THE CLASSICAL AVOIDANCE CANON AS A PRINCIPLE OF GOOD-FAITH CONSTRUCTION

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INTRODUCTION

During her confirmation hearings, Justice Elena Kagan offered a surprising take on constitutional interpretation: "[W]e are all originalists."[1] Yet, originalism—and its application—is not the same to all involved. Specifically, some originalists have splintered on the most *fundamental* of interpretive questions: how judges should resolve the constitutional text when the meaning runs out.

This splintering centers on the distinction between (i) discovering the semantic meaning of a text and (ii) applying such semantic meaning to a case at the fore.[2] These categories have since been described as semantic interpretation, which is discerning the meaning of a particular text, and applicative interpretation, or construction, which is the process that takes place when the semantic meaning of a text suffers from vagueness or irreducible ambiguity.[3] As Jamal Greene noted, "many academic originalists have found it necessary to distinguish between constitutional interpretation, the hermeneutic work to which originalism may usefully apply, and constitutional construction . . ."[4]

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[1] THE BLOG OF LEGAL TIMES, *Kagan: We Are All Originalists* (June 29, 2010), http://legaltimes.typepad.com/blt/2010/06/kagan-we-are-all-originalists.html.

[2] *See, e.g.*, Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010) ("The first of these moments is interpretation--which I shall stipulate is the process (or activity) that recognizes or discovers the linguistic meaning or semantic content of the legal text. The second moment is construction--which I shall stipulate is the process that gives a text legal effect (either by translating the linguistic meaning into legal doctrine or by applying or implementing the text).").

[3] Randy Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 65 (2011) ("[L]egal scholars are increasingly distinguishing between the activities of 'interpretation' and 'construction'...there is a difference between (a) discovering the semantic meaning of the words in the text of the Constitution, and (b) putting that meaning into effect by applying it in particular cases and controversies... [a]lthough I begin by offering definitions of interpretation and construction, the labels are not important. Both activities could be called "interpretation" —for example, something like 'semantic interpretation' and 'applicative interpretation.'").

[4] Jamal Greene, *How Constitutional Theory Matters*, 72 OHIO ST. L.J. 1183, 1190 (2011).

This Article argues that the constitutional avoidance canon— in its classical iteration[5]— has a major role to play in constitutional construction.[6] This is an open question in the ongoing debate over what background principles a court should embrace when constructing a constitutional provision in relation to a statutory text.[7] As Randy Barnett challenges, "[i]f you think the courts should defer to the legislature when a particular clause is vague, you need a normative argument for this principle of construction."[8] This Article holds to the view that deference to the legislature, as contemplated by the classical avoidance canon, is an appropriate tool of good-faith constitutional construction in limited circumstances.[9]

It may seem odd that a principle of *constitutional* construction should find effect in the interpretation of a statute, but the process of construction necessarily requires interpretation of a statute, or a set of facts in the real world—the process of construction begins when irreducibly ambiguous or vague constitutional provisions must be applied to actual enactments.[10] This Article is specifically limited to the scenario where federal legislation is judged against the Constitution.[11]

Part I of this Article gives an overview of the distinction between interpretation and construction. Part II argues that the views of Alexander Hamilton, Brutus,

[5] I use the classical iteration of the avoidance canon throughout this Article to address the concern that John McGinnis lays out in his recent and influential piece on the topic. *See generally* John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843 (2016). McGinnis makes a convincing case based on the historical record that judges have what he labels a "duty of clarity"—a duty to use various legal and interpretive tools at hand to determine the semantic meaning of a text. If judges cannot clarify the text after such efforts, the legislature's interpretation of the text should prevail—that is, the courts should defer to the legislature. The classical avoidance canon is more appropriate for this paper in light of McGinnis' argument—the canon requires judges to actually make two determinations of legal meaning, before preferring the route that doesn't transgress the Constitution.

[6] There are those, including the late Justice Scalia, who believed that the distinction between interpretation and construction was a mirage. "As it happens, non-textualists have latched onto the duality of construction. From the germ of an idea in the theoretical works of Franz Lieber, scholars have elaborated a supposed distinction between *interpretation* and *construction*...[t]hus is born, out of false linguistic association, a whole new field of legal inquiry." ANTONIN SCALIA & BRYAN GARNER, READING LAW 15 (2012).

[7] Whether constitutional avoidance should be a principle in constitutional construction seems to be an open question. *See* Lawrence Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 523 (2013) ("I have not argued against a principle of deference on the basis of a constitutional construction—but I have not endorsed such a principle either.").

[8] Barnett, *supra* note 3, at 70.

[9] The two rationales underlying the classical avoidance canon are both intimately related to deferring to the legislature. These two rationales are first, that "the court must construe the statute in accordance with the legislative intent; since it is always to be presumed the legislature designed the statute to take effect, and not to nullify" and second, to "minimize the instances of judicial review in which an unelected court invalidates the work product of the democratically accountable branches." Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1204 (2006).

[10] Gillian Metzger and Trevor Morrison reiterate this point when, in a discussion of the constitutional avoidance canon, they state "[a]dmittedly, the presumption of constitutionality is, by its terms, a principle of constitutional adjudication, not statutory interpretation. But it would be a mistake to assume the presumption has no impact on how courts assign statutory meaning. If the presumption of constitutionality leads courts to uphold enactments in the absence of evidence of clear unconstitutionality, then ambiguity in statutory meaning can be one reason why a statute might not be clearly unconstitutional." Gillian E. Metzger & Trevor W. Morrison, *The Presumption of Constitutionality and the Individual Mandate*, 81 FORDHAM L. REV. 1715, 1731 (2013).

[11] The avoidance canon's most natural use is in resolving conflicts between statutes and the Constitution. While there may be other uses of the canon, this Article's scope is limited to the process of construction that takes place when a vague or hopelessly ambiguous constitutional provision meets a statute.

and others at the founding, along with two early Supreme Court cases, support the proposition that the classical avoidance canon should appropriately be deployed as an aspect of good-faith constitutional construction. Part III seeks to incorporate the views of James Bradley Thayer to draw the point that allowing judges to attempt to ascertain the "spirit" of a provision, as a remedy to clarify vague constitutional "instructions," is not supported by agency principles, nor by views held at the founding. Part IV proposes that the classical avoidance canon should be deployed as a tool in constitutional construction, but only when dueling semantic interpretations are in true or relative equipoise. This also functions as a limiting principle for the use of the classical avoidance canon.

PART I: THE INTERPRETATION/CONSTRUCTION DICHOTOMY

Interpretation and construction "correspond to two different moments in the process of any decision controlled by an authoritative legal text."[12] "New" Originalists generally agree that determining the communicative content—the semantic meaning—of a text requires resort to the original public meaning of the words.[13] This methodology separates New Originalism from "Old" Originalism; the latter seeks to determine semantic meaning through evidence of the writer's communicative *intent*.[14]

Yet, New Originalism finds itself at odds over how to treat what has been labeled "construction." Allan Farnsworth's distinction between ambiguity and vagueness sets the stage for distinguishing between semantic interpretation and applicative interpretation (construction). Ambiguity, as he defines it, arrives when "a word may . . . have two entirely different connotations so that it may be applied to an object and be at the same time both clearly appropriate and inappropriate."[15] Ambiguity can often—but not always—be resolved by resorting to interpretive methods, such as by turning to sources that explicate the original public meaning of a text, or by turning to legislative history.

Vagueness operates differently. As Farnsworth explains, vagueness problems arise when we're faced with a text or word "that may or may not be applicable to marginal objects."[16] It is in the realm of vagueness that so-called "constitutional construction"—the application of semantic meaning to particular cases—becomes crucial. When faced with vague provisions, "[t] he original meaning of the text does not definitively answer [the problem]."[17] Something else—what has been dubbed

[12] Richard Kay, *Construction, Originalist Interpretation and the Complete Constitution*, U. PA. J. CONST. L. ONLINE 1 (forthcoming 2017) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2778744

[13] Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y. 599, 609-10 (2004).

[14] *See* Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545 (2013) ("new originalists maintain that the proper target of originalist interpretation is the original public meaning of the constitutional text, as opposed to the Framers' or ratifiers' intentions or expectations.").

[15] E. Allan Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939, 953 (1967).

[16] *Id.*

[17] Barnett, *supra* note 3 at 69.

applicative interpretation, or "construction"[18]—must fill the void. Construction also plays a role when the meaning of a word is irreducibly ambiguous.[19] When faced with problems of vagueness or irreducible ambiguity, the process of construction[20] takes place. As Jack Balkin[21] framed the matter, during construction "[w]e look to underlying principles because when the text uses relatively abstract and general concepts, we must know which principles the text presumes or is attempting to embrace."[22]

Substantive canons are vital to the process of construction: "[s]ubstantive canons are canons of construction—they determine legal effect and not linguistic meaning."[23] And of all the substantive canons—and there are plenty[24]—the constitutional avoidance canon seems to have an extra cachet these days, in light of Chief Justice Roberts' use of the canon in *NFIB v. Sebelius*.[25] There are several forms of the avoidance canon, which generally track one another albeit with sight distinctions. The two most cited versions of the canon are the "modern" and "classical" avoidance canons.[26] The so-called "modern" avoidance canon counsels that "a statute should be interpreted in a way that avoids placing its constitutionality in doubt."[27] In this sense, it is a prophylactic rule. The classical avoidance canon differs from the modern version insofar as the former posits that one plausible interpretation of a statute *would* be unconstitutional whereas the latter merely posits that a plausible interpretation *may* be unconstitutional. The traditional formulation of the classical avoidance canon is, "as between two possible interpretations of a statute, by one of which it *would be* unconstitutional and by the other valid, the Court's plain duty is to adopt that which will save the Act."[28]

There is a fairly wide array of ideas on what principles judges should look to when constructing the constitutional text in relation to a statute. Jack Balkin cites separation of powers, the principle of democracy, social mores and legal precedent.[29]

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[18] *See* Barnett, *supra* note 3 at 69 ("Although I begin by offering definitions of interpretation and construction, the labels are not important. Both activities could be called 'interpretation'—for example, something like 'semantic interpretation' and 'applicative interpretation.'").

[19] *See* Solum, *supra* note 7, at 458 ("[I]n other cases, the constitutional text does not provide determinate answers to constitutional questions. For example, the text may be vague or irreducibly ambiguous. We can call this domain of constitutional underdeterminacy 'the construction zone.'").

[20] This paper uses the term "construction" throughout, although the term "applicative interpretation" would work equally well. *See* Barnett, *supra* note 3, at 69.

[21] Balkin is not one who is readily identified with the originalist movement. However, in his recent scholarship, he has acknowledged that originalism is the proper process by which to engage in interpretation, while "living constitutionalism" is actually a form of constitutional construction. *See* Jack Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 551-52 (2009). For a full-fledged description of his originalism approach to interpretation, and his "living constitutionalism" approach to construction, *see* JACK M. BALKIN, LIVING ORIGINALISM (2011).

[22] Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 306 (2007).

[23] Solum, *supra* note 7, at 510.

[24] Justice Scalia and Bryan Garner identify dozens of substantive canons. *See generally*, SCALIA & GARNER, *supra* note 6.

[25] 567 U.S. 519 (2012).

[26] See Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997).

[27] SCALIA & GARNER, *supra* note 6, at 247.

[28] Blodgett v. Holden, 275 U.S. 142, 147 (1927) (Holmes, J., concurring) (emphasis added).

[29] Balkin, *supra* note 22, at 306. Balkin also cites to other factors that he deems important in determining a

Keith Whittington argues that the process of construction should take place in the political branches: judges should be constrained to semantic interpretation.[30] Randy Barnett—not a newcomer to the debate over construction[31]— and Evan Bernick have a forthcoming paper entitled "*The Letter and the Spirit: A Theory of Good Faith Constitutional Construction*."[32] As Bernick states, their paper elaborates on the notion that "where the letter gives out, the law does not—and neither does judicial duty . . . [judges] are legally bound to act consistently with not only the *letter* of the Constitution—its text—but its *spirit* . . . they must have recourse to the spirit of the law in formulating rules of construction."[33]

Barnett and Bernick make the case for what they call "good faith constitutional construction." That is, when in the "construction zone,"[34] judges should resort to the spirit of the constitutional provision at issue, but be thoughtful, diligent, and honest when doing so.[35]

The under-determinacy[36] of vague or irreducibly ambiguous constitutional provisions reveals a cleavage in originalist thinking that Barnett and Bernick, two committed public-meaning originalists, are right to try to corral with a firm set of principles that entail good faith construction.

Nonetheless, they have dismissed what should be regarded as a basic tenet of any theory of good faith construction: the classical avoidance canon. This paper seeks to make the case that the classical avoidance canon has a strong affirmative role to play in any theory of constitutional construction. Unlike John McGinnis, who sets forth an impressive history of the judicial power[37] requiring a "duty of clarity" before invalidating a statute,[38] this paper acknowledges and agrees with Barnett &

constitutional construction—eleven factors in all, according to Kay. *See* Kay, *supra* note 12, at 11-12.

[30] KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999). Whittington still seems to subscribe to this view, although he now acknowledges that courts have a role to play in construction, albeit a secondary one. Laura A. Cisneros, *The Constitutional Interpretation/construction Distinction: A Useful Fiction*, 27 CONST. COMMENT. 71, 76-77 (2010) (citing KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY (2007)).

[31] Barnett has been a major player in the development of the interpretation-construction distinction. *See, e.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 5 LOY. L. REV. 611 (1999); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2005).

[32] Randy E. Barnett, *2017 Originalism Works in Progress Conference Roster*, THE WASHINGTON POST (Oct. 5, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/10/05/2017-originalism-works-in-progress-conference-roster/?utm_term=.921b361d5ce1; *see also* Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: The Judicial Duty of Good-Faith Constitutional Construction*, GEO. L. FACULTY PUBLICATIONS AND OTHER WORKS, http://scholarship.law.georgetown.edu/facpub/1946.

[33] Evan Bernick, *Deciding Unclear Originalist Cases: Towards Good-Faith Constitutional Construction*, THE FEDERALIST SOCIETY (Dec. 19, 2016) http://www.fed-soc.org/blog/detail/deciding-unclear-originalist-cases-towards-good-faith-constitutional-construction.

[34] The "construction zone" refers to the act of construction—that is, the "activity of giving legal effect to [semantic] meaning". *See* Barnett & Bernick, *supra* note 32, at 1-2.

[35] Barnett & Bernick, *supra* note 32, at 39 ("As noted above, the inquiry is empirical, and empirical inquiries can be evaluated with reference to the rigor of the method through which evidence is collected, the presentation of that evidence, and the persuasiveness of arguments made on the basis of that evidence.").

[36] It is worth noting that vagueness in semantic meaning results in an underdeterminate application—not an indeterminate application. *See* Barnett & Bernick, supra note 32, at 7 ("Underdeterminacy—not to be confused with indeterminacy—can result where the text is vague or ambiguous.").

[37] U.S. CONST. ART. III.

[38] *See* McGinnis, *supra* note 5, at 843("The judicial duty of clarity also suggests that the judiciary can engage

Bernick, and others,[39] that the "construction zone" exists, and that scholars, judges and practitioners would be wise to coalesce around a coherent theory of construction that restrains judicial freewheeling. However, Barnett and Bernick too readily dismiss the classical avoidance canon as a principle of construction.

PART II: THE CLASSICAL AVOIDANCE CANON DURING THE FOUNDING ERA

Constitutional history supports the use of the classical avoidance canon during construction. This is demonstrated through analysis of historical conceptions of the judicial power and several early Supreme Court cases that utilize the avoidance canon during the construction phase.

A. Hamilton's Pitch for Judicial Restraint in Federalist 78

In response to John McGinnis' historical argument—namely, the array of historical materials that he summons as support for the proposition that judges should not lightly declare a statute unconstitutional[40]—Barnett and Bernick choose to interpret these historical conceptions of the Article III power differently.[41] The main source of disagreement surrounds Alexander Hamilton's arguments in *The Federalist Papers*.

In *Federalist 78*, Hamilton argues quite explicitly that judges should require an "irreconciliable variance" between a statutory text and a Constitutional provision before invalidating a statute:

> A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. *If there should happen to be an irreconcilable variance between the two*, that which has the superior obligation and validity ought, of course, to be preferred.[42]

In the same piece, Hamilton writes that the role of the Court "must be to declare all acts contrary to the *manifest* tenor of the constitution void."[43] The emphasis in his writing, of course, is that some higher threshold of unconstitutionality must be determined—not simply a bare majority of the evidence.

Barnett and Bernick, however, dismiss this portion of *Federalist 78* as "not properly understood as part of a response to Anti-Federalist concerns about arbitrary

only in interpretation, not construction, during the course of judicial review").

[39] Other scholars to have embraced the interpretation-construction distinction include Keith Whittington, Larry Solum, and Jack Balkin. *See supra* notes 26-28 and accompanying discussion.

[40] *See generally* McGinnis, *supra* note 5, at 867-98.

[41] *See* Barnett & Bernick, *supra* note 34, at 57-58.

[42] Alexander Hamilton, THE FEDERALIST NO. 78 (June 14, 1788) *available at* http://www.constitution.org/fed/federa78.htm (emphasis added).

[43] *Id.*

judicial power."[44] Rather, Barnett and Bernick point to Hamilton's argument in *Federalist 78* about procedural rules and precedent as being the direct response to Anti-Federalist concern about arbitrary judicial power.[45]

Instead, Barnett and Bernick tell us to look at *Federalist 81* in order to get a more accurate flavor of Hamilton's views on constitutional interpretation. "It is in Federalist 81 that Hamilton addressed Anti-Federalist concerns about arbitrary judicial power most directly."[46] They argue that in *Federalist 81*, Hamilton cabined judicial power by pointing to its relative weakness vis-à-vis lack of force. Thus, institutional weakness, and not a presumption of constitutionality (as indicated in *Federalist 78* with his "irreconcilable variance" note) was Hamilton's retort to the Anti-Federalist's charge of judicial supremacy. "Crucially," Barnett and Bernick write, "Hamilton did not here [in *Federalist 81*] mention a requirement of clarity."[47]

And yet, *Federalist 81* contains *precisely the same* presumption of constitutionality that Hamilton voiced in *Federalist 78*:

> The Constitution ought to be the standard of construction for the laws, *and that wherever there is an* ***evident*** *opposition, the laws ought to give place to the Constitution*. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention, but from the general theory of a limited Constitution.[48]

The key phrases—"irreconcilable variance," "manifest," and "evident"—all point in the same direction: a statute must be clearly unconstitutional, and not arguably unconstitutional, for the Court to void it.

By Barnett and Bernick's own framing of the issue, *Federalist 81*—presumably Hamilton's *direct* counterargument to the Anti-Federalist clamor against judicial fiat—invokes a presumption of constitutionality as a way to neuter judicial policymaking.

Moreover, Hamilton's argument evokes the classical avoidance canon, which instructs judges to disregard even the most natural reading of a statute if such reading would violate the constitution and there exists another reasonable alternative reading.[49] Hamilton proceeds similarly, laying out three steps for a fulsome interpretation of a statute. First, a court must decide on the statute's semantic meaning.[50] Next, a court should compare that meaning to the constitutional text at issue.[51] Finally, only if there is "manifest" or "evident" opposition between the two should the

[44] Barnett & Bernick, *supra* note 34, at 58.

[45] Barnett & Bernick, *supra* note 34, at 58 ("Hamilton did seek to address those [Anti-Federalist] concerns. In Federalist 78, however, he did so only by referring to 'strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.' The requirement of clarity is referenced earlier in the essay.").

[46] Barnett & Bernick, *supra* note 34, at 58.

[47] Barnett & Bernick, *supra* note 34, at 58.

[48] *See* Alexander Hamilton, THE FEDERALIST NO. 81 (June 28, 1788), *available at* http://www.constitution.org/fed/federa81.htm.

[49] JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 250 (2d ed. 2010). *See* Part IV of this Article for a further discussion on what qualifies as a "reasonable" alternative reading.

[50] *See* Alexander Hamilton, *supra* note 42 ("It therefore belongs to them to ascertain its meaning.").

[51] *See id.* ("If there should happen to be an irreconcilable variance between the two. . .").

law be invalidated.[52] The classical avoidance canon utilizes the same first two steps.[53] The third step of the classical avoidance canon—choosing the interpretation that saves an act—is an outgrowth of Hamilton's argument that only an "irreconcilable variance" should render a statute unconstitutional. When a jurist is faced with "two possible interpretations of a statute, one of which it would be unconstitutional and by the other valid,"[54] the "plain duty"[55] of the jurist, as Hamilton would likely agree in *Federalist 78* and *81,* is to adopt the saving construction of the statute.

Hamilton locates his presumption of constitutionality not in any particular text of the Constitution, but in "the general theory of a limited Constitution." Crucial to that theory of a limited Constitution—a part of the spirit of the Constitution, if you will—was the avoidance principle.[56]

B. The Brutus Question

There is one more point about history that is worth dwelling over. In explaining Hamilton's motivations and arguments in both *Federalist 78* and *Federalist 81,* Barnett and Bernick explain that Hamilton was responding directly to Anti-Federalist accusations. According to Barnett and Bernick, "Hamilton's references to a presumption of constitutionality in *Federalist 78* are not properly understood as part of a response to Anti-Federalist concerns about arbitrary judicial power."[57] Rather, as noted above, *Federalist 81* was his response to that charge. The specific charge that Hamilton was pushing back against was Brutus' argument that "this power in the judicial [branch] will enable them to mould the government, into any shape they please."[58]

The question becomes, to what is Brutus referring to when he writes, "this power in the judicial [branch]"? Barnett and Bernick supply an answer: "[Anti-Federalists] feared federal judges would "mould the government" by being *more deferential to assertions of federal power*."[59] This conclusion seems dubious. To be fair, Brutus is not a model of clarity in XI. In one, albeit different sense, Brutus seems to support the core of the Barnett and Bernick thesis—Brutus stipulates that the judiciary is empowered to have recourse to the spirit of the Constitution, and not simply its

[52] *See id.* ("[T]hat which has the superior obligation and validity ought, of course, to be preferred.").

[53] *See* T.J. Fosko, *Constitutional Law —Statutory Interpretation —Avoiding the Unavoidable: The Canon of Constitutional Avoidance As Applied to the Patient Protection and Affordable Care Act*, 35 U. ARK. LITTLE ROCK L. REV. 591, 596 (2013) (arguing that the three steps are (1) determining the meaning of the text (2) determining if that meaning would result in unconstitutionality of the statute and (3) applying the savings construction if a reasonable alternative exists).

[54] Blodgett v. Holden, 275 U.S. 142, 147 (1927) (Holmes, J., concurring).

[55] *Id.*

[56] Barnett and Bernick explicitly accept the spirit of the Constitution as a guiding principle of good-faith constitutional construction. *See* Barnett & Bernick, *supra* note 34, at 72 ("Our thesis is that there are contexts in which judicial recourse to the spirit of this Constitution is not only proper but necessary."). On this basis, then, Hamilton's argument, sounding in functionality & structure, should be relevant to their theory.

[57] *Id.* at 58.

[58] *See id.*; *see also* BRUTUS, XI, CONST. SOC'Y (Jan. 31, 1788), *available at* http://www.constitution.org/afp/brutus11.htm.

[59] Barnett & Bernick, *supra* note 34, at 58.

letter.[60] But continuing on in the piece, and closer to the part about ""mould[ing] the government" Brutus registers an inimitably grave fear with the judiciary[61]—that power corrupts, and as such, the "same principle will influence them to extend their power, and increase their rights; this of itself will operate strongly upon the courts to give such a meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own authority."[62]

It is this lead-in to the concern about "mould[ing] the government" that has prompted several commentators to assume, as the plain language seems to convey, that Brutus was concerned about the judiciary being corrupted by power and using the broad strokes of the Constitution to further their own political agenda.[63] Further, Brutus' letter "XV" lends additional support to this understanding. In XV, Brutus writes that the *people*, not judges—whom he feared would be corrupted—should be the ultimate arbiters of whether a stated policy runs afoul of the Constitution:

> [I]f the rulers break the compact, the people have a right and ought to remove them . . . those whom the people chuse . . . should have the power in the last resort to determine the sense of the compact . . . ***but when this power is lodged in the hands of men independent of the people***, and of their representatives, and who are not, constitutionally, accountable for their opinions, ***no way is left to controul them*** but with a high hand and an outstretched arm.[64]

It seems dubious, then, that Brutus' concern about the judiciary molding the government was actually a concern about the judiciary being *too deferential* to the government. Rather, Brutus' concern was that unelected judges, given life tenure, would foreclose questions of policy by shrouding them in the protective cocoon of the Constitution's broad and sometimes vague clauses.[65]

C. The Debates Over the Council of Revision

The debate over—and failure of—a proposed Council of Revision during the Constitutional Convention further shows that Alexander Hamilton's views on

[60] BRUTUS, *supra* note 58 ("By this they are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter.").

[61] Brutus also registered this same fear a few weeks letter, in XV. *See* BRUTUS, XV, CONST. SOC'Y (Mar. 20, 1788), *available at* http://www.constitution.org/afp/brutus15.htm ("[I]n short, they are independent of the people, of the legislature, and of every power under heaven...[m]en placed in this situation will generally soon feel themselves independent of heaven itself.").

[62] BRUTUS, *supra* note 58.

[63] *See* ANTHONY ARTHUR PEACOCK, FREEDOM AND THE RULE OF LAW 77 (2009).

[64] BRUTUS, *supra* note 61.

[65] For further support of this reading of Brutus, *see, e.g.*, WILLIAM F. CONNELLY JR., JAMES MADISON RULES AMERICA: THE CONSTITUTIONAL ORIGINS OF CONGRESSIONAL PARTISANSHIP 89-90 (2011) (explaining how the Anti-Federalists were deeply distrustful of the judiciary, especially the power of judicial review, and citing to the Brutus quote from XI for support); David Forte, *Appealing to Judge's Better Angels*, THE HERITAGE FOUNDATION (Feb. 19, 2009) (citing the Brutus quote from XI and stating, "[t]he words of the faction that lost the battle of the Constitution sound prophetic to us today . . . [d]id Hamilton truly believe that men in robes would act differently from men in frock coats? Was not Brutus's assessment of human nature more realistic?").

constitutional avoidance were very much within the mainstream among the founding class.

1. Three Votes, Three Failures

On May 29, 1787, the Virginia Plan was formally proposed to the Constitutional Convention in Philadelphia.[66] Included within the Virginia Plan was a proposal designed to curb legislative excess. The "Council of Revision," as it was called, was proposed as a body of executive and judicial officers that would wield a veto—similar to the Presidential veto enjoyed today—over acts of legislation passed by Congress.[67] The Council of Revision had long been important to Madison,[68] as it served as a further check upon power. Generally, he thought that no department—including the judiciary—had the authority to solely determine the contours of the Constitution.[69]

The Council of Revision was proposed to the Convention delegates on June 4, July 21 and August 15, failing each time to garner a majority of votes from the states. Nonetheless, the debates over the Council are instructive, especially on the delegates' views of judicial duty.

James Wilson, a delegate from Pennsylvania and future Justice of the Supreme Court stated in support of the Council, "[l]aws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect."[70] He backed the Council precisely because he did not believe the Constitution otherwise gave judges *carte blanche* to invalidate duly enacted legislation. George Mason, who also supported the Council, reiterated this view. Judges, he stated, "could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course."[71] James Madison stated that the Council "would be useful to the Judiciary depart[men]t by giving it an additional opportunity of defending itself [against] Legislative encroachments."[72] Madison's statement is interesting—envisioning an already existing role for the judiciary (hence his reference to "additional" opportunity") in countering the legislature, but acknowledging that the current framework didn't go far enough.

[66] The Virginia Plan, OFFICIAL RECORDS OF CONST. CONVENTION (originally published May 29, 1787), *available at* https://ourdocuments.gov/doc.php?flash=true&doc=7.

[67] James T. Barry III, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 235 (1989) ("The proposed Council would have vested the federal veto power in an institution composed of the President and several members of the federal judiciary, presumably the Justices of the Supreme Court.").

[68] *See id.* at 244 ("James Madison, the chief architect of the proposed national Council of Revision, expressed his admiration of the New York Council [of Revision].").

[69] 1 ANNALS OF CONG. 520 (Joseph Gales ed., 1789) (quoting Madison as stating, "[t]here is not one Government on the face of the earth . . . in which provision is made for a particular authority to determine the limits of the Constitutional division of power between the branches of the Government.").

[70] Neal Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1725 (1998) (quoting 2 THE RECORDS OF THE FED. CONVENTION OF 1787, at 73 (Max Farrand ed., 1923)).

[71] THE RECORDS OF THE FED. CONVENTION OF 1787, at 323 (Max Farrand ed., 1937) *available at* http://press-pubs.uchicago.edu/founders/print_documents/v1ch10s10.html.

[72] *Id.* at 322.

Elbridge Gerry stood in steadfast opposition to the Council. Gerry believed, in contrast to Wilson (and perhaps, similar to Madison), that the Constitution gave judges a limited power of judicial review, "as [judges] will have a sufficient check [against] encroachments . . . by their exposition of the laws."[73] Nonetheless, he did not wish to expand this power of review by placing judges on the Council. Gerry stated that "[i]t was quite foreign from the nature of [the judicial] office to make them judges of the policy of public measures." He set forth a clear line of demarcation. Judges should not hesitate to "set aside laws as being [against] the Constitution," which was done in some states "with general approbation." However, they should not sit on a Council of Revision, as that would vest them with power to set public policy. Particularly illuminating for this Article, Gerry stated bluntly that "[the Council of Revision] was making Statesmen of the Judges; and setting them up as the guardians of the Rights of the people . . . [rather] the Representatives of the people [are] the guardians of their Rights & interests."[74]

2. What the Failures of the Council of Revision Highlighted

The debates over the Council of Revision are interesting insofar as the proponents of the measure (Wilson, Mason, Madison) and the opponents of the measure (Gerry) agree on a fundamental premise: the judiciary had a limited role under the Constitutional scheme. The supporters of the Council sought to expand the Judiciary's role beyond what was contemplated, and the detractors sought to keep the Judiciary within their contemplated role.

This forms a neat contrast with the fundamental anchor of the Barnett & Bernick theory of construction, which states in part, "[w]here the letter of the law does not yield a clear answer, [judges] must have recourse to the spirit of the law in formulating rules of construction." Their principle of construction centers on the idea that the judiciary must be, in Bernick's words:

> [A]n impenetrable bulwark against every assumption of power in the legislative or executive. The judiciary cannot perform that vital function if judges do not impartially evaluate and, when proper, invalidate legislation, even in controversial and consequential cases. We can have a judiciary that reflexively defers to the political branches or we can have constitutionally limited government—but we cannot have both.[75]

Gerry's statement that "the Representatives of the people," and not the judiciary, are "the guardians of their Rights & interests"[76] brings this premise into question. Gerry did not seem to view the judiciary as a "bulwark" against assumption of power and undermining of rights; he vested that responsibility in elected representatives.[77] Moreover, the general sentiment among the founders with regard to the

[73] *Id.* at 320.

[74] *Id*. at 322.

[75] Evan Bernick, *Cruz vs. the Court: Why Conservatives Shouldn't Join His Crusade*, THE HUFFINGTON POST (Aug. 5, 2015), http://www.huffingtonpost.com/evan-bernick/cruz-vs-the-court-why-con_b_7936498.html.

[76] *See* THE RECORDS OF THE FED. CONVENTION OF 1787, *supra* note 71, at 322.

[77] This suspicion of "judicial authoritarianism" couched as constitutional protectionism has a well-worn history.

proper judicial role seems to embody some form of deference (with varying degrees) to the legislature. Wilson's admonition that "[l]aws may be unjust, may be unwise . . . and yet not be so unconstitutional as to justify the Judges in refusing to give them effect"[78] arguably locates the classical avoidance canon[79] in the judicial role.

D. Constitutional Avoidance and the Marshall Court

Consistent with the views of the framers, the use of the classical avoidance canon as a canon of construction followed in short order at the United States Supreme Court.

1. Mossman v. Higginson

In 1800 in *Mossman v. Higginson*, the Court was faced with the application of Section 11 of the Judiciary Act of 1789 to Article III of the Constitution.[80] Higginson, a British citizen, was suing to foreclose on his property in Georgia.[81] The citizenship of the defendant, whom Higginson was foreclosing on, was not stated in the pleadings. Under Section 11, circuit courts were permitted jurisdiction "where . . . an alien is a party." The question reaching the Court was whether Section 11 would permit the suit to proceed, despite the Article III prohibition on such jurisdiction (limiting suits involving aliens to suits between a citizen and an alien, and not suits between two aliens).[82] The Court dismissed the suit, and applied a familiar version of the classical avoidance canon. Reasoning that the Judiciary Act of 1789 "*must* receive a construction, consistent with the constitution"[83] and implicitly recognizing that the statute, as written, would contravene a clear constitutional limit on jurisdiction in Article III, the Court constructed the statute as consistent with Article III. Despite the clear import of the clashing meanings of Article III and Section 11, the Court nonetheless, in an act of construction (i.e., applicative interpretation), read Section 11 to be consistent with Article III. As the Court stated in a brief opinion, "[Section 11] says, it is true, in general terms, that the Circuit Court shall have cognizance of suits 'where an alien is *a party;*' but . . . we must so expound the terms of the law, as to meet the case, 'where, indeed, an alien is one party,' but a citizen is the other."[84] The Court recognized that the semantic interpretation of Section 11 was

See, e.g., ROBERT BORK, THE TEMPTING OF AMERICA 20 (1990) (describing the debate between Justices Chase and Iredell in *Calder v. Bull* and noting that "the impulse to judicial authoritarianism surfaced and was resisted at the beginning of constitutional history.").

[78] Katyal, *supra* note 70, at 1725.

[79] Wilson's statement arguably evokes the classical conception of the avoidance canon, insofar as his statement presumes that a statute has been interpreted in a way that would raise constitutional concerns (as opposed to a avoiding interpreting a statute in a way that may raise constitutional concerns).

[80] 4 U.S. 12 (1800).

[81] DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, 29–30 (1985).

[82] *See* U.S. CONST. ART. III. § 2 (limiting jurisdiction "between a state, or the citizens thereof, and foreign states, citizens or subjects.").

[83] Mossman v. Higginson, 4 U.S. 12, 14 (1800).

[84] *Mossman*, 4 U.S. at 14.

generally straightforward: "[Section 11] says, it is true, in general terms, that the Circuit Court shall have cognizance of suits . . ."[85] Yet, at the point of applicative interpretation—of construction—the court harmonized Section 11 and Article III. This sort of gap-filling is a quintessential role of construction. As Larry Solum pointed out, "[f]or example, it is at least theoretically possible that a legal text could contain gaps or contradiction . . . if there were a constitutional issue on which the [legislative] text was silent, then a construction might fill the gap."[86] *Mossman* seems to be an early example of the Court using the classical avoidance canon (i.e., that Section 11 "*must* receive a construction, consistent with the constitution") as a principle of construction.

2. McCulloch v. Maryland

McCulloch v. Maryland stands as another example of an early case where the classical avoidance canon was deployed as a canon of construction.[87] *McCulloch*, of course, centered on the constitutionality of the Second National Bank, chartered by Congress shortly after the War of 1812. The Maryland legislature, in its bid to effectively destroy the bank, passed a law levying taxes on all bank branches "not chartered by the legislature."[88] Both the Supremacy Clause of Article IV, and the Necessary and Proper Clause of Article I, Section 8, were implicated.[89]

Chief Justice Marshall was faced, first, with a problem of semantic interpretation: how to define the word "necessary." Turning to find the original public meaning of the word, Chief Justice Marshall looked to the use of the word "necessary," "in the common affairs of the world, or in approved authors."[90] Engaging in a form of intra-textualism, Marshall also compared the use of the phrase "absolutely necessary" in Article I, Section 10,[91] to the use of the word "necessary" in Article I, Section 8, to make the point that the word has various degrees of meaning: as the Chief Justice put it, "[a] thing may be necessary, very necessary, absolutely or indispensably necessary."[92]

As Barnett and Bernick state, Chief Justice Marshall concluded that these sources revealed that the word, "frequently imports no more than that one thing is convenient, or useful, or essential to another."[93] Thus, Chief Justice Marshall had purported to resolve what the semantic meaning of the word "necessary" in Article I, Section 8 was.

[85] *Id.*

[86] Solum, *supra* note 2, at 107.

[87] 17 U.S. 316 (1819).

[88] *Id.* at 318 ("[A]nd that there was passed on the 11th day of February 1818, by the general assembly of Maryland, an act, entitled, 'an act to impose a tax on all banks, or branches thereof, in the state of Maryland, not chartered by the legislature").

[89] *See* U.S. CONST. ART. IV; U.S. CONST. ART. I § 8.

[90] McCulloch, 17 U.S. at 413.

[91] *See* U.S. CONST. ART. I § 10 (Prohibiting states from levying "'imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.").

[92] *McCulloch*, 17 U.S. at 414.

[93] McCulloch v. Maryland, 17 U.S. 316, 414 (1819).

However, Marshall reached his destination in a more abstruse fashion. In fact, Marshall appears to have had a rather difficult time concluding that the meaning of the word necessary was simply "that one thing is convenient, or useful." Marshall *does* make such a statement after surveying sources bearing on the original public meaning of the word ("approved authors" and other instances where the word is used in "common affairs"). Nonetheless, if Chief Justice Marshall had reached his conclusion at that point, the analysis could have stopped. Yet, the Chief Justice continues on, burnishing his conclusion with further evidence by comparing uses of the word "necessary" in other sections of the Constitution. Importantly, Marshall concludes the paragraph by stating that "[t]his word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view."[94]

The clear import of the linearity of Marshall's argument seems to suggest that he used the original public meaning as one way to wrestle ambiguity out of the word "necessary." Nonetheless, in Marshall's view, the original public meaning could still not definitively draw all of the contours of the word. Thus, his use of the word "if" at the start of the sentence describing that "*if* reference be had [to public meaning sources]" connotes a view that the original public meaning of "necessary" was not completely dispositive. Moreover, Marshall continues struggling with the meaning of the word, admitting that the "taken in [its] rigorous sense, ["necessary"] would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word 'necessary' is of this description."[95]

Thus begins Part II of *McCullough*. Part II is Chief Justice Marshall's need to engage in construction: whether the act chartering the Second Bank of Congress was covered by his understanding of the word "necessary." And what we see is Marshall engaging in a form of construction very much anchored in principles of avoidance. The thrust of Marshall's argument is that the Constitution would be very odd indeed if, buried in a section detailing the *powers* of Congress, the Necessary and Proper clause existed as an awesome limitation on Congress' power—constraining the Congress to only pass laws that were indispensable to their other, enumerated powers.[96] Besides these sort of structural and consequentialist concerns, Marshall otherwise is unable to locate other compelling reasons, besides the original public meaning sources, for his conclusion that necessary means convenient. Effectively, Marshall is stuck with what appears to be irreducible ambiguity. But he uses, as a tiebreaker, what can only be termed a form of constitutional avoidance:

> *If no other motive for its insertion can be suggested*, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.[97]

[94] *Id.* at 415.
[95] McCulloch, 17 U.S. at 414.
[96] *See id.* at 420.
[97] McCulloch, 17 U.S. at 420–21 (emphasis added).

Marshall says that, if no other reason can be found *in favor of restricting the clause*, then we must construe it in favor of *Congress*. Uncomfortable with his argument about the clarity of the original public meaning of the word (perhaps, due in part, to his acknowledgement that the "rigorous" meaning of "necessary" was closer to indispensable than convenient)[98] and unable to latch onto any other reasons besides consequentialist ones, Marshall simply applies a tiebreaker: favoring the interpretation of the provision that the legislative branch (Congress) has proffered. In finding himself balanced somewhat evenly between the constitutionality and unconstitutionality of the chartering of the Second Bank, Chief Justice Marshall blinked in favor of the statute's constitutionality. In getting to that point, he used notions of constitutional avoidance as a principle of constitutional construction.

PART III: THAYERIANISM AND THE CLASSICAL AVOIDANCE CANON

James Bradley Thayer casts an outsized shadow over the question of whether the classical avoidance canon should play a principal role in constitutional construction. Several of the theorists mentioned earlier, including Larry Solum, view "Thayerianism [a]s best understood as a distinctive approach *to* constitutional construction and a way of proceeding *in* the construction zone."[99] Yet, Solum admits that while he has not argued against Thayerianism[100] as a principle of construction, he "ha[s] not endorsed such a principle either."[101] In this Part, this Article argues that while Thayerianism[102]—especially its "not open to rational question" standard— sets the bar for unconstitutionality much too high,[103] its theoretical underpinnings cast doubt on whether agency and fiduciary law, as Barnett and Bernick propose, is truly the best lens through which to analyze the contours of the judicial power.

[98] See *supra* note 92 and accompanying discussion.

[99] Solum, *supra* note 23, at 523.

[100] Solum defines Thayerianism as "when the meaning of the text is unclear or uncertain, then judges should defer to decisions made by the political branches. Thus, in a case where the requirements of equal protection are unclear (because of vagueness, for example), judges should refrain from declaring legislative or executive action unconstitutional." Solum, *supra* note 23, at 473.

[101] Solum, *supra* note 23, at 473.

[102] As drawn from James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

[103] For example, John McGinnis, who agrees that the judicial power encompasses some aspects of deference (such as a "duty of clarity"), finds that Thayer's standard sets the bar too high. *See* McGinnis, supra note 5 at 847 ("Against Thayer's conception of deference, the position offered here argues that his doctrine of clear mistake stems from a misunderstanding of the jurisprudence in the early Republic.").

A. Thayerianism and the Republican Tradition

Thayer's general thesis[104]— that the Court should not invalidate federal legislation[105] unless unconstitutionality is "so clear it is not open to rational question"[106]—is arguably[107] supported in the historical record. Thayer himself discusses a litany of late 18th century and early 19th century cases that invoke some sort of "clear" or "manifest" unconstitutionality standard.[108]

Moreover, Thayer's position is an outgrowth of both Federalist and Republican positions held at the time of the founding. As demonstrated in Part II,[109] "both Republicans and Federalists expected courts to use restraint in exercising judicial review."[110] For Republicans especially, to the extent the law was not unconstitutional beyond dispute, "Republicans said the courts should leave the decision to those who had primary responsibility for deciding: the People themselves."[111] Courts were agents of the people, in the Republican view and "[w]hen they declared legislation void for being unconstitutional, they were acting in a manner they presumed their principal had commanded . . . such presumptuousness was not to be indulged lightly . . ."[112] Federalists, while also embracing judicial deference, did so for different reasons. Rather than viewing courts as agents of the people, the Federalists believed "restraint or deference was a matter of prudence and political expediency: something necessary to secure and preserve judicial (rather than popular) authority by minimizing the risks of overstepping."[113]

Thayerianism fits well within the Republican tradition of judicial deference. Thayer locates the power of judicial review as a secondary check on legislative excess: "it is always to be remembered that the judicial question is a secondary one."[114] This is because the "judicial duty now in question touches the region of political administration."[115] Because judicial duty, through judicial review, touches on political administration, "the standard of duty to which the courts bring legislative Acts . . . [is] their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it."[116]

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[104] As argued in Thayer, *supra* note 102.

[105] Thayer makes it clear in *The Origin and Scope of the American Doctrine of Constitutional Law* that federal review of *state* legislation should not be judged by the "clear error" standard. *See id.* ("[W]hen the question is whether State action be or be not conformable to the paramount constitution, the supreme law of the land, we have a different matter in hand.").

[106] Thayer, *supra* note 102, at 144.

[107] For the argument that Thayer's thesis is grounded in a post-founding, politicized understanding of the judiciary, *see generally* McGinnis, *supra* note 5, at 904-08.

[108] *See* Thayer, *supra* note 102, at 133-37.

[109] See *supra* Part II.C and accompanying discussion.

[110] Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CAL. L. REV. 621 (2012).

[111] *Id.* at 625.

[112] *Id.*

[113] *Id.* at 626. This argument inheres in Bickel's endorsement of "passive virtues." *See generally*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986).

[114] Thayer, *supra* note 102, at 148.

[115] *Id.* at 152.

[116] *Id*. at 144.

Thayer's theory thus seems premised on the idea that the judicial check—not a "full and complete" check but merely a "partial" one[117]— requires a level of deference to the legislature insofar as the *legislature*, not the courts, are imbued with "the duty of making [legislation]."[118] To the extent a law is not unconstitutional beyond reasonable doubt, the legislature—the vessel of the People—has authority to interpret the Constitution within a range of reasonableness. "The constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional."[119] Thayer's argument thus sounds in similar terms as the Republican's argument: the *People*, through their elected representatives, have authority to determine the constitutionality of their enactments, within the borders of the constitution that the judiciary fixes.[120] To do otherwise would be to steal sovereignty from the body politic and couch it in the black robes of the judiciary. This argument is of course quite similar to the argument that Brutus advanced in XI and XV.[121]

This rendition of Thayerianism—both its place as inhering in the Republican tradition of the judicial role, and as an early enunciation of the classical avoidance canon—works against the Barnett & Bernick thesis that classical avoidance has no role to play in constitutional construction. Barnett, in a recent book, specifically argues that Thayer's theory has no role to play in constitutional construction because Thayer "framed the judicial power to nullify laws" in the vision of a "concern for the will of the people" as opposed to "as a means by which the rights retained by the sovereign people are protected from their servants."[122] In this vein, Barnett chides Thayer for adhering to "Democratic Constitutionalism"—the will of the majority—as opposed to "Republican Constitutionalism," which centers on individual rights of the People.[123] Barnett and Bernick are not willing to grant any measure of deference—let alone clear error— to the legislature.[124]

But this doesn't seem quite right. Thayer's approach did embody a respect for individual rights of the People; his theory of judicial restraint was borne out of the Republican tradition of deference as opposed to the Federalist tradition. That is, the Court, as an agent for the People, is not to invalidate legislation unless the principal's command (the People, speaking through the Constitution) was *clear*. In the Republican vision of the judiciary, the Court is *itself*, to use Barnett's language, a "servant" of the People. The "means by which the rights retained by the sovereign people are protected from their servants"[125] is through Thayer's clear error standard. As a result, Thayer's principle of construction mollifies Barnet's principle concern

[117] *Id.* at 152.
[118] *Id*. at 144.
[119] *Id.*
[120] *Id.* at 148 ("The judicial function is merely that of fixing the outside border of reasonable legislative action.").
[121] See *supra* Part II.B.
[122] RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION 126 (2016).
[123] *Id.*
[124] *See* Barnett & Bernick, *supra* note 34, at 54-62 (discussing their theory of judicial engagement, which puts the burden of persuasion (and ultimately, proof) on the government to proffer reasons for a law that infringes on individual liberty).
[125] *See* Mason, *supra* note 71.

about the rights of the People being invaded by their "servants." The difference that splits the two, it seems, is a question over which "servants" pose more of a threat to individual rights: the judges or the legislators.[126]

B. Thayerianism and Fiduciary Duties

Thus, while Thayer, Barnett and Bernick all conceptualize of the government as being an agent of the People, their fear of departmental overreach is located in different branches of government.

However, Barnett and Bernick also differ from Thayer specifically on the question of *how clear* the principal's (We the People's) instructions must be in order for the judiciary to deem an act unconstitutional. Thayer, perhaps anchored in the Republican tradition, imposed a high barrier on the clarity of instruction: there must be "clear error" in order for a statute to be deemed unconstitutional.[127]

Barnett and Bernick, in building out their theory of the judge-as-agent,[128] "focus on one fiduciary duty that is particularly relevant to constitutional adjudication: the duty to follow instructions."[129] However, they take the opposite approach of Thayer. Instead of requiring that the "instructions" in the Constitution be clear in order to invalidate a piece of legislation, Barnett and Bernick advocate that judges resort to the "function" or "spirit" of a provision (or an entire Constitution) in order to fulfill their role as agents of the People.[130]

The difficulty, of course, is exactly *how* judges are to follow instructions when the semantic meaning of a provision is unclear. Barnett and Bernick turn to principles of contract law to provide an answer. Specifically, the concept of the "duty of good-faith performance enables judges to police opportunism by preventing parties from using discretion accorded them under the express terms of an agreement to defeat the fundamental purpose of the agreement."[131]

Effectively, Barnett and Bernick advise that judges use the spirit of the law as a mechanism by which to engage in good-faith construction—drawing on basic principles of contract law that a party cannot upset the fundamental purpose of an

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[126] Barnett and Bernick, while recognizing that judges themselves are also agents of the people, are much more concerned with legislative excess. *Compare* Barnett & Bernick, *supra* note 34, at 14 ("References to government officials as servants, agents, guardians, and trustees abound in Founding-era literature and in public debates") *with* Mason, *supra* note 71 at 15 ("That is, judges were understood to have a fiduciary duty to ensure that the people's agents in the other branches adhered to their fiduciary duties"). Thayer's concern lies with an overweening judiciary. *See* Thayer, *supra* note 102 at 144 (explaining how the Congress is vested with Article I power, and as judicial review touches on questions of political administration, its power of review must be circumscribed by an understanding of the limits of judicial duty).

[127] Thayer, *supra* note 102, at 144.

[128] *See* Barnett & Bernick, *supra* note 34, at 16 ("Judges are no exception to a general principle that is central to understanding the Constitution's structure and content—the principle of *fiduciary government.*").

[129] Barnett & Bernick, *supra* note 34, at 3.

[130] *See, e.g.*, Barnett & Bernick, *supra* note 34, at 34 ("For any given provision of the Constitution, there are reasons that the particular words were chosen, functions that those words were designed to perform."); Barnett & Bernick, *supra* note 34, at 37 ("When the evidence concerning the function of a particular provision is not sufficiently clear for judges to identify and apply it, judges should have recourse to the spirit of the Constitution as a whole.").

[131] Barnett & Bernick, *supra* note 34, at 23.

agreement by abusing gaps in the agreement. Barnett and Bernick lay out grounds rules for identifying the "spirit" of a provision:

> Has the judge taken account of the text, structure, and history of the provision? Has he explained why text, structure, and history point towards a particular function? Has he defined that function with precision, at the proper level of generality? If a provision serves as a number of functions and he has concluded that one is particularly relevant to the kind of case that is now before the court, has he explained why? If more than one is relevant, has he sought to identify which function is of primary importance? How does the function he claims for the text compare with others?[132]

However, agency law, specifically with regard to the problem of vague or overly broad instructions, seems ill-suited for the task of constitutional interpretation.

As an initial matter, it is unclear that the fiduciary analogy of principal and agent fits neatly into the debate over how to engage in construction. As detailed in the debates over the Council of Revision, it is doubtful whether the framers of the Constitution really intended to confer broad swaths of discretion on the judiciary, as opposed to in an agency context, where a principal can more effectively monitor an agent to verify that said agent is acting within acceptable parameters of discretion. The lack of an ability for "We the People" to effectively monitor the judiciary—save, perhaps, for a constitutional amendment or a bill from Congress—undercuts one of the main advantages of affording discretion to an agent, which is that the agent can confirm with the principal whether or not she should undertake the activity.[133] This is simply not possible in the Article III context.

Second, Barnet and Bernick are correct that agency law permits an agent fill in gaps by *reasonably* seeking to fulfill the principal's desires or wishes, as the agent knows them.[134] As basic agency law states, "[the agent] is not free to disregard what [the agent] knows about [the principal's] preferences, even if [the agent] believes them to be mistaken."[135]

However, and importantly, "suppose [the agent] had no way of knowing about [the principal's personal tastes]. How widely [others] share [the principal's tastes] is relevant to whether [the agent] acted reasonably."[136] This notion of agency law—that the discretion exercised by an agent must be *reasonably* undertaken—impugns the test that Barnett and Bernick submit. Would it really ever be reasonably ascertainable that the spirit of a certain law is X versus Y? Perhaps, yes, in particular circumstances.

But in the vast majority of others, it seems that a court would be unlikely to reasonably determine the spirit of a provision, especially given that "spirit" is often

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[132] Barnett & Bernick, *supra* note 34, at 40.

[133] Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions* at 7 (forthcoming in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (Andrew S. Gold & Paul B. Miller eds. Oxford Univ. Press 2014)) ("Agents often resolve such questions by seeking clarification from the principal.") http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5839&context=faculty_scholarship.

[134] *See id.* at 13-14.

[135] *Id.* at 13

[136] *Id.* at 14.

framed and discussed at such an elevated level of abstractness that *any* evidence of *any* "spirit" becomes compelling. Barnett and Bernick address this problem by acknowledging that "[j]udges do, however, need to take care to properly identify the level of abstraction at which the function of a provision should be characterized . . . [t]here is no way to identify the appropriate level of abstraction without examining the evidence."[137] Unfortunately, this approach is circular: judges cannot know which level of abstraction to characterize the "spirit" of the law without examining the evidence, but how can judges properly analyze and compile the evidence without having at least some sense of the level of abstraction at which they should *look* for the relevant evidence?

In short, Barnett and Bernick share some base similarities with Thayer, if one agrees that they all conceive of the judiciary, in some sense, as an agent of the People. Thayer was concerned, however, with judges using vague and unclear "instructions" as a method of thwarting the will of the People as expressed through legislative enactments. Barnett and Bernick have something of the opposite worry: judges not invalidating legislative enactments often enough, too often hiding behind the veil of semantic vagueness. In support of their admonition that judges go beyond the text, and into the spirit of the clause, Barnett and Bernick rely on agency and fiduciary principles of good faith performance. It is not entirely clear, however, that the theory of good faith performance in agency law can be mapped onto the judicial duty, if primarily due to (1) the inability for judges to confer with the principal (the People) and (2) the immense difficulty of properly formulating the level of abstraction upon which a judge could, in good faith, adduce evidence for or against a certain spirit of a provision.

PART IV: THE CLASSICAL AVOIDANCE CANON AS A TIEBREAKER

The classical avoidance canon should not, however, simply be applied reflexively when one is in the so-called "construction zone." As Bernick notes, "reflexive deference to legislative judgments"[138] marginalizes the role of the judiciary, and minimizes the duty that judges have to actually interpret the Constitution. To do otherwise would be judicial abdication.[139]

Recognizing this problem, this Article proposes instead that the classical avoidance canon be used during the process of construction as a *tiebreaker*, or something approximating a tiebreaker.[140] If the function of a particular provision is either unclear, or stands in equipoise with a competing function, the classical avoidance canon should counsel construction in favor of the legislative body. This use of the

[137] Barnett & Bernick, *supra* note 34, at 34.

[138] *See* Evan Bernick, *The Progressive Root of Judicial Restraint*, THE HUFFINGTON POST (Mar. 24, 2015), http://www.huffingtonpost.com/evan-bernick/the-progressive-roots-of-judicial-restraint_b_6925454.html.

[139] *See* Evan Bernick, *Three Generations of Judicial Abdication Are Enough: A Reply to Carson Holloway (Part II)*, THE HUFFINGTON POST Post (Apr. 14, 2015), http://www.huffingtonpost.com/evan-bernick/three-generations-of-judi_b_7040898.html.

[140] The rule of lenity, for example, is sometimes employed as a tiebreaker. *See* Muscarello v. United States, 524 U.S. 125, 138-39 (1998) (using the rule of lenity as a tiebreaker).

canon was most "prominently defended" by Justice Scalia,[141] but has been adopted by other Justices over time.[142]

U.S. v. X-Citement Video Inc.[143] provides a good example of the tiebreaking theory of constitutional avoidance. In *X-Citement*, the respondents were convicted under the Protection of Children Against Sexual Exploitation Act of 1977, which prohibits "knowingly" transporting, shipping, receiving, distributing, or reproducing a visual depiction, if such depiction "involves the use of a minor engaging in sexually explicit conduct."[144] The Court held that the *scienter* requirement—"knowingly"—applied to both the act of transportation as well as to the age of the minor, in part due to the fact that had the Court *not* read "knowingly" to apply to both clauses, the statute would be constitutionally imperiled.[145] In deploying the avoidance canon, the Court wrote that "[i]t is therefore incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress."[146]

Justice Scalia took great issue with what he charged to be the Court's tap-dance around the statute's plain unconstitutionality. Only "every *reasonable* construction," he stated, "must be resorted to, in order to save a statute from unconstitutionality."[147] Anything less would constitute judicial re-writing of the statute.[148] Justice Scalia would have found that the statute unconstitutionally criminalized protected First Amendment activity due to its strict liability scheme.[149]

Similarly, in *INS v. St. Cyr*,[150] Justice Scalia, dissenting, set forth his view on the necessary conditions for invoking the constitutional avoidance canon: "[t]he

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[141] Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1280 (2016) ("In one understanding of the canon, prominently defended by Justice Scalia, it is merely an interpretive tiebreaker—if there are two equally plausible readings of the statute, the avoidance canon selects the winner.").

[142] *See id.* at 1287 (citing Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2676 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); Nw. Austin. Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 212 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 511, 516–18 (1979) (Brennan, J., dissenting); Welsh v. United States, 398 U.S. 333, 345 (1970) (Harlan, J., concurring in the result); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 785–86 (1961) (Black, J., dissenting); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 144–45 (1961) (Black, J., dissenting); Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 213–14 (1960) (Black, J., dissenting); Kent v. Dulles, 357 U.S. 116, 131–32, 143 (1958) (Clark, J., dissenting); United States v. UAW, 352 U.S. 567, 596–98 (1957) (Douglas, J., dissenting)); *see also* Smith v. Doe, 538 U.S. 84, 110 (2003) (Souter, J., concurring) ("What tips the scale for me is the presumption of constitutionality normally accorded a State's law.").

[143] 513 U.S. 64 (1994).

[144] *Id.* at 64.

[145] *Id.* at 78 (citing New York v. Ferber, 458 U.S. 747, 765 (1982); Smith v. California, 361 U.S. 147 (1959); Hamling v. United States, 418 U.S. 87 (1974); and Osborne v. Ohio, 495 U.S. 103, 115 (1990)) ("[A] statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts.").

[146] *Id.*

[147] *Id.* at 86 (Scalia, J., dissenting) (citing Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

[148] *Id.* ("Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute or judicially rewriting it.") (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841 (1986)).

[149] *Id.* ("I would find the statute, as so interpreted, to be unconstitutional since, by imposing criminal liability upon those not knowingly dealing in pornography, it establishes a severe deterrent, not narrowly tailored to its purposes, upon fully protected First Amendment activities").

[150] 533 U.S. 289 (2001).

condition precedent for application of the doctrine is that the statute can *reasonably be construed* to avoid the constitutional difficulty."[151] The key to Justice Scalia's understanding of the avoidance canon was premised on the fact that "the doctrine of constitutional doubt is meant to effectuate, not to subvert, congressional intent, by giving *ambiguous* provisions a meaning that will avoid constitutional peril."[152]

Now, to be sure, we don't know what threshold level of ambiguity Justice Scalia is referring to. However, one can surmise that Justice Scalia envisioned the canon applying when competing interpretations were in some degree of equipoise. Otherwise, such a provision would not be particularly ambiguous. As Justice Scalia states, the avoidance canon "is a device for interpreting what the statute says."[153] Thus, it seems clear that Justice Scalia envisioned the avoidance canon as a tool to be deployed when statutory meaning was unclear even after resorting to public-meaning bearing sources. Put differently, the semantic meaning of the statutory text would be irreducibly ambiguous.[154] "The key point [for Scalia] is that [the avoidance canon] can only be used to resolve true ambiguities."[155]

Such a condition precedent not only hints at Justice Scalia's "vociferous defen[se] of tiebreaking avoidance,"[156] but is also an acknowledgement, perhaps implicitly, that constitutional construction exists as a method to be administered when semantic interpretation fails to provide a clear answer. As it happens, Justice Scalia was an ardent critic of the interpretation-construction distinction.[157] However, his use of the avoidance canon belies such criticism. As *X-Citement* and *St. Cyr* point to, Justice Scalia promoted the use of the avoidance canon when a provision was still semantically ambiguous or vague even after applying the usual methods of originalism and textualism. This seems to be the area of construction. Nonetheless, Justice Scalia was disciplined in cabining the use of the avoidance canon to situations where two competing semantic meanings were in some sense equally strong, rendering the provision irreducibly ambiguous. In circumstances such as these, he approved of the application of the classical avoidance canon, which "makes the avoidance canon more like the rule of lenity—it breaks interpretive ties by choosing the interpretation that advances certain system values."[158] The use of the classical avoidance canon in this manner has been advanced by academics as well.[159]

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[151] *Id.* (Scalia, J., dissenting).

[152] *Id.*

[153] *Id.*

[154] Irreducible ambiguity is a condition precedent for construction. *See* Farnsworth, *supra* note 15, and accompanying discussion.

[155] Fish, *supra* note 141 at 1286.

[156] *See* Fish, *supra* note 141 at 1286.

[157] SCALIA & GARNER, *supra* note 6, at 13-14 ("[N]ontextualists have latched onto the duality of construction. From the germ of an idea in the theoretical works of…Francis Lieber, scholars have elaborated a supposed distinction between *interpretation* and *construction* . . . . Thus is born, out of false linguistic association, a whole new field of legal inquiry.").

[158] *See* Fish, *supra* note 141, at 1286.

[159] *See* Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331, 336 (2015) ("[E]ven if a general canon about avoiding constitutional questions is not a reliable guide to the intended meaning of statutory language, courts could still use such a canon as a tiebreaker when their ordinary tools for identifying a statute's intended meaning leave them in equipoise between two readings."); Michael Ramsey, *A Lot More on Constitutional Avoidance*, THE ORIGINALISM BLOG (June 15, 2015)

CONCLUSION

Courts must often engage in the process of construction.[160] When semantic or linguistic meaning is impossible to accurately discern due to either due to vagueness or irreducible ambiguity, "construction becomes obvious . . . [because] [semantic] interpretation cannot resolve the case."[161]

In building towards a theory of "good faith constitutional construction," Randy Barnett and Evan Bernick would be wise to incorporate the classical avoidance canon as a principle of good faith construction. If originalists value their semantic interpretive methodology for its ability to rein in the discretion of judges,[162] they should value a constructive methodology that, if premised on application of the classical avoidance canon, would do the same.

http://originalismblog.typepad.com/the-originalism-blog/2015/06/a-lot-more-on-constitutional-avoidancemichael-ramsey.html ("I suppose if the statute is perfectly ambiguous -- that is, there are two exactly equal meanings) perhaps the avoidance canon could be a tie breaker..."); Edward C. Dawson, *Adjusting the Presumption of Constitutionality Based on Margin of Statutory Passage,* 16 U. PA. J. CONST. L. 97, 109 (2013) ("[A]t times, some Justices on the modern Court seem to view the presumption as a mere tiebreaker that will only prompt a vote to uphold the statute if other considerations are in equipoise.").

[160] *See* Kay, *supra* note 12 at 2 ("It is hard to deny the conceptual distinctness of these two kinds of activities.").

[161] Solum, *supra* note 2, at 95.

[162] Laura A. Cisneros, *The Constitutional Interpretation/Construction Distinction: A Useful Fiction*, 27 CONST. COMMENT. 71 (2010) ("[O]riginalism...concentrated on (at least) two commitments: (1) pushing against the doctrinal developments of the Warren Court and (2) constraining judicial activity by limiting judicial discretion.").