2007

Judicial Interpretation in the Cost-Benefit Crucible

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Article

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We do not 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

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1. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006). For reviews, see William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041 (2006) (book review); Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329 (2007) (book review).

2. *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (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); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 991–98 (2001) (arguing that the Constitution permits nontextualist interpretive practices); John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1649–51 (2001) (arguing

efforts.[3] Similarly, he sees no need to 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 that do more than simply enforce plain text, and the costs of those methods.[6] Because we lack, and probably cannot hope to get, data that could tell us whether these methods move courts

that our constitutional structure compels courts to adopt the "faithful agent" model of statutory interpretation and to reject the English practice of equitable interpretation); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 706–07 (1997) (arguing that the constitutional rule against congressional self-aggrandizement prohibits reliance on legislative history in statutory interpretation); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1460–61 (2000) [hereinafter Siegel, *Use of Legislative History*] (arguing that the Constitution permits courts to consult legislative history, but imposes some limits on what may constitute consultable legislative history).

3. *See* VERMEULE, *supra* note 1, 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 . . . .").

4. *See id.* 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 ("[D]espite frequent statements to the contrary, [courts] do not really look for subjective legislative intent."), *and* 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."), *and* 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* WILLIAM BLACKSTONE, 1 COMMENTARIES 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."), *and* 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. *See* VERMEULE, *supra* note 1, at 153–229.

closer to or further away from any accepted interpretive goal, and because we do know that the methods are costly, Vermeule believes courts should reject them.[7]

The goal of this Article is to engage Professor Vermeule's arguments and to respond to the substantial challenge that his book presents to the interpretation scholarship community. In essence, Vermeule challenges interpretation scholars to justify their allegedly sophisticated interpretive recommendations. For decades (indeed, centuries), interpretive theorists have debated the goals of statutory interpretation and have offered innumerable prescriptions for how courts might best achieve those goals.[8] But, Vermeule argues, scholars have neglected critical elements of the inquiry by naively assuming that judges might adopt their pet interpretive theories en masse and execute them perfectly.[9] Vermeule claims that prominent interpretive theorists have 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.[10] No interpretive theory, Vermeule concludes, can be correct unless it incorporates the institutional limitations that may cause courts to err.[11] Vermeule's theory of interpretation 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 the statutory text at issue is unambiguous and specifically addresses the question before the court, the court should enforce the statute's text and eschew all other considerations, such as legislative history, interpretation of the statutory text in light of similar text in other statutes, and canons of

7. *See id.*

8. 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. Blackstone relies on the work of Pufendorf, published a century earlier. *See id.*; 2 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO 802 (C.H. Oldfather & W.A. Oldfather trans., Oxford Univ. Press 1934) (1688) ("[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.").

9. *See* VERMEULE, *supra* note 1, at 36.

10. *Id.* at 15–39.

11. *See id.* at 15–18, 36–39.

construction.[12] In cases where the statutory text contains an ambiguity, courts should defer to administrative or other executive branch constructions of the statute without attempting to use traditional tools of statutory construction to resolve the ambiguity.[13]

As with statutes, so too with the Constitution. The courts, Vermeule argues, should enforce clear and specific constitutional texts, but should disclaim any role beyond that.[14] Where constitutional texts are ambiguous or open ended, courts should let legislatures interpret them.[15] Under this rule, Vermeule blandly notes, courts would cease enforcing the Bill of Rights and the Fourteenth Amendment.[16] In particular, freedom of speech, due process, and equal protection would all be remitted to legislative enforcement.[17]

A bit of a comedown for judges! Vermeule recognizes that his proposed interpretive methods would make judges rather humble functionaries[18] and pluck the heart out of the academic enterprise of advising judges regarding statutory interpretation.[19] But, Vermeule notes, the goal is not to make judges' work interesting,[20] nor for academics to have fun,[21] but to find interpretive methods that work best for our institutional structure given the empirical uncertainties surrounding the value of various interpretive methods.[22] Vermeule's 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 Part I summarizes Vermeule's arguments, Part II examines both ends of Vermeule's cost-benefit critique. First, Part II.A addresses the "cost" side of Vermeule's equation—the claim that discarding all judicial interpretive methods beyond enforcement of plain text will result in an

12. *Id.* at 189, 198, 202–03.
13. *Id.* at 206.
14. *Id.* at 230.
15. *Id.*
16. *Id.* at 230–31.
17. *Id.*
18. *Id.* at 229.
19. *Id.* at 290.
20. *Id.* at 229.
21. *Id.* at 290.
22. *Id.* at 229, 290.

"enormous" cost savings.[23] Part II.A questions whether the costs of judicial interpretation are really as "enormous" as Vermeule asserts.[24] It also suggests that regardless of the size of the costs of interpretive methods, implementing Vermeule's theory might not eliminate those costs. Adoption of Vermeule's theory by only some judges would leave the bulk of the costs in place,[25] and the avoidance of judicial interpretive costs could result in increased offsetting costs elsewhere in the legal system.[26]

The remainder of Part II considers the "benefit" side of the analysis—Vermeule's claim that there is no way to gauge whether the interpretive techniques that he rejects have any positive net benefits.[27] This Part suggests that while no one can precisely measure the value of these techniques, there are reasons to believe that the value is positive. It analyzes different interpretive contexts that Vermeule discusses and suggests that the judiciary has important institutional advantages that apply to each. The judiciary's institutional features, this Part suggests, give it a comparative advantage over other institutional bodies in detecting appropriate occasions for departure from statutory text,[28] in checking the self-aggrandizing tendencies of the executive branch,[29] and in enforcing constitutional constraints on the legislative power.[30] These institutional advantages suggest that judicial interpretive techniques that go beyond enforcement of plain text produce value, thus undermining Vermeule's argument that because such techniques offer zero benefits, we should discard them to 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.

23. *E.g.*, *id.* at 194.
24. *See infra* Part II.A.1.
25. *See infra* Part II.A.2.a.
26. *See infra* Part II.A.2.b.
27. *E.g.*, VERMEULE, *supra* note 1, at 193.
28. *See infra* Part II.B.
29. *See infra* Part II.C.
30. *See infra* Part II.D.

A. VERMEULE'S CRITIQUE

Vermeule begins by criticizing prior interpretation scholarship for failing to analyze the institutions that carry out the interpretive process.[31] Ignoring this institutional structure, Vermeule says, is a fundamental error.[32] No interpretive theory can succeed without considering both the capabilities of interpreters to carry it out and the social effects of giving particular institutions interpretive powers.[33]

A good picture of Vermeule's critique emerges from his criticism[34] of Blackstone's acceptance of the principle that courts should construe statutes so as to avoid absurd results.[35] Even if everyone could agree that "absurd results are bad," it might not follow, Vermeule suggests, that *courts* should have the power to construe statutes to avoid absurd results.[36] He bases his argument not on the conventional, formalist reason that judicial reform of statutes constitutes an invasion of the legislative power,[37] but on practical reasons stemming from the institutional capability and fallibility of courts.[38]

If courts have the power to avoid statutory absurdity, Vermeule notes, it is inevitable that they will sometimes use that power incorrectly: they will sometimes mistakenly conclude that a statutory application is absurd because the judges cannot sufficiently appreciate the relevant policies or purposes behind the statute.[39] The costs of mistaken exercises of the absurdity power must be set against the benefits of its correct use.[40] Moreover, judges will have to *decide* whether any given application of a statute produces an absurd result, and making this determination will require courts to expend interpretive resources, which is another cost that must be considered.[41] Fi-

31. VERMEULE, *supra* note 1, at 16–17.

32. *See id.*

33. *See id.*

34. *Id.* at 19.

35. *See also* 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).

36. VERMEULE, *supra* note 1, at 19–20.

37. *Id.* at 31.

38. *See id.* at 20–21, 61 (noting that interpretive rules "must be chosen in light of *institutional capacities* and the *systemic effects* of interpretive approaches").

39. *Id.* at 20, 38–39.

40. *Id.*

41. *Id.*

nally, giving courts the power to reform statutes introduces uncertainty that also creates costs; parties planning their conduct must consider the possibility that a court will later disregard statutory text because it produces a result the court considers to be absurd.[42]

The costs of error, of the decision process, and of legal uncertainty are for Vermeule vital institutional considerations that most interpretation scholarship ignores.[43] Vermeule criticizes the main players in the interpretation world for assuming that judges will perfectly carry out interpretive methods.[44] For example, the purposivism of Hart and Sacks requires judges to promote legal coherence,[45] a fine aspiration. However, Vermeule observes, the theory could go awry if judges wrongly identify the principles and purposes to which the law is then made to cohere.[46] Similarly, William Eskridge's theory of "dynamic" statutory interpretation[47] may successfully refute the formalist, separation-of-powers objections to judicial "updating" of statutes,[48] 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 outnumber the cases in which courts update statutes correctly.[49] Vermeule similarly addresses Judge Richard Posner's early theory of "imaginative reconstruction,"[50] which called upon judges to ask what an enacting legislature would have done if presented with a given case.[51] Vermeule criticizes Posner for

42. *Id.*

43. *Id.*

44. *See id.* at 36 ("[I]ntellects of the highest caliber have explored interpretive strategies without attending to the fact that such strategies will inevitably be used by fallible institutions.").

45. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1111–1380 (William N. Eskridge & Phillip P. Frickey eds., 1994) (analyzing the role of the courts in interpreting statutes).

46. VERMEULE, *supra* note 1, at 26–27.

47. *See generally* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

48. VERMEULE, *supra* note 1, at 45.

49. *Id.* at 47.

50. *Id.* at 52–53.

51. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpre-*

failing to consider that imaginative reconstruction, if performed poorly, might drive courts farther away from legislative intent than would unimaginative, plodding application of statutory text.[52] Posner's more recent pragmatic theory, which views judges as "wise elders" and licenses them to interpret statutes so as to maximize their beneficial social consequences,[53] similarly fails, in Vermeule's view, to consider whether the costs of decision and the costs of legal uncertainty associated with pragmatism would outweigh its benefits.[54]

Vermeule even criticizes John Manning, a formalist whose ultimate interpretive prescriptions have considerable overlap with Vermeule's, for reaching his conclusions on the basis of constitutional, separation-of-powers arguments, rather than on the basis of institutional characteristics.[55] For Vermeule, constitutional arguments are unsatisfactory guides to interpretive practices—the Constitution, he says, mandates neither formalist nor nonformalist interpretive methods.[56] The focus, according to Vermeule, should be on the institutional characteristics of the interpreter.[57] Through his review and criticism of the prominent interpretation theories, Vermeule takes the interpretation scholarship community to task for disregarding institutional considerations in developing interpretive theories.

B. VERMEULE'S RECONSTRUCTION

Interpretation scholarship, Vermeule therefore says, must take an "institutional turn"—it must consider the institutional characteristics of the interpretive actors in our legal system.[58] For Vermeule, several of these characteristics are especially salient: judicial capacities and potential for error, the costs and systemic effects of interpretive methods, and the difficulties of methodological coordination within the judiciary.[59]

tation of Statutes and the Constitution, 37 CASE W. RES. L. REV. 179, 190 (1987).

52. VERMEULE, *supra* note 1, at 52–53.

53. 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 235, 244 (Morris Dickstein ed., 1998).

54. VERMEULE, *supra* note 1, at 54.

55. *Id.* at 29–33.

56. *Id.* at 31–32.

57. *See id.* at 36–39.

58. *Id.* at 63.

59. *Id.* at 86–148.

Vermeule begins by considering judicial capacities.[60] 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.[61] Vermeule illustrates this point by considering the question of judicial reliance on legislative history.[62] He argues that while formalists and intentionalists have long debated whether or not reliance on legislative history is constitutionally permissible, they have ignored the most vital consideration: whether courts really benefit from, or will merely be confused by, legislative history.[63]

To show this, Vermeule presents a detailed critique of the famous case, *Church of the Holy Trinity v. United States*.[64] He argues that the Supreme Court, in attempting to use legislative history to implement congressional intent in that case, misread the legislative history.[65] This case study, Vermeule claims, reveals the importance of considering the possibility of judicial *error*.[66] It demonstrates that even given a series of generous assumptions—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—courts should still reject legislative history because of the problem of judicial capacity.[67] Courts, Vermeule notes, have limited resources and may not be able to properly process all of a statute's legislative history, especially given how voluminous and heterogeneous legislative history can be.[68] According to Vermeule, *Holy Trinity* 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.[69] If this is true, perhaps even intentionalists should reject legislative history as an interpretive tool, not because of any theoretical problem with it, but because of the practical problem that it may

60. *Id.* at 86–117.
61. *Id.*
62. *Id.*
63. *Id.*
64. Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).
65. VERMEULE, *supra* note 1, at 90–102.
66. *Id.* at 102–03.
67. *Id.* at 106–07.
68. *Id.* at 110–17.
69. *Id.* at 105–17.

drive courts further away from what intentionalists themselves claim is the goal of interpretation—ascertaining legislative intent.[70]

Based on this example, Vermeule concludes that the generalizable lesson is that many of the apparently great debates in interpretive theory may be irrelevant.[71] If practical considerations dictate that the actual interpretive *methods* that courts should use would be the same under both textualist and intentionalist theories, little justification remains for debating which theory provides the ultimate guide to statutory meaning.[72] If even an intentionalist would conclude on the basis of intentionalist theory that, in light of the possibility of judicial error, courts should not consult legislative history, textualists and intentionalists could reach practical agreement without resolving their larger, theoretical debate.[73]

The other main institutional consideration that Vermeule addresses is the lack of coordination within the judiciary.[74] Interpretation scholars, Vermeule notes, often offer prescriptions for "the courts" to adopt, as though the entire judiciary were governed by some Kantian universal imperative and might, en masse, adopt a particular interpretive method.[75] In reality, however, no judge can force any other judge to adopt particular interpretive methods. Indeed, perhaps somewhat curiously, even when the Supreme Court makes a ruling related to statutory interpretation, it appears to give the ruling 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.[76] Justice Antonin Scalia, for example, continues his notable campaign against reliance on legislative history even though the Supreme Court has expressly rejected his position.[77]

70. *Id.* at 115–17.

71. *Id.* at 116–17.

72. *Id.*

73. *Id.*

74. *Id.* at 118–48.

75. *Id.* at 119, 122.

76. *See* Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 385–90 (2005); *see also* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2144 (2002).

77. *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 518 n.12 (1993) (justifying, in response to a dissent by Justice Scalia, resort to legislative history even in a case where the statutory text is unambiguous); United States v. Thomp-

Vermeule observes that this lack of coordination within the judiciary may significantly impact the effectiveness of various interpretive methods in reaching desired results.[78] In particular, he suggests that "democracy-forcing" interpretive methods—interpretive methods that purportedly improve legislative behavior—may increase judicial error costs if some, but not all, judges apply such methods.[79] For example, some textualists argue that courts should disregard legislative history because doing so "fosters the democratic process" by compelling Congress to ensure that it enacts its desires into statutory text.[80] However, even assuming that this strategy would have its desired effect if *all* judges resolutely ignored legislative history, Vermeule observes that if only *some* judges refuse to consider legislative history, but most judges will consider it, then legislators will expect courts to consider legislative history and will keep using it to communicate their intent to courts.[81] The judges who refuse to consider legislative history will then miss this indicator of intent, possibly causing them to misinterpret statutes.[82]

For this reason, it is incorrect to assume that an individual judge should choose an interpretive method simply because the method would have desirable effects if *all* judges applied it.[83] Vermeule calls this incorrect assumption the "fallacy of division."[84] Because no judge can force another judge to adopt a particular method, Vermeule concludes that each judge must choose a method that will contribute at least marginal benefits to the overall judicial system even if other judges do not choose the same method.[85]

C. VERMEULE'S PRESCRIPTION

In light of the institutional concerns detailed above, Vermeule concludes that the most pressing questions in inter-

son/Ctr. Arms Co., 504 U.S. 505, 516 n.8 (1992) (plurality opinion) (justifying resort to legislative history in response to a dissent by Justice Scalia).

78. VERMEULE, *supra* note 1, at 118–48.

79. *Id.* at 118, 135–37.

80. *See, e.g.*, United States v. Taylor, 487 U.S. 326, 346 (1988) (Scalia, J., concurring in part).

81. VERMEULE, *supra* note 1, at 135–36.

82. *Id.*

83. *Id.* at 135.

84. *Id.* at 121–22.

85. *Id.* at 121–23, 146–47.

pretation are not theoretical, but empirical.[86] Scholars can endlessly debate whether the ultimate goal of interpretation should be to discern the meaning of enacted text or, rather, the 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. 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? Vermeule complains that scholars have relied on intuition rather than hard evidence in answering this question.[87] It is no good pointing to particular cases in which legislative history proved helpful, he says, because those cases might be more than balanced out by cases in which use of legislative history harms the interpretive enterprise.[88] 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 the value of legislative history or other interpretive tools and, Vermeule notes, it may be impossible to obtain such evidence at a reasonable cost within a reasonable time.[89] An empirical study on the usefulness of interpretive techniques would inevitably suffer from fuzzy categorization of "right" and "wrong" cases (who would determine 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.[90] Unfortunately, judges cannot wait to decide cases until someone collects valid empirical data. Judges need a set of interpretive techniques that are appropriate for use *now*, despite the paucity of empirical knowledge about the effectiveness of interpretive techniques—hence, Professor Vermeule's title, "*Judging Under Uncertainty*."

Vermeule attempts to develop a technique for "judging under uncertainty" by borrowing from "decision theory."[91] Decision theory suggests that, in the face of uncertainty about the value of interpretive methods, one would, ideally, calculate the

86. *Id.* at 149, 153.
87. *Id.* at 108.
88. *Id.* at 90.
89. *Id.* at 158.
90. *Id.* at 158–62.
91. *Id.* at 171.

"expected" value of each method by multiplying each method's various possible payoffs by the probability of each payoff.[92] However, not only are the payoffs of various interpretive methods unknown, we do not have appropriate numbers—or even, Vermeule claims, reasonable estimates—to assign to their probabilities.[93] Vermeule therefore turns to a more radical decision technique: the "principle of insufficient reason," which consists of assuming that unknown probabilities are equal, i.e., that the good and bad aspects of the unknowable effectiveness of proposed interpretive techniques cancel each other out.[94] Vermeule's answer, in other words, focuses on those outcomes of interpretive methods that are knowable, and assumes that everything else washes out in the long run.

Vermeule also notes several other decision theory techniques, only one of which will be mentioned here: "satisficing."[95] This technique consists of searching among options only until finding a choice that is "good enough."[96] The satisficer contents herself with a good choice and does not demand the *best* choice.[97] 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 under consideration is unambiguous, courts should apply its clear meaning and ignore all other considerations.[98] He reaches this conclusion by applying the principle of insufficient reason and the "satisficing" technique to the situation of courts in our legal system.[99]

Vermeule observes that courts lack solid empirical data about the value of most interpretive techniques that go beyond enforcing the plain meaning of the immediately applicable sta-

92. *Id.*

93. *See, e.g.*, *id.* at 192 (stating that "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").

94. *Id.* at 173.

95. *Id.* 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 504 (2d ed. 1989).

96. VERMEULE, *supra* note 1, at 176–77.

97. *Id.* at 177.

98. *Id.* at 183.

99. *See, e.g.*, *id.* at 192–95.

tutory text, but they are in a good position to gauge one fact about these methods: their costs.[100] Courts have a comparative advantage in assessing how interpretive methods affect litigation costs and judicial workloads.[101]

Vermeule applies this insight to various interpretive techniques, starting with judicial reliance on legislative history. As noted earlier, judges have little concrete information about how reliance on legislative history affects the reliability of their decisions. Under the principle of insufficient reason courts would 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).[102] But courts do know that legislative history is costly: it is expensive for counsel to research and for courts to consider.[103] In the absence of any empirical reason to believe that legislative history increases the accuracy of courts' decisions, Vermeule suggests that courts save themselves and litigants the cost of considering it.[104] In other words, in the absence of data regarding which method of statutory interpretation is best, courts might as well select the cheapest.

Of course, Vermeule acknowledges, minimizing costs is not the only goal[105]—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 Vermeule suggests that there is a good alternative—simple reliance on clear statutory text.[106] Such a method is "good enough," and according to the satisficing technique, when faced with a method that produces "good enough" results, courts should not search for other methods that offer uncertain benefits but certain and substantial costs.[107] 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 clear statutory text. He rejects most of the "canons of construction," because their benefits are uncertain, but their costs are defi-

100. *Id.* at 166–68, 192–95.
101. *Id.* at 166–68.
102. *Id.* at 193.
103. *Id.* at 193–94.
104. *Id.* at 192–97.
105. *Id.* at 196.
106. *See, e.g.*, *id.* at 183, 196–97.
107. *Id.* at 194.

nite.[108] 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).[109] In that case, Vermeule asserts, courts should pick a default rule and be done with it.[110] Otherwise, courts should abandon the canons and enforce statutory plain text.[111] Similarly, comparison of statutory text to similar text in other statutes, which Vermeule dubs "holistic" statutory interpretation, provides uncertain benefits, but definite costs, and should also be abandoned.[112]

In cases where statutory text is not clear, but contains a gap or ambiguity, Vermeule argues that courts should defer to an administrative agency's construction of the statute.[113] Administrative agencies, Vermeule argues, have a comparative advantage over courts in assessing statutory meaning, and this institutional advantage is the true reason for *Chevron* deference.[114] Agencies have specialized expertise that puts them in a better position than courts to discern the true meaning of ambiguous text, and because each agency is a single organ that can interpret its own organic statute, agencies are free of the coordination problems courts encounter.[115] Courts should therefore adopt agency interpretations of ambiguous statutes without even attempting to use traditional tools of statutory construction to narrow the ambiguity.[116] For courts to use such tools duplicates the costs of agency interpretation without any certainty of a corresponding benefit.[117] Again, cost minimization is not the only goal, but accepting the agency's interpreta-

108. *Id.* at 198–202.
109. *Id.* at 200.
110. *Id.* at 201.
111. *Id.* at 201–02.
112. *Id.* at 202–05.
113. *Id.* at 206.
114. *Id.* at 207–08; *see* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 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. *See id.* at 844. 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. VERMEULE, *supra* note 1, at 208–10.
115. *See* VERMEULE, *supra* note 1, at 208.
116. *Id.* at 211.
117. *Id.* at 210–11.

tion is "good enough," and doing anything more risks incurring costs with no benefits.[118]

2. Constitutional Cases

Turning from statutory interpretation to constitutional interpretation, Vermeule applies the same cost-benefit analysis. He argues that courts should enforce constitutional text that is clear and specific and should leave everything else—including enforcement of most of the Bill of Rights and the Equal Protection Clause—to other officials.[119] Any other approach, he argues, incurs definite costs but provides only uncertain benefits.[120]

Vermeule acknowledges that this rule would entail discarding some decisions that are near to our hearts, such as *Brown v. Board of Education*,[121] but for every *Brown*, there is a *Dred Scott*[122]—i.e., a case in which the courts wrongly strike down the work of the political branches.[123] 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.[124] Thus, instead of focusing only on their favorite decisions, lovers of judicial review must consider the whole range of decisions in order to determine whether judicial review produces not just good results, but *net* good results.[125]

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.[126] Article III courts are free of political pressure to conform to current majoritarian preferences, but that does not free them to come to *correct* constitutional decisions; it just frees them to do whatever they please.[127] Like courts interpreting statutes, courts that attempt to tackle ambiguous constitutional text may make errors of interpretation,

118. *Id.*
119. *Id.* at 230–31.
120. *Id.*
121. 347 U.S. 483 (1954); *see* VERMEULE, *supra* note 1, at 231.
122. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).
123. *See* VERMEULE, *supra* note 1, at 231, 241, 281.
124. *Id.* at 231.
125. *Id.*
126. *Id.* at 258–59, 273–75.
127. *Id.* at 258–59.

and we cannot empirically know whether those courts will, on balance, do more good than harm.[128]

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 extensive historical research.[129] Moreover, judicial review adds a layer of uncertainty to the law that imposes extra costs by complicating planning—parties planning their primary conduct cannot simply rely on statutes but must consider the possibility that courts will hold the statutes unconstitutional.[130]

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.[131] He notes that other liberal democracies survive without judicial review.[132]

Thus, once again, Vermeule maintains that 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.

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 judicial power to deviate from statutory text in appropriate cases.[133] There is considerable debate about which cases are "appropriate" for the exercise of such a judicial power—my own theory calls upon courts to discern the "back-

128. *Id.* at 275.
129. *Id.* at 259.
130. *Id.* at 275–76.
131. *Id.* at 265.
132. *Id.*
133. *See, e.g.*, BLACKSTONE, *supra* note 5, at 60; Eskridge, *supra* note 1; Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023 (1998) [hereinafter Siegel, *Textualism and Contextualism*]; Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309 (2001) [hereinafter Siegel, *Statutory Drafting Errors*]; Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235.

ground principles" underlying the area of law of which a statute is a part and to use those principles as a guide, departing from statutory text only when the text deviates so surprisingly from background principles that such departure is justified[134]—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 rightly observes that once courts have the power to depart from statutory text, they will inevitably misuse that power in some cases.[135] 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 light of the possibility of judicial error.

Vermeule also correctly draws attention to the costs that arise from litigation over whether a court should exercise the power to depart from statutory text in a given case—a power that, most agree, should be exercised rarely. 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, such as legislative history or background principles, reinforce a statute's apparent textual meaning.[136] 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.[137] Jus-

134. *See* Siegel, *Textualism and Contextualism*, *supra* note 133, at 1033, 1043–44, 1054; Siegel, *Statutory Drafting Errors*, *supra* note 133, at 348.

135. I have always acknowledged this. *See* Siegel, *Textualism and Contextualism*, *supra* note 133, at 1110.

136. *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 133, at 335 n.116 (noting the convergence of interpretive methods in most cases).

137. For a more detailed look at Vermeule's precursors, see Eskridge, *supra*

tice 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."[138] But Vermeule has taken the argument to a new level, 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 in the absence of empirical data about the value of interpretive methods.

The remainder of this Article attempts to respond to Vermeule's challenge. Part II.A first argues 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.[139] Part II then suggests that to justify employing 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. This Article then attempts to offer institutional reasons for such a belief.[140]

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. However, a closer look at the costs and 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,"[141] and he disregards certain costs associated with his own proposals that might exceed the cost savings his methods would provide.

note 1, at 2044–50.

138. Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (emphasis omitted). Justice Scalia also sounded this theme in his book on interpretation. *See* SCALIA, *supra* note 2, at 36–37.

139. *See infra* Part II.A.

140. *See infra* Part II.B–D.

141. VERMEULE, *supra* note 1, at 194.

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 "enormous."[142] Theoretically, one might say that Vermeule's argument does not depend on the size of these costs. If one adopts the "principle of insufficient reason" and assumes that the net benefits of interpretive techniques that look beyond plain text are zero, then courts should, in theory, 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 argue about something else. Vermeule's own notion of "satisficing" would suggest that the current interpretive system is "good enough" unless an alternative offers a substantial improvement.[143] Thus, the enticing notion that implementation of his theory could provide society with "enormous" cost savings is a central component of Vermeule's arguments.

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.[144] But given that Vermeule criticizes as "empirically far too ambitious"[145] these same scholars' estimation that the benefits justify the costs, this agreement seems a slender reed on which to hang his theory. It is true that Professor Eskridge has said that the cost of researching legislative history "involves a very large number of dollars,"[146] but Eskridge offers no data to support this judgment. Similarly, Justice Scalia estimates that when he was head of the Justice Department's Office of Legal Counsel, his staff spent sixty percent of its time researching legislative history.[147] But if personal ex-

142. *Id.* at 194, 210 (referring to the cost of researching legislative history and the cost of using traditional tools of statutory construction to review administrative interpretation of statutes).

143. *See id.* 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").

144. *E.g.*, *id.* at 193.

145. *Id.*

146. William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1541 (1998).

147. SCALIA, *supra* note 2, at 36–37; *see also* Kenneth W. Starr, *Observa-*

perience provides sufficient data to measure the cost of relying on legislative history, I would add my own five and a half years of experience (one year as a law clerk and four and a half as an advocate in the Department of Justice). While I certainly researched a substantial amount of legislative history, I never felt it was a particularly grinding burden, especially relative to the overall costs of litigation. Moreover, in at least one case, legislative history strongly influenced the litigation in my client's favor, a benefit that seemed well worth the cost.[148]

An evaluation of the cost of interpretive techniques *relative* to the overall cost of litigation seems particularly neglected in Vermeule's theory. Indeed, even if Vermeule's theory were fully adopted by every Article III judge tomorrow, litigation would hardly cease. Surely the lion's share of litigation revolves around disputed facts, and not arguments about the law's meaning. Even arguments about statutory interpretation would continue under Vermeule's theory because his theory retains for the courts the decision of whether statutory language is clear or ambiguous.[149] The costs involved are not quantifiable—Vermeule himself does not attempt to quantify them—but a consideration of the litigation that would remain gives some reason to doubt that the cost savings produced by Vermeule's theory would be "enormous." If the total savings would be something to the right of the decimal point, the argument for incurring costs to achieve the *best* possible methods of interpretation is strengthened.

This point was recently considered by another expert group of statutory interpreters, the British House of Lords. In deciding whether to relax their rule against judicial consideration of legislative history, the Lords faced the cost question squarely.[150] Over the "practical objection" of the Lord Chancellor that permitting such consideration might lead to "an immense increase in the cost of litigation in which statutory construction is involved,"[151] the leading opinion stated that "it is easy to overestimate the costs of such research," and that while the new

tions 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).

148. *See* Int'l Bhd. of Teamsters, AFL-CIO v. Fed. Highway Admin., 56 F.3d 242, 246–47 (D.C. Cir. 1995).

149. *See* VERMEULE, *supra* note 1, at 188–89 (noting that judges may disagree about whether statutory language is clear).

150. Pepper v. Hart, [1993] A.C. 593 (H.L.) (appeal taken from Eng.).

151. *Id.* at 614–16 (Lord Mackey, L.C., dissenting).

practice would "inevitably involve some increase in the use of time, this will not be significant."[152] 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 United States practice allows.[153] Still, it shows that experts do not agree on how large the costs of interpretive techniques are, and no one really has definitive 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 assume that they are, at least, large. Even so, adopting Professor Vermeule's theory would not necessarily avoid those 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 result in benefits if adopted by the whole judiciary must also produce benefits even if adopted only by individual judges.[154] Vermeule contends that judges must adopt methods that produce benefits notwithstanding the choices of other judges. It is questionable, however, whether Vermeule's theory satisfies this criterion.

Vermeule contends that the benefits of adopting his theory are "marginal" or "divisible."[155] That is, he contends that each adoption of his theory by an individual judge will "reduce systemic decision costs and legal uncertainty at the margin."[156] Even if the full benefit of his theory were achieved only when adopted by all, or at least most, judges, he perceives costs declining continuously as individual judges adopt his theory.

However, 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 many, judges. For nearly twenty years now, Justice Scalia has engaged in a sustained campaign against re-

152. *Id.* at 636–38.
153. *Id.*
154. VERMEULE, *supra* note 1, at 121–22.
155. *Id.* at 226.
156. *Id.*

liance on legislative history,[157] and some other judges have signed on.[158] What costs have been avoided as a result of this campaign? 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.[159] So long as *most* of the Justices will consider legislative history, prudent counsel will likely research, brief, and argue it.[160]

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 period immediately before Justice Scalia arrived at the Court, one beginning ten years later, and one twenty years later—reveals the following:

157. 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 eleven and fifteen, which discussed legislative history).

158. 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).

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

160. *See* Nelson, *supra* note 1, at 346.

Table 1: Citations to Legislative History in Supreme Court Briefs

Time Period	Briefs filed by parties in the Supreme Court[161]	Briefs citing House or Senate Reports[162]	Percentage of briefs citing House or Senate Reports
1/1/1981–12/31/1985	4111	1326	32.3%
1/1/1991–12/31/1995	2510	905	36.1%
1/1/2001–12/31/2005	2642	847	32.1%

If Professor Vermeule's argument that "marginal" benefits result as each judge adopts his theory were correct, one would expect to see a decline in citations to legislative history as a result of Justice Scalia's sustained campaign against its consideration. 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.

Similarly, the trend of the rate of citations to legislative reports over *all* completed years in the LEXIS database (1979–2006)[163] is almost completely flat, as shown in the following graph, in which the X-axis represents the year and the Y-axis is

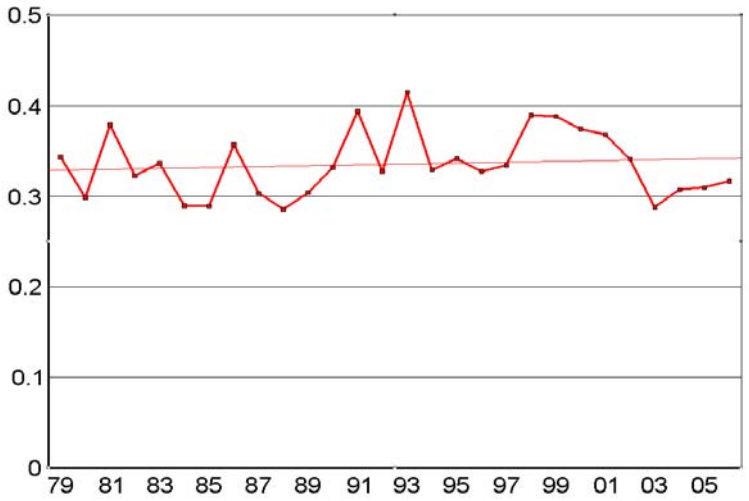
161. As revealed by conducting the search *DOCUMENT-TYPE ("brief") and not DOCUMENT-TYPE ("amicus")* in LEXIS's Supreme Court Briefs database, with the specified date restrictions. All searches were conducted the week of June 18, 2007. Unfortunately, as I learned by conducting these searches in February 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.

162. 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.

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

the percentage of party briefs filed that year that cite legislative reports (expressed as a decimal):

Figure 1: Citations to Legislative History in Supreme Court Briefs



The slope of the best linear fit to the year-by-year data over all years is 0.00049.[164] That is, 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

164. The full data set showing changes in percentage of briefs citing legislative history is:

Table 2: Percentage of Supreme Court Briefs Citing Legislative History by Year

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

Year	1986	1987	1988	1989	1990	1991	1992
%	35.7	30.4	28.6	30.4	34.0	46.7	33.9

Year	1993	1994	1995	1996	1997	1998	1999
%	41.5	32.9	34.2	32.7	34.9	38.9	38.8

Year	2000	2001	2002	2003	2004	2005	2006
%	37.6	36.8	34.1	28.8	30.7	30.8	31.7

In the above table, "%" means the 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.

legislative history has had no impact on the rate at which parties rely upon it.[165]

While these admittedly crude data do not fully measure the overall cost of legislative history research, they support the intuition that counsel will not decrease their use of legislative history simply because individual judges or Justices refuse to consider it in reaching a decision.[166] Indeed, even if a majority

165. 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 multiyear 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 −0.00056. 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 −0.00020, 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 1979–2006 reveal that the slope of the trend line in their citation is −0.0013. Searches for citations to committee hearings over the same period show a trend line with a slope of −0.00023. 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 0.0015—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.

166. 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

of the Court disregarded legislative history and only a minority continued to consider it, counsel would likely continue to brief and argue it, because a single Justice's vote could prove crucial in deciding a case.[167] It would be uncharacteristic for a lawyer to omit arguments that *might* prove helpful. When plaintiff's counsel in *Gibbons v. Ogden* concluded his Supreme Court argument with a peroration that quoted Virgil's *Aeneid*,[168] his opponent did not simply respond, "Virgil is not authority." Instead, he explained in a three-page peroration of his own why the quotation from the *Aeneid* actually supported his side of the case.[169] If lawyers will expend costs to respond to a literary allusion to a poet who has been dead two thousand years, they are unlikely to neglect arguments based on legislative history that at least some Supreme Court Justices will consider.[170] This same reasoning applies to 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 eight out of nine Supreme Court Justices renounced reliance on legislative history, counsel might decrease expenditures devoted to researching and briefing legislative history, preferring to put most of their energy into matters that would likely prove more productive.[171] But the actual experience of having an individual Justice reject legislative histo-

all cases, to a situation in which it is considered by the controlling opinion in only a small minority of decisions" and that "in most cases, it is not mentioned at all"); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 656–57 (1990) (providing similar statistics). However, the Court's reduced reliance on legislative history does not imply that any resources will be saved, 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, these savings may be dismissed as trivial.

167. Rosenkranz, *supra* note 76, at 2144.

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

169. *Id.* at 183–86 (argument of the Attorney General).

170. *But see* VERMEULE, *supra* note 1, at 103–04 (noting that the government declined to argue the legislative history in the *Holy Trinity Church* case and said only that legislative intent should be gathered from the statute itself).

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

ry 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.[172]

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 execute it perfectly.[173] 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 reality that individual judges adopting Vermeule's theory will lack power to force their colleagues to fall into line, the cost savings that are the theory's main benefit seem unlikely to materialize.[174]

b. Offsetting Costs

The coordination problem is not the only obstacle to achieving the cost savings predicted by Professor Vermeule's theory. Even if Vermeule's book captured the attention and the adherence of the entire Article III judiciary, the cost savings of his theory would remain 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

172. *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 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.

173. *Id.* at 123–25.

174. 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.

indicated by the plain text appears costly. Consider, for example, *United States v. Storer Broadcasting Co.*[175] In this well-known case, the Supreme Court considered § 309 of the Communications Act of 1934, which instructs the Federal Communications Commission to evaluate applications for broadcast licenses.[176] The text of the statute clearly provided that if the Commission denied an application (and maintained that denial after giving the applicant a second chance), it was required to "formally designate the application for hearing."[177] It further provided that "[a]ny hearing subsequently held upon such application" would be a "full hearing" in which the applicant could participate.[178] 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 if the application, on its face, did not satisfy valid agency rules implementing the Communications Act.[179] As I have described in detail elsewhere,[180] 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*,[181] 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."[182]

Imagine, however, that the Court had adopted Professor Vermeule's theory. That theory would have obliged the Court to implement the clear statutory text, and would have required the agency, therefore, to conduct costly, pointless hearings—perhaps hundreds per year.[183] Presumably, if the costs had

175. *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956). For a detailed discussion of this case, see Siegel, *Textualism and Contextualism*, *supra* note 133, at 1045–49.

176. *Storer Broad. Co.*, 351 U.S. at 192–205.

177. *Id.* at 195–96 n.5 (quoting 47 U.S.C. § 309(b) (1952)) (internal quotation marks omitted).

178. *Id.*

179. *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, 195, 197.

180. *See* Siegel, *Textualism and Contextualism*, *supra* note 133, at 1045–49.

181. *See Storer Broad. Co.*, 351 U.S. at 202.

182. *Id.* at 205.

183. The FCC receives hundreds of applications for broadcast licenses every year, and it denies, dismisses, or returns hundreds without designating

been great enough, the agency would have persuaded Congress to rewrite the statute, but that too would have entailed considerable costs in the form of congressional time.

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.[184]

Moreover, if courts insist on following plain text no matter what, Congress will incur increased costs because it will have to draft statutes more precisely. Interpretive techniques that go beyond enforcement of plain text permit Congress to save time and resources in the drafting process. When giving any instructions to anyone, the giver relies on a host of background interpretive understandings that permit the instructions to be given in a reasonably concise form.[185] For example, 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." However, if the secretary interprets the boss's instructions literally, this qualification, as well as many others, would be necessary. Similarly, if courts insist on following Congress's apparently clear textual instructions no matter how absurd the result, Congress will have to expend more energy drafting literal, judge-proof instructions.[186]

As a statutory example, consider the Sherman Antitrust 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."[187] As the Supreme Court has long noted, this statute "cannot mean what it says,"[188] because, if applied

them for hearing. *See, e.g.*, 63 FCC ANN. REP. 23 (1997).

184. Professor Eskridge called attention to similar costs in responding to similar arguments from Justice Scalia. *See* Eskridge, *supra* note 146, at 1541–42.

185. *See* FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 28–30 (Roy M. Mersky & J. Myron Jacobstein eds., 1970) (1839); William N. Eskridge, Jr., *"Fetch Some Soupmeat,"* 16 CARDOZO L. REV. 2209 (1995) (discussing Lieber's famous example).

186. *Cf.* LIEBER, *supra* note 185, at 30–32 (complaining that strict interpretive principles used by British judges complicate the task of Parliament).

187. 15 U.S.C. § 1 (2000 & Supp. IV 2006).

188. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687 (1978).

literally, it would outlaw virtually all private commercial contracts, inasmuch as restraint is the very essence of such contracts.[189] 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 outlaw all private contracts, not only would substantial social costs have resulted directly, 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 predict that these costs, assuming them to exist, would be balanced by cost savings from his theory. Yes, Congress would have to expend energy overturning foolish judicial decisions that refuse to depart from plain text, but Congress would also *save* energy by *not* having to overturn decisions that *wrongly* depart from plain text. Similarly, other social actors would have to live with foolish decisions implementing plain text until Congress could overturn them, but they would be saved the burden of dealing with decisions that wrongly depart from plain text. According to Vermeule, under the "principle of insufficient reason," any analysis should assume these costs and benefits cancel each other out.[190]

The principle of insufficient reason, however, is a double-edged sword. If unknowable quantities are assumed to cancel each other out, the principle should be applied more broadly. As this Section shows, adopting Vermeule's interpretive methods would entail a substantial and unknowable shift in costs of many kinds, including judicial costs, legislative costs, and other social costs. Following the principle of insufficient reason should lead to the conclusion that all of the imponderable costs and benefits that would accrue to Vermeule's theory would cancel each other out.

Vermeule would say that the judicial cost savings from his theory are distinct from all other costs, because their direction is certain and because courts are uniquely well-positioned to gauge these costs, while they are not in a good position to gauge other types of costs.[191] But, as the previous Sections 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 Vermeule's methods will always reduce judicial costs. As *Chev-*

189. *Id.*; Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

190. VERMEULE, *supra* note 1, at 173–74.

191. *See id.* at 166–68.

ron litigation under the current system shows, considerable debate can arise over whether statutory text is clear or ambiguous,[192] and, under Vermeule's theory, courts would continue to make this determination. One can imagine cases in which a court looking only at the text might need to expend considerable energy deciding whether the text is clear or ambiguous, whereas other clues beyond the text might settle the matter fairly easily if the court consulted them.[193] While these clues may not help often, they may sometimes, and under the principle of insufficient reason, unknowables cancel one another out.[194]

The point 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, apparently unaware 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," seemingly 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 claims; 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 intui-

192. *See id.* at 189 ("Judges can . . . hold different views about whether statutory language is clear."). The recent case of *Zuni Public School District No. 89 v. Department of Education*, 127 S. Ct. 1534 (2007), provides an excellent example: it required Supreme Court litigation to determine whether the statute involved was clear or ambiguous, and, even then, five Justices thought the agency's interpretation was a permissible reading of an ambiguous statute. *See id.* at 1546. Four Justices however, thought the statute so clear that the agency's construction deserved no deference. *See id.* at 1551 (Scalia, J., dissenting).

193. 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] A.C. 593 (H.L.) (appeal taken from Eng.), 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," but that the legislative history made the true construction of the statute clear. *Id.* at 640–42. In such a case, a system that rejected legislative history would impose larger costs of uncertainty and litigation than one that permitted its use.

194. VERMEULE, *supra* note 1, at 173.

tion 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, 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 remaining Sections of this Article offer competing insights. Each Section responds 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 do not know whether interpretive techniques that go beyond enforcement of plain text provide any benefit, but we do know that they are expensive, so we should discard them and save the expense. The previous Sections questioned one pillar of this theory—that an "enormous" cost savings would result from discarding the interpretive techniques that he disfavors—and instead suggested that the effect on costs is unknowable.

This Section challenges 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 justification for these techniques is less than fully persuasive, but that there is *no* reason to think that these techniques, on balance, do more good than harm.[195] For example, regarding holistic textualism, a method of interpretation appealing to sources beyond the statute's text to ascertain meaning, Vermeule says that "there is *no particular reason* to think that the illuminating effect of holistic textualism will predominate over its error-producing effect."[196] He similarly states that "there is *no reason at all* to think that the tools of judicial gap-filling are superior to agency interpretation"[197] and that "[t]here is *no particular reason* to believe that judges are better positioned than legislators to update constitutional principles and rules through incremental decisionmaking over time."[198]

195. *See, e.g.*, *id.* at 205, 210, 273–74.
196. *Id.* at 205 (emphasis added).
197. *Id.* at 210 (emphasis added).
198. *Id.* at 273–74 (emphasis added).

Vermeule's contention that there is no reason to believe in the value of certain interpretive techniques is essential to his theory of interpretation. Both Vermeule's appeal to the "principle of insufficient reason" and his assumption that the costs and benefits of interpretive techniques that go beyond plain text wash each other out are valid only if we really have no basis for estimating the probability that these interpretive techniques will help or harm. Even a modest shift in the probabilities—say, if certain interpretive techniques led courts astray in forty percent of the cases, but were helpful in the remaining sixty percent—would undermine the "washing out" hypothesis fundamental to Vermeule's theory.[199]

This Section suggests that there is some reason to believe that courts can, on balance, reach better results by employing techniques other than straightforward enforcement 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,[200] 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.[201] 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.

The first critical institutional consideration, which I have highlighted elsewhere, is that courts act at the moment the statutory text is actually applied to a particular case.[202] In contrast to legislatures, which act generally and in advance, and thus cannot anticipate every circumstance to which statutes will apply,[203] courts are better positioned to use certain interpretive techniques. Consider, for example, the interpretive principle that courts should construe statutes so as to avoid absurd results. Vermeule does not definitively state what should happen to this principle under his theory, and it is a principle accepted even by most textualist judges and scholars.[204] How-

199. *See id.* at 174.

200. *Id.* at 15–39.

201. *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).

202. *See* Siegel, *Statutory Drafting Errors*, *supra* note 133, at 341–43.

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

204. Justice Scalia, for example, approves it. *See* Holloway v. United

ever, based on Vermeule's arguments, 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.[205] In the absence of any hard data as to the rate of correct versus mistaken applications of the absurd results principle, Vermeule would presumably appeal to the "principle of insufficient reason" and conclude the rates are equal.[206] Thus, he would 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.[207] Therefore, it should be discarded.[208]

However, because of their institutional feature that they act at the moment of statutory implementation, courts can probably produce net benefits by applying the absurdity principle. Legislatures are institutionally disadvantaged when it comes to appreciating the potential absurdity of what they write. No matter how much work they do in advance, they will make some mistakes that come to light only afterwards.[209] Courts, on the other hand, are in a position to see the statute after the drafting process, when its absurdity may be apparent in light of the particular case in which it arises.

Another institutional feature that promotes the courts' capacity to apply the absurdity principle is the availability of judicial time to focus on discrete statutory provisions. Vermeule emphasizes the limited time and attention of courts,[210] which is certainly a valid point, but at least courts faced with an argu-

States, 526 U.S. 1, 19 n.2 (1999) (Scalia, J., dissenting); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527–30 (1989) (Scalia, J., concurring); SCALIA, *supra* note 2, at 20.

205. VERMEULE, *supra* note 1, at 20, 37.

206. *See id.* at 173–75.

207. *See id.* at 18–24.

208. 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. *Id.* 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.

209. *See* Siegel, *Statutory Drafting Errors*, *supra* note 133, at 341–43.

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

ment that statutory text dictates an absurd result can take the time necessary to consider the argument. The hurly-burly of the legislative process, on the other hand, and the need to vote up or down on an entire statute at the moment it 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 a power of deviation exists, it seems impossible to deny Vermeule's charge that courts will sometimes use it unwisely.[211] 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 also 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, the court's conclusion *likely* has some merit because the court has an institutional advantage over the legislature in the discovery of statutory absurdity.

And that is all one needs 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. This assumption 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 the likelihood of correct judicial implementation of the absurdity principle even slightly outweighs the likelihood of incorrect implementation, then the assertion that the principle has no benefit collapses, and with it, the conclusion that we should discard the principle to avoid its costs. Rather, we must compare the costs of implementing the absurdity principle against its benefits and, since both are unmeasurable, the possibility remains that the benefits exceed its costs.

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, for example, about the usefulness of

211. *See id.* at 20, 192–94.

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 fully capture the set of cases in which courts should be able to deviate from statutory text.[212] A statute's startling departure from background principles of law may indicate that the statute is erroneously drafted even if following the statute's literal text would not produce an "absurd" result.[213] Courts should have the power to deviate from statutory text in such cases[214] and, again, contrary to Vermeule's conclusions,[215] institutional features of courts support this view. The 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.[216] This institutional advantage suggests that courts can likely produce net benefits by using the process of interpretation to maintain statutory coherence with background principles of law.[217]

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 sometimes departing from plain text. There is some reason, stemming from institutional features of courts. The features do not come with concrete numbers, 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.[218] In "Type

212. Siegel, *Statutory Drafting Errors*, *supra* note 133, at 326–32.

213. *Id.*

214. *Id.* at 348.

215. VERMEULE, *supra* note 1, at 27, 203–05.

216. Siegel, *Statutory Drafting Errors*, *supra* note 133, at 341–43.

217. 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 133, at 1024; Siegel, *Statutory Drafting Errors*, *supra* note 133, at 358. I have argued that there is no constitutional obstacle to judicial reliance on legislative history, *see* Siegel, *Use of Legislative History*, *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.

218. VERMEULE, *supra* note 1, at 189.

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 consulting traditional tools of statutory construction to try to resolve the ambiguity.[219] 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.[220] Rather, he relies on practical, institutional considerations. He reasons that 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 entail duplicative costs and add to legal uncertainty without offering any likely benefit.[221]

Vermeule is surely onto something here. I have argued at length elsewhere that the background principles of any area of law are necessary guides to construing statutes related to that area.[222] If that is true, 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. Thus, courts gain no edge over agencies on this point, 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),[223] 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 a court that may encounter an agency's statute only sporadically. Moreover, as Vermeule observes, each agency is a single organ that can produce a unified construction of a statute, whereas the process of producing a coor-

219. *Id.* at 205–07; *see also id.* 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).

220. *Id.* at 207–08.

221. *Id.* at 208–12.

222. *See* Siegel, *Textualism and Contextualism*, *supra* note 133; Siegel, *Statutory Drafting Errors*, *supra* note 133.

223. *See* 28 U.S.C. § 1295 (2000) (giving the Federal Circuit exclusive jurisdiction over all appeals in patent cases).

dinated judicial interpretation is rather clumsy and inefficient.[224]

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 agency interpretations. Again, however, Vermeule's analysis gives too little weight to institutional advantages of courts. The previous Section focused on institutional advantages stemming from a vital difference between the courts and Congress, namely, that courts interpret statutes at the moment of application.[225] Here, the key is the most vital difference between courts and agencies, namely, the courts' advantage in providing 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 takes note of the political insulation of courts, 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.[226] 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.[227] 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.[228]

In offering such a stingy view of the courts' potential value, Vermeule gives too little weight to the courts' vital role 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

224. VERMEULE, *supra* note 1, at 208.
225. *See supra* Part II.B.
226. VERMEULE, *supra* note 1, at 209–11.
227. *Id.*
228. *Id.*

formulation or execution of policy.[229] If that role were removed, executive agencies would have a greatly enhanced ability to set the limits of their own power.[230] The executive has a strong tendency to aggrandize its own power even with courts playing the role that they play now;[231] one shudders to think what would happen if the courts did not play a checking role.

Consider, for example, the current administration's assertion that Congress's Authorization for Use of Military Force (AUMF), enacted after September 11, 2001, authorizes the President to order warrantless electronic surveillance of persons within the United States.[232] Under Vermeule's interpretive theory, because the President's claimed statutory authority for his surveillance power—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[233]—is less than perfectly clear, courts should defer to the executive's construction without even considering traditional canons of statutory construction.[234] These canons, such as the canons that the specific controls the general,[235] or that repeals by implication are disfavored,[236] might lead to the conclusion that the Foreign Intelligence Surveillance Act still governs domestic electronic surveillance and the President's claimed power does not exist.[237]

229. *See* Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1283–85 (2002).

230. *Id.* at 1285–86.

231. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 497–98, 525 (1989) (noting that *Chevron*'s rule already tends to "swell agency power" and "enlarges the quantum of administrative discretion potentially amenable to direction from the White House").

232. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); Memorandum from Elizabeth B. Bazan & Jennifer K. Elsea, Legislative Attorneys, Cong. Research Serv., 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).

233. Authorization for Use of Military Force § 2.

234. VERMEULE, *supra* note 1, at 187.

235. *E.g.*, Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 228–29 (1957).

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

237. *Cf.* Memorandum from Elizabeth B. Bazan & Jennifer K. Elsea, *supra* note 232, at 40–44 (discussing these issues at length).

Of course, consistent with his "washing out" theory, Vermeule would presumably assert that while courts might rightly prevent the executive from invading civil liberties, 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 understand congressional instructions any better than the agencies, the principle of insufficient reason would suggest that good and bad court decisions will cancel each other out. Therefore, Vermeule would conclude, judicial review of agency interpretations of ambiguous statutes incurs costs but provides no benefit, and so courts should not engage in such review.

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 only from its political insulation, but also 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.[238] The judiciary's limited role in reviewing the executive's action for legality rather than in formulating policy also restricts the judiciary.[239] While the judiciary will not perform its function perfectly, we can expect that it will serve as a valuable counterweight to the executive's natural self-aggrandizing tendencies.[240] This benefit is sufficient ground for incurring the costs of maintaining the judicial role in reviewing agency interpretations of ambiguous statutes. 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.[241]

238. Molot, *supra* note 229, at 1283–85.

239. *See id.*

240. *Cf. id.* at 1292–1313 (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 congressional agents).

241. *See supra* Part II.B.

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 recognizes that many will find this part of his theory "beyond the pale."[242] 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 institutional reasons to believe that judicial review does more good than harm.

In a recent book chapter, I suggested some such reasons.[243] Perceiving them requires looking beyond the institutional feature of courts upon which Vermeule primarily focuses: the courts' insulation from politics.[244] As noted earlier, Vermeule rejects the notion that political insulation puts courts in a better position than political actors to interpret the Constitution.[245] 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 constellation of institutional features that make the judiciary the branch best positioned to give constitutional guarantees real meaning.

To see the judiciary's advantage, consider Vermeule's suggestion 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."[246] Thus, Vermeule

242. VERMEULE, *supra* note 1, at 231.

243. Jonathan R. Siegel, *Political Questions and Political Remedies*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 243 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007) [hereinafter Siegel, *Political Questions*]. 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.

244. *See* U.S. CONST. art. III; VERMEULE, *supra* note 1, at 258–59.

245. *See supra* note 226 and accompanying text.

246. VERMEULE, *supra* note 1, at 259. Vermeule draws on Larry Kramer's suggestion that the framers envisioned the Constitution being enforced "as a result of republican institutions and the citizenry's own commitment to its founding document." *Id.* at 235; *see* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 26 (2001).

envisions that political pressures will play a role in constitutional enforcement. There are, however, vital institutional reasons to question whether such a system of enforcement can properly give meaning to constitutional guarantees.

Under Vermeule's proposal, a person or group desiring enforcement of a less-than-perfectly-clear constitutional provision, such as the Free Speech Clause, could not seek judicial review. The only available enforcement mechanism would be political agitation, which could take place either in the electoral or legislative arena. Both of these, however, lack institutional features that are 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 considerable multiple.[247] Inasmuch as Vermeule's theory is driven largely by cost considerations, this point seems highly significant.

Beyond these practical points, however, there are crucial theoretical and institutional differences between the electoral process and the judicial process. 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 some 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 only one of dozens of issues that come into play in any election, and the other issues could easily drown out the importance of the constitutional claim. Elections are not referendums; they do not provide a focused mechanism through which voters can express their preferences on constitutional issues.[248]

247. Even a single congressional race costs millions of dollars these days, far exceeding the likely cost of a suit challenging the lawfulness of government action. *See, e.g.*, Press Release, Federal Election Commission, Congressional Candidates Spend $1.16 Billion During 2003–2004 (June 9, 2005).

248. *See* Siegel, *Political Questions*, *supra* note 243, at 259; *see also* Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 99 (1985).

Moreover, even if voters managed to use an election to defeat politicians who supported allegedly unconstitutional legislation, the result would still fail to provide effective 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.[249] These statements of reasons can truly establish constitutional principles, because they expressly articulate legal norms that show why one party wins and the other loses. Elections do not articulate norms.

Moreover, the electoral system *does not operate within a system of precedent*. Because, as just noted, 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. Moreover, even if voters somehow understood an election result to have turned on a constitutional issue, no rule in the electoral system requires the voters to vote the same way at the next election. The judicial process, by contrast, operates within a system of precedent that tends to ensure that constitutional norms remain established.

Finally, the electoral process is *majoritarian*. Politicians who take action that might violate constitutional guarantees presumably do so because they believe they will gain political advantage.[250] 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. In contrast, the judicial process can check majoritarian tendencies because of the political insulation of judges.

Thus, there are several institutional reasons why the electoral process seems a poor vehicle for enforcement of constitutional guarantees. Vermeule also suggests the possibility of enforcement of constitutional guarantees through the political

249. *Cf.* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1292 (1975) (noting the importance of the statement of reasons).

250. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 25 (1962).

process more generally, rather than simply at the ballot box.[251] Even legislators who do not fear electoral defeat over a particular constitutional issue might desire to placate a group that feels strongly about it. Therefore, the legislative process might provide a vehicle for enforcement of constitutional guarantees even if the electoral process itself does not.

Despite this possibility, 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 than the electoral process. A particular constitutional issue could be decided on an up-or-down legislative vote. But this does not always happen; constitutionally doubtful provisions might appear in the same bill as other, vital 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.

In addition, 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 have a stronger tendency to respect precedent than the judicial process because the legislature 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.[252] Still, the judicial process operates within an ethic whereby precedent ought 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, for no other reason than that its membership has changed. Like the electoral process, therefore, the legislative process seems a poor structure for the establishment and enforcement of constitutional guarantees. Without a system of precedent, constitutional

251. VERMEULE, *supra* note 1, at 251–52.
252. *Id.* at 274.

guarantees can never really be established. Even if a potentially unconstitutional bill were legislatively defeated on constitutional grounds, the defeat would not establish a constitutional norm. Proponents of the bill could just keep reintroducing it until it passed.

Finally, and most importantly, unlike elections and judicial process, the legislative process is not available to citizens as a matter 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. In contrast, elections are mandatory: they occur at constitutionally specified intervals. Similarly, the judicial process provides a mandatory mechanism for resolution of claims of constitutional right.[253] Courts must respond to constitutional claims, perhaps rejecting them on their merits, of course, but not ignoring them altogether.

Therefore, 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 it is the whole range of the judiciary's institutional features that 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.[254]

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 likely benefits of the process are demonstrated, Vermeule's argument fails. One can no longer accept his argument that inasmuch as the expected net benefits are zero, we might as well eliminate judicial review and save its costs.

253. 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." 19 U.S. (6 Wheat.) 264, 404 (1821).

254. *See* Siegel, *Political Questions*, *supra* note 243.

CONCLUSION

Professor Vermeule's book offers a useful challenge to conventional thinking about the judicial role in interpreting statutes and the Constitution. Formal, theoretical arguments have dominated the debate, with many scholars focusing on questions such as whether the Constitution requires courts to follow certain rules of interpretation, and 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 were to focus on how the institutional failings of courts 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 demonstrating 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 that 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 detecting cases in which departure from statutory text is appropriate. The courts' separation from the primary role in formulating and implementing policy also puts them in a good position to counteract 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. These institutional features of courts suggest that there are likely benefits to allowing courts to use interpretive methods that go beyond Vermeule's ultrastrict textualism. These benefits defeat his suggestion that courts should abandon all such methods on the grounds that they have zero benefits, but positive costs.