METHODOLOGY AS MODEL; MODEL AS METHODOLOGY

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We are fortunate, here in Oregon, to have drawn the attention of Professor Gluck's groundbreaking and thoughtful scholarship, and we are particularly pleased that she has taken the time to visit us in person to discuss her observations about how Oregon's innovations have played a part in the wide range of statutory interpretation methodologies.

In this essay, I would like to use Professor Gluck's work as a launching point for two observations. First, as I discuss in Part I, the use of a methodology for interpreting statutes in Oregon appears to affect not only the way in which Oregon courts approach the interpretation of Oregon statutes, but how they think about the process of interpreting statutes from other jurisdictions– including federal statutes. In turn, that approach may alter the way that federal courts think about their own processes of statutory interpretation. Second, in Part II, I discuss some ways in which Oregon's modified *PGE* methodology reflects (and, perhaps, is determined by) the relationships between the various branches of Oregon's government. This essay looks at the role of Oregon's methodological approach as a model for other jurisdictions, and considers one way in which Oregon's governmental model may have had a hand in generating Oregon's methodology for statutory interpretation.

I. METHODOLOGY AS A MODEL

One of the starting points of Professor Gluck's work is her observation regarding a fundamental distinction between the approach that federal courts take to statutory interpretation and the approach that many states, such as Oregon, take to the same problem. As Professor Gluck notes in her article, the federal courts "do not have a consensus methodology for statutory

interpretation."[1] Although this conclusion seems entirely in line with the experience of most law students, academics (and, in fact, federal court judges), the Oregon Supreme Court disagrees. As the Court noted as recently as 2009, there *is* a "methodology" that federal courts "have prescribed for interpreting federal statutes."[2]

Before describing this surprising conclusion in more detail, it is worth asking why the Oregon Supreme Court would bother weighing in on the federal approach to statutory interpretation. The answer comes from what are commonly called "reverse-*Erie*" cases.[3] Unlike the standard setup for the application of *Erie RR Co. v. Tompkins*,[4] in which federal courts are required to apply state law, the reverse-*Erie* case presents a situation in which state courts are required to apply federal law. This seemingly unremarkable application of the Supremacy Clause[5] creates interesting problems when considered in the context of statutory interpretation. If, as Professor Gluck suggests, there *is* no consensus methodology for statutory interpretation in federal courts–if, indeed, there is no "federal law" to apply on the question of *how* to go about interpreting a federal statute–then there could hardly be an explicit or implicit direction to the state courts to use "the federal approach" to the interpretation of statutes.[6]

1. Abbe R. Gluck, *Statutory Interpretation Methodology as "Law": Oregon's Path-Breaking Interpretive Framework, and its Lessons for the Nation*, 47 WILLAMETTE L. REV. 4, 543 (2011). *See also* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898 (2011).

2. Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Com'n, 213 P.3d 1164, 1171 - 1172 (Or. 2009) .

3. *See generally* Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1 (2006).

4. Erie RR Co. v. Tompkins, 304 U.S. 64 (1938).

5. U.S. CONST. art. VI.

6. Clermont, *supra* note 3, at 20-21 (describing basic scenario of reverse-*Erie* cases in which an articulated federal law provides the basis for decision in state court). It is worth emphasizing, as Professor Gluck's work suggests, that applying reverse-*Erie* principles to statutory interpretation problems in state court is by no means a straightforward proposition. The strongest case for deeming a federal approach to statutory interpretation binding in state courts would be presented in a situation in which Congress enacted a federal statutory interpretation methodology. Yet it is not clear that Congress could do so (or, at least, that the federal courts would permit it). The idea of judicial supremacy over the process of statutory interpretation is echoed, to some degree, by the Oregon Supreme Court's decision in State v. Gaines, 206 P.3d 1042 (2009), in which the Court, when faced with the 2001 Amendments to ORS 174.200, concluded that it, and only it, retained the power to determine "the extent of … consideration of [legislative] history, and the evaluative weight that the court gives it." *Id.* at 1051.

And yet, Oregon tries. An example of this effort, and the way that the Oregon Supreme Court resolved it, is found in the Oregon Supreme Court's 2009 decision in *Friends of the Columbia River Gorge v. Columbia River Gorge Commission*. In that decision, penned by Justice Landau's predecessor on the Court, Justice W. Michael Gillette, the Court was faced with a challenge to a revision of the Columbia River Gorge Commission's management plan for the National Scenic Area. The petitioners argued that the management plans were inconsistent with the federal Columbia River Gorge National Scenic Area Act.[7]

The Commission is something of a chimera, a little bit federal agency, a little bit state government agency, a little bit interstate compact. Although the Act did provide for review of Commission decisions in the state courts of Oregon and Washington,[8] "the Act itself provides no standards for reviewing actions and orders of the commission, but appears to leave such details to the courts that are authorized to perform such reviews."[9] In Oregon, the legislature implemented the Act through specific legislation, ORS 196.115, under which the Court of Appeals would hear petitions for review of decisions by the Commission.

The initial difficulty was the standard of review. Under ORS 196.115, the Court of Appeals was to use a standard of review nearly identical to the Oregon APA's approach to the review of orders in contested cases.[10] Because the decision at issue in this case was a rule, rather than an order, that standard of review did not fit, and the Oregon Supreme Court concluded that the Court should simply proceed with review of the Commission decision just as it would review a rule issued by a state agency.[11] The primary question, then, was whether the agency's decision "departed from a legal standard expressed or implied in the

7. Act of Nov. 17, 1986, Pub. L. No. 99-663, 1986 U.S.C.C.A.N. (100 Stat.) 4274 (codified at 16 U.S.C. §§ 544-544p).

8. 16 U.S.C. § 544m(b)(4), (6) (2011).

9. *Friends*, 213 P.3d at 1170.

10. *See* ORS 196.115(2), (3)(c)-(e). *But see Friends*, 213 P.3d at 1170 (this legislative guidance proved awkward for the Oregon courts, which struggled to determine the applicable standard of review).

11. *Friends*, 213 P.3d at 1170-71.

particular law being administered, or contravened some other applicable statute."[12]

The Court then had to assess whether the management plan was consistent with the Act. To do that, it was necessary for the Court "to determine what the Act requires. Consequently . . . review of petitioner's claims generally would involve some interpretation of the Act."[13] And, for present purposes, here is where the Oregon Supreme Court offered the somewhat remarkable statement on which I focus this discussion:

> In interpreting the Act, we follow the methodology that federal courts have prescribed for interpreting federal statutes, just as we would do in interpreting any other federal statute. In general, that means examining the text, context, and legislative history of the statute. However, there is an additional methodological wrinkle when, as in the present case, one of the parties before the court is the agency that has been charged with implementing the statute that is to be interpreted. A long line of federal cases, beginning with Chevron, U.S.A. v. Natural Res. Def. Council, holds that, when a federal agency has been charged by Congress with implementing a federal statute, courts should defer to that agency's interpretation of the statute, treating that interpretation as controlling as long as it is reasonable. Although that sort of deference is foreign to the administrative law of this state, we are bound to apply it in our interpretation of federal statutes if the federal interpretive methodology so demands.[14]

For those of us familiar with Professor Gluck's work, the suggestion that federal courts have "prescribed a methodology" for the interpretation of federal statutes is surprising, to say the least. In support for this proposition, the Court cites its 2005 decision in *Corp. of Presiding Bishop v. City of West Linn*.[15] In that decision, the Court was faced with a challenge under the federal Religious

12. *Id.* at 1171 (citing Planned Parenthood Assn. v. Dept. of Human Res., 687 P.2d 785 (1984) (emphasis and internal quotations omitted)).

13. *Id.*

14. *Id.* at 1172 (emphasis added, internal citations and punctuation omitted). I will return to the issue of *Chevron* and deference in Part II.

15. *Id.* (citing Corp. of Presiding Bishop v. City of West Linn, 111 P.3d 1123 (2005)).

Land Use and Institutionalized Persons Act of 2000 (RLUIPA),[16] and stated that "[w]hen this court construes a federal statute . . . we follow the methodology prescribed by the federal courts" which "generally determine the meaning of a statute by examining its text and structure and, if necessary, its legislative history."[17]

The origin of the federal interpretive "methodology" in Oregon dates to a period shortly after the decision in *PGE*. In *City of West Linn*, the Court relied upon its 1999 decision in *Hagan* noting the importance of following the "methodology prescribed by federal courts" in "construing a federal statute."[18] To support this proposition, the *Hagan* court looked in turn to the 1997 decision in *Northwest Airlines, Inc. v. Department of Revenue*;[19] in that case, the Court only parenthetically described its interpretive approach to an earlier decision involving a federal statute as having "followed the United States Supreme Court's *methodology* when interpreting a federal statute."[20]

If one is to believe the plain language of the Oregon Supreme Court, then, there *is* a fixed federal methodology for statutory interpretation. If that is the case, a central observation of Professor Gluck's work – that there is no interpretive approach that carries precedential weight in the federal system – is undermined.

As any student of the federal system knows, however, it is difficult to argue that any particular interpretive approach has precedential weight in federal court. It seems quite unlikely that federal judges would characterize statutory interpretation in their

16. 42 U.S.C. § 2000cc.

17. Corp. of Presiding Bishop v. City of West Linn, 111 P.3d 1123, 1128 (2005).

18. Hagan v. Gemstate Manufacturing, Inc., 982 P.2d 1108, 1114 (1999) (at issue in *Hagan* was not a federal statute, but a federal regulation, although the statement regarding the federal "methodology" was applicable to both).

19. Northwest Airlines, Inc. v. Dept. of Revenue, 943 P.2d 175 (1997) (emphasis added).

20. *Id.* at 180 (emphasis added) (describing earlier decision in Shaw v. PACC Health Plan, Inc., 908 P.2d 308, 313 (1995), in which the Court stated: "… ERISA is a federal statute. Therefore, our task is to identify and carry out the intent of Congress when it enacted ERISA. In doing so, we follow the methodology generally used in ERISA preemption cases by the Supreme Court of the United States. That is, 'we begin * * * with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs.'" (citations omitted)). Because ERISA is a very specific statutory context in which the U.S. Supreme Court has been willing to articulate a particular approach to interpretation, the decision in Shaw is a more accurate statement of the federal interpretive process than any of the other statements regarding a federal interpretive "methodology" that are mentioned in the text.

courts as rooted in a fixed methodology. So Professor Gluck is quite correct in her premise: There is no recognized federal interpretive methodology.

So what are we to make of the Oregon opinions noted above? I do not believe that the Court in these cases is intentionally ignoring the substantial debate at the highest levels of the federal judiciary regarding the appropriate methodology for interpreting federal statutes. What is of importance here is the ease with which the Oregon Supreme Court in these reverse-*Erie* cases distills down the complexities of federal interpretive jurisprudence so that it can get to the business of actually figuring out what the statute means.[21] This is remarkable in at least two ways.

First, the great ease with which the Oregon Courts deem the federal system to have a "methodology" for interpretation, even in light of substantial evidence to the contrary, suggests the substantial shift in attitude that occurred after *PGE*. Before that case, the idea of a methodology for statutory interpretation was almost unheard of. Afterwards, the idea permeated Oregon judicial opinions.[22] This shift in thinking was a dramatic linguistic change that spilled over into how Oregon Courts thought about the process of interpretation in the federal courts.

The change was more than linguistic. As Professor Gluck notes, there are very few federal courts that have thought of state interpretive methodology as "state law" subject to an *Erie* analysis and application in federal court.[23] While I have not conducted an exhaustive search, this seems to have also been the case for reverse-*Erie* cases in Oregon prior to the decision in *PGE*. In one 1990 case, for instance, the Court of Appeals asked whether Oregon courts were required to follow lower federal court interpretations of ERISA *at all*. In concluding that they were not binding, the Court of Appeals gave no hint that it was searching for

21. In many ways, the federal "methodology" outlined in the Oregon cases is little more than a summary of several of the most significant references to which federal courts turn in interpreting statutory language. Perhaps not surprisingly, it bears a passing resemblance to the *PGE* approach.

22. A search in Westlaw for (methodology /p (interpret! meaning)) reveals 356 documents. Of those, only two predate the decision in *Hoffman*, which (just a year before *PGE*) established a "methodology" for construing insurance policies. Of the 350+ cases postdating *Hoffman*, the vast majority cite *PGE* (search conducted March 21, 2011). *See generally*, Hoffman Constr. Co. v. Fred S. James & Co., 836 P.2d 703, 706-709 (1992).

23. Gluck, *Intersystemic Statutory Interpretation*, *supra* note 1, *at* text accompanying n. 81 & following.

(or even suspected the existence of) an overarching "federal interpretive methodology" to guide its own interpretation of federal law.[24] After *PGE*, by contrast, Oregon courts had a familiarity with the idea of what Prof. Gluck calls "methodological stare decisis." That familiarity translated into not only an assumption that the federal system had something that could be deemed an interpretive methodology, but that it was entitled to treatment as binding precedent, and subject to reverse-*Erie* analysis. This significant shift in how the Oregon courts thought of the process of interpretation came about because of the decision in *PGE*.

What kind of effect can we expect this way of thinking about interpretation to have going forward? Professor Gluck is certainly a better prognosticator than I, and some skepticism about the federal courts' willingness to move toward a "consensus model" of interpretation is certainly warranted. The history of PGE's methodology, however, makes me wonder whether there might not be effects that flow from Oregon into the federal system. As Professor Gluck notes, the Ninth Circuit is one of the few federal courts that has considered state methodological stare decisis under *Erie*; in several cases, the Ninth Circuit has specifically used the Oregon approach in cases presenting questions about the proper interpretation of Oregon law.[25] Once the Ninth Circuit begins to regularly think of this issue as one presenting a case for methodological stare decisis, it is not implausible to think that the Ninth Circuit, forced to think regularly about the role of statutory interpretation as positive law, might soon suffer from its own case of creeping methodological labels. Such an epidemic might ultimately lead to that court developing a "Ninth Circuit" approach to federal statutory interpretation.

Given the resistance of the federal system to methodological stare decisis, such an effort would certainly draw a challenge. In that debate, the important work of Professor Gluck would

24. Van De Hey v. U.S. Nat. Bank of Oregon, 793 P.2d 1388, 1389-90 (1990) (in a pre-*PGE* ERISA case, examining the question of whether Oregon courts were obliged to follow federal court interpretations at all. Contrast this with the approach in *Shaw*). This is distinguishable from *Shaw* in that it is examining whether a Ninth Circuit decision interpreting a federal statute (for instance) is binding on Oregon courts. The conclusion seems correct, but the contrast I seek to point out is in the unwillingness of the Court of Appeals to seek out a single "federal methodology" to interpret this federal statute. That willingness comes only after the decision in *PGE*.

25. Gluck, *Intersystemic Statutory Interpretation*, *supra* note 1, at text accompanying note 118.

substantially advance the discussion. If such a federal methodology survived, Oregon's Supreme Court might take some credit. Sometimes, shorthand (and even somewhat inaccurate) descriptions can prove prescient; that might be the case here with the "federal interpretive methodology" identified by the Oregon Supreme Court.

II. MODEL AND METHODOLOGY

Why has Oregon been such a significant leader on the issue of statutory interpretation methodologies? Professor Gluck and Justice Landau have suggested several reasons for why *PGE* happened as it did, and when it did. Those factors include the conviction (whether held by individual judges or the court as a whole) about the importance of a clear approach to interpretation in order to ease the work of counsel and the courts, the desire of particular Justices to develop clear methodologies for their own decision-making process, the level of experience that particular Justices had with the legislative process and a corresponding attention to statutory interpretation problems, and the degree to which Oregon and other state courts have had much less academic and political attention on the issue of interpretation than has been true at the federal level (leading to less polarization in the interpretive process).[26]

I would like to suggest one other motivating factor that is rooted in the relationship between interpretive approaches and how judges and courts fit into a particular sovereign's legal system. Professor Gluck's work already suggests some of these connections; the process of interpretation is at the heart of a judge's work, and it should not be surprising that the approach to interpretation reflects, to a substantial degree, the role of the judge within the broader legal and political world in which the courts exist.

My jumping-off point comes from a comparison between the Oregon Supreme Court's decision in *Friends of the Gorge* and the U.S. Supreme Court's decision in *Chevron*. As the Oregon Supreme Court noted in *Friends*, the federal approach to statutory interpretation in cases involving administrative interpretations of

26. *See* Hon. Jack L. Landau, *Oregon as a Laboratory of Statutory Interpretation*, 47 WILLAMETTE L. REV. 4 (2011), *and* Gluck, *Statutory Interpretation Methodology as "Law," supra* note 1.

federal law is very different than the approach taken by the Oregon Courts.[27] Under *Chevron*, a federal court reviewing an agency's interpretation of law asks 1) whether Congress has spoken clearly to the precise question at issue (i.e., whether the agency's interpretation is contrary to a clear statutory provision), and 2) whether, in the case of an ambiguous statute, the agency's interpretation of the statute is "reasonable."[28] This strongly deferential approach to agency interpretations of law is, as the *Friends* court noted, "foreign to the administrative law of this state."[29]

Professor Gluck notes that the *Chevron* methodology is something of an outlier in the federal system; it is one example of a rare situation in which the federal courts' approach to the problem of interpretation involved the creation of binding precedent for the *process* of interpreting a particular statutory provision.[30] The U.S. Supreme Court concluded that statutory ambiguity signaled an implicit delegation of authority by Congress to the administrative agency.[31] That perception regarding the importance of structural priorities–of the relationships between the various branches of the federal government–was enough for the U.S. Supreme Court to cede to the agencies the courts' traditional role as interpreters of the law.

In Oregon, by contrast, no such abdication has occurred. Instead, the courts in Oregon work diligently at step one of *PGE* in order to eliminate ambiguity and identify the intent of the legislature. Particularly after the decision in *Gaines*, which permits the Court to use legislative history in order to resolve ambiguity at an early stage of the interpretive process,[32] the likelihood of a court finding ambiguity in Oregon is quite low. And, in any event, the only time Oregon courts should defer to an agency is if they are engaged in review of a "delegated term"–a

27. *Friends*, 213 P.3d at 1172.

28. Chevron v. NRDC, 467 U.S. 837, 842-43 (1984).

29. *Friends*, 213 P.3d at 1172.

30. Gluck, *supra* note 23 (identifying limited circumstances in which the federal courts have adopted a federal statutory methodology).

31. *Chevron*, 467 U.S. at 843-44.

32. State v. Gaines, 206 P.2d 1042, 1050 (2009) ("[A] party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis.")

word that the legislature explicitly hands to an agency with the intent that the agency itself decide the meaning.[33]

Thus, when it comes to the interpretation of statutes by agencies and judicial review of those decisions, Oregon courts and federal courts use two very different methods. Federal courts are willing to hand over the process of interpretation to the federal agencies, perceiving the existence of ambiguity as a Congressional delegation of authority to the agencies.[34] In Oregon, by contrast, the court views ambiguity as something of a challenge, triggering ever-deeper steps of analysis under the modified *PGE* methodology in an effort to resolve linguistic uncertainty. The ultimate arbiter of ambiguity in the federal administrative system is the agency; in Oregon (absent clear direction to the contrary) the arbiter is the judiciary.

The contrast between the Oregon and federal systems of review is highlighted by important differences in the next step of the judicial review process. In the federal system, the federal Administrative Procedure Act calls on courts to determine whether the agency's decision is arbitrary, capricious, or contrary to law; this charge has been interpreted to mean that courts must take a "hard look" at whether the agency's decision is backed by a logical and clear path of reasoning, along with evidentiary and policy rationales to support the chosen path. In Oregon, by contrast, there is no statutory arbitrary and capricious review of agency rulemaking. If an agency's rules are within the scope of statutory authority, a facial challenge to the rule will be rejected.[35]

In the end, then, federal and state judicial review provisions are almost mirror images of each other. In the federal system, the

33. *See* Springfield Educ. Assn. v. School Dist., 621 P.2d 547, 552-556 (1980).

34. This is not to say that the federal courts do no work under Step 1 of *Chevron*. As many academic commentators have noted, many federal courts are able to dispose of cases under *Chevron* Step I, concluding that Congress had spoken clearly to the question at issue in the case. Ultimately, however, the federal courts have a clear understanding of what to do if ambiguity cannot be resolved at Step I. The Oregon courts will instead press forward with an effort to clarify any perceived ambiguity.

35. *Compare* ORS 183.400 (describing basis for vacating agency decisions; extending only to the failure to comply with relevant constitutional, statutory, or procedural limits) *with* 5 U.S.C. § 706 (providing for court reversal of agency decisions when the decision is arbitrary, capricious, or otherwise contrary to law). In 2011, a bill introduced to the Oregon Legislature would have changed Oregon law to conform more closely to federal law. House Bill 3277 (2011) would have permitted Oregon courts to reverse agency rules if they were "arbitrary, capricious, or contrary to law." Despite testimony in support, and limited opposition (including this author's) the bill died in committee.

Courts step away from ambiguity, assuming that it amounts to an implicit delegation of interpretive authority to federal administrative agencies. Once those agencies make a decision, however, the federal courts are intimately involved in reviewing the validity of those administrative decisions for reasonableness. In Oregon, the courts hold firmly to the PGE interpretive process, confident in their ability to resolve ambiguity on their own in an effort to discern legislative intent–which is presumed (in the absence of a clear indication to the contrary) to be hidden somewhere in the statutory language and accompanying legislative process. The agencies have no role in the resolution of that ambiguity. Once the court has defined the scope of permissible agency action under a statute, however, the courts will presume that the agency has appropriately balanced the relevant considerations, and let the agency decision stand in all but the most egregious cases.[36]

What does the contrasting approach reveal about the *PGE* methodology? The Oregon APA preceded *PGE* by many decades, so there may be little connection between the two. Furthermore, the scope of *PGE* is much broader than *Chevron*, since *PGE* applies to statutory interpretation generally, while *Chevron* is limited to cases in which administrative agency decisions are under review.

At the same time, however, *PGE* was an administrative law case. While Oregon law had already developed the sophisticated tiered approach to reviewing agency interpretations of law,[37] the Oregon Supreme Court was certainly aware of the U.S. Supreme Court's decision in *Chevron*, decided just a decade before. *Chevron*, with its methodological approach, caught on like wildfire in the federal system, and rapidly became one of the most-cited cases in federal courts.[38] The emphasis that Step I of the case placed on ambiguity drew particular attention among judges and

36. Under the Oregon APA, a court could find that the agency's decision is so unreasonable that it is outside the scope of statutory authority. This form of review is much narrower than that permitted under the federal APA, however.

37. *See* Springfield Educ. Assn. 621 P.2d at 553-56 (setting out different approaches to agency interpretations of law depending on whether they were "exact terms," "inexact terms," or "delegated terms").

38. Asimow & Levin, FEDERAL & STATE ADMINISTRATIVE LAW 531 (3rd ed. 2009); *see also* Thomas W. Merrill, "The Story of *Chevron*: The Making of an Accidental Landmark." *in* ADMINISTRATIVE LAW STORIES (Peter L. Strauss, ed. 2006).

scholars, and it was in this context that *PGE* came before the Oregon Supreme Court.

In considering the proper resolution of *PGE*, the Oregon Supreme Court would have recognized that the state system is different than the federal system. The legislature is smaller and (at least in theory) more responsive to judicial and agency decisions that merit change. With the guidance provided by the *PGE* methodology (particularly after the decision in *Gaines*), the legislature is able to keep a closer eye on the decision-making process of courts and agencies, and to intervene through additional legislation if necessary. In addition, Oregon judges are elected. Under the federal system, there is a sense that the federal agencies are (through the President) at least ultimately responsible to the public at large, and that deference to agency interpretations of law is ultimately more respectful of the democratic process. In Oregon, by contrast, the judges stand for reelection every six years, and are arguably more responsive to the public than are the largely appointed employees of the state agencies.

In many ways, the methodology set forth in *PGE* could be explained as an appropriate response to the way in which Oregon's judiciary fits within the legal and political community of the state. The Courts, not agencies, are ultimately responsible for making legal determinations. The Courts feel themselves well-positioned to discern the will of the electorate, as revealed in statutory language, and yet to insist on clarity through the *PGE* process (and therefore forcing legislative action to correct errors). The *PGE* methodology, I suggest, is at least in part a reflection of the way that the Oregon courts perceive themselves within the constitutional structure of the state. To the degree that the process of interpretation is at the heart of judging, this should not be surprising. The means by which a court exercises its most fundamental powers should be a reflection of the place of those powers within the wider governmental system. We should thank Professor Gluck for her work in drawing our attention to this window into the process and place of judging in our nation's, and our state's, legal system.