
ARTICLE

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

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I. INTRODUCTION

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

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1. See, e.g., ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 55 (R. Heffner ed., 1956) (“Wherever the political laws of the United States are to be discussed, it is with the doctrine of the sovereignty of the people that we must begin.”). See also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 330 (1969) (noting that in the pre-Revolutionary period, “[t]he people were the undisputed, ubiquitous source that was appealed to by both the advocates and the opponents of independence”); MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* 9 (1982) (“We in the United States are philosophically committed to the political principle that governmental policymaking . . . ought to be subject to control by persons accountable to the electorate.”).

2. For example, decisionmaking even by accountable and representative officials was confined by principles of separation of powers. See U.S. CONST. arts. I, II. Also, as originally enacted the Constitution provided that U.S. senators were to be elected by state legislatures rather than by means of direct popular election. See U.S. CONST. art. I, § 3, cl. 1 (amended 1913). However, this method of

countability to the populace—if only indirectly—served as the sine qua non of American government.

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

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

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

While the Constitution's protection of judicial independence obviously gives rise to important systemic benefits, in what is predominantly a democratic society there are also costs that must be incurred. As already

election was subsequently replaced, through amendment, by direct popular election. See U.S. CONST. amend. XVII.

3. 5 U.S. (1 Cranch) 137 (1803).

noted, judicial independence means that judges may decide cases in a manner that will prove to be unpopular with the polity. Moreover, the life tenure given to judges to preserve their decisional independence may cause significant problems when judges—for whatever reason—become unwilling or unable to perform their function in an honest and efficient manner. In other words, either through disability or personal choice, judges on occasion may abuse their office. If the life tenure they have been afforded were to provide for no safety valves, the seemingly salutary constitutional assurance of life tenure would effectively deprive society of any practical means of controlling such renegade government officials. Not only would such a result undermine the democratic principles of accountability and representationalism that are essential to American political theory, it would also undermine the very judicial integrity which the protections of judicial independence were designed to assure.

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

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

4. See THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton stated,

The complete independence of the courts of justice is peculiarly essential in a limited Constitution Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Id.

5. See THE FEDERALIST NO. 79 (Alexander Hamilton).

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

This Article is intended to explore the competing societal concerns of judicial independence and judicial responsibility from the perspective of constitutional analysis. In so doing, it will attempt to view these issues as a matter of textual and structural interpretation. By this I mean that the Article will seek to develop coherent constructions of the various constitutional provisions that deal with either judicial independence or judicial discipline. Because, for reasons explored in detail elsewhere, I consider myself at a fundamental level to be a textualist,⁹ I consider these questions in the first instance by seeking rational constructions of the words that appear in the Constitution. However, because there often exist both ambiguities in individual provisions and potential tension among different provisions, I also recognize the need to employ an analysis which seeks to weave the various relevant constitutional provisions into a viable and coherent textual structure. It is only by means of such an attempt to link seemingly unrelated portions of text, I believe, that one can effectively understand the Constitution's often intricate structural web of judicial protections and judicial limitations.

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

6. See RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 224-30 (1973).

7. See *Judge's Rejection of Evidence Is Criticized*, N.Y. TIMES, Jan. 29, 1996, at B5; Norimitsu Onishi, *Judge to Be Asked to Rethink Drug Ruling*, N.Y. TIMES, Feb. 1, 1996, at B2.

8. See Don Van Natta, Jr., *Drug Case Reversal*, N.Y. TIMES, Apr. 3, 1996, at B3.

9. See MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 6-16 (1995).

10. See discussion *infra* Part III.A.

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

I conclude that whenever either salary or tenure may be affected, the constitutionally available methods of judicial discipline are necessarily narrowly circumscribed. The only conceivable method of discipline under such circumstances, I believe, is through resort to the impeachment process, and the availability of even that process is to be narrowly confined to situations in which the judge has engaged in criminal behavior that threatens the integrity of the judicial role. Moreover, I conclude that the political-question doctrine should have absolutely no applicability as a bar to the judicial review of the legislative determination that the challenged judicial behavior does, in fact, constitute an impeachable offense under the Constitution.

The necessary implication of my conclusion about the exclusivity of the impeachment remedy is that no form of judicially self-imposed discipline affecting either salary or tenure may constitutionally be employed.¹⁵ I reach these conclusions, because I believe that any more expansive constructions of the disciplinary power indirectly but inescapably would contravene Article III’s salary and tenure protections, and effectively render those prophylactic protections of judicial independence all but meaningless.

11. See U.S. CONST. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).

12. *Id.* art. III, § 1.

13. See, e.g., Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c) (1994). For a detailed description of the statute’s provisions, see 15 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 100.04 [3] (3d ed. 1997).

14. See generally Harry T. Edwards, *Regulating Judicial Misconduct and Divining “Good Behaviour” for Federal Judges*, 87 MICH. L. REV. 765 (1989) (arguing that judicial self-regulation unencumbered by any form of congressional interference is the only way to regulate judicial misconduct which fall short of impeachable offenses).

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

Part II of this Article will describe in more detail the interpretive methodology which I employ in construing the constitutional provisions that implicate both judicial independence and judicial discipline. As previously noted, the focus of this methodology is, to the extent reasonably possible, on the text of the individual provisions concerning both judicial independence and judicial discipline, and the structural intersection of those provisions.

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

Part IV next considers the constitutionality of disciplinary measures short of formal removal from office. That analysis examines in particular whether the judiciary should be deemed to possess broader constitutional power to discipline its own members than does Congress. Part IV also considers whether Congress possesses unlimited constitutional power to impose disciplinary measures on members of the federal judiciary, even in retaliation for unpopular constitutional decisions, as long as the penalties imposed implicate neither the judicial salary or tenure expressly guaranteed by Article III.

II. A COMMENT ABOUT INTERPRETIVE METHODOLOGY

The contribution I hope to make in this Article is to provide a perspective on the issues of judicial independence and judicial discipline that has rarely, if ever, been considered by those who have written on the subject in the past. While most scholarly commentary has focused, quite naturally, directly on the issues of judicial independence, judicial discipline, or both, few commentators have viewed these questions through the lens of constitutional interpretive theory. My goal, then, is to apply a generalized theory of constitutional interpretation—one on which I have written extensively in the past¹⁶—to the specific constitutional issues of judicial disci-

16. See REDISH, *supra* note 9; Martin H. Redish, *Text, Structure and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633 (1990) [hereinafter *Text, Texture and Common Sense*]; Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991); Martin H. Redish & Karen L.

pline and independence to draw several principled insights about how those seemingly contradictory constitutional values may be reconciled. I begin my inquiry, then, with a brief review of the interpretive model which I employ.

Initially, I should note that while under my interpretive model the insights, arguments, or intentions of those who framed the Constitution may be probative, helpful, or persuasive in resolving issues of interpretation where the text is rationally capable of more than one construction, they are in no way deemed dispositive. There simply were too many framers—particularly when one includes those who ratified the document, as well as those who drafted it—with too many different individual agendas and motivations from which to infer a single, coherent, and controlling intent. Moreover, it was the text, not some external or hidden drafters' intention, which was approved through lawful processes. To the extent a modern understanding of intent differs from the natural implications of the text, then, it is the latter that must take precedence. Also, too much has happened, both doctrinally and politically, since the Constitution's framing to be able to predict with any level of certainty how the framers would have wanted certain current ambiguities to be construed today in order to implement their abstract normative goals.¹⁷ Finally, it may well have been the case that the framers themselves failed to recognize potential tensions or inconsistencies between seemingly distinct provisions.¹⁸ It will therefore be necessary for a modern-day interpreter to attempt to construe one set of provisions to avoid undermining the obvious social or political purposes sought to be attained by other provisions. In most such situations, the modern day interpreter will be unable to obtain substantial assistance from the words of the framers, because it is apparent that the framers failed or refused to recognize the potential inconsistency.

Applying these interpretive precepts to the issues surrounding judicial independence and discipline, one must conclude that the fact that pre-Revolutionary English practice defined impeachable offenses in a particular manner or that post-ratification Congresses acted in a manner consistent with a particular understanding of the phrase "high Crimes and Misdemeanors" may be both relevant and probative of how the constitutional directives should be construed today, but is certainly not binding. The re-

Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1 (1987).

17. See Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445 (1984).

18. This may well have been true in the case of the judicial-independence provisions and the impeachment power. See discussion *infra* at Part III.B.

ality is that no matter how much historical evidence we gather, we will not be able to determine exactly what the framers, as a unit, were seeking to accomplish. More importantly, in many ways the framers themselves may not have fully foreseen all the potential complications in achieving seemingly conflicting goals. In reconciling judicial discipline and judicial independence, for example, it is simply unclear whether the framers themselves fully recognized the potential conflicts among Article III's guarantees of judicial independence, Article II's creation of the congressional power to impeach, and Article III's "good Behaviour" language. Relying on our understanding of their intent in adopting any one of those three provisions in the abstract will prove to be of little help in determining how they can be structurally reconciled when appearing to conflict.¹⁹

While a modern ascertainment of the intent of the framers should not be dispositive, for reasons of legal process and democratic theory that I have discussed elsewhere²⁰ the outer rational limits of the text are controlling. In a constitutional democracy, an unrepresentative and unaccountable judiciary has no legitimate authority to overrule decisions of the majoritarian branches of government without a grounding in the text of the countermajoritarian document that it is empowered and obligated to enforce. On the other hand, the judiciary has no authority to permit the majoritarian branches to contravene or ignore the constitutional limitations on its authority.

Such textualism is of little help, of course, where as a linguistic matter the relevant text is capable of more than one reasonable construction. Under those circumstances, normative considerations of social policy and political theory will inevitably influence the choice among rational constructions of the text as a necessary element of the judicial review power.²¹ It is important to emphasize, however, that, in order to prevent the judicial review function from collapsing into the legislative function, such normative considerations must extend beyond the narrow confines of the case before the court.²² Moreover, such nontextual considerations are, as a matter of interpretive theory, irrelevant where (1) the constitutional text is capable of only one rational construction, or (2) though a number of constructions are rationally conceivable, the construction claimed to be derived from external considerations of social policy or political theory is not

19. See *supra* text accompanying notes 4-5.

20. See Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803 (1994).

21. See sources cited *supra* note 16.

22. See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

among them. Though in a number of ways my interpretive model could be described as “textualist,”²³ it is important to emphasize that it seeks to view the constitutional text in a wholistic, or structural sense.²⁴ By this I mean that the individual provisions of the text often cannot be considered in a vacuum. Rather, potentially conflicting provisions must be individually construed in a manner that seeks to view them as part of a broader, organic, synthesized textual whole. Such a wholistic form of interpretation is necessary, even if the framers themselves failed to recognize the potential conflicts among the provisions. Otherwise, a slavish adherence to modern perceptions of narrow framers’ intent can lead to contradictory, or even nonsensical constructions—hardly a result one could imagine the framers would have chosen had they recognized the dangers.²⁵

It should be emphasized that the interpretive model employed here is by no means the only conceivable approach to constitutional construction. Indeed, I readily concede that both originalist approaches²⁶ and non textualist approaches²⁷ are far more prevalent among both scholars and jurists. However, this is not an article primarily about the proper methodology of constitutional interpretation. Rather, this Article’s focus is on the constitutional ramifications of the tensions between judicial discipline and judicial independence. I include this brief discussion of constitutional methodology—which, for the most part, seeks to incorporate by reference my prior work on issues of interpretive theory²⁸—to clarify the nature of whatever criticism to which my substantive conclusions are ultimately subjected.

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

23. Indeed, I have described it in this manner myself. See Redish & Drizin, *supra* note 16.

24. See Redish, *Text, Structure and Common Sense*, *supra* note 16.

25. See *id.* at 1642.

26. See, e.g., Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986) (arguing that an originalist approach is best suited for judges interpreting constitutional issues).

27. See, e.g., Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975) (arguing judges should enforce liberty and justice beyond the four corners of the Constitution).

28. See sources cited *supra* note 16.

more than my assessment and understanding of the purposes and values of constitutionally protected judicial independence.

III. JUDICIAL INDEPENDENCE VERSUS THE IMPEACHMENT POWER: RESOLVING THE CONSTITUTIONAL DILEMMA

A. DELIMITING THE SCOPE OF IMPEACHABLE OFFENSES: APPLICATION OF THE TEXTUAL AND STRUCTURAL ANALYSIS

The first question in delimiting the scope of the concept of impeachable offenses is the extent to which that scope should be deemed to vary based on the type of federal officer sought to be impeached. To be sure, by its terms the provision authorizing the impeachment power draws no such distinction.²⁹ On that basis, presumably a textualist—as I claim to be—would be forced to conclude that the scope of impeachable offenses must be constant, varying not at all on the basis of the nature of the officer to be impeached. However, an important conceptual distinction must be drawn between a textualist and a literalist.³⁰ While a literalist interprets only the actual words of a provision, viewed in a vacuum, a textualist takes a more wholistic interpretive approach, viewing each provision as part of an integrated, purposefully directed whole, presumed to be designed to achieve a coherent and consistent set of constitutional goals. In short, while the literalist views the linguistic trees, the textualist views the linguistic forest. Hence, in interpreting particular constitutional text, where necessary the textualist will attempt to synthesize related and possibly conflicting provisions in order to discern a coherent textual structure.³¹

Such an effort is intended to achieve two interpretive ends: (1) Wherever possible, to avoid construing the Constitution in a manner that results in including diametrically opposing provisions within the same document, and (2) under any circumstances to avoid a construction of one provision that renders another provision or set of provisions effectively nugatory or meaningless. The former goal is framed in a contingent manner, while the latter is not because, although it is at least conceivable that a coherently

29. See U.S. CONST. art. II, § 4.

30. For a more detailed explanation of this distinction, see generally Redish & Drizin, *supra* note 16.

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

crafted and structured document could be fashioned in such a manner as contain provisions that simultaneously to point in opposite directions, it is wholly inconceivable that such a document would contain one provision whose inherent and inescapable effect would be to eradicate another provision.

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

As previously mentioned, Article III on its face distinguishes members of the federal judiciary from members of the other branches by expressly insulating them from key influences of the political process. The salutary political purposes served by such insulation have also already been noted. Absent an independent judiciary free from basic political pressures and influences, individual rights intended to be insulated from majoritarian interference would be threatened, as would the supremacy of the countermajoritarian Constitution as a whole. No member of the executive branch serves these functions.

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

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

key purpose sought to be served by the salary and tenure protections—that is, to remove, or at least significantly reduce, the possibility of external political intimidation designed to offset the judicial decisionmaking process. A broad reading of the scope of the impeachment power may well give rise to the possibility of such intimidation, aimed at the very heart of the interests protected by Article III. By relying on the supermajoritarian conviction requirement, this argument has the dubious advantage of confining the susceptibility of federal judges to political intimidation to those cases in which an extremely large portion of the public or government has been angered by judicial decisions. In any event, this argument completely ignores the fact that the danger of impeachment itself—which can be triggered merely by a simple majority of one house of Congress³²—can be sufficient to give rise to the very intimidation that Article III is intended to prevent.

Although leading scholars appear to agree that a special impeachment standard is appropriate for members of the federal judiciary, they often tend to go in the completely opposite direction from the interpretation I have suggested. Professor Michael Gerhardt, for example, has argued that because of the unique need to preserve judicial integrity, members of the federal judiciary should actually be held to a *higher* behavioral standard than are executive officers.³³ For example, he notes that a federal judge should be subject to impeachment for such activities as publishing a “particularly controversial” law review article while executive officers should not be deemed subject to impeachment for similar behavior.³⁴

On one level, it is certainly possible to sympathize with Professor Gerhardt’s concerns over the special need to preserve judicial integrity. For the very reason that federal judges are, in fact, insulated from most forms of external political pressure, it is necessary to maintain the judiciary’s high status in the mind of the public. But such an expansive conception of impeachable offenses on the part of the judiciary must nevertheless be rejected, because it would inescapably invite far reaching and even crude political attempts to intimidate members of the judiciary in their de-

32. See U.S. CONST. art. I, § 2.

33. See MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS* 106-07 (1996).

34. *Id.* Gerhardt offers further elaboration on this point:

[A] federal judge might be impeached for a particularly controversial law review article or speech, because these actions undermine confidence in the judge’s neutrality and impugn the integrity of the judicial process. In contrast, an executive official who has done the same thing may not be impeached, because neutrality is not necessarily important to his or her job

Id. at 107.

cisionmaking—again, the very result sought to be avoided by the creation of the salary and tenure protections in the first place.

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

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

However, when one adds an analysis of broader textual structure to this narrow textualist analysis, one should be able at least to understand the argument in favor of confining the scope of impeachable offenses solely for members of the federal judiciary to such objectively characterizable criminal behavior. Simply put, that argument is that Article III's special protections of salary and life tenure underscore the unique and vital role in our constitutional democratic system played by federal judges in enforcing the countermajoritarian Constitution against the political branches and to preserve the rule of law in what is otherwise a nakedly political system. Article III's provision of life tenure is quite obviously intended to insulate federal judges from undue external political pressures on their decision-making, which would undermine and possibly preclude effective performance of the federal judiciary's function in our system. Yet if the scope of

impeachable offenses is not confined in some meaningful and largely objective manner, the possibility of impeachment would threaten to eviscerate the salutary impact of the life tenure protection.³⁵ In effect, under this construction the impeachment power would be construed in a manner that consumed the tenure protection of Article III.

If a construction of a constitutional provision is available that does not have such a destructive impact on attainment of the purposes served by a separate provision, a structural analysis of constitutional text dictates that such a construction be adopted. Therefore, a construction of the Impeachment Clause confined to objectively definable criminal behavior should be adopted solely for the reason that it would dramatically reduce the ability of Congress to employ its impeachment power as a tool of intimidation to influence future judicial decisionmaking or penalize past judicial decisionmaking. In this manner, the two provisions would be interpreted in a manner that preserves the legal and political vitality of both. This argument, premised on an understanding of normative constitutional policy gleaned from a structural analysis of constitutional text, is logically limited to issues involving the impeachment of members of the federal judiciary. Hence, there is no reason to extend its application to the impeachment of executive officials.

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

B. THE HISTORICAL ATTACK ON THE STRUCTURAL ANALYSIS

The scope of impeachable offenses viewed from a purely historical perspective offers a very different picture from the one dictated by the structural analysis. According to respected scholars, under well established English precedent both impeachment practice and the concept of “high Crimes and Misdemeanors” extended well beyond behavior that was technically criminal.³⁶ Because I claim no special expertise in the historical practice of impeachment, I am readily willing to concede—if only for purposes of argument—the accuracy of these scholarly assertions. Even

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

36. See BERGER, *supra* note 6; GERHARDT, *supra* note 33, at 107.

assuming the accuracy of this historical perspective, however, it is by no means clear that history dictates a parallel modern construction of the Impeachment Clause.

Initially, even if we assume that modern constitutional interpretation should for some reason be constrained by the modern perception of framers' intent,³⁷ it does not automatically follow that framers' intent necessarily was designed to incorporate by reference all pre-Revolutionary English practice. Indeed, while our constitutional structure obviously borrowed much from English political theory, it is also true that much of the political system established in the Constitution was designed specifically to depart from English practice. There is much evidence that the lack of judicial independence that characterized English practice was one of the most offensive aspects of that practice to those who led the Revolution.³⁸

True, modern day scholars have also pointed to certain post-ratification practices to support the conclusion that impeachment is not confined to criminal behavior.³⁹ But equating post-ratification practice with framers' intent is often a risky undertaking. For example, by such reasoning, presumably modern day First Amendment interpretation would be constrained by the enactment of the Alien and Sedition Acts—a conclusion which the Supreme Court expressly rejected in *New York Times Co. v. Sullivan*.⁴⁰

I find it quite puzzling that scholars who devote their attention to the Impeachment Clause appear almost uniformly to have assumed—without, as far as I can see, the slightest discussion or explanation of their overarching theory of constitutional interpretation—that historical practice is somehow dispositive of modern constitutional doctrine. The only issue then would involve the task of determining exactly what that practice was.⁴¹ Yet in virtually no other area of modern constitutional doctrine has the Supreme Court deemed itself bound by a narrow understanding of either pre-ratification practice, post-ratification practice, or framers' intent.⁴²

37. *But see* discussion *supra* Part II.

38. In this context, it is worth noting that one of the express complaints made against the British Crown in the Declaration of Independence concerned the Crown's power over the judges in the Colonies. *See* THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

39. *See* BERGER, *supra* note 6; GERHARDT, *supra* note 33.

40. 376 U.S. 254, 274 (1964).

41. *See* BERGER, *supra* note 6; GERHARDT, *supra* note 33, at 103-09.

42. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942) (providing modernized, expansive view of scope of congressional power under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3).

If there is any reason that the Impeachment Clause, more than any other constitutional provision, is deserving of such rigid historicism, the scholars who have employed such an approach have utterly failed to explain it. Nothing in the text of the provision directs use of such a uniquely historical mode of interpretation. Indeed, even where a constitutional provision arguably does appear textually to direct such a historical inquiry, as is the case for the Seventh Amendment's directive that the right to jury trial in civil cases "at common law" be "preserved,"⁴³ the Court has modified modern interpretation in order to take into account the impact of modern practices and conditions on the traditional legal/equitable dichotomy.⁴⁴ Thus, even conclusive evidence of historical practice is not deemed dispositive in modern constitutional interpretation.

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

Yet what the framers enacted, what they passed on to subsequent generations, was not their own subjective perceptions and assumptions, but rather the text itself. If, either because of subsequent developments or simply the luxury of a broader, more carefully reasoned social, legal, or political perspective, we today can apprehend difficulties or problems that the framers apparently did not—that their subjective understanding of one constitutional provision in reality has a dramatically destructive impact on the unambiguous purposes sought to be served by a separate constitutional

43. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .").

44. See, e.g., *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959).

provision—there is no reason that we must make the same mistakes that they did. Unless the framers tied the hands of subsequent interpreting generations by use of narrow and restrictive wording, there is no reason that we should not be able to benefit from structural and interpretive insights that the framers were either unable or unwilling to see (or, perhaps, to foresee).

C. THE THEORETICAL ATTACK ON THE STRUCTURAL ANALYSIS

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

Note that this argument turns not at all on assumptions about either historical practice or framers' intent concerning the scope of impeachable offenses. It turns, rather, exclusively on the application of considerations of normative political theory. The primary problem with this approach, however, is that in seeking to prevent the unaccountable judiciary from usurping political authority, for all practical purposes it removes the judiciary as a countermajoritarian check on the political branches, in contravention of both the foundational premises of American political theory and the implementational device of the salary and tenure protections. The recent example of the political calls for impeachment following Judge Harold Baer's Fourth Amendment ruling and his subsequent reversal of his own decision⁴⁵ underscore the point. If one assumes that a federal judge may be impeached because of nothing more than the perceived incorrectness of his constitutional decisions, then a judge will always be potentially subject to external political pressure in his constitutional decisionmaking, in direct contravention of the unambiguous purpose designed to be served by the prophylactic protections of Article III's tenure protection.

For whatever reasons, the fear of a judicial dictatorship that critics often raise has never come to pass. Perhaps because of its lack of independent enforcement and financial powers, as well as the constitutional

45. See *supra* notes 7-8 and accompanying text.

power of Congress to control its jurisdiction,⁴⁶ the federal judiciary has never interfered with the long-term, fundamental policy choices held by a consensus of the polity. To construe the impeachment power to enable Congress to penalize or threaten federal judges because of nothing more than disagreement with their substantive decisions would thus unnecessarily upset the balance of branch power.

One might respond that, at most, this reasoning supports a view of impeachable offenses that excludes decision-based impeachment. In other words, perhaps impeachment should not be permitted because of a particular judicial decision, but it does not necessarily follow that judicial impeachment must be confined to criminal behavior. Under this modified approach, Congress would be able to impeach a member of the federal judiciary because of noncriminal behavior, but not because of the alleged inaccuracy or impropriety of a particular decision or series of decisions made by the judge in question.

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

D. THE PRAGMATIC ATTACK ON THE STRUCTURAL ANALYSIS

A critic of the structural analysis might contend that confining the scope of impeachable offenses to criminal behavior would give rise to what are, purely as a practical matter of judicial administration, preposterous results. Such a standard, the argument proceeds, would necessarily

46. See U.S. CONST. art. III, §§ 1, 2 (authorizing congressional discretion to ordain and establish lower federal courts and to make exceptions to Supreme Court's appellate jurisdiction). See also *Lockerty v. Phillips*, 319 U.S. 182 (1943); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

preclude Congress from removing from office judges who engaged in public drunkenness, sexual harassment, or behavior exhibiting insanity, merely because such behavior could not be characterized as criminal. This result could arguably undermine public respect for the federal judiciary and lead to situations that are pragmatically untenable.

In considering the force of this argument, it is interesting to note that no federal judge in memory has been impeached on noncriminal grounds. Thus, no practical difficulties would have resulted, even if the scope of impeachment had in the past been confined to criminal behavior.⁴⁷ Moreover, it should be emphasized that the unavailability of impeachment does not necessarily imply that government is bereft of methods for dealing with extreme, albeit noncriminal judicial behavior. Judges who are truly incapable of continuing to perform their judicial function due to infirmity may presumably have their caseloads transferred to other judges for the period during which they are incapacitated. Because such a remedy is appropriately viewed as administrative, rather than punitive, impeachment is not implicated. Finally, there is presumably nothing in the Article III independence protections that precludes private civil suits, where legally appropriate, against members of the federal judiciary.

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

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

E. THE TEXTUALIST ATTACK ON THE STRUCTURAL ANALYSIS:
THE RELEVANCE OF THE “GOOD BEHAVIOUR” CLAUSE

Even a textualist might suggest that there are problems with my structural analysis of the impeachment power, because it completely ignores the express limitation of Article III’s tenure protection to a period of judicial “good Behaviour.”⁴⁸ Because by its terms this phrase is not confined to criminal conduct, the argument proceeds, it is impossible to employ a textualist-structuralist analysis as a basis for confining impeachable offenses for members of the federal judiciary to criminal behavior.

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

To prevent such an untenable construction, then, the good-behavior language must be construed as nothing more than a cross-reference to the availability of impeachment. As such, reliance on the good-behavior language to support a construction of impeachable offenses effectively begs the question, because as a cross-reference to impeachment it is no more revealing as to the scope of impeachable offenses than is the language of the Impeachment Clause itself.

F. JUDICIAL REVIEW OF IMPEACHMENTS AND
THE POLITICAL-QUESTION DOCTRINE

Closely intertwined with the question of the substantive scope of the category of impeachable offenses is the process-based issue concerning the

48. U.S. CONST. art. III, § 1.

relevance of the political-question doctrine to the review of congressional impeachment decisions. When applicable, the political-question doctrine creates a self-imposed bar to the judiciary's power to review the constitutionality of federal governmental action. Traditionally, the doctrine has been confined to specified categories of cases involving constitutional issues which, allegedly, either are not susceptible to judicially manageable standards or are textually committed to final resolution by another branch.⁴⁹ If the political-question doctrine is deemed applicable to the constitutional scope of impeachable offenses, then questions on the meaning of "high Crimes and Misdemeanors" in the Impeachment Clause are rendered purely academic: Absent judicial review, the congressional determination of impeachable behavior is effectively final.

As one who has strenuously argued that the political-question doctrine in all its procedural manifestations represents a perversion of the proper theory of judicial review,⁵⁰ I have little trouble rejecting its application in the specific context of the permissible constitutional scope of impeachable offenses. Indeed, even if one were to accept the political-question doctrine as a matter of abstract principle, it would be improper to apply it to the issue of the scope of impeachable offenses. If, as I argued in the previous section, it is important from the perspective of the value of limited government to preserve judicial independence by confining the scope of congressional power to impeach federal judges, then it would be nonsensical to preclude judicial review of congressional conclusions that certain judicial conduct is impeachable. Such a result would give rise to the very same unconstrained congressional power to intimidate federal judges that had just been rejected as undermining the values of limited government and judicial independence.

Moreover, determination of the scope of impeachable offenses does not satisfy any of the traditional criteria of the political-question doctrine. There is no reason to believe that the words, "high Crimes and Misdemeanors" in the Impeachment Clause are any less subject to the creation of manageable interpretive judicial standards than is the language of such commonly interpreted constitutional provisions as the First, Fourth, Fifth or Fourteenth Amendments.⁵¹ The possibility that judicial impeachments

49. See *Baker v. Carr*, 369 U.S. 186 (1962).

50. See Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031 (1985). For a completely contrary view, see Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643 (1989).

51. See U.S. CONST. amend. I (prohibiting abridgment of "the freedom of speech"); *id.* amend. IV (prohibiting "unreasonable searches and seizures"); *id.* amend. V (prohibiting deprivations of life,

may give rise to substantial political tension—a fact that will, in any event, often be untrue—surely does not qualify the issue for application of the political-question doctrine. Numerous issues of constitutional law that the Supreme Court has not hesitated to resolve on the merits have stimulated considerably more political tension than any individual impeachment decision.⁵² Nor is there anything in the constitutional text that even arguably commits this question to final determination by another branch of government, at least any more than is true of any constitutional provision. If the language of the Impeachment Clause were construed to give rise to such a commitment to another branch, it would be difficult to understand why any other provision could be construed any differently.⁵³ Additionally, while the Supreme Court has suggested that the interest in assuring the finality of a decision dictates applicability of the political-question doctrine in the impeachment context,⁵⁴ its reasoning (though apparently not its conclusion) was limited to the special situation of the President, where prolonged uncertainty about his legal status could give rise to obvious political problems.⁵⁵ This is a concern that is largely irrelevant in the judicial context.

The Supreme Court has further argued:

[J]udicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscer-

liberty or property “without due process of law”); *id.* amend. XIV § 1, cl. 4 (guaranteeing “the equal protection of the laws”).

52. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (upholding the right to abortion); *Engel v. Vitale*, 370 U.S. 421 (1962) (holding unconstitutional school prayer).

53. In *Nixon v. United States*, 506 U.S. 224 (1993), the Supreme Court found the basis for a textual commitment of the interpretation of the Impeachment Clause to Congress in the words, “The Senate shall have the sole power to try all impeachments.” *Id.* at 228 (quoting U.S. CONST. art. I, § 3, cl. 6). At most, however, that language vests *the power to try* impeachments in the Senate; it says absolutely nothing about the final power to determine the scope of the category of impeachable offenses. In *Nixon*, the issue was the constitutionality of the Senate’s practice of prohibiting the entire Senate from participating in the evidentiary hearings for a judicial impeachment. Arguably, the constitutionality of this practice could, in fact, come under the Senate’s “sole” power to “try” impeachments, because it deals with the specific nature of the trial process. That conclusion, however, should have no relevance whatsoever to the issue of the constitutional scope of impeachable offenses.

54. See *Nixon*, 506 U.S. at 228.

55. See *id.* at 236. The Supreme Court noted:

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

The Court, it is true, further noted that uncertainty also plagued “the question of what relief a court may give other than simply setting aside the judgment of conviction. Could it order the reinstatement of a convicted federal judge, or order Congress to create an additional judgeship if the seat had been filled in the interim?” *Id.* at 236. The obvious answers to what the Court apparently considered to be rhetorical questions are “yes” and “yes.”

ate the 'important constitutional check' placed on the Judiciary by the Framers [in the Impeachment Clause]. [This] argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.⁵⁶

As superficially appealing as this argument may at first appear, closer examination reveals its serious flaws. First, it is by no means uncommon for the judiciary to have final power to decide the constitutionality of congressional action that is intimately and inextricably intertwined with the scope of the judiciary's power. For example, the federal judiciary will, without the slightest hesitation, review the constitutionality of laws that restrict its jurisdiction, even though the federal courts have a special interest in the conclusion.⁵⁷ Moreover, if one were to hypothesize a law that reduces the salaries of all Article III judges, it would be absurd to believe that the federal judiciary would deem itself too personally interested in the outcome to sit in judgment on the constitutionality of such a law. Indeed, federal judges as a group would undoubtedly have a considerably more acute and direct personal interest in the outcome of this constitutional issue than they would in reviewing the constitutionality of a particular federal judge's impeachment.

The reason that the federal judiciary would unhesitatingly review the constitutionality of these laws, despite its obvious and indisputable personal interest in the outcome, is that the alternative would be even worse. The alternative would allow Congress to so abuse its powers as to destroy the effectiveness of judicial review. For example, absent the availability of judicial review, there presumably would be nothing to prevent a Senate bent on punishing judges it deems contrarian from removing them from office without any trial at all, or from declaring, by simple majority vote, that a simple majority shall be deemed the equivalent of a two-thirds majority for purposes of the impeachment in question. Alternatively, the House could conceivably deem a judicial decision protecting the free speech rights of politically unpopular groups to constitute an impeachable offense. While such a hypothetical may appear to be extreme, the reasoning of the political-question doctrine would necessarily insulate even such a preposterously unconstitutional law from the judicial review process. Under such an unchecked impeachment process, Congress could easily intimidate or punish the judiciary for exercising its intended checking function.

56. *Nixon*, 506 U.S. at 235.

57. *See, e.g.*, *Yakus v. United States*, 321 U.S. 414 (1944); *Lockerty v. Phillips*, 319 U.S. 182 (1943); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

Thus, the exact same logic that dictates the need for judicial review requires that the federal judiciary sit in final judgment on the constitutional validity of the impeachable offense in question, lest the entire judicial review process itself be fatally undermined. The simple political reality is that, absent some meaningful judicial review of the impeachment process, Congress would effectively be given a blank check in subverting the judicial review process. Supreme Court decisions⁵⁸ and respected scholarly commentary⁵⁹ to the contrary notwithstanding, the use of the political-question doctrine in determining the proper scope of the category of impeachable offenses for federal judges would be both unjustified and extremely harmful to the rule of law and the values of limited government.

G. THE EXCLUSIVITY OF IMPEACHMENT AS A REMOVAL DEVICE

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

There are two conceivable arguments, purportedly grounded in textual interpretation and principles of textual structure, to support the position that the Impeachment Clause does not provide the exclusive means of removal: First, that, by its terms, the Impeachment Clause does not itself provide that it is the exclusive means of removal; and second, that the “good Behaviour” language in Article III expressly provides an alternative basis for removal. Neither argument, however, should prevail. Instead, an

58. See, e.g., *Nixon*, 506 U.S. 224. In *Nixon*, the Court found that judicial review of impeachments is inappropriate, in part because there is “[no] evidence of a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers.” *Id.* at 223. This reasoning is seriously flawed, however, for two reasons. First, as I have argued, in virtually no other area of constitutional interpretation do we today feel slavishly bound to the framers’ intent, and there is no special reason to do so in the impeachment context. Second, requiring evidence of express framers’ statements supporting the concept of judicial review for every constitutional provision would lead to absurd results. Indeed, the framers did not even place judicial review expressly within the Constitution, so requiring that judicial review for a specific provision find a basis in express framers’ statements before the Court will authorize judicial review would impose an anachronistic and impossible burden on those who advocate judicial review.

59. See GERHARDT, *supra* note 33, at 118-38. But see Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, 1993 SUP. CT. REV. 125, 129 (questioning the holding in *Nixon*).

analysis of textual structure quite clearly reveals that impeachment must be the sole means of removal of a federal judge from office.

The response to the first argument is simply that recognition of any means of removal other than impeachment would, as a practical matter, severely undermine the limitations inherent in the impeachment process that are designed to control congressional resort to the removal process.⁶⁰ If an alternative means of removal without these strict limitations were recognized, then there would have been no point in imposing the limitations on impeachment in the first place, because Congress could then so easily circumvent them. If Congress can achieve the ultimate goal of the impeachment process yet simultaneously circumvent the restrictions imposed on its power by the impeachment process, then impeachment becomes both useless and meaningless—hardly the result that the Constitution could reasonably be construed to have intended. Thus, the fact that the Impeachment Clause does not on its face proclaim itself the exclusive means of removal should not be deemed dispositive; by its very structure, the clause inescapably dictates its exclusivity as a removal device.

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

It might be responded that this argument would be irrelevant were the good-behavior language construed, not to authorize Congress to remove federal judges but rather to authorize the federal judiciary as a whole to remove them.⁶¹ Under this construction, the good-behavior language would not provide Congress with a means of circumventing the restrictions imposed by the Impeachment Clause. Rather, it would merely authorize another branch to remove federal judges, pursuant to an entirely distinct constitutional standard.

Such a construction of the good-behavior language, however, is extremely dubious, for several reasons. Initially, it must be noted that nothing in the text of the good-behavior language itself indicates that it provides authorization exclusively to the judicial branch to invoke its terms.

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

61. This is the conclusion of Judge Harry Edwards. See Edwards, *supra* note 14.

Moreover, to the extent one finds such evidence probative,⁶² it should be noted that no historical data exists to support such a limited construction of the good-behavior language. Thus, while as a textual matter it is at least conceivable to construe the good-behavior language to create an alternative means of judicial removal, there exists no textual or historical basis to find such a power confined to the judicial branch. Finally, purely as a matter of constitutional policy it is questionable whether any advantage is gained by confining the good behavior removal authority to the judicial branch. One might at first believe that the threat to judicial independence posed by the judicial branch would not be as great as that posed by the legislative branch because the judicial branch is itself insulated from the majoritarian pressures which Congress is structured to reflect. But as commentators have widely recognized,⁶³ the judicial branch may itself present significant threats to the independence of individual federal judges. Judges appointed by a different President may well have very different political and ideological outlooks. Thus, there always exists the danger that judges appointed by one President would seek to pressure or intimidate judges appointed by a former President.

The minimalist nature of the good-behavior language strongly suggests that it was not fashioned to create an independent means of judicial removal, regardless of which branch is supposed to exercise that authority. The good-behavior language includes not a word about *who* gets to determine whether the requirements of good behavior have been violated or *what conduct* actually constitutes a violation of the good behavior requirement. This is in stark contrast to the Impeachment Clause, which provides in meticulous detail the procedure by which the impeachment process is to be conducted and who is to conduct it. That clause also provides considerably more information than does the good-behavior provision concerning the substantive standard for removal. It is difficult to believe that the very same framers who were so careful in structuring the standards and process of impeachment would so cavalierly have inserted an alternative mechanism for removal of judges that remains so open ended and unconstrained. Thus, the Supreme Court is undoubtedly correct

62. See discussion *supra* Part III.E.

63. See, e.g., GERHARDT, *supra* note 33, at 101. On occasion, members of the Supreme Court have also recognized these dangers. See *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 137 (1970) (Douglas, J., dissenting) (“[T]here is no power under our Constitution for one group of federal judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his power to act as a judge. This . . . form of ‘hazing’ [has] no place under the Constitution.”).

when it concludes that the good-behavior language does nothing more than provide a cross-reference to the impeachment process.⁶⁴

If, as I conclude, impeachment is the sole means of judicial removal, one must ask whether judges who have not been subjected to the impeachment process may nevertheless be subjected to criminal prosecution, at least when the result of that prosecution is imprisonment. As a practical matter, imprisonment precludes a judge from performing the functions of his office. Yet it is widely assumed that federal judges may be subjected to criminal prosecution, even when they have not been previously subjected to the impeachment process.⁶⁵ The rationale appears to be that even though imprisoned, federal judges remain in office. Though of course they are unable to handle a caseload, presumably they still can be paid their salaries while in prison.⁶⁶

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

In support of this suggested distinction, one might argue that the imposition of neutrally-fashioned and applied criminal law to federal judges in no way threatens the judicial independence that the restrictions on the availability of impeachment are designed to avoid. In this sense, criminal prosecutions could properly be analogized to the impact of a generally im-

64. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (Brennan, J., plurality opinion) ("The 'good Behaviour' Clause guarantees that Article III judges shall enjoy life tenure, subject only to removal by impeachment."). See also *Toth v. Quarles*, 350 U.S. 11, 16 (1955).

65. See 15 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 100.04[2] (3d ed. 1997) ("It is well established that an Article III judge may be indicted and prosecuted for criminal activity before being impeached."). See *United States v. Claiborne*, 765 F.2d 784, 789 (9th Cir. 1985) (holding that the U.S. Constitution does not immunize a federal judge from prosecution before impeachment).

66. See REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 72-82 (1993) (offering, among others, the example of a federal judge "sentenced in 1984 to two years in jail, which he served while still holding office and receiving his federal salary").

posed tax increase on federal judges in light of Article III's guarantee against salary reduction. The Supreme Court has found such tax increases to be constitutional, even though in a certain sense they will necessarily have the effect of reducing judicial salaries.⁶⁷ Yet if Congress were to impose a special tax solely on federal judges, presumably such a law would be held to be an unconstitutional reduction in judicial salaries. Under this approach, application of generally applicable criminal law to federal judges does not present the threat to judicial independence that both Article III's guarantee of tenure and the restrictions imposed on the impeachment process were clearly designed to prevent.⁶⁸

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

One possible response to this criticism is that the judge-based focus of the criminal penalty does not require use of a case-by-case inquiry into the specific motivations and harm to judicial independence. Instead, it establishes a priori rules: Criminal prosecutions based on laws that single out federal judges are unconstitutional, while those prosecutions of federal judges for violation of generally imposed prohibitions are constitutional.⁶⁹

67. See *O'Malley v. Woodrough*, 307 U.S. 277, 281-82 (1939) (ruling that judges appointed after income tax was enacted could constitutionally be subject to that tax). See also *Atkins v. United States*, 556 F.2d 1028, 1045 (Ct. Cl. 1997), cert. denied, 434 U.S. 1009 (1977) (holding that indirect decreases in judicial compensation that are unconnected to independence of judiciary are not constitutionally prohibited). But see *Hatter v. United States*, 64 F.3d 647 (Fed. Cir. 1995) (ruling that withholding of social security taxes from the salaries of judges who took office before those taxes were imposed violates Compensation Clause).

68. This application of criminal law does not threaten judicial independence solely because imprisonment is not constructive removal (indeed, imprisonment in a practical sense probably is constructive removal), but rather because the application of criminal law is conducted in a neutral manner that has nothing to do with the status of the judge. Such laws therefore cannot be viewed as congressional efforts to intimidate the federal judiciary.

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

Ultimately, one may have to accept this arguable departure from the exclusivity of the impeachment device, simply to establish that federal judges are not above the law. However, if it were at some point held that imprisonment does violate the tenure protection of Article III, Congress could possibly avoid the untenable conclusion that federal judges are above the criminal law by simply in the first instance resorting to the impeachment process, as a predicate to ultimate criminal prosecution.

The issue of constructive removal posed by the imprisonment scenario also has relevance to some of the disciplinary remedies which Judicial Councils in each circuit are authorized to use by the Judicial Conduct and Disability Act of 1980,⁷⁰ which include the possibility of the suspension of a judge's caseload.⁷¹ If such a remedy is imposed, certainly a strong argument can be made that it is tantamount to removal from office, even though the judge still retains both her official status and her salary. Moreover, for reasons already discussed,⁷² the fact that it is the Judicial Councils, rather than Congress, that impose the loss of tenure should make no difference for purposes of Article III: Both situations give rise to the very threats to judicial independence that Article III's tenure protection was designed to avoid. Hence, the availability of this remedy pursuant to existing federal legislation should be held unconstitutional.

IV. THE CONSTITUTIONALITY OF JUDICIAL DISCIPLINE NOT AFFECTING SALARY OR TENURE

The analysis of textual structure provides a very different scenario when judicial discipline affects neither salary nor tenure.⁷³ In such situations, the salary and tenure protections of Article III play no role whatsoever in preventing invasions of judicial independence. Because the salary and tenure protections are structured in general, noncontextual terms, they cannot properly be construed to protect against all conceivable threats to

70. 28 U.S.C. § 372 (1994). The Councils were created by Congress in 1939, albeit with extremely limited enforceable authority. Congress strengthened that power in the 1980 legislation, which also formalized the procedure for processing complaints. See Charles Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 248-63 (1993).

71. Pursuant to the statute, a judge may be reprimanded publicly or privately, or suspended from the assignment of cases, or subject to whatever action deemed "appropriate under the circumstances," with the exception of the removal from office of an Article III judge. 28 U.S.C. § 372(c)(6)(B)(vii) (1994). A Judicial Council may also recommend to the House of Representatives the initiation of an impeachment investigation. See 28 U.S.C. § 372(c)(8)(A) (1994).

72. See discussion *supra* at Part III.G.

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

judicial independence. Thus, unless one of the other constitutional protections of judicial independence—including the Due-Process Clause and the Vesting Clause of Article III⁷⁴—is triggered, even those disciplinary measures that could be deemed to present real threats to judicial independence would have to be considered constitutional, as unwise as they might seem on a pure policy level.

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

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

Whether this legislation would, in fact, violate some other constitutional guarantee of judicial independence is not entirely clear. It likely would violate procedural due process in future federal litigation presenting a parallel issue, because in such cases the judges could not be considered the neutral adjudicators required by the Due Process Clause.⁷⁵ This would be true, even of federal judges who had not been directly affected by the legislation. Once such legislation has been enacted, the possibility of un-

74. See U.S. CONST. art. III, § 1 ("The judicial Power of the United States shall be vested . . .").

75. See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 475-91 (1986).

due external influence on the judicial decisionmaking process is considerably more than abstract, hypothetical, or potential. Rather, the danger that the judge will be influenced by factors other than her assessment of the merits of the case is as real as in cases such as *Tumey v. Ohio*⁷⁶ and *Aetna Life Insurance Co. v. LaVoie*,⁷⁷ where the judge stood to gain personally from a decision one way more so than the other.

To be sure, one cannot be certain that, in each case, the judge will, in fact, be improperly influenced. But due process has not been held to require such a showing. Instead, for due process to be violated, there must exist merely a temptation that would affect a reasonable decisionmaker. No one could reasonably doubt that this standard would have been satisfied had Congress enacted a statute which selectively revoked nonsalary judicial benefits on the basis of disagreement with substantive decisions of the federal courts.

It is by no means certain, however, that due process would serve the exact same function that the salary and tenure protections would serve had they been applicable. For one thing, while presumably the judges themselves would have standing to immediately challenge the constitutionality of a congressional statute under the salary and tenure protections, that would not necessarily be the case where the Due Process Clause, rather than the salary and tenure protections, provides the constitutional source of the protection of judicial independence. The due-process right is that of the future litigants, not the judges themselves. Thus, it may well be that when the Due Process Clause triggers the protection, the determination of constitutionality will have to await a future suit raising the very issue on which Congress premised its selective reduction in non salary benefits.⁷⁸

76. 273 U.S. 510 (1927) (holding that a system in which a judge is paid more for convictions than acquittals violates the Due Process Clause).

77. 475 U.S. 813 (1986) (ruling that due process was violated by failure of state supreme court justice to recuse himself in suit brought against insurance company that alleged bad-faith failure to pay claims, especially where justice had himself filed two state court suits against insurance companies also alleging bad-faith failure to pay claims).

78. Perhaps one could make an argument that the federal judges should be allowed to exercise third-party standing in order to raise the constitutional issue that would at some point in the future affect private litigants. Third-party standing is heavily disfavored in the federal courts. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982); *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976). Nevertheless, where the litigant has suffered actual injury, has a close relationship to the third party, and there exists some hindrance to the third party's ability to protect her own interests, third-party standing is allowed. *See, e.g., Caplin & Drysdale, Chartered v. United States*, 491 U.S. 627 (1989). Whether federal judges would meet this standard, however, is subject to doubt.

A second potential difficulty caused by reliance on the Due Process Clause is the Clause's prerequisite that either liberty, property, or life be at stake. While the Supreme Court has often defined property interests broadly to include statutory entitlements,⁷⁹ this is a controversial position on the Court⁸⁰ and possibly subject to future revision. Thus, due process provides a somewhat limited check on congressional threats to judicial independence that do not implicate either salary or tenure.

It is also conceivable that the selective reduction in non salary benefits would be considered a violation of the Vesting Clause of Article III. The vesting of the judicial power in the federal judiciary has already been construed to prohibit either executive or legislative reversal of particular decisions by the federal courts.⁸¹ Applied in the present context, the argument would proceed in the following manner: Congressional retaliatory action based on specific decisions of the federal courts so interferes with the individual judge's resolution of the same issue in future parallel litigation that such action effectively removes the judicial power from the federal judge.

The success of this argument is somewhat uncertain. While in previous situations either Congress or an executive official was found to have reviewed and reversed specific decisions of the federal courts,⁸² here the interference is not nearly so direct. To be sure, one could fashion a reasonable argument that the exercise of the judicial power requires that the decisionmaker not be influenced by extraneous forms of intimidation, and that the concrete fear of decision-specific retaliation by Congress constitutes just such extraneous intimidation. However, at least as a doctrinal matter, it remains at best unclear whether such indirect interferences constitute a violation of the Vesting Clause. Moreover, as a conceptual matter one might readily distinguish the situations in which another branch has retained power actually to reverse a holding from those in which the other branch has merely sought to influence the holding. In the former case, in no meaningful sense does the actual final decisionmaking power remain in the hands of the judge, whereas in the latter case the judge still retains ultimate power to decide the case.

79. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970).

80. See *Arnett v. Kennedy*, 416 U.S. 134, 153-54 (1974) (Rehnquist, J., dissenting).

81. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792).

82. See *supra* note 80.

V. CONCLUSION

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

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

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

When the inquiry turns to the constitutionality of judicial disciplinary measures which do not affect salary or tenure, the textual-structural analysis dictates a very different set of conclusions. In such cases, the salary and tenure protections become irrelevant by their very nature. Article III does not impose an overarching protection of judicial independence against all conceivable threats. Instead, the provision selects specific methods of potential invasion of judicial independence for absolute prohi-

bition, as a means of preserving the broader goal of judicial independence in general. When such methods are employed by other branches, the protection forms an impenetrable shield. However, when judicial independence is threatened by other means, the selective instrumentalism model is of no help.

At such a point, other constitutional protections of judicial independence—such as the Due Process Clause or the Vesting Clause of Article III—may come into play. Both forms of independence protection, however, suffer from restrictions or limitations that may reduce their effectiveness in protecting against retaliatory or intimidating action by Congress.

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