, however, and argue that judicial independence is a necessary attribute of a constitutional democracy. In a democracy, the majority rules, but in a *constitutional* democracy, there are some things that even the majority is not permitted to do. And an independent judiciary is the only way to enforce those limits. As the Founders wisely recognized, without an independent judiciary, there is no check on majority tyranny. A judiciary controlled by the legislature cannot serve to check the legislature's own excesses.

The best way to illustrate this argument—which I am certainly not the first to make—is to compare the state and federal judiciaries. State judges, unlike federal judges, are often subject to electoral pressures. Does this compromise their ability to administer justice or to enforce the less popular or more anti-democratic aspects of the Constitution? Professor Bright, among others, has shown that in many cases the lack of independence of state judges can result in either less protection of individual rights, or, if the judge withstands the pressure, removal of the judge by the electorate.<sup>38</sup> We should not be surprised by such findings. After all, as one scholar has pointed out, we generally do not trust decisions made by those with an interest in the outcome: “Imagine, for a moment, that the Chicago Cubs

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38. See, e.g., Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1 (1997); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995); Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117 (1987); Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 523 (1996).

announced that from this point forward, they would hire umpires, unilaterally determine their salaries, and retain unreviewable discretion to fire them at any time. Can anyone imagine that we could trust a call at second base?"<sup>39</sup>

A few examples should suffice to round out the pragmatist argument in favor of judicial independence. First, of course, there were the California votes recalling two supreme court justices for their reluctance to uphold the imposition of the death penalty. Second, citizens in other states have also waged successful campaigns to oust judges who have upheld the rights of criminal defendants.<sup>40</sup>

Finally, a pair of Minnesota cases shows just how pervasive the electoral influence can be. In 1991, the Minnesota state legislature passed a law prohibiting employers from hiring permanent replacements for striking workers. I have been assured by my labor law colleagues that not a single labor law expert in the country would have found this statute constitutional, because it was so clearly preempted by the National Labor Relations Act.<sup>41</sup>

You might ask why the Minnesota legislature would pass an undeniably unconstitutional statute. It might help you to understand if you know that there is no Democratic Party in Minnesota: the party that opposes Republicans is called the DFL, or Democratic-Farmer-Labor Party. Although Minnesota Republicans recently changed their name from I-R, or Independent-Republicans, the DFL has steadfastly adhered to its unique name. At the time the statute banning striker replacements was enacted, the DFL controlled the state legislature, and strikebreaking was a *big* issue in Minnesota.

In any case, with the unconstitutional statute on the books, two separate lawsuits were filed in Minnesota. Both plaintiffs sought injunctions against the new anti-strikebreaker provision. Within a few months of each other, both judges issued decisions. Federal District Judge James Rosenbaum enjoined the provision

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39. Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 333 (1988).

40. See, e.g., Ronald J. Tabak, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?* 21 FORDHAM URB. L.J. 239 (1994) (referring to Chief Justice Exum's Comments); Bright, *supra* note 36, at 11.

41. 29 U.S.C. §§ 151-169 (1994).

as preempted.<sup>42</sup> Minnesota state trial court judge Lawrence Cohen upheld the Minnesota statute.<sup>43</sup> Both judges' rulings were affirmed by their respective courts of appeals.<sup>44</sup> It took an appeal to the Minnesota Supreme Court to finally reverse Judge Cohen's clearly erroneous judgment.<sup>45</sup> There is no rational explanation for Judge Cohen's failure to see the obvious, but it is likely that had he ruled against the striker replacement law, he would have faced a serious challenge in the next election.

There are many other examples of state court judges who lacked the courage or the will to defy popular sentiment, or who did so and paid the price. I leave you to identify your own favorites. Cases involving local athletes or well-connected businessmen on the one hand, or criminals, minorities, or political dissidents on the other, are a fruitful avenue of research.

Notice that my point here is not that federal court judges are always right or state court judges always wrong. Indeed, after twelve years of conservative Republican appointees to the federal bench, I might be more inclined to agree with the substantive views of state court judges than with those of federal court judges. But whatever you might think of Justice Scalia's rulings, for example, you cannot accuse him of bending to popular sentiment—nor can he be punished for his failure to do so. If his interpretation of the Constitution is wrong, it is not because the legislature is looking over his shoulder as he writes.

Thus, the pragmatist would wholeheartedly agree that judicial independence of the popular branches is established by the Constitution, and that judges cannot be impeached merely because the legislature disagrees with their rulings.<sup>46</sup>

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42. See *Employers Ass'n, Inc. v. United Steelworkers of Am.*, 803 F. Supp. 1558 (D. Minn. 1992), *aff'd*, 32 F.3d 1297 (8th Cir. 1994).

43. See *Midwest Motor Express, Inc. v. International Bhd. of Teamsters*, 139 LAB. REL. REP. M. 2563 (Minn. D. Ct. 1992), *aff'd*, 494 N.W.2d 895 (Minn. Ct. App. 1993), *rev'd*, 512 N.W.2d 881 (Minn. 1994).

44. See *Employers Ass'n, Inc. v. United Steelworkers of Am.*, 32 F.3d 1297 (8th Cir. 1994); *Midwest Motor Express, Inc. v. International Bhd. of Teamsters*, 494 N.W.2d 895 (Minn. Ct. App. 1993).

45. See *Midwest Motor Express, Inc. v. International Bhd. of Teamsters*, 512 N.W.2d 881 (Minn. 1994).

46. For other recent defenses of judicial independence, see, for example, Penny J. White, *It's a Wonderful Life, or Is It? America Without Judicial Independence*, 27 U. MEM. L. REV. 1 (1996); Victor Williams, *Third Branch Independence and Integrity Threatened by Political Branch Irresponsibility: Reviewing the Report of the National Commission on Judicial Discipline and Removal*, 5 SETON HALL CONST. L.J. 851 (1995).



## II.

We turn, then, to the second question. Concluding that judges are fully independent of the political branches does not set them completely adrift. They are still anchored to the Constitution, and their decisions must remain faithful to that document. Is the required faithfulness limited to text and original intent?

The simple answer is that it would be impossible to interpret the Constitution at all if we limited ourselves to textualism and originalism. It is not that textualism and originalism provide bad or incorrect answers; in most cases they cannot provide *any* answers. Neither of those methods provides sufficient guidance to resolve the sorts of constitutional disputes that arise today.

Let us begin with textualism. It is easy to use a textualist analysis to determine that a thirty-year-old is ineligible to serve as president. It is, as we have seen, somewhat more difficult—but perhaps still possible—to use a textualist analysis to determine that judges may not be impeached for their judicial philosophies. However, the fact that some participants in this symposium apparently disagree with my textualist conclusion on that question provides a perfect illustration of the difficulties inherent in textualist analysis. And beyond these sorts of rather clear textual provisions, textualism becomes completely incoherent.

The framers simply spoke a different language than we do. They were animated by different concerns, understood both law and government in different ways, and used words to mean different things. To us, good behavior is applied to prisoners wanting an early release and children wanting a later bedtime. To the framers it meant something else, but because we no longer speak their language, it is difficult to know exactly what they meant. And the difficulty in interpreting good behavior does not even approach the problems we confront when we turn to such phrases as “privileges or immunities,” or “rights . . . retained by the people,” or “the equal protection of the laws.”

To take a basic example, how are we to understand either the Ninth Amendment’s exhortation that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,” or the Fourteenth Amendment’s ban on the abridgement of “the privileges or

immunities of citizens of the United States"?<sup>47</sup> The original meaning of the fundamental terms in these clauses has become incomprehensible because our view of law differs so greatly from that of the founders. The founders believed in natural law and natural rights: in the "brooding omnipresence" of law that we modern, unremitting positivists finally laid to rest in 1938.<sup>48</sup> That belief underlay their use of both the "rights . . . retained by the people," and the "privileges or immunities" of citizens. How are we to interpret those phrases if we no longer share the framers' worldview? It is, as John Ely once suggested, as if the framers had incorporated in the Constitution some provision respecting ghosts.<sup>49</sup> We could not give any textualist meaning at all to such a provision because we do not believe in ghosts.

This problem runs through almost all the provisions of the Constitution that give rise to lawsuits. Indeed, the rare provisions that are textually easy—such as the age limit for the president—engender no disputes because they *are* easy. Unfortunately, that fact does not help us when we have to interpret the textually difficult clauses.

As an aside, I cannot resist noting here that even textualists often cannot seem to remain faithful to their preferred approach. Justice Scalia, for example, who claims to be a textualist, is perfectly comfortable ignoring the plain meaning of even clear constitutional text when it suits his purpose. What textualist would think that language prohibiting the federal judiciary from adjudicating suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State"<sup>50</sup> would also prohibit a suit against a state brought by one of its own citizens? Justice Scalia and at least four of his brethren reach just such a counter-textual interpretation.<sup>51</sup>

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47. U.S. CONST. amends. IX, XIV, § 1.

48. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); see also *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . .").

49. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 39 (1980).

50. U.S. CONST. amend. XI.

51. See, e.g., *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29 (1989) (Scalia, J., dissenting); *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114 (1996). For the textualist-originalist argument against this bizarre interpretation, see *Seminole Tribe*, 116 S. Ct. at 1145-85 (Souter, J., dissenting) and sources cited therein.

It should not surprise us that a document written in the Eighteenth Century—or even in the middle of the Nineteenth—is textually inscrutable at the end of the Twentieth. What is surprising is the number of people who continue to insist that textualism is not only *a* valid interpretive method, but is the *only* valid interpretive method.

As for originalism, divining the original intent of the founders is no easier than ascertaining the meaning of their text, and for many of the same reasons. Whatever evidence we have of the original intent is itself written in often archaic language and based on the same incomprehensible worldview that makes the text so difficult to understand. Moreover, even identifying relevant evidence poses difficulties, ranging from disputes about who should count as a framer to doubts about the integrity of the historical record. And why should we assume that “the framers” had a monolithic opinion on the Constitution they adopted? Maybe they disagreed with one another. Finally, even once we pass over these initial hurdles, the historical evidence is still hopelessly ambiguous.

After thorough and careful historical research, respected scholars disagree with one another on the original meaning of almost every important constitutional provision. Does the Eleventh Amendment apply to all suits against any state, only to suits by non-citizens of the state, or only to diversity suits? There are scholars who support each of the three positions.<sup>52</sup> Does the Fourteenth Amendment incorporate any or all of the Bill of Rights, so that the provisions of the Bill of Rights limit states as well as the federal government? The same historical evidence has led different scholars to different conclusions.<sup>53</sup> Did those who

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52. See, e.g., William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989), Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983), William A. Fletcher, *Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988).

53. Compare MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 92-105 (1986), with Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 134 (1949).

adopted the Establishment Clause mean to bar any government aid to religion, or only government preference for particular religions? Scholars disagree.<sup>54</sup> Did those who adopted the Equal Protection Clause mean to prohibit segregated public schools? Again, scholars disagree.<sup>55</sup>

Originalism, like textualism, is simply not a viable interpretive method. It does not matter whether we *ought* to defer to the views of long-dead aristocrats from a society that excluded large portions of the population from voting. The hard truth is that we *cannot* defer to their views, because we cannot identify those views with any confidence. The text and the original intent are starting points for constitutional interpretation, but they cannot be a stopping point.

### III.

There is one final issue raised by my exploration of these two questions of judicial independence, and one final linkage between the two. I began by saying that judges have an obligation to remain faithful to the Constitution. Might those who wish to impeach a judge for wrongheaded decisions argue that such decisions constitute faithlessness, and can thus serve as grounds for impeachment? Judges, they might suggest, are independent only to the extent that they remain faithful to the Constitution, and judges who pick the wrong interpretive method—or even simply reach the wrong result—are unfaithful and therefore impeachable. In other words, the second question trumps the first.

But for anyone who counts faithfulness to the Constitution as an important value, that argument gets things exactly backwards. It is the answer to the first question that helps us determine the answer to the second. The Constitution tells us, in no uncertain terms, that political control over the judiciary shall

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54. Compare ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982), and Robert L. Cord & Howard Ball, *The Separation of Church and State: A Debate*, 1987 UTAH L. REV. 895, with Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986).

55. Compare Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 950-53 (1995), with Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955), and Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995).

be extremely limited. Before we conclude that impeachment is warranted in any given case, we ought to measure it against that constitutional background. In order to be faithful to the Constitution, we must ask ourselves whether such an impeachment would undermine the Constitution's clear directive that judges should be independent.

In other words, is it consistent with judicial independence to impeach judges for adopting the wrong approach to interpreting the Constitution? That depends on how wrong the approach is, and how certain we are that reasonable people could not disagree. Impeaching judges for their judicial philosophy puts ultimate control over the important question of appropriate methods of constitutional interpretation in the hands of Congress. It significantly diminishes a judge's ability to act, in good faith, in the manner that Colhoun described as good behavior: "to act with justice, integrity, ability and honor, and to administer justice speedily and impartially . . . ."<sup>56</sup> As long as reasonable people disagree on whether a judge's philosophy or interpretive approach is valid, impeaching him for that philosophy is inconsistent with the clear meaning of the Constitution.

Let me turn the tables for a moment. I have just argued that neither textualism nor originalism is a valid interpretive method. The only correct method of interpretation is pragmatism. Does that mean that Justice Scalia should be impeached for his consistent rejection of the pragmatist approach? Of course not. The Constitution's guarantee of judicial independence entitles him to the benefit of the doubt—the same benefit of the doubt that should be given to judges who adopt pragmatism or any other plausible interpretive approach. When a judge starts deciding cases by tossing a coin, only then might it be time to bring out the impeachment machinery.

### CONCLUSION

A proposal to subject federal judges to greater political control was raised during the Constitutional Convention, and again immediately after Justice Chase's acquittal by the Senate. Both were stillborn. Cooler heads prevailed, as they have numerous times over the past two hundred years, whenever a perceived

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56. ANNALS OF CONGRESS, *supra* note 26, at 140.

crisis has led to attacks on the independence of the judiciary. There are once again calls to rein in independent judges, and it is ironic that those who purport to be most solicitous of history and most guided by its lessons are the ones now seeking to break with the past. Let us not be the first generation of Americans to succumb to what James Madison called the “transient impressions” of popular sentiment,<sup>57</sup> lest we lose one of the necessary supports of liberty and democratic government.

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57. MADISON, *supra* note 13, at 193.

