NOTES

Statutory Rules of Constitutional Interpretation and the Original Understanding of Judicial Power and Independence

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ABSTRACT

In American legal culture today, it is widely acknowledged that the Supreme Court of the United States has the final authority "to say what the law is." Whether they agree or disagree with a decision of the Supreme Court, the coordinate branches of the federal government, state governments, and citizens everywhere respect and adhere to those decisions. On the whole, it seems that little stands in the way of the Supreme Court exercising its fundamental duty to issue authoritative interpretations of the Constitution using its own independent judgment. Yet this assumption may be flawed. This note draws attention to a subtle and underappreciated way in which proposed legislation in Congress, if enacted, would undermine the power and independence of the Supreme Court in interpreting the Constitution. For example, the Constitution Restoration Act of 2005 purported to outlaw the consideration of foreign legal or political materials in the interpretation of the Constitution.

This note argues that this kind of proposed statutory rule of constitutional interpretation is unconstitutional for two reasons. First, the federal courts, and in particular the Supreme Court, retain a limited set of inherent powers by their very nature as a court of law that can be traced back to English common law. Among these inherent powers is the power to choose and apply an interpretive methodology in carrying out the judicial function of deciding a case. The Framers would have understood that courts exercised some inherent powers, and the Constitution did nothing to displace those inherent powers. Second, under the original meaning of "judicial Power" in Article III, the federal courts have the authority to choose a particular interpretive methodology and arrive at a definitive interpretation of the Constitution without interference from Congress. This authority is not only consistent with the text of Article III, it is also supported by the structural independence of the federal courts under the Constitution as the framing and ratification debates make clear.

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INTRODUCTION

In Federalist No. 78, Alexander Hamilton argued that "[t]he interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact . . . fundamental law. It therefore belongs to [the courts] to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body."[1] This fundamental view of the role of the federal judiciary as expositor of constitutional law has largely prevailed and frequently echoes Chief Justice John Marshall's famous declaration in *Marbury v. Madison* that it is "emphatically the province and duty of the judicial department to say what the law is."[2] Although the "judicial Power" of Article III is not defined, to ascertain the meaning of a law, or to "say what the law is," courts require some basic "interpretive tools" to arrive at an authoritative interpretation.[3] Thus, the fundamental role of the federal courts in interpreting law necessarily includes an essential subset of judicial

1. THE FEDERALIST NO. 78, at 577–78 (Alexander Hamilton).
2. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
3. Jennifer M. Bandy, *Interpretive Freedom: A Necessary Component of Article III Judging*, 61 DUKE L.J. 651, 652 (2011).

power: the power to apply interpretive tools and methodologies to ascertain the meaning of the Constitution or a legislative act.

This may all seem rather uncontroversial to the modern reader. Time and again, federal judges cite Marshall's passage in *Marbury* for the proposition that it is the quintessential duty of the federal courts to issue authoritative interpretations of provisions of law, and each spring, a significant portion of the population awaits the Supreme Court's pronouncements on important and controversial issues that affect the day-to-day lives of many Americans. It seems that little stands in the way of the Supreme Court exercising its fundamental role in interpreting and adjudicating cases brought by litigants under federal law or the Constitution. But there are a number of ways in which this apparent interpretive freedom faces existential challenges. In recent years, some scholars have begun to explore the possibility of introducing federal rules of statutory interpretation that would bind federal judges or impose some limits on the ways that federal courts choose to approach interpretive questions.[4] Other debates surround the power of Congress to abrogate the stare decisis effect of a Supreme Court decision.[5]

It is the objective of this paper to draw attention to a subtle and underappreciated way in which Congress may seek to limit the interpretive freedom of the federal courts by passing a statute with a seemingly authoritative interpretation of a constitutional provision. This paper argues that no matter how a statute is written, it cannot require the Supreme Court to adhere to a particular method of interpretation or adopt a particular interpretation of a constitutional provision. This conclusion follows from a study of the original meaning of the Constitution and, in particular, the meaning of "judicial Power" and judicial independence in Article III. Thus, this paper relies heavily on historical sources from English common law as well as evidence from the framing and ratification of the Constitution. Part I will argue that the concept of inherent powers of the federal judiciary prevents other branches from controlling how the federal courts interpret the Constitution. Part II will introduce a related structural theory of judicial independence under Article III that would prohibit any act of Congress from creating a binding rule of

4. *See, e.g.*, Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2156 (2002) (arguing that "Congress can and should codify rules of statutory interpretation"); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1856 (2010) (suggesting that an analysis of approaches to statutory construction by state courts of last resort could yield a "theoretical compromise" that would "enhance coordination and stability in a complex (and for lower courts) overworked legal system").

5. *Compare, e.g.*, Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1538–39 (2000) (arguing that Congress could pass legislation that would remove the precedential effect of Supreme Court decisions and require the Court to consider a given issue on a "clean slate"); John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 504 n.7 (2000) (agreeing), *with* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 570–71 (2001) (disagreeing); Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-making*, 18 CONST. COMMENT. 191, 191 (2001) (disagreeing).

constitutional interpretation. Part III will apply these theories to bills that have been introduced in Congress.

I. INHERENT JUDICIAL POWER AND ARTICLE III COURTS

Before proceeding, two points of clarification are in order. First, this paper is concerned only with statutory limits on *constitutional* interpretation by federal judges, especially Supreme Court justices. Accordingly, this paper will leave discussion about the merits of federal rules of *statutory* interpretation to other scholars who are steeped in that debate.[6] Second, because this paper argues that statutory rules of constitutional interpretation are unconstitutional under the original public meaning of Article III and the "judicial Power," it applies originalist methods of constitutional interpretation.

Originalism is premised on two fundamental concepts: (1) that the "communicative content of the constitutional text is fixed at the time each provision is framed and ratified," and (2) that "constitutional practice should be constrained by the communicative content of the text."[7] Thus, the method of an originalist approach in constitutional interpretation is to analyze conventions of language as well as the works of "intelligent and informed people of the time" of framing and ratification to ascertain "how the text of the Constitution was originally understood."[8] To accomplish this, originalism looks not only to the semantic content of a text, but also to the "public context of constitutional communication—the facts about the context of constitutional communication that were accessible to the members of the general public at the time the constitutional text was made public and subsequently ratified."[9] Once the original meaning has been recovered, the second task of originalist exegesis is to determine what legal effect that original meaning has on the circumstances at hand.[10] In other words, an originalist approach must discern a "constitutional principle" from the original understanding of a text that can be applied to the case at hand.[11]

To do that, this note first explores whether the federal courts have inherent power to interpret legal texts or to choose an interpretive methodology. Historical evidence shows that colonial-era courts exercised many inherent powers that can be traced back to early English tradition, and that those inherent powers survived the adoption of the Federal Constitution. As relevant here, that included the inherent power of interpretation.

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6. *See* Rosenkrantz, *supra* note 4.

7. Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 270 (2017).

8. ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION 3, 38 (Amy Gutmann ed., 1997).

9. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 28 (2015).

10. Solum, *supra* note 7, at 293.

11. William N. Eskridge Jr., *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067, 1074–75 (2015).

Going back at least as far as 1812 in the seminal case of *United States v. Hudson*, the Supreme Court has claimed that it retains some nucleus of inherent judicial power that shields it from interference by the other branches of government.[12] Over time, the Court has articulated three principle areas in which the federal courts retain inherent authority. First, federal courts have the inherent authority to manage their dockets and internal affairs in order to ensure efficiency and fairness in the administration of justice.[13] Second, and related to a court's management of its own dockets, federal courts have an inherent power to control the conduct of attorneys and other individuals appearing in court through the use of sanctions and other disciplinary proceedings.[14] Finally, the courts have an inherent power of "judicial supervision" over the administration of criminal justice.[15]

For the most part, the Supreme Court has grounded its holdings related to inherent powers of the federal courts on the claim that these powers are "indispensably necessary" to the discharge of Article III duties.[16] At other times, however, the Court has claimed an inherent power because it was "firmly established in English practice long before the foundation of our Republic."[17] But all this con

12. *See* 11 U.S. (7 Cranch) 32, 35 (1812).

13. *See* Landis v. N. Am. Co., 299 U.S. 248, 254 (1936) ("the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"); Link v. Wabash R.R. Co., 370 U.S. 626, 629–31 (1962) (reaffirming that this kind of inherent power is of "ancient origin"); Clinton v. Jones, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.") (quoting *Landis*, 299 U.S. at 254); Bandy, *supra* note 3, at 664.

14. *See* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates . . . ."); Ex parte Burr, 22 U.S. (9 Wheat.) 529, 530–31 (1824) (claiming the power to discipline attorneys appearing before the court); Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (reaffirming this power in the context of imposing sanctions on a party); Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1186 (2017) (holding that the inherent powers of federal courts includes "the ability to fashion an appropriate sanction for conduct which abuses the judicial process") (quoting Chambers, 501 U.S. at 44–45); Bandy, *supra* note 3, at 664.

15. McNabb v. United States, 318 U.S. 332, 340 (1943) ("Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."); *but see* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1434 (1984) (arguing that "the supervisory power doctrine has blurred the constitutional and statutory limitations on the authority of the federal courts and has fostered the erroneous view that the federal courts exercise general supervision over federal prosecutors and investigators"); Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 387 (2006) (arguing the "Constitution's structure cuts against, and history rules out, the proposition that the Supreme Court possesses inherent supervisory power over inferior court procedure").

16. Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 782–83 (2001); *see, e.g.*, United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (defining inherent powers as those "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others").

17. *See, e.g.*, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944) (holding that the Court had an inherent and equitable power to dismiss a case for fraud on the court in the interest of correcting injustice).

venient categorization is deceptive. The Court has not always been consistent in grounding its inherent powers jurisprudence in "indispensabl[e] necessity," and scholars have been unable to articulate a "systematic constitutional examination of the inherent authority of federal courts."[18] Indeed, the Court's treatment of inherent power has created a tension in its own jurisprudence: On the one hand, the Court repeatedly insists that the federal courts have a limited role under our Constitution but, on the other hand, it clings to a murky and expansive conception of "inherent powers" whose boundaries are not easily defined.[19] Rather than trying to resolve this theoretical tension, this paper will undertake a careful inspection of historical sources bearing on inherent judicial power, both during the colonial period and during the framing and ratification of the Constitution, to discern what principles of inherent judicial authority existed at English common law and which, if any, survived the adoption of the Constitution.

A. Inherent Judicial Power at English Common Law

The idea of inherent judicial power can be traced back to the late thirteenth century when early judges acted as representatives of the King's prerogative to do justice.[20] In other words, a close bond with the sovereign King was the wellspring of English courts' power and authority. That power and authority included two of the great virtues of exercising sovereign authority: flexibility and discretion.[21] But this relationship also meant that English courts could not be called independent in any modern sense of the word. The move toward independence incrementally unfolded over the course of several centuries. One of the first signs of a shift towards independence was a decline in the discretion and flexibility that English judges exercised.[22]

Take for example, the reaction of English courts to the Statute of Northampton in 1328, which declared that no command of the king could alter the course of the common law. In a moment that might be characterized as the birth of modern statutory interpretation, judges began to enforce the plain terms of this act in a detached manner that is more typical of a modern court.[23] Instead of using discretion and flexibility to "bend[] the rules of procedure to the broad requirements of justice," courts emphasized that they "will not and cannot change ancient usages" and that "statutes are to be taken strictly."[24] Notably, in at least one case, a court

18. Pushaw, *supra* note 16, at 782–87; *see also* Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 CATH. U. L. REV. 1, 2 (2011) ("The nature of the inherent powers of federal courts—whether they are constitutional or not, whether Congress can curtail some or all of them, and how far they extend—has bedeviled courts and commentators for years.").

19. Pushaw, *supra* note 16, at 798.

20. *Id*. at 805 ("This bond with the executive branch was the source of the judiciary's deep well of powers—including those that gradually came to be known as 'inherent,' such as contempt.").

21. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 157 (5th ed. 1956) [hereinafter PLUCKNETT I].

22. *Id*. at 157–58.

23. *Id*.

24. *Id*.

cited the Statute of Northampton in the course of boldly rejecting a writ of supersedeas issued by the King that would have suspended the execution of a judgment against a criminal defendant.[25] Instead, the court hanged a man for robbery in spite of the King's writ.[26] Thus, rather than serving as agents of the King and exercising his sovereign authority with discretion and judgment, the courts gradually adopted a more neutral and detached approach to their role as adjudicators.

The manner in which the English courts interpreted statutes more generally also marked the continuing growth of judicial independence from the crown. In the first half of the 14th century, courts employed a more flexible approach to interpreting statutes; but that free and flexible approach vanished as the courts felt less and less confident in exercising powers of discretion.[27] They no longer "regarded [statutes] as merely suggestions of policy within whose broad limits the court can exercise a wide discretion."[28] To the contrary, statutes came to be respected as fixed texts that were to be applied precisely as formulated.[29] This was a momentous change because courts were distinguishing between two functions—enacting a statute and establishing law, on the one hand, and adjudicating and interpreting that law on the other.[30]

The final move toward judicial independence in the lead up to the Declaration of Independence came during the Glorious Revolution of 1688. The overthrow of James II, and William and Mary's repudiation of certain royal prerogatives, established a new political order that recognized limits on the King and the sovereignty of Parliament.[31] These developments were soon followed by the Act of Settlement that reinforced early judicial independence by giving judges tenure during good behavior and salary protections.[32]

Nevertheless, inherent powers persisted. Changes in the political order did not roll back those inherent powers that were understood to possess from the beginning as essential characteristics of a court.[33] These included the power to make informal rules to regulate and govern proceedings and adjudicate cases, the power to manage internal business of the courts, the power to punish misconduct and impose sanctions, and the supervisory power over inferior courts.[34] And, as explained in Part II.C, courts also retained the inherent authority to interpret the law. These inherent powers have been helpfully described as falling into three categories: control of process, control over persons, and control over powers of

25. THEODORE F.T. PLUCKNETT, STATUTES & THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY 142–43 (1922) [hereinafter PLUCKNETT II].
26. *Id*. at 143.
27. PLUCKNETT I, *supra* note 21, at 332–33.
28. *Id*. at 333.
29. *Id*.
30. *Id*.; Pushaw, *supra* note 16, at 805–06.
31. Pushaw, *supra* note 16, at 807.
32. *Id*.
33. *Id*. at 810.
34. *Id*. at 810–14.

inferior courts.[35] The historical record makes clear that these powers have a rich tradition in English common law leading up to the colonial period and the Declaration of Independence.

B. Inherent Judicial Power and the Framing and Ratification of the Constitution

Though the English political system was transplanted to the American colonies, the English model of judicial independence did not immediately follow.[36] In fact, the colonial courts experienced a sort of pre-14th century throwback where the judicial power was still understood to be encompassed by the executive power.[37] Because the Act of Settlement did not apply to the colonies, colonial judges did not have tenure or salary protection and served at the pleasure of the King.[38] Moreover, the colonial courts lacked formalized conceptions of the judicial function or even a well-developed system of precedent.[39] Colonial courts relied on outside legal sources (e.g., English statutes, legal authorities, and court precedents), but the success of a litigant's case would often swing on the breadth of a particular judge's knowledge of legal literature.[40] To make matters even more uncertain, colonial precedent hardly existed because prior decisions were not recorded or printed, and judges were left to rely only on those precedents that memory served.[41] The colonial courts were therefore flexible and free in their approach to resolving legal disputes, just as they had been in the early 14th century while exercising the inherent powers of the King.[42] The entire situation led one former chief justice of the Massachusetts Superior Court to remark on his tenure: "I never presumed to call myself a [l]awyer . . . [t]he most I could pretend to was when I heard the [l]aw laid on both sides to judge which was right."[43] The convergence of all these factors meant that colonial courts exercised vast inherent powers in the absence of formalized structure or process, and their interpretation of the law was virtually unconstrained.

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35. JACK I.H. JACOB, *The Inherent Jurisdiction of the Court*, *in* THE REFORM OF CIVIL PROCEDURAL LAW AND OTHER ESSAYS IN CIVIL PROCEDURE 227–40 (1982).

36. Pushaw, *supra* note 16, at 816.

37. *Id*. There were notable colonists who espoused this view. *See* GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 159 (1997) (quoting John Adams as saying "there is no more than two powers in any government, viz. the power to make laws, and the power to execute them; for the judicial power is only a branch of the executive").

38. *Id*. at 817–18.

39. *Id*. at 296–97.

40. *Id*.

41. *Id*.

42. *Id*. at 297*; see also* Zechariah Chafee, *Colonial Courts and the Common Law*, *in* ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 66 (David H. Flaherty ed., 1969) (quoting Roscoe Pound as describing the law at the time as making "little progress in America in the seventeenth century. Social and economic conditions were such that a rude administration of justice by magistrates sufficed").

43. *Id*. (quoting Thomas Hutchinson, who served as the chief justice of the Massachusetts Superior Court from 1760–1769).

After the Declaration of Independence, the various states began to formulate their own structures of government in written constitutions that treated courts of law in different ways. In general, the states reacted negatively to the English crown's abuse of power and vested almost all power in state legislatures and representative bodies.[44] The change was so dramatic that James Madison described the trend toward representative assemblies among the states as "drawing all power into its impetuous vortex."[45] As a result, most state courts were subject to the will of the legislature.[46] The weakening of the judiciary by many states was in large part the result of colonist concerns that the judiciary's dependence on the executive threatened to undermine liberty.[47] Thus, the arrogation of control over the judicial branch to state legislatures was both the product of a popular movement to concentrate power in representative bodies and an effort to remove the influence of the executive on courts and judges.

The Articles of Confederation soon followed. Though the Articles permitted Congress to establish courts, their jurisdiction would be very limited and Congress itself would be the final arbiter of disputes "concerning boundary, jurisdiction or any other causes whatever" between the States.[48] Thus, under the Articles of Confederation, the Congress reigned supreme.

But for all the weakening of judicial power, the courts of some states still necessarily exercised inherent judicial powers. In New York, for example, because of the rush to establish a new framework of government in 1777, no article on the judiciary was inserted into the state constitution.[49] Such a provision seemed unnecessary as the courts were an ongoing phenomenon that the drafters thought "needed no words of creation, let alone a direct and explicit affirmation of [their] existence."[50] The lack of a provision about the judiciary seems to have troubled no one, and the judiciary in New York operated as it had before the Declaration of Independence.[51] Leading up to the establishment of the federal judiciary in 1787, New York state courts enjoyed supremacy even greater than they had under the crown.[52] The feeble provisions of the Articles of Confederation that contemplated limited tribunals did not affect this supremacy.[53] Accordingly, inherent

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44. Pushaw, *supra* note 16, at 820.

45. WOOD, *supra* note 37, at 407.

46. *Id*. at 154–61; William M. Treanor, *The Genius of Hamilton and the Birth of the Modern Judiciary*, *in* CAMBRIDGE COMPANION TO THE FEDERALIST 7 (forthcoming 2019) (unpublished manuscript).

47. *Id*. at 160.

48. ARTICLES OF CONFEDERATION OF 1781, art. IX.

49. 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 11 (Julius Goebel, Jr. ed., 1964).

50. *Id*.

51. *Id*.

52. *Id*. at 27 (It is worth noting that Alexander Hamilton's law practice before the Philadelphia Convention and the publication of *The Federalist Papers* took place in these New York courts. He was therefore very familiar with the concept of inherent judicial authority. Other Framers who practiced before New York courts also would likely have been familiar with this state of affairs.).

53. *Id*.

judicial power in state courts survived at least until the Constitutional Convention in 1787.

As with the crafting of state constitutions and the Articles of Confederation, the issue of modeling a judiciary was not the main focus of the Philadelphia Convention. This fact was surprising in light of Hamilton's claim in *Federalist 22* that the lack of an established "judiciary power" was one of the crowning "defects of the confederation"—a point he had been making since at least 1783.[54] Yet discussion of the judicial branch sparked only a handful of debates during the Convention, and even then, most discussions were centered on a proposed council of revision, the appointment and independence of judges, or the jurisdiction of the courts, and not the intricate details of a working system of federal courts.[55] But the opinion that a judicial branch was necessary must have been widely shared as the proposal to establish a national judiciary passed unanimously.[56] After limited debate on the subject, which did not include any discussion of inherent judicial power or the scope of the judicial power more generally,[57] the Framers adopted the basic sketch of national judiciary in Article III of the Constitution.

Article III, Section 1 provides that "the *judicial Power* of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[58] The remainder of Article III offers little by way of qualification of the "judicial Power" except to set forth protections designed to ensure the independence of the judiciary from the other branches of government and to describe the Supreme Court's jurisdiction. Thus, the text of Article III is noticeably silent on the issue of inherent judicial power or the nature of the power of federal courts to interpret the Constitution.

C. Inherent Judicial Power to Interpret the Constitution

Scholars have long acknowledged the opaqueness of the "judicial Power" that was vested in the Supreme Court under Article III and the lack of an evidentiary record from the Convention and ratification debates that would otherwise shed light on its meaning.[59] But that does not mean the interpretive enterprise is at an

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54. THE FEDERALIST NO. 22 (Alexander Hamilton); HAMPTON T. CARSON, THE SUPREME COURT OF THE UNITED STATES: ITS HISTORY 87 (1891).

55. Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 758 (1984); CARSON, *supra* note 54, at 87–105.

56. CARSON, *supra* note 54, at 91.

57. Pushaw, *supra* note 16, at 822.

58. U.S. CONST. art. III, § 1 (emphasis added).

59. Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts - A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1017 (1924) (pointing out that "[t]he term "judicial power" is not self-defining . . . ."); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 168 (2013) ("The term judicial power in Article III is, at least on its face, ambiguous. It might be understood narrowly to mean the power to say what the law is in a particular judicial proceeding. But it might also be understood more broadly to include certain traditional aspects of the judicial office that were widely and

end. Where, as here, the communicative content of the text is unclear, originalist methodology acknowledges that "precedent and historical practice can liquidate the meaning of provisions that are irreducibly ambiguous or vague."[60] Here, the preceding historical exposition strongly suggests that inherent judicial power survived the ratification of the Constitution and encompasses the adjudicator's power to interpret legal texts and precedent.

The grant of "judicial Power" to the Supreme Court includes the freedom to apply an interpretive methodology or authoritatively interpret a provision of the Constitution free from interference from other branches. Thus, federal statutory rules of constitutional interpretation, to the extent they purport to bind the Supreme Court, would be an unconstitutional usurpation of the Supreme Court's inherent judicial authority under Article III.

Inherent "judicial Power" survived the framing and ratification of the Constitution. As noted earlier, the concept of inherent power can be traced back as early as 12th century England when the first judges or ministers of justice other than the king himself were the kings servants and councils.[61] In the centuries that followed, courts in England and then in the American colonies continued to exercise inherent powers until the Philadelphia Convention in 1787. Most notably, after the Declaration of Independence, the American colonists quickly set about forming new governments in their respective states through written constitutions.[62] In their haste, the colonists aggregated power in their state legislatures and expended little effort developing plans for their respective state courts. Instead, courts like those in New York operated without well-defined boundaries and even experienced a resurgence in their own power to adjudicate cases.[63] It was against this backdrop that a convention of delegates, composed primarily of lawyers (and even ten state court judges), met at Philadelphia to address the many deficiencies of the Articles of Confederation, including Hamilton's complaint

consistently exercised."); William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 767, 783 (1997) (pointing out that "the records of the Convention contain absolutely no discussion of the phrase 'judicial Power,' and that phrase does not appear in any of the four plans submitted to the Convention for consideration . . . ."); Dustin B. Benham, *Beyond Congress's Reach: Constitutional Aspects of Inherent Power*, 43 SETON HALL L. REV. 75, 82 (2013) (acknowledging that "judicial power" is neither defined by the text nor informed by records of the Convention); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 342 (2002) (conceding the difficulty of defining the full scope of "judicial power").

60. Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 295 (2017); *see also* John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1151 (1996) ("In the absence of any textual definitions of the judicial power, one must turn to understandings of the courts' power that are contemporaneous with the ratification.").

61. Pushaw, *supra* note 16, at 799–805.

62. WOOD, *supra* note 37, at 127–28.

63. 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 49, at 12.

that the national government lacked a functioning judiciary.[64]

The text of Article III does not displace the concept of inherent judicial power. The Framers didn't invent the "judicial Power" out of whole cloth only to then fail to define it. To the contrary, the delegates were informed by their experiences under the early state constitutions, and likely understood that the power to exercise judicial authority "was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called 'inherent.'"[65] They came to Philadelphia with a conception of the "judicial Power" that was manifest under the state constitutions and English common law. Felix Frankfurter made just this point when he observed that the:

> "[J]udicial power" is not self-defining; it is not, like "jury" or "grand jury," a technical term of fixed and narrow meaning; it does not, like "unreasonable searches and seizures," embody a familiar page of history. "Judicial power" sums up the whole history of the administration of justice in English and American courts through the centuries.[66]

Thus it follows that the Framers vested their fundamental understanding of what it means to be a court in Article III. When we look to the "whole of history of the administration of justice in English and American courts," it is clear that that history tips heavily in favor of the position that inherent judicial powers survived the adoption of Article III. The grant of the "judicial Power" is written broadly and by its own plain terms does not retire the only notion of judicial power that the Framers knew. Indeed, because the very grant of the "judicial Power of the United States" to all federal courts is undefined, and because the Constitution does not grant any other power to the federal judiciary, at least some "core judicial functions must inhere within the very grant of judicial power."[67] The Framers knew how to decisively break with tradition, and yet there is no hint of a transformation like there was in establishing a new era of judicial independence upon the ratification of the Constitution.

Of those inherent powers that remained with the newly established Supreme Court, perhaps none is more fundamental than the Court's power to interpret law — particularly the Constitution. In general, the "essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused."[68] That

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64. CARSON, *supra* note 54, at 91 (noting the predominance of lawyers and judges at the Convention); THE FEDERALIST NO. 22 (Alexander Hamilton). While Carson puts the number of judges at the Convention at four, Charles Evans Hughes counted ten. *See* CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS: AN INTERPRETATION 11 (1927).

65. Jacob, *supra* note 35, at 224.

66. Frankfurter & Landis, *supra* note 59, at 1017.

67. Ryan, *supra* note 59, at 783–84.

68. Jacob, *supra* note 35, at 224.

is why control over the process of adjudication and control over the people that appear before courts has long been considered inherent.[69] But if it is accepted that federal courts can "control the disposition of the causes on its docket,"[70] "impose silence, respect, and decorum, in their presence, and submission to their lawful mandates,"[71] and supervise inferior tribunals[72] under a theory of inherent judicial power, then surely they have the inherent authority to engage in the art of constitutional interpretation in order to carry out its essential duty to adjudicate cases—that is, to develop the interpretive methodology they use to determine "what the law is."[73]

Moreover, the Framers understood that judges would be interpreting the law to carry out their core duty: adjudicating cases. The records of the Constitutional Convention are replete with examples illustrating that the Framers understood that judges would have the power to interpret the Constitution as well as statutes.[74] Elbridge Gerry, for example, argued against including the judiciary in the proposed Council of Revision because he believed that the judiciary "will have a sufficient check [against] encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality."[75] Gerry also approvingly acknowledged the fact that, in some states, judges "set aside laws as being [against] the Constitution."[76] Rufus King agreed and noted that "the Judges ought to be able to expound the law as it should come before them."[77] Elsewhere throughout the Convention, the Framers' were consistent in their objection to the participation of federal judges in a Council of Revision, because, they argued, judges could declare a law unconstitutional later and because they feared that participating in such a Council would give rise to bias in favor of a law if its constitutionality was challenged in a case at a later point in time.[78]

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69. *Id*.; Pushaw, *supra* note 16, at 810–14 (describing the various inherent powers exercised by English courts "to control their proceedings in order to promote the fair and efficient administration of justice"); Bandy, *supra* note 3, at 664–71; *see also* Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.") (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821)); Joseph J. Anclien, *Broader Is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 42 (2008) (arguing that "courts may exercise inherent powers whenever such action possesses a natural relation to the exercise of the judicial power").

70. *Landis*, 299 U.S. at 254.

71. *Anderson*, 19 U.S. (6 Wheat.) at 227.

72. Pushaw, *supra* note 16, at 814; *McNabb*, 318 U.S. at 338.

73. Pushaw, *supra* note 16, at 844; THE FEDERALIST NO. 78 (Alexander Hamilton) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.").

74. Bandy, *supra* note 3, at 674 (citing examples).

75. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 97 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS]; *see also* Bandy, *supra* note 3, at 674.

76. 1 FARRAND'S RECORDS, *supra* note 75, at 97.

77. *Id*. at 98.

78. Bandy, *supra* note 3, at 674–75.

The ratification debates only confirm this understanding. Hamilton's statement in *Federalist* 78 is the most prominent example, which states, "[t]he interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact ... fundamental law. It therefore belongs to [the courts] to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body."[79] Accordingly, the Supreme Court's role under Article III is premised on the inherent authority to interpret the Constitution and statutes in order to adjudicate cases and "to say what the law is."[80]

Of course, one might look elsewhere in Article III or the Constitution for a limitation on inherent powers of the federal courts. One argument is that under Article III, Congress has the power to create inferior courts as well as to regulate the judiciary.[81] Coupled with Congress' power under the Article I sweeping clause to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, *and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof*,"[82] there is a strong textual argument here that an amorphous concept of inherent judicial power cannot trump the positive vesting of power in the national legislature. Yet the debates over the Constitution reveal a conscious design to expand judicial authority and to insulate the federal judiciary from other branches of government.[83] While it can be conceded that the Supreme Court is subject to congressional regulation, Congress only has the power to carry the "judicial Power" into execution, and not to curtail the full exercise of it.[84]

Ultimately, the concept of inherent judicial power is a viable one, and even under the narrowest reading, it empowers the Supreme Court to apply an interpretive methodology of its choosing in the course of carrying out its essential function of adjudicating cases and controversies. Though Congress has significant leeway in regulating many aspects of the federal courts (especially the inferior courts), those powers are limited and must carry into execution the "judicial

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79. THE FEDERALIST NO. 78 (Alexander Hamilton).

80. Marbury v. Madison, 5 U.S. (1 Cranch) 177 (1803).

81. Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 CATH. U. L. REV. 1, 8 (2011) (arguing that the notion that federal courts have "indeterminate core constitutional inherent power" that trumps Congress' Article I power to pass laws that are "necessary and proper" to carry into execution the powers of the departments of government should be "repudiated"); *see also* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish"); *id*. art. III, § 2, cl. 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

82. U.S. CONST. art. I, § 8, cl. 18 (emphasis added); Barton, *supra* note 81, at 8.

83. A. Benjamin Spencer, *The Judicial Power and the Inferior Federal Courts: Exploring the Constitutional Vesting Thesis*, 46 GA. L. REV. 1, 7 (2011).

84. Benham, *supra* note 59, at 91–98; *see also* David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 81–82 (1999) (arguing that "the Necessary and Proper Clause 'operates like a one-way ratchet,'" and statutes that purport to "diminish, curtail, or interfere" with the judicial power do not fall within the power granted to Congress under the sweeping clause).

Power" rather than curtailing or limiting it. Therefore, it follows that any act on the part of Congress to curtail the Supreme Court's free exercise of constitutional interpretation is highly suspect under an original understanding of the "judicial Power" vested in the Supreme Court under Article III.

II. CONSTITUTIONAL INTERPRETATION AND THE STRUCTURAL INDEPENDENCE OF THE FEDERAL COURTS

This part presents a more concrete and structural theory of the Supreme Court's independent power of constitutional interpretation. During the Constitutional Convention, the Framers adopted strong measures, such as a fixed salary and life tenure, in order to insulate judges from the political process. Indeed, the objective was to preserve the independence of judges with the understanding that they would pass judgments on the actions of the other branches. One of the chief objections to this design was that an independent federal judiciary (and in particular the Supreme Court) would face little accountability for its decisions. During the ratification debates, both proponents and opponents of the new federal judiciary proceeded on the same premise that the judiciary would be a strong and independent branch. The ultimate triumph of the Federalists in this debate ensured that the interpretive enterprise of the federal courts would remain free from legislative interference.

The establishment of a truly independent federal judiciary converted one of the most notorious defects from the Articles of Confederation into one of the crowning achievements of the Constitution.[85] For even after six centuries of a gradual movement toward the view that courts are an independent and coequal branch of government (not merely an extension of the executive power), the state constitutions before 1787 and the Articles of Confederation failed to give real teeth to the judiciary.[86] In fact, in some ways, early state constitutions made the state judiciaries even more dependent on their legislatures than they had been before the Declaration of Independence.[87] Most of the new state constitutions claimed to have established a new government with three separate and distinct branches, yet state legislatures largely resolved private disputes, and the state judiciaries were subject to legislative control.[88] Tenure protection for judges was weak (often they were limited by short and fixed terms) and judges were frequently subject to removal by those legislatures.[89]

The Constitution took the next great step forward.[90] At the Convention, there was near universal agreement that a strong central government required a national

85. 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789–1800, at 1 (Maeva Marcus ed., 1992) [hereinafter DHSC].

86. *See* discussion *infra* Sections II.A–B.

87. Treanor, *supra* note 46, at 8.

88. *Id*. at 7.

89. *Id*.

90. 4 DHSC, *supra* note 85, at 1 (noting the significant step forward from the precedent of the early state constitutions).

judiciary.[91] Almost as soon as a national judiciary was proposed, the Framers moved to establish the independence of the judiciary against encroachment by the legislative and executive branches by agreeing that judges would hold office during "good behavior" and would receive fixed salaries.[92] This new national judiciary would be vested with significant, independent powers. During the Convention it was openly acknowledged that the federal courts would engage in an interpretive enterprise and that courts could expound on the meaning of the Constitution and declare laws unconstitutional.[93] The lack of oversight became one of the Antifederalists' chief concerns during the ratification debates. Indeed, the writings of Brutus complained that the national judiciary was endowed with "such immense powers, and yet placed in a situation so little responsible."[94] Responding to Brutus' Antifederalist essays, Hamilton in *Federalist* 78 did not shy away from acknowledging that "[t]he interpretation of the laws is the proper and peculiar province of the courts" and asserted that it was the power of the Supreme Court "to ascertain [the Constitution's] meaning, as well as the meaning of any particular act proceeding from the legislative body."[95]

When the dust settled, the Constitution was ratified over the objections of Antifederalists, and Article III became operative. Article III vested the "judicial Power of the United States" in "one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[96] It did not, however, define "judicial Power." Article III also contained strong protections for the independence of federal judges by providing that judges would "hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[97] The remainder of Article III goes on to specify the jurisdiction of the Supreme Court, to provide for jury trials in criminal cases, and to define treason.[98] Nowhere else does the Constitution specify the powers or limitations of the federal courts. Because the question of whether the Supreme Court has an independent power of constitutional interpretation is not clear from the text of Article III, we must look to other sources—such as debates at the

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91. CARSON, *supra* note 54, at 91 (noting that "[t]he resolution that a national judiciary be established passed unanimously"); 4 DHSC, *supra* note 85, at 1.

92. *See* 1 FARRAND'S RECORDS, *supra* note 75, at 21 ("[Resolved] that a National Judiciary be established to consist of one or more supreme tribunals . . . to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services . . . ."); 4 DHSC, *supra* note 85, at 3.

93. *See supra* notes 74–80 and accompanying text.

94. 4 DHSC, *supra* note 85, at 11; *see also id*. at 11 n.34 (citing a letter from Melancton Smith to Abraham Yates, Jr., where Smith complained that the federal judiciary was "framed as to *clinch* all the other powers; and to extend them in a silent and imperceptible manner to any thing and every thing, while the Court who are vested with these powers are totally independent, uncontroulable and not amenable to any other power").

95. THE FEDERALIST NO. 78 (Alexander Hamilton).

96. U.S. CONST. art. III, § 1.

97. *Id*.

98. *See id*. §§ 2–3.

Constitutional Convention and in the subsequent state ratifying conventions—to discern what the provisions meant at the time they were adopted.

A. First Conceptions of the Need for an Independent Judiciary

Under the Articles of Confederation, the fledgling United States government lacked both a judicial and executive branch.[99] Legal luminaries like Hamilton and Madison recognized this shortcoming long before the Convention even began.[100] As early as May 1783, Hamilton complained that the lack of a federal judiciary was a serious flaw in the Articles of Confederation and expressed frustration that there was no national court system to ensure uniform application of laws and treaties.[101] Even after the Convention ended, Hamilton took up the pen in *Federalist 22* to emphasize this point again, arguing that for treaties and laws of the United States "to have any force at all, [they] must be considered as part of the law of the land" and "be ascertained by judicial determination."[102] James Madison agreed and—in a letter written a month before the start of the Philadelphia Convention—submitted that: "The National supremacy ought also to be extended, as I conceive, to the judiciary department."[103] These views were shared by other lesser known delegates such as William R. Davie who asked a friend to advise him on "how far the introduction of judicial powers . . . would be politic or practicable in the States."[104]

The first discussion at the Convention of a new federal judiciary arose when Governor Edmund Randolph proposed the Virginia Plan as the basis of a new framework of national government.[105] Resolution Nine of the Virginia Plan proposed "that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behavior; and to receive punctually at stated times fixed compensation for their services"[106] among other things. Randolph stood up to introduce the Plan and gave "a long and elaborate speech, [which] shewed the defects in the system of the present federal government as totally inadequate to the peace, safety and security of the confederation, and the absolute necessity of a more energetic government."[107] Only a day later, the delegates formally resolved to establish a national government "consisting of a supreme legislative, judiciary and executive."[108] Thus, the Framers settled early in the Convention on a structure of government composed of three distinct branches—including a truly

99. 4 DHSC, *supra* note 85, at 1.
100. *See* CARSON, *supra* note 54, at 87–88.
101. *Id*.
102. THE FEDERALIST NO. 22 (Alexander Hamilton).
103. CARSON, *supra* note 54, at 88.
104. *Id*. at 89.
105. 1 FARRAND'S RECORDS, *supra* note 75, at 18–28; CARSON, *supra* note 54, at 90; 4 DHSC, *supra* note 85, at 3.
106. 1 FARRAND'S RECORDS, *supra* note 75, at 21–22.
107. *Id*. at 23–24.
108. *Id*. at 30.

independent judiciary—in an effort to resolve the past deficiencies of a central government. Yet this structure left open many of the crucial details about this new judicial branch.

B. An Independent Judiciary Is Born

Though the delegates raised numerous issues related to the judiciary during the Convention, two particular debates about the nature of the federal judiciary help to illuminate the Framers' original conception of the independence of judges—a conception that was later shared by both sides of the ratification debates. The first concerned the method of selecting judges, and the second involved a proposed Council of Revision.

The issue of the selection of judges came first. After the delegates settled on a national judiciary with a single "supreme tribunal," a strong debate arose about whether the national legislature or the executive should appoint federal judges.[109] James Wilson spoke out strongly against appointment by the legislature, arguing that experience had shown that leaving such decisions to "numerous bodies" was unsound and that a "single, responsible person" (such as the executive) was far better suited to the task.[110] John Rutledge opposed executive appointment because, in his words, the "people will think we are leaning too much towards Monarchy."[111] Madison favored a middle ground where only the Senate would appoint judges.[112]

After the Committee of Detail produced a draft constitution retaining Madison's Senate-appointment suggestion, John Dickinson proposed to weaken the independence of the judiciary by removing the guarantee of tenure during "good behavior" and instead providing that judges "may be removed by the Executive on application [by] the Senate and House of Representatives."[113] Randolph was the primary voice in opposition, arguing the proposal had the effect of "weakening too much the independence of the Judges."[114] Dickinson's motion lost—only Connecticut voted in favor of his proposal—and the Framers ultimately settled on a compromise we find in Article II today: the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . judges of the supreme Court, and all other Officers of the United States."[115]

The second revealing debate emerged later when James Wilson pushed for a Council of Revision. Concerned that the strong national legislature would eventually erode the power of the executive and the judiciary, James Wilson renewed discussion of a proposal from the Virginia Plan for a council, composed of the

109. *Id.* at 119–20.
110. *Id.* at 119.
111. *Id.*
112. *Id.* at 120.
113. *Id.* at 428.
114. *Id.* at 429.
115. U.S. CONST. art. II, § 2.

executive and members of the judiciary, who would have the power to veto acts of the legislature.[116] Madison joined the motion on the view that it would enable both the executive *and* the judiciary to defend against legislative encroachments.[117] Interestingly, Oliver Ellsworth (a former Connecticut state court judge) also supported the plan because he believed that judicial participation in the Council of Revision would lend "wisdom and firmness to the Executive."[118]

But the objections to this measure are most telling. Opponents of judicial inclusion on the council argued that "Judges ought not to be subject to the bias which a participation in the making of laws might give in the exposition of them."[119] These opponents also argued that the judiciary "ought to be separate [and] distinct from the other great Departments."[120] Caleb Strong declared that the proposal would violate "a well-established maxim that the power making ought to be kept distinct from that of expounding the laws."[121] The proposal to join the judiciary with the executive in a Council of Revision ultimately failed, and the veto power remained solely in the hands of the president.[122]

These and other debates from the Convention underscore the importance and centrality of the new federal judiciary's independence and its fundamental role in interpreting the Constitution, laws passed by Congress, treaties, and even state laws. Although the Framers' experiences with the excesses of the English crown and the failure of early state constitutions to place the courts on equal footing with other branches of government made clear the need for judicial independence, no less fundamental was their understanding of the role that courts would play in interpreting the Constitution. As the objections to including judges in the proposed Council of Revision made clear, including the judiciary on the council was not necessary to prevent legislative encroachment because the courts would have the later opportunity to pass on the constitutionality of a statute so long as a case was brought before them.

The ratification debates that followed confirm the centrality of the courts' independence to the original understanding of the judicial power. In Pennsylvania, an Antifederalist author known only as "Centinel" published a letter criticizing the new constitution as being "like Pandora's box, replete with every evil."[123] In particular, Centinel complained that the new federal judges' authority to "refuse their sanction to laws made in the face and contrary to the letter and spirit of the constitution" and "to decide upon the construction of the constitution itself in the last resort" were "extraordinary" and "unprecedented" powers.[124] Notably, a

116. 1 FARRAND'S RECORDS, *supra* note 75, at 21, 106.
117. *Id*. at 138.
118. CARSON, *supra* note 54, at 96.
119. *Id*.
120. *Id*.
121. CARSON, *supra* note 54, at 98.
122. U.S. CONST. art. I, § 7, cl. 2.
123. 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 217–21 (John P. Kaminski & Gaspare J. Saladino eds., 1986) [hereinafter DHRC].
124. *Id*. at 220.

Federalist response published a month later did not deny the new powers of the national judiciary. Rather, it argued that the proposed Constitution offered a system of diversified power "necessary to the good government of an extensive republican empire" and cited the independence of federal judges as a great virtue of this new system.[125] During the Connecticut ratifying convention, James Wadsworth explicitly attributed the power to check the legislature to the judiciary, declaring that if "the United States go beyond their powers," or if the "states go beyond their limits," the "judicial power, the national judges, who to secure their impartiality are to be made independent, will declare it to be void."[126] Though Rhode Island did not ratify the Constitution, records from the debate reveal that its delegates understood that the judicial power rested solely with the judiciary.[127] John Kean, a delegate to the South Carolina ratifying convention, repeatedly noted discussions of the judiciary's independence during those debates.[128] And some states, like Maryland, even proposed constitutional amendments strengthening the existing progressive protections that the Constitution already recognized (i.e., life tenure and fixed salary). For example, one proposed amendment provided, "[t]hat the federal judges do not hold any other office or profit, or receive the profits of any other office under congress, during the time they hold their commission."[129] The states explained that these proposed amendments served several purposes, including to "secure the independence of the federal judges, to whom the happiness of the people of this great continent will be so greatly committed by the extensive powers assigned them."[130]

Although the celebrated writings of Brutus and *The Federalist Papers* came late in the ratification process, their dueling arguments surrounding the federal judiciary encapsulated and summarized the debates that the proposed Constitution sparked. In Brutus's five essays challenging the Constitution's plan for the federal judiciary, he argued that nearly airtight judicial independence and the power of the federal courts to exercise judicial review would undermine the power of the states and increase the power of the national government.[131] Brutus expressed particular concern with the lack of accountability for Supreme Court decisions.[132] Indeed, he concluded Essay XV with an alarming claim that "when this power [of interpreting the Constitution] is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to controul them but *with a high hand and an outstretched arm*."[133] In his letters, Brutus outlined two ways in

125. 17 DHRC, *supra* note 123, at 246–47.
126. 3 *id*. at 551–53.
127. 24 *id*. at 145.
128. 27 *id*. at 1408–09.
129. 17 *id*. at 1242–43.
130. *Id*. at 243.
131. Treanor, *supra* note 46, at 18, 22.
132. 4 DHSC, *supra* note 85, at 11–12.
133. BRUTUS, ESSAYS OF BRUTUS XV (1788), *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE 262 (Michael P. Zuckert & Derek A. Webb eds., 2009).

which the federal courts would undermine state power and increase national power. First, he argued that the federal courts would give a broad reading to the powers of the national government, which would inevitably expand and swallow up state power.[134] Second, he argued that the self-interest of judges would lead them to aggrandize their own power and to expand its reach over the states.[135]

In *The Federalist* essays 78–83, Hamilton did not retreat from these complaints about the scope of the new judicial power. Rather, he argued that judges would decide cases based on the law (and not the self-interest Brutus warned of) and that the provisions designed to protect judges' independence were necessary to empower federal judges to decide cases as they should: free from political influence and self-interest.[136] Hamilton praised the independence protections as an "excellent barrier to the encroachments and oppressions of the representative body" and most useful to ensuring "impartial administration of the laws."[137] But Hamilton took it one step further by declaring that the people's liberty depended on an independent judiciary: "the general liberty of the people can never be endangered . . . so long as the judiciary remains truly distinct from both the legislature and the executive."[138] He also famously characterized the new national judiciary as the "least dangerous" branch of government because it would not have the power of the "purse" or the "sword" and because it could impose "neither FORCE nor WILL, but merely judgment."[139]

William Treanor has also observed that *Federalist* 78 is noteworthy for its discussion of judicial review. Though the subject came up at the Convention and in the ratifying conventions of several states,[140] Hamilton was the first to weave a discussion of judicial review into a larger theory of the proposed federal judiciary.[141] Hamilton was in good company, for eight of the Framers spoke in favor of judicial review during the Convention, and this "apparent support for judicial review reflected the growing acceptance of the view that courts had the power to invalidate statutes they deemed unconstitutional."[142] Apparently relying on a broader conception of judicial authority that predated the Constitution, Hamilton insisted that the exercise of judicial review was consistent with traditional understandings of judicial authority.[143]

Thus, despite different rhetoric—Brutus calling the new judicial power "extraordinary" and Hamilton describing judicial review as a "familiar" practice—

134. Treanor, *supra* note 46, at 24.
135. *Id*.
136. *Id*. at 26.
137. THE FEDERALIST NO. 78 (Alexander Hamilton).
138. *Id*.
139. *Id*.
140. *See infra* notes 144, 146 and accompanying text.
141. *See* Treanor, *supra* note 46, at 29 ("The analysis of judicial review in *Federalist 78* became the most significant discussion of the subject in the years before the Court invalidated part of the Judiciary Act of 1789 in the 1803 case of *Marbury v. Madison*.").
142. *Id*. at 15–16.
143. *Id*. at 31.

Brutus and Hamilton both agreed that the new federal judiciary would be independent and exercise broad judicial power in the interpretation of law with minimal interference from the other branches of government.[144]

C. Article III and the Supreme Court's Independent Power of Constitutional Interpretation

Despite the apparent indeterminacy of the Article III's reference to the "judicial Power," the records of the Convention and the ratification debates reveal a consistent understanding by members on all sides of the debate that the new federal courts would be both remarkably independent and issue final and authoritative constructions of the Constitution and statutes passed by Congress.[145] This independence was the subject of recurring ratification debates when the subject of the judiciary arose, and it was the focus of Brutus' systematic critique of the new federal judiciary along with Alexander Hamilton's famous responses in *Federalist* essays 78–83.[146]

Early historical records after the Constitution was ratified lend further support to the largely theoretical debates of the late 1780s. Most notably, federal courts exercised the power of judicial review almost from the start, years before the Marshall court decided *Marbury*.[147] In so doing, the courts were issuing authoritative interpretations of the Constitution, even against another branch.[148] Thus, Hamilton's view of interpretation as "the proper and peculiar province of the courts" took hold from the earliest days after ratification.[149] Chief Justice John Marshall cemented that legacy in *Marbury*, and the Supreme Court has never retreated from it.[150] Therefore, Founding Era sources make it quite clear that

144. Critically, these divergent views were representative of the debates about the federal judiciary that occurred in other state ratification conventions. *See supra* notes 122–29 and accompanying text.

145. *See supra* notes 113–45 and accompanying text; *infra* notes 148, 152–53 and accompanying text.

146. *See supra* notes 113–45 and accompanying text; *infra* notes 148, 152–53 and accompanying text; Treanor, *supra* note 46, at 12, 18 (explaining that Brutus's essays 11 & 16 "focused on the dangers of judicial independence and the ways in which federal courts' exercise of judicial review and construction of the Constitution would cripple the states" and the "people's inability to control federal courts").

147. William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 517–54 (2005).

148. *See id.*

149. *See id.* at 554–60.

150. For some recent examples of the Court's unwavering adherence to *Marbury*, *see, e.g.*, N.L.R.B. v. Noel Canning, 134 S. Ct. 2550, 2560 (2014) (recognizing "that it is the 'duty of the judicial department'—in a separation-of-powers case as in any other—'to say what the law is'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); N.F.I.B. v. Sebelius, 567 U.S. 519, 538 (2012) ("[T]here can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits." (citing *Marbury*, 5 U.S. (1 Cranch) at 175–76)); Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012) ("At least since Marbury v. Madison . . . we have recognized that when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" (internal citation omitted)).

interpretive deliberation has long been essential to the judicial function and the Supreme Court's position as expositor of the law.[151]

The notion that the Supreme Court could render an act of Congress void because it violated a more fundamental law (i.e., the Constitution) necessarily entails that the Supreme Court has the power to interpret a provision of the Constitution free of interference from Congress. Constitutional interpretation at its core is the process of "discover[ing] the communicative content or linguistic meaning of the constitutional text."[152] Accordingly, in order to ascertain the meaning of a constitutional provision and determine whether a statute offends it, judges must engage in some form of linguistic analysis to determine the legal significance of an aspect of law or the interaction between two sets of laws. It would be impossible then for the Supreme Court to invalidate an act of Congress as contrary to the Constitution without engaging in the interpretation of the meaning of relevant legal texts. The object of discerning linguistic meaning applies more broadly to constitutional interpretation, even if a congressional statute is not at issue. Antifederalists like Brutus understood these implications, which explains his vigorous complaint regarding the lack of oversight over Supreme Court decisions.[153]

The ultimate triumph of judicial independence ensured that this interpretive enterprise of the federal courts would remain free from legislative interference. As Hamilton observed, this freedom from political interference was essential to the "impartial administration of the laws."[154] And that is why it was originally proposed that judges be part of a Council of Revision to check legislative encroachment.[155] Were it otherwise, Brutus's complaint of a lack of oversight on the authority of the Supreme Court would have been misguided, and Congress could pass laws contrary to the Constitution with impunity and without fear that the Supreme Court would be able to review them.

The genius of a constitutional design that protects the independence of the courts is therefore profound for two reasons. First, as has already been explained, the federal courts can exercise judicial review in order to judge the validity of a statute against the more fundamental law of the Constitution. That dynamic serves as an effective check against legislative excess that undermines the separation of powers. In order to ensure that judges are in the position to exercise effective review, they given lifetime tenure and a guaranteed salary. Second, and most relevant to the scope of this note, Congress cannot appropriate the ability of the federal courts to "say what the law is" by enacting laws that narrow or constrain the meaning of a constitutional provision or the available methods of constitutional interpretation. If Congress did have such a power, it would undermine the

151. Bandy, *supra* note 3, at 677–85.

152. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 453 (2013).

153. 4 DHSC, *supra* note 85, at 11–12.

154. THE FEDERALIST NO. 78 (Alexander Hamilton).

155. 1 FARRAND'S RECORDS, *supra* note 75, at 138.

separation of powers and enable Congress to influence the substantive outcome of Supreme Court cases interpreting the Constitution. That kind of manipulation is plainly at odds with the original understanding of judicial power and independence, and it would toll the death knell of a truly independent judiciary.

III. STATUTORY RULES OF CONSTITUTIONAL INTERPRETATION AND THE SUPREME COURT'S INDEPENDENCE

The principles of inherent powers and judicial independence provide us with two means to evaluate potential interference by Congress with constitutional interpretation by federal courts. First, inherent powers are those "derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law,"[156] and include those "core judicial functions [that] must inhere within the very grant of judicial power."[157] Close inspection of the history of English and early American courts demonstrate that the power to interpret constitutions and statutes was among those core judicial functions retained even after the ratification of the Constitution.[158] And as such, this power was beyond the manipulation of the legislature.

Second, under the Constitution, one of the key design features of Article III was to insulate judges from the political influence of the legislative branch. Hamilton praised the protections of life tenure and fixed salary as an "excellent barrier to the encroachments and oppressions of the representative body" and most useful to ensure "impartial administration of the laws."[159] The Framers understood that one of the central tasks of the judicial department would be to interpret the Constitution as well as federal law, and moved to protect this function. This independence was critical because it enabled the Supreme Court to rule on the constitutionality of congressional acts—a power which greatly upset Antifederalists.[160] It follows that under this structure of government, it is essential that the Supreme Court has unfettered freedom to interpret the meaning of the Constitution and the relation of statutes to this fundamental rule of law.[161] Were it otherwise, Congress could easily thwart this check on its powers.

Applying these principles, this paper will now weigh hypothetical and proposed limitations on the power of the Supreme Court to freely interpret the Constitution. For the sake of simplicity, this paper will apply these principles only in the context of the Supreme Court's special position at the apex of the

156. JACOB, *supra* note 35, at 224.

157. Ryan, *supra* note 59, at 784.

158. Though it is not relied on here, the argument that federal courts have an inherent power to choose and apply an interpretive method or to interpret the Constitution free from congressional interference might easily meet the "indispensably necessary" standard found in the Supreme Court's early precedent on inherent judicial power. *See, e.g.*, United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (defining inherent powers as those "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others").

159. THE FEDERALIST NO. 78 (Alexander Hamilton).

160. *See supra* notes 133–69 and accompanying text.

161. *See supra* Part III.

federal court system, in part because it is the only court whose establishment is mandated by the Constitution.[162]

It is perhaps most useful to begin this analysis with an admittedly extreme hypothetical. Suppose Congress passed a statute that provided the following: "In light of Congress' finding that originalism best serves the interests of the rule of law and democratic government embodied by the Constitution, federal judges (including Supreme Court justices) shall apply only originalism—as articulated by Justice Scalia—in the interpretation of the Constitution." Leaving aside the fact that the law is laden with ambiguity, such a statute would be an impermissible interference with inherent judicial power and independence. The hypothetical statute purports to bind the Supreme Court to applying a particular interpretive methodology in any case requiring constitutional interpretation. Therefore, it would infringe on the Supreme Court's inherent power to interpret the Constitution—a power that is part of the core function of the Court by virtue of its very nature as a court of law.[163] Or in the words of the Supreme Court, the statute would infringe on a power "which cannot be dispensed with in a Court, because [it is] necessary to the exercise of all others."[164] Although the statute allows the Supreme Court to apply *some* form of interpretive methodology, it still hampers a court in the exercise of an inherent power essential to deciding cases fairly and impartially. Moreover, it deprives a court of the inherent power to decide for itself the most appropriate means of determining the communicative content of the Constitution.

The hypothetical statute is also unconstitutional because it infringes on the independence of the Supreme Court. Under Article III, the Framers protected the federal courts from legislative interference so that they could carry out their duties fairly and impartially and review federal law to ensure it conforms to the Constitution. The hypothetical statute would remove that independence in a significant way by controlling the way the Supreme Court could interpret the Constitution. Such a statute cannot be utilized as a means through which Congress could sideline meaningful judicial review and expand its own power in the process.

This hypothetical statute has real-world analogs. Take, for example, the proposed Constitution Restoration Act of 2005, which purported to banish consideration of certain materials in constitutional interpretation by federal courts:

> SEC. 201. INTERPRETATION OF THE CONSTITUTION. In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and

162. *See* U.S. CONST. art. III, § 1.
163. *See supra* Part II.
164. United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812).

> common law up to the time of the adoption of the Constitution of the United States.[165]

The Constitution Restoration Act in particular was proposed in response to decisions of the Supreme Court in cases like *Roper v. Simmons* and *Lawrence v. Texas* that relied on foreign law to determine the meaning of the Constitution.[166] Other examples are not difficult to find. In the last few decades, pro-life advocates and legislators have worked together to introduce bills under section five of the Fourteenth Amendment that would declare that "persons" under the amendment includes all human beings at every stage of development, including from the moment of conception.[167] Another bill, titled the Unpaid Intern Protection Act, declares that a "[s]tate shall not be immune under the eleventh article of amendment to the Constitution of the United States from an action in a court of the United States for a violation of this Act."[168]

As with the hypothetical statute, the Constitution Restoration Act purports to create a rule of constitutional construction that would prevent the federal courts from considering any outside sources other than those from the English common law tradition that the United States inherited. Rather than imposing a particular kind of interpretive methodology, the rule would restrict the universe of sources that a court could rely on in interpreting the Constitution. Though it is a less comprehensive rule of constitutional interpretation, it runs headlong into the same concerns articulated above. At the time the Constitution was written, there was a common attitude that the judiciary was so fundamental that it "needed no words of creation, let alone a direct and explicit affirmation of its existence."[169] The same is true of constitutional interpretation. Because it is so fundamental to the very concept of the "judicial Power," it must be said to "inhere within the very grant of judicial power."[170] The Constitution Restoration Act of 2005 is an explicit attempt to curtail the most fundamental power of the Supreme Court—to interpret the Constitution in the way that some of its members judge to be sound and faithful to the text of the Constitution. As a result, it is an impermissible interference with the Court's inherent powers. It is also an unconstitutional usurpation

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165. S. 520, 109th Cong. § 201 (2005).

166. *See* Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to the Law of Other States*, 59 STAN. L. REV. 1281, 1281–82 (2007) (citing Roper v. Simmons, 543 U.S. 551 (2005) and Lawrence v. Texas, 539 U.S. 558 (2003).

167. *See, e.g.*, S. 158, 97th Cong. (1981) ("Congress hereby declares that for the purpose of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law, human life shall be deemed to exist from conception, without regard to race, sex, age, health, defect, or condition of dependency"); Life at Conception Act, S. 583, 113th Cong. §§ 2–3 (2013) (relying on section 5 of the Fourteenth Amendment to "declare[] that the right to life guaranteed by the Constitution is vested in each human being" and defining "human being" as including "each member of the species homo sapiens at all stages of life, including the moment of fertilization"); Sanctity of Human Life Act, H.R. 586, 115th Cong. (2017) (essentially the same).

168. H.R. 651, 115th Cong. § 5 (2017).

169. 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 49, at 12.

170. Ryan, *supra* note 59, at 783–84.

of the judicial power as it aims to control how cases are decided and is an intrusion into the sphere of judicial independence.

The constitutionality of the human life bill depends largely on how it is construed. It reads, in relevant part:

> The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception.
>
> The Congress further finds that the fourteenth amendment to the Constitution of the United States was intended to protect all human beings.
>
> Upon the basis of these findings, and in the exercise of the powers of Congress, including its power under section 5 of the fourteenth amendment to the Constitution of the United States, the Congress hereby declares that for the purpose of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law, human life shall be deemed to exist from conception, without regard to race, sex, age, health, defect, or condition of dependency; and for this purpose "person" shall include all human life as defined herein.[171]

The language seems to be limited to offering an interpretation that is only binding on Congress. But if the act sought to bind federal courts to the interpretation that unborn fetuses are human "persons" within the meaning of the Fourteenth Amendment, it could not stand.

The same goes for the Unpaid Intern Protection Act. The Act declares that a "State shall not be immune under the eleventh article of amendment to the Constitution of the United States from an action in a court of the United States for a violation of this Act."[172] If this provision is designed to be a limit on the Supreme Court's ability to interpret the meaning of the Eleventh Amendment, it would impermissibly infringe on the Supreme Court's inherent power of constitutional interpretation, as well as its independent power of constitutional interpretation under Article III. Under an original understanding of judicial power and independence, Congress cannot claim this power to inoculate a statute against the effect of a constitutional mandate or protection.

CONCLUSION

No matter how these various actual and hypothetical statutes are framed, Congress cannot usurp or in any way limit the power of the Supreme Court to interpret the Constitution for itself under either the theory of inherent judicial power or the structural theory of judicial independence. Admittedly, the text of Article III Section 1 is somewhat ambiguous and lacking in detail when referring to the "judicial Power," but an abundance of historical context readily supplies us with an understanding of how that power was originally understood. As

171. S. 158, 97th Cong. (1981).
172. H.R. 651, 115th Cong. § 5 (2017).

demonstrated in Parts II and III, the inherent power of courts to interpret legal texts was not displaced by Article III and, in fact, the Framers contemplated in Article III that the federal courts would expound on the meaning of the Constitution and accordingly moved to protect the independence of federal judges. This move did not catch opponents of the Federal Constitution unaware, as John Dickinson moved to weaken the judiciary during the Convention and Brutus subsequently complained during the ratification process of an unaccountable Supreme Court. In short, the duty of the Supreme Court to "say what the law is" cannot be controlled or limited by legislative rules or constructions of the Constitution.

Though inherent judicial power and structural judicial independence are often considered in tandem when evaluating the scope of the federal courts' power of interpretation, either can serve as an independent basis for invalidating statutory rules of constitutional interpretation. Both arguments enjoy strong historical support, even if the structural theory of judicial independence is favored for its greater and more concrete reliance on the text and structure of the Constitution. Given the advantage of the structural approach, it is no surprise that the Supreme Court rarely invokes its inherent powers to justify an exercise of power or to justify its decisions. The inherent powers approach may also be disfavored because the Court has also struggled to articulate a consistent principle on the content and scope of inherent judicial powers. But even if that is the case, an argument from inherent power is particularly persuasive in the context of legal interpretation because interpretation is such a "core judicial function" that it "must inhere within the very grant of judicial power."[173] If the inherent theory of judicial power is particularly persuasive in the context of interpretation, the structural theory is even more so. The richness of the debates during the Constitutional Convention and throughout the ratification process serve to underscore the textual and structural separation between legislative and judicial power. And if that power is to be effective at all and conform with the Framers' conceptions of judicial power at the time of the framing and ratification of the Constitution, it must include the most rigorous protections of the freedom and independence of federal courts (in particular the Supreme Court) to interpret the Constitution as it sees fit.

Hamilton really did say it best when he wrote that "[t]he interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact . . . fundamental law. It therefore belongs to [the courts] to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body."[174] This was the reason that the judicial branch was elevated to the status of a coequal branch of government under the Constitution, and why its independence has been vigorously defended from its inception. The idea that an act of

173. Ryan, *supra* note 59, at 783–84.
174. THE FEDERALIST NO. 78 (Alexander Hamilton).

Congress could undo this signature achievement of the Constitution must be emphatically denied. Whether through the exercise of the inherent power to interpret law or the structural independence of the federal courts, the Supreme Court remains free to apply those methods and tools of interpretation that the justices believe are most faithful to our fundamental framework of government.