"WHICH IS TO BE MASTER," THE JUDICIARY OR THE LEGISLATURE? WHEN STATUTORY DIRECTIVES VIOLATE SEPARATION OF POWERS

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Statutory interpretation is at the cutting edge of legal scholarship and, now, legislative activity. As legislatures have increasingly begun to perceive judges as activist meddlers, some legislatures have found a creative solution to the perceived control problem: statutory directives. Statutory directives, simply put, tell judges how to interpret statutes. Rather than wait for an interpretation with which they disagree, legislatures use statutory directives to control judicial interpretation.

Legislatures are constitutionally empowered to draft statutes. In doing so, legislatures expect to control the meaning of the words they choose. Moreover, they prefer to do so early in the process, not after a judge has interpreted the statute in a way they did not expect or intend. Judges are constitutionally empowered to interpret statutes without legislative micromanagement. The question, then, is how to balance these valid, but competing, constitutional roles. This Article explores when statutory directives disrupt this balance and violate separation of powers. The Article concludes that when the legislature tries to control the process of interpretation, as opposed to trying to influence the outcome of interpretation to promote specific policy objectives, the legislature aggrandizes itself, oversteps constitutional boundaries, impermissibly intrudes into the judicial sphere, and becomes master of the interpretive process.

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INTRODUCTION

In *Through the Looking Glass*, Humpty Dumpty and Alice contemplated the power of speech:

> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
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> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."[1]

1. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS 190 (Oxford University Press 1982) (1871).

With his parting response, Humpty suggested that the one who speaks has more power than the one who listens. Words, in his view, can mean whatever the speaker wants them to mean, "neither more nor less."

Humpty's view has powerful implications for our system of government in which the legislature "speaks," or writes, laws that the judiciary later "hears," or interprets. Legislatures are constitutionally empowered to draft statutes. Hence, they expect to control the meaning of these statutes. Moreover, they would prefer to do so early in the process, not after a judge has interpreted the statute in a way they did not expect or intend. Judges are constitutionally empowered to interpret statutes and would prefer to do so without legislative micromanagement. The question, then, is how to balance these valid but competing constitutional roles. Placed in this context, Humpty's response—"which is to be master"—implies a binary choice, either of which would be undesirable. The legislature and judiciary share responsibility for the interpretive process, acting as partners in an ongoing dialogue. But Humpty's response reminds us of the potential risk that should one branch overstep its role, that branch could well become master of the other. In this ongoing dialogue between courts and legislatures, there are constitutional limits to the ways in which one branch may attempt to control the role of the other.[2] This Article explores those limits.

Statutory interpretation is at the cutting edge of legislative activity. As legislatures have increasingly begun to perceive judges as activist meddlers, some legislatures have found a creative solution: statutory directives. Statutory directives, simply put, instruct judges how to interpret statutes.[3] Rather than wait for an interpretation with which they disagree, legislatures use statutory directives to influence judges prior to judicial interpretation. For example, imagine that the U.S. Congress enacted the following three statutory directives:

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2. Interpretation is a cooperative venture, and either side can be guilty of abusive practices. For example, absent underlying constitutional considerations, judicial decrees that the U.S. Congress must be explicit if it wishes to achieve certain results, such as the one in, *Crawford Fitting Co. v. J.T. Gibbons Inc.*, 482 U.S. 437, 445 (1987), are just as problematic as would be some congressional instructions to judges, such as one that legislative history is to be given preference over statutory text. *Crawford Fitting*'s requirement of an explicit statement, ungrounded in statutory text, presaged years of continuing battle between the courts and Congress over the question of when exactly successful litigants were entitled to recoup elements of their expense. *See* W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 112 n.11 (1991) (Stevens, J., dissenting). The judiciary might well overstep its role by deciding what the law shall be despite Congress's statute. See generally Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149 (2001), in which the author has put the judicial-legislative back-and-forth in a historical perspective and suggests persuasive reasons for resisting either side's effort to rigidify the process.

3. *See* discussion *infra* Part II.

> 1. For all Acts of Congress, the word "marriage" means only a legal union between one man and one woman as husband and wife.[4]
> 2. All Acts of Congress shall be broadly construed with a view to promote the Act's purposes and carry out the intent of the legislature; the rule that statutes in derogation of the common law are to be strictly construed shall not apply. Moreover, the rule of the common law that penal statutes are to be strictly construed has no application. All statutes are to be construed according to the fair import of their terms, with a view to further their purposes and to promote justice.
> 3. The meaning of a statute shall be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining the text and such other relationships, the meaning of the text is plain and unambiguous and does not yield absurd results, the judiciary shall not consider extratextual evidence.

Would the U.S. Supreme Court find these statutory directives constitutional under the separation of powers doctrine? The three directives are very different. The first directive merely defines *terms*. The second directive tries to control the interpretive *outcome*. The third directive tries to control the interpretive *process*. Is there a difference in the constitutionality of these statutory directives under separation of powers analysis?

This Article explores that question and concludes that there is a difference. Some directives are legitimate instances of legislative involvement in the interpretive dialogue, while others are unconstitutional attempts to usurp judicial power. The legislature may legitimately try to influence the interpretive outcome to promote specific policy choices. However, when attempting to control the interpretive process without regard for policy choices, the legislature aggrandizes itself and violates separation of powers.

In analyzing this issue, this Article explores the intersection of two important legal doctrines: separation of powers and statutory interpretation. The separation of powers doctrine lacks judicial clarity and resolution, as the Court has yet to "develop a sophisticated theory of the underlying philosophy of our structure of government."[5] In fact, "the Supreme Court has failed for over two hundred years . . . to develop a *law* of separation of powers."[6] Statutory

4. This directive actually exists in slightly different form at 1 U.S.C. § 7 (2006).

5. E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 509 (1989).

6. *Id.* at 507.

interpretation similarly lacks clarity and resolution. Indeed, Justice Scalia once sarcastically commented, "I thought we had adopted a regular method for interpreting the meaning of a . . . statute . . . ."[7]—highlighting the Supreme Court's history of grappling to find the appropriate approach to statutory interpretation, without ever settling on one.[8] Because the justices cannot agree, there is an interpretive vacuum, and Congress has an incentive to make the decision itself.

Despite this vacuum, Congress should not step in. In this Article, I show why some statutory directives violate separation of powers, while others do not. In Part I, I use examples from two states to illustrate the problem.[9] Yet this issue is not confined to the states; Congress is similarly crafting such directives.[10] In Part II, I divide statutory directives into three categories, illustrated by the hypothetical directives above: definitional, interpretive, and theoretical.[11] Understanding the distinctions between these categories is essential in determining which types of directives violate separation of powers.

Next, in Part III, I describe the historical development of the separation of powers doctrine and the two dominant approaches: formalism and functionalism.[12] While, I do not attempt to evaluate these approaches, I do suggest that fears of tyranny and legislative aggrandizement underlie these divergent approaches and can provide useful principles for guiding the analysis. Finally, after describing the principles of separation of powers, I analyze in Part IV whether the various types of statutory directives violate either of these approaches.[13] I conclude that definitional directives are legitimate exercises of congressional involvement in the interpretive process, while theoretical directives are likely unconstitutional attempts to usurp judicial power and

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7. Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) ("I thought we had adopted a regular method for interpreting the meaning of a . . . statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies.").

8. *See* Aharon Barak, *The Supreme Court, 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 65–66 (2002) (stating the author's view that a purposivist approach is best).

9. *See infra* notes 14–53 and accompanying text.

10. *See, e.g.*, Pub. L. 102-166, § 105(b), 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981 (2000)) (stating that "[n]o statements other than [a specific interpretive memorandum] shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act . . . ."); Organized Crime Control Act, Pub. L. No. 91-452 § 904(a), 84 Stat. 942, 947 (1970) (codified at 18 U.S.C. § 1961 (2000)) (directing judges not to apply the rule of lenity to the Act's provisions).

11. *See infra* notes 54–97 and accompanying text.

12. *See infra* notes 102–295 and accompanying text.

13. *See infra* notes 296–386 and accompanying text.

control the interpretive process. Interpretive directives present the most challenging analysis: In sum, interpretive directives are likely unconstitutional when enacted to apply generally to many statutes, but not when enacted to apply specifically to just one. It may be an odd, formalistic distinction, but it is one that I believe helps to identify the point at which Congress shifts from partner to master in the interpretive dialogue.

I. THE PROBLEM

Two state cases from Connecticut and Delaware illustrate the increasingly active role legislatures are taking in response to judicial decisionmaking. First, in 2003, the Connecticut Supreme Court decided *State v. Courchesne*.[14] The facts of the case are simple. Late one December evening, Robert Courchesne stabbed Demetris Rodgers to death over his $410 drug debt.[15] Courchesne lured Rodgers to a bank under the guise of getting cash to pay her.[16] Instead, he stabbed her and left her bloody body in the street.[17] At the time of her death, Rodgers was pregnant.[18] Although she died before arriving at the hospital, the physicians performed an emergency cesarean section and delivered her baby, who lived for forty-two days before dying from deprivation of oxygen to the brain.[19]

Courchesne was convicted of "murder[ing] two or more persons at the same time or in the course of a single transaction."[20] A state statute permitted the imposition of the death penalty when "the defendant committed *the offense* in an especially heinous, cruel or depraved manner . . . ."[21] The narrow issue for the court was whether the statute required the state to prove that the defendant killed in an especially cruel manner both victims, the mother and the baby, or just one victim, the mother.[22] In other words, the issue was whether "the offense" meant the killing of just the mother or of both the mother and her baby. The majority held that the offense referred to the killing

14. 816 A.2d 562 (Conn. 2003).

15. *Id.* at 567. *See also* Courant.com, Connecticut's Death Row Inmates, http://www.courant.com/news/hc-deathrow-pg,0,3123710.photogallery?index=hc-courchense-deathrow (last visited Feb. 16, 2009).

16. Drug-Rehabs.org, Connecticut Man Sentenced to Death for Killing Pregnant Woman, http://www.drug-rehabs.org/con.php?cid=1194&state=Connecticut (last visited Feb. 16, 2009).

17. *Id.*

18. *Courchesne*, 816 A.2d at 567.

19. *Id.* at 568.

20. *Id.* at 568 (quoting CONN. GEN. STAT. ANN. § 53a-54b (West 2003)).

21. *Id.* at 569 (quoting CONN. GEN. STAT. ANN. § 53a-46a(i)(4) (West 2003)).

22. *See id.*

of one victim, not both; thus, Courchesne was eligible for the death penalty even though only one death was determined to be especially cruel.[23]

Given the heinous nature of the crime, the holding might not seem particularly surprising. Yet in reaching this holding, the majority acknowledged that the plain meaning of the statute supported the defendant's argument that he was not subject to the death penalty.[24] Nonetheless, the majority concluded that the context and history of the statute suggested that the state legislature had not intended the statute to apply as the plain meaning would suggest.[25] The majority reasoned that the statute's purpose was to deter crime, which would be best furthered by interpreting the statute to apply to Courchesne's circumstances. Hence, the majority rejected the plain meaning of the statute and interpreted the statute in light of its purpose.[26] The majority then went one step further and used the case as an opportunity to explicitly reject the plain meaning rule for all statutory interpretation cases in the state.[27] In its place, the majority formally adopted purposivism, an approach that focuses on the purpose of the statute.[28]

A spirited dissent disagreed not only with the result, but with the majority's adoption of purposivism.[29] The dissent criticized the majority for substituting its view of what the law should be for unambiguous statutory text.[30] The dissent persuasively argued that because the language of the statute was ambiguous, the rule of lenity required the court to adopt the least penal interpretation: that the state must prove that both murders were committed in an especially cruel manner.[31] More relevantly for our purposes, the dissent described the majority's opinion as "nothing short of breathtaking."[32] "[T]he majority's abandonment of the plain meaning rule in favor of an alternative and novel method of statutory interpretation represents an incorrect deviation from our traditional mode of statutory interpretation and *an impermissible usurpation of the legislative function*."[33]

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23. *Id.* at 569–70.
24. *Id.* at 569.
25. *Id.* at 569–70.
26. *See id.* at 576.
27. *See id.* at 578.
28. *Id.*
29. *Id.* at 597–98 (Zarella, J., dissenting).
30. *See id.* at 613.
31. *Id.* at 604–06. The majority never responded to the dissent's rule of lenity argument. *Id.*
32. *Id.* at 597.
33. *Id.* (emphasis added). The plain meaning rule and textualism are used relatively interchangeably in judicial opinions because textualism relies so heavily on the plain meaning canon of interpretation. LINDA D. JELLUM & DAVID CHARLES HRICIK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 95, n.* (2006).

Apparently, the Connecticut legislature agreed. In direct response to the holding in *Courchesne*, just three months later the state legislature rejected the court's adoption of purposivism and enacted a statute directing the Connecticut courts to use a plain meaning approach to interpretation. The statute provided:

> The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.[34]

Without first considering whether it could constitutionally have a role in determining how judges should interpret statutes, the legislature simply took control.

What is surprising about this case is not the holding, not the reasoning, not the adoption of purposivism, and not even the prompt legislative response. Rather, it is the reaction—or lack of one—of the Connecticut courts to the legislature's power-grabbing reply to *Courchesne*. The Supreme Court of Connecticut has not questioned the legislature's ability to enact a law that potentially usurps the judiciary's interpretive function.

In contrast, the Delaware judiciary did not submit so meekly to the power play of its legislature. The relevant case proceeded as follows. In an initial opinion, *Evans v. State*,[35] the Delaware Supreme Court agreed with a defendant who argued that his life sentence for first degree rape was illegal because it did not provide a conditional release date.[36] Accordingly, the court found that the defendant's life sentence ended after a term of forty-five years, rather than at the end of his natural life.[37]

After rendering that decision, however, the court decided to reconsider the holding.[38] Because of the pending reconsideration, the first opinion never became final.[39] Nevertheless, the Delaware General Assembly took issue with

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34. CONN. GEN. STAT. ANN. § 1-2z (West 2003). Justice Borden, the author of the concurring opinion in *Courchesne*, points out:

> It is ironic that the legislative debate surrounding [this statute] specifically indicated that its purpose was to overrule that part of *Courchesne*. If we were to read [this statute] literally, and assume that it is not ambiguous in any way, we would be barred by it from consulting that very legislative history in order to determine that its purpose was to overrule *Courchesne*.

Carmel Hollow Assocs. Ltd. P'ship v. Bethlehem, 848 A.2d 451, 470 n.1 (Conn. 2004) (Borden, J., concurring).

35. No. 67, 2004, 2004 Del. LEXIS 545 (Nov. 23, 2004), *withdrawn*, 872 A.2d 539 (Del. 2005).

36. *Id.* at *6.

37. *See id.* at *5.

38. *Evans*, 872 A.2d at 543.

39. *Id.* at 541–42.

the opinion, and, during the pendency, enacted House Bill number 31.[40] That bill declared the court's initial opinion in *Evans* "null and void" and asserted the legislature's right to determine the meaning of its laws.[41]

More importantly for this Article, the bill included language telling Delaware's judiciary (1) to "strictly interpret or construe legislative intent," (2) to "use the utmost restraint when interpreting or construing the laws of [Delaware]," and (3) to not "interpret or construe statutes . . . when the text [is] clear and unambiguous."[42] The Delaware statute differed from the Connecticut statute, which created a rule applicable to all cases. The Delaware statute, in part, purported to tell the Delaware courts how to decide a particular case. Federal statutes that provide a rule of decision violate federal separation of powers.[43] Legislatures cannot review judicial decisions or decide particular cases. But the Delaware statute also created a rule for future cases: The Delaware courts were ordered to strictly construe legislative intent and the laws of Delaware. It is this latter portion of the statute that is relevant here.

Unlike Connecticut's judiciary, the Delaware Supreme Court promptly rejected the legislature's attempt to "assert[ ] its right and prerogative to be the ultimate arbiter of the intent, meaning, and construction of its laws"[44] and declared the bill unconstitutional.[45] In reaching the holding that the directive violated separation of powers, the court extensively reviewed the federal separation of powers doctrine and found the Delaware doctrine to be identical.[46] According to the court, the statute "attempt[ed] to confer upon the General Assembly fundamental judicial powers"[47] and therefore violated Delaware's separation of powers.

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40. *Id.*

41. *Id.* at 543 (citing H.B. 31, 143rd. Gen. Assem., Reg. Sess. (Del. 2005)). The full statute provided:

> § 5403. Construction and interpretation of laws.
>
> (a) Delaware judicial officers may not create or amend statutes, nor second-guess the soundness of public policy or wisdom of the General Assembly in passing statutes, nor may they interpret or construe statutes and other Delaware law when the text is clear and unambiguous.
>
> (b) Notwithstanding 11 Del. C. § 203, Delaware judicial officers shall strictly interpret or construe legislative intent.
>
> (c) Delaware judicial officers shall use the utmost restraint when interpreting or construing the laws of this State.

H.B. 31. (held unconstitutional by *Evans*, 872 A.2d at 549).

42. *Id.*

43. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 146–47 (1871).

44. H.B. 31.

45. *Evans*, 872 A.2d at 550.

46. *Id.* at 545–50.

47. *Id.* at 550.

The Connecticut and Delaware legislatures are not the only state legislatures to attempt to rein in their judiciaries with statutory directives. Many other states have enacted similar directives.[48] Despite the possible separation of powers conflict,[49] I am not aware of any state's judiciary other than Delaware's that has squarely examined its legislature's ability to take this power.

Congress has also begun its foray into this arena. While Congress has not enacted a general theoretical directive like Connecticut's, Congress has enacted specific theoretical and interpretive directives.[50] And with the

48. For a relatively complete listing, see *infra* note 83.

49. Federalism principles prevent the federal government from imposing federal separation of powers notions on states, which can choose to structure themselves however they like. *See, e.g.*, Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."); Dreyer v. Illinois, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state."); *cf.* Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957) (stating in dictum that "the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments"). The U.S. Constitution does, however, presuppose that each state will have judicial, executive, and legislative branches. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 134 (3d ed. 2000).

50. For example, the "work made for hire" definition in the U.S. Copyright Act is followed by a theoretical directive:

> In determining whether any work is eligible to be considered a work made for hire under paragraph (2), neither [a later enacted] amendment . . . nor the deletion of the words added by that amendment—
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> (A) shall be considered or otherwise given any legal significance, or
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> (B) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination,
>
> by the courts or the Copyright Office. Paragraph (2) shall be interpreted as if [later amendments] . . . were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.

17 U.S.C. § 101 (2006).

According to Professor David Post, this provision was added after Congress amended the definition in 1999 to include sound recordings then immediately deleted the amendment in 2000 in response to industry concern. According to Professor Post, this provision says to courts, "When interpreting the work made for hire provisions, you must not take into account certain facts about the world, namely the fact that in 1999 we amended the statute, and that in 2000 we deleted the amendment." Posting of David Post to Volokh Conspiracy, http://volokh.com/posts/1223579568.shtml#456941 (Oct. 9, 2008, 15:12 PST). As Professor Post suggests, this provision encroaches "on a core judicial function—the function of statutory interpretation; not just telling courts what Congress thinks a statute means (which Congress does all the time, via statutory definitions and the like), but telling courts what tools of statutory construction they may or may not use when interpreting the statute." *Id.*; *see also* Organized Crime Control Act Pub. L. No. 91-452 § 904(a), 84 Stat. 942, 947 (1970) (codified at 18 U.S.C. § 1961 (2000)) (directing judges to liberally construe its provisions); Pub. L. 102-166, § 105(b), 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981 (2000)) ("No statements other than the interpretive memorandum appearing at [137 CONG. REC. S28680 (daily ed. Oct. 25, 1991) (statement of Sen. Danforth),] shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to *Wards Cove*—Business necessity/cumulation/alternative business practice.").

increasing tension between the judiciary and Congress over activism, it is likely that Congress will increase its use of directives in the future. "Congress has both the power to regulate statutory interpretation and the incentives to do so . . . ."[51] Indeed, some legal scholars, like Nicholas Rosenkranz and Stephen Ross, have urged Congress to do so.[52] But they are misguided; this issue is one for the judiciary to resolve, not the legislature.[53]

II. STATUTORY DIRECTIVES DEFINED

Statutory directives are statutes that tell the judiciary how to interpret a statute or statutes. There are many different types of directives. For this Article, I categorize statutory directives in three ways. First, directives can be characterized as definitional, interpretive, or theoretical depending on whether the legislative goal in enacting the directive is to define a term (definitional), to affect the outcome of interpretation (interpretive), or to influence the interpretive process itself (theoretical). Second, statutory directives are either specific, applying to just one statute, or general, applying to more than one statute. Finally, statutory directives are either mandatory, meaning judges must follow the directive, or presumptive, meaning judges may follow the directive. These distinctions are explained more fully below because, in this context, categorization matters.

A. Definitional Directives

Definitional directives are the most familiar and common type of directives. These directives are statutes that define terms for either one or many statutes. For example, the Defense of Marriage Act (DOMA) provides: "In determining the meaning of any Act of Congress . . . the word 'marriage' means only a legal union between one man and one woman as husband and

51. Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 768 (1992).

52. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 (2002); *contra* Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97, 98 (2003) (rejecting Professor Rosenkranz's proposal and arguing that neither the courts nor Congress can limit the interpretation of statutes through rules of interpretation without violating entrenchment principles—the notion that an earlier legislature cannot bind a later legislature). Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 566–72 (1992) (suggesting that Congress adopt interpretive rules by statute).

53. *See* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2108–12 (2002); Eric A. Posner & Cass R. Sunstein, Response, *On Learning From Others*, 59 STAN. L. REV. 1309, 1310–12 (2007).

wife . . . ."[54] DOMA is a general definitional directive because its definition of the word "marriage" applies to most federal statutes. Legislatures more commonly define a word for a particular statute. Illustratively, in the Racketeer Influenced and Corrupt Organizations Act (RICO),[55] Congress defined "enterprise" as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[56] Regardless of whether a directive defines a term generally for all statutes, such as DOMA, or specifically for just one statute, such as RICO, it is a definitional directive.

B. Interpretive Directives

Interpretive directives are more diverse. These directives tell judges how to interpret either all statutes or a particular statute.[57] There are many different types of interpretive directives. For example, some interpretive directives tell judges to construe statutes broadly or narrowly.[58] Other interpretive directives tell judges to ignore the rule of lenity.[59] And still other interpretive directives urge courts to prefer the ordinary to the technical meaning of words in a statute.[60] The Delaware statute identified earlier in Part II[61] was an interpretive directive.

C. Theoretical Directives

Theoretical directives tell judges what process to use to interpret statutes. A number of approaches to, or "theories of," interpretation have

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54. 1 U.S.C. § 7 (2006).
55. 18 U.S.C § 1961(4) (2006).
56. *Id.*
57. Like definitional directives, interpretive directives also may be either specific or general.
58. *E.g.*, KY. REV. STAT. ANN. § 446.080(1) (West 2008) ("All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to the statutes of this state.").
59. *E.g.*, CAL. PENAL CODE § 4 (West 1999) ("The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.").
60. *E.g.*, KY. REV. STAT. ANN. § 446.080(4) (West 2008) ("All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning.").
61. *See supra* note 41. The statute enacted by the Delaware legislature directed its judiciary to "strictly interpret or construe legislative intent," (2) to "use the utmost restraint when interpreting or construing the laws of [Delaware]," and (3) to not "interpret or construe statutes . . . when the text [is] clear and unambiguous." H.B. 31, 143rd. Gen. Assem., Reg. Sess. (Del. 2005).

been adopted by judges. There are three dominant theories: textualism (or plain meaning), purposivism, and intentionalism.[62] To oversimplify, textualists focus on the words of the text, believing that judges will best further the legislative agenda by giving words their ordinary meaning.[63] Purposivists focus on the broad, at times unexpressed, purpose of the bill, believing that judges will further the legislative agenda best by furthering a particular bill's purpose.[64] Intentionalists focus on the legislative process and legislative history, believing that judges will best further the legislative agenda by comparing various versions of the bill and the legislators' statements accompanying those versions.[65]

A significant distinction between the supporters of each theory is their willingness to consider and give weight to sources other than statutory text. There are three sources of meaning: (1) intrinsic (or textual), (2) extrinsic, and (3) policy-based.[66] Intrinsic sources include materials that are part of the official text being interpreted, the most important being the words of the statute itself.[67] Other intrinsic sources include grammar and punctuation; components such as purpose and findings clauses, titles, and definition sections; other statutes in existence when the statute at issue was enacted; statutes subsequently enacted; and the linguistic canons of statutory interpretation.[68]

Extrinsic sources, while not part of the text of the specific statute, are related to the enactment process, either specifically or generally.[69] Extrinsic sources include such things as the legislative history of the statute being interpreted,[70] subsequent legislative acquiescence,[71] borrowed statutes,[72] and interpretations by agencies.[73]

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62. JELLUM & HRICIK, *supra* note 33, at 7.

63. *Id.*

64. *Id.*

65. *Id.*

66. While it would be nice if these categories were consistently defined in judicial opinions and academic circles, they are not. What one judge calls a policy-based source, another judge might identify as an extrinsic source. *Id.* at 5. Knowing which category a source falls within is less important than understanding that there is a breadth of evidentiary sources available to judges and that some judges are more willing to look beyond intrinsic sources for meaning. *Id.* at 5–6. *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law As Equilibrium*, 108 HARV. L REV. 26, 97, 101 (1994).

67. John M. Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333, 338 (1976) (stating that the first steps in the interpretation process, as taught by Felix Frankfurter, are always "(1) read the statute, (2) Read the Statute, (3) READ THE STATUTE!" (citing HENRY J. FRIENDLY, BENCHMARKS 202 (1967))).

68. JELLUM & HRICIK, *supra* note 33, at 5.

69. *Id.* at 6. While the use of intrinsic sources is generally uncontroversial, the use of some forms of extrinsic sources, particularly legislative history, is condemned by some. *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527–28 (1989) (Scalia, J., concurring) (stating that his reason for concurring was to make clear that legislative history was not relevant to interpretation).

70. The legislative history is the written record of a bill's enactment process.

Last are policy-based sources. These sources are separate from the statutory text and the legislative process. They reflect important social and legal choices derived from federal and state constitutions and common law.[74] Examples of policy-based sources include the constitutional avoidance doctrine,[75] the rule of lenity,[76] clear statement rules,[77] and the reciprocal rules that statutes in derogation of the common law should be strictly construed while remedial statutes should be broadly construed.[78] When policy-based sources are codified, they become interpretive directives because they tell courts how to construe one or more statutes.

Which of these sources a judge will consider depends, in large part, on that judge's theory of statutory interpretation.[79] Judges who focus on text generally believe that the statute's words are central; thus, they focus primar-

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71. "Legislative acquiescence" refers to the canon that subsequent legislative silence shows acquiescence by the legislative branch to an interpretation previously given to a statute by the judiciary. JELLUM & HRICIK, *supra* note 33, at 225.

72. "Borrowed statutes" refers to the canon that when a state adopts a statute from another jurisdiction, the borrowing state's courts "will look to settled judicial construction in the other jurisdiction *as of the time the statute was adopted*." *Id.* at 345.

73. In *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Court held that deference is due to an agency's interpretation of a statute. *Id.* at 838. The exact parameters of this deference are still being explored. *Compare* Christensen v. Harris County, 529 U.S. 576, 587 (2000) (suggesting that less deference is due when an agency acts using less formal procedures), *with* Barnhart v. Walton, 535 U.S. 212, 221–22 (2002) (stating in dicta that *Chevron* deference may be appropriate even when an agency uses less formal procedures).

74. JELLUM & HRICIK, *supra* note 33, at 6.

75. The constitutional avoidance doctrine directs that when there are two reasonable interpretations of statutory language, one of which raises constitutional issues and one of which does not, the statute should be interpreted in a way that does not raise the constitutional issue. *See* Almedarez-Torres v. United States, 523 U.S. 224, 250 (1998) (Scalia, J., dissenting) (quoting United States v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

76. Pursuant to the rule of lenity, judges should strictly interpret statutes that punish citizens by imposing a fine or imprisonment. *See, e.g.*, McNally v. United States, 483 U.S. 350, 359–60 (1987) (reversing the defendants' mail fraud convictions based on the rule of lenity).

77. A statute is in derogation of common law when it partially repeals or abolishes existing common law rights or otherwise limits the scope, utility, or force of that law. BLACK'S LAW DICTIONARY 476 (8th ed. 2004); Shaw v. Merchants' Nat'l Bank, 101 U.S. (11 Otto) 557, 565 (1879) ("No statute is to be construed as altering the common law, farther than its words import."). In contrast, a statute passed to repair the common law is not *in derogation* of the common law, but rather is *in aid* of the common law. Hence, these "remedial" statutes, as they came to be known, are to be liberally, not narrowly, construed to achieve the statutory purpose. *See* Chisom v. Roemer, 501 U.S. 380, 403 (1991).

78. A clear statement of legislative intent is generally required

> [w]here a statute can be interpreted to abridge long-held individual or states' rights or when it appears that a legislature has made a large policy change . . . . The requirement of a clear, or plain, statement is based on the simple assumption that a legislature would not make major changes without being absolutely clear about doing so.

LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 244 (2008).

79. *See* JELLUM & HRICIK, *supra* note 33, at 7–8.

ily, but not necessarily exclusively, on intrinsic sources.[80] Judges who look for legislative intent focus on both intrinsic and extrinsic sources, often perusing the legislative history, to find the specific intent of the enacting body. Because purposivists generally believe that the purpose of the statute is as important as the text, judges who focus on purpose are willing to look globally at all sources to find purpose.

The point of this Article is not to argue that a particular approach best determines meaning; those arguments have already been made.[81] Rather, the purpose of this Article is to determine who should control this choice: the legislature or the judiciary.

Some legislatures try to control this choice with theoretical directives, which tell judges what sources of meaning, or "evidence,"[82] they may consider when interpreting a statute. Currently, quite a few state legislatures have enacted theoretical directives; some state legislatures have chosen to stress the text, while others have not.[83] For example, the Iowa legislature enacted a theoretical statute that provides as follows:

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80. See generally ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997), for a detailed description of this theory. Interestingly, legislators seem less convinced that textualism is the proper approach. *See* Joan Biskupic, *Scalia Takes a Narrow View in Seeking Congress' Will*, CONG. Q. WKLY. REP. 913, 918 (March 24, 1990)); Rodriguez, *supra* note 51, at 750 (citing Joan Biskupic, *Congress Keeps Eye on Justices as Court Watches Hill's Words*, CONG. Q. WKLY. REP. 2863 (Oct. 5, 1991)); *accord* Bernard W. Bell, *Metademocratic Interpretation and Separation of Powers*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 35 (1998) ("Even though Congress has never formally voted to require that legislative history, or particular aspects of legislative history, be considered in interpreting statutes, it seems reasonably clear that, over a long period of time, a large majority of Congress has rejected the absolutist position that legislative history should never be used to interpret an ambiguous statute.").

81. *See, e.g.*, Carlos E. González, *Statutory Interpretation: Looking Back. Looking Forward.*, 58 RUTGERS L. REV. 703 (2006) (exploring some of the arguments surrounding statutory interpretation); *see also* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 890–913 (2003) (cataloging the influential work on interpretation).

82. By using the term evidence, I do not mean it in the traditional legal sense. Rather, I mean it to refer to the sources of evidence a court will consider in construing statutory language. *See* discussion *infra* Part IV.B.

83. In addition to Connecticut and Iowa, other states that have statutory directives include Colorado, COLO. REV. STAT. § 2-4-203 (West 2008); Georgia, GA. CODE ANN. § 1-3-1(a) (West 2008) ("In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy."); Hawaii, HAW. REV. STAT. ANN. § 1-15 (LexisNexis 2006); New York, N.Y. STAT. LAW § 92 cmt. a (McKinney 2008) ("The primary consideration of the courts in the construction of statutes is to ascertain and give effect to the intention of the Legislature."); North Dakota, N.D. CENT. CODE § 1-02-39 (2008); Ohio, OHIO REV. CODE ANN. § 1.49 (West 2008); Pennsylvania, 2003 PA. CONS. STAT. ANN. § 1939 (West 2008) ("The comments or report of the commission, committee, association or other entity which drafted a statute may be consulted in the construction or application of the original provisions of the statute . . . but the text of the statute shall control in the event of conflict between its text and such comments or report."); and Texas, TEX. GOV'T CODE ANN. § 311.023 (Vernon 2005) (providing that, in construing even an unambiguous statute, a court may consider inter alia the purpose of the statute, the circumstances under

> If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:
> (1) The object sought to be attained.
> (2) The circumstances under which the statute was enacted.
> (3) The legislative history.
> (4) The common law or former statutory provisions, including laws upon the same or similar subjects.
> (5) The consequences of a particular construction.
> (6) The administrative construction of the statute.
> (7) The preamble or statement of policy.[84]

While Congress has not yet enacted a general theoretical directive,[85] it has enacted at least one specific theoretical directive.[86] To date, the question of whether this specific directive violates separation of powers has not been addressed, although some have noted the quandary it leaves for the courts.[87] Because this directive has not been challenged, Congress may be encouraged to enact additional theoretical directives.[88]

D. Mandatory and Presumptive Directives

Statutory directives can also be distinguished on the basis of whether the directive is mandatory, presumptive, or permissive. Mandatory directives give courts little option: If a definitional directive defines "white" as "black," then white means black. Or, to take an actual case, a statute may define "building"

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which the statute was enacted, legislative history, common law or former statutory provisions, administrative interpretations, and preambles).

84. IOWA CODE ANN. § 4.6 (West 2008).

85. Specific theoretical directives are less common than general. Because the legislature is generally trying to influence the court's approach in all cases, theoretical directives are commonly general directives. *But see, e.g.*, Pub. L. 102-166, § 105(b), 105 Stat. 1071 (1991)).

86. *Id.* ("No statements other than the interpretive memorandum appearing at [137 CONG. REC. S28680 (daily ed. Oct. 25, 1991) (statement of Sen. Danforth),] shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to *Wards Cove*—Business necessity/cumulation/alternative business practice.").

87. *See, e.g.*, Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 963 (2005) ("That Interpretive Memorandum states laconically that '[t]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.* and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*.' Because the Court's pre-*Wards Cove* decisions send conflicting signals, this statement offers little guidance, leaving the scope of the defendant's burden open to question." (citations omitted) (quoting 137 CONG. REC. S28680 (daily ed. Oct. 25, 1991) (statement of Sen. Danforth))).

88. *See* Rodriguez, *supra* note 51, at 768 ("Given that Congress has both the power to regulate statutory interpretation and the incentives to do so, I regard canonical construction as an appropriate means by which courts can preserve an important role in the process of creating law against potential encroachments and disruptions by the legislature and the executive.").

to include bulldozers. For the purposes of the statute, then, a bulldozer would be a building despite the plain meaning of the word.[89]

Other directives are merely presumptive, not mandatory. For example, the Dictionary Act specifically provides that its definitions apply to all acts of Congress "unless the context indicates otherwise . . . ."[90] Presumptive directives give judges wiggle room to avoid a directive that makes no sense in a specific situation. For example, in *United States v. Ekanem*,[91] the Second Circuit held that the Dictionary Act did not control the meaning of the word "victim" in the Mandatory Victims Restitution Act of 1996,[92] because the context of the statute "indicate[d] otherwise."[93]

Sometimes, a directive appears mandatory, but courts interpret it as presumptive. Consider, for example, an interpretive directive in RICO that directs judges not to interpret that Act's provisions using the rule of lenity.[94] This directive raises constitutional concerns because the rule of lenity is grounded in the Constitution's due process requirements.[95] To avoid the constitutional question that would be presented if courts ignored due process concerns, some federal courts have interpreted the directive to apply only to the civil provisions in RICO.[96] Thus, even when a directive appears mandatory, courts may interpret it as presumptive.[97]

Intuitively, these categories of directives should seem different. Some of the directives identified above probably appear benign, even appropriate, such as definitional directives and directives that indicate a legislature's preference that statutes be broadly or narrowly construed. Other directives seem ill-considered, or even invading, such as directives that tell the judiciary

89. KY. REV. STAT. ANN. §§ 513.030(1), 513.010 (West 2007).

90. 1 U.S.C. § 1 (2006).

91. 383 F.3d 40, 41 (2d Cir. 2004) (holding that "the Government fits within the meaning of 'victim' under the [Mandatory Victims Restitution Act]").

92. Pub. L. 104-132, 110 Stat. 122.

93. 383 F.3d 40, 42–43 (2d Cir. 2004) (quoting 1 U.S.C. § 1). Context, in this case, includes an enforcement provision that provides: "In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution." *Id.* at 43 (quoting 18 U.S.C. § 3664(i) (2006)). This provision made clear that "victim" included the United States. *Id.*

94. Organized Crime Control Act, Pub. L. No. 91-452 § 904(a), 84 Stat. 942, 947 (1970) (codified at 18 U.S.C. § 1961 (2006)).

95. "The applicability of the liberal construction standard has been questioned in criminal RICO cases in view of the general canon of interpretation that ambiguities in criminal statutes are to be construed in favor of leniency." Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1128 n.3 (3d Cir. 1988) (citation omitted), *overruled in part by* Klehr v. A.O. Smith Corp., 521 U.S. 179, 187–90 (1997).

96. *Keystone Ins. Co.*, 863 F.2d at 1128 ("At a minimum the liberal construction language requires that we resist the temptation to restrict civil RICO.").

97. *Cf.* Rodriguez, *supra* note 51, at 749.

what sources of meaning to consider. And still others seem unconstitutional, such as directives that tell a court to ignore the rule of lenity in a criminal case. Is there a difference under separation of powers analysis? This Article concludes that there is a difference. Some directives represent legitimate legislative involvement in the interpretation dialogue, while others are unconstitutional attempts to usurp judicial power. The next two sections of this Article explain the Court's jurisprudence in this area.

III. SEPARATION OF POWERS

Simply stated, separation of powers refers to the allocation of power and function among the branches of the government.[98] It concerns "the distribution of powers *among* the three coequal Branches; it does not speak to the manner in which authority is parceled out within a single Branch."[99] Separation of powers analysis examines the roles the legislature, the judiciary, and the executive should respectively have in creating, interpreting, and implementing law.[100] Ultimately, this analysis involves categorizing governmental power, allocating authority for that power to one of three institutions, and identifying which personnel should exercise that power in a way that best protects individual liberties and prevents tyranny.[101]

Legal scholars have divided the Supreme Court's separation of powers doctrine into two approaches.[102] The formalist approach emphasizes the need to maintain three distinct branches of government based on function.[103] The

98. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1132 (2000).

99. Touby v. United States, 500 U.S. 160, 167–68 (1991) (holding that Congress could delegate to the Attorney General rather than another member of the executive branch, the power to identify illegal substances (citation omitted)).

100. Rodriguez, *supra* note 51, at 767.

101. *See generally* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991) (discussing the theory of separation of powers and arguing that the Framers designed it to protect individual liberties).

102. *See* Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 434–35 (1987). *See generally* Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 229–35; Peter R. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987); Timothy T. Hui, Note, *A "Tier-ful" Revelation: A Principled Approach to Separation of Powers*, 34 WM. & MARY L. REV. 1403, 1428–30 (1993) (discussing the aggrandizement problem); Matthew James Tanielian, Comment, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. 961 (1995) (explaining the various visions and the justices adhering to each approach). *But see* Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1256 (1988) (arguing "that the current debate between a formalist and functionalist approach is to a large measure misconceived").

103. *See* discussion *infra* Part III.B.1.

functionalist approach emphasizes the need to maintain pragmatic flexibility to respond to modern government.[104] These categories and the Court's jurisprudence in this area are imperfect. Indeed, various scholars have criticized the Court's separation of powers jurisprudence as "abysmal,"[105] "utterly asinine,"[106] and "appalling."[107] It is a doctrine easily invoked, but not clearly explained.[108] At its essence, separation of powers is a doctrine that has been compartmentalized into two categories, but has never been completely cabined within either.

In this Part, I describe separation of powers and these two prevailing approaches. In doing so, I describe the current doctrine as explained by the Supreme Court. I do not evaluate the consistency of the Court's jurisprudence in this area, for that is not my purpose. Rather, my purpose is to predict the Court's resolution of this issue. Despite the criticism and numerous suggestions for reform,[109] the Court's jurisprudence shows that both doctrines are alive and well today. Because I cannot anticipate which approach the Court would use to resolve the constitutionality of statutory directives, I analyze this issue using both.

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104. *See* Barak, *supra* note 8, at 120; *see also* discussion *infra* Part III.B.2. The formalist-functionalist division is not without criticism. *E.g.*, M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 604 (2001) (arguing that the formalist-functionalist distinction is of little use).

105. Elliott, *supra* note 5, at 507.

106. *Id.*

107. Aaron-Andrews P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 384 (2003).

108. Magill, *supra* note 98, at 1132–33 (describing the formalist and functionalist approaches to separation of powers).

109. *See, e.g.*, Brown, *supra* note 101, at 1515–16 (suggesting that "[t]he protection of individual rights . . . should provide . . . an animating principle for the jurisprudence of separated powers"); Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 453 (1979) (suggesting that the Supreme Court should consider "whether the other branches can effectively exercise their checks"); Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 682–84 (1997) (suggesting that separation of powers should focus on the political constituencies of the different branches of government and the sequence of their decisionmaking); Krent, *supra* note 102, at 1256–57 (arguing that the Constitution already limits each branch of the federal government); Magill, *supra* note 98, at 1146–47 (describing "abstention" and other approaches); Merrill, *supra* note 102, at 228 (suggesting that every federal office be located in one of the three branches and be subject to the limitations of that branch); Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 757–60 (1999) (describing various approaches); Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991) (promoting "pragmatic formalism" and criticizing other alternatives); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303–22 (1989) (suggesting that courts should focus on preventing conflicts of interest between the three branches).

A. Historical Development of Separation of Powers Doctrine

To understand the separation of powers doctrine of today, we must start with the past. The Framers believed that lawful power was derived from the people and must be held in check to preserve individual liberty.[110] Protection of individual liberty required both the separation of the federal and state governments, known as federalism, and the separation of the branches of the federal government, known as separation of powers.[111]

Although the Framers were concerned with separation of powers, they did not include a specific "Separation of Powers Clause" in the Constitution.[112] This omission was deliberate. Many of the colonies had such clauses in their early constitutions.[113] Most of these provisions separated the judiciary from the other two branches. But Massachusetts's provision was unique. That state had "the most famous constitutional statement of the separation of powers doctrine."[114] The Massachusetts Constitution, which was adopted in 1780 before the federal Constitution, specifically provides that none of Massachusetts's three branches of government shall *ever* exercise the power of any of the other branches.[115] The federal Constitution does not contain similar language, even though James Madison specifically proposed such language in one draft of the Bill of Rights.[116] It is not clear why his language was rejected.[117] In any event,

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110. TRIBE, *supra* note 49, at 6–7.

111. *Id.* at 7.

112. Elliott, *supra* note 5, at 508.

113. For a description of the separation of powers approaches by the various state governments, see THE FEDERALIST No. 48, at 275–78 (James Madison) (E.H. Scott ed., 1898). Virginia was the first state to include a separation of powers clause in its constitution. Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587, 588 (1990) (explaining that Virginia separated "the Legislative and Executive powers of the State . . . from the Judicative").

114. *Id.* at 588.

115. MASS. CONST., pt. 1, art. XXX ("In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.").

116. TRIBE, *supra* note 49, at 128 n.16 (citing 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1151 (1971)). James Madison's proposed language was similar to Massachusetts's provision:

> The powers delegated by this constitution are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial, nor the executive exercise the powers vested in the legislative or judicial, nor the judicial exercise the powers vested in the legislative or executive departments.

1 ANNALS OF THE CONGRESS OF THE UNITED STATES 453 (Joseph Gales ed., 1834).

117. At least one representative suggested that such an amendment would be duplicative "inasmuch as the constitution assigned the business of each branch of the Government to a separate

history shows that complete separation of powers, such as that suggested by Massachusetts's provision,[118] was specifically rejected.[119]

Had the Massachusetts-like provision been adopted, the federal government would look much different than it does. For example, "the rise of the modern administrative agency would have been impossible."[120] By allowing the creation of agencies, the Court recognized "that modern government [had to] address a formidable agenda of complex policy issues."[121] A rigid approach to separation of powers was simply unworkable in modern times. Hence, Congress could delegate its lawmaking powers (and the judiciary's judicial powers) to the executive, so long as Congress provided an "intelligible principle."[122]

The Framers' desire to strengthen individual freedom required more than just separation of powers; the concentration of power in the hands of any one branch of government likewise had to be prevented.[123] Individual liberty was endangered "where the *whole* power of one department [was] exercised by the same hands which possess[ed] the *whole* power of another department."[124] No branch should dominate the others, lest tyranny result.[125] Tyranny was not

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department." 1 ANNALS OF CONG. 789 (Joseph Gales ed., 1834); Schwartz, *supra* note 113, at 590. Another representative suggested such a clause would be subversive of the Constitution. *Id.* at 590.

118. Whether Massachusetts' separation of powers is, in reality, as complete as it is articulated is questionable. In a part of its Constitution entitled "The Frame of Government," governmental powers are intermingled. For example, the Massachusetts's legislature is authorized to appoint all civil officers, a power typically reserved to the executive branch. *See* TRIBE, *supra* note 49, at 128 n.16 (citing Brian S. Koukoutchos, *Constitutional Kinetics: The Independent Counsel Case and the Separation of Powers*, 23 WAKE FOREST L. REV. 635, 649–50, 650 n.92 (1988)).

119. As Professor Schwartz notes:

> Whatever separation of powers may be provided for, it does not compel a bright line separation between the departments, with each of them expressly prohibited from exercising any power appropriate to one of the others. That would have been the case under the Madison-proposed separation of powers amendment modeled as it was after the Massachusetts provision. Its rejection indicates a more flexible approach to the separation of powers.

Schwartz, *supra* note 113, at 590.

120. *Id.* at 592. Agencies can promulgate rules and regulations that have the force of law, can investigate and prosecute entities that violate the law, and can adjudicate cases and render decisions that have binding effect. In other words, administrative agencies have legislative, judicial, and executive powers all wrapped into one package. *Id.* at 592–93 (stating that administrative agencies have legislative and judicial functions).

121. INS v. Chadha, 462 U.S. 919, 999 (1983) (White, J., dissenting).

122. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (citing J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)). As Professor Schwartz notes, the pre-Burger Court had "relegated the requirement of a defined standard to the level of a purely formal one, devoid of most of its practical efficacy." Schwartz, *supra* note 113, at 596. Essentially, Congress could delegate, requiring only that the executive act in "the public interest." NBC v. United States, 319 U.S. 190, 225–26 (1943).

123. *See* Barak, *supra* note 8, at 120.

124. THE FEDERALIST No. 47, at 325–36 (James Madison) (E.H. Scott ed., 1898).

125. *See* TRIBE, *supra* note 49, at 7.

understood simply as the misuse or exercise of power; "[r]ather, it [was] the very fact of its accumulation that Madison equated with tyranny."[126]

To prevent tyranny, the Framers included provisions requiring at least two of the branches to cooperate to affect individual rights; for example, "[p]assage of a federal law . . . requires the concurrence of both Houses of Congress and the agreement of the Executive . . . ; enforcement of the law in turn often requires cooperation of the Judiciary and the Executive but no further action by Congress."[127] Bicameral passage, the requirement that both houses of Congress approve legislation in identical form, reduces legislative predominance.[128] The presidential veto gives the executive power over the legislature to veto acts of Congress.[129] The Senate must ratify treaties and has the power to oversee the selection of some executive and judicial officers.[130] Both of these powers check the power of the president. Judicial independence from both the executive and the legislature is preserved with lifetime tenure and pay security.[131] Nonetheless, Congress defines the jurisdiction of all inferior courts.[132] And Congress, via the impeachment power, also has the ability to address corruption and abuse of power by anyone in either the executive or judicial branches.[133] The Framers specifically included these checks and balances to limit the possibility that one branch would tyrannize the other two. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[134]

By including passages such as the appointments, salary, and tenure clauses, the Framers hoped to prevent "beholdenness,"[135] or dependency, of

126. Redish & Cisar, *supra* note 109, at 464.
127. TRIBE, *supra* note 49, at 122.
128. U.S. CONST. art. I, §§ 1, 7, cl. 2.
129. *Id.* art. I, § 7, cl. 2.
130. *Id.* art. II, § 2, cl. 2.
131. *Id.* art. III, § 1.
132. *Id.* art. III, § 1, cl. 1.
133. *Id.* art. I, § 3, cl. 6.
134. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
135. The Court recognized the Framers' concern with beholdenness in *Myers v. United States*, 272 U.S. 52 (1926). In that case, the Court examined the appointments clause and struck down a statute that required the president to obtain the advice and consent of the Senate prior to removing the postmaster general. *Id.* at 106–18, 176. According to the Court, the power to remove a federal officer necessarily accompanied the constitutionally granted power to appoint that officer. *Id.* at 122, 126–27, 164. It did not flow from the constitutionally granted power to advise on and consent to that appointment. *Id.* In reaching this holding, the Court was concerned that if executive appointees were beholden to the legislature for their livelihood they would cease to be an independent department of the government. *Id.* at 131.

any one of the branches.[136] In Madison's view, separation of powers would be compromised if one branch were beholden to another for reappointment or reelection.[137] These clauses helped to insure the separateness and independence of the branches.[138] "The discourse of inter-branch beholdenness was the Framers' chief idiom for conceptualizing the separation of powers."[139]

Legislative intrusions into the judicial sphere are particularly troubling for the purposes of our discussion because the Framers most feared legislative usurpation of judicial power.[140] The Framers had this concern because prior to the drafting of the Constitution, they lived under the British system in which legislative and judicial powers were regularly intermingled.[141] Moreover, in early America, seventeenth- and eighteenth-century colonial legislatures routinely acted as courts of last resort and enacted special bills to overturn specific judicial decisions.[142] Because of the lack of judicial independence in both the British and early colonial systems, most of the early state constitutions contained separation of powers clauses. "Although the specific provisions varied, the legal result . . . was the same: to define the sovereign power with precision and to restrain its exercise within marked boundaries."[143]

During the ratification of the federal Constitution in 1787, the primary collective concern of the states was the lack of a separation of powers clause limiting legislative intrusions into the judicial sphere.[144] In response to this concern, Federalist Paper Number 81[145] made clear that the draft was "modeled after many existing state constitutions."[146] It specifically explained that the proposed constitution would prevent Congress from interfering with a particular case: "'A legislature without exceeding its province cannot reverse

136. Bruhl, *supra* note 107, at 383.

137. *Id.* at 407 (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1781, at 34 (Max Farrand ed., 1966) (1787)).

138. *Id.*

139. *Id.* at 407 (citing Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers:* The Federalist Papers *as Political Narrative*, 74 TEX. L. REV. 447, 459–63 (1996)).

140. TRIBE, *supra* note 49, at 146.

141. Evans v. State, 872 A.2d 539, 544–45 (Del. 2005).

142. *Id.*

143. *Id.*

144. *Id.* at 546.

145. THE FEDERALIST NO. 81, at 544–45 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

146. *Evans*, 872 A.2d at 546 (citing THE FEDERALIST No. 81, at 544–45 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (identifying the constitutions of Delaware, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, South Carolina, and Virginia as models); THE FEDERALIST No. 47, at 269 (James Madison) (E.H. Scott ed., 1898)).

a determination once made, in a particular case; though it may prescribe a new rule for future cases.'"[147]

The Court's early jurisprudence understood separation of powers to be categorical, stating that each branch must "be limited to the exercise of the powers appropriate to its own department and no other."[148] This rigid view soon gave way, for it proved too extreme; the Constitution expressly anticipates some comingling of functions.[149] By the end of the twentieth century, the Court recognized this constitutionally induced power sharing and backed away from its earlier view, acknowledging that "separation of powers . . . did not make each branch . . . autonomous . . . . [Instead, it] left each . . . dependent upon the others, as it left to each . . . power to exercise functions in their nature executive, legislative and judicial."[150]

B. Two Competing Approaches: Formalism and Functionalism

Perhaps because the Constitution is less clear than it could be in this area, the Court has not agreed on any one analysis for separation of powers issues.[151] Rather, there are various ways that separation of powers may be violated, and "there is no single test to detect them all."[152] Legal scholars have divided the Court's separation of powers doctrine into two categories: the formalist approach and the functionalist approach.[153] Simply put, the formalist approach emphasizes the necessity of maintaining three distinct branches of government based on function: one to legislate, one to execute, and one to adjudicate. Overlap is permitted only when constitutionally prescribed. The functionalist approach likewise recognizes that each of the three branches has a core function and that it is most critical to maintain separateness around these core functions. Unlike the formalist approach,

147. *Evans*, 872 A.2d at 546 (quoting THE FEDERALIST No. 81, at 545 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961)).

148. Kilbourn v. Thompson, 103 U.S. 168, 191 (1880); *accord* Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 610 (1838).

149. For example, the president has limited legislative power in approving or vetoing legislation. U.S. CONST. art. I, § 7, cl. 2. The judiciary has limited legislative power in making common law. *See id.* art. III, § 2. And the legislature has limited executive and judicial power in indicting and adjudicating those accused of impeachable offences. *Id.* art. I, §§ 2–3.

150. Myers v. United States, 272 U.S. 52, 291 (1926) (Brandeis, J., dissenting); *accord* United States v. Nixon, 418 U.S. 683, 707 (1974) ("In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.").

151. *See* Bruhl, *supra* note 107, at 406 n.224.

152. *Id.*

153. *See* sources cited *supra* note 102.

however, the functionalist approach posits that overlap beyond the core functions is practically necessary and even desirable.[154] Each approach is described in more detail below.

1. Formalist Principles

The formalist approach to separation of powers focuses on the functions and the constraints found within the text of the Constitution. Formalists divide the branches of government based on the function granted to each by the vesting clauses.[155] The vesting clauses identify three categories of power and, with some explicit exceptions, assign specific powers to each branch of government.[156] Specifically, Article I grants Congress "[a]ll legislative Powers herein granted;"[157] Article II grants the president "executive Power;"[158] and Article III grants the judiciary "judicial Power."[159] "It is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others."[160] Formalism is, thus, a textually literal approach that relies primarily on the vesting clauses to define categories of power—legislative, executive, and judicial—and to identify the owner of each power.[161] Under formalism,

> the Court's role in separation of powers cases should be limited to determining whether the challenged branch action falls within the definition of that branch's constitutionally derived powers—executive, legislative, or judicial. If the answer is yes, the branch's action is constitutional; if the answer is no, the action is unconstitutional.[162]

154. The Court's separation of powers doctrine reflects a certain amount of eclecticism. For an explanation of how to reconcile the Court's formal and functional approaches, see Tanielian, *supra* note 102, at 999–1000 (arguing that when the "challenged action 'encroaches upon a power that the text of the Constitution commits in explicit terms to [another branch],'" the Court applies a formalist approach, but when "the power at issue [is] not explicitly assigned by the text of the Constitution," the Court applies functionalism (quoting Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 482, 484 (1989) (Kennedy, J., concurring))).

155. U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

156. Magill, *supra* note 104, at 608; *see* Bruhl, *supra* note 107, at 350.

157. U.S. CONST. art. I, § 1.

158. *Id.* art. II, § 1, cl. 1.

159. *Id.* art. III, § 1.

160. United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871).

161. INS v. Chadha, 462 U.S. 919, 951 (1983) ("The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.").

162. Redish & Cisar, *supra* note 109, at 454.

Formalists are concerned with undue accretion of power, no matter how small, and regardless of whether that power is being misused.[163] Accretion of power in and of itself is unacceptable because once the power is built-up, it can be difficult to determine whether too much power has been ceded; critically, at this point, it would be too late to remedy the situation.[164] Thus, formalists view separation of powers doctrine as "prophylactic in nature[,] . . . designed to avoid a situation in which one might even debate whether an undue accretion of power has taken place."[165]

Under formalism, separation of powers is violated when one branch performs the "wrong" function.[166] So, for example, if the legislature performs a function constitutionally entrusted to the judiciary or the executive, separation of powers would be violated.[167] When confronting an issue that raises separation of powers concerns, a formalist judge uses a rule-based approach: first, identifying the power being exercised and then asking whether the appropriate branch is exercising the power in the constitutionally prescribed way.[168] Thus, a formalist's first step is to categorize the relevant activity as legislative, executive, or judicial in nature. But what exactly are legislative, executive, and judicial acts?

a. Legislative Acts

Legislative power, broadly defined, is the power "to promulgate generalized standards and requirements of citizen behavior or to dispense benefits—to achieve, maintain, or avoid particular social policy results."[169] It is the power to create law and the procedural rules for enforcing those laws.[170]

Legislative acts implement this power; they "[have] the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch."[171] Congress alters legal rights by legislating: enacting, amending, and repealing laws.[172] According to the Court's precedent, when

163. *Id.* at 476.
164. *Id.*
165. *Id.*
166. Bruhl, *supra* note 107, at 350.
167. *See id.* at 404–05.
168. Magill, *supra* note 104, at 608–09.
169. Redish & Cisar, *supra* note 109, at 479.
170. *See* William D. Araiza, *The Trouble With* Robertson*: Equal Protection, The Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1079 (1999).
171. INS v. Chadha, 462 U.S. 919, 952 (1983) (holding that the legislative veto was "essentially legislative" in nature).
172. Barak, *supra* note 8, at 133–34 ("The main role of the legislature is to enact statutes.").

another branch (or only one house of Congress, for that matter) legislates, that branch impermissibly performs a legislative act because democracy demands that the legislature alter legal rights.[173]

For example, using formalism, the Court held the line-item veto unconstitutional in *Clinton v. New York*.[174] The Line-Item Veto Act granted the president the power to veto certain provisions in appropriations bills.[175] The Court held that the line-item veto violated separation of powers because the president would be performing a legislative act, that of amending or repealing legislation.[176] While the Court's reasoning in this case has been criticized,[177] the case remains good law.

Relatedly, the Court held the legislative veto unconstitutional in *INS v. Chadha*.[178] The legislative veto was, at one time, Congress's favored method of controlling the "'Imperial Presidency,' resulting from [an] over-aggrandizement of presidential power."[179] In an attempt to more closely control executive power, Congress enacted legislative veto provisions in many statutes during the 1970s. Legislative veto provisions provided a procedure whereby Congress delegated authority to the executive, but reserved for itself—either to a single chamber or to a committee from a single chamber—the power to oversee and

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173. *See id.* at 41.

174. 524 U.S. 417, 417 (1998). For a criticism of this case, see Steven G. Calabresi, *Separation of Power and the Rehnquist Court: The Centrality of* Clinton v. City of New York, 99 NW. U. L. REV. 77, 85 (2004) (arguing that the case actually raised a nondelegation issue "masquerading" as a bicameral passage and presentment issue).

175. *Clinton*, 524 U.S. at 436 (citing 2 U.S.C. § 691(a) (1994 & Supp. II 1996)). The Act also disallowed the use of funds from any vetoed provisions to offset deficit spending in other areas. *Id.* at 440–41 & n.31.

176. *Id.* at 448–49. According to the Court, only Congress can legislate: "In both legal and practical effect, the President [by way of the line item veto] has amended two Acts of Congress by repealing a portion of each." *Id.* at 438.

177. *See, e.g.*, Steven F. Huefner, *The Supreme Court's Avoidance of the Nondelegation Doctrine in* Clinton v. City of New York: *More Than "A Dime's Worth of Difference*," 49 CATH. U. L. REV. 337 (2000). For an interesting take on this issue, see H. Jefferson Powell & Jed Rubenfeld, *Laying It on the Line: A Dialogue on Line-Item Vetoes and Separation of Powers*, 47 DUKE L.J. 1171, 1199–200 (1998).

178. 462 U.S. 919, 959 (1983). Under the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(1), the Immigration and Naturalization Service (INS) has authority to suspend the deportation of certain aliens when the attorney general determined that "'deportation would . . . result in extreme hardship.'" *Id.* at 924 (quoting 8 U.S.C. § 1254(a)(1) (1970)). When the attorney general makes such a finding, a report is sent to Congress. *Id.* at 924–25 (citing 8 U.S.C. § 1254(c)(1)). Either house has the power to veto the decision. *Id.* at 925 (citing 8 U.S.C. § 1254(c)(2)).

The plaintiff in *Chadha* successfully convinced the INS that returning to his homeland would lead to extreme hardship. *Id.* at 924. Upon review, the House rejected the INS's decision. *Id.* at 926–27.

179. Schwartz, *supra* note 113, at 598 (footnote omitted) (quoting ARTHUR M. SCHLESSINGER, JR., THE IMPERIAL PRESIDENCY (1973)).

veto the executive's use of this delegated authority.[180] In essence, a part of Congress acted as the executive's overseer.[181]

At the time *Chadha* was decided, there were approximately two hundred statutes with legislative vetoes.[182] Rather than decide the case narrowly and reject only the specific legislative veto at issue, the Court categorically held that all legislative vetoes violated separation of powers.[183] The Court reasoned that the House, by way of the legislative veto, was effectively, albeit unilaterally, amending legislation.[184] Because amending legislation is a legislative act, the constitutionally prescribed procedures for lawmaking had to be followed: bicameral passage and presentment.[185] Because neither process was followed under the Act, the Court held that the Act violated separation of powers.[186]

Note that in *Chadha* the majority held that the legislative veto violated separation of powers not because the wrong branch was legislating, but rather because the right branch was legislating in the wrong way. Under the Constitution, "lawmaking was a power to be shared by both Houses and the President."[187] The legislative veto allowed Congress to make law without following the bicameral passage and presentment process. Congress may not "invest itself or its Members with either executive power or judicial power"[188] and "when it exercises its [own] legislative power, it must follow the 'single, finely wrought and exhaustively considered, procedures' specified in Article I."[189]

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180. See *Chadha*, 462 U.S. at 1003–13 (app. to White, J., dissenting), for a list of the many such statutes.

181. This practice is similar to the British practice of laying administrative regulations before Parliament, where either house could then annul them. Schwartz, *supra* note 113, at 597.

182. *Id.* at 598 (citing *Chadha*, 462 U.S. at 944–45).

183. Justice O'Connor urged the other justices to decide the case more narrowly. *Id.* at 599 (citing Letter From Sandra Day O'Connor, Associate Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 11, 1982)). Justice Powell would have preferred to avoid the issue. *Id.* at 598–99 (citing Letter From Lewis F. Powell, Associate Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Feb. 25, 1982)). The other justices apparently believed that the time was ripe to resolve "'the persisting controversy between the Executive and the Congress concerning the lawfulness of these one-house veto provisions.'" *Id.* at 599 (quoting Letter From William J. Brennan, Associate Justice, U.S. Supreme Court, to Lewis F. Powell, Associate Justice, U.S. Supreme Court (Feb. 25, 1982)). *Chadha*, 462 U.S. at 956–59.

184. *Id.* at 947.

185. *See id.* at 954–55, 958. Interestingly, Justice Powell argued that the act was judicial, not legislative, because Congress essentially made individualized decisions that caused the deportation of specific persons. *Id.* at 964 (Powell, J., concurring). *See* Schwartz, *supra* note 113, at 599 (suggesting that applying statutory language to a specific set of facts is adjudicatory in nature, not executive).

186. *Chadha*, 462 U.S. at 956–59.

187. *Id.* at 947.

188. Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 274 (1991) (quoting J.W. Hampton Jr., & Co. v. United States, 276 U.S. 394, 406 (1928)).

189. *Metro. Wash.*, 501 U.S. at 274 (quoting *Chadha*, 462 U.S. at 951 (holding that a board of review composed of members of Congress was unconstitutional)).

Thus, legislative acts—enacting, amending, and repealing statutes—are those acts that alter the rights, duties, or responsibilities of those outside the legislature. When a branch other than Congress (or even when only a part of Congress) legislates, that branch violates formalist separation of powers.

b. Executive Acts

Just as legislating is the quintessential legislative act, executing the laws is the quintessential executive act: applying a law already enacted by Congress.[190] "[T]he function of 'executing' the law . . . inherently presupposes a pre-existing 'law' to be executed. Thus, the executive branch is, in the exercise of its 'executive' power, confined to the development of means to enforce legislation already in existence."[191]

Executive acts are those in which an official interprets an enacted law and exercises judgment "concerning facts that affect the application of [that law]."[192] Indeed, the Court has stressed that "[t]he President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'"[193] For this reason, the Court held that President Harry S. Truman's executive order seizing the steel mills was unconstitutional in *Youngstown Sheet & Tube Co. v. Sawyer*.[194] According to the Court, seizing private property altered private rights and was, thus, legislative in nature.[195] Similarly in *Medellín v. Texas*,[196] the Court held

190. *See* Bowsher v. Synar, 478 U.S. 714, 732–33 (1986).

191. Redish & Cisar, *supra* note 109, at 480.

192. *Bowsher*, 478 U.S. at 733; *accord* Redish & Cisar, *supra* note 109, at 480 ("[T]he executive branch must be exercising . . . creativity, judgment, or discretion in an 'implementational' context. In other words, the executive branch must be interpreting or enforcing a legislative choice or judgment; its actions cannot amount to the exercise of free-standing legislative power.").

193. Medellín v. Texas, 128 S. Ct. 1346, 1368 (2008) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952)).

194. 343 U.S. 579. President Truman tried to seize the nation's steel mills to prevent a possible steel shutdown during the Korean War. *Id.* at 582. The President's order was not based upon any specific statutory grant of authority; indeed, Congress had refused the President's earlier request specifically for that authority. *Id.* at 586. Therefore, the issue for the Court was whether the President had power to seize private property in the absence of specifically enumerated authority in the Constitution. *Id.* at 587. The President had argued that he had inherent power as Commander-in-Chief to act in light of the Korean War and because he had to "faithfully execute" the laws. *Id.* at 587. The Court disagreed with both arguments. *Id.* at 587–88.

195. *Cf. id.* at 588–89.

196. 128 S. Ct. 1346 (2008). Prior to *Medellín*, the International Court of Justice (ICJ) had held that the United States had violated international law by failing to inform Mexican nationals of their Vienna Convention rights. *Id.* at 1355. In response, President Bush issued a memorandum stating that the United States would "'discharge its international obligations . . . by having State courts give effect to the [ICJ's] decision.'" *Id.* at 1353 (quoting Memorandum From George W. Bush, President of the United States, to Alberto Gonzalez, the Attorney General of the United States (Feb, 28, 2005)).

unconstitutional President George W. Bush's memorandum to require state courts to review the convictions and sentences of foreign nationals who had not been advised of their rights under the Vienna Convention.[197] In both cases, the presidents acted to alter legal rights without any preexisting statutory or constitutional authority; hence, they acted unconstitutionally.

Additionally, when a branch other than the executive executes the law, separation of powers is violated. For instance, in *Bowsher v. Synar*,[198] the Court held that the legislature cannot execute the law nor can it retain removal power over someone who does.[199] The removal power, according to the Court's opinion in *Myers v. United States*,[200] is executive in nature. Because executive

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Relying on the ICJ's decision and the president's memorandum, Medellín filed a state habeas application challenging his state murder conviction and death sentence. *Id.* Texas dismissed the application because Medellín had failed to raise the Vienna Convention claim in a timely manner. *Id.* The Supreme Court affirmed, holding that the president lacked the authority to preempt state law and require state courts to obey international treaties and decisions of the ICJ. *Id.* Absent a grant of power—from the Constitution, from a statute, or from a self-executing treaty—there was simply no law for the president to execute. *See id.* at 1369. Hence, the president acted legislatively, which he had no power to do.

197. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (1969).

198. 478 U.S. 714 (1986). In *Bowsher*, the Court analyzed the constitutionality of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (codified as amended in scattered section of 2 U.S.C.). The Act allowed the comptroller general (1) to determine whether the President and Congress were abiding by federal deficit caps and (2) to implement cuts as necessary. *Bowsher*, 478 U.S. at 732–33. Although he was appointed by the President, the comptroller general was subject to removal by Congress. *Id.* at 727–28. Because the comptroller would be executing the law, the Court struck down the law. *Id.* at 732–34. The Court held that Congress could not vest any authority to execute the laws in the comptroller general because the removal arrangement would then give Congress a role in executing the laws. *Id.* at 726–27, 733–34. "The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." *Id.* at 726.

Some suggest that the reasoning in this case is simply circular. Had Congress been exercising the power delegated to the comptroller general, likely the Court would have seen the power as legislative. Schwartz, *supra* note 113, at 608. Why then did the Court determine that the power was executive? Because Congress was not exercising the power. *Id.* "The implication then . . . is that any power giving effect to a statute that is not exercised by the legislature or the courts must be 'executive.'" *Id.* Regardless, had the Court concluded that the power was legislative, the Act would still have been unconstitutional for the comptroller general's decisions were not subject to bicameral passage and presentment. Redish & Cisar, *supra* note 109, at 489 (citing *Bowsher*, 478 U.S. at 754–55 (Stevens, J., concurring)).

199. Interestingly, the Court did allow the judiciary to execute the law. In *Morrison v. Olson*, 487 U.S. 654 (1988), the Court upheld Congress's decision to establish an independent counsel, who was supervised by the judicial rather than the executive branch. *Id.* at 659–60. The independent counsel's function was to "investigate and, if appropriate, prosecute certain high-ranking government officials" for criminal activity. *Id.* at 660. The Court approved the arrangement despite expressly conceding that the power to investigate and to prosecute crimes was executive. *Id.* at 671. This finding would have ended the inquiry under formalism, for the legislative branch cannot constitutionally vest executive power in the judicial branch. Instead, the Court employed functionalism and upheld the power distribution. *See id.* at 670–77.

200. 272 U.S. 52 (1926).

staff have executive authority, the legislature cannot retain the power to advise on and consent to their removal.[201]

Thus, executive acts are those acts that require a government official to interpret existing law and to exercise judgment in applying that law to a given situation. If there is no existing law to apply, whether in the form of a statute or treaty, then the executive cannot act. Admittedly, the delegation doctrine blurs this distinction: The executive has a role in lawmaking when Congress entrusts the executive with such power and provides some guiding principles for exercising that power. But once Congress enacts a law, Congress can have no role in executing that law, including the power to remove those with executive power.

c. Judicial Acts

While legislating is the quintessential legislative act and executing the law is the quintessential executive act, interpreting the law is the quintessential judicial act.[202] "Legislatures prescribe the rights and duties of citizens, while interpreting laws setting forth those rights and duties is the province of the courts."[203] Simply stated, the legislature makes law, and the judiciary says what that law means. As has been oft quoted:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. . . . This is of the very essence of judicial duty.[204]

Only the judiciary can dispositively interpret laws to resolve legal disputes.[205] While the legislature has the power to write and to enact laws, it is

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201. *Compare id.* at 115–18, *with* Humphrey's Ex'r v. United States, 295 U.S. 602, 623 (1935) (holding that the executive did not have implicit power to remove quasi-legislative officers from office without express authority from Congress).

202. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction.").

203. Bell, *supra* note 80, at 18 (citing Plaut v. Spendthrift Farms, 514 U.S. 211, 222 (1995) (quoting THE FEDERALIST No. 78, at 523, 525 (Alexander Hamilton) (J. Cooke ed. 1961)).

204. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

205. Indeed, only Article III courts have this power. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 84 (1982). Before *Northern Pipeline*, Congress had established federal bankruptcy courts within the executive branch. Congress gave bankruptcy judges jurisdiction over all "civil proceedings arising under [the Bankruptcy code] or arising in or related to cases under [the Bankruptcy code]." *Id.* at 54 (quoting 28 U.S.C. § 1471(b) (Supp. IV 1976)). Additionally, the bankruptcy judges had most of the "powers of a court of equity, law and admiralty." *Id.* at 55 (quoting 28 U.S.C. § 1481 (Supp. IV 1976)). But unlike Article III judges, who are appointed for life (subject to impeachment) and whose salary cannot be reduced while in office, bankruptcy judges were appointed for fourteen-year terms, and their salary was subject to readjustment. *Id.* at 60–61. The Court held that Congress

the judiciary that must interpret those laws in the course of adjudicating a case.[206] Indeed, a court's fundamental power is "to decide cases according to [its] own legal interpretations and factual findings"[207] "to render dispositive judgments."[208] Neither the executive nor the legislature can decide cases or review a federal court's determinations.[209] The Supreme Court has been clear that when another branch intrudes on the judiciary's right to resolve disputes conclusively, separation of powers is violated.[210] For example, in *Plaut v. Spendthrift Farm, Inc.*,[211] the Court held that Congress could not retroactively require federal courts to reopen final judgments.[212]

The judicial role is fundamentally different from the legislative role. "To declare what the law is, or has been, is a judicial power, to declare what the law shall be is legislative."[213] The prohibition against Congress enacting "rules of decision" is illustrative. In *United States v. Klein*,[214] the Court invalidated a statute that prescribed "rule[s] of decision."[215] According to the Court,

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could not grant Article III powers to non-Article III judges, who lacked lifetime tenure and salary protection and, thus, might not be politically independent. *Id.* at 84. In a plurality opinion, Justice Brennan explained that the Article III protections—life tenure and salary protection—helped the judiciary retain political independence from the executive and legislative branches. *See id.* at 64 n.15, 67–69.

206. "A fundamental precept of the federal constitutional structure . . . is the distinction between a legislature's power to enact laws and a court's authority to interpret them in the course of adjudicating a case." Araiza, *supra* note 170, at 1055 (criticizing the Court's holding in *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992), for failing to check legislative usurpation of judicial power).

207. Araiza, *supra* note 170, at 1073.

208. Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990).

209. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) (holding that the judiciary could be compelled to hear veterans' disability pension claims, which were not judicial in nature); *accord* Bates v. Kimball, 2 D. Chip 77, 90 (Vt. 1824).

210. Illustratively, in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), the concurrence criticized "the Legislature of [Connecticut, for it] ha[d] been in the uniform, uninterrupted, habit of exercising a general superintending power over its courts of law, by granting new trials." *Id.* at 398 (Iredell, J., concurring). "[The] power to grant, with respect to suits depending or adjudged, new rights of trial, new privileges of proceeding, not previously recognized and regulated by positive institutions . . . is judicial in its nature . . . not legislative . . . ." *Id.*

211. 514 U.S. 211, 218–19 (1995).

212. In holding that Congress could not "retroactively command[ ] the federal courts to reopen final judgments" without violating separation of powers, the Court reasoned that the judiciary's role is "not merely to rule on cases, but to *decide* them" *conclusively*. *Id.* at 218–19.

213. Town of Koshkonong v. Burton, 104 U.S. 668, 678 (1881).

214. 80 U.S. (13 Wall.) 128 (1872).

215. *Id.* at 146. After the Civil War, Congress had passed the Abandoned and Captured Property Act, which allowed owners of property confiscated during the war to receive the proceeds from the sale of that property so long as the owner had never given any aid to the Southern rebellion. Pursuant to his pardoning authority, President Lincoln had offered to pardon anyone who had supported the Confederate Army so long as that person took an oath of allegiance to the United States. The pardon fully restored property rights. *See id.* at 139–40

by prescribing a rule of decision in a pending case, Congress "inadvertently passed the limit which separates the legislative from the judicial power."[216] By "withhold[ing] appellate jurisdiction [ ] as a means to an end[,]"[217] Congress had invaded the province of the judicial branch.[218] Pursuant to *Klein*, Congress may change the underlying substantive law to accomplish its policy objectives, but it may not "dictate results under existing law."[219] Thus, when Congress interferes with specific, pending cases to tell the judiciary what decision to reach in a case, Congress impermissibly intrudes into the judicial arena.[220]

The line between dictating results and altering underlying policy can be difficult to draw. In *Miller v. French*,[221] the Court rejected the argument that a

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In response, Congress limited the president's pardon power. Additionally, Congress made acceptance of a pardon conclusive evidence that the person pardoned had *supported* the Confederate Army and that the person was, therefore, ineligible to recover property sale proceeds. The Supreme Court was directed to dismiss any case for lack of jurisdiction when the claimant had prevailed as a result of receiving a pardon. *See id.* at 141–44. In *Klein*, the Court held Congress's actions unconstitutional because the legislation required the federal courts to exercise judicial power in a manner contrary to Article III. *Id.* at 146–47. Simply put, the Constitution vests the judicial power in the judicial branch and Congress may not interfere with the functioning of the judiciary. *Id.*

216. *Id.* at 147. *But see* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992) (holding that the Northwest Timber Compromise, in which Congress stated that the statutory requirements for two lawsuits identified by name and caption number were met, did not violate the separation of powers doctrine).

217. *Klein*, 80 U.S. at 145.

218. *Id.* at 147. The Court also held that Congress had impermissibly infringed the power of the executive branch by limiting the effect of a presidential pardon. *Id.*

219. Araiza, *supra* note 170, at 1061. Professor Araiza notes that *Klein* is not an easy decision for courts to apply or commentators to understand. For a description of some of the *Klein* analysis, see Araiza, *supra* note 170, at 1074–75.

220. *But see Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 512–14 (1869) (holding that Congress could eliminate the Court's appellate jurisdiction in a pending case without violating the Constitution). Subsequent commentators have criticized the Court's decision in *McCardle*, suggesting that it was a result of the political atmosphere. *See, e.g.*, Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures From the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1593–1615 (1986) (detailing *McCardle* and the political climate surrounding the Court's decision). Despite the holding in *Klein*, Congress continues to create "rules of decision" for particular cases. *See, e.g.*, Araiza, *supra* note 170, at 1067 (arguing that Congress prescribed a rule of decision in an appropriations bill for the Department of the Interior).

221. 530 U.S. 327 (2000). Twenty years before *Miller* was filed, four federal prison inmates had filed a class action lawsuit challenging their confinement conditions. *Id.* at 331–32. The court issued an injunction, which was still in effect in 1995 when Congress enacted the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, 110 Stat. 1321–66. *Miller*, 530 U.S. at 332. PLRA allowed defendants in such cases to challenge existing injunctions and stayed the injunction for thirty days after any such motion to terminate was filed. *See* 18 U.S.C. § 3626(e)(2). The prison filed its motion, and the prisoners moved to enjoin the automatic stay, arguing that PLRA "encroache[d] on the central prerogatives of the Judiciary and thereby violate[d] the separation of powers doctrine." *Miller*, 530 U.S. at 342. Separation of powers was violated, the prisoners argued, because the injunction governing living conditions at the prison was a final judgment. *Id.* By legislatively suspending a final judgment, Congress impermissibly usurped judicial power in violation of the principles of *Plaut*, 514 U.S. 211 (1995), and *Hayburn's Case*, 2 Dall. 409 (1792). *Id.* The prisoners

statute that stayed injunctions in pending litigation reopened final decisions or interfered with judicial decisionmaking. Reasoning that the Act "establish[ed] new standards for prospective relief,"[222] the Court concluded that Congress had acted entirely within its power. Congress had not told "'judges when, how, or what to do.'"[223] Rather, Congress simply changed the rules for the future because it was unhappy with the past. Congress has this power.

At bottom then, the judicial role is to decide cases conclusively by interpreting and applying existing law to a specific, factual situation. When either the executive or legislature attempts to decide cases, reopen final cases, or interfere with the decisionmaking process, separation of powers is violated.

2. Functional Principles

The justices of the Supreme Court have never collectively embraced formalism. Rather, the Court has oscillated between formalism and functionalism throughout its history. With a government confronted with the complexity of the twenty-first century, functionalism seems to be winning the war.

Functionalism's focus differs from formalism's. Formalists focus on separation; functionalists focus on balancing inevitable overlap. Functionalists' core concern is that one branch not take away or be given too much constitutionally assigned power from another branch. In an effort to preserve the relative power distribution among the branches, functionalists minimize, but do not bar completely, encroachments into the core functions of each branch.[224]

Core functions are those functions assigned to each branch by the Constitution. For example, the executive's power of appointment, detailed in Article II, is a core function.[225] But it is not absolute. The Constitution gives the executive the power to appoint principal officers, subject to congressional approval, but not to appoint inferior officers.[226] Congress can delegate the

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also argued that the PLRA violated *Klein*, 13 Wall. 128 (1872). *Id.* at 335. The Court rejected both arguments, reasoning that PLRA did not suspend or reopen a decided case. *Id.* at 346. Rather, PLRA "establish[ed] new standards for prospective relief," which is entirely within Congress's power. *Id.*

222. *Id.*

223. *Id.* (quoting French v. Duckworth, 178 F.3d 437, 449 (1999) (Easterbrook, J., dissenting from denial of rehearing en banc)).

224. Strauss, *supra* note 102, at 489 (stating that the "functional approach . . . stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened"); Eric D. Greenberg, *Falsification as Functionalism: Creating a New Model of Separation of Powers*, 4 SETON HALL CONT. L.J. 467, 515 (1994).

225. U.S. CONST. art. II, § 2, cl. 2.

226. Buckley v. Valeo, 424 U.S. 1, 113 (1976). In this case, the Court invalidated a statute that created the Federal Election Commission (FEC) because Congress had encroached on the

power to appoint inferior officers.[227] Of course, this begs the question: How should inferior be defined? The Court has not yet answered definitively.[228] The removal power is also constitutionally assigned to the executive, though the assignment is implicit.[229] It too is not absolute; Congress can condition the executive's power to remove executive officers,[230] but not eliminate it altogether.[231] Importantly, the vesting clauses define the most central core functions: the legislature legislates,[232] the judiciary adjudicates,[233] and the executive executes the law.[234] But unlike formalism, under functionalism these core functions are not sacrosanct.[235] For example, under formalism, the role of the judiciary might be characterized as being that of "faithful agent" to the legis-

president's appointment power. The statute specifically allowed the president to appoint only two of the FEC's six members. *Id.* Congress reserved the right to appoint the remaining four members. *Id.* The Court reasoned that the members were principal officers because of the nature of their job duties; hence, the president had the constitutional right to appoint them. *Id.* at 126. If the president had to share this power, his position as head of the executive branch would be "unduly dilute[d]." Schwartz, *supra* note 113, at 596.

227. Morrison v. Olson, 487 U.S. 654 (1988) (holding that Congress could give the judiciary the power to appoint an inferior officer). Although the act at issue in *Morrison* empowered the judiciary to appoint and to oversee the inferior officer who would perform executive functions, the Court did not invalidate the act as it would likely have done had it used formalism.

228. The Court has taken an ocular (as in "I know it when I see it") approach to this issue. *See id.* at 671.

229. Myers v. United States, 272 U.S. 52, 126–27 (1926); *see* U.S. CONST. art. II, § 2, cl. 2.

230. *Morrison*, 487 U.S. at 686. At issue in *Morrison* was the removal provision in the Ethics in Government Act of 1978, 28 U.S.C. §§ 591–599 (2000): The Attorney General, a member of the executive branch, had the sole and unreviewable power to remove any independent counsel, but only for "good cause." *Id.* This removal provision presented two issues for the Court: whether the "good cause" provision impinged on the president's Article II functions, and whether the entirety of the act violated separation of powers by impinging on the president's control of prosecutorial functions. *Id.* The Court rejected both arguments. Recognizing that it had previously found statutes unconstitutional when Congress had reserved for itself the power to remove executive officers, the Court found no such problem here where Congress had given removal power to the executive, even though the removal power was not absolute. *Id.* The Court also noted that the president retained the power to supervise and control the counsel's power. *Id.* at 695–96. Thus, because the executive retained the ability to control and, ultimately, fire any independent counsel, the president's core functions were not unduly burdened. *Id.* at 691.

Justice Scalia, taking a formalistic approach, passionately disagreed. He argued that the Act intruded into one of the executive branch's core constitutional functions. *Id.* at 709 (Scalia, J., dissenting). "It is not for [the Court] to determine, and [it has] never presumed to determine, how much of the purely executive powers of government must be within the full control of the President [because t]he Constitution prescribes that they *all* are." *Id.* According to Justice Scalia, when the Constitution specifically vests power in one branch; no intrusions are acceptable.

231. Bowsher v. Synar, 478 U.S. 714, 725–26 (1986); *Myers*, 272 U.S. at 127 (both holding that the president has unfettered power to remove executive officials so as to control the operation of the executive branch).

232. U.S. CONST. art. I, § 1.

233. *Id.* art. III, § 2.

234. *Id.* art. II, § 1.

235. *See infra* notes 237–243 and accompanying text.

lature.[236] The legislature writes a law, the judiciary interprets the law as the legislature directed, and the legislature corrects any errors after the fact. The judiciary should not make law, and the legislature should not adjudicate.

In contrast, under functionalism, the judiciary is more like a "partner" to the legislature.[237] Functionalism recognizes that lawmaking is not exclusively within the legislature's control; rather, the legislature and judiciary are partners in the lawmaking process. While a core legislative function is to make law, the judiciary also makes law in the form of common law.[238] Moreover, even when it interprets statutes, the judiciary makes law because "[t]he meaning of the law before and after a judicial decision is not the same."[239] Indeed, "[t]he interpretation of a single statute affects the interpretation of all statutes"[240] because statutes are read in pari materia.[241]

When the judiciary interprets statutes, it acts as a "junior partner"[242] to the legislature: The legislature crafts a statute to further specific policy choices, while the judiciary, via interpretation, helps ensure that the statute accomplishes those policy choices.[243] Together, the two branches work together, acting in relative parity, rather than autocracy. Although some encroachment will occur, undue encroachment is problematic.

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236. Many commentators have identified the limitations of this view of the judicial role. *E.g.*, Barak, *supra* note 8, at 34–35 (arguing that the role of the judiciary in statutory interpretation is one of junior partner rather than agent); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 284 (1989) (claiming that "federal judges are not the agents of Congress[, t]heir employer is not the Congress but the United States, and their ultimate allegiance is to the Constitution rather than to the House and Senate"); 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, 1253 (2002) (stating that the "faithful agent theory has never offered a wholly adequate basis for judicial power").

237. For the classic debate between Professors John Manning and William Eskridge, Jr. regarding this issue, *compare* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 23 (2001), *with* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 881–93 (2001) (criticizing Manning's article), *with* John F. Manning, *Deriving Rules of Statutory Interpretation From the Constitution*, 101 COLUM L. REV. 1648, 1651–53 (2001) (responding to Professor Eskridge's criticism).

238. Some suggest that it is not the judiciary's function to make law: "If judges were to stray from their statutory instructions and make law themselves, there would be reason to question the legitimacy of *Marbury*'s holding." Molot, *supra* note 236, at 1241. This articulation is inaccurate, for judges make law continuously, whether through common law or by interpreting statutes. Barak, *supra* note 8, at 23.

239. *Id.*

240. *Id.* at 26.

241. In pari materia literally means "part of the same material." JELLUM, *supra* note 78, at 99. This linguistic canon directs that new statutes should be harmoniously interpreted with existing statutes concerning related subjects. *Id.* at 101.

242. Barak, *supra* note 8, at 26.

243. *See id.* at 34.

Encroachment into a core function alone, however, is not enough to violate separation of powers under functionalism, as it would be under formalism. For example, in *Commodity Futures Trading Commission v. Schor*,[244] the Court held that Congress can delegate to the executive the power to adjudicate a limited, "particularized area of law."[245] In that case, the litigants had argued that the Constitution prohibited Congress from authorizing a federal agency to adjudicate common law counterclaims.[246] The Court rejected this argument as "formalistic and unbending."[247] According to the Court, the power arrangement "raise[ed] no question of the aggrandizement of congressional power at the expense of a coordinate branch."[248] In other words, separation of powers was not violated simply because Congress may have enabled the executive to encroach on a judicial function. Violation of separation of powers required a finding that Congress had correspondingly expanded, or aggrandized, the executive's power.[249] Illustratively, the Court had earlier denied a broader judicial power grant to a non-Article III bankruptcy court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[250] But in *Schor*, the Court distinguished *Northern Pipeline*: "[T]he [Act at issue] leaves far more of the 'essential attributes of judicial power' to Article III courts than did that portion of the Bankruptcy Act found unconstitutional in *Northern Pipeline*."[251] Simply put, the power transfer in *Schor* was not intrusive enough to raise aggrandizement concerns.

Using similar reasoning, the Court approved Congress's delegation of limited legislative-like powers to the judiciary. In *Mistretta v. United States*[252]

244. 478 U.S. 833 (1986). The litigants in that case had challenged regulations that gave power to a federal administrative agency to adjudicate state, common-law issues. Sustaining the power shift, the Court looked to the purpose of Article III. *Id.* at 847. According to the Court, that purpose was two-fold: to protect the independence of the judiciary and to safeguard litigants' rights to have decisions made by judges free from domination by the other branches. *Id.* at 848. Because the appellant in *Schor* had agreed to have the administrative law judge hear its claim, it had waived the second concern. *Id.* at 849. As for the first concern, the Court specifically rejected a formal analysis in favor of a balancing test which weighed the extent to which Article III powers had been delegated to a non-Article III tribunal with "the concerns that drove Congress to depart from the requirements of Article III." *Id.* at 851. In this case, the congressional scheme did "not impermissibly intrude on the province of the judiciary," *id.* at 851–52, and the jurisdictional grant was for a limited, "particularized area of law." *Id.* at 852 (quoting N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 85 (1982)). The Court upheld the statute.

245. *Id.* (quoting *N. Pipeline Constr. Co.*, 458 U.S. at 85).

246. *Id.* at 847.

247. *Id.* at 851.

248. *Id.* at 856.

249. *Id.* at 856–57.

250. 458 U.S. 50, 84 (1982).

251. *Schor*, 478 U.S. at 852.

252. 488 U.S. 361, 384 (1989).

the Court upheld the constitutionality of the U.S. Sentencing Commission, even though three of the seven commission members were sitting federal judges.[253] The Court was unconcerned that members of the judiciary would be drafting sentencing guidelines.[254] The Court reasoned that the work that the Commission was doing was similar to establishing court rules; therefore, "the Commission's functions . . . [were] clearly attendant to a central element of the historically acknowledged mission of the Judicial Branch."[255] Hence, any intrusion was minimal, already tolerated, and thus acceptable.

And in *Morrison v. Olson*,[256] the Court found no aggrandizement concern. At issue in that case was the Ethics in Government Act by which Congress delegated the power to appoint an inferior officer to the judiciary. In reaching its holding that the delegation was constitutional, the Court reasoned that the appointment procedure did not present a situation in which Congress had "increase[ed] its *own* powers at the expense of the Executive Branch."[257] Thus, because this case did not "pose a 'dange[r] of congressional usurpation of Executive Branch functions,'"[258] separation of powers was not violated.

Although the Framers were concerned about the concentration of governmental power in any one of the three branches, they were primarily concerned with congressional self-aggrandizement.[259] Perhaps for this reason, the Court more closely scrutinizes legislation that expands Congress's authority than legislation that results in judicial or executive aggrandizement.[260] The analysis in *Morrison*, where the Court focused on the shift of power away from Congress, supports this hypothesis. The Court did not explicitly evaluate whether Congress had aggrandized the judiciary's power at the executive's expense or whether Congress had aggrandized itself simply by weakening the presidency. Specifically, the Court failed to recognize that by taking power away from the executive, Congress likely made that office weaker and itself

253. *Id.* at 368.
254. *Id.* at 371.
255. *Id.* at 391.
256. Morrison v. Olson, 487 U.S. 654 (1988).
257. *Id.* at 694 (emphasis added).
258. *Id.* (quoting Bowsher v. Synar, 478 U.S. 714, 727 (1986)). Rather, Congress retained no power to control or supervise the independent counsel other than impeachment, which applied to all officers of the United States. *Id.* The Court noted that: "Congress' role under the Act is limited to receiving reports or other information and oversight of the independent counsel's activities, functions that we have recognized generally as being incidental to the legislative function of Congress." *Id.*(citation omitted).
259. Elliott, *supra* note 5, at 528–29 (citing *Bowsher*, 478 U.S. at 722–24 (identifying the Founders' fear of legislative interference with executive function)).
260. Hui, *supra* note 102, at 1405–06; *accord* Ronald J. Krotoszynski, *On the Danger of Wearing Two Hats:* Mistretta *and* Morrison *Revisited*, 38 WM. & MARY L. REV. 417, 480 (1997) (suggesting that the Court's distinction between these types of aggrandizement is "precisely backwards").

stronger. Moreover, the Court did not expressly evaluate whether Congress had aggrandized the judiciary's power at the executive's expense, although arguably Congress did so by allowing the judiciary to appoint and to oversee an executive officer. Implicit in the opinion, however, is a finding that Congress had not aggrandized the judiciary because the executive retained (1) the ability to remove the independent counsel for good cause and (2) the power to supervise and control the counsel's activities.[261] Thus, while aggrandizement is a concern, legislative aggrandizement is of particular concern.

In sum, under functionalism, separation of powers is violated when constitutionally assigned power is transferred among the branches in a way that inappropriately aggrandizes one branch while withdrawing constitutionally assigned power from another.[262] Although formalism and functionalism share a common goal to ensure that no one branch acquires too much unilateral power,[263] these approaches go about meeting this goal in different ways. Whereas formalism uses a bright-line-rule approach to categorize acts as legislative, judicial, or executive,[264] functionalism uses a factors approach, balancing the competing power interests with the pragmatic need for innovation.[265] Functionalists do not want to "unduly constrict Congress' ability to take needed and innovative action. . . ."[266] In other words, functionalists balance Constitutional and pragmatic concerns, recognizing that government needs flexibility to create new power-sharing arrangements to address the evolving needs of the modern century.

To allow flexibility, functionalists focus less on maintaining separateness. Rather, functionalists favor independence with oversight; each branch must be able to perform its core functions while also being able to limit the accretion of power by the other branches.[267] Justice Jackson's tripartite framework from *Youngstown* is informative. According to Justice Jackson, the Court should review separation of powers issues differently depending upon the level of cooperation among the other two branches:

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261. *Morrison*, 487 U.S. at 677–78.

262. Greenberg, *supra* note 224, at 515.

263. *See* Powell & Rubenfeld, *supra* note 177, at 1201–02.

264. *See supra* Part III.B.1.

265. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986) ("Among the factors [to be balanced] . . . are the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.").

266. *Id.*

267. Powell & Rubenfeld, *supra* note 177, at 1202 (identifying functionalism as a "checks and balances" approach).

> First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." In this circumstance, Presidential authority can derive support from "congressional inertia, indifference or quiescence." Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject."[268]

Although Justice Jackson was addressing executive power, his framework applies more globally: When one branch acts unilaterally against the express or implied will of the other branches, the risk of tyranny is at its greatest.

The Constitution's checks and balances also act as a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another."[269] There are numerous check and balance provisions littered throughout the Constitution. For example, Congress's power to control the jurisdiction of the federal courts provides a check on the power of the judiciary to resolve cases, but each branch remains able to act independently.[270] Similarly, each house of Congress formulates its internal rules independently of the other house.[271] The Arrest, Speech, and Debate Clause helps ensure that the members of Congress can formulate laws as they wish, can say what they wish to say however they wish to say it, can travel freely to their respective chambers, and can be free from arrest while doing all of this.[272] The Incompatibility Clause prohibits members of Congress from serving within the executive branch.[273] This clause helps ensure that

268. Medellín v. Texas, 128 S. Ct. 1346, 1368 (2008) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1951) (Jackson, J., concurring)) (citations omitted).

269. Magill, *supra* note 98, at 1149 (describing the formalist and functionalist approaches to separation of powers).

270. Araiza, *supra* note 170, at 1072–73.

271. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings.").

272. *Id.* art. I, § 6, cl. 1 ("The Senators and Representatives . . . shall in all Cases . . . be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.").

273. *Id.* art. I, § 6, cl. 2.

members of Congress remain free to legislate without executive influence.[274] Under other clauses, the executive has the power to veto bills,[275] and the Senate has the power to advise and to consent to the appointment of executive and judicial officials.[276] There are other examples, but this much should be clear: The Constitution diffuses power among the branches while simultaneously recognizing that the branches must work together to run government.[277] Each branch has its separate, constitutionally assigned functions, yet each branch also has a penumbra of overlap that shades gradually into the core functions of the other two branches. So long as the branches steer relatively clear of the other branches' core functions and so long as the branches do not enlarge their own power at the expense of another branch, separation of powers is maintained.

In summary, functionalists take a pragmatic view of separation of powers and seek to avoid any branch aggrandizing its own power while encroaching upon another branch's constitutionally delineated power.[278] Whereas formalists ask what kind of power is being wielded and whether the appropriate branch is wielding that power, functionalists ask whether one branch has unduly encroached into the core functions of another branch and aggrandized itself.[279] Illustratively:

> [I]f the Supreme Court were to void a presidential pardon because it was given for improper motives, . . . if the Court were to void a Senate impeachment proceeding because it had defects, . . . if the Court were to order the President to dismiss a Secretary of State who was facing

274. Bruhl, *supra* note 107, at 410. This clause helps ensure that members of Congress cannot become beholden to the executive, just like members of the executive branch cannot become beholden to Congress. See the discussion of *Myers supra* Part III.B.1(b).

275. *See* U.S. CONST. art. I, § 7, cl. 2.

276. *Id.* art. II, § 2, cl. 2.

277. As Justice Jackson said in *Youngstown*:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1951) (Jackson, J., concurring).

278. TRIBE, *supra* note 49, at 122–23, 139; *see* Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 338–39 (1998) ("Under [separation of powers], the Court employs four principles. First, the Court requires strict adherence to the express procedures contained in the Constitution's text. Second, Congress may not aggrandize itself by exceeding the outer limits of its power. Thus, Congress may not assign itself power that is not legislative or 'in aid of the legislative function.' Third, Congress may not impede the ability of another branch to perform its constitutional role. Finally, Congress may not delegate the legislative power vested in it by Article I, Section 1.").

279. Strauss, *supra* note 102, at 489.

> criminal proceedings, the Court would violate the principle of separation of powers.[280]

In all of these examples, the issue would not be whether the Court had the power to act—the Court likely has the power to require the executive and the legislature to obey the Constitution.[281] Rather, the issue would be whether, in doing so, the Court would impede the executive's or the legislature's ability to carry out core functions and in the process aggrandize its role. In sum, power given or taken by one branch must not "intru[de] on the authority and functions of [another] Branch."[282] Intrusions that impair another branch's ability to perform are unconstitutional unless the "impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."[283]

C. Preventing Tyranny and Legislative Aggrandizement

Rigidly dividing separation of powers analysis into these two categories, formalism and functionalism, is imperfect. The justices have never collectively adopted one approach; rather, their jurisprudence vacillates between the two. For example, on the same day the Court decided *Bowsher*[284] using the formalist approach,[285] the Court decided *Schor*[286] using a functionalist approach.[287] Sometimes, the opinions blend elements of both.[288] Indeed, some critics[289] have suggested that the Court relies on the formalist approach when it wants to invalidate a particular power distribution, such as the line-item veto[290] and legislative veto,[291] but relies on the functionalist approach to validate other

280. Barak, *supra* note 8, at 122.

281. *See id.* at 122 n.389 (citing Nixon v. United States, 506 U.S. 224, 253–54 (1993) (Souter, J., concurring) (suggesting that judicial review may be warranted if the Senate impeached a person "upon a coin toss")).

282. Nixon v. Fitzgerald, 457 U.S. 731, 754 (1982).

283. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977).

284. 478 U.S. 714 (1986).

285. *Id.* at 722–26.

286. Commodity & Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

287. *Id.* at 847–48. In doing so, the Court emphasized the functionalist concern that "'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.'" *Id.* (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587 (1985)).

288. Magill, *supra* note 98, at 1138.

289. *E.g.*, Krotoszynski, *supra* note 260, at 480 (arguing that the Court uses a formalist approach to non-Article III encroachments and a functionalist approach to Article III encroachments).

290. *See* Clinton v. City of New York, 524 U.S. 417 (1998) (holding that the line-item veto violated separation of powers).

291. Magill, *supra* note 104, at 609–10; *see, e.g.*, INS v. Chadha, 462 U.S. 919 (1983) (holding that the legislative veto violated separation of powers); *supra* III.B.1.a.

power-sharing distributions, such as the independent counsel arrangement,[292] the sentencing guidelines plan,[293] and the exercise of adjudicatory authority by administrative agencies.[294] In other words, the Court's jurisprudence in this area is sufficiently inconsistent that it lends itself to criticism that it is outcome driven.

In response, various commentators have suggested alternative approaches.[295] But none of these alternatives have garnered universal following, and certainly not among the Supreme Court justices. Underlying both functionalism and formalism, however, are uniting concerns: fears of tyranny and legislative aggrandizement.[296] Hence, the analysis of this issue should ultimately be guided by the Framers' fear that the concentration of power in the hands of a single branch, especially the legislature, would threaten liberty.

IV. THE CONSTITUTIONALITY OF STATUTORY DIRECTIVES

Definitional directives and theoretical directives are easier to analyze under separation of powers than are interpretive directives. Ultimately, it is likely irrelevant whether the Court uses a formalist or functionalist approach. Under either approach, definitional directives do not violate separation of powers while theoretical directives do. Below, I explain why, and then move to the more complicated analysis: interpretive directives. Interpretive directives seem to violate the formalist approach but not the functionalist approach. In this case then, the Court's approach may well be outcome determinative. To further guide the discussion, I address concerns underlying both approaches: preventing tyranny and legislative aggrandizement. I suggest that these concerns lead the analysis to a surprising, somewhat formalistic, conclusion: General interpretive directives likely violate separation of powers while specific interpretive directives do not.

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292. Morrison v. Olson, 487 U.S. 654 (1988) (holding that the independent counsel statute did not violate separation of powers).

293. Mistretta v. United States, 488 U.S. 361, 382 (1989) (holding that the judiciary may constitutionally enact sentencing guidelines).

294. Magill, *supra* note 104, at 609–10.

295. See sources cited *supra* note 109.

296. In other words:

> [J]udicial review serves one principal goal: safeguarding liberty from the threat of tyranny. Where the political branches intrude directly on individual rights, or where they seek to alter the balance of power among the federal branches in such a way as to make such an intrusion more probable, the role of the courts is to intervene, to say no to the majority, and thereby to preserve our rights and freedoms.

David R. Dow, Cassandra Jeu, Anthony C. Coveny, *Judicial Activism on the Rehnquist Court: An Empirical Assessment*, 23 ST. JOHN'S J. LEGAL COMMENT. 35, 69 (2008).

A. Definitional Directives

Definitional directives, which define terms for one or more statutes,[297] do not violate formal or functional separation of powers.

1. Formalist Separation of Powers

Under formalism, definitional directives do not violate separation of powers because the legislature is simply performing a legislative act. When the legislature enacts a definitional directive, the legislature is "affecting legal rights."[298] Therefore, definitional directives are legislative in nature. To understand why they are legislative, assume that a legislature defined "buildings" in an arson statute to include vehicles. Assume further that the legislature defined "vehicles" to include bulldozers. Then, for purposes of this statute, a bulldozer would be a building (strange, but true).[299] In this situation, the legislature has altered legal rights: Whereas normally bulldozers are not considered buildings and the arson statute would not protect their owners, the legislature has changed the norm by including bulldozers within the protected class. Simply put, the legislature has changed the bulldozer owner's legal status.

Similarly, consider the Defense of Marriage Act.[300] When Congress defined marriage as the legal union between a man and a woman,[301] Congress altered the legal rights of all gay people. The Act had two immediate effects: (1) No state need treat persons of the same sex as married, even if they were considered married in another state; and (2) the federal government could not recognize any same-sex relationship as marriage for any purpose, even if recognized as such by a state.[302] While Congress can amend this definition at a later time, until Congress does so, marriage means only traditional marriage for all federal purposes.[303] Thus, Congress altered

297. *See* discussion *supra* Part II.A.

298. For a discussion of what acts are legislative under this approach, see *supra* Part II.A.

299. *See* Commonwealth v. Plowman, 86 S.W.3d 47, 50 (Ky. 2002) (holding that a bulldozer is a vehicle and thus protected by the arson statute prohibiting the intentional burning of buildings).

300. 1 U.S.C. § 7 (2006).

301. *Id.* (stating that "the word 'marriage' means only a legal union between one man and one woman as husband and wife").

302. *Id.* For example, Massachusetts currently recognizes gay marriage. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

303. Another example is the Dictionary Act, in which Congress defined the word "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1 (2006). By doing so, Congress potentially expanded the legal rights and responsibilities of many businesses. *See* Alexander & Prakash, *supra* note 52, at 100.

legal rights by defining "marriage." Because the legislature is performing a legislative act by defining terms, definitional directives do not violate formalist separation of powers.

2. Functionalist Separation of Powers

Further, definitional directives do not violate functionalist separation of powers because these directives neither encroach impermissibly on a core judicial function nor aggrandize the legislative role. Practically speaking, "[l]egislative definitions or redefinitions of statutory terms are commonplace and generally quite desirable, as they render the legislature's intent more precise and easily discoverable."[304]

The legislature makes law.[305] Making law includes the power to define words and phrases, to say what those words mean, and to change the dictionary meaning of words when necessary, all which aid the reader in understanding what the drafter intended. "Congress has a right to legislate by definition"[306] and can even "deem that certain conduct satisfies elements or provisions elsewhere in the statute."[307]

Definitional directives are articulations of law rather than interpretations of law because definitional directives help ensure that the law and all of its contours are clearly understood by judges and litigants.[308] When a legislature drafts definitions, it does not aggrandize its power or encroach on the judiciary's core function.[309] Admittedly, the power to say what the law means is a core function of the judiciary.[310] Yet, by enacting a definition, the legislature has not unreasonably encroached on this power. When the legislature

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Pursuant to this definition, corporations and other entities can sue, be sued, file for bankruptcy, and pay taxes, among other things. *Cf. id.* at 99 (arguing that the directive would not necessarily apply to every future statute). Legal rights have been affected; hence, the act is legislative.

304. Araiza, *supra* note 170, at 1064.

305. *See* U.S. CONST. art. I, §§ 1, 8.

306. Ace Waterways, Inc. v. Fleming, 98 F. Supp. 666, 667 (S.D.N.Y. 1951) (holding the definition of "steam vessel" included every vessel propelled by any form of mechanical or electrical power because Congress defined it as such).

307. Araiza, *supra* note 170, at 1055 ("In the absence of such definitions or 'deeming' clauses, such decisions are made by the courts. . . . [L]egislatures and courts share this power . . . .").

308. *Id.* at 1131. But redefinitions, when the legislature amends a statutory term, have an even greater interpretive effect because they "alter[ ] the reach of the statute without purporting to change its substance." *Id.* at 1064.

309. *See id.* at 1055–56 (stating that when Congress does so, "questions will inevitably arise about when one branch—usually the legislature—has unconstitutionally encroached on the functions of the other").

310. U.S. CONST. art. III, § 2; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 257 (2006).

defines (or even redefines) a term, the legislature's act is "part of the ongoing dialogue between [the] legislature and court over the original legislation's meaning."[311] In other words, definitions are simply part of the enactment process, which includes legislative enactment, judicial interpretation, and legislative correction.[312] Any encroachment is minor, even beneficial, for the judiciary is better able to interpret the statute in a way that furthers the legislature's policy choices. Thus, the two branches work in partnership to accomplish the legislative agenda. The judiciary remains free to interpret statutes; it just must do so with the definition Congress provided. Thus, when a legislature enacts a definitional directive, the legislature neither encroaches on the judicial role nor aggrandizes its own lawmaking role; hence, definitional directives do not violate functionalist separation of powers.

B. Theoretical Directives

"*Can* Congress limit the Court's sources of knowledge?"[313] This is precisely the question that theoretical directives raise. Theoretical directives, which identify what evidence a court may consider when interpreting statutes,[314] seem to violate both the formalist and functionalist approaches to separation of powers notwithstanding pragmatic reasons supporting their use.

1. Formalist Separation of Powers

Theoretical directives violate formalist separation of powers quite simply because the legislature is performing a judicial act. Unlike definitional directives, theoretical directives do not affect legal rights.[315] Indeed, affecting legal rights is not the purpose of theoretical directives. Instead, the purpose of theoretical directives is to tell the judiciary what evidence to consider when interpreting statutes.

Interpreting statutes is the quintessential judicial act.[316] Determining what evidence to consider when deciding what a statute means is essential to the interpretive process because the court is determining how it will perform its function. When a legislature crafts a theoretical directive such as the one

311. Araiza, *supra* note 170, at 1064.
312. *See id.*
313. MICHAEL L. WELLS, WILLIAM P. MARSHALL, & LARRY W. YACKLE, CASES AND MATERIALS ON FEDERAL COURTS 492 (4th ed. 2007).
314. *See* discussion *supra* Part II.C.
315. For a discussion of what acts are legislative under this approach, see *supra* Part III.B.1.a.
316. *See* discussion *supra* Part III.B.1.c.

adopted in Connecticut,[317] the legislature is not legislating; the legislature is not trying to alter legal rights. Rather, the legislature is trying to control the judicial function: interpreting statutes. "If officials in either of the [executive or legislative] branches were given final say over statutory interpretation . . . or legislators could determine the meaning of their own statutes—this would sabotage both the constitutionally prescribed lawmaking procedures and the constitutional separation of powers."[318] Saying what the law means is the judiciary's job. Hence, when the legislature enacts a theoretical directive, it is performing a judicial act, which is unconstitutional under formalist separation of powers.

2. Functionalist Separation of Powers

Admittedly, the Court has rarely struck down congressional power choices while using functionalism; thus, it might also decline to do so in the case of theoretical directives. Yet, theoretical directives seem to violate the functional approach to separation of powers. Theoretical directives raise concerns under functionalism because they impermissibly allow Congress to intrude into a core judicial function and aggrandize its role while simultaneously contracting the roles of the judiciary and the executive. While there may be pragmatic reasons for allowing the legislature to aid the judiciary in its interpretive role in this way, simply put, these directives go too far. First, theoretical directives impermissibly intrude on the judiciary's core function to interpret the law[319] or "say what the law means."[320] Saying what the law means is not just one core function of the judiciary; it is the most central constitutionally assigned function of the judiciary, as found in the vesting clause.[321] As such, the Court should guard it jealously.[322]

When the Framers rejected Massachusetts's rigid version of separation of powers, they chose a more fluid version that focuses on the independence and

317. *See* discussion *supra* Part I.
318. Molot, *supra* note 236, at 1246.
319. U.S. CONST. art. III, § 2.
320. *Id.*; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see* GEYH, *supra* note 310, at 257.
321. U.S. CONST. art. III, § 1, cl. 1.
322. *See* Kinkopf, *supra* note 278, at 357. The author opined:

> As the guardian of its own Article III-assigned role, the judiciary can be expected to be somewhat less restrained in reviewing legislation that might undermine the judiciary's ability to perform its constitutional role. It is therefore not surprising that the only legislation ruled unconstitutional under the general separation of powers principle has been statutes that the Court concluded would undermine the ability of the judiciary to perform its constitutional role.

Id.

cooperation of the branches.[323] Independence and cooperation require that each branch retain sufficient autonomy to function effectively, while still being subject to some oversight.[324] "[E]ach branch of government deserves the autonomy necessary to carry out its functions within the constitutional scheme,"[325] and each branch should "enjoy[ ] a protected sphere of control over its internal affairs."[326] No branch should be able to regulate the inner workings of any other branch.[327] Rather, each branch must be "master in [its] own house."[328]

For the most part, each branch does control its internal affairs. For example, the legislature is solely in charge of the procedure by which it legislates. Indeed, each chamber formulates its own internal rules independently of the other chamber.[329] The judiciary will not review the legality of the procedures of a bill's passage. "[W]hen litigants challenge congressional choices regarding . . . legislative procedure, the Judiciary almost invariably refuses to adjudicate the claims . . . . [A]t base these holdings reflect the courts' respect for Congress' power to organize itself."[330] The Court could constitutionally review these issues, but chooses not to. Thus, if a specific legislator must be present at a vote and is not, the judiciary will not review the effect of that absence on the validity of any successfully enacted bill.[331] Lawmaking is a legislative function; the authority to make laws belongs to Congress. So too should the mechanics of lawmaking belong to Congress. For the most part, the judiciary cannot tell Congress how to draft laws, what procedural rules to follow, or what policies to choose when it does so.[332]

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323. *See* discussion *supra* Part III.A.

324. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 442 n.5 (1977) (stating that separation of power is not an absolute divide between the branches); Plaut v. Spendthrift Farms, 514 U.S. 211, 244–45 (1995) (Breyer, J., concurring) (same); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1951) (Jackson, J., concurring) (stating that the Constitution provides "separateness but interdependence, autonomy but reciprocity").

325. Bell, *supra* note 80, at 7 (arguing that when the judiciary adopts an instrumental approach to statutory interpretation because such an approach will likely affect the legislative decisionmaking process, it violates separation of powers).

326. Bruhl, *supra* note 107, at 410.

327. *Id.* at 406.

328. *Id.*(quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 630 (1935). The master-of-the-house concern does not apply to definitional directives because they do not relate to procedure.

329. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings.").

330. Bell, *supra* note 80, at 31–32 (citations omitted); *see also* Des Moines Register & Tribune Co. v. Dwyer, 542 N.W.2d 491, 496 (Iowa 1996) ("It is entirely the prerogative of the legislature, however, to make, interpret, and enforce its own procedural rules, and the judiciary cannot compel the legislature to act in accordance with its own procedural rules so long as constitutional questions are not implicated." (citations omitted)).

331. Heimbach v. State, 454 N.Y.S.2d 993, 999 (App. Div. 1982) (refusing to review the validity of a statute even though a legislator whose vote was necessary for passage was not actually present during the vote).

332. *See* Alexander & Prakash, *supra* note 52, at 102. In their article, the authors posit:

Similarly, the executive must be master over the procedure by which executive functions are exercised.[333] Consider the veto process. The president is solely in charge of that process.[334] So too, the mechanics of vetoing should belong to the president. Congress could not tell the president that any veto will be ineffective unless specific procedures are followed or magic language is used. "[T]he Constitution grants the President the right to express his objections however he likes, and Congress cannot circumscribe how the President might express them."[335]

Likewise, the judiciary would not overturn a presidential pardon simply because the president used words the judiciary did not believe were as clear as they could have been or because the president chose to grant the pardon on the wrong day of the week.[336] The mechanics of pardoning belong to the executive, and the judiciary should not intervene.

If the judiciary cannot tell the legislature or the executive how to do their respective jobs, and if the legislature cannot tell the executive how to do its job, and if the executive cannot tell the judiciary or legislature how to do their respective jobs, why then can the legislature tell the judiciary how to do its job?[337] Why is it permissible for the legislature to tell the judiciary to look only at certain information when deciding what words mean?

Congress's role in lawmaking is to be as clear as it can be, given political and linguistic limitations. The judicial role is to take those words and give them the meaning Congress tried to convey within a particular factual setting. Certainly, the legislature can have a voice in interpretation and, indeed, already does. Congress may inform itself of how legislation is being implemented through the ordinary means of legislative investigation and oversight. If the legislature disagrees with the result in any particular case, it

> In what way does the "judicial power of the United States" grant the federal judiciary the authority to create counterintuitive rules of interpretation that then require the Congress affirmatively to circumvent them? We doubt that the judicial power—the power to decide cases—gives the federal judiciary the power to dictate interpretive rules to Congress. The courts cannot dictate (or constrain) how Congress must express itself.

Id.

333. *See* Clinton v. Jones, 520 U.S. 681, 711 (1997) (Breyer, J., concurring) (asserting that the executive must be master of "his own time and energy"—even his choice to avoid or delay judicial proceedings).

334. INS v. Chadha, 462 U.S. 919, 946–48 (1983).

335. Alexander & Prakash, *supra* note 52, at 104.

336. *See* Barak, *supra* note 8, at 122.

337. There is a related question: Can the current Congress create theoretical directives which bind future congresses? That entrenchment question is beyond the scope of this Article. Alexander & Prakash, *supra* note 52, at 109 ("[W]e believe that neither the federal courts nor the Congress has any constitutional authority that enables them to require future Congresses to jump through physical or linguistic hoops prior to legislating.").

can legislatively overrule the decision.[338] In this way, statutory interpretation becomes an ongoing dialogue between the judiciary and the legislature.

The legislature can be involved earlier in the process by issuing a presumptive theoretical directive, which would not bind the judiciary's hands. A presumptive theoretical directive would indicate the legislature's preferred interpretive process—permitting the legislature an earlier influence than it currently has—while still allowing the judiciary to maintain ultimate control of the interpretive process. In the end, though, the judiciary must choose its process. "[T]here seems to be little doubt that courts have the right to craft their own rules of statutory interpretation regardless of congressional action."[339]

Allowing Congress a greater role at the front end of the judicial interpretation process, a role in controlling how statutes are interpreted, would allow Congress to become master of the interpretive process. Courts should be able to choose the method that, in their view, best accomplishes the job of interpreting statutes, just as the legislature chooses the best method for drafting statutes. Hence, theoretical directives allow the legislature to unduly encroach into the judicial sphere.

Theoretical directives also present aggrandizement concerns. Were Congress to enact a theoretical directive, Congress could shift power away from the judiciary to itself or to the executive. Or, Congress could shift power away from the executive to itself. While this Article is focused on the judiciary, aggrandizement of either of the other two branches at the judiciary's expense is nonetheless concerning.

To understand how congressional aggrandizement at the executive's expense could occur, assume that Congress passed a theoretical directive that required a court to consider committee reports in every case of interpretation, or to give legislative history priority over statutory text, or to use one dictionary exclusively. Such directives would allow Congress to bypass the prescribed constitutional process for future legislation by putting essential information into a document that would not be subject to bicameral passage or presentment. Thus, Congress would prospectively expand its ability to legislate beyond what the Constitution allows, which is a formalist concern. But, by doing so, Congress would aggrandize its own role at the expense of the executive because the constitutionally assigned veto and approval power, which belong to the executive, would be impacted. The president has no power to veto a committee report (or other legislative history), even one at odds with

338. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 251–52 (1994) (listing eight decisions legislatively overruled by the Civil Rights Act of 1991).

339. Rodriguez, *supra* note 51, at 750.

proposed text.[340] Although the president has the ability to veto the bill itself, the language of the bill might be unobjectionable, even ideal, to the president. Yet, the president would have no choice but to first read all the legislative history and then to exercise the veto power to prevent the judiciary from interpreting a perfectly acceptable statute in unexpected ways.[341]

Theoretical directives could also aggrandize the executive's power at the expense of the judiciary. Assume, for example, that Congress enacted a statute that directed courts to defer to an administrative agency's interpretation of a statute regardless of whether that interpretation was reasonable or comported with the text. In this situation, Congress would have aggrandized the executive's role in interpretation, eliminating the judiciary's oversight role altogether.[342] Once an agency interprets a statute, the judiciary would have no power to reject the interpretation, even if the interpretation were contrary to the enacted text, legislative intent, or purpose.

And theoretical directives have the potential to aggrandize Congress at the expense of the judiciary, the Framers' greatest concern.[343] Assume, for example, that Congress directed the judiciary to never consider legislative history when interpreting statutes, regardless of whether the language was ambiguous or lead to absurd results. If legislative history could never be considered, what should a court do when presented with ambiguity or absurdity?

This situation is not completely hypothetical. Congress enacted a specific theoretical directive similar to this example in the Civil Rights Act of 1991.[344] That directive, section 105(b), stated that "[n]o statements other than [a specific interpretive memorandum] shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act . . . ."[345] The identified memorandum did little more than indicate Congress's unhappiness with a particular Supreme

340. U.S. CONST. art. I, § 7, cl. 2 (providing that only "Bills" may be vetoed by the president).

341. Indeed, one chamber of Congress, whichever branch authored the relevant committee report or legislative history, could aggrandize its own power to enact legislation over the other chamber and the executive.

342. *See generally* Peter L. Strauss, *Overseers or "The Deciders"—The Courts in Administrative Law*, 75 U. CHI. L. REV. 815 (2008) (suggesting that *Chevron U.S.A Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), provides the appropriate framework for the relationship between the executive, the primary decider, and the judiciary, the overseer).

343. *See* discussion *supra* Part III.A.

344. Civil Rights Act of 1991, Pub. L. No. 102-106, 105 Stat. 1071 (codified as amended at 42 U.S.C. §§ 1981–2000) (2006)). Similarly, Congress enacted a specific theoretical directive in the U.S. Copyright Act's definition of "work for hire." 17 U.S.C. § 101 (2006) (see *supra* note 50 for the precise language of the directive). After the definition, Congress specifically directed the courts to ignore the fact that it had amended the statute in 1999, and then deleted the amendment in 2000. *Id.*

345. Civil Rights Act of 1991, Pub. L. No. 102-106, 105 Stat. 1071 (codified as amended at 42 U.S.C. §§ 1981–2000) (2006)) (Legislative History for 1991 Amendment).

Court case[346] and direct the judiciary to interpret language in the Civil Rights Act according to the jurisprudence that existed prior to that case.[347] Yet, the jurisprudence that existed prior to that case was uncertain at best.[348] Hence, Congress shifted power by interfering with the interpretive process.[349]

Traditionally, the judiciary has made the choice of what materials to consider in the face of ambiguity and absurdity. But with such a directive, the judiciary's hands have been tied. Congress has decided for the judiciary what information is relevant and prevented the judiciary from looking beyond this information. Thus, by assuming control of this process, Congress has aggrandized its role at the expense of the judiciary, for part of the interpretive role is deciding what evidence is relevant to meaning.

Interpreting the law to further Congress's policy choices is the quintessential judicial function. Theoretical directives that "instruct[ ] courts to accord executive construction of statutes no deference, [and those] establishing the significance of a failure to enact a law disapproving an agency regulation, relate less clearly to particular substantive legislative decisions."[350] Because they relate less to specific policy choices and more to interpretive methodology, Congress's involvement is troubling. Certainly, Congress has the primary role in choosing policy, but Congress can have no more than an advisory role in selecting the interpretive process. When a legislature chooses the approach to judicial decisionmaking in statutory interpretation cases, the legislature gains a role in the judicial function and thereby invades the province of the judiciary. This result is troubling at best, unconstitutional at worst.

To be sure, there are pragmatic reasons functionalists could cite for allowing theoretical directives. Theoretical directives might reduce legislation costs. It is time consuming and not always effective for the legislature to wait for the judiciary to make a mistake and then to fix that mistake. Allowing the legislature to have a say at the start of the process might eliminate the need for corrective legislation. Theoretical directives might "spare

346. Wards Cove Packing Co. v. Atonio, 90 U.S. 424 (1989).

347. The legislative history of section 105(b) shows that members of Congress could not agree on how to define "business necessity." El v. Se. Penn. Transp. Auth., 479 F.3d 232, 241–42 (3d Cir. 2007). Section 105(b) was a compromise: *Wards Cove* was not explicitly overruled, yet the judiciary was directed to look to prior law for the definition. *Id.*

348. WELLS ET AL., *supra* note 313, at 490–92.

349. *See El*, 479 F.3d at 241 (stating "some may be skeptical of Congress's power to instruct courts what legislative history they may take into account when interpreting a statute . . . .").

350. Bell, *supra* note 80, at 31.

legislators the costs of anticipating all possible interpretive problems and legislating solutions for them."[351]

Theoretical directives might also reduce litigation costs. These directives could help frame and organize the inquiry for litigants and the judiciary. While the statutory language facing a court will differ in each case, the approach to resolving any conflict would remain constant with a theoretical directive. Simply put, theoretical directives might promote judicial efficiency by identifying, for both courts and litigants, the steps that should be taken in every case to resolve statutory issues.[352] Moreover, theoretical directives should reduce the overall amount of litigation because if the potential litigants know in advance how statutes will be interpreted, then, arguably, these litigants will interpret language accurately and more easily for themselves, rather than seek judicial resolution. As a result these directives may further judicial economy.[353]

Despite these pragmatic benefits, however, theoretical directives remain problematic. They fundamentally alter the relationship of the judiciary and legislature. If the role of the judiciary is that of "junior partner" to the legislature,[354] then theoretical directives upset this balance. The sole purpose for a theoretical directive is to tell the judiciary what sources of meaning to consider when interpreting statutes. Determining what sources of meaning to consult in interpreting a statute is essential to the interpretive process.[355] Contrariwise, identifying the sources of meaning that can be consulted is irrelevant to the lawmaking function. In essence, with theoretical directives, the legislature micromanages the judiciary as it performs its constitutionally assigned job. When a legislature controls the constitutionally assigned job of another branch, the legislature impermissibly intrudes into that branch's core function.

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351. Rodriguez, *supra* note 51, at 748 (citing Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540 (1983)); *accord* KENNETH C. DAVIS, 4 ADMINISTRATIVE LAW TREATISE § 28.07 (West 1958) (summarizing the common law of reviewability as it applies to administrative law).

352. Rodriguez, *supra* note 51, at 748.

353. Yet the experience of the states with directives does not seem to support this argument. Connecticut's example is instructive. After the legislative response to *State v. Courchesne*, 816 A.2d 562 (Conn. 2003), the Connecticut courts were supposed to look at legislative history and other sources of meaning much less frequently. The theoretical directive was clear: Extratextual sources of meaning would be relevant only when statutes were ambiguous or absurd. CONN. GEN. STAT. ANN. § 1-2z (West 2007). Despite the directive, with limited exception, in every Connecticut Supreme Court case following the legislature's enactment through 2008, the court found the text of the statute at issue ambiguous. In other words, the Connecticut judiciary has essentially ignored the directive from its legislature. Perhaps the court has recognized, even without explicitly acknowledging, that its legislature impermissibly intruded into the judicial arena. Research on file with author.

354. *See supra* Part III.B.2.

355. Rodriguez, *supra* note 51, at 750 ("Courts historically have reserved for themselves the power to fashion these interpretive rules.").

If Congress were to codify an approach to interpretation, Congress would give itself a say in the process where, constitutionally, it "should have no voice."[356]

"[T]he sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there."[357] Ours is a government in which each branch has its core functions; each branch must also have the autonomy to choose the best method to perform those core functions, lest tyranny or aggrandizement result.

C. Interpretive Directives

This category is the most difficult to analyze; however, I believe that interpretive directives, which tell the judiciary how to interpret or construe statutes,[358] violate formalist—but not functionalist—separation of powers. Hence, my analysis cannot stop with these two approaches. Instead, I look to the possibility that these directives would permit tyranny or legislative aggrandizement and conclude that the Court should find that general interpretive directives violate separation of powers. General interpretive directives are unconstitutional because they interfere with the process of interpretation, much like theoretical directives, allowing for legislative aggrandizement. In contrast, specific interpretive directives seem less troubling because they are designed to promote specific policy choices arrived at via the constitutionally prescribed legislative process.

1. Formalist Separation of Powers

Interpretive directives violate formalist separation of powers. Unlike definitional directives, interpretive directives do not give or take rights away; rather, they tell the courts how the legislature wants its laws interpreted. A statute that requires the judiciary to interpret statutes broadly does not alone affect legal rights or duties.[359] For example, a bulldozer owner does not gain legal rights simply because an arson statute indicates that its provisions should be construed narrowly or broadly. Similarly, gay individuals would not gain or lose legal rights if Congress were to direct that DOMA be broadly or narrowly interpreted. Nor would criminal defendants lose specific legal rights

356. Bruhl, *supra* note 107, at 349 ("When the legislature statutizes the rules of debate, it gives the president a say in a sphere of activity where, constitutionally speaking, he should have no voice.").

357. Nixon v. Adm'r of Gen. Serv., 433 U.S. 425, 442 (1977) (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 630 (1935)).

358. *See* discussion *supra* Part II.B.

359. For a discussion of what acts are legislative under this approach, see *supra* Part III.B.1.a.

because Congress directed the judiciary to ignore the rule of lenity in all penal cases. Instead, in all of these cases, it is the underlying statute—the arson statute, DOMA, or the penal statute—that would affect legal rights. While legal rights might (or might not) ultimately be affected by these directives, the effect would be tangential; it would not occur without the underlying statute.

Arguably, a directive that tells a court to ignore the rule of lenity (or another constitutionally based directive) in a criminal case could alter the constitutional right of all individuals to due process. Such a directive would likely be unconstitutional. However, it would be unconstitutional because of the due process doctrine, not because of the separation of powers doctrine.[360] Assuming the directive violated due process, the judiciary would be at liberty, even required, to ignore or limit the directive, as was the case with the directive in RICO,[361] because determining whether a statute is constitutional falls within the province of the judiciary.[362]

Interpretive directives do little more than tell the judiciary how to interpret these statutes and how to resolve disputes involving conflicts arising under these statutes. Because these directives do not affect legal rights, they cannot be legislative acts. Instead, interpreting statutes and resolving disputes are quintessential judicial acts.[363] Interpretive directives, which are targeted at this process, impact the interpretive process. Because the legislature is the wrong branch to perform a judicial act, interpretive directives violate formalist separation of powers.

This was exactly the conclusion reached by the Supreme Court of Delaware in *Evans v. State*,[364] identified earlier in Part I. Prior to that case, the Delaware General Assembly had attempted to "assert[ ] its right and prerogative to be the ultimate arbiter of the intent, meaning, and construction of its laws . . . ."[365] Simply, the state legislature disagreed with the state

360. The rule of lenity is grounded upon due process concerns. Thus, a statute that directs the judiciary to ignore the rule of lenity may raise constitutional issues that should not be ignored by the court simply because the legislature does not want them considered. *Cf.* Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1128 n.3 (3rd Cir. 1988) (discussing the federal judiciary's unwillingness to ignore the rule of lenity in criminal RICO cases despite a statutory directive telling them to do so), *overruled in part by* Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997).

361. *See* discussion *supra* Part II.D.

362. From their first year in law school, every budding lawyer learns that the judiciary is the guardian of the Constitution. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The judiciary must determine whether the acts of the other branches are constitutional and lawful. *See* Barak, *supra* note 8, at 116.

363. For a discussion of what acts are judicial under this approach, see *supra* Part III.B.1.c.

364. 872 A.2d 539 (Del. 2005) (pur curiam).

365. H.B. 31, § 5402, 143d Gen. Assem., Reg. Sess., (Del. 2005).

supreme court's decision in a criminal case.[366] So, the Delaware legislature enacted a general interpretive directive telling its judiciary how to interpret all Delaware statutes.[367] The court was unimpressed and found that the directive violated Delaware's separation of powers doctrine, for the interpretive directive impermissibly "attempt[ed] to confer upon the General Assembly fundamental judicial powers."[368] If the legislature disagreed with the court's decision, its remedy was to rewrite the underlying substantive law, not to intrude on the court's power to interpret statutory text and impermissibly usurp the judiciary's function.

In sum, interpretive directives violate formalist separation of powers because the legislature is performing a judicial act.

2. Functionalist Separation of Powers

Functionalists would likely find interpretive directives constitutional. Functionalists view the legislative process as a dialogue between the legislature and judiciary. The two work in partnership to coordinate lawmaking and law interpretation to accomplish the legislature's policy choices.[369] Interpretive directives further the partnership and do not unduly encroach on the judiciary's core function.

The legislature, when it enacts interpretive directives, does not impermissibly encroach on a core function of the judiciary:

> Congress may regulate the process of statutory interpretation by instructing courts to interpret statutes in a certain way. It may direct a court to interpret a statutory provision narrowly or broadly. It may instruct the court to interpret certain provisions of the statute in light of other provisions in that same statute. . . . Congress can, and often does, circumscribe judicial creativity in interpretation by fiat.[370]

Rather, interpretive directives fall within the penumbra of overlapping functions. "Statutory interpretation is an area in which there is coordinate responsibility between courts and the political branches."[371] Clearly courts have a role in defining the principles of their interpretive methodology because

366. *See supra* Part I.

367. Del. H.B. 31, § 5403 (telling Delaware's judiciary (1) to "strictly interpret or construe legislative intent," (2) to "use the utmost restraint when interpreting or construing the laws of [Delaware]," and (3) to not "interpret or construe statutes . . . when the text [is] clear and unambiguous").

368. *Evans*, 872 A.2d at 550.

369. *See* discussion *supra* Part IV.A.2.

370. Rodriguez, *supra* note 51, at 767–68.

371. Bell, *supra* note 80, at 27.

> [t]he task of interpreting statutes requires the interpreter to determine the interpretive principles it will employ. . . . However, the text of the Constitution, in particular the clauses giving Congress the power to create inferior courts and to make all laws "necessary and proper" for carrying out expressly granted powers, allows Congress to prescribe the rules by which courts will decide cases. . . . [I]nterpretive principles influence the substance of statutes. Congress must retain some power to address issues of interpretive methodology in order to protect its ability to establish substantive policies.[372]

Under the Constitution, Congress has a role in this area and an interest in ensuring that its substantive policy choices are furthered. Additionally, "[a]s the institution responsible for specifying substantive law, Congress must have the power to exercise some control over interpretive techniques."[373] Thus, functionalists would likely find that interpretive directives further the partnership relationship of the two branches.[374]

It is perhaps easiest to see how interpretive directives further the dialogue when they are specific to a particular statute. When the legislature enacts a specific interpretive directive, the legislature is attempting, via the directive, to make its policy choice for that particular statute clear. In this way, interpretive directives mirror definitional directives in that the legislature is simply trying to further its policy choices, not take over the process of interpretation itself. For example, when a legislature directs the judiciary to interpret a particular statute broadly to accomplish its remedial purpose, such a directive informs the court that the legislative purpose for that particular statute was remedial and that the words should be interpreted as broadly as the court deems reasonable, but no further. The directive indicates the policy choices the legislature made in regard to that particular issue. Thus, the directive aids the judiciary in interpreting the statute in a way that best accomplishes the legislature's specific policy choices. The legislature is not aggrandizing its role; rather, it is furthering its partnership with the judiciary.[375]

Some interpretive directives might present separate constitutional concerns. For example, interpretive directives that tell the judiciary to ignore

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372. *Id.* at 27–28.

373. *Id.* at 30.

374. *But see* Araiza, *supra* note 170, at 1059 (arguing that a provision of an appropriations act for the Department of the Interior impermissibly intruded on the judiciary's law interpreting function by deciding that particular conduct satisfied an existing statutory standard).

375. Moreover, this balance would be furthered if the legislature made the directive presumptive, for the courts would then be freer to work in partnership with the legislature and to apply the directive only when doing so would further the legislative policy choice. For a discussion of the difference between presumptive and mandatory directives, see *supra* Part II.D.

the rule of lenity or to avoid an interpretation raising a constitutional issue might raise separate constitutional issues. But the issue is not a separation of powers issue; rather, the issue involves other provisions in the Constitution, such as the due process clause. On the one hand, if the legislature directs the judiciary to ignore the rule of lenity for a particular penal statute, then the legislature has informed the judiciary about its policy choices for that particular statute. On the other hand, the court must ultimately determine whether ignoring the rule of lenity in a particular case is constitutional.[376] The interpretive directive provides the court with the legislature's preference in regard to that statute, but Congress cannot direct the judiciary to ignore the Due Process Clause.

Moreover, functionalists are pragmatists. Allowing these directives likely promotes legislative and judicial efficiency. The costs of requiring Congress to amend each and every statute it wishes to amend after the fact could be high. More legislation fails than ever passes.[377] In some cases, the legislature could avoid the need for subsequent amendment by providing an interpretive directive. For example, the legislature could create a clear statement requirement in an interpretive directive for a particular area of law, say tort reform. Were it to do so, the judiciary would not need to guess at the legislature's policy choices; those choices would be clear. "[L]egislatively-created 'clear statement' rules, and certain other interpretive provisions are intimately intertwined with substantive law."[378] Moreover, judicial economy could possibly be furthered because litigation might be avoided if litigants know in advance how a statute will likely be interpreted.[379]

Because interpretive directives do not impermissibly encroach on a core function of the judiciary, do not aggrandize the role of the legislature, and do further judicial and legislative economy, they likely do not violate functionalist separation of powers.

3. Preventing Tyranny and Legislative Aggrandizement

Interpretive directives are the only type of directive where the Supreme Court's approach to separation of powers would likely affect the resolution of whether they are constitutional. Under formalism, the directives are likely unconstitutional; under functionalism, the directives are likely constitutional.

376. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
377. JELLUM & HRICIK, *supra* note 33, at 24.
378. Bell, *supra* note 80, at 30–31.
379. *See* discussion *supra* Part IV.B.1.

Thus, the more important question may be whether interpretive directives increase the possibility of tyranny or legislative aggrandizement.

I suggest that the distinction between constitutional and unconstitutional directives lies in the difference between specific interpretive directives, those that apply to one statute, and general interpretive directives, those that apply to the entire code. While specific interpretive directives arguably have the purpose of informing the judiciary about the legislature's goals and policy choices for a particular statute that a specific legislature enacted, general interpretive directives have the purpose of telling the judiciary how to interpret all statutes, those already enacted and those to be enacted, without regard to specific policy choices. In other words, the purpose of general directives is not to work harmoniously with the judiciary to make law that furthers specific policy choices reached via the legislative process. Rather, the purpose of general interpretive directives is to direct interpretation of all statutes irrespective of the original enacting intent, text, or purpose. Simply put, with general directives, Congress can no longer say it is trying to further a specific policy choice. Instead, Congress is acting despite any specific policy choice. When Congress intrudes on the judicial function in this way, it "extend[s] the sphere of its activity, and draw[s] all power into its impetuous vortex."[380]

Perhaps an extreme example will illustrate the distinction most clearly. What if Congress enacted a statute that simply provided: "Should any statute ever be challenged, the court shall adopt the executive's interpretation." With this statute, Congress has taken complete control of the interpretation process from the judiciary and given it to the executive. Congress is no longer acting as partner with the judiciary; rather, Congress has become dictator. The fears of the Framers for protecting individual liberties from congressional tyranny would be realized. "[T]he [whole] power of one department [has been] exercised by the same hands which possess the [whole] power of another department . . . ."[381] The legislature has taken the whole power of the judiciary.

Consider a more realistic scenario. Assume that Congress enacted a general interpretive directive that required the rule of lenity to be ignored for all statutes in the penal code.[382] Again, Congress is not trying to influence interpretation to further specific policy choices that it reached only after a deliberative process. Instead, Congress's main motivation with such a statute

380. THE FEDERALIST No. 48, at 274 (James Madison) (E.H. Scott ed., 1898).

381. THE FEDERALIST No. 47, at 268 (James Madison) (E.H. Scott ed., 1898).

382. Though Congress has not done so, some state legislatures have enacted similar general interpretive directives. *E.g.*, CAL. PENAL CODE § 4 (West 1999) ("The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.").

is to control the interpretive process: No more can activist judges be lenient on criminals. While "getting tough on crime" is certainly a policy choice, Congress cannot possibly be sure that this policy will be furthered in every case by eliminating the rule of lenity for all criminal cases. It is likely, but not assured. Therefore, Congress is simply playing the odds.

Similarly, a general directive that says that every statute should be broadly or narrowly interpreted, though seemingly more benign, suffers the same fate. When Congress simply includes a specific interpretive directive in one statute that directs the judiciary to interpret that particular statute broadly or narrowly, Congress is trying to influence the interpretive outcome regarding a specific policy choice for that statute. Certainly, process may be impacted, but impacting process is not the purpose of such a specific interpretive directive; it is merely tangential. In contrast, if Congress enacted a statute that directed the judiciary to interpret all existing statutes broadly or narrowly, then Congress would not be trying to influence the interpretation of particular statutes to further specific policy choices, although that result might occur. Rather, Congress would be trying to control the judiciary's method of interpretation regardless of whether a specific policy choice would ultimately be furthered. Thus, general directives are not legitimate attempts to influence interpretation to further specific, legislative policy choices. Rather, they are attempts to control the process of judicial interpretation.

Admittedly, this distinction is highly formalistic and, possibly, unworkable, though the Court found a similar distinction persuasive in the past. In *Clinton v. City of New York*,[383] the Court rejected the line-item veto, which was a generally applicable statute. In dissent, Justice Breyer suggested that "Congress . . . could simply have embodied each appropriation in a separate bill, [then made] each bill subject to a separate Presidential veto."[384] Why then, he wondered, would "the Constitution [not permit] Congress to choose a particular novel *means* to achieve this same, constitutionally legitimate, *end*"?[385] Answering the question, the majority found the distinction crucial: "The critical difference between this statute and all of its predecessors . . . is that unlike any of them, this Act gives the President the unilateral power to change the text of duly enacted statutes."[386] The fact that the Court has accepted such a distinction in the past leaves the possibility that it might do so again.

383. 524 U.S. 417 (1998).
384. *Id.* at 471 (Breyer, J., dissenting).
385. *Id.*
386. *Id.* at 446–47.

Candidly, Congress could theoretically defeat the distinction altogether. For example, Congress could add the identical interpretive directive to every new or existing statute. Notably, Congress is likely to be unsuccessful in any such effort, for it is difficult to enact new legislation, let alone amend every existing statute.[387] But, even if Congress were successful in this effort, the judiciary could, at least, have some assurance that Congress might have actually considered the effect of such a directive on the specific policy choices for each affected statute. In other words, to enact one directive for every statute, Congress would theoretically debate, evaluate, and consider whether such a directive would be appropriate for that particular statute and its underlying policy choices. With general interpretive directives, there are no such assurances.

In summary, specific interpretive directives do not appear to violate separation of powers. By requiring Congress to enact each directive while considering the policy objectives for a particular statute, the Court can ensure that Congress is merely trying to influence interpretation to further those objectives rather than impermissibly intrude into the judicial sphere. In contrast, general interpretive directives are problematic, at best. They allow the legislature to take over the interpretive process, not to promote specific policy objectives, but rather to control the interpretation process. As such, they concentrate power in the legislature's hands, thereby threatening tyranny.

CONCLUSION

Predicting whether the Court will find that statutory directives violate separation of powers is challenging, especially given that the Court's jurisprudence in the area of separation of powers has been inconsistent, at best. The Court has used the formalist approach to invalidate some power-sharing distributions between the legislature and executive—such as the line-item and legislative veto.[388] Contrariwise, the Court has used the functionalist approach to validate other, but not all, power-sharing distributions involving

387. To simplify this process, Congress could instead pass an omnibus statute that said, "All statutes passed during this session of the legislature are deemed to include the following interpretive directive . . . ." The omnibus statute would still be troubling. It is really no more than a disguised general interpretive directive because the result is the same: Congress need not actually debate, evaluate, and consider every affected statute.

388. *See Clinton*, 524 U.S. at 421 (holding that the line-item veto violated separation of powers); INS v. Chadha, 462 U.S. 919, 956–58 (1983) (holding that the legislative veto violated separation of powers); Magill, *supra* note 104, at 609–10. See discussion *supra* Part III.B.1.a.

the judiciary and executive—such as the independent counsel arrangement[389] and the exercise of adjudicatory authority by administrative agencies.[390] The Court's mixed jurisprudence demonstrates that neither approach garners a clear majority. For this reason, the constitutionality of statutory directives must be analyzed under both approaches: formalism and functionalism.

Yet neither formalism nor functionalism completely answers the question of whether Congress can constitutionally enact statutes that tell the judiciary how to interpret statutes. For definitional and theoretical directives, the approach seems irrelevant: Under either approach the former are constitutional while the latter are likely unconstitutional. But the choice of approach appears to matter for interpretive directives: They are unconstitutional under formalism but constitutional under functionalism. Hence, approach cannot completely resolve the constitutional question.

Concerns with tyranny and legislative aggrandizement underlie both approaches to separation of powers. With these concerns informing the discussion, I conclude that Congress has the constitutional power to enact directives that attempt to influence statutory interpretation to further specific policy objectives, but does not have the constitutional power to enact directives that attempt to control the process of interpretation irrespective of policy objectives. When Congress crosses the line from helping the judiciary determine what the law means, to taking control of the judiciary's function, it violates separation of powers by aggrandizing itself and providing the potential for tyranny. In other words, Congress unconstitutionally becomes master of the judiciary.

389. Morrison v. Olson, 487 U.S. 654, 659–60 (1988) (holding that the independent counsel statute did not violate separation of powers).

390. Magill, *supra* note 104, at 609–10.