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Judicial Interpretation in the Cost-Benefit Crucible

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INTRODUCTION

We don't really know whether judicial reliance on legislative history or other interpretive techniques that go beyond simply enforcing plain text is helpful, but we do know that these techniques are expensive. Therefore, courts should reject them.

That, in a nutshell, is Adrian Vermeule's challenge to the community of interpretation scholars. His new book, *Judging Under Uncertainty*,[1] eschews, and attempts to transcend, the main elements of the long-standing debates over methods that courts should use to interpret statutes and the Constitution. Countless judges and scholars have attempted to prove that particular interpretive methods are constitutionally required or constitutionally illegitimate;[2] Vermeule rejects these efforts.[3] Simiarly, he sees no need to

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[1] ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (Harvard University Press 2006). For reviews, see William N. Eskridge, Jr., *No Frills Textualism*, 119 Harv. L. Rev. 2041 (2006); Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. Chi. L. Rev. 329 (2007).

[2] *See*, *e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519 (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy"); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 35 (Amy Gutmann ed., 1997) (arguing that reliance on legislative history is unconstitutional); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673, 706-707 (1997) (arguing that the constitutional rule against congressional self-aggrandizement prohibits reliance on legislative history in statutory interpretation); John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 Colum. L. Rev. 1648, 1650-51 (2001) (arguing that our constitutional structure compels courts to adopt the "faithful agent" model of statutory interpretation and to reject the English practice of equitable interpretation); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 Colum. L. Rev. 990 (2001) (arguing that the Constitution permits nontextualist interpretive practices); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 Vand. L. Rev. 1457 (2000) (arguing that the Constitution permits courts to consult legislative history, but imposes some limits on what can constitute consultable legislative history).

[3] *Id.* at 31 ("[C]onstitutional premises . . . mandate neither formalist interpretive methods nor nonformalist interpretive methods . . . . The Constitution cannot plausibly be read to say a great deal about the contested issues of statutory interpretation.").

resolve apparently burning questions such as whether courts are bound by what legislatures *write*, or by what legislatures *intend*[4]—again distancing himself from innumerable arguments in the scholarly literature.[5] For Vermeule, everything comes down to a simple but withering cost-benefit analysis involving two factors: the empirical uncertainty regarding the benefits of interpretive methods other than simply enforcing plain text, and the costs of those methods. Because we lack, and probably cannot hope to get, data that could tell us whether these methods move courts closer to or further away from any accepted interpretive goal, and because we do know that the methods are costly, courts should reject them.

The goal of this Article is to engage Professor Vermeule's arguments and to respond to the substantial challenge that his book represents to the interpretation scholarship community. In essence, Vermeule challenges interpretation scholars to justify their allegedly sophisticated interpretive recommendations. For decades (indeed, centuries),[6] interpretive theorists have debated the goals of statutory interpretation and have offered

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[4] *E.g.* Vermeule, *supra* note 1, at 87 (arguing that it might be possible to "bracket" this and other high-level questions altogether, if institutional considerations show that judges should, in practice, use the same interpretive techniques under any theory of the ultimate goals of interpretation).

[5] *Compare*, *e.g.*, Scalia, *supra* note 2, at 16-18 (arguing that "despite frequent statements to the contrary, [courts] do not really look for subjective legislative intent"); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61, 67-68 (1994) ("[S]tatutory text and structure, as opposed to legislative history and intent (actual or imputed), supply the proper foundation for meaning. . . . Intent is empty. . . . Intent is elusive for a natural person, fictive for a collective body."); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 Int'l Rev. L. & Econ. 239, 239 (1992) ("Legislative intent is an internally inconsistent, self-contradictory expression..") *with* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 59 (photo. reprint 1979) (1765) ("The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable."); Patricia M. Wald, *The Sizzling Sleeper: the Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 Am. U. L. Rev. 277, 281, 301 (1990) ("[W]hen we are called upon to interpret statutes, it is our primary responsibility, within constitutional limits, to subordinate our wishes to the will of Congress because the legislators' collective intention, however discerned, trumps the will of the court. . . . Congress makes the laws, I try to enforce them as Congress meant them to be enforced.").

[6] Blackstone's assertion of the judicial power to depart from statutory text that dictates an absurd result goes back to 1765, *see* Blackstone, *supra* note 5, at 60, and Blackstone relies on the work of Pufendorf, published a century earlier. *See id.*; 5 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO ch. 12, § 8 (1688) (Oldfather tr.) ("[W]hen words, if taken in their plain and simple meaning, will produce an absurd or even no effect, some exception must be made from their more generally accepted sense, that they may not lead to nothingness or absurdity.").

innumerable prescriptions for how courts might best achieve those goals. But, Vermeule argues, scholars have neglected critical elements of the inquiry. Scholars have naively assumed that judges might adopt their pet interpretive theories en masse and execute them perfectly. Scholars have, Vermeule claims, neglected to consider the inevitable, institutional limitations on judicial interpretation—limits that stem from judges' cognitive limitations, from the limits on their time and resources, and from each judge's inability to compel other judges to adopt preferred interpretive methods.[7] No interpretive theory, Vermeule concludes, can be correct unless it takes due account of the institutional limitations that may cause courts to err. Vermeule's theory focuses almost exclusively on these limitations.

The result is perhaps the most austere vision of the judicial interpretive role ever put forward. Vermeule argues that, in cases where statutory text immediately at issue is clear and specific, courts should simply enforce that text and eschew all other considerations, such as legislative history, interpretation of the statutory text in light of other statutory text, or application of canons of construction.[8] In cases where the statutory text immediately at issue contains an ambiguity, courts should defer to administrative or other executive construction of the statute, without even attempting to use traditional tools of statutory construction to resolve the ambiguity.[9]

As with statutes, so too with the Constitution. The courts, Vermeule argues, should enforce clear and specific constitutional texts, but should eschew anything beyond that.[10] Where constitutional texts are ambiguous or open-ended, courts should let legislatures interpret them.[11] Under this rule, Vermeule blandly notes, courts would cease enforcing the Bill of Rights and the Fourteenth Amendment. In particular, freedom of speech, due process, and equal protection would all be remitted to legislative enforcement.[12]

A bit of a comedown for judges! Vermeule recognizes that his proposed interpretive methods would turn judges into rather humble functionaries[13] and would also pluck the heart out of the academic enterprise of advising judges

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[7] Vermeule, *supra* note 1, at 15-39.

[8] *Id.* at 189, 198, 202-03.

[9] *Id.* at 206.

[10] *Id.* at 230.

[11] *Id.*

[12] *Id.* at 230-31.

[13] *Id.* at 229.

with regard to interpretation.[14] But, Vermeule notes, the goal is not to make judges' work interesting,[15] nor for academics to have fun,[16] but to find interpretive methods that work best for our institutional structure, giving due regard to the empirical uncertainties surrounding the value of various interpretive methods.[17] His book challenges interpretation scholars to ask whether they really have any basis for believing that their favorite methods make interpretation better rather than worse.

This Article attempts to respond to Professor Vermeule's important challenge. After summarizing Vermeule's arguments in Part I, Part II examines both ends of Vermeule's cost-benefit critique: both the argument that discarding all judicial interpretive methods beyond enforcement of plain text will result in an "enormous" cost savings,[18] and the argument that there is no way to gauge whether these interpretive techniques have any positive net benefits.[19] First, Part II.A takes on the cost side of Vermeule's equation. It questions whether the costs of judicial interpretive methods are really as "enormous" as Vermeule would have us believe,[20] and it also suggests that whatever the size of the costs involved, Vermeule's theory might not result in avoiding those costs, both because adoption of Vermeule's theory by only some judges would leave the bulk of the costs in place,[21] and because the avoidance of judicial interpretive costs could result in increased offsetting costs elsewhere in the legal system.[22]

The remainder of Part II then considers the benefit side of the analysis. This part suggests that, while no one can precisely measure the value of the interpretive techniques Vermeule would discard, there are reasons to believe that the value is, at least, positive. The judiciary has institutional features that give it a comparative advantage at detecting appropriate occasions for departure from statutory text,[23] at checking the self-aggrandizing tendencies

[14] *Id*. at 290.

[15] *Id*. at 229.

[16] *Id*. at 290.

[17] *Id*. at 229, 290.

[18] *E.g.*, *id*. at 194.

[19] *E.g.*, *id*. at 193.

[20] *See infra* Part II.A.1.

[21] *See infra* Part II.A.2.a.

[22] *See infra* Part II.A.2.b.

[23] *See infra* Part II.B.

of the executive,[24] and at giving real content to constitutional constraints on the legislative power.[25] Because these institutional considerations suggest a positive value for judicial interpretive techniques that go beyond enforcement of plain text, those techniques cannot be discarded on the basis that, if they offer zero benefits, we might as well avoid their costs.

I. Vermeule's Challenge

Before critiquing Professor Vermeule's theory, it seems only fair to present it in its best light. In compressing three hundred pages into ten, some nuances will undoubtedly be lost. Professor Vermeule's main ideas, however, are sufficiently simple that they can be summarized briefly.

A. Vermeule's Critique

Professor Vermeule begins by criticizing prior interpretation scholarship for failing to analyze the institutions that carry out the interpretive process.[26] Ignoring this institutional structure, Vermeule says, is a fundamental error. No interpretive theory can succeed without taking into account the capabilities of interpreters to carry it out and the social effects of giving actual interpretive institutions particular powers.

A good picture of Vermeule's critique emerges from his criticism of Blackstone's acceptance of the principle that courts should construe statutes so as to avoid absurd results.[27] Vermeule distinguishes between "first-best," aspirational principles of interpretation that might apply in an idealized world and "second-best" principles that should apply in a real world in which fallible institutions must carry out the interpretive process. On the one hand, it might seem that everyone could agree that "absurd results are bad." But even so, Vermeule suggests, it might not follow that *courts* should have the power to construe statutes to avoid absurd results—and not for the conventional, formalist reason that judicial reform of statutes constitutes an invasion of the legislative power,[28] but for different, practical reasons that take account of the institutional capability and fallibility of courts. If courts have the power to avoid statutory absurdity, it is inevitable that they will

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[24] *See infra* Part II.C.

[25] *See infra* Part II.D.

[26] Vermeule, *supra* note 1, at 16-17.

[27] *Id*. at 19, *see* 1 Blackstone, *supra* note 5, at 60 (providing the famous example that a law against "letting blood in the streets" should not apply to a doctor who bleeds a patient who has fallen down in the street in a fit).

[28] Vermeule, *supra* note 1, at 31.

sometimes use that power incorrectly, identifying a statutory application as absurd because the judges do not sufficiently appreciate the relevant policies or purposes.[29] The costs of mistaken exercises of the absurdity power must be set against the benefits of its correct use. Moreover, judges will have to *decide* whether any given application of a statute is absurd, and making this decision will require courts to expend interpretive resources, another cost that must be considered.[30] Finally, giving courts the power to reform statutes introduces uncertainty into the law; parties planning their conduct must always consider the possibility that some court will later fail to follow the apparent meaning of statutory text on the ground that the court considers the result dictated by the text to be absurd. The increased difficulty of planning is another important social cost of the absurdity power.[31]

The costs of decision, the costs of error, and the costs of planning in light of legal uncertainty are, for Vermeule, vital institutional considerations that most interpretation scholarship ignores. Vermeule criticizes prior scholars for assuming that judges will perfectly carry out interpretive methods. He systematically surveys the main players in the world of interpretation and subjects them to this critique. Thus, the purposivism of Hart and Sacks,[32] Vermeule observes, requires judges to promote legal coherence, a fine aspiration, but one that could go awry if judges wrongly identify the principles and purposes to which the law is then made to cohere.[33] William Eskridge's theory of "dynamic" statutory interpretation[34] may successfully refute the formalist, separation-of-powers objections to judicial "updating" of statutes,[35] but it insufficiently considers whether the same objections might be justified on different, institutional grounds: Eskridge does not, Vermeule says, adequately consider whether dynamism might cause more harm than good, because cases in which fallible judges mistakenly update statutes (because they fail to perceive the statutes' current social utility) might outweigh the cases in which courts correctly exercise the updating power.[36] Judge Richard Posner's early theory of "imaginative reconstruction," which called upon judges to ask what an enacting legislature would have done if

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[29] Vermeule, *supra* note 1, at 20, 38-39.

[30] *Id*. at 20.

[31] *Id*.

[32] *See* HART & SACKS

[33] Vermeule, *supra* note 1, at 26-27.

[34] *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

[35] Vermeule, *supra* note 1, at 45.

[36] *Id*. at 47.

presented with a given case,[37] similarly fails to consider the potential inability of judges to do the work of imaginative reconstruction well, and judicial error in imagining what a legislature would have done could drive judges farther away from legislative intent than they would have achieved by an unimaginative, plodding application of the statutory text.[38] Posner's more recent pragmatic theory,[39] which views judges as "wise elders" and licenses them to interpret statutes so as to maximize their beneficial social consequences, similarly fails to consider whether the costs of decision and the costs of legal uncertainty that such a judicial power would entail would overwhelm its benefits.[40]

Thus, Vermeule calls the interpretation scholarship community to task for disregarding institutional considerations. Even a formalist such as John Manning, whose ultimate interpretive prescriptions have considerable overlap with Vermeule's, is criticized for reaching his conclusions on the basis of constitutional, separation-of-powers arguments, rather than on the basis of institutional considerations.[41] For Vermeule, constitutional arguments are unsatisfactory guides to interpretive practices—the Constitution, he says, mandates neither formalist nor nonformalist interpretive methods.[42] The focus, according to Vermeule, should be on the institutional characteristics of the interpreter.

B. Vermeule's Reconstruction

Interpretation scholarship, Vermeule therefore says, must take an "institutional turn"[43]—it must consider the institutional characteristics of the interpretive actors in our legal system. For Vermeule, several of these characteristics are especially salient: judicial capacities and potential for error, the costs of and systemic effects of interpretive methods, and the difficulties of methodological coordination within the judiciary.

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[37] Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case W. Res. L. Rev. 179 (1987).

[38] Vermeule, *supra* note 1, at 52-53.

[39] RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003); Richard A. Posner, *Pragmatic Adjudication*, in THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE (Morris Dickstein ed., 1998).

[40] Vermeule, *supra* note 1, at 54.

[41] Vermeule, *supra* note 1, at 30.

[42] *Id*. at 31-32.

[43] Vermeule, *supra* note 1, at 63.

Vermeule begins by considering judicial capacities.[44] He argues that debates over proper interpretive methods have focused too much on theoretical considerations and have too often ignored the question of judicial capacity to perform interpretive methods properly. He illustrates this point by considering the question of judicial reliance on legislative history. Much has been written on the question of legislative history's *legitimacy*, with formalists arguing that reliance on legislative history is constitutionally forbidden and with intentionalists arguing that legislative history is constitutionally legitimate and that it may provide useful insight into legislative intent. But all along, Vermeule claims, scholars have ignored the most vital consideration: whether courts really benefit from, or will merely be confused by, legislative history.

Vermeule presents a detailed critique of the famous *Holy Trinity Church* case.[45] He argues that the Supreme Court, in attempting to implement congressional intent as revealed in legislative history, in fact misread the legislative history.[46] This case study, Vermeule claims, is revealing. Although it is, of course, just a detailed look at the use of a single interpretive method in a single case, it illustrates the vital, general importance of taking account of the possibility of judicial *error*.[47]

The point of the case study is that, even on a very generous series of assumptions in favor of legislative history—even assuming that Congress forms a collective intent about the meaning of statutory text, that legislative history properly reflects that intent, and that intent is the ultimate touchstone of statutory meaning—the problem of judicial capacity may cause one to conclude that courts should not consult legislative history.[48] Courts, Vermeule notes, have limited resources—there is only so much time to consider each case. They may not be able to properly process all of a statute's legislative history, especially given how voluminous and heterogeneous legislative history can be. *Holy Trinity Church*, according to Vermeule, shows that judicial reliance on legislative history may move courts further from, rather than closer to, the proper interpretation of a statute, even assuming that legislative history would provide an infallible interpreter with the best guide to statutory meaning.[49] Courts are not infallible and interpretive methods must be designed for real decisionmakers, not

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[44] Vermeule, *supra* note 1, at 86-117.

[45] Holy Trinity Church v. United States, 143 U.S. 457 (1892).

[46] Vermeule, *supra* note 1, at 90-102.

[47] *Id*. at 102-03.

[48] *Id*. at 106-07.

[49] *Id*. at 105-17.

hypothetical ones.[50] Thus, in the end, perhaps even intentionalists should reject the use of legislative history, not because of any theoretical problem with it, but because of the practical problem that its net effect may be to drive courts further away from what intentionalists themselves claim is the goal of interpretation.

The generalizable lesson, Vermeule says, is that many of the apparently great debates in interpretive theory may be irrelevant. Who cares whether textualism or intentionalism provides the ultimate guide to statutory meaning if practical considerations dictate that the actual interpretive *methods* that courts should use would be the same under either theory? If even an intentionalist would conclude that, in light of the possibility of judicial error, the net effect of the use of legislative history is to drive courts further away from statutory meaning *as measured by intentionalism*, then intentionalists would agree with textualists that courts should not consult legislative history. Textualists and intentionalists could thus reach practical agreement without resolving their larger, theoretical debate.[51]

The other main institutional consideration that Vermeule considers is the lack of coordination within the judiciary.[52] Interpretation scholars, Vermeule notes, often offer prescriptions for "the courts" to adopt, as though the judiciary were all governed by some Kantian universal imperative and might, en masse, adopt a particular interpretive method.[53] In fact, that is not how things work. No judge can force any other judge to adopt particular interpretive methods. Indeed, perhaps somewhat curiously, even when the Supreme Court itself makes a ruling in an interpretation case, it appears to regard the ruling as having stare decisis effect only as to the particular interpretation reached; neither the Court nor individual Justices seem to regard rulings as having stare decisis effect with regard to interpretive methodology.[54] Justice Scalia, for example, continues his notable campaign against reliance on legislative history even though the Supreme Court has expressly rejected it.[55]

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[50] *Id*. at 116.

[51] Vermeule, *supra* note 1, at 116-17.

[52] *Id*. at 118-48.

[53] *Id*. at 119, 122.

[54] *See* Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 Tex. L. Rev. 339, 385-90 (2005); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2144 (2002).

[55] *See*, *e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 518 n.12 (1993) (expressly justifying, in response to a dissent by Justice Scalia, resort to legislative history even in a case where the statutory text is unambiguous); *cf.* United States v. Thompson/Center Arms. Co., 504 U.S. 505, 516 n.8 (1992) (plurality opinion) (similarly justifying resort to legislative history in

Vermeule observes that this lack of coordination within the judiciary may have significant impact on the choice of interpretive methods. In particular, he suggests that "democracy-forcing" interpretive methods—interpretive methods that supposedly have the virtue of improving legislative behavior—may only make things worse if some, but not all, judges use them.[56] For example, some textualists argue that courts should disregard legislative history because doing so will "foster the democratic process" by compelling Congress to ensure that it enacts its desires into statutory text.[57] Vermeule, however, observes that if *some* judges refuse to consider legislative history but most judges will consider it, then legislators will expect legislative history to be considered and will keep on using it. Isolated textualist decisions will then not achieve the benefit of improving the legislative process—and they may have the cost of missing legislative intent as revealed in legislative history. Thus, such isolated decisions may not only fail to achieve their democracy-forcing result, but may actually make things worse.[58] Vermeule calls the assumption that a method is best for one judge if it would be best if used by all judges simultaneously "the fallacy of division."[59]

Because no judge can force another judge to adopt a particular method, Vermeule concludes, individual judges cannot choose a method as best on the assumption that all other judges will fall into line. Rather, each judge must choose a method that will be helpful to the overall judicial system even if other judges do not choose to follow. The individual judge's choice will, of course, not make things perfect, but, to avoid the fallacy of division, judges must choose methods that will at least contribute marginal benefits even if other judges do not choose the same methods.[60]

C. Vermeule's Prescription

In light of the institutional concerns detailed above, Vermeule concludes that the most pressing questions in interpretation are not theoretical, but empirical.[61] Scholars can endlessly debate whether the ultimate goal of interpretation should be to discern the meaning of enacted text or, rather, the

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response to a dissent by Justice Scalia).

[56] Vermeule, *supra* note 1, at 118.

[57] *See*, *e.g.*, United States v. Taylor, 487 U.S. 326, 346 (Scalia, J., concurring in part).

[58] Vermeule, *supra* note 1, at 135-36.

[59] *Id*. at 121.

[60] *Id*. at 121-23, 146-47.

[61] *Id*. at 149, 153.

intent of those who enacted it, but what we really need to know is whether particular interpretive methods bring us closer to, or drive us further away from, either of these goals. If it turns out that certain interpretive methods are not helpful in achieving *any* goal that anyone might posit for interpretation, then everyone could agree on discarding those methods, even without reaching agreement on the ultimate interpretive goals.[62]

The problem, then, is the empirical one of determining the actual value of interpretive methods. Does reliance on legislative history, for example, help or harm judicial efforts to discern legislative intent (even assuming that discerning legislative intent is the right goal)? Vermeule complains that scholars have long relied on intuition rather than hard evidence in answering this question. It is no good pointing to particular cases in which legislative history is helpful, he says, because, for all one knows, those cases might be more than balanced out by cases in which use of legislative history harms the interpretive enterprise (as he believes occurred in *Holy Trinity Church*). We need real empirical evidence on whether legislative history and other interpretive tools do more good than harm overall.

The problem, of course, is that there is no real empirical evidence on this question, and, Vermeule notes, it may be impossible to get any, at least anytime soon. The relevant questions may be "trans-scientific," that is, impossible to study empirically at a reasonable cost within a reasonable time.[63] An empirical study on the usefulness of interpretive techniques would almost inevitably suffer from fuzzy categorization of cases (who would judge which cases reached the "right" results?), uncertainty about the relevant variables, and the impossibility of performing direct experiments about the long-term effects of adopting particular interpretive regimes.[64]

Unfortunately, judges cannot put off deciding cases until someone conceives and executes studies that provide valid empirical data. They must decide cases in real time. What is needed, then, is a set of interpretive techniques that are appropriate given the paucity of empirical knowledge about which interpretive techniques really achieve their stated goals—hence, Professor Vermeule's title, "Judging under Uncertainty."

Vermeule finds the answer by borrowing from "decision theory."[65] If we are uncertain about the value of various interpretive methods, decision theory tells us that, ideally, we would calculate the "expected" values of different methods by taking a weighted average in which we multiply the various possible payoffs to each method by the probability of each payoff. The

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[62] *Id*. at 85, 116-17.

[63] *Id*. at 158.

[64] *Id*. at 158-62.

[65] *Id*. at 171.

difficulty, however, is that the payoffs of various interpretive methods are not only unknown, but we do not have appropriate numbers to assign to their probabilities, and Vermeule claims, we cannot even make reasonable estimates.[66] Vermeule therefore turns to a more radical decision technique: the "principle of insufficient reason," which consists of simply assuming that unknown probabilities are equal, or, to put it another way, that the good and bad aspects of the unknowable results of proposed interpretive techniques cancel each other out.[67] Vermeule's answer, in other words, will consist of focusing on those outcomes of interpretive methods that are knowable, and assuming that everything else washes out in the long run.

Vermeule also notes several other decision-theoretical techniques, only one of which will be mentioned here: "satisficing."[68] This technique consists of searching among options only until one has found a choice that is "good enough" and then abandoning any further search for a better choice. The satisficer contents herself with a good choice and does not demand the *best* choice. Armed with these techniques, Vermeule proceeds to offer prescriptions for judicial interpretation.

1. Statutory Cases

For statutory interpretation, Vermeule proposes that, where the statutory text immediately under consideration is clear, courts should simply apply its clear meaning and ignore all other considerations. This conclusion follows from the decision-theoretical premises just noted, as applied to the actual situation in which courts find themselves.

Vermeule observes that courts, as noted earlier, lack solid empirical data about the value of most interpretive techniques that go beyond enforcing the plain meaning of the immediately applicable statutory text, but they are in a good position to gauge one fact about these methods: their costs. Courts have a comparative advantage in assessing how interpretive methods affect litigation costs and judicial workloads.[69]

Vermeule applies this insight to various interpretive techniques, starting with judicial reliance on legislative history. As noted earlier, judges have

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[66] *See*, *e.g.*, Vermeule, *supra* note 1, at 192 ("judges have almost no reliable information" about the reliability of legislative history or its effect on judicial error; its external costs and benefits are "at best difficult to specify and at worst wholly indeterminate").

[67] *Id*. at 173.

[68] Vermeule, *supra* note 1, at 176. I thought this was a contrived word, but according to the Oxford English Dictionary it has had the meaning Vermeule mentions since at least 1956. OXFORD ENGLISH DICTIONARY (2d ed. 1989).

[69] Vermeule, *supra* note 1, at 166-68.

little hard information about how reliance on legislative history affects the reliability of their decisions. Under the principle of insufficient reason, Vermeule suggests, courts should assume that this factor washes out—that, on balance, reliance on legislative history neither helps nor harms judicial efforts to reach the correct interpretations of statutes (on any view of correctness).[70] But courts do know that legislative history is costly: it is expensive for counsel to research and for courts to consider. In the absence of any solid, empirical reason to believe that legislative history actually helps courts reach more accurate decisions, courts might as well save themselves and litigants the cost of considering it.[71] In other words, in the absence of any real information about which alternative is best, one might as well select the cheapest.

Of course, Vermeule acknowledges, minimizing costs is not the only goal[72]—we should not try to minimize costs at all costs, one might say—and it would be wrong to discard reliance on legislative history if there were no good alternative. But there is a good alternative—simple reliance on clear statutory text. Such a method is "good enough," and this is where the idea of satisficing comes in: faced with a method that produces "good enough" results, courts should not adopt other methods that offer uncertain benefits but certain and substantial costs.[73] Again, the result is to discard reliance on legislative history.

Vermeule reaches the same conclusion, for similar reasons, as to other techniques that go beyond simply enforcing the clear statutory text immediately at hand. He rejects most of the "canons of construction," again on the ground that their benefits are uncertain, while their costs are definite.[74] Occasionally, some default canon will be an inevitable necessity (for example, in the absence of any express statement, statutes must either be assumed to apply, or not to apply, extraterritorially), in which case, Vermeule asserts, courts should just pick a default rule and be done with it, but otherwise the canons should be abandoned and statutory plain text simply enforced.[75] Similarly, comparison of statutory text to similar text in other statutes (which Vermeule dubs "holistic" statutory interpretation) again provides uncertain benefits, but definite costs, and should also be

[70] *Id*. at 193.

[71] *Id*. at 192-95.

[72] *Id*. at 196.

[73] *Id*. at 194.

[74] Vermeule, *supra* note 1, at 198-99.

[75] *Id*. at 201-02.

abandoned.[76]

In cases where statutory text is not clear, but contains a gap or ambiguity, Vermeule argues that courts should defer to the statute's administrative construction. Administrative agencies, Vermeule argues, have a comparative advantage over courts in assessing statutory meaning, and this is the true reason for *Chevron* deference.[77] Agencies have specialized expertise that puts them in a better position than courts to know the true meaning of ambiguous text, and they have no coordination problem, because each agency is a single organ that can interpret its own organic statute.[78] Courts should therefore accept agency interpretations of ambiguous statutes without even attempting to use traditional tools of statutory construction to narrow the ambiguity. For courts to use such tools just duplicates the costs of agency interpretation without any certainty of any corresponding benefit. Again, cost minimization is not the only goal, but accepting the agency's interpretation is "good enough," and doing anything more risks incurring costs with no benefits.[79]

2. Constitutional Cases

Turning from statutory interpretation to constitutional interpretation, Vermeule applies the same theory. Again, he argues that courts should enforce those texts (here, parts of the Constitution) that are clear and specific and should leave everything else—specifically including enforcement of most of the Bill of Rights and the Equal Protection Clause—to other officials.[80] Anything else, he argues once again, incurs definite costs for uncertain benefits.

Of course, Vermeule acknowledges, this rule would entail discarding some decisions that are near to our hearts; every now and then the courts seem to do a good job and come down with a constitutional decision that

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[76] *Id*. at 202-05.

[77] *Id*. at 207-08; *see* Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). *Chevron* deference is most conventionally justified on the theory that an ambiguous provision in a statute entrusted to an administrative agency constitutes an implicit delegation of power from Congress to the agency to resolve the statutory ambiguity. Vermeule contends that, in fact, Congress has neither required nor forbidden courts to adopt the *Chevron* principle and that its true justification lies in the agencies' superior institutional ability to discern statutory meaning.

[78] *Id*. at 208.

[79] *Id*. at 210-11.

[80] Vermeule, *supra* note 1, at 230-31.

most people would hate to lose, such as *Brown v. Board of Education*.[81] But for every *Brown*, Vermeule says, there is a *Dred Scott*—i.e., a case in which the courts wrongly strike down the work of the political branches.[82] If courts have the power of judicial review, they will inevitably make some bad uses of it: there is no way to get the good decisions without the bad ones. Thus, lovers of judicial review have to stop focusing on their favorite decisions and instead consider the whole range of decisions. We need to know whether judicial review produces, not just good results, but *net* good results.

Vermeule again concludes that there is no way to answer this empirical question. There is no reason, he suggests, to believe that courts have an institutional advantage in interpreting the Constitution.[83] True, Article III courts are free of political pressure to conform to current majoritarian preference, but that does not free them to come to *correct* constitutional decisions; it just frees them to do whatever they please.[84] It does not make them truer agents of the people than the people's elected representatives. Courts that attempt to tackle ambiguous constitutional text may make errors of interpretation, just as they do in statutory interpretation. We cannot empirically know whether they will, on balance, do more good than harm.[85]

But we can know, once again, that sophisticated interpretive methods are costly. The decision costs of constitutional interpretive methods are high (originalism, for example, requires a lot of historical research). Moreover, judicial review adds a layer of uncertainty to the law that imposes extra costs by complicating planning.[86]

While this aspect of his theory seems even more radical than his statutory interpretation prescription, Vermeule assures the reader that eliminating judicial review will not lead to terrible results, such as tyranny. He notes that some other liberal democracies get by without judicial review.[87]

Thus, once again, doing anything other than enforcing clear text, and leaving the rest to other officials, incurs certain costs while yielding no certain benefit. Vermeule concludes that the courts' interpretive role should be as humble in the constitutional arena as it is with regard to statutes.

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[81] 347 U.S. 483 (1954); *see* Vermeule, *supra* note 1, at 231.

[82] *See* Vermeule, *supra* note 1, at 231, 241, 281.

[83] *Id*. at 258-59, 273-75.

[84] *Id*. at 258-59.

[85] *Id*. at 275.

[86] *Id*. at 275-76.

[87] *Id*. at 265.

II. Responding to the Challenge

Professor Vermeule's work poses a valuable and significant challenge to the community of interpretation scholars. Many of us, including myself, have written extensively about cases in which following plain statutory text leads to the wrong result and have argued for a judicial power to reform or deviate from statutory text in appropriate cases.[88] There is considerable debate about when a case is "appropriate" for the exercise of such a judicial power—my own theory calls upon courts to discern the "background principles" underlying the area of law of which a statute is a part and to use them as a guide, deviating from statutory text only when the text deviates so surprisingly from background principles that departure from the text is justified[89]—but some power of judicial reform is a common theme in the scholarly literature.

Vermeule rightly asks those of us arguing for the existence of this power to consider whether we really have a basis to believe that the power will, *on balance*, do more good than harm. Vermeule is surely right to observe that, once courts are granted the power to depart from statutory text, they will inevitably misuse that power in some cases.[90] Therefore, for scholars to prove the value of our pet interpretive techniques, it is not enough to exhibit particular cases in which the power of judicial departure from statutory text will provide benefits; we must offer some reason to believe that the power offers *net* benefits in the whole run of cases, in light of the possibility of judicial error.

Vermeule also rightly draws attention to the costs of litigation that arise from the need to decide whether a court should exercise the power to depart from statutory text in a given case—a power that, most agree, should be rarely exercised. Even I, who have delighted in collecting cases in which application of a strict textualism would make courts look silly, regard such cases as curiosities. Most of the time, as Vermeule observes, simple application of statutory text leads to what all interpreters regard as the correct result, because the other cues to which some interpreters would also look

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[88] *See*, *e.g.*, Blackstone, *supra* note 5, at 60; Eskridge, *supra* note 2; Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 Geo. Wash. L. Rev. 309 (2001) [hereinafter Siegel, *Statutory Drafting Errors*]; Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. Rev. 1023 (1998)[hereinafter Siegel, *Textualism and Contextualism*]; Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 Wis. L. Rev. 235.

[89] *See* Siegel, *Statutory Drafting Errors, supra* note 88; Siegel, *Textualism and Contextualism, supra* note 88.

[90] I have always acknowledged this. *See* Siegel, *Textualism and Contextualism, supra* note 88, at 1110.

(legislative history, background principles, or whatever else) only reinforce a statute's apparent textual meaning.[91] Therefore, interpretation scholars who argue for judges to look beyond plain meaning are suggesting that courts and parties must bear the cost of engaging interpretive machinery that will make a difference only in unusual cases. Is the game worth the candle?

Vermeule is not the first to attack widely used interpretive methods on the ground that they fail a cost-benefit test.[92] Justice Scalia has long complained that judicial reliance on legislative history is a "waste of research time and ink" that "condemns litigants to subsidizing historical research by lawyers" while being, "on the whole . . . more likely to confuse than to clarify."[93] But Vermeule has taken the argument to a new level, expanding it and making it the centerpiece of an entire theory of interpretation. Vermeule challenges us to consider whether we have erred in relying on our armchair intuitions about the value of interpretive methods in the absence of real, empirical data.

The remainder of this Article attempts to respond to Vermeule's challenge. The next section suggests that some reliance on armchair intuition is inevitable in the choice of interpretive methods, and, indeed, that Vermeule relies on it no less than anyone else.[94] Therefore, to justify interpretive techniques that go beyond enforcement of plain text, it should be enough to exhibit a reasonable basis for believing that the techniques have a positive net value, even if that value cannot be precisely gauged. The Article then attempts to offer institutional reasons for such a belief.[95]

A. Costs: The Costs of Interpretation and the Inevitability of Armchair Intuition

Professor Vermeule criticizes interpretation scholars for relying on their intuitions regarding the value of interpretive methods in the absence of empirical data. His own theory, he believes, avoids this problem by focusing only on those costs and benefits of interpretive choices that courts would be in a good position to gauge. In fact, however, a closer look at the costs and

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[91] *See* Vermeule, *supra* note 1, at 186 (noting that all interpretive methods agree that clear and specific text is the single best source of interpretive information); Siegel, *Statutory Drafting Errors, supra* note 88, at 335 n.116 (noting convergence of interpretive methods in most cases).

[92] For a more detailed look at Vermeule's precursors, see Eskridge, *supra* note 1, at 2044-50.

[93] Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (emphasis deleted). Justice Scalia also sounded this theme in his book on interpretation. *See* Scalia, *supra* note 2, at 36-37.

[94] *See infra* Part II.A.

[95] *See infra* Part II.B - II.D.

benefits involved reveals that Vermeule is as guilty of armchair empiricism as anyone else. He posits, without any real data, that the costs of the interpretive methods he desires to reject are "enormous," and he disregards some costs of his own proposals that, for all we know, might exceed the cost savings his methods would provide.

1. How Big are These Costs, Really?

A centerpiece of Professor Vermeule's theory is his assertion that interpretive methods that go beyond the application of plain text (or deference to administrative construction of ambiguous text) entail costs that are high, indeed, "enormous."[96] Theoretically, one might say, Vermeule's argument does not depend on the size of these costs. If one assumes (by virtue of the "principle of insufficient reason") that the net benefits of interpretive techniques that look beyond plain text are zero, then courts might as well jettison these techniques even if the resulting savings were very low—even a dollar of savings would beat zero dollars of foregone benefits.

Still, if the costs of looking beyond plain text were really that low, we would all be better advised to spend our time arguing about something else. Vermeule's own notion of "satisficing" would suggest that the current interpretive system is "good enough"—it would hardly be worth buying Vermeule's book if the savings resulting from his theory were less than the price of the book, and even on a more realistic view (the costs involved are surely more than that), the satisficer might stick with the current system unless an alternative offers a substantial improvement. Thus, the enticing notion that implementation of Vermeule's theory could provide society with "enormous" cost savings is really central to his arguments.[97]

It is notable, therefore, that Vermeule does not attempt to quantify the costs of the interpretive techniques he criticizes. He notes only that other interpretation scholars seem to agree that the costs are high.[98] But given that Vermeule criticizes these same scholars' estimation that the costs are worth it as "empirically far too ambitious,"[99] that seems a slender reed on which to hang his theory. It is true that Professor Eskridge has said that, in his

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[96] Vermeule, *supra* note 1, at 194 (referring to the cost of researching legislative history); *id. at* 210 (referring to the cost of using traditional tools of statutory construction to review administrative interpretation of statutes).

[97] *See* Vermeule, *supra* note 1, at 175 (noting that invocation of the principle of insufficient reason seems most plausible when "the consideration given dispositive weight is . . . of the same order of importance as the discarded imponderables").

[98] *E.g.*, *id.* at 193.

[99] *Id.*

judgment, the cost of researching legislative history "involves a very large number of dollars,"[100] but Eskridge gives no basis for this judgment. Also, Justice Scalia estimates that, when he was head of the Justice Department's Office of Legal Counsel, his staff spent 60% of its time researching legislative history.[101] But if we are to make impressionistic judgments based on personal experience, I would add that, in my own five and a half years of experience of litigation of statutory issues (one year as a law clerk and four and a half as an advocate in the Department of Justice), I certainly researched a substantial amount of legislative history, but I never felt that doing so was a particularly grinding burden, especially relative to the overall costs of litigation (and there was at least one time that it pretty much won the case for me,[102] which seemed quite beneficial).

The cost of interpretive techniques *relative* to the overall cost of litigation seems particularly neglected in Vermeule's theory. Indeed, imagine that Vermeule's theory were fully adopted by every Article III judge tomorrow. Litigation would hardly cease. Surely the lion's share of litigation is over establishing facts, not arguing about the law's meaning. Even arguments about statutory interpretation would continue. Vermeule's theory retains for the courts the function of deciding whether statutory language is clear or ambiguous. Even if stripped of certain techniques, such as reliance on legislative history or comparison of statutory text to text in other statutes, counsel will surely find things to argue about.[103] The amounts involved are not quantifiable—as noted, Vermeule himself does not attempt to quantify them—but the thought of the amount of litigation that would remain gives some reason to doubt whether the cost savings from adopting Vermeule's theory would truly be "enormous." If the whole savings would be something to the right of the decimal point, then the argument for incurring costs in the name of achieving the *best* possible methods of interpretation is strengthened.

When the British House of Lords recently relaxed its rule against judicial consideration of legislative history,[104] it faced the cost question squarely. Over the "practical objection" of the Lord Chancellor that permitting such

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[100] William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 Mich. L. Rev. 1509, 1541 (1998).

[101] Scalia, *supra* note 2, at 36-37; *see also* Kenneth W. Starr, *Observations about the Use of Legislative History*, 1987 Duke L.J. 371, 377 (noting that counsel must consult legislative history not only in litigation, but also in counseling clients).

[102] *See* International Brotherhood of Teamsters, AFL-CIO v. Federal Highway Admin., 56 F.3d 242, 246-47 (D.C. Cir. 1995).

[103] *See* Vermeule, *supra* note 1, at 188-89 (noting that judges may disagree about whether statutory language is clear).

[104] Pepper v. Hart, [1993] 1 All E.R. 42.

consideration might lead to "an immense increase in the cost of litigation in which statutory construction is involved,"[105] the leading opinion stated that "it is easy to overestimate the costs of such research," and that while the new practice would "inevitably involve some increase in the use of time, this will not be significant."[106] This opinion was, it should be noted, based on the notion that courts would permit consultation of legislative history only in limited cases—more limited than U.S. practice allows.[107] Still, the bottom line is that experts do not agree on how large the costs of interpretive techniques are, and no one really has hard information.

2. How Much of the Costs Would Really Be Saved?

But inasmuch as the costs of the interpretive techniques that Professor Vermeule attacks are unmeasurable, let us charitably assume that they are, at least, large (we need not go so far as to say "enormous"). There are still reasons to wonder whether adopting Professor Vermeule's theory would lead to a savings of these large costs.

a. The Coordination Problem

As noted earlier, Professor Vermeule chides interpretation scholars for committing the "fallacy of division"—that is, for assuming that methods of statutory interpretation that would be beneficial if adopted by the *whole* judiciary must necessarily be good if adopted by individual judges.[108] Because judges cannot compel each other to adopt particular interpretive methods, Vermeule contends that judges must adopt methods that produce benefits even if other judges do not follow their lead. It is questionable, however, whether Vermeule's theory satisfies this criterion.

Vermeule contends that the benefits of adopting his theory are "marginal" or "divisible."[109] That is, he contends that each adoption of his theory by an individual judge will reduce systemic decision costs and the costs of legal uncertainty at the margin.[110] Of course, it may still be true that the full benefit of his theory will be achieved only when it is adopted by all, or at least most, judges, but he nonetheless perceives costs declining continuously as

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[105] *Id*. at 47-48 (opinion of Lord Mackey of Clashfern, LC).

[106] *Id*. at 66-67 (opinion of Lord Browne-Wilkinson).

[107] *Id*.

[108] Vermeule, *supra* note 1, at 121-22.

[109] *Id*. at 226.

[110] *Id*.

individual judges adopt his theory one by one.

This argument seems incorrect. Consider the example of the costs of researching legislative history. With regard to this particular interpretive tool, we have actual experience of what it is like to have Vermeule's theory adopted by some, but not that many, judges. Justice Scalia has famously engaged in a sustained campaign against reliance on legislative history for nearly twenty years now,[111] and some other judges have signed on.[112] What is the resulting effect on litigation costs? Probably, none.

Consider the plight of counsel arguing a statutory case before the Supreme Court. Counsel knows that citations to legislative history are wasted on Justice Scalia, and perhaps even on some of his colleagues. Counsel also knows, however, that a majority of the Justices have expressly stated their willingness to consider legislative history despite Justice Scalia's scorn for it.[113] So long as *most* of the Justices will consider legislative history, it seems likely that prudent counsel will research, brief, and argue it.[114]

An actual (if admittedly crude) empirical search bears out this intuition. Lexis provides a database of Supreme Court briefs going back to 1979, so it is possible to compare citations to legislative history from the pre-Justice Scalia era to those of the present. A search for citations to House or Senate Reports in Supreme Court briefs from three five-year periods, one just before Justice Scalia arrived at the Court, one ten years later, and one twenty years later, reveals the following:

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[111] Although Justice Scalia cited legislative history in some of his early opinions as a Justice, *e.g.*, Lukhard v. Reed, 481 U.S. 368, 379-81 (1987) (plurality opinion), he soon started to complain about the use of legislative history. *E.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 529-30 (1989) (Scalia, J., concurring). Subsequently, Justice Scalia carried his campaign against legislative history to the point where he regularly declines to join portions of opinions that cite legislative history, even where he joins the remainder of the opinion. *See* Michael C. Dorf, Foreword: The Limits of Socratic Deliberation, 112 Harv. L. Rev. 4, 18 (1998). This practice is ongoing. *See*, *e.g.*, Safeco Ins. Co. v. Burr, 127 S. Ct. 2201, 2205 n.* (2007) (noting that Justice Scalia joined all of the Court's opinion except for footnotes 11 and 15, which discussed legislative history).

[112] Justice Thomas, for example, although not as doctrinaire about the matter as Justice Scalia, has occasionally joined him in rejecting the validity of reliance on legislative history. For example, he joined Justice Scalia in suggesting that the Court should not "maintain the illusion that legislative history is an important factor in this Court's deciding of cases, as opposed to an omnipresent makeweight for decisions arrived at on other grounds." Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 219 (1994) (Scalia, J., concurring).

[113] *E.g.*, Conroy v. Aniskoff, 507 U.S. 511, 518 n.12 (1993).

[114] *See* Nelson, *supra* note 1, at 346.

Time Period	Briefs filed by parties in the Supreme Court[115]	Briefs citing House or Senate Reports[116]	Percentage of briefs citing House or Senate Reports
1/1/1981-12/31/1985	4,111	1,326	32.3%
1/1/1991-12/31/1995	2,510	905	36.1%
1/1/2001-12/31/2005	2,642	847	32.1%

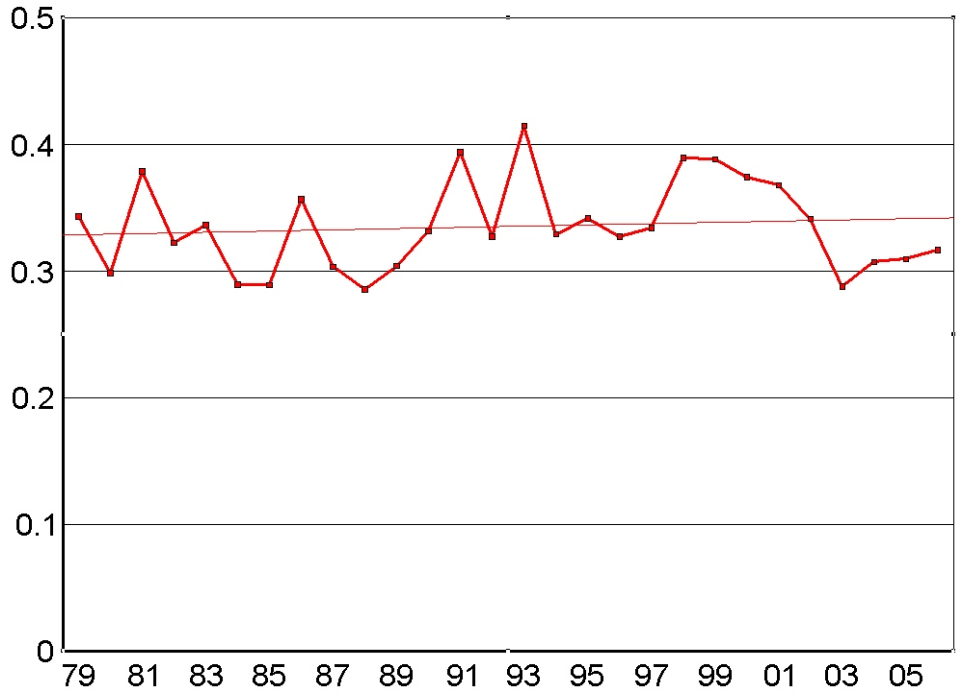
If Professor Vermeule's theory were correct, one would expect to see a decline in citations to legislative history as a result of Justice Scalia's sustained campaign of refusing to consider it. In fact, the rate of citations to legislative reports *increased* somewhat in the early years of Justice Scalia's campaign, and after some twenty years of the campaign the rate is virtually indistinguishable from what is was when Justice Scalia came to the Court in 1986 (it is down, but only by a minuscule 0.1%, or 0.4% of its original value).

Similarly, the trend of the rate of citations to legislative reports over *all* completed years in the LEXIS database (1979-2006)[117] is almost completely flat, as shown in this graph in which the X-axis is the year and the Y-axis is the percentage of party briefs filed that year that cite legislative reports:

[115] As revealed by conducting the search *DOCUMENT-TYPE ("brief") and not DOCUMENT-TYPE ("amicus")* in Lexis's Supreme Court briefs database, with the specified date restrictions. All searches described herein were conducted the week of June 18, 2007. Unfortunately, as I learned by conducting these searches in February 2007 and then again in June 2007, the data in the Lexis databases seem to vary over time – documents appear in or disappear from the Supreme Court briefs database even for years long past. Thus, it may be impossible to reproduce these exact results.

[116] As revealed by conducting the search *DOCUMENT-TYPE ("brief") and ("H.R. Rep." or "S. Rep.") and not DOCUMENT-TYPE ("amicus")* in Lexis's Supreme Court briefs database, with the specified date restrictions. Note that this search counts each brief once, regardless of the number of times a brief cites legislative reports, so its measure of the amount of citation to legislative history is obviously not perfect.

[117] As revealed by conducting the searches described in the last two footnotes, with year-by-year date restrictions.



The slope of the best linear fit to the year-by-year data over all completed years is .00049.[118] That is, the trend of the rate of citations to legislative history is actually positive (i.e., citations to legislative reports are *increasing*), but the change is so small that it seems more accurate to conclude that a single Justice's campaign against legislative history has simply had no impact

[118] The full data set is:

Year	1979	1980	1981	1982	1983	1984	1985	1986	1987
%	34.3	29.8	37.9	32.3	33.6	29.0	28.9	35.7	30.4

1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
28.6	30.4	34.0	46.7	33.9	41.5	32.9	34.2	32.7	34.9

1998	1999	2000	2001	2002	2003	2004	2005	2006	
38.9	38.8	37.6	36.8	34.1	28.8	30.7	30.8	31.7	

In the above table, "%" means, "percentage of party briefs citing legislative reports, as shown by the LEXIS Supreme Court briefs database." The linear best-fit line was calculated by Quattro-Pro.

on the rate at which parties rely upon it.[119]

Of course, this is a rather crude statistical analysis that does not fully measure the overall cost of legislative history research. But any data seem better than none, and these admittedly crude data do bear out the intuition that counsel will not decrease their use of legislative history just because individual judges or Justices stop using it.[120]

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[119]The above tables and chart consider only briefs filed by parties. The reason for this is that amicus briefs tend to cite legislative history at a different rate than that of party briefs (in the whole LEXIS database from 1979-2006, 33.1% of party briefs cite legislative reports, but only 27.1% of amicus briefs do so), and amicus briefs have been increasing (or at least, their representation in the LEXIS database has been increasing) over time: from 1981-1985, the database contains 45.0% as many amicus briefs as party briefs; from 2001-2005, it contains 62.3% as many amicus briefs as party briefs. Thus, consideration of trends in citation to legislative reports in *all* briefs might reveal an apparent decrease in citation rates that could really just be an artifact of the increasing percentage of amicus briefs (which cite legislative history less) in the database. It is therefore necessary to look only at the same kind of brief when doing a multi-year comparison.

The overall trend in citations to legislative reports in the amicus briefs considered as a separate group, like the trend in the party briefs, is almost completely flat. The slope of the trend line is -.00056. Thus, while this trend is technically decreasing, the effect is minuscule. Moreover, even if one does look at *all* briefs, the slope of the overall trend line is -.00020, again suggesting no impact from a single Justice's sustained campaign against legislative history.

Note also that the above data consider citations to legislative *reports*, not to legislative history more generally. Legislative reports are the most important form of legislative history, *see* Garcia v. United States, 469 U.S. 70, 76 (1984), so it seems reasonable to focus on them. Similar searches for citations to the Congressional Record in Supreme Court party briefs from 1979 to 2006 reveal that the slope of the trend line in their citation is -.0013. Searches for citations to committee hearings over the same period show a trend line with a slope of -.00023. Again, these are decreases, but only negligible decreases. Searching for all citations to all three forms of legislative history in party briefs for the same period reveals a trend line with a slope of .0015—an increase, but only a negligible increase.

Thus, while different indicators could be chosen to portray a tiny increase or tiny decrease in citations to legislative history, the data overall really suggest that Justice Scalia's refusal to consider legislative history has simply had no effect on the use of legislative history by parties to Supreme Court litigation.

[120] Some previous studies have suggested that Justice Scalia's campaign against legislative history has had a notable effect; these studies have gauged the impact by counting cases in which *the Supreme Court itself* has relied, or not relied, on legislative history. *See* Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 Wash. U. L.Q. 351, 355-56 (1994) (providing statistics regarding the decline in the Supreme Court's use of legislative history and concluding that "in slightly more than a decade the Court has moved from a position in which legislative history was routinely considered in all cases, to a situation in which it is considered by the controlling opinion in only a small minority of decisions. And in most cases, it is not mentioned at all."); William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. Rev. 621, 656-57 (1990) (providing similar statistics). However, the Court's reduced reliance on legislative history less does not imply that any resources will be saved,

Indeed, even if a majority of the Court joined Justice Scalia in disregarding legislative history and only a minority continued to consider it, it seems likely that counsel would continue to brief and argue it, because one never knows which votes will prove crucial in deciding a case.[121] It does not seem to be in the lawyerly character to omit arguments that *might* prove helpful. When counsel for the plaintiff in *Gibbons v. Ogden* concluded his Supreme Court argument with a peroration that quoted from Virgil's *Aeneid*,[122] his opponent did not simply respond, "Virgil is not authority" and save himself the trouble of researching it; rather, he explained in considerable detail, in a peroration of his own that extended for nearly three pages, why the quotation from the *Aeneid* really supported his side of the case.[123] If lawyers will not forbear to respond to a literary allusion, to a poet who has been dead two thousand years, it seems unlikely that they would neglect arguments based on legislative history that at least some Supreme Court Justices will certainly consider. The same would be true for arguments based on the other interpretive techniques that Vermeule would have judges abandon.

Vermeule is probably correct that, at some point, some cost savings would accrue from his theory even if it were not universally adopted. If, say, eight out of nine Supreme Court Justices renounced reliance on legislative history, so that only one Justice was still considering it, one could imagine that counsel might cut back on the resources that they would devote to researching and briefing legislative history, preferring to put most of their energy into matters that would likely prove more productive.[124] But the actual experience of having an individual Justice reject legislative history suggests that the costs of the interpretive techniques that Vermeule disfavors will not decline continuously as more and more judges reject them. Rather, it would seem that a "critical mass" of judges must adopt the theory before it has its desired cost-reducing effect.[125]

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because, as the statistics presented herein suggest, counsel will still research and brief legislative history even if the Court might not rely on it in a given case. (Of course, some slight savings would arise from any individual judge's refusal to consider legislative history—that judge's time will be saved, if nothing else. But given the ratio of resources expended by parties to those expended by courts, this savings may be dismissed as trivial.)

[121] Rosenkranz, *supra* note 54, at 2144.

[122] *See* Gibbons v. Ogden, 22 U.S. 1, 158 (1824) (argument of Mr. Emmett).

[123] *Id*. at 183-86 (argument of the Attorney General).

[124] Professor Vermeule kindly drew my attention to this point in an e-mail exchange.

[125] *Cf*. Vermeule, *supra* note 1, at 226 (denying that adoption of his theory by a critical mass of judges is necessary for it to have a beneficial effect). Another possibility, suggested to me by my colleague Michael Abramowicz, is that individual adoptions of Vermeule's theory could at first each produce a slight cost savings, with a substantial savings coming if a critical

Thus, the coordination problem to which Professor Vermeule calls attention has the potential to sap a considerable part of his theory's benefits. Of course, this objection may seem a little unfair. As Vermeule notes, most interpretation scholars do not worry about the fallacy of division; they just imagine that courts will adopt their pet theory en masse and perform it perfectly.[126] The next section examines whether Vermeule's theory will produce cost savings under this more typical, Panglossian assumption. But inasmuch as the main virtue of Vermeule's theory is supposed to be that it takes proper account of the structure of our actual interpretive institutions, it is only fair to observe that, given the structural feature that individual judges adopting Vermeule's theory will lack power to force their colleagues to fall into line, the cost savings that is the theory's main benefit seems unlikely to materialize. Even if a majority of federal judges adopt Vermeule's theory, so long as a sufficiently large minority sticks with interpretive methods that go beyond plain text, counsel will have to brief and argue those methods, thus incurring the resulting costs.[127]

b. Offsetting Costs

Now let us charitably assume that the coordination problem does not bedevil adoption of Professor Vermeule's theory. Imagine that Vermeule's book captures the attention and the adherence of the whole Article III judiciary. It still seems that the cost savings of the theory is speculative.

The problem is that Vermeule focuses on some costs while neglecting other, offsetting costs. One reason that courts sometimes look beyond the plain text of statutes is that the result indicated by the plain text appears costly. Consider, for example, a case like *United States v. Storer Broadcasting Co.*[128] In this well-known case, the Supreme Court considered section 309 of the Communications Act, which instructs the Federal Communications Commission to consider applications for broadcast licenses. The text of the statute clearly provided that, if the Commission denied an application (and maintained that denial after giving the applicant a second

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mass of judges adopted the theory. Vermeule would then, literally, be correct that judges could contribute marginally to cost savings by adopting his theory, but it would be important to note that the savings might be trivial or small until a critical mass of judges went along.

[126] Vermeule, *supra* note 1, at 123-25.

[127] This section has focused on litigation, but similar remarks would apply to the costs of client counseling and social planning more generally. If counsel cannot know whether the judges who might ultimately decide an issue would rely on legislative history, they will have little choice but to consider it as one factor when counseling clients and planning behavior.

[128] 351 U.S. 192 (1956). For a detailed discussion of this case, *see* Siegel, *Textualism and Contextualism*, *supra* note 88, at 1045-49.

chance), it was required to "formally designate the application for hearing," and that "[a]ny hearing subsequently held upon such application" would be a "full hearing" in which the applicant could participate.[129] Despite this clear statutory command, the Supreme Court approved the agency's determination that it was not required to hold a hearing after denying an application on the ground that the application evidently did not satisfy valid agency rules implementing the Communications Act.[130] As I have described in detail elsewhere,[131] the Court elevated background principles of administrative law above the dictates of statutory text: in light of the background principle that hearings exist to resolved disputed *facts*,[132] the Court concluded that Congress did not intend the agency to "waste time on applications that do not state a valid basis for a hearing."[133]

Imagine, however, that the Court had adopted Professor Vermeule's theory. Under that theory, the Court would have been obliged to implement the clear statutory text, and the agency, therefore, would have been obliged to conduct costly, pointless hearings—perhaps hundreds per year. Presumably, if the costs had been great enough, the agency would have persuaded Congress to fix the statute, but that too entails considerable cost, because congressional time is a scarce resource.

The point of this example is that a firm decision to implement clear statutory text no matter what may save some judicial costs, but it will likely increase other costs. Congress will have to bear the costs of correcting foolish decisions resulting from following plain text. Society will have to bear the costs of living under foolish decisions until they are corrected.[134]

Moreover, if courts insist on following plain text no matter what, there will predictably arise an increased cost to Congress of drafting statutes more precisely. Interpretive techniques that go beyond enforcement of plain text permit Congress to save some drafting time. When giving any instructions to anyone, the giver necessarily relies on a host of background interpretive understandings that permit the instructions to be given in reasonably concise

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[129] 351 U.S. at 195-96 n.5 (quoting 47 U.S.C. § 309(b) (1952)).

[130] *Id*. at 205. The agency had denied the particular application in question on the ground that it had previously determined by rule that it would not serve the public interest, convenience, and necessity (the statutory standard for granting an application) to grant a broadcast license to a party that already had five such licenses, and the application revealed that the applicant already did have five. *See id*. at 194 n.1, 197.

[131] *See* Siegel, *Textualism and Contextualism, supra* note 88, at 1045-49.

[132] *See* 351 U.S. at 202.

[133] *Id*. at 205.

[134] Professor Eskridge called attention to similar costs in responding to similar arguments from Justice Scalia. *See* Eskridge, *supra* note 100, at 1541-42.

form.[135] If such background understandings are not permitted, the costs of giving the instructions must increase.

This is a consequence that would follow in any context in which instructions are given. When a boss tells a secretary, "this task is urgent—finish it before you leave the building today," the boss does not add, "but if the building catches on fire, you can leave without finishing the task." But if the secretary insists on interpreting the boss's instructions literally, the qualification, as well as many others, would be necessary. Similarly, if courts are going to follow Congress's apparently clear instructions no matter how absurd the result, Congress is going to have to expend more energy drafting literal-judge-proof instructions.[136]

Consider, for example, the Sherman Anti-Trust Act, which provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[137] As the Supreme Court has long noted, this statute "cannot mean what it says,"[138] because, if applied literally, it would outlaw virtually all private commercial contracts, inasmuch as restraint is the very essence of such contracts.[139] Congress, however, saved itself time and energy by legislating in this broad and vague fashion and leaving the rest to judicial implementation. If the courts had insisted on applying the letter of the law to the absurd point of outlawing all private contracts, not only would there have been substantial social costs resulting directly from such an interpretation, but Congress would have been forced to expend resources to overturn the decision and to craft a statute that the judges could enforce properly.

Vermeule would presumably say that these costs, assuming them to exist, should be assumed to be washed out by cost saving from his theory. Yes, Congress will have to expend energy overturning foolish judicial decisions that refuse to depart from plain text, but Congress will also *save* energy by *not* having to overturn decisions that *wrongly* depart from plain text. Similarly, other social actors will have to live with foolish decisions implementing plain text until Congress can overturn them, but will be saved the burden of living with decisions wrongly departing from plain text. Under

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[135] *See* William N. Eskridge, Jr., *"Fetch Some Soupmeat,"* 16 Card. L. Rev. 2209 (1995) (discussing Lieber's famous example); FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 18 (Roy M. Mersky & J. Myron Jacobstein eds., 1970) (1839).

[136] *Cf.* Lieber, supra note 135, at 30-32 (complaining that strict interpretive principles used by British judges complicate the task of Parliament).

[137] 15 U.S.C. § 1.

[138] National Soc. of Professional Engineers v. United States, 435 U.S. 679, 687 (1978).

[139] *Id.*; Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

the "principle of insufficient reason," these costs and benefits should be presumed to cancel each other out.[140]

The principle of insufficient reason, however, is a two-edged sword. If we are to give ourselves license to imagine that unknowable quantities simply cancel one another out, the principle should be applied more broadly. As this section shows, adopting Professor Vermeule's interpretive methods would entail a substantial and unknowable shift in costs of many kinds. Judicial costs, legislative costs, and other social costs would all be shifted around in imponderable ways. If we are really to follow the principle of insufficient reason, the logical conclusion is that all of these imponderable costs and benefits cancel each other out.

Professor Vermeule would say that the judicial cost savings from his theory may properly be distinguished from all other costs, because we can be confident of their direction and because courts are uniquely well-positioned to gauge these costs, while they are not in a good position to gauge other costs. But, as the previous sections in this part have suggested, it is far from clear how big these costs are, or how much of them would really be saved. Indeed, it is not even clear that judicial time will *always* be saved by Vermeule's methods. As *Chevron* litigation under the current system shows, there can be considerable debate over whether statutory text is clear or ambiguous,[141] and, under Vermeule's theory, courts must still make this determination. One can imagine cases in which a court looking only at the text might need to expend considerably energy deciding whether the text is clear or ambiguous, whereas other clues beyond the text might settle the matter fairly easily if they could only be consulted.[142] This might not happen often, but it could happen sometimes, and once we are in the realm of unknowable quantities, we apparently are to imagine that the unknowables cancel one another out.

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[140] Vermeule, *supra* note 1, at 173-74.

[141] *See* Vermeule, *supra* note 1, at 189 ("Judges can . . . hold different views about whether statutory language is clear.").

[142] More generally, it is always possible that the interpretive techniques Vermeule rejects could make the law easier to interpret in a given case, and thus their use in that case could save costs. *Pepper v. Hart*, [1993] 1 All E.R. 42, the British case noted earlier (in which the House of Lords relaxed its rule against consulting legislative history), provides an example. The judges felt that the statutory text was ambiguous and that the two possible interpretations were "nicely balanced," *id.* at 69-70, but that the legislative history made the true construction of the statute clear. *Id.* at 70-71. In such a case, a system that rejected legislative history would impose larger costs of uncertainty and litigation than one that permitted its use.

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The point of this part overall is this: Vermeule accuses interpretation scholars of either neglecting institutional considerations entirely, or, at best, sitting lazily in their academic armchairs and simply dreaming about institutional costs and benefits instead of realizing that they lack actual, empirical data. But it is not clear that Vermeule himself can do any better. Vermeule offers some intuitive reasons for privileging one particular insight about costs and benefits and then invokes the "principle of insufficient reason," which seems to be a fancy term for "let's ignore everything else." But it is not clear that the costs and benefits he privileges are of the "enormous" magnitude he gives to them; it is not clear that the savings he ascribes to his theory would really materialize; and it is not clear to what degree the savings would be offset by increases in other costs.

It therefore seems that a certain amount of armchair intuition is an inevitable part of the debate in this area. If it is good enough for Vermeule, it should be good enough for the rest of us. Until someone gathers actual, empirical data (which, as Vermeule rightly suggests, is at best a far-off prospect), we can, and indeed must, deploy our intuitions as to the directions of cost and benefit shifts that would result from adoption of various interpretive methods. Vermeule offers one intuitive insight, which is not provably wrong, but which is also not provably right. The next parts of this Article suggest some competing insights, which at least attempt to further respond to Vermeule's challenge by offering *institutional* reasons as to why we might be able to gauge the direction of benefits that accrue to current interpretive methods.

B. Benefits: Judicial Institutional Advantages

As noted earlier, Professor Vermeule's theory is essentially that we don't know whether interpretive techniques that go beyond enforcement of plain text are any use, but we do know that they are expensive, so we might as well discard them and save the expense. The previous sections questioned one pillar of this theory: the notion that an "enormous" cost savings would result from discarding the interpretive techniques that he disfavors. Instead, this Article has suggested, the overall cost effect is unknowable.

It is now time to challenge the other pillar of the theory: Vermeule's assertion that we cannot gauge the benefits of interpretive techniques that go beyond enforcement of plain text. Vermeule asserts, not just that the reasons for applying these techniques are less than fully persuasive, but that there is *no* reason to think that these techniques, on balance, do more good than harm. Vermeule says that "there is *no particular reason* to think that the illuminating effect of holistic textualism will predominate over its error-

producing effect"[143]; that "there is *no reason at all* to think that the tools of judicial gap-filling are superior to agency interpretation"[144]; that "[t]here is *no particular reason* to believe that judges are better positioned than legislators to update constitutional principles and rules through incremental decision-making over time."[145]

Vermeule's assertion that we should not merely have some doubts about the value of certain interpretive techniques, but that there is no reason at all to believe in them, is of the essence for his theory of interpretation. Vermeule's appeal to the "principle of insufficient reason," and his assumption that that the costs and benefits of interpretive techniques that go beyond plain text wash each other out, so that, in making a cost-benefit analysis, we should assign them a net benefit of zero, are valid only if we really have no basis for making any estimate of the probabilities that these interpretive techniques will help or harm. Even a modest shift in the probabilities—say, if one admitted that certain interpretive techniques might lead courts astray in 40% of the cases, but could show that they were helpful in 60%—would undo the fundamental "washing out" hypothesis. There would then likely be *some* benefit from using those techniques, and Vermeule's fundamental claim, that because there is *no* benefit we might as well save ourselves the costs, would fail.

In fact, this section suggests, there is at least some reason to believe that courts can, on balance, do better by employing techniques other than pure consideration of statutory texts. The reasons are institutional. As noted earlier, one of Vermeule's central points is that the choice of interpretive methods should be informed by institutional considerations,[146] and he permits some elements of his overall cost-benefit analysis to be privileged (and thus exempt from the principle of insufficient reason) on the basis of what is essentially a probabilistic judgment that courts are in a good institutional position to gauge them.[147] Therefore, it should be equally legitimate to rely on institutional reasons why courts are well-positioned to look beyond plain statutory text in certain respects.

A critical institutional consideration, which I have highlighted elsewhere, is that courts interpret statutes at the moment of implementation.[148]

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[143] Vermeule, *supra* note 1, at 205 (emphasis added).

[144] *Id*. at 210 (emphasis added).

[145] *Id*. at 273-74.

[146] Vermeule, *supra* note 1, at 15-39.

[147] *See, e.g., id*. at 192 (arguing that courts are in a good position to gauge the litigation costs imposed by judicial resort to legislative history).

[148] *See* Siegel, *Statutory Drafting Errors*, *supra* note 88, at 341-43.

Legislatures act generally and in advance. They can never fully foresee every circumstance to which the statutes they enact will apply.[149] Courts, however, act at the moment the statutory text is actually applied to a particular case. This institutional feature of courts puts them in an advantageous position to use certain interpretive techniques.

Consider, for example, the interpretive principle that courts should construe statutes so as to avoid absurd results. Perhaps somewhat curiously, Vermeule does not definitively state what should happen to this principle under his theory, and it is a principle accepted even by most judges and scholars who call themselves textualists.[150] It would appear, however, based on Vermeule's arguments, that the absurd results principle would have to go. Vermeule observes that judges applying the principle may err; they may erroneously identify a statutory application as absurd because of their insufficient ability to perceive the policies and purposes of the statute.[151] In the absence of any hard data as to the rate of correct and mistaken applications of the absurd results principle, it would appear from Vermeule's appeal to the "principle of insufficient reason" that he would conclude the rates are equal.[152] Thus, he would presumably conclude that the value of permitting courts to apply the absurd results principle is speculative, but its costs are definite—it increases litigation and decision costs and introduces uncertainty into the law.[153] Therefore, it should be discarded.[154]

In fact, however, there is some reason to think that courts can get net benefits from the absurdity principle, based on the institutional feature that they act at the moment of statutory implementation. Legislatures are institutionally disadvantaged when it comes to appreciating the potential absurdity of what they write. They can do their best to perfect statutory text, but they must do all of their work prior to enactment. No matter how much

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[149] *See* H.L.A. HART, THE CONCEPT OF LAW 128 (2d ed. 1994).

[150] Justice Scalia, for example, approves it. *See* Holloway v. United States, 526 U.S. 1, 19 n.2 (1999) (Scalia, J., dissenting); Green v. Bock Laundry Machine Co. 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring); Scalia, *supra* note 2, at 20.

[151] Vermeule, *supra* note 1, at 20, 37.

[152] *See id*. at 173-74.

[153] *Id*. at 20.

[154] Vermeule expressly discusses and rejects only some interpretive techniques that go beyond implementation of plain text, particularly, looking to legislative history, applying canons of construction, and "holistically" comparing statutory text to other statutory text. Vermeule, *supra* note 1, at 183-229. Still, rejection of *all* techniques that go beyond implementation of plain text is implicit in Vermeule's overall conclusion that "[w]hen the statutory text directly at hand is clear and specific, judges should stick close to its surface or apparent meaning, eschewing the use of other tools to enrich their sense of meaning, intentions, or purposes." *Id*. at 183.

work they do in advance, they will make some mistakes that come to light only afterwards.[155] Courts, however, get to see the statute afterwards, when its absurdity may be apparent in light of the particular case in which it arises.

Closely related to this point is the additional institutional feature that courts have time to focus on discrete statutory provisions. Vermeule makes much of the limited time and attention of courts,[156] which is certainly a valid point. But at least courts faced with an argument that statutory text dictates an absurd result can take the time to consider and decide the argument; there is typically no fixed deadline for a court to make a decision. The hurly-burly of the legislative process, and the need to vote up or down on an entire statute on the date the statute comes before the legislature for a vote, put the legislature in a less advantageous position to discover absurdities in individual statutory provisions.

None of this is to suggest that courts exercising the power to deviate from clear but absurd statutory text will always do so correctly. Once the power of deviation exists, it seems impossible to deny Vermeule's charge that courts will sometimes use it unwisely. But it does suggest that there are reasons—institutional reasons—why legislatures, even if made up of legislators who individually are perfectly reasonable and rational, will write absurdities into statutory text that courts will later discover. It suggests that when a court, acting with due regard for the presumption that the legislature meant what it said, concludes that the legislature cannot have meant what it said because what it said is absurd, there is *likely* to be something to the court's conclusion, because of the court's institutional comparative advantage in the discovery of statutory absurdity.

And that is all one needs to show to refute Vermeule's theory. There is no need to quantify the exact probabilities involved. Vermeule's theory, particularly his invocation of the "principle of insufficient reason," depends critically on the assumption that judicial reliance on extratextual interpretive techniques such as the rule against absurd results has *zero* net benefit, an assumption that is valid only if we assume that a judicial decision based on the absurdity principle is as likely to be wrong as to be right. If there is even a small excess likelihood of correct judicial implementation of the absurdity principle, the assertion that the principle has no benefit collapses. We can then no longer say that, inasmuch as the benefit of the principle is zero, we might as well avoid the costs of implementing it; instead, we would have to compare the costs of implementing it against its benefits, and since both are unmeasurable, we could not reject the possibility that the benefits of the absurdity principle exceed its costs.

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[155] *See* Siegel, *Statutory Drafting Errors*, *supra* note 88, at 341-43.

[156] *E.g.*, Vermeule, *supra* note 1, at 107 (noting that courts "operate under significant constraints of time, information, and expertise").

This line of argument does not refute all of Vermeule's conclusions. The courts' comparative advantage that results from their interpretation of statutory text at the moment of implementation says nothing particular, for example, about the usefulness of legislative history. It does, however, suggest that courts have a similar comparative advantage at detecting statutory drafting errors by applying background principles of law. As I have discussed at length elsewhere, the absurdity principle does not do a sufficient job of describing the circumstances in which courts should deviate from statutory text, because a statutory provision may be erroneously drafted without producing an absurd result.[157] Again, however, the fundamental institutional fact that courts interpret statutes at the moment of implementation puts them in a good position to detect startling deviations from background understandings that escaped detection in the legislative process.[158] This suggests that courts can likely produce net benefits by using the process of statutory construction so as to maintain some degree of coherence with background principles of law, contrary to Vermeule's conclusion.[159]

In sum, Vermeule goes too far in asserting that there is *no* reason to think that courts can add value to the interpretive process by considering the need for departures from plain text. There is some reason, and the reason stems from institutional features of courts. The features do not come with hard numbers attached, but neither does Vermeule's own reasoning.

C. The Role of Agencies

So far, this Article has considered only what Professor Vermeule calls "Type 1" cases, that is, cases in which the statutory text immediately at hand is clear and specific. In "Type 2" cases, in which courts must apply ambiguous statutory text, Vermeule advises courts to defer to administrative or other executive construction of the statute, without even using traditional

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[157] Siegel, *Statutory Drafting Errors, supra* note 88, at 326-32.

[158] *Id*. at 341-43.

[159] Vermeule, *supra* note 1, at 27, 203-05. This is why I have always emphasized the role of background principles in the process of statutory construction while being rather agnostic on the legislative history question. *See* Siegel, *Textualism and Contextualism, supra* note 88, at 1024; Siegel, *Statutory Drafting Errors*, *supra* note 88, at 358. I have argued that there is no constitutional obstacle to judicial reliance on legislative history, *see* Siegel, *supra* note 2, but have not passed judgment on the argument, emphasized by Vermeule, that it is just more trouble than it is worth, *see id*. at 1518-19.

tools of statutory construction to try to resolve the ambiguity.[160] As noted earlier, Vermeule rejects the formal, conventional justification for deference—that ambiguous agency statutes constitute an implicit delegation of power from Congress to the agencies to resolve the ambiguities.[161] Rather, he relies on practical, institutional considerations: agencies are better positioned than courts to understand the meanings of the statutes they administer, and judicial use of traditional tools of statutory construction to review an agency's interpretation would just entail duplicative costs and add to legal uncertainty without offering any likely benefit.[162]

Vermeule is surely onto something here. If, as I have argued at length elsewhere,[163] the background principles of any area of law are the necessary guide to construing statutes within that area, then it makes sense to desire that statutes be construed by those with the best understanding of those background principles. Agencies, like courts, have the institutional advantage of construing statutes in the course of their implementation, so courts gain no edge over agencies there, and agencies have the further advantage of specialized subject-matter expertise. Putting aside exceptions such as the Federal Circuit (which, because of its specialized jurisdiction, might be expected to know as much about patent law as the Patent Office),[164] agencies will know more about their organic statutes, which they administer on a daily basis, and be better able to discern the background principles underlying those statutes, than courts, any one of which would encounter an agency's statute only sporadically. Moreover, as Vermeule observes, each agency is a single organ that can produce a unified construction of its organic statute, whereas (again with exceptions such as the Federal Circuit) numerous different courts may be called upon to review the agency's construction, and the process of producing a coordinated judicial interpretation is rather clumsy and inefficient.[165]

Thus, it might seem that those who preach the virtues of background principles as a guide to statutory interpretation would be the most enthusiastic supporters of Professor Vermeule's proposed regime of strong deference to

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[160] Vermeule, *supra* note 1, at 227-28 (exhibiting Justice Kennedy's plurality opinion in *K Mart, Corp. v. Cartier, Inc.,* 486 U.S. 281 (1988), as a model of appropriate judicial modesty).

[161] *Id*. at 207-08.

[162] *Id*. at 208-212.

[163] *See* Siegel, *Textualism and Contextualism*, *supra* note 88; Siegel, *Statutory Drafting Errors*, *supra* note 88.

[164] *See* 28 U.S.C. § 1295 (giving the Federal Circuit exclusive jurisdiction over all appeals in patent cases).

[165] Vermeule, *supra* note 1, at 208.

agency interpretations, and Vermeule is certainly right about one thing: a proper understanding of the *basis* for deference to agency interpretations is essential to determining numerous rules about the *scope* of such deference. The Supreme Court has gotten itself rather tangled up as to the rules governing deference to agency interpretation, in part because it has never quite resolved the basis for such deference. The "delegation" theory appears to be the conventional understanding,[166] but the Court's opinions, including *Chevron* itself, also offer some support for the theory that deference finds its basis in the agency's superior expertise,[167] as well as for other possible theories.[168]

As Vermeule observes, a court that believed that the basis of deference is the agency's comparative expertise in understanding its organic statute could never have come down with the recent *Mead* decision, which limited the availability of *Chevron* deference depending on the form of the agency action involved.[169] If courts defer to agency constructions simply because the agency is more likely to understand the statute than the court, then the precise circumstances of how the agency arrived at its construction should be irrelevant. All that should matter, as Justice Scalia argued in dissent, is that the court be sure that the agency's construction *is* the agency's construction.[170] A better understanding of the role of agency expertise in justifying *Chevron* deference would have avoided this opinion, which Vermeule rightly criticizes.[171]

Thus, there is much to be admired in Vermeule's institutional analysis of deference to agency interpretations. Still, Vermeule's analysis gives too little weight to the essential institutional point of checks and balances. Once again, the courts' institutional position gives them a vital role to play in statutory interpretation that cannot be properly fulfilled by applying Vermeule's theory.

Vermeule gives only passing attention to the role that separation of powers considerations should play in the choice of interpretive methods. He

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[166] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984) (discussing express and implicit delegations of power to agencies).

[167] *See id*. at 844 (discussing the practice of giving deference in cases in which "a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations").

[168] *E.g.*, *id*. at 865-66 (suggesting that it is appropriate for courts to let agencies resolve statutory ambiguities because agencies are more politically responsive than courts).

[169] United States v. Mead Corp., 533 U.S. 218 (2001); *see* Vermeule, *supra* note 1, at 215-23.

[170] 533 U.S. at 241 (Scalia, J., dissenting) (noting that the agency construction must be the agency's "authoritative" construction of the statute).

[171] Vermeule, *supra* note 1, at 222.

takes note of the political insulation of courts,[172] but considers it only in relation to the courts' interpretive capabilities, and he does not believe it gives courts any comparative advantage over agencies in that regard. Politically responsive agencies, he suggests, will be closer to the legislative process and more familiar with a statute's original purpose than courts, and better able to discern those purposes from legislative history.[173] The political insulation of courts frees them, Vermeule acknowledges, from the pressure to construe statutes in accordance with current majoritarian desires, but that does not mean they will do better than agencies at understanding a statute's original meaning; it just means that courts can do what they please, which might or might not have any relation to the original meaning of or intent behind a statute.[174]

In offering such a stingy view of the courts' potential value, Vermeule gives too little weight to a vital role that the courts play in our tripartite government system, that of checking the executive. This role arises not merely from the courts' political insulation, but from their status as a separate branch of government that does not participate in the primary formulation or execution of policy. If that role were removed, executive agencies would have a greatly enhanced ability to set the limits of their own power. The executive has a strong tendency to aggrandize its own power even with courts playing the role that they play now; one shudders to think what would happen if the courts did not play a checking role.

To see this, consider, as just one of countless possible examples, the current administration's assertion that Congress's Authorization for Use of Military Force (AUMF), enacted after September 11, 2001, authorized the President to order warrantless electronic surveillance of U.S. persons within the United States.[175] The surveillance controversy provides a good illustration of what would happen under Vermeule's interpretive theory. The President's claimed statutory authority, the AUMF's simple statement that the President is "authorized to use all necessary and appropriate force" against those who planned, authorized, or committed the 9/11 attacks,[176] is less than perfectly clear. Because the statute contains a gap or ambiguity,

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[172] Vermeule, *supra* note 1, at 209-11.

[173] *Id*.

[174] *Id*.

[175] See Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001); Congressional Research Service, "Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information," (Jan. 5, 2006); Press Release, White House, Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005).

[176] Pub. L. 107-40, 115 Stat. 224 (2001).

Vermeule's theory would require the courts to defer to the executive's construction, without even considering traditional canons of statutory construction, such as the canons that the specific controls the general,[177] or that repeals by implication are disfavored,[178] which might support the conclusion that the Foreign Intelligence Surveillance Act still governs domestic electronic surveillance.[179]

Of course, Vermeule would argue that for every case in which the courts correctly overturn the executive's construction of a statute, there will be another case in which the courts do so wrongly, and so the benefits of judicial review will be offset by its costs. To continue with the AUMF example, the courts might rightly prevent the executive from invading civil liberties, but they might just as well wrongly prevent the executive from engaging in surveillance that is necessary to prevent terrorism. With no basis for believing that the courts will do any better than the agencies at understanding congressional instructions, the principle of insufficient reason (Vermeule would say) would suggest that good and bad court decisions will cancel each other out, so we might as well save ourselves the litigation costs of generating such decisions in the first place.

Again, however, institutional considerations suggest that we can at least predict the sign of the value of judicial review of agency interpretations, even if we cannot estimate its exact magnitude. The critical institutional consideration here is the natural tendency of the executive to aggrandize its own power. The judiciary's comparative advantage arises not solely from its political insulation, but from its removal from primary policy formulation and implementation. The executive is motivated in part by its desire to give itself the broadest powers that will permit the maximum implementation of its preferred policies. The judiciary cannot wrest the primary policy role from the executive; all it can do is check the executive's tendencies. It is restrained, moreover, by the principle that the judicial role is only to review the executive's action for legality and is not to formulate the policy even where the executive has acted illegally. While the judiciary will not perform its function perfectly, we can expect that, more likely than not, it will serve as a valuable counterweight to the executive's natural self-aggrandizing tendencies.[180]

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[177] *E.g.*, Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228-29 (1957).

[178] *E.g.*, Cook County v. United States ex rel. Chandler, 538 U.S. 119, 132 (2003).

[179] *Cf.* Congressional Research Service, *supra* note 175 (discussing these issues at length).

[180] *Cf.* Jonathan T. Molot, *Reexamining Marbury in the Administrative State: a Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 53 Stan. L. Rev. 1 (2000) (explaining why the judicial role in statutory interpretation should be retained for institutional reasons even if the judiciary cannot be expected to act as perfectly faithful

As the previous section explained, to defeat Vermeule's application of the principle of insufficient reason, we need only some reason to believe that maintaining the judicial role will be more beneficial than harmful. We do not need to prove that the judiciary will be perfect. The natural tendency of the executive to aggrandize its own power provides a sufficient reason to believe that there would be a cost to letting the executive have a totally free hand in the interpretation of any statute that is less than perfectly clear, and this is a sufficient ground for desiring to incur the costs of maintaining the judicial role.

D. Constitutional Interpretation

Professor Vermeule's theory of statutory interpretation could conceivably attract some adherents; his theory of constitutional interpretation seems unlikely to do so. Vermeule himself recognizes that this part of his theory will strike many as "beyond the pale."[181] Still, he rightly offers the same challenge to constitutional theorists as to statutory interpretation scholars: can we really know that judicial review produces, not just some good cases, but net benefits overall? Once again, it is necessary to offer at least some institutional reasons to believe that judicial review does more good than harm.

In a recent book chapter, I suggested some such reasons.[182] The chapter primarily questioned the degree to which the political question doctrine should restrain judicial review, but most of the arguments apply equally in response to Professor Vermeule. As with statutory interpretation, there are institutional reasons to believe that judicial review offers net benefits even if we cannot quantify those benefits precisely.

Perceiving these institutional reasons requires looking beyond the primary institutional feature of the courts that is usually mentioned in discussions of judicial review, and the one upon which Vermeule primarily focuses—the courts' insulation from politics that stems from the constitutional guarantee of life tenure and salary protection for federal judges.[183] Vermeule rejects the notion that political insulation puts courts in a better position than political actors to interpret the Constitution. Yes, it frees them from majoritarian pressures, but that, Vermeule says, does not give them any motivation to

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congressional agents).

[181] Vermeule, *supra* note 1, at 231.

[182] Jonathan R. Siegel, *Political Questions and Political Remedies*, in THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES (B. Cain & N. Sabbah, eds.) (2007).

[183] U.S. Const., Art. III; *see* Vermeule, *supra* note 1, at 258-59.

interpret the Constitution *correctly*; it simply frees them to do as they please.[184]

However, the institutional advantage of the judiciary with regard to constitutional interpretation lies not only in the judiciary's political insulation, but also in a whole constellation of institutional features that make the judiciary the best positioned branch to give constitutional guarantees real meaning. To see this, consider the way in which Vermeule suggests that constitutional guarantees (other than those that are quite clear and specific) be enforced: by the political branches themselves. Vermeule suggests that the legislature can be trusted just as well as judges to enforce the Constitution, and he notes that "even on the crudest model of legislators as reelection maximizers, legislators will enforce constitutional rules if that is what constituents demand."[185] Thus, Vermeule envisions that political pressures will play a role in constitutional enforcement. Vermeule draws on Larry Kramer's suggestion that the Framers envisioned the Constitution's being enforced "as a result of republican institutions and the citizenry's own commitment to its founding document."[186]

There are, however vital institutional reasons to question whether such a system of enforcement can properly give meaning to constitutional guarantees. The judicial process is well-suited, and the electoral and legislative processes are ill-suited, to performing this function. The reason lies not just in political responsiveness, but in numerous characteristics of the different processes.

Consider a person or group desiring enforcement of a constitutional provision that would, under Professor Vermeule's theory, not be judicially enforceable—say, the Free Speech Clause. What is such a person or group to do? In Vermeule's world, the only available enforcement mechanism would be political agitation, which could take place either in the electoral or legislative arena. Both of these, one would quickly discover, lack institutional features that would be critical to making the Free Speech Clause a meaningful guarantee of rights.

First, consider the possibility of trying to correct an alleged violation of Free Speech rights through the electoral process. Such a program would face enormous practical problems. The violation might be a minor one that would not likely gain much traction in any electoral campaign. Even if it were more significant, the costs of engaging the political process would surely outweigh the cost of bringing a lawsuit by a very considerable multiple. Inasmuch as

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[184] Vermeule, *supra* note 1, at 258-59.

[185] Vermeule, *supra* note 1, at 259.

[186] *Id*. at 235; *see* Larry D. Kramer, *The Supreme Court, 2000 Term, Foreword: We the Court*, 115 Harv. L. Rev. 1 (2001).

Vermeule's theory is driven largely by cost considerations, this point seems highly significant.

Beyond these practical points, however, there are crucial theoretical, institutional differences between the electoral process and the judicial process that make the latter much better suited for the enforcement of constitutional guarantees than the former. First, the judicial process is *focused*: parties come to court with a specific claim of right and the court can issue a ruling on that precise claim. Elections, by contrast, are the very opposite. Even if a constitutional issue played a role in an election (say, because a political group was attempting to defeat political candidates who supported what the group viewed as unconstitutional legislation), the constitutional issue would be just one of the dozens of issues that always come into play in any election. Elections are not referendums; they do not provide a focused mechanism through which voters can express their preferences on constitutional issues.[187]

Moreover, even if voters managed to use an election to defeat politicians who supported allegedly unconstitutional legislation, the result would still not really provide good enforcement of constitutional guarantees, because it would be impossible to say that the election had established any constitutional rule. Elections have the institutional feature that they are *inscrutable*. They yield only a result, not a statement of reasons. One could sense that constitutional issues played a role in a politician's defeat, but one could never really be sure; perhaps the politician would have lost anyway. The judicial process, by contrast, provides a statement of reasons for its decisions.[188] These statements of reasons can truly establish constitutional principles.

Moreover, the electoral system *does not operate within a system of precedent*. Because elections yield only a result and provide no statement of reasons, it would be impossible for voters to follow the precedent set by elections, even if they wanted to. Even assuming a constitutional issue were influential in a particular election, the issue would have to be fought out afresh with each election cycle. The judicial process, by contrast, operates within a system of precedent.

Finally, although it is not the only point, some consideration must be given to the fact that the electoral process is, of course, *majoritarian*. Politicians who take action that might violate constitutional guarantees presumably do so because they believe they will gain a political advantage.[189]

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[187] *See* Siegel, *supra* note 182; Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 Cal. L. Rev. 52, 99 (1985).

[188] *Cf.* Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1292 (1975) (noting the importance of the statement of reasons).

[189] *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 25 (1962).

If the politicians correctly detect the popular mood, they may prevail despite the unconstitutionality of their actions. The electoral process could hardly serve as a good institutional mechanism for putting certain matters beyond majoritarian control; the judicial process at least has the potential to do so.

Thus, there are several institutional reasons why the electoral process seems a poor vehicle for enforcement of constitutional guarantees. But this does not end the analysis. One must also consider the possibility of enforcing constitutional guarantees, not simply at the ballot box itself, but through the political process more generally. Even legislators who do not fear electoral defeat over a particular constitutional issue might desire to placate a group that feels strongly about it. Thus, the legislative process might provide a vehicle for enforcement of constitutional guarantees even if the electoral process itself does not.

Again, however, there are important institutional reasons to suspect that the legislative process will be inferior to the judicial process in this regard. The legislative process might avoid some difficulties with the electoral process: it has at least some potential to be more focused and less inscrutable. A particular constitutional issue could be brought to an up-or-down legislative vote. But this is not always true; constitutionally doubtful provisions might appear in the same bill as other, vitally needed matters, and the vagaries of the legislative process might never allow a vote on the doubtful provisions independent of the bill as a whole. The legislature might vote for the bill as a whole because its overall virtues outweigh any doubts about the constitutionality of a particular provisions. Thus, the legislative process, like the electoral process, might lack the focused nature of the judicial process. Also, the legislative process is majoritarian in nature and seems unlikely to be a good mechanism to enforce restraints on majoritarianism.

Also, the legislative process does not operate within a system of precedent. One Congress can always undo what a previous Congress has enacted. Vermeule makes the interesting argument that the legislative process may, if anything, have a stronger tendency to respect precedent that the judicial process, because the legislature at least has formal requirements for changing the law from the status quo (it must pass a new bill through the bicameral process), whereas the judiciary has no formal restraint on overruling its past decisions.[190] Still, the judicial process operates within an ethic whereby precedent ought, at least, to be respected over time, whereas it is regarded as altogether appropriate for a legislature to repeal previous statutes, or to enact statutes that a prior legislature declined to enact, even if for no other reason than that its membership has changed. Like the electoral process, therefore, the legislative process seems a poor structure for the

[190] Vermeule, *supra* note 1, at 274.

establishment and enforcement of constitutional guarantees.

Even more important, the legislative process lacks a critical feature of the judicial process that elections do provide. Elections, for all their difficulties, are, at least, mandatory: they occur at constitutionally specified intervals. The judicial process, similarly, provides a mandatory mechanism for resolution of claims of constitutional right. As Chief Justice Marshall remarked in *Cohens v. Virginia*, "[t]he judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by, because it is doubtful."[191] Courts must respond to constitutional claims, perhaps rejecting them on their merits, of course, but not ignoring them altogether.

The legislative process, by contrast, is not invokable as of right. Disgruntled citizens can complain to the legislature that a statute violates their constitutional rights, but they cannot compel the legislature to vote on their complaint. The legislature may simply ignore the issue indefinitely.

Thus, in considering the institutional features of courts in relation to their suitability to conduct judicial review, it is not just the political insulation of courts that matters. That is an important feature, to be sure. As noted in the previous section, the separation of the judicial power from the political branches enables the courts to check the political branch's natural self-aggrandizing tendency. But there is more to it than that. The whole range of institutional features of the judiciary contributes to the suitability of courts as implementers of constitutional guarantees. The fact that the judicial power is focused, that it is mandatory, that it provides reasons for its decisions, and that it operates within a system of precedent, all contribute to having a system in which constitutional guarantees are meaningful. The electoral and legislative processes do not offer these features.[192]

Thus, again, while one must concede that the power of judicial review can be used for ill as well as for good, there are institutional reasons to believe that it offers net benefits. Once the process is seen to offer some likely benefits, Vermeule's argument fails. One can no longer argue that inasmuch as the expected net benefits are zero, we might as well eliminate judicial review and save its costs.

CONCLUSION

Professor Vermeule's book offers a useful challenge to much conventional thinking about the judicial role in interpreting statutes and the Constitution. Formal, theoretical arguments have dominated the debate, with

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[191] Cohens v. Virginia, 19 U.S. 264, 404 (1821).

[192] For a more detailed elaboration of these arguments, see Siegel, *supra* note 182.

many scholars focusing on questions such as whether the Constitution requires courts to follow certain rules of interpretation, or whether the ultimate guide to statutory meaning is found in statutory text or in legislative intent. Vermeule offers a shift in thinking and makes the intriguing suggestion that those battling over interpretive theories might, in the end, agree on interpretive *methods*, thus rendering the theoretical debates irrelevant, if only they would focus on the ways in which the institutional failings of courts might interfere with ideal implementation of interpretive theories. Vermeule rightly challenges those who call upon courts to employ allegedly sophisticated interpretive techniques and to depart from statutory text in some cases to offer reasons to believe that these methods will not only produce superior results in isolated cases, but will, on the whole, do more good than harm.

However, this Article has suggested, in considering whether such reasons can be offered, Vermeule has not considered a sufficient range of institutional features of the courts. The courts' political insulation, to which he adverts, is certainly an important feature, but it is by no means the only important feature that has implications for the courts' role in interpretation. The timing of judicial action, and particularly the fact that courts interpret statutes at the moment of implementation, implies that they have an institutional advantage in the detection of cases in which departure from statutory text is appropriate. The courts' separation from the primary role in formulating and implementing policy puts them in a good position to check the self-aggrandizing tendencies of the political branches. And a range of institutional features of the judicial process—that it is mandatory, that it is focused, that it provides reasons for its decisions, and that it operates within a system of precedent—make it a superior choice for the enforcement of constitutional norms.