The Duty of Clarity

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Abstract

This Article shows that the Constitution contemplates that judges are to exercise a duty of clarity before declining to follow legislation because it violates the Constitution. That is, they were to exercise the power of judicial review only if the legislation at issue proved to be in manifest contradiction of a constitutional provision. The best categorization of this duty of clarity is that it was an aspect of the judicial power granted under Article III of the Constitution. But judges were also expected as part of their duty to use the ample legal methods of clarification available to pin down the Constitution's precise meaning.

Thus, this Article rejects James Bradley Thayer's famous form of radical judicial deference—that legislation should be upheld on the basis of any interpretation that could be embraced by "a rational person"—as extreme and unwarranted. Thayer followed a jurisprudential tradition that developed subsequent to the Framing in which judicial review was fundamentally a political rather than a legal exercise and in which judges necessarily made law in the interstices of a written text's unclear commands. As a result, Thayer's concept of constitutional deference does not accord with the concept of judicial duty reflected in the meaning of judicial power.

The judicial duty of clarity also suggests that the judiciary can engage only in interpretation, not construction during the course of judicial review. According to many New Originalists, construction can take place when a provision is unclear, but the duty of clarity permits the judiciary to invalidate a provision only when it clearly conflicts with the Constitution. In short, if a central thesis of these New Originalists—that interpretation runs out when a provision is irreducibly ambiguous or vague—is accurate, it is the legislature rather than the judiciary that can construct the constitutional order when the meaning of the Constitution is unclear. The judiciary's role in the course of judicial review is thus confined to interpreting the Constitution. That is an important role, but one circumscribed by its duty under law.

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Table of Contents

INTRODUCTION

The notion that judges should uphold congressional legislation if it can be supported by a possible, even if not the best, interpretation of the Constitution remains evergreen in constitutional law. This conception of judicial deference, often referred to as judicial restraint, figured prominently in debates about recent important cases in constitutional law. For instance, some commentators believed that an obligation of judicial deference militated in favor of upholding the individual mandate in litigation over the Affordable Care Act.[1]

Although there are many kinds of arguments for and against judicial deference, this Article explores originalist arguments. The Article rejects a key modern idea of judicial deference: judicial review does not require or permit courts to defer to any possible or even facially plausible interpretation of the Constitution. But it also rejects the notion that judicial review permits judges to overturn legislation based on their view of the Constitution, even if their interpretation is not clearly the best one. The conclusion here is that originalists should require a clear violation of the Constitution before invalidating legislation. But originalists should also demand that judges use the ample methods of clarification available to clarify the precise meaning of the Constitution. Both the obligations of clarity and clarification flow from the judicial duty—a duty that is an aspect of the judicial power granted under Article III of the Constitution.

Jurists of the Founding Era believed that even texts that might be unclear on their face or to a layperson could be clarified by interpretive methods and that these methods were reliable tools for discovering or establishing meaning. It was thus substantially less likely that the meaning of a provision would remain unclear after legal methods were applied. At the time of the Framing, judges were central actors in the enterprise of clarification because they were understood to be knowledgeable about the legal methods of clarification—a knowledge that would discipline their judgments.

The duty of judicial clarity raises several important issues for originalist methodology. First, although jurists writing before and after the Constitution's enactment almost universally engaged in the practice of clarification and expressly acknowledged an obligation of clarity in the exercise of judicial review, what makes such statements

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[1] *See, e.g.*, Jonathan Cohn, *Shocker: A Decision Tinged by Politics*, NEW REPUBLIC (Feb. 1, 2011), http://www.newrepublic.com/blog/jonathan-cohn/82545/vinson-ruling-affordable-care-act-mandate (criticizing absence of judicial restraint in a decision striking down the Affordable Care Act).

binding or even relevant to courts today?[2] To answer that question requires an assessment of how constitutional judicial review fits into preexisting law from which the concept emerged. This Article describes the variety of ways judicial review should be understood as either constituted by or hedged by the legal obligation to find clarity before displacing the judgment of the legislature.[3] It is the nature of the law at the time of the enactment of the Constitution that explains that continuing obligation today.[4]

A second difficulty is that statements setting an obligation of clarity might be strategic. Perhaps the judges of the early American republic wanted to speak in such language to better assuage fears of judicial usurpation and amplify their long-term power. But the obligation of clarity has deep roots, both in English law before 1789 and in the general jurisprudence at the time of the Framing.[5] The coherence of the practice with general jurisprudence substantially reduces the possibility that the statements are merely strategic.

This solution to the enduring question of the appropriate nature of judicial review reflects the centrality of the common law roots of the Constitution. In his book, *The Ideological Origins of the American Revolution*, Bernard Bailyn stated: "English law—as authority, as legitimizing precedent, as embodied principle, and as the framework of historical understanding—stood side by side with Enlightenment rationalism in the minds of the Revolutionary generation."[6] The Constitution itself was the product of those same minds caught between the traditions of the common law and the axioms of the Enlightenment.[7] An approach that requires clarity but has confidence in methods of clarification reflects the common law background of judicial review.[8] A legal concept like judicial review, itself derived from judicial duty, comes into the Constitution shaped and framed by legal concepts from the past.

The two strongest competitors to the view offered here—the view that no obligation of clarity should exist in judicial review and the view that any lack of clarity in the text triggers deference—are opposite reactions both rooted in the more severe calculus of the Enlight-

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2 *See infra* Part I.

3 *See infra* Sections II.A–C.

4 *See infra* Part IV.

5 *See infra* Parts III.A, IV.

6 BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 31 (1967).

7 *Id.*

8 *See infra* Parts III.A, IV.

enment than the winding historicity of the law.[9] The no-clarity approach depends on a logic of reason—a stark syllogism. Judges are to apply the Constitution as higher law to displace the lower form of statutory law. Therefore, statutes should be invalidated whenever they conflict with the Constitution on the best reading, according to an ordinary preponderance of evidence standard.

The strong deference rule, in contrast, depends on a logic of power. Under this view, determining the reach of unclear texts makes judges sovereign.[10] Sovereignty is better located in the legislatures.[11] Judges should therefore defer whenever there is any lack of clarity on the face of a provision.[12] This jurisprudential stance was a basis of James Bradley Thayer's argument for judicial deference in one of the most famous articles ever written about the United States Constitution.[13]

A more accurate assessment of the original understanding of judicial review dissolves the antinomy between these two more absolutist views. Against the no-deference approach, the resolution offered here argues that the Constitution was not created *ex nihilo* but against a set of practices that were constitutive of judicial power and thus of judicial review. These practices included an obligation to find a clear violation of the Constitution before displacing the action of another government actor. 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. Thayer followed a jurisprudential tradition that developed subsequently in which judicial review was fundamentally a political rather than a legal exercise. Moreover in Thayer's jurisprudence judges necessarily made law in the interstices of a written text's unclear commands without any clear framework of discipline provided by legal rules.[14] Thayer's own jurisprudence made it easy to misapply statements about clarity as directions to judges to refrain from exercising judicial review except when the text itself was pellucid and thus no "rational" person—to use Thayer's telling formulation that excluded

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9 *See infra* Sections I.B, II.B.

10 *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 148 (1893) ("The judicial function is . . . that of fixing the outside border of reasonable legislative action . . . .").

11 *See id.* at 148–49.

12 *See id.* at 150.

13 *See generally id.*

14 *See id.* at 144.

the legal learning peculiar to a jurist—can mistake the meaning.[15] Many modern constitutional theorists share Thayer's view either that judicial review is political rather than legal or that much of the Constitution is irreducibly ambiguous or vague.[16] Thus, constitutional deference has a larger scope and effect in such conceptions of law than it did at the jurisprudence of the Founding and early Republic where judges were not seen as lawmakers in that sense and where the judicial duty of clarity had jurisprudential roots in natural law rather than positivism.[17]

The position offered here also has the advantage of being the best way of reconciling two common kinds of statements about the nature of judicial review at the time of the enactment and in the early Republic: declarations that the Constitution should invalidate legislation only when its meaning is clear and aggressive judicial attempts to consider all kinds of materials to clarify meaning.[18] Justice James Iredell is sometimes seen as the original poster boy for judicial deference,[19] but a closer look at his jurisprudence reveals this same combination of beliefs in an obligation of clarity with robust confidence in the use of many methods to elucidate text. These methods could require—in the words of one of his official letters—canvassing "every consideration" and making "difficult" judgments.[20]

This reconciliation also comports with the jurisprudence of the time, which saw judges as disciples of legal meaning rather than judicial lawmakers.[21] Judicial deference to avoid interstitial lawmaking in the penumbra of a text thus is an anachronism. But the judicial obligation of clarity as an attitude that enforces care and requires the judge to consider all the possible ways of reconciling the commands of the Constitution with a statute passed by a coordinate branch reflects an originalist approach. The requirement of clarity thus acted not so much to cramp a vigorous and wide ranging judicial evaluation to discover meaning but instead to underscore the duty of judges to put aside passions and political desires and decide only on the basis of discovering the content of law.

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15 *See id.*

16 For a recent example of a scholar who embraces both premises, see Pamela S. Karlan, *Democracy and Disdain*, 126 HARV. L. REV. 1, 67–68 (2012).

17 *See infra* Part V.

18 *See infra* Part IV.

19 *See, e.g.*, Deana Pollard Sacks, *Elements of Liberty*, 61 SMU L. REV. 1557, 1558 n.1 (2008).

20 *See infra* note 228 and accompanying text.

21 *See supra* note 6 and accompanying text.

For ease of reference, the table below illustrates the difference between the originalist position offered here and the "no deference" and "Thayerian deference" positions. There are two axes of difference: the obligation to consult clarifying methods distinctive to law before deciding and the standard of certainty required before displacing legislation.

	Clarifying Methods	Displacement Standard
Originalist	Yes	Obligation of clarity
No Deference	Yes	Preponderance of evidence
Thayerian Deference	No	Beyond reasonable doubt

Some important caveats to this conclusion are in order. First, this analysis considers only questions about how courts are to interpret the language of the Constitution. At times the Constitution may require Congress to provide proof to underpin the implicit factual claims of its legislation. This Article does not consider the degree of deference congressional fact finding should receive.[22] Nor does the analysis consider the degree to which courts should defer to precedent.[23]

Second, the analysis here directly concerns the scope of the obligation of clarity to be applied to the original Constitution and the Bill of Rights. It is conceivable that some other conception of a judicial duty should inform subsequent amendments to the Constitution, although if the judicial obligation of clarity is a component of the judicial duty that is itself the justification for judicial review as an aspect of judicial power, this possibility does not seem likely.

There is also one question of terminology. The obligation of clarity discussed here is one that comes from the nature of judicial duty itself. It does not flow from a theory of politics or legislative respect as do some modern theories of judicial deference. Nevertheless in the body of this Article, this theory will also be referred to generically as a deference theory, because it requires the

22 Previously, I considered the question of such deference on pragmatic rather than originalist grounds and concluded that the judiciary should not, as a general matter, defer to Congress. *See generally* John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69 (2008).

23 Precedent is generally a different question from interpretation of the language. Although following precedent is not inconsistent with the original meaning of the Constitution, for the most part precedent rules depend on instrumental considerations. *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 154–96 (2013).

judiciary to decline to displace legislation unless it conflicts with a meaning of the Constitution that can be clearly ascertained after applying all legal methods.

Part I of the Article considers various types of judicial deference and canvasses a variety of arguments for and against judicial deference. It considers that these arguments are for the most part nonoriginalist in that they depend on policy claims not rooted in the original meaning of the Constitution.

Part II of the Article considers whether the text of the Constitution precludes a judicial duty of clarity either implicitly or by failing to mention it, making consideration of practices and statements about the subject from the time of the Framing irrelevant. It concludes that these practices and statements are relevant at least if they provide substantial evidence of a practice that bears on the meaning of judicial power and thus on the nature of judicial duty. There are three possible theories to justify using such evidence in support of a judicial obligation of clarity. First, they may help clarify the nature of judicial duty, which, as a component of judicial power in Article III, is the best justification for judicial review in the federal courts. Second, they may provide evidence of a legal backdrop at the time of the Framing under which judicial review was obliged to be exercised. Third, they might show that judicial obligation of clarity was an interpretive method by which the Constitution is to be interpreted. The Part concludes that the evidence of the judicial obligation of clarity is best understood as a part of judicial duty and thus of judicial power, but also considers the effects of other categorizations on whether that obligation can be varied today.

Part III considers the philosophical and historical background of legal interpretation that the enactors inherited from England—a background that itself has recently been greatly clarified by Philip Hamburger's *Law and Judicial Duty*.[24] That jurisprudential background combined a sense that law could be clarified though disciplined legal judgment together with an interest in harmonizing conflicting laws because all actors were thought to be trying to perceive law's true nature. Both aspects then informed the duty of a judge in a compound republic where his impartiality was to contrast with the passion and interest that might lead legislatures to disregard constitutional commands, particularly about the respective spheres of the states and the nation.

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24 PHILIP A. HAMBURGER, LAW AND JUDICIAL DUTY (2008).

Part IV considers statements and practices that bear on the judicial obligation of clarity and clarification at five points in the history of judicial review: (1) decisions by state courts concerning judicial review of state constitutions before the United States Constitution; (2) statements at the convention and ratification process for the Constitution; (3) federal court decisions in the pre-Marshall era; (4) federal courts decisions in the Marshall era; and (5) decisions interpreting state constitutions shortly after the ratification of the federal Constitution. The evidence from all periods overwhelmingly supports the view that judges combined a demand for clarity in judicial review with an aggressive use of legal methods to clarify an otherwise unclear text.

Part V considers Thayer's view of judicial deference and shows that it was a product of the jurisprudence of his time rather than that of the Founding period. His jurisprudence is particularly dependent on a notion that irreducible gaps in the Constitution could give the judiciary unconstrained lawmaking power. He considered judicial review a political rather than a legal enterprise and thus entirely overlooked the Framers' understanding that judges had peculiar expertise in tools of clarification that allowed them to close superficial gaps in meaning.

Part VI discusses the significance of this recovery of the judicial obligation of clarity for contemporary originalism. The Part first considers whether the obligation of clarity is more or less likely to be exercised in the contemporary era. It then considers the two most important recent constitutional law cases in the Supreme Court, *District of Columbia v. Heller*[25] and *National Federation of Independent Business v. Sebelius*,[26] and concludes that two of the opinions in these cases should not have been deterred by claims of judicial deference in interpreting the Second Amendment and the Commerce Clause respectively to invalidate the federal legislation at issue. It then assesses what originalists should do if the premises of the clarification aspect of classical jurisprudence turn out to be false. Finally, it suggests that the obligation of judicial clarity undermines the claims of some new originalists that judges should play a significant role in constitutional construction, as distinct from constitutional interpretation.

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25 District of Columbia v. Heller, 554 U.S. 570 (2008).

26 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

I. ARGUMENTS FOR AND AGAINST JUDICIAL DEFERENCE

A. *Defining Judicial Deference*

Judicial deference, like judicial activism and many other concepts that underlie popular debates in constitutional law, is rarely clearly defined. It can mean a variety of things and thus it is useful to try to clarify the concept before assessing whether it should be part of the originalist method. At its weakest, it might simply convey an attitude of respect for the decisions of the political branches. Before invalidating any statute, the judiciary should search particularly hard for all considerations supporting it. Perhaps this kind of judicial deference also motivates judicial decisions that favor interpreting statutes to render them constitutional. Respect for coordinate branches should make one think that the interpretation of a statute that is constitutional is likely the right one.[27]

Another sense of judicial deference is an epistemic one. Under this view, the judiciary should be more likely to uphold a statute supported by the legislature because of the epistemic value of the legislature's underlying decision that the statute is constitutional.[28] The epistemic value of deference in this context, like the epistemic value of deference to precedent, arises because constitutional questions can

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27 Although this notion of judicial constraint may underlie a rule of statutory construction that chooses the interpretation that avoids declaring a statute unconstitutional, the Supreme Court often employs a broader rule, suggesting that it prefers interpretation of statutes that will avoid even addressing a constitutional question. This version of the rule depends on yet another idea of judicial deference—that the Court should avoid pronouncing on constitutional questions until it is absolutely forced to do so. This rule seems to have less to do with respect for other branches than an attempt to minimize the frequency of judicial review, and to postpone constitutional questions as long as possible. The Court itself recognizes that this avoidance canon has a dual rationale. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (rooting the canon in "the prudential concern that constitutional issues not be needlessly confronted, but also . . . that Congress, like this Court, is bound by and swears an oath to uphold the Constitution").

In its strongest form, constitutional avoidance may reflect the practice of equitable interpretation for statutes. In this form of equitable interpretation, courts are to avoid an interpretation of an ambiguous statute that conflicted with natural law or justice. *See* HAMBURGER, *supra* note 24, at 339–40. In cases of judicial review, equitable interpretation would be designed to avoid conflict with the Constitution—as fundamental a law in the United States as natural law is in a common law system. But there have been powerful arguments that equitable interpretation was not thought to be a legitimate form of interpretation at the time of the Founding. *Id.* at 356–57; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 85 (2001). Be that as it may, equitable interpretation is not the subject of this Article. Equitable interpretation is about interpreting statutes in a latitudinarian manner, whereas this Article describes the appropriate originalist standard for exercising judicial review under the Constitution.

28 *See* Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1085 (2008).

be difficult and the fact that other minds resolved the question in one way provides some information about the likely answer.[29] But deference to the legislature likely has a weaker epistemic basis than deference to precedent because judges tend to deliberate more seriously on constitutionality than legislatures.[30] It should apply only if the political branches have actually deliberated on the constitutional issues. Moreover, even then the epistemic value of judicial deference would likely vary with the extent of the legislative consideration.[31]

The last kind of judicial deference would be more substantive. Because of some feature of the Constitution, the judiciary would not at times displace legislation, even if that legislation were inconsistent with a reading of the Constitution that they believed was even slightly better than the reading that supported the legislation.[32] This next Section explores originalist arguments for this kind of judicial deference.

B. Arguments for and Against Substantive Judicial Deference

This Section canvasses arguments for and against substantive constitutional deference. It begins in reverse order of the originalist bona fides of the argument, starting with arguments that are not all originalist and ending with those that, while having some basis in inferences from the Constitution, cannot ultimately be sustained by originalism. The rest of the Article considers an originalist argument for a judicial obligation of clarity that can be sustained.

One common argument for judicial deference is expressly nonoriginalist. It suggests that the Constitution is an old one and ill-adapted to the modern times. Thus, the judiciary should permit the political institutions, certainly Congress and perhaps the states, substantial flexibility, striking down only statutes that egregiously violate the Constitution.[33] This argument is in substantial tension with originalism because it suggests that the Constitution cannot be fully

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29 The epistemic arguments for precedent in classical jurisprudence, which saw precedents as evidence of law rather than law itself. *See* Steven D. Smith, *Stare Decisis in a Classical and Constitutional Setting*, 5 AVE MARIA L. REV. 153, 157–59 (2007).

30 *See, e.g.*, Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587–88 (1975).

31 If deference is owed to the legislature, regardless of its actual deliberation on the constitutional issue that the statute raises, the deference is more structural than epistemic.

32 *See* Thayer, *supra* note 10, at 144.

33 *See, e.g.*, Lino A. Graglia, *Revitalizing Democracy*, 24 HARV. J.L. & PUB. POL'Y 165, 166–67 (2000) (judicial restraint can relax the dead hand of the past). Others agree with this premise and argue that it suggests that the judiciary should adapt the Constitution to the times, permitting judicial review that is not in any respect deferential. *See, e.g.*, Nelson Lund, *The Cosmic Mystery of Judicial Restraint*, 14 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 100, 100

applied due to its age.[34] James Bradley Thayer makes a subtler claim for deference to the federal legislature in his article, *The Origin and Scope of the American Doctrine of Constitutional Law*.[35] He ends his article by suggesting that too intrusive a judicial review will diminish the likelihood that the legislators (and presumably the Executive) will engage in constitutional review themselves.[36] Ultimately, the Constitution is dependent on the protection of political branches and only a deferential attitude will build up that culture of legislative scrutiny.[37]

Although Thayer does make other originalist arguments in his piece, historical materials do not support this claim. Indeed, this Article argues that in republican theory at the time of the Framing, judicial review was thought necessary because the federal legislature could not be trusted to exercise impartial judgment, particularly when it was determining the extent of its own powers. It thus seems unlikely that the absence of searching judicial review would incentivize legislators to look carefully at the congruity of legislation with the Constitution.[38]

Another argument for judicial deference is simply respect for coordinate branches of government. As Thayer puts it, "where a power so momentous as this primary authority to interpret [the Constitution] is given [to Congress], the actual determinations of the body to whom it is intrusted are entitled to a corresponding respect."[39] This argument also faces the difficulty that legislatures were not thought always to have impartial judgment, particularly about their own powers.[40] Moreover, respect is given when one gives fair and indeed respectful consideration to the arguments that the legislature makes in favor of

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(2013) (reviewing J HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE (2012)).

34 Originalism can defend itself against the charge that it is forcing the polity to adhere to an outdated Constitution. *See generally* John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693 (2010) (on file with *The George Washington Law Review*) (arguing that originalism "advances the welfare of present day citizens of the United States" because such interpretative theory "preserve[s] the benefits of the widespread agreement that gave [the Constitution] birth").

35 *See* Thayer, *supra* note 10, at 144.

36 *Id.* at 155–56.

37 *See id.* at 146, 155–56.

38 *See* RICHARD A. POSNER, REFLECTIONS ON JUDGING 172 (2013) (doubting Thayer's argument that legislators would become more interested in evaluating constitutionality if judicial review were less searching).

39 Thayer, *supra* note 10, at 136.

40 *See* POSNER, *supra* note 38, at 172 (noting how Oliver Wendell Holmes likened the legislature to a "juggernaut").

its constitutional interpretation. But respect does not entail deference.

But perhaps this kind of argument can be strengthened by focusing on the tricameral structure for the passage of legislation. By the time legislation reaches the judiciary, the Constitution forces it through two screens—Congress and the President (three if one counts each step of the bicameral passage through the House and Senate as separate). Thus, assuming that the branches were following their duties, a degree of deference might be thought to follow because it overcomes multiple screens.

Such a structural inference favoring judicial deference can be analyzed in terms of Type 1 and Type 2 errors. Type 1 errors occur when a court upholds a law that it should have struck down, thus underenforcing the Constitution. Type 2 errors, on the other hand, occur when a court strikes down a law that it should have upheld, thus overenforcing the Constitution. Courts exercising a more deferential standard of review would make more Type 1 errors; they would uphold more laws, including laws that they should have struck down. Courts taking a more stringent approach when reviewing a statute would make more Type 2 errors; they would strike down more laws, including laws that they should have upheld.

The difficulty with this inference is that the tricameral structure does not tell us how likely Type 1 errors are as opposed to Type 2 errors. Moreover, the Constitution does not tell us that Type 1 and Type 2 errors are equally damaging and thus whether we should be worried about overenforcement or underenforcement. It may be that multiple stages of review were thought justified because intrusions on liberty and on the powers of the states were so grave. Such a view might well accord with the interest in separation of powers as a mechanism for limiting government.[41] Thus, it seems difficult to make strong arguments in favor of judicial deference from the tricameral structural of the Constitution.

One possible counterargument is that Type 2 errors are worse because they are harder to correct. If the Supreme Court fails to enforce the Constitution against the legislation, the legislation may be repealed in the future because it has bad consequences. But a Type 1 error enshrines the mistake in constitutional law, and constitutional amendments to correct the mistake are quite difficult.[42]

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41 *See* Patrick M. Garry, *Liberty Through Limits: The Bill of Rights as Limited Government Provisions*, 62 SMU L. REV. 1745, 1756 (2009).

42 Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L.

This claim is the best structural argument for judicial deference, but it still is not quite persuasive. First, nothing in the Constitution tells us to value Type 2 errors as worse than Type 1 errors even if they are harder to correct. Even more importantly, the claim implicitly buys into a modern presumption in favor of precedent that is hard to justify as an original matter. Although it is too large a subject for this Article to determine what the originalist view of precedent is, many originalists see it as far more modest. Some argue that precedent is in fact incompatible with originalism.[43] Others think the precedent should apply in relatively narrow circumstances.[44] Otherwise the constitutional issue should be reexamined. Either view sharply tempers the claim of deference depending on a comparison of the dangers of Type 1 and Type 2 errors and, in combination with the lack of an assigned constitutional value to these errors, prevents the counterargument from succeeding.

Yet another possible argument for deference comes less from structure than from history—that of the rejection of a Council of Revision. The council would have been composed of judges and executive officials who could veto legislation.[45] At the time of the Constitutional Convention, some states, like New York, had councils of revision, in which members of the judiciary, along with others, reviewed laws passed by the legislature and assessed their fairness and wisdom.[46] If they deemed them unfair or unwise they could send them back to the legislature for revision.[47] A similar structure was proposed for the federal government at the Convention.[48] It might thus be argued that judicial review would be more deferential than that exercised by judges in a Council of Revision.

But a competing inference is that the judiciary is to exercise a different kind of review—a legal rather than a political review. In a

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REV. 1029, 1035 n.38, 1046–51 (2014) (discussing the difficulty of amending the U.S. Constitution).

43 *See, e.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 24–28 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005).

44 *See* MCGINNIS & RAPPAPORT, *supra* note 23, at 175–97.

45 *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 94 (Max Farrand ed., 1911) [hereinafter 1 Farrand]; *see also* Robert J. Reinstein & Mark C. Rahdert, *Reconstructing* Marbury, 57 ARK. L. REV. 729, 821 (2005).

46 N.Y. CONST. of 1777, art. III.

47 *Id.*

48 It was included originally in the Virginia Plan. *See* Virginia Resolutions Presented to the Constitutional Convention on May 29, 1787, *reprinted in* MICHAEL KAMMEN, THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 24 (1986).

Council of Revision, the judiciary sits with politicians in evaluating laws.[49] It was thus not surprising that their review was not strictly legal but included political considerations.[50] Accordingly, the inference to be drawn from the rejection of the Council of Revision is not that review should be very deferential, but that it should not be policy or politically oriented. Elbridge Gerry, for instance, opposed the plan for a Council of Revision because he thought the plan created the risk that judges might mix up their two roles and bring the entirely unsuitable considerations of policy that were relevant to the deliberations of a Council of Revision into their deliberations as judges.[51]

II. Why Look at the History of Judicial Review

This Part responds to the argument that the text of the Constitution precludes any kind of constitutional gloss on judicial review, including a duty of judicial clarity, either because the text does not mention it or because the Supremacy Clause implies that the Constitution should be treated like other law and thus the standard for proving its meaning in cases of judicial review should be no different from any other law. It considers three ways in which a duty of judicial clarity may bind judges even if it is not expressly mentioned in the Constitution. First, the duty may itself be part of judicial duty that justifies judicial review as an aspect of judicial power under Article III. Second, the duty of clarity could be a constitutional backdrop—a preexisting rule that defined how the standard by which the judiciary was to displace the applicable law by a law of higher obligation. In this case, the duty would not be contained with the Constitution. Instead it would be a preexisting standard that the Constitution did not change. Finally, the duty of clarity might be characterized as an interpretive rule that applies peculiarly to the judiciary. Understanding the obligation of judicial clarity as a constitutive component of judicial duty is probably the best of the possible categorizations, although the constitutional backdrop analysis is not to be dismissed. Although the backdrop analysis might permit Congress to change the obligation of judicial clarity, the decision to characterize the judicial obligation of clarity as an aspect of judicial review or a constitutional backdrop does not make much practical difference because Congress faces constitutional constraints in expanding deference and is very unlikely to narrow it.

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49 *See* Reinstein & Rahdert, *supra* note 45, at 821.

50 *See id.* at 823.

51 1 Farrand, *supra* note 45, at 97–98.

As a result of this analysis, the historical evidence about the manner in which judges exercised judicial review before, at, and immediately after the Framing becomes relevant. So is evidence of the even older practice by which judges displaced executive commands by reference to constitutive law. Such evidence turns out to show that the obligation of clarity is as well rooted in judicial duty as is the obligation to displace legislation with the higher law when the two conflict. In other words, the nature of judicial power that justifies judicial review also imposes the duty of clarity.

A. Duty of Clarity as an Aspect of Judicial Duty

Perhaps the most powerful argument against any notion of a judicial duty of clarity that qualifies the nature of judicial review is the absence of express textual support. It is the proverbial dog that did not bark. There is no statement in the Constitution requiring a judicial obligation of clarity. That lacuna is all the more striking because the Constitution does provide peculiar rules of evidence for particular circumstances, such as the rule requiring the evidence of two witnesses before the conviction for treason.[52] Moreover, given that each branch is coordinate, one might presume that its interpretive decisions should be unaffected by other branches.[53] Gary Lawson has also suggested the usual measure of proof for a law's meaning has always been that the interpretation selected beat the other possibilities.[54] Thus, given the command of the Supremacy Clause, judges should always choose the best possible interpretation, whether of the Constitution or of a federal law, when it conflicts with another law to which it is superior.[55]

But this argument fails to consider that judicial review is a legal concept that may come with its own constitutive traditions, including a judicial obligation of clarity, and thus that proof of law in the context of judicial review may reflect these traditions. To put it another way, the argument that the absence of a specific textual command for clarity conclusively shows that judicial review includes no concept of judicial clarity is odd when the Constitution itself provides no specific textual command for judicial review itself.[56]

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52 U.S. CONST. art. III, § 3.

53 *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 229 (1994). As Professor Paulsen acknowledges, branches could be coordinate but not have complete interpretive independence. *See id.*

54 *See* Gary Lawson, *Proving the Law*, 86 Nw. U. L. REV. 859, 890–91 (1992).

55 *See id.*

56 Professor Solum does not fully consider this point in his recent argument that a rule of judicial deference cannot be found as part of the communicative content of the Constitution.

The text of the Constitution itself points to the notion that judicial review was an attribute of judicial power and duty that preexisted the Constitution, and thus that its content and contours might well have depended on its provenance and history. It is true that the Supremacy Clause makes it clear that federal statutes, treaties, and the Constitution are the supreme law.[57] But it explicitly imposes the obligation to follow this law only on state court judges.[58] Otherwise, state court judges might well have regarded federal law as foreign law, which their oaths to the state constitutions would have obligated them to ignore.[59] The Supremacy Clause thus tells state court judges to prioritize the Constitution over state law but limits the obligation to apply federal law to law made pursuant to the Constitution.

But the converse of the Supremacy Clause's imposition of an obligation on state court judges to follow the Constitution rather than state law is the absence of any statement to federal judges to follow the Constitution rather than federal law. This absence is not puzzling if judicial review was widely understood as part of judicial duty, and thus a component of judicial power of Article III. Given that federal judges were themselves actors within the federal system, they needed no special direction to apply federal constitutional law in the course of their decisions.[60] Such judicial review was an aspect of their authority and duty that had developed in the course of the Anglo-American legal experience.[61] Of course, the single most famous statement in

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See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 517 (2013). Professor Solum concedes elsewhere that legal terms of art can have meanings defined by their understanding in the legal community. *Id.* at 504. But he does not address the possibility that "judicial power" is a legal term of art that itself included a notion of deference, when judges exercised that power in accordance with their duty to apply the higher law. More generally, Michael Rappaport and I have argued that the Constitution is written in the language of the law. *See* McGinnis & Rappaport, *supra* note 34 (on file with *The George Washington Law Review*). Thus, any term in the Constitution has to be understood according to its legal context, and the legal context can be established by publicly available material in the legal community, even if that context was not known by members of the general public.

57 U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.").

58 *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 247–48 (2000).

59 *See id.* at 246–47. There were, however, instances in which judges of state courts did hold that the statutes of their states were inconsistent with the Articles of Confederation. *See* HAMBURGER, *supra* note 24, at 596–602.

60 *See* Philip Hamburger, *Law and Judicial Duty*, 72 GEO. WASH. L. REV. 1, 40 (2003).

61 *See* Philip Hamburger, *A Tale of Two Paradigms: Judicial Review and Judicial Duty*, 78 GEO. WASH. L. REV. 1162, 1171–72 (2010).

Marbury v. Madison,[62] "[i]t is emphatically the province and duty of the judicial department to say what the law is," pithily summarizes what remains the best originalist argument for judicial review.[63]

There is evidence beyond the legal text that judicial review was part of a preexisting concept of judicial duty that reflected historical understandings. In his book, *Law and Judicial Duty*, Philip Hamburger shows how judges developed a review of governmental action in England that was a precursor to judicial review in America.[64] In their own discussion of judicial review, Saikrishna Prakash and John Yoo have shown that it was widely assumed at the Convention that the federal judges would have the power of judicial review, even before the inclusion of any of the specific constitutional provisions from which jurists and commentators have tried to infer judicial review.[65] If judicial review comes from a well understood tradition of judicial duty, it is possible that some obligation of judicial deference was also part of that duty. The proof would be historical in nature and that history is discussed in Part III.[66]

B. Duty of Clarity as a Judicial Backdrop

It may not even be necessary to say that the judicial duty of clarity is incorporated in the concept of judicial review to see it as impos-

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62 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

63 *Id.* at 177.

64 *See* HAMBURGER, *supra* note 24, at 309–16.

65 *See* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 945 (2003). The claims that judicial review can be sustained from specific inferences from the text other than from a historical understanding of judicial power are weak. *See* William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 17–18 (criticizing Marshall's specific textual arguments for judicial review); *see also* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 457 (2005) (arguing that judicial review was a well understood concept before *Marbury*).

66 Another argument against the obligation of clarity might be inferred from Professor Solum's contention that Thayerian deference does not eliminate the need for a construction zone. *See* Solum, *supra* note 56, at 521–22. Professor Solum argues that Thayerian deference leads to indeterminate results in cases of conflict between the executive powers and Congress, or of Congress and the states, because the executive and state governments are democratically elected and therefore it is unclear which way deference cuts. *Id.* But however strong this argument is against Thayerian deference, it cannot be turned into an argument against the obligation of clarity. That obligation derives from the nature of the jurisprudence underlying judicial duty, not deference to democracy. It concerns how the judiciary should act to displace an action alleged to be unconstitutional. Under the obligation of clarity, the judiciary will displace that action, whether state or federal, executive or legislative, only if it can come to a clear and stable judgment that the action violates the Constitution. Thus, if a legislative action is claimed to violate executive powers, the Court will enjoin it only if its decision meets that obligation, and it will enjoin an executive action only if it meets the same standard.

ing an obligation on the judiciary. Another way to characterize this judicial duty is as a constitutional backdrop. Stephen Sachs has persuasively argued that there is a category of rules that are not actually in the Constitution but preexist the Constitution and are left unaltered by its adoption.[67] He calls these rules constitutional backdrops and argues that they may have binding effects even after the adoption of the Constitution.[68] More generally, the Constitution was not created *ex nihilo*, but was placed within a preexisting legal order.[69]

Sachs provides a variety of examples of constitutional backdrops—rules about defining the borders of states, the contempt power, and the rule against legislative entrenchment.[70] It should be noted that there is substantial evidence that all of these rules preexisted the Constitution and were not changed by its adoption. To be sure, there is not necessarily very substantial evidence of some of the details of the operation of the rules. For instance, some rules about setting the boundaries of states remain contested, but there is little doubt that we still look to a set of common law rules to set these boundaries even after the Constitution was adopted. This structure of proof is not surprising: one needs quite substantial evidence to show that a certain kind of backdrop rule should be applied, even if the details of the particular rules may be shown with less substantial evidence.[71]

C. Duty of Clarity as an Interpretive Rule

Another way to show that a judicial duty of clarity is part of the Constitution might be that it is an interpretive rule.[72] But such a duty would be different from most interpretive rules in that it would apply only to the judiciary. For instance, if a legislator seeks to interpret the Constitution in the exercise of his or her duties, a *judicial* obligation of clarity is not relevant. The unique application to the judiciary would make this obligation of clarity a different kind of interpretive rule than most other rules with which we are familiar, such as the antisur-

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67 *See* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1823–24 (2012).

68 *Id.*

69 *See* John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 750.

70 Sachs, *supra* note 67, at 1855–63.

71 Sachs himself gives judicial deference as a possible background rule. *Id.* at 1867–68.

72 On the relevance of interpretive rules, see MCGINNIS & RAPPAPORT, *supra* note 23, at 116–31.

plusage rule or *ejusdem generis*.[73] Such interpretive rules, no less than the rules of grammar, can help constitute the meaning of the Constitution.[74] Or to put it in another way, one cannot fully understand the meaning of the Constitution without understanding the background rules of law, any more than one can fully understand the significance of actions in a baseball game without understanding its rules. Interpretation is a legal "game" with rules.

D. The Best Categorization

How it is best to categorize the obligation of clarity before displacing legislation for the Constitution? Although the question is not free from all doubt, the better view is that this requirement of clarity helps constitute the judicial duty and it is not a contingent aspect of the common law that can be changed. As this Article will show, from the beginning the judicial duty of following the higher law was allied with the duty of clarity.[75] Indeed, the latter was consistently noted in defending the former.

The view that the clarity requirement is an interpretive rule clearly has some difficulties. The judicial obligation of clarity would be an unusual interpretive rule because the rule would not help constitute meaning in the same way for different interpreters. This difference may not make the category wholly inapposite: it might be possible for the judicial interpretive game to have a few rules of its own. But viewing the judicial obligation of clarity as a constituent of judicial duty—and thus judicial power—or as a constitutional backdrop that defined the standard by which judges displaced applicable law with law of higher obligation provides the better perspective.

The question of whether we should understand the requirement of clarity as part of judicial duty or simply a judicial backdrop is to inquire into what are the necessary and what are the incidental aspects of judicial duty and thus judicial power—those that are part of the Framers' core concept and those that are contingent to its application. We cannot assume that every aspect of judicial duty except the obligation to follow the higher law is a contingent—rather than a necessary—aspect of judicial duty. Judicial duty itself depends on the legal context, and an obligation of judicial clarity may have been part of the legal context as well. For several reasons, the obligation of clarity is

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73 *See id.* at 120.

74 *Id.* at 118–21.

75 *See infra* Part III.

much more like the obligation to follow the higher law itself in being a necessary, not a contingent, aspect of judicial duty.

First, there is enormous agreement on the clarity standard by judges applying the Constitution. Something that is part of the nature of judicial duty is likely to command such agreement, where something that is contingent is not. That is one of the reasons that subsequent sections of this Article spend so much time amassing evidence. As they show, no one around the time of the Framing seems to dispute the obligation of clarity.[76] Indeed there is probably more agreement that a requirement of clarity is part of judicial duty, conditional on accepting that following the higher law is part of judicial duty, than there is on the judicial duty of following the higher law itself.[77]

Second, at times those asserting that the courts had the authority not to follow law inconsistent with the Constitution suggested that this authority would be used only in clear cases as a defense to those who attacked it as a part of constitutionalism. As this Article shows, comments by Iredell and Hamilton provide examples of the manner in which the obligation of clarity is intertwined with the defense of judicial review.[78] Even Marshall's test for the assertion of judicial review in *Marbury* may fall into this category.[79] It would be somewhat cold comfort to their opponents if Hamilton, Iredell, and possibly Marshall were actually saying that the requirement of clarity was a contingent aspect of the judicial review that could be eliminated.

Third, as discussed below,[80] the obligation of clarity was present before the Constitution in both state cases and the English practice and was referred to at the Convention. The deeply rooted history of the clarity standard also suggests that when judicial power hooked on to judicial duty, the obligation of clarity came with it. Following the preexisting concept in its attributes is the best we can do to approximate the concept at the time: one has to take the bitter with the sweet.

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76 It is interesting in this respect to contrast the obligation of clarity with the practice in the early republic of not reviewing legislative purpose, which Caleb Nelson argues was a practice that was not part of the nature of judicial duty or review. *See* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. Rev. 1784, 1787–88 (2008). Although most judges did not consider legislative purpose, sometimes judges around the time of the Framing did seem to invite consideration of legislative purpose. *See id.* at 1802–03. Justice Marshall in dicta in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), expresses the idea that the purpose of the legislature might determine whether it is exercising the commerce power that is reserved to Congress. *Id.* at 201–02. Other judges in the antebellum period follow this lead. *See* Nelson, *supra*, at 1802–03.

77 *See* Nelson, *supra* note 76, at 1789.

78 *See infra* notes 173–174, 209–211 and accompanying text.

79 *See infra* notes 266–268 and accompanying text.

80 *See infra* Sections IV.A, III. A, and III.D.

The judicial duty of clarity comes into the Constitution in the same way that the duty to follow the higher law comes in—together and intertwined.

One final consideration is whether it is possible to say that the concept was tied to a fact about judicial practice that was itself obviously contingent. For instance, it would have been difficult to look at legislative purpose given the absence of records about legislative proceedings that were readily and quickly available.[81] Thus, it would be less likely that the disinclination to look at judicial purpose in the Founding era could be seen to be an inherent part of judicial duty.

On the other hand, an obligation of clarity can be applied on the theories offered without any concern about information that is likely to change. Again in this respect the obligation of judicial clarity is like the obligation to follow the higher law itself.[82]

E. The Practical Relevance of Different Categorizations

The relevance of the categorization of the judicial obligation of clarity lies in the capacity of Congress or the Supreme Court to significantly change its contours.[83] If the judicial obligation of clarity is part

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81 See Nelson, *supra* note 76, for discussion of judicial review of legislative purpose in the Founding era.

82 Assuming that the evidence this Article reviews in Parts III and IV support a concept of a judicial obligation of clarity, it is easier to regard such an obligation as part of the meaning of judicial power than it is to regard another important doctrine, precedent, as contained within the concept of judicial power. It might be thought "odd" for the text not to mention precedent if following it were a constitutional requirement. *See* John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 521 (2000) (arguing against precedent as required component of judicial power). *But see* MCGINNIS & RAPPAPORT, *supra* note 23, 168–69 (suggesting some very modest respect for precedent may be implicit in the concept of judicial power). But it is not so odd for the text not to mention a judicial obligation of clarity if it is an aspect of judicial duty to apply the higher law that was itself not textually specified. Moreover, applying a judicial obligation of clarity was functionally possible for judges of the Founding era in a way that adhering to a precedent requirement was not. *Id.* (discussing difficulty of complying with precedent requirement at the time of the Founding). Reports of past American decisions were not readily available, but judges had the legislation they were reviewing in front of them. *See* Julius Goebel, Jr., *The Common Law and the Constitution*, *in* CHIEF JUSTICE JOHN MARSHALL: A REAPPRAISAL 101, 108 (W. Melville Jones ed., 1956) (contrasting availability of English and American precedent).

83 Determining whether to categorize the obligation of judicial deference as a component of judicial duty or as an obligation of the general law that is a backdrop to the Constitution is not an easy question. As Caleb Nelson says about liquidation, "treating it as a command of the general law and treating it as a command of the Constitution is not a distinction that members of the founding generation had any immediate reason to think about." Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 552 (2003). Nevertheless, because judicial review was intertwined from the beginning with judicial deference, both being aspects of judicial duty, the better argument is that it is a component of judicial duty and thus judicial review.

of the judicial duty that is itself part of the judicial power, it could not be substantially modified without a constitutional amendment.

But if the rule is a constitutional backdrop, it is potentially subject to change. As Stephen Sachs suggested, constitutional backdrops are best understood as common law rules that form a preexisting legal framework into which the Constitution fits.[84] Because they are common law rules, it is possible that they can be changed only in accordance with law. This Section first looks at the question of the degree to which Congress, and then the judiciary, might change the obligation of clarity, if it were a constitutional backdrop.

Congress is not bound by the common law but can change it only if Congress has an enumerated power to do so. The only possible enumerated power available in this instance to change the obligation of judicial clarity would be the Necessary and Proper Clause—"for carrying into Execution . . . Powers vested by this Constitution in the Government of the United States, or in any Department . . . thereof" (the department in question being the judicial department).[85]

But the requirement of propriety in the Clause imposes substantial limitations. Congress is limited both by its relation to the judiciary and by the kind of considerations that gave rise to the rule in the first place. Given that it is the judicial department at issue, Congress must act in accordance with the rule of law values that are at the heart of that department. It must thus legislate prospectively and neutrally. Given that the judicial department is a coordinate branch in the separation of powers scheme, Congress may not legislate to aggrandize its power at the expense of this other branch.[86]

As a result, it seems likely that Congress could not legislate to make the requirement of clarity more stringent than the common law version of judicial duty requires because that would directly diminish the constitutional role of the judicial branch. In any event, as recent scholarship on the Exceptions Clause[87] has suggested, the structural barriers of bicameralism and presentment create a very substantial barrier to legislation reducing judicial superintendence.[88] There is a substantial faction of risk-averse politicians who believe that judicial independence will preserve their core interests in periods when they

84 Sachs, s*upra* note 67, at 1865.

85 U.S. CONST. art. 1, § 8, cl. 18.

86 *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 727, 770 (1986).

87 U.S. CONST. art. III, § 2, cl. 2.

88 *See* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 881–82 (2011).

are out of power and that structural barriers to the passage of legislation, like bicameralism and the Senate filibuster, generally give them a minority veto.[89]

Fewer constitutional objections impede Congress's ability to eliminate any obligation of judicial clarity. But Congress would be systematically legislating against the scope of the effect of its own powers—an unlikely prospect.

Perhaps it would be permissible for Congress to enact legislation that would vary the obligation of clarity depending on objective factors. As this Article shows, the stringency of the duty of clarity might be varied depending on the amount of constitutional consideration Congress actually gave to the legislation at issue.[90]

The question of whether the judiciary as opposed to Congress could change the rules is a separate one. The judiciary has power to change the common law, but it must have some reason to do so that is consonant with the nature of the rule. It is a little hard to see exactly what reason the judiciary would give for eliminating the obligation of clarity, particularly because this obligation is one that limits the judiciary's power and, as will be shown, was thought to help demonstrate its dispassion and neutrality.[91] In any event, the Supreme Court has never eliminated this rule.[92]

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Looked at either as a component of judicial duty which itself helps constitute the concept of judicial review or as a constitutional backdrop, the judicial duty of clarity cannot be ruled out on originalist grounds. But its existence does require substantial proof. First, this Article looks at the jurisprudential wellsprings of the obligation of clarity. Then this Article considers the very large volume of statements about the judicial duty of clarity as well as relevant judicial practices from the Founding era.[93]

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89 *Id.* at 883–84.

90 *See infra* note 308 and accompanying text.

91 *See infra* notes 163–166 and accompanying text.

92 The last Part considers the question of what the Supreme Court should do if the obligation is based on factual claims that have turned out to be false.

93 This Article takes the position that constitutional review is fundamentally a legal rather than political enterprise. Larry Kramer has contested this point. *See* Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5, 10 (2001). *But see* McGinnis & Rappaport, *supra* note 34, at 1740–41.

III. The Jurisprudential Background for the Duty of Clarity and Clarification

This Part considers the historical background for a rule of judicial obligation of clarity. Given that statements in particular opinions might be dismissed as strategic, it is important to understand how they can fit into a larger jurisprudential worldview. Thus, it is worth exploring the tradition of the obligation of clarity in review of government actions before written constitutions and, indeed, before judicial review. Philip Hamburger's important work, *Law and Judicial Duty*, shows that conscience was the measure by which English judges evaluated government action and that this measure led them to reject government action only where there was manifest contradiction between the action and the unwritten Constitution.[94] It is also worth considering eighteenth- and nineteenth-century's philosophy of legal science that led jurists to try to harmonize different kinds of law, if possible, because all law was thought to reflect an underlying natural law. Both of these aspects of the jurisprudential background help us understand how the duty of clarity could develop in tandem with judicial review.

On the other hand, legal thought at the time is also consistent with engaging in searching inquiry into the constitutionality of law and not resting content with measuring constitutionality by any possible reading of a constitutional text. At the time of the Constitution's framing, interpretation took place against the background of a notion of a comprehensive legal science. Legal science seeks to use the full range of rules to find the accurate interpretation of a legal text. These rules were thought to reduce the uncertainty of interpretation, thus clarifying meaning which might otherwise be thought unclear. The need for judicial review in a compound republic is also consistent with the sequential process of clarification and then an obligation of clarity. Judicial review is founded on the fear of willful legislatures and therefore demands searching scrutiny of the constitutional basis of the legislation, regardless of whether the legislation was federal or state. But already by the time of the Framing jurists were concerned to demonstrate that they were exercising judgment, not will. A constitutional obligation of clarity helped assure that the judicial judgments were stable and not perceived to partake of the mutability of political judgments.

This background helps to assess the scope of the judicial obligation of clarity because it shows how judges could both require clarity

94 *See* Hamburger, *supra* note 24, at 309–11.

and yet find that requirement compatible with a comprehensive use of legal methods—what an official letter from Justice Iredell calls "duly weighing every consideration"—to clarify meaning.[95]

A. Early English Origins

The notion of an obligation of judicial clarity had a foundation in the English law of applying higher law to government action. As Philip Hamburger shows, well before American judicial review judges addressed the contradictions between different legal obligations.[96] Some laws were higher in the sense that they could displace laws of lesser obligation and it was part of their judicial duty to follow the higher law.[97] But the higher law displaced the lesser obligation only if the contradiction was manifest.[98] As the seventeenth-century English theorist Jeremy Taylor put it: the contradiction "must be manifest: for if it be doubtfull, the law retains her power; for it is in possession, and the justice of it is presumed."[99]

According to Hamburger, even the King had to reconsider his judgments if manifest error was shown. Writs provided that if "manifest error" intervened, the error had to be rectified and judgment amended.[100] But to unbind the obligation in conscience to follow the order of the official, the contradiction had to be manifest.[101] A manifest error "became the measure of contradiction necessary for one law to displace the obligation of another."[102]

It is important to note that, unlike some commentators who have relied on *Thomas Bonham v. College of Physicians* (*Dr. Bonham's Case*),[103] Hamburger does *not* argue that judges in England exercised a power to decline to follow acts of Parliament. Judges felt obligated to follow such acts not because of parliamentary sovereignty but because Parliament was the highest court in the land.[104] As such, Parliament had the power to declare the Constitution, which itself was a

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95 *See infra* note 228 and accompanying text.

96 *See* HAMBURGER, *supra* note 24, at 309.

97 *See id.*

98 *See id.*

99 *Id.* at 311 (quoting JEREMY TAYLOR, 2 DUCTOR DUBITANTIUM, OR THE RULE OF CONSCIENCE IN ALL HER GENERAL MEASURES 411 (1660)).

100 *Id.* at 309.

101 *See, e.g.*, *id.* (citing TAKASHI SHOGIMEN, OCKHAM AND POLITICAL DISCOURSE IN THE LATE MIDDLE AGES 113–16 (2007)).

102 *Id.*

103 Thomas Bonham v. College of Physicians (1907) 77 Eng. Rep. 638.

104 *See* HAMBURGER, *supra* note 24, at 237–42.

matter of custom, like the common law itself.[105] But when polities in the United States separated the highest court from the legislature, courts followed their always-recognized judicial duty to follow the higher law, which now could conflict with legislative law.[106] But the English history also tells us something valuable about judicial clarity. An obligation of judicial clarity had already become part of the process of displacing lesser obligations by higher obligations: only when the error was manifest was that duty to displace the action of another government action triggered.[107]

B. Legal Science

Blackstone's commentaries were the single most influential document on the understanding of law at the time of the Framing.[108] Indeed, as one historian has stated: "All of our formative documents—the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall—were drafted by attorneys steeped in Sir William Blackstone's *Commentaries on the Laws of England*."[109] The jurisprudential background of Blackstone is also consistent with an obligation of both clarification and clarity.

The first axiom of Blackstone's jurisprudence is the denial that judges make law even when they were giving judgments about unwritten law—the common law.[110] Judicial power is "not delegated to pronounce a new law, but to maintain and expound the old one."[111] Famously, according to Blackstone, judges are to be the "the living oracles" of the law, not its fabricators.[112]

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105 *See id.*

106 *See id.*

107 *See id.* at 311.

108 There is contemporary evidence of the extent of this influence. Edmund Burke states that "nearly as many copies of Blackstone's 'Commentaries' [had been sold] in America as in England," Edmund Burke, Speech on Moving His Resolutions for Conciliation with the Colonies (Mar. 22, 1775), *in* 2 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 100, 125 (3d ed. 1869), although the population of England was substantially larger. *See* DONALD S. LUTZ, A PREFACE TO AMERICAN POLITICAL THEORY 134–40 (1992) (showing that, in political pamphlets, Blackstone and Montesquieu are three times more cited in debates over the Constitution than the next most cited figure, John Locke); JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 77 (1996) (Blackstone had even more influence in the United States than in Great Britain).

109 ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 11 (1984).

110 *See* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 34 (Herbert A. Johnson ed., 1995).

111 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *69.

112 *Id.* at *69.

Yet Blackstone was not naïve about the clarity of law or the capabilities of interpreters. Blackstone called humans the "noblest of all sublunary beings," whose endowment by reason helps them to discover the law.[113] In keeping with traditional Christian theology, however, man is a fallen creature subject to passion.[114] Thus, it is not surprising that Blackstone thought that it is important to have systemic principles to guide us to find the information relevant to the correct interpretation of the law rather than intuit the meaning directly.

In particular, even for written texts, Blackstone applied a variety of maxims derived in part from the common law in order to glean the meaning of statutes.[115] This system of jurisprudence reduces the uncertainty in a legal text through the systematic application of rules, attempting to avoid the passions and errors that are endemic to fallen man. It was not only established rules of interpretation, like that about preambles or remedial statutes, that were relevant. The spirit or purpose of the statute helps clarify law, and inquiry into purpose provides a window into the practical issues of human affairs it was meant to resolve.[116]

One of those principles was to try to harmonize laws that on their face seemed to conflict. The rationale is that all men were presumably trying to apprehend a natural law that lay behind all of man's efforts at creating law.[117] The ideal of harmony gives a reason to try to interpret the common law and statutes to be consistent.[118] Blackstone urged that statutes should not be interpreted to conflict with the com-

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113 *Id.* at *39.

114 *See* Charles J. Reid, Jr., *Judicial Precedent in Late Eighteenth and Early Nineteenth Centuries: A Commentary on Chancellor Kent's* Commentaries, 5 AVE MARIA L. REV. 47, 79–80 (2007). The notion of discovering the inherent order of law in nature "made perfect sense in a time that saw the world as shot through with certainty, illuminated with Reason, Divine Design, or the ordering hand of a Clockmaker God." Thomas S. Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 206 (1965).

115 For a cardinal list, see 1 BLACKSTONE, *supra* note 111, at *88. There were other more extensive lists of rules well known to the Framers. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1036–37 (2001).

116 *See* 1 BLACKSTONE, *supra* note 111, at *61.

117 *See* Reid, *supra* note 114, at 78–81 (discussing the divine order Blackstone saw behind law, which humans attempted to apprehend).

118 *See* Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 CIN. L. REV. 67, 83 (1985). For Blackstone, the common law was the surest way for reason to apprehend the law, but statutes could also apply natural law principles to changing circumstances.

mon law.[119] Statutes were an attempt to find nature's principles in changing circumstances.[120]

Thus, although Blackstone understood natural principles as immutable, the form they take in human circumstances may change. Blackstone's vision of a coherent law was widely shared at the time of the Founding.[121] Law was regarded as "more than a haphazard aggregation of holdings and statutes."[122] Instead it tended to approximate an organic unity.[123] When the Constitution was written it was therefore only natural to try to find harmony between the statutes and the Constitution as well.[124] The impulse towards harmonization comported with the terms of prior English law—to require a manifest contradiction before substituting judicial judgment for that of other government officials.[125]

These basic elements of Blackstone's understanding were reflected in the judging of the early Republic. As Robert Clinton Lowry has suggested, the jurisprudence of Chief Justice John Marshall and his colleagues is best understood through the prism of such classical legal thought.[126] Like Blackstone, Marshall saw law as a reflection of natural order and his interpretation of the Constitution embraces the application of "historically-honored [legal] rules" to the constitutional text.[127] Judges at the time of the Framing applied a complex set of legal hermeneutics to discover the meaning of the written texts.[128] Thus, law was not only a science but a demanding one. It required the application of a great deal of knowledge of various relevant considerations. But it was precisely the application of legal science that reflected the view of many in the founding generation that the meaning of law could be discovered, not made.[129] The practices that reflect an

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119 *See* 1 BLACKSTONE, *supra* note 111, at *89.

120 *See id.* at *86.

121 *See* Larry D. Kramer, *The Pace and Cause of Change*, 37 J. MARSHALL L. REV. 357, 375 (2004).

122 *Id.*

123 *See id.*

124 Of course, such harmony can be created in two ways: to interpret the statutes to be consistent with the Constitution or to interpret the Constitution to be consistent with the statute. Both can be part of the impulse to harmonize.

125 *See* 1 BLACKSTONE, *supra* note 111, at *90.

126 *See generally* Robert Lowry Clinton, *Classical Legal Naturalism and the Politics of John Marshall's Constitutional Jurisprudence*, 33 J. MARSHALL L. REV. 935 (2000). A point this Article will discuss at greater length, *see infra* Section IV.D.

127 Clinton, *supra* note 126, at 966.

128 *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 918 (1985).

129 *See* R. Kent Newmyer, *John Marshall,* McCulloch v. Maryland*, and the Southern States'*

obligation of judicial clarity at the time of the Framing therefore are largely compatible with applying such principles to clarify the meaning of the law. Even if the text of the Constitution taken on its own is susceptible to different interpretations, the science of law at the time creates a sophisticated technology of interpretation that is thought to reduce uncertainty.

C. Liquidation

However, as influential as Blackstone was, it is not clear that Blackstone's view that law was out there waiting to be discovered enjoyed universal acceptance. Madison, in particular, seemed to view language as having inherent ambiguities and limitations.[130] But even if Madison's formulation may suggest differences with Blackstone's jurisprudential view from a thinker who was primarily a politician and political theorist rather than a lawyer,[131] Madison still believed that unclear language could be elucidated and that elucidation was very much part of the judicial role.[132]

References to the judicial practice of "liquidation" show that even for thinkers like Madison, the judicial power extended to clarifying provisions that were unclear. Most prior scholarship on liquidation focuses on it in the context of settling an unclear text through the

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Rights Tradition, 33 J. MARSHALL L. REV. 875, 927–29 (2000) (discussing how the idea of legal science "justif[ied] and restrain[ed] the Court's powers" at the Founding. "[C]ountless rules" helped keep "judging objective").

130 *See* THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961) ("[N]o language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many, equivocally denoting different ideas."). On this point generally, see Nelson, *supra* note 83, at 526–30. For further discussion, see *infra* note 133 and accompanying text. Hamilton's views are less clear, but he famously describes the exercise of the power of judicial review "judgment," not discovery. *See* THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

131 Although Madison had studied law, he was not a member of the bar. *See* Mary Sarah Bilder, *James Madison, Law Student and Demi-Lawyer*, 28 LAW & HIST. REV. 389, 389–91 (2010). He may have been less likely than the actual lawyers of the time to work within Blackstone's paradigms. Indeed, while Bilder believes that Madison read Blackstone, *id.* at 399, it is not clear how familiar he was with the most influential primer on law. And he was not steeped like a practicing lawyer in methods of clarification. For this reason, this Article does not regard his views on legal interpretation as the best guide to the consensus of the time on the contours of the exercise of judicial duty.

132 *See* Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 309 (1989). As Philip Hamburger notes, one should not exaggerate Madison's skepticism about the capacity and importance of precision in language. Many of Madison's points reflected John Locke's views in his *Essay Concerning Human Understanding*—a view that was not entirely skeptical in this regard. *See id.* at 303–06 (citing JOHN LOCKE, ESSAY CONCERNING HUMAN UNDERSTANDING (1690)).

precedent.[133] Both linguistically and logically, however, liquidation must refer to a practice of clarification as well. Logically, the series of decisions to which liquidation is often thought to refer must begin with decisions of first and second impression that are not settled by precedent.[134] These provide opportunities for clarification on a blank slate, or at least on one where the interpretation is not set in stone.

Moreover, linguistically, "liquidate" includes a meaning of clarification. The Oxford English Dictionary ("OED") defines "liquidate" in this usage as: "To make clear or plain (something obscure or confused); to render unambiguous; to settle (differences, disputes)."[135] This definition of the word (there are several similar definitions in the OED) was in wide use starting in the 1760s, if not earlier.[136]

Some of the references to "liquidate" by the Framers also suggest that that focus on the settlement function of a course of clarifications. For instance, in *The Federalist No. 78*, Hamilton described a situation in which two statutes conflict.[137] "In such a case," he wrote, "it is the province of the courts to liquidate and fix their meaning and operation."[138] Many years later, in a letter to Judge Spencer Roane in 1819, Madison defended the Supreme Court's decision in *McCulloch v. Maryland*,[139] saying:

> It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter; more especially those which divide legislation between the general and local governments; and that it might require a regular course of practice to liquidate and settle the meaning of some of them.[140]

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133 *See, e, g.*, Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1095–96 (2003); Smith, *supra* note 29, at 165; Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 464 (2006).

134 *See* Murphy, *supra* note 133, at 1098–99.

135 *Liquidate*, OXFORD ENGLISH DICTIONARY (online ed.), http://www.oed.com/view/Entry/108917 (last visited May 22, 2016). Webster's Dictionary of 1817 includes "ascertain" within its definitions. 1 NOAH WEBSTER, NOAH WEBSTER'S FIRST EDITION OF AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 14 (Found. for Am. Christian Educ., 7th ed. 1993).

136 *Liquidate*, *supra* note 135.

137 THE FEDERALIST NO. 78, *supra* note 130 at 525.

138 THE FEDERALIST No. 78, *supra* note 130 at 525.

139 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

140 Letter from James Madison to Judge Roane (Sept. 2, 1819), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 143, 145 (J. B. Lippincott & Co. 1865).

In both of these uses "liquidate" seemed to be used in a manner that emphasizes the clarification aspect because it is allied with a term, either "fixed "or "settled," that focused on the settlement through a course of elucidating decisions. To be sure, there were uses of liquidate that seem to elide the two aspects together.[141] But given the logical necessity of clarifying the unclear in the first instance, the term "liquidate" encompasses acts of initial clarification.

Understood in this manner, the practice of liquidation confirms that for the Framers', clarification of unclear text through interpretive rules comes before any obligation of judicial clarity comes into play. It also shows that the method of clarification at the time was thought to be compatible with the view that the Constitution contained ambiguities because of the inherent limitations of language, which was clearly Madison's view.[142] If under Blackstone's jurisprudence common law methods offered a way of discovering meaning, for those who saw the need to clarify opaque texts these methods were a way of supplying meaning in a disciplined way.[143] In modern terms, it could be said that the concept of liquidation contemplates a reticulated system of information about interpretation accumulated over the years that brings greater precision to terms that might otherwise be ambiguous.[144] This view of clarification may be subtly different from the Blackstonian view that saw the legal methods as simply tools for discovering the meaning already contained in the text itself, like the use of a telescope to reveal information that is already there but which the naked eye cannot perceive.

There is also reason to believe that in the jurisprudential world of the Framing judicial elucidation should replace that of the legislator if judges' interpretations are clearly better. It is jurists who will not only have the judgment to make these clarifications but, as Hamilton noted

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141 For instance, in *The Federalist No. 37*, Madison said: "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." THE FEDERALIST NO. 37, *supra* note 130, at 236.

142 *See id.* at 237 (noting the vagueness of constitutional language and "inadequateness of the vehicle of ideas").

143 *See supra* notes 110–111 and accompanying text.

144 Here the view may be that the judiciary is delegated the authority to apply such a body of interpretive rules to bring clarity to ambiguity or vagueness. *See* Nelson, *supra* note 83, at 551–52. In contrast, under the Blackstonian view, one might not see any need for a delegation to apply such rules. The rules may have been constitutive of the meaning of the words.

in *The Federalist No. 78*, they will often possess the superior knowledge:[145]

> To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is that there can be but few men in the society, who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.[146]

If, as Hamilton implied, the process of interpretation includes clarification though rules of interpretation, the judges are likely in as good a position, if not better, to engage in clarification. Again this perspective emphasizes the common law background of the Constitution—this time the social background of common law decisionmakers. Given the requisites of legal reasoning, judges may actually have a greater superiority in the task of clarification than in discerning the ordinary meaning of words.[147]

To be sure, it can be argued that the rules, however "strict," are themselves not very clear.[148] Indeed, given that the Constitution was a relatively new legal document, it is not clear what rules of interpretation apply to it.[149] For instance, one might argue for the application of only rules that apply to any legal text, rules that apply to statutes, rules that apply to constitutions in general, or only rules that would be within the compass of the general public.[150] Some of the early Supreme Court cases are, in some important respects, debates about which interpretive rules should apply.

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145 THE FEDERALIST NO. 78, *supra* note 130, at 529–30.

146 THE FEDERALIST NO. 78, *supra* note 130, at 529–30.

147 *See id.*

148 *See* MCGINNIS & RAPPAPORT, *supra* note 23, at 128–30 (arguing that only certain rules should apply when interpreting the Constitution).

149 *Id.*

150 *See id.* (identifying possible sources of interpretive rules); *see also* Nelson, *supra* note 83, at 576 (same).

But such disagreements do not necessarily mean that jurists believed the choice of rules was indeterminate. There may be better and worse arguments for applying certain rules and not others in the constitutional context. Chief Justice Marshall did not write as if he were exercising substantial discretion when he rejected some rules and accepted others.[151] Now it is certainly possible that some sophisticated thinkers, like Madison himself, may well have conceded the rules themselves were in some measure indeterminate.[152] But even if so, if jurists had the best knowledge and understanding of the interpretive rules, they were likely to make more consistent and coherent interpretations of the Constitution through their use.[153] Thus, even under this conception, which may well have been a minority one,[154] it would have seemed sensible for judges to apply comprehensive legal methods before deferring to the legislature.

D. Judicial Review in (Compound) Republican Theory

The republican theory of judicial review also comports with the process of clarification and the obligation of clarity. Republican theory saw judicial review as the anchor of government because the judiciary was likely to be impartial in a way that the legislature was unlikely to be.[155] Thus, it embraced the relative confidence in the use of legal methods of clarification that had been traditionally employed by judges. Yet judges needed to display their impartiality. The obligation to possess a high degree of confidence in their judgments before displacing that of other government officials was a badge of impartiality.

The need for judicial review in republican theory stemmed from concern about the legislature's fidelity to constitutional limitations.[156] The modern fear about legislative fidelity to restraints comes largely

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151 *See infra* Section IV.D. Certainly, it is possible to believe as a matter of historical fact that the Federalist jurists of the time emphasized rules of interpretation to "maintain an image of judges as being bound by professional conventions while at the same time affording judicial interpreters of the Constitution as much freedom as possible to draw on the range of extra-constitutional sources in the interpretation of the constitutional text." G. Edward White, *The Marshall Court and Cultural Change, 1815–1835*, *in* 3–4 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1, 117 (Paul A. Freund & Stanley N. Katz eds., 1988). Yet the jurists themselves may have believed that they were simply following the most appropriate and best supported rules.

152 *See* THE FEDERALIST NO. 37, *supra* note 130, at 236.

153 *See* Nelson, *supra* note 83, at 577.

154 *See supra* note 134 and accompanying text.

155 G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 9 (2005).

156 *See id.* at 10.

from concern about politicians' ideological impulses to disobedience.[157] But at the time of the Framing, the greater fear was that state legislators would act systematically against the national interest and that national legislators would act against the states' interests.[158] Judicial review was presented as a mechanism for preserving equilibrium in a compound republic.

As Professor Bradford Clark has shown, the decision to use the Supremacy Clause rather than a congressional negative on state action to police violations of the Constitution showed that the Convention trusted neither the states nor Congress to police the boundaries of the authorities granted to the federal government under the Constitution.[159] Thus, judicial review under the Constitution is not just about the meaning of the Constitution, but about who should decide the meaning of the Constitution in contested cases in a federal system.[160]

At the Connecticut Ratification Convention, Oliver Ellsworth, subsequently to become the nation's third Chief Justice, best articulated how judges exercising judicial review would be a solution to the problem of boundary policing because of their relative impartiality:

> This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so. Still, however, if the United States and the individual states will quarrel, if they want to fight, they may do it, and no frame of government can possibly prevent it.[161]

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157 *See id.* at 36.

158 *See id.* at 9.

159 *See* Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 111 (2003); Bradford R. Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319, 329 (2003) (proponents of the Supremacy Clause in the New Jersey plan saw it as a check on both federal and state power).

160 I am indebted to discussions with Professor Bradford Clark on this point.

161 Oliver Ellsworth, Speech in the Connecticut Ratifying Convention (Jan. 7, 1788), *in* 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 190, 196 (William S. Hein & Co., 1996) (1891).

Thus, the judge's role in applying the Constitution as higher law provided the impartial protection of the legal boundaries of the Constitution of both state and federal legislatures, not a structure for policing the states more stringently than the federal government.[162]

At the same time, some who accepted the republican theory of judicial review were very concerned to make sure that judges were genuinely dispassionate and not partisan.[163] Justice Story, for instance, was at pains to disavow a compliment that his famous constitutional commentaries reflected a substantive position against Jeffersonian policies.[164] Particularly in a compound republic where one of the most essential struggles remained that of the relative scope of state and federal power, it was important to ground law in a process of dispassionate elucidation. Indeed, for the Framers the stakes were very high; republics of any kind, but particularly complex compound ones, were liable to degeneration without careful preservation of their equilibrium.[165]

Thus, republican theory both privileges the judges' role in assuring the maintenance of the Constitution's meaning over time and is concerned about their potentially partisan nature.[166] A doctrine that judges should strike down legislation only when they believe there is a clear violation takes account of both concerns because it makes it less likely that judicial decisions will appear mutable. When this mood is allied with a method of judicial interpretation that has a large toolbox of aids to bring clarity where a more intuitive or less learned approach would be more likely to indulge passion, it creates a particular and peculiar kind of judicial attitude—one that is confident that the application of legal methods can bring clarity to the question of a statute's constitutionality, but that upholds the statute if that clarity cannot be established.

The most famous statement of the republican theory of judicial review in American history—*The Federalist No. 78*—touches on all

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162 This understanding also is in substantial tension with the view expressed initially by Thayer and subsequently by others that the Court should defer to the federal legislature but not to the state legislature on constitutional questions. *See infra* notes 320 and accompanying text.

163 *See* White, *supra* note 155, at 10–13.

164 *See id.* at 12 (quoting JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION vi (1833)); *see also* White, *supra* note 151, at 103–04 (suggesting that Story attempts to frame his conclusions about the Constitution as "general opinion" rather than his own and that his opinion was "treated as an apolitical, neutral concept").

165 *See* White, *supra* note 155, at 28, 69.

166 *See id.* at 10.

these themes.[167] It is of course well known that Hamilton's premise for judicial review was that judges will be exercising "judgment" rather than "will" and thus are indispensable as "bulwarks of a limited constitution" against the possible willful usurpations of the legislative branch.[168] But Hamilton also recognized the antifederalist concern with the "arbitrary discretion in the courts."[169] He had two solutions to the problem that are not as widely discussed as his endorsement of judicial review. First, he suggested the harmonization theme discussed earlier that is itself an echo of the obligation of clarity in the English tradition.[170] Judges were to invalidate statutes only if there is an "irreconcilable variance" between the statute and the Constitution.[171] This gloss on judicial review suggests that judges must find a clear violation of the Constitution, one that cannot be reconciled by the harmonizing impulse of legal interpretation at the time.[172]

But consistent with another axiom of Blackstone's jurisprudence, Hamilton believed that the key to preventing undue discretion will be the "strict rules" by which judges are to be bound.[173] Thus, Hamilton also reflected the general jurisprudential confidence of the lawyer of his age that, through the complex body of rules for interpretation, judges will be able to bring clarity to a text without resorting to their own policy preferences.[174] Following the constraint of rules is another signal of judicial impartiality. When reading *The Federalist No. 78* in the context of the general tenets of jurisprudence at the time and re-

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167 THE FEDERALIST NO. 78, *supra* note 130.

168 *Id.* at 526.

169 *Id.* at 529.

170 *See id.* at 527.

171 *Id.* at 525

172 Hamilton enlarges on the same point elsewhere. He states in *The Federalist No. 78* that Court's duty "must be to declare all acts contrary to the *manifest* tenor of the constitution void," *id.* at 524 (emphasis added), and in *The Federalist No. 81* that "wherever there is an *evident* opposition, the laws ought to give place to the constitution," THE FEDERALIST NO. 81, at 542 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added). For discussion of this point, see CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW, FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW 79 (1994). It might be thought that Hamilton undercuts the requirement of exercising judicial review only in clear cases by suggesting that judges should "mitigat[e] the severity" of "unjust and partial laws." THE FEDERALIST NO. 78, *supra* note 130, at 528. But these positions are not themselves in irreconcilable variance. For Hamilton, judges are to construe law, if possible, in the interests of justice and against partiality. But they are to strike down law only if there is an irreconcilable variance between them and the Constitution. As Christopher Wolfe notes, there is a good reason for this difference: Congress can easily amend legislation, but constitutional amendments are far more difficult. *See* WOLFE, supra, at 79.

173 THE FEDERALIST NO. 78, *supra* note 130, at 529.

174 *Id.*

publican theory, it becomes quite illuminating about the nature of judicial review and its limits.

It also helps us reconcile what might seem in tension between the premises of the older Blackstonian vision of harmonizing the law and the republican theory of need for judicial review. That ideal emphasizes the unity of the law that comes from all men seeking the natural law,[175] but the republican theory emphasizes that the turbulence of politics may take people away from the constitutional principles set by the people.[176] The first might be thought to suggest a unity of the law consistent with constitutional deference and the second, a haphazard legislative process that requires no deference at all. Hamilton retained the notion of presumptive unity, while recognizing the excesses of the democratic process—excesses that had been brought home to the Framers in the Critical Period.[177] His reconciliation of this tension flowed from his confidence that rules and learning will discover meaning.[178] Thus the jurisprudence at the time of the Framing made it quite possible to retain a notion of the judicial obligation of clarity with a vigorous and wide ranging judicial search for meaning. That reconciliation is achieved though the confidence that the judges can clarify the law through hermeneutic principles.

IV. Evidence About the Duty of Clarity and Clarification from the Framing Period

This Part turns from the relevance of general jurisprudence of the Framing period to look at the specific evidence for the obligation of clarity in the period surrounding the Framing. It divides the evidence into five areas: (1) cases involving state judicial review before the federal Constitution; (2) comments in the debates over the Constitution; (3) federal judicial decisions in the pre-Marshall Court; (4) federal judicial decisions in the Marshall Court; and (5) state judicial decisions involving state constitutions after the framing of the federal Constitution.

The evidence confirms that judges exercised both an obligation of clarity and a process of clarification. The cases combine statements that judges should invalidate legislation only when the meaning of the

175 *See* David Jenkins, *From Unwritten to Written: Transformation in the British Common-Law Constitution*, 36 Vand. J. Transnat'l L. 863, 875 (2003).

176 *See* Ethan J. Leib, *Redeeming the Welshed Guarantee: A Scheme for Achieving Justiciability*, 24 Whittier L. Rev. 143, 149–50 (2002).

177 *See* Darren Patrick Guerra, Perfecting the Constitution: The Case for the Article V Amendment Process 63 (2013).

178 *See* The Federalist No. 78, *supra* note 130, at 529.

Constitution is clear with vigorous use of "every consideration," in the words of the letter that Justice Iredell signed in connection with *Hayburn's Case*,[179] to clarify the meaning of the Constitution.[180] It is manifest that courts do not accept any possible textual reading that upholds the statute if through the legal science of the day they can find a clearly better reading that condemns it, and courts are generally confident in their ability to come to clear conclusions because legal rules point to considerations that systematically reduce uncertainty.[181]

A. Cases Before the Constitution

An important case before the Constitution for analysis of the judicial obligation of clarity is *Commonwealth v. Caton*.[182] It provides evidence that the judicial obligation of clarity was an aspect of judicial review but one compatible with the application of many hermeneutic methods to the text to determine its meaning.[183]

In that case, three prisoners convicted by the Commonwealth of Virginia for treason tried to avoid execution by relying on a resolution of the Virginia House of Delegates that pardoned them.[184] The Senate, however, had not concurred and a statute that had previously been passed stated that a pardon could not be provided by the governor alone, but required a resolution of the General Assembly (i.e., the House and Senate).[185] Additionally, a provision of the Virginia Constitution arguably gave the House of Delegates the power to pardon on its own.[186] A question thus arose whether the statute forbidding

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179 Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

180 Letter from James Iredell and John Sitgreaves to George Washington (June 8, 1792), FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/05-10-02-0290 (last visited June 18, 2016).

181 Dean Treanor seems to argue that in a variety of cases, including those concerning juries and judicial power, the courts did not take a deferential approach in judicial review. Treanor, *supra* note 65, at 458–59. Some of his readings of cases are disputable. *See infra* notes 242–243. Moreover, as Philip Hamburger has suggested, there is some danger in twenty-first century second-guessing of eighteenth-century cases. *See* HAMBURGER, *supra* note 24, at 13 n.30. But more importantly, as this Part shows, there is a very large number of statements that suggest that the obligation of deference was not confined to a particular set of cases and that this obligation was widely known. Treanor does not explain how his analysis is consistent with this evidence.

182 Commonwealth v. Caton, 8 Va. (4 Call) 5 (1782).

183 *See id.* at 8.

184 *Id.* at 5.

185 *Id.* at 5 n.† ("The governor, or in case of his death, inability, or necessary absence, the councillor who acts as president, shall in no wise have or exercise a right of granting pardon to any person or persons convicted in manner aforesaid, but may suspend the execution until the meeting of the general assembly, who shall determine whether such person or persons are proper objects of mercy or not, and order accordingly.").

186 *Id.* at 9 ("But he (the governour) shall, with the advice of the council of state, have the

the pardon was constitutional.[187] Thus the stage was set for the argument that the statute should be held void for violating the Constitution.

The most interesting evidence of the views about the nature of judicial review are not so much the opinions of the judges as arguments of the lawyers. Eight judges sat on the case and there are records of only two of their opinions in full, those of Judges Wythe and Pendleton.[188] Wythe supports judicial review, did not mention any standard for constitutional review, and provides a complex argument for his position that the pardon is not valid, discussing at length the history of impeachment to show that the constitutional provision limiting pardons to the House of Delegates was limited to impeachments, not ordinary criminal law.[189] This position certainly reflected the view that close legal reasoning could be part of judicial review. Pendleton, in contrast, did not ultimately reach the question of whether judicial review is permitted, but frames it in way that suggests some requirement of judicial clarity:

> But how far this court, in whom the judiciary powers may in some sort be said to be concentrated, shall have power to declare the nullity of a law passed in its forms by the legislative power, without exercising the power of that branch, contrary to the *plain terms* of that constitution, is indeed a deep, important, and I will add, a tremendous question.[190]

The arguments of the lawyers recently discovered by Dean William Treanor are more interesting for our analysis. Two of the most important advocates took the positions on the fundamental questions of judicial review and obligation of clarity that are in tension with the ultimate conclusion they want the court to draw, thus suggesting that both judicial review and the concept of judicial obligation of clarity as part of it were both well established. Edmund Randolph argued for judicial review, despite the fact that if the court strikes down the statute it would undermine the government's position.[191] It is not so sur-

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power of granting reprieves or pardons, except where the prosecution shall have been carried on by the house of delegates, or the law shall otherwise particularly direct; in which cases, no reprieve, or pardon, shall be granted, but by resolve of the house of delegates.").

187 *Id.*

188 *See* William Michael Treanor, *The* Case of the Prisoners *and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 529 (1994).

189 *Caton*, 8 Va. (4 Call) at 7–13.

190 *Id.* at 17 (emphasis added).

191 *See* Treanor, *supra* note 188, at 506–11, 518; *see also* HAMBURGER, *supra* note 24, at 491 (describing Randolph's dramatic reversal to embrace this position).

prising that he argues for a judicial obligation of clarity: he does not want the court to strike the statute down.[192]

St. George Tucker, the most able and illustrious of the lawyers arguing the case, also took this view, although, as a lawyer appointed by the court to give his view, he believed the statute was unconstitutional.[193] Importantly, the standard he said the court should apply was that "[i]f any Act" of the Assembly "be found absolutely & *irreconcileably* [sic] contradictory to the Constitution, it cannot admit of a Doubt that such act is absolutely null & void."[194] Thus, the "absolutely and irreconcilably" standard appears to have been the general rule.[195]

But Tucker then made a variety of arguments to interpret the meaning of the provision at issue, including looking at the spirit of the document.[196] While accepting obligation of clarity, he emphatically did not confine himself to an argument that the express terms of the Constitution rendered the statute unconstitutional.

Other state cases that exercised judicial review before the Constitution are much less useful in gauging the extent or scope of judicial review, because we do not have opinions for the cases. The only case that sheds some light certainly does suggest that extra-textual historical evidence could be used to clarify meaning. In *Holmes v. Walton*,[197] the New Jersey Supreme Court struck down a statute that permitted loyalists' property to be seized and then directed that a jury of six men adjudicate the seizure.[198] A loyalist challenged the procedure on the

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192 *See* Treanor, *supra* note 188, at 517.

193 3 St. George Tucker, *Argument in the* "Case of the Prisoners" (Commonwealth v. Caton), *in* 3 St. George Tucker's Law Reports and Selected Papers 1782–1825, 1741, 1745–46 (Charles F. Hobson ed., 2013).

194 *Id.* at 1745. This standard, as reported by St. George Tucker himself, is similar. "Therefore I hold, that any Act of the Legislative, absolutely contradictory, or repugnant to the Constitution, to be absolutely null and void—& consequently that the Judges are not bound to consider such Act as a Law." *Id.* at 1744.

195 It might be argued that Tucker's statement about the standard of judicial review simply suggests that when the irreconcilable conflict between a statute and the Constitution is clear, unconstitutionality is beyond doubt and thus has no implication of a standard of review. This is not the best reading, given that Randolph laid out a similar standard.

196 For a discussion of these arguments that include invocation of a rule of lenity, see Treanor, *supra* note 188, at 522–29.

197 There likely was no written opinion in *Holmes v. Walton*. Austin Scott, Holmes v. Walton*: The New Jersey Precedent*, 4 Am. Hist. Rev. 456, 459 (1899). The opinion in this case was given orally and was not contemporaneously recorded. *Id.* As Larry Kramer notes, the principal record is a recounting in *State v. Parkhurst*, 9 N.J.L. 427, 444 (1802). *See* Kramer, *supra* note 93, at 37 n.333.

198 Treanor, *supra* note 65, at 474–75. One difficulty in giving too much weight to this case is the absence of an opinion. The opinion in this case was delivered orally and was not contem-

theory that a jury of six men was "contrary to the constitution of New Jersey."[199] But the Constitution required only a right of jury trial and did not specify a number.[200] Nevertheless, the English common law had specified twelve as the number of people on a jury for hundreds of years.[201] Thus, the court interpreted jury as a term that in light of its history required twelve individuals.[202] Accordingly, the case provides more evidence that judicial review did not require courts to defer to any possible meaning of the text, but that they read the text in light of historical traditions.

Another piece of evidence comes not from a case or its opinion but from a letter about a case exercising judicial review. *Bayard v. Singleton*[203] concerned yet another instance of the expropriation of land from loyalists—perhaps the most important fault line in post-Revolutionary War America that the judiciary had to address.[204] Elizabeth Bayard was the daughter of such a loyalist and sued for return of her lands, arguing that a 1785 act that barred loyalists from challenging expropriation violated the North Carolina Constitution and in particular the right to trial by jury.[205] The North Carolina Supreme Court tried to encourage settlement,[206] but ultimately concluded that it could not follow a law inconsistent with the Constitution.[207]

James Iredell—the future Supreme Court Justice—argued in a public pamphlet that the North Carolina Supreme Court had no choice but to consider the law's constitutionality because of the duty of judges to follow the law. In a lengthy letter he then answered Richard Dobbs Spaight, who doubted the power of review. Iredell argued that constitutional review was part of the exercise of judicial power.[208] "The Constitution, therefore, *being a fundamental law*, and a law *in writing* of the solemn nature . . . , the judicial power . . . must take

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poraneously reported. As Larry Kramer notes, the principal record is a recounting in State v. Parkhurst, 9 N.J.L. 427, 444 (1802). *See* Kramer, *supra* note 93, at 37 n.333.

199 Treanor, *supra* note 65, at 474.

200 *Id.* at 475.

201 *See, e.g.*, James B. Thayer, *The Jury and Its Development* (pt. 2), 5 HARV. L. REV. 295 (1892).

202 Treanor, *supra* note 65, at 474.

203 Bayard v. Singleton, 1 N.C. (Mart.) 42, 43 (1787).

204 *See id.*

205 CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 112–13 (2d ed. 1959).

206 *Id.* at 113.

207 *Id.* at 118.

208 Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), *in* 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 172, 173 (Griffith J. McRee ed., 1857).

notice of it as the groundwork of that as well as of all other authority."[209] But he conceded later in the letter that "[i]n all doubtful cases, to be sure, the Act ought to be supported: it should be unconstitutional beyond dispute before it is pronounced such."[210]

This letter was not published in Iredell's lifetime and certainly did not influence the Constitution directly. But what it shows is that a leading jurist of the day steeped in legal history believed that a constitution was law like other law (not some new form of political-legal review) and yet that the judiciary should stay its hand in the doubtful case.[211] For Iredell, both propositions were apparently aspects of the duty of a judge.[212] Thus this letter is consistent with the jurisprudence that colonists inherited from England that combined a belief in formalism with an impulse to harmonize.

B. The Debate at Philadelphia and in the Ratifying Conventions

The debate over the Constitution at Philadelphia and in the ratifying conventions also contained expressions that support some kind of constitutional obligation of clarity in the exercise of judicial review. These statements, however, are not useful in approximating its scope. First, they lack the context of any particular case where we can perceive the standard being used. Second, they were used in the context of a political debate. Nevertheless, these comments comport with the other evidence for an obligation of clarity.

Two of delegates at the Philadelphia Convention who acknowledged that judges would possess the power of judicial review nevertheless noted that this power would be limited. James Wilson—the future Supreme Court Justice—complained that only laws that were "so unconstitutional" would be invalidated.[213] According to George

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209 *Id.* Iredell was a lawyer for Bayard in the case. *See* HAINES, *supra* note 205, at 114.

210 Letter from James Iredell to Richard Dobbs Spaight, *supra* note 208, at 175.

211 *See* Gerald Leonard, *Iredell Reclaimed: Farewell to Snowiss's History of Judicial Review*, 81 CHI.-KENT L. REV. 867, 880 (2006). Gerald Leonard similarly uses Iredell's position on the *Bayard* case as an important part of his evidence to refute the thesis of Sylvia Snowiss (based on a misreading of that same case) that judicial review was not understood as part of the application of law in the normal course of judicial duty but as a special political-legal review that was linked to the right of revolution. *See id.* at 872.

212 On relevance to the judicial duty, see HAMBURGER, *supra* note 24, at 462–66.

213 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 73 (Max Farrand ed., 1937) [hereinafter 2 Farrand]. In the ratification debates, Wilson did not note this qualification to judicial review:

> If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void. For

Mason, federal judges "could declare an unconstitutional law void," but would have to give "a free course" to "every law however unjust oppressive or pernicious, which did not come *plainly* under this description."[214] It may be that Wilson and Mason had a strategic reason to minimize the power of judicial review because they favored the Council of Revision that would have more far reaching power to block problematic legislation. But it is also noteworthy that they are setting up a contrast between a legalistically oriented role for judges and a more policy oriented and political one that would be exercised in a Council of Revision. That contrast in turn reflected the dichotomy between law and politics that marked republican theory at the time. It was important, as Justice Story's later action suggested,[215] for the operation of law to be seen as different from politics, and this standard was one way of demarcating the difference.

There was little discussion of the standard of judicial review in the ratification debate, other than the significant comments in *The Federalist No. 78* already discussed. This lacuna is not surprising given that the ratification debate covered scores of issues, most of which were more significant and accessible than what would have seemed a subtle issue for lawyers.

Nevertheless, one of the provisions added in the Bill of Rights—the Ninth Amendment—provides strong evidence that the enactors believed the interpreters would consider legal rules to help clarify meaning rather than adopt any plausible meaning of the text.[216] The Amendment shows that the Framers expected that the Constitution would be interpreted against the background of legal interpretive rules to clarify meaning.[217] For instance, without the Ninth Amendment, it was feared that interpreters might apply an antisurplusage

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> the power of the Constitution predominates. Anything, therefore, that shall be enacted by Congress contrary thereto will not have the force of law.

The Pennsylvania Convention Proceedings and Debates of the Convention (Dec. 7, 1787), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 512, 517 (Merrill Jensen ed., 1976). This omission is not necessarily surprising, as the context did not call for a detailed discussion of the nature of judicial review. Subsequently, as a Justice, Wilson labels as "obvious" the incongruity between the Constitution and the pension statute at issue in *Hayburn's Case*—the only case in which he wrote invalidating a congressional statute.

214 2 Farrand, *supra* note 213, at 78 (emphasis added).

215 *See supra* note 165 and accompanying text.

216 *See* MCGINNIS & RAPPAPORT, *supra* note 23, at 126–27.

217 *Id.* In a forthcoming paper, Professor Rappaport and I describe other parts of the Constitution that show the expectation that interpreters would apply clarifying interpretive rules. *See* John O. McGinnis & Michael B. Rappaport, *Defending Original Methods* (on file with author).

rule to conclude that the failure to enumerate a right was a denial of the right.[218]

C. *The Pre-Marshall Court*

The federal judiciary in the era before Chief Justice Marshall decided a few cases where questions of judicial review arose, but those cases provide strong support for the double thesis that judges embraced a constitutional duty of clarity but that this duty was consistent with the employment of a wide variety of legal rules and considerations to affix the meaning of the Constitution. The duty of clarity did not enjoin judges to uphold legislation so long as it was based on any plausible reading of the Constitution.

The most telling evidence of the scope of the duty of clarity from this period comes in a letter to President George Washington signed by James Iredell in *Hayburn's Case*.[219] In that case, Congress had passed a statute that required pension seekers to file an application together with proof of eligibility to the federal circuit, which in turn determined eligibility and certified the applicant to the Secretary of War.[220] The Secretary of War was authorized to put the applicant's name on a list to be paid, but also retained authority to refuse the pension to someone on the list if he believed there had been a fraud or a mistake.[221] Three federal courts considered and rejected the constitutionality of the statute as written because it attempted to bestow a non-judicial power on the Court given that their decision could be revised by an officer not part of the judiciary—namely the Secretary of War.[222] The courts nevertheless consented to act as commissioners rather than as judges to advance the worthy cause of supporting de-

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218 *See* McGinnis & Rappaport, *supra* note 23, at 127. Professor Solum has suggested that the Ninth Amendment blocks a rule of judicial deference. *See* Solum, *supra* note 56, at 522. However, there is no particular reason to think that it was intended to have this effect given the very plausible preexisting rules of interpretation at which the Ninth Amendment is aimed at blocking. This claimed effect of the Ninth Amendment would not accord with the way it was understood by knowledgeable legal observers at the time because judges appear equally committed to following the duty of clarity both before and after the ratification of the Bill of Rights. No one at the time appeared to think that the Ninth Amendment made any difference to the obligation of clarity. *Id.* at 474. Given that the contextual understanding of judicial power offered uncovers a meaning that concerns the relation of legal rules—that between judicial review and the duty of clarity, the fact that no lawyers noticed this effect seems a decisive objection to the claim.

219 Hayburn's Case, 2 U.S. (2 Dall.) 409, 412–14 (1792).

220 Act of March 23, 1792, ch. 11, 1 Stat. 243 (repealed 1793).

221 *Id.* § 4.

222 *Hayburn's Case*, 2 U.S. (2 Dall.) at 410–14.

serving veterans.[223] But they wrote President Washington telling him of the constitutional difficulties with the statute.[224]

The letter from the court on which Justice James Wilson sat is sometimes quoted for information about judicial deference.[225] At the end of its letter, that court stated: "To be obliged to act contrary, either to the obvious directions of Congress, or to a constitutional principle, in our judgment equally obvious, excited feelings in us, which we hope never to experience again."[226] On its face this statement is not an express standard of judicial review because it is simply a statement of how obvious was the unconstitutionality of the legislation. But the claim about the obviousness of both the statute and the Constitution does suggest that Wilson and his fellow circuit judges thought they were acting consistently with the "irreconcilable variance" standard articulated by Hamilton.[227]

The more interesting sentiment in *Hayburn's Case* about the nature of judicial review has never been discussed in the legal literature. The letter from James Iredell and a district court colleague noted:

> We beg leave to premise, that it is as much our inclination, as it is our duty, to receive with all possible respect every act of the Legislature, and that we never can find ourselves in a more painful situation than to be obliged to object to the execution of any . . . . *But, however lamentable a difference in opinion really may be, or with whatever difficulty we may have formed an opinion, we are under the indispensable necessity of acting according to the best dictates of our own judgment, after duly weighing every consideration that can occur to us*.[228]

The italicized parts of this passage show the limited scope of the obligation of clarity in the Founding era. It might be initially thought that these words reject the concept completely, but that would be a mistaken interpretation. As this Article has shown, Iredell himself argued against striking down a statute in a doubtful case in state constitutional review before the Constitution.[229] Just six years after

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223 Maeva Marcus & Robert Teir, Hayburn's Case*: A Misinterpretation of Precedent*, 1998 WIS. L. REV. 527, 529–34 (recounting history of the case before it reached the Supreme Court).

224 *Id.* at 530. Marcus and Teir label these letters advisory opinions. *Id.* at 534.

225 *See, e.g.*, Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113, 165 n.316 (2003).

226 *Hayburn's Case*, 2 U.S. (2 Dall.) at 412.

227 *See supra* note 171 and accompanying text.

228 *Hayburn's Case*, 2 U.S. (2 Dall.) at 412 (emphasis added).

229 *See supra* notes 208–209 and accompanying text.

Hayburn's Case, Iredell expressed the same view in *Calder v. Bull*.[230] There he wrote that: "If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case."[231] Thus, both before and after *Hayburn's Case* Iredell affirmed a judicial obligation of clarity.

The better interpretation is that this passage provides evidence about the scope of judicial review. The kind of constitutional constraint practiced at the Founding was consistent with deploying every consideration—that is every legal rule and all relevant evidence, including indications of purpose—to reduce uncertainty and thus inform the best dictates of judgment to allow the judge fully to carry out his judicial duty.[232] Iredell acknowledged that it may be "difficult" to form a judgment about unconstitutionality, but it was the obligation of the judge to try.[233] If he could not come to rest in his mind that there was an incongruity between the statute and the Constitution, the statute should stand.[234] But given that the judge was obliged as matter of judicial duty to search every consideration, even ones of substantial difficulty, there was every prospect of dispelling doubts.[235]

Iredell also took this approach in *United States v. Villato*,[236] where sitting on circuit he struck down a state statute on naturalization as beyond the power of the Pennsylvania Constitution to enact.[237] The question was one of state rather than federal constitutional law, but still concerned the issue of whether higher law could trump statutory law.[238] Did the Pennsylvania Constitution of 1790 permit it to sustain a naturalization statute?[239] The predecessor Pennsylvania Constitution had contained a power of naturalization,[240] but the constitution of 1790 had omitted this power.[241] Iredell interprets this silence adversely because of the change.[242] He might also have been influenced

230 Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); *supra* note 208, at 399.

231 *Calder*, 3 U.S. (3 Dall.) at 399.

232 *See Hayburn's Case*, 2 U.S. (2 Dall.) at 412.

233 *See id.*

234 *See Calder*, 3 U.S. (3 Dall.) at 399.

235 *See Hayburn's Case*, 2 U.S. (2 Dall.) at 412.

236 United States v. Villato, 2 U.S. (2 Dall.) 370 (C.C.D. Pa. 1797).

237 *Id.* at 372.

238 *Id.* at 370–71.

239 *Id.*

240 PA. CONST. of 1776, § 42.

241 PA. CONST. of 1790.

242 *See Villato*, 2 U.S. (2 Dall.) at 373 ("The only act of naturalization suggested, depends

by the fact that in the interim the United States Constitution had provided Congress with a power of naturalization, leading Pennsylvania's fundamental law to defer to the national power.[243] Here Iredell was again searching for all considerations to interpret the new constitution's silence on naturalization.[244]

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upon the existence, or non-existence, of a law of Pennsylvania; and it is plain, that upon the abolition of the old constitution of the state, the law became inconsistent with the provisions of the new constitution, and, of course, ceased to exist, long before the supposed act of naturalization was performed.").

243 Iredell in fact speculated that the federal government might have exclusive power over naturalization:

> [I]f the question had not previously occurred, I should be disposed to think, that the power of naturalization operated exclusively, as soon *as it was exercised by Congress*. But the circumstances of the case now before the court, render it unnecessary to enquire [sic] into the relative jurisdictions of the State and Federal governments.

Id. at 373 (emphasis added). Dean Treanor believes that these two sentences show an absence of deference "to state statutes when those statutes implicate national concerns." Treanor, *supra* note 65, at 530. His argument is a little quick. Iredell's statement is obviously dicta. Because of its brevity, it is not even clear that this dictum provides an interpretation of the Constitution rather than a claim of preemption, as the italicized words about Congress's exercise of its powers might suggest. Even if it were a claim about the exclusivity of the naturalization power in the federal government, that claim can be rooted in textual argument. For instance, in his discussion of the Dormant Commerce Clause in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Marshall describes why the grant of some powers to the federal government may take them away from the states. *Id.* at 199–200. Powers cannot be understood as concurrent when the powers necessarily conflict. *See generally* Norman R. Williams, *The Dormant Commerce Clause: Why* Gibbons v. Ogden *Should Be Restored to the Canon*, 49 ST. LOUIS U. L.J. 817, 822–24 (2005) (discussing Marshall's rejection of the dormant power over commerce).

244 Dean Treanor correctly argues that this case reveals that a statute "can be 'plain[ly]' unconstitutional even if close legal reasoning is necessary to reveal the unconstitutionality." *See* Treanor, *supra* note 65, at 529 (alteration in original). Iredell's stance in fact exemplifies the clarification and obligation of clarity approach suggested here. In *Villato*, Iredell did not defer to a plausible reading of the text, but, as is clear from the interpretive method outlined in *Hayburn's Case*, he is not content to rest simply on the text but looks to all relevant considerations for clarification. Judge Peters took a similar approach. *See Villato*, 2 U.S. (2 Dall.) at 372.

Treanor argues that the opinion of Justice Patterson who rode circuit in *Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795), is not "premised on close reading of the text" because the opinion relies on a truncated fundamental rights analysis, not simply the text of the Constitution. Treanor, *supra* note 65, at 524. But the constitutional provision in question read that all men "have certain natural, inherent and inalienable rights, amongst which are . . . acquiring . . . and protecting property." PA. CONST. of 1776, § 1. The constitutional text here invites inquiry into understandings of natural rights. And although Justice Patterson's discussion is brief, the government action here, which essentially took property from A and gave it B, was the paradigm case of violating natural rights. *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (providing this example as a paradigm case of rights' violation); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 798–99 (2009) (arguing that the approach in this case is consistent with originalism).

Another example comes from *United States v. Ravara*.[245] At the appellate level, the question was whether a lower court could entertain a prosecution against a foreign counsel.[246] Article III provides:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.[247]

The question presented in *Ravara* was whether jurisdiction was exclusive in the Supreme Court. The majority of the Court held it was not exclusive and thus the statute was not unconstitutional. Although the opinions of the case were sparsely reported, Iredell recollected what was dispositive for the majority:

> I think the principal reasons assigned by Judge Wilson and Judge Peters were that [the prosecution was within the general] Act of Congress . . . that tho' an Act of Congress plainly contrary to the Constitution was void, yet no such construction should be given in a doubtful case; and that in this case, the Constitution, tho' it said "the Supreme Court should have *original* jurisdiction," yet not having said it should be also *exclusive*, it was not necessary to give such an interpretation to it. I think these were substantially the reasons.[248]

The opinions in *Hylton v. United States*,[249] the only pre-Marshall Supreme Court case that engaged in judicial review of a federal statute, are also consistent with the twin tendencies of requiring clarity for invalidation and the deployment of a robust set of tools to bring clarity to the Constitution. *Hylton* concerned the constitutionality of a tax that Congress had imposed on carriages.[250] If the tax were a "direct

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245 United States v. Ravara, 2 U.S. (2 Dall.) 297 (1793).

246 *See id.* at 297–98.

247 U.S. CONST. art. III, § 2, cl. 2.

248 CASTO, *supra* note 110, at 223 (citing Iredell, *Recollections of the Opinions in* Ravara (McDougall Papers, New York Historical Society) (mislabeled "Memoranda by John Jay")). It is true that Iredell struck down the statute on the grounds that the purpose of original jurisdiction was to make sure that cases that might disturb the peace of the Republic, like those against foreign representatives, should be lodged in the Supreme Court. *See id.* at 224. But as Casto notes, even Iredell on reconsideration appeared to think that the better course was to interpret the statute not to provide jurisdiction in the lower courts, thus avoiding the Constitutional question. *See id.* at 224–25.

249 Hylton v. United States, 3. U.S. (3 Dall.) 171 (1796).

250 *Id.* at 171–72.

tax," it would have triggered Article I, Section 9's requirement that direct taxes be apportioned among the states in proportion to their population.[251] If labeled direct, the carriage tax would have violated the requirement because the tax was not apportioned but instead was applied uniformly across the states.[252]

Justice Samuel Chase referred to the clarity standard for judicial review—a standard expressly embraced in one form or another by six of the pre-Marshall Court justices.[253] After concluding that the carriage tax is not a direct tax, Chase ends his opinion saying that "it is unnecessary, *at this time*, for me to determine, whether this court, *constitutionally* possesses the power to declare an act of Congress *void*, on the ground of its being made contrary to, and in violation of, the Constitution; but if the court have such power, I am free to declare, that I will never exercise it, *but in a very clear case*."[254]

But Chase's opinion is quite complicated and is also consistent with the view that there are substantial tools at disposal for judges to enforce clarity on matters that may initially appear unclear.[255] Chase made some complex interpretive arguments to clarify the meaning of "direct tax" that must be apportioned according to population. For instance, Chase denied that the Constitution creates a dichotomy between direct and indirect taxes. Chase reasoned that if the Constitution had wanted such a dichotomy, it would have provided: "Congress shall have power to lay and collect *direct* taxes, and *duties*, *imposts* and *excises*; the *first* shall be laid according to the *census*; and the *three last* shall be *uniform* throughout the *United States*."[256] Because Chase believed that the Constitution permitted a third category of tax—both "direct and indirect," as he described it—he concluded that the carriage tax was within a category of taxes not apportioned.

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251 U.S. CONST. art. I, § 9; *Hylton*, 3 U.S. (3 Dall.) at 172.

252 *See Hylton*, 3. U.S. (3 Dall.) at 172–75.

253 Besides Iredell, Chase, and Wilson, Bushrod, Washington, and William Paterson also articulated a similar standard for constitutional interpretation. In *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14 (1800), Justice Paterson wrote: "[T]o authorise this Court to pronounce any law void, it must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative implication." *Id.* at 19. Justice Washington wrote: "The presumption, indeed, must always be in favour of the validity of laws, if the contrary is not clearly demonstrated." *Id.* at 18. In *Cooper*, the Justices were not interpreting the United States Constitution, but rather evaluating whether a Georgia law violated the constitution of that state. *Id.* at 14–16. But there is no suggestion that they are stating a proposition peculiar to Georgia rather than to the nature of constitutional review.

254 *Hylton*, 3 U.S. (3 Dall.) at 175.

255 *See* McGinnis & Rappaport, *supra* note 244, at 800–01.

256 *Hylton*, 3 U.S. (3 Dall.) at 173–74.

Justice Paterson's opinion considered evidence extrinsic to the text itself to pinpoint the meaning of a direct tax. Paterson quoted from Adam Smith's *The Wealth of Nations*, which had been published approximately a decade before the Constitution, to show how the terms "direct tax" and "indirect tax" were used.[257] Thus, he certainly does not seem to be proceeding as if Congress could choose any possible meaning of direct and indirect tax, but was trying to find the best meaning, drawing on the relevant technical literature of the time.[258] It is not necessary to endorse all the Justices' arguments in *Hylton* to conclude that their style follows Iredell's admonition to consider all relevant considerations to clarify the Constitution's actual meaning rather than to uphold Congress on any plausible interpretation.

D. The Marshall Court

The Marshall Court's approach to constitutional interpretation is continuous with that of the pre-Marshall Court—statements about the obligation of clarity are not infrequent, but the application of canons of construction and other aids to interpretation belie any notion that the Court is deferring to any plausible interpretation of the Constitution.

Because Chief Justice Marshall so dominated the Marshall Court, evaluating the nature of judicial review on that Court largely revolves around analyzing the opinions of Marshall himself. But the focus on Marshall's writing should not obscure the fact that most, if not all, of his colleagues generally joined the opinions. As time went on, Democratic-Republican Presidents appointed his colleagues.[259] Thus, his consistent position about the obligation of clarity and clarification suggest a unity that militates against any claim that this approach was confined to Federalist partisans.[260]

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257 *Id.* at 176 (opinion of Paterson, J.).

258 Justice James Iredell also made some clarifying arguments. Viewing the apportionment requirement as operating on states rather than individuals—because the amount of the tax was based on the state's population—Iredell narrowly construed the requirement on the ground that the Constitution generally applied to individuals and had largely dispensed with the Articles of Confederation's principle of operating on states. *Id.* at 181 (opinion of Iredell, J.). This interpretive rule resolves ambiguity by looking at the overall structure of the document, suggesting that Iredell would look at every consideration to clarify meaning before upholding legislation.

259 After 1811, Democratic-Republican appointees constituted a majority of the Court. *See* William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 900 (1978).

260 *Cf. id.* (suggesting the importance of the agreement of Republican Justices in the Marshall Court decisions for understanding Marshall's jurisprudence).

In two cases Marshall embraced the obligation of clarity familiar from earlier courts. In *Fletcher v. Peck*,[261] a case that struck down the Georgia legislature's decision to repeal a land grant as inconsistent with the Contract Clause, he wrote: "The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case."[262] In the case of *Trustees of Dartmouth College v. Woodward*,[263] a case that invalidated New Hampshire's attempt to change the charter of Dartmouth College under the same Clause, he expressed similar sentiments:

> This court can be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative act is to be examined; and the opinion of the highest law tribunal of a State is to be revised: an opinion which carries with it intrinsic evidence of the diligence, of the ability, and the integrity, with which it was formed. On more than one occasion, this Court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared, that, in no doubtful case, would it pronounce a legislative act to be contrary to the constitution.[264]

It is true that both these cases review state rather than federal law for constitutionality. But in neither case did Marshall's language make a distinction between constitutional review of state legislation and constitutional review of federal legislation. Indeed, by referring to the "more than one occasion" which the Court had declined to invalidate legislation in a "doubtful case," he seems to be referring to expressions in the course of federal constitutional review in such cases as *Hylton v. United States*.[265]

In *Marbury*, Marshall does not offer an express statement about judicial obligation of clarity.[266] But, on more than one occasion, he used the term "repugnant to the Constitution" to describe the standard for judicial review.[267] For example, he wrote that "an act of the legislature, repugnant to the constitution, is void."[268] Philip Hamburger has shown that the term "repugnant," as applied against

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261 Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

262 *Id.* at 128.

263 Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

264 *Id.* at 625.

265 *Id.* For further discussion, see *supra* notes 249, 253 and accompanying text.

266 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

267 *Id.* at 177, 180.

268 *Id.* at 177.

the laws of the Colonies, referred to a law that flatly or absolutely contradicted English Law.[269] For example, when interpreting Parliament's 1696 Act for Preventing Frauds and Regulating Abuses in the Plantation Trade, which held void any American laws "repugnant" to English law, London's agent for Massachusetts and Connecticut interpreted this to mean "*a law in the plantations may be said to be repugnant to a law made in* Great-Britain, *when it flatly contradicts it*."[270] Repugnant then may well have been a legal term with a meaning of "clearly or manifestly inconsistent." In any event, in *Marbury*, Marshall nowhere disavowed the articulation of the judicial obligation of clarity that he makes in other cases.

But as with the pre-Marshall Court, the avowal of an obligation of clarity is consistent with a vigorous use of legal resources to bring clarity to the Constitution. Perhaps the most obvious example is *Marbury* itself. In that case, of course, the Court refused to accept original jurisdiction over a writ of mandamus on the theory that Congress did not have the authority to extend the Court's original jurisdiction beyond that which Article III established.[271] At issue in *Marbury* was whether Congress, as Marshall interpreted it to have done in section 13 of the Judiciary Act of 1789,[272] could add to the cases that the Constitution included within the Court's original jurisdiction.[273] If it could not, then section 13 was contrary to the Constitution and thus void.[274] The Constitution provides in relevant part:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.[275]

But Marshall rejected the argument that Congress could add to the Court's original jurisdiction by applying several interpretative rules, most notably relying on the antisurplusage rule.[276] According to

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269 HAMBURGER, *supra* note 24, at 312–13.

270 JEREMIAH DUMMER, A DEFENCE OF THE NEW-ENGLAND CHARTERS 68 (1721) (italicization in original).

271 *See Marbury*, 5 U.S. (1 Cranch) at 174.

272 Judiciary Act of 1789, ch. 20 § 13, 1 Stat. 73, 80–81.

273 *See Marbury*, 5 U.S. (1 Cranch) at 174.

274 *See id.*

275 U.S. CONST. art. III, § 2, cl. 2.

276 *See Marbury*, 5 U.S. (1 Cranch) at 174–75.

Marshall, the Framers would not have added this sentence if they had not meant it to be exclusive:

> If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplussage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.[277]

Thus, Marshall argued that in light of the antisurplusage rule, the better interpretation is exclusive.[278]

As with the pre-Marshall Court, one difficulty in ascertaining the standard of judicial review is that there are few cases in which the Court invalidated a statute on constitutional grounds. But even in cases where the law was upheld, Marshall's analysis does not simply rest on any cursory claim that a statute is supported by a plausible reading. Instead he sought to persuade that it is the better reading. To be sure, he began his analysis in *McCulloch* with a strong statement of deference: "An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded."[279] But he

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277 *Id.* at 174.

278 *See id.* The use of the antisurplusage principle was not unique to Marshall. *See* Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 88–89 (1793) ("The repetition of the term, judges, shows that it was in contemplation that both the tribunals, and the judges should be distinct and separate.").

279 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819). Here Marshall may run together deference to legislation and deference to settled practice. For instance, prior to this sentence he writes:

> But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice.

Id. Marshall then goes on the speak about the relevance of precedent, particularly that of the Executive:

> After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever exper-

went on to deploy a number of subtle legal arguments, suggesting he is searching for the best interpretation of the Constitution rather than a plausible one that will nevertheless uphold the federal legislation.

For instance, Marshall argued that "necessary" in the Necessary and Proper Clause should not be read as strictly necessary because the phrase "necessary" is qualified as "absolutely necessary" elsewhere.[280] Here he applied a canon of what is now known as intratextualism that discovers meaning from considering a slight variation in wording from one clause to another.[281]

But Marshall also considered interpretive rules rooted in the structure of the Constitution. He rejected Maryland's argument that the Constitution should be interpreted strictly because it was a compact among the states. But he did not reject it simply by stating that the legislature should get the benefit of the doubt. Instead, he argued that the interpretative rule was wrong.[282] According to Marshall, the Constitution was not a compact among the states, but a delegation of power by the national people to their representatives and thus the argument for strict constitutional interpretation was not well founded.[283] Thus, even in upholding a congressional statute, Marshall's reasoning reflects a jurisprudential process of clarification—deploying what he believes are the proper rules of interpretation to clarify meaning rather than resorting immediately to some canon of deference to shortcut the search for the best interpretation of the Constitution.

Another example of Marshall's approach is his interpretation of "commerce" in *Gibbons v. Ogden*.[284] He argued that if it is unclear on its face whether commerce encompassed navigation, one should resort to a clarifying legal rule:

> If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is

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ienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law.

Id. at 402. Of course, this last argument is really a kind of argument from authority: George Washington, father of the nation, approved the bank!

280 *Id.* at 413–15 (quoting U.S. CONST. art. I, § 10, cl. 2).

281 *See generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (suggesting this method).

282 *See McCulloch*, 17 U.S. (4 Wheat.) at 403–04.

283 *Id.* And Marshall was not making this argument up. *See* Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution"*, 72 IOWA L. REV. 1177, 1248–49 (1987) (showing that the notion that a national people created the Constitution, rather than a compact among the states, went back to the Philadelphia Convention).

284 *See* Gibbons v. Ogden, 14 U.S. (1 Wheat.) 1 (1824).

> a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case.[285]

Given that it was clear that the national government was to have power over vessels and seaman, Marshall concluded that the term commerce must be understood to include navigation.[286]

E. State Courts in the Early Republic

The final cases to consider are state cases engaged in constitutional review of state statutes for consistency with the state constitution in the early Republic. These cases may generally provide less probative evidence than either state cases before the Constitution or federal cases in the early Republic because they less clearly reflect the background of federal constitutional meaning. Nevertheless, they are broadly consistent with the twin themes this Article has discussed elsewhere. There were statements of an obligation of clarity by a variety of judges often combined with vigorous constitutional scrutiny.[287] And one particularly salient bit of evidence is a state court reference to a tradition of an obligation of clarity throughout the United States, including in its supreme court.[288] This reference and some similar sug-

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285 *Id.* at 188–89. Marshall was not using "construction" in the sense that modern scholars use it to distinguish between construction and interpretation. *See* MCGINNIS & RAPPAPORT, *supra* note 23, at 145; *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 13–15 (2012) (suggesting that "construction" at the Founding refers to the noun equivalent of the verb "construe" rather than "construct").

286 *Gibbons*, 14 U.S. (1 Wheat.) at 189–90. Despite upholding an aspect of the Judiciary Act of 1802, *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803), does not shed much light on deference. In response to a challenge that Supreme Court judges could not act as riding circuit court judges as the Act required them to do, Justice Patterson responded:

> Another reason for reversal is, that the judges of the supreme court have no right to sit as circuit judges, not being appointed as such, or in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.

Id. at 309. Patterson's conclusion depends on a view of previous precedent and practice, not deference.

287 *See, e.g.*, Andrew T. Hyman, *The Substantive Role of Congress Under the Equal Protection Clause*, 42 S.U. L. REV. 79, 122 (2014).

288 The memory of this aspect of judicial duty remained even after the Civil War. John Bingham, for instance, declared in 1868:

gestions strongly indicate that such a judicial obligation of clarity was widely known at least among the legal profession. This knowledge makes the absence of any objection to the notion even more telling evidence that the concept as understood and qualified here was widely accepted.

The most extensive discussion of constitutional review came in *Kamper v. Hawkins*.[289] There the question was whether the Virginia legislature followed the proper appointment method and other conditions specified in the Virginia Constitution when creating a district court. Under its constitution, the Virginia legislature was given the power to appoint, by joint ballot of the two houses, the judges of the Supreme Court of Appeals, the General Court, the Chancery Court, and the Admiralty Court. These judges, who were to be commissioned by the Governor, were to continue in office during good behavior. The district court judges created by the legislature were different in a variety of respects. For instance, they were not commissioned by the governor, and they were not protected by good behavior tenure. The constitutional question at issue was whether the legislature could establish courts through different appointment methods and with different tenure protections than those specified in the state constitution.[290]

Thus, all justices on the court held that the Virginia Constitution prohibited the creation of the justices by the legislature even if the constitution did not do so explicitly. Some of the judges in the case offered language consistent with an obligation of clarity, but showed a willingness to employ structural arguments that resolved the ambiguity in the constitution against the constitutionality of the statute.[291] They thus showed that an obligation of clarity was compatible with searching judicial review that goes beyond express textual commands.

> It has been settled law in this country from a very early period that the constitutionality of a law should not be questioned, much less be adjudged invalid, by a court clothed by the Constitution with jurisdiction in the premises, unless upon a case so clear as to scarcely admit of a doubt . . . .

2 THE TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIME AND MISDEMEANORS 425 (Gov't Printing Office 1868); *see also* Hyman, *supra* note 287, at 122 (discussing other instances in which members of Congress and the Supreme Court reiterated this standard in the antebellum and Civil War era).

289 Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20 (1793).

290 *Id.* For a fuller discussion of the case on which this discussion relies, see McGinnis & Rappaport, *supra* note 244, at 794–96.

291 *See, e.g.*, *Kamper*, 3 Va. (1 Va. Cas.) at 61, 66.

The opinion by Judge Spencer Roane is particularly instructive. He argues that "the judiciary may and ought to adjudge a law unconstitutional and void, if it be *plainly repugnant* to the letter of the Constitution, or the fundamental principles thereof."[292] But it is clear that for him plain repugnancy did not require inconsistency with an explicit textual provision. As he also stated: "I now think that the judiciary may and ought not only to refuse to execute a law expressly repugnant to the Constitution; but also one which is, by a plain and natural construction, in opposition to the fundamental principles thereof."[293] These fundamental principles are structural: Roane also showed that the legislature's appointment method creates courts that do not serve under good behavior, which conflicts with another constitutional provision requiring the separation of legislative and judicial power.[294] Thus, legal methods bring out unconstitutionality that is only implicit in the text of a constitution.[295] One other point about his opinions bears emphasis: Spencer Roane was a strong Democratic-Republican and Chief Justice Marshall's greatest judicial antagonist.[296] Yet they approached their exercise of judicial duty in similar ways.

One state supreme court expressly referred to the United States Supreme Court's endorsement of a standard of clarity required before invalidating legislation.[297] In *Commonwealth ex rel. O'Hara v. Smith*[298] in 1811, Chief Justice William Tilghman of the Supreme Court of Pennsylvania stated:

> It must be remembered, however, that for weighty reasons, it has been assumed as a principle in construing constitutions, by the Supreme Court of the *United States*, by this Court, and every other court of reputation in the United States, that an

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292 *Id.* at 40 (emphasis added).

293 *Id.* at 35–36.

294 *Id.* at 41–42.

295 Other judicial opinions in the case are consistent with this approach. For Judge John Tyler, the constitutional violation must be "plain and clear," but he finds such a violation. *Id.* at 61, 66.

296 *See generally* Note, *Judge Spencer Roane of Virginia: Champion of States' Rights—Foe of John Marshall*, 66 HARV. L. REV. 1242 (1953).

297 Another indication of the wide acceptance of the standard was the reaction of the judges of the Pennsylvania Supreme Court in *Respublica v. Duquet*, 2 Yeates 493 (Pa. 1799). There the defendant argued that a municipal ordinance against the erection of wooden houses in a certain part of the city was unconstitutional as beyond the municipality's power. The Attorney General responded that "[t]he defendant in order to succeed, must make out a clear case; on him lies the *onus probandi*; every legal presumption is in favour of the constitutionality of the acts of the legislature." *Id.* at 497–98. The court actually interjected its agreement: "The law clearly is so; we must be satisfied beyond doubt, before we can declare a law void." *Id.* at 498.

298 Commonwealth *ex rel.* O'Hara v. Smith, 4 Binn. 117, 123 (Pa. 1811).

> act of the legislature is not to be to declared void, unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.[299]

Such references show how widely accepted had become the judicial obligation of clarity in constitutional cases.[300]

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Thus, the evidence from all these sources is overwhelming that judges publicly embraced an obligation of judicial clarity. Besides the many cases that indicate that the judiciary should strike down legislation only when it clearly violated the meaning of the Constitution, there is also negative evidence: no jurists expressly denied a standard requiring clarity.[301]

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299 *Id.* at 123 (emphasis added).

300 To be sure, in at least one instance, a court provided an exuberant gloss on judicial deference that goes beyond what was stated and practiced in the Supreme Court:

> But if the judicial department can declare an act unconstitutional, in what manner ought a power of such magnitude be exercised? I think it ought only to be exercised where the act is directly in the teeth of the constitutional provision; . . . no nice doctrines, no critical exposition of words, no abstract rules of interpretation, such as may fit the elucidation of principles in a legal contest between individuals, can, or rather ought, to be resorted to in deciding on the constitutional operation of a statute. This violation of a constitutional right ought to be as obvious to the comprehension of every one, as an axomatic truth; as that the parts are equal to the whole.

Grimball v. Ross, 1 Charlton 175, 178 (Ga. Super. Ct. 1808). It is equally obvious, however, that this is not the formulation or the practice of Justices on the Supreme Court or most state judges of the era. It is a single decision of a trial court in Georgia and thus has even less weight than most cases interpreting state constitutions in the early Republic in helping inform the nature and scope of constitutional deference.

301 Professor Solum has argued that St. George Tucker took a position against deference by embracing a rule of strict construction. *See* Solum, *supra* note 56, at 521 (quoting 1 St. George Tucker, Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia 307–08 (Augustus M. Kelley ed., 1969) (1803)). But in the understanding of clarification and deference offered here, Tucker's proffered rule is a substantive rule of constitutional interpretation to be applied before reaching any question of deference. Second, Tucker's rule itself was not widely accepted and expressly rejected by the Supreme Court jurisprudence of the time. *See, e.g.*, McCulloch v. Maryland, 17 U.S. 316, 401 (1819). St. George Tucker was an agrarian Republican, *see* Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 Duke L. Rev. 1229, 1252 n.108, and out of sympathy with the nationalism of the Constitution, *see* Kurt T. Lash, "*Tucker's Rule": St. George Tucker and the Limited Construction of Federal Power*, 47 Wm. & Mary L. Rev. 1343, 1367–72 (2006). Finally, Tucker's embrace of the rule of strict construction is, at best, indirect evidence of his view about deference. There is far more direct evidence from his own embrace of a rule of deference in the *Prisoners' Case*. *See supra* notes 193–196 and accompanying text.

It might be argued that the duty of clarity is not a component of judicial power because some cases considering the constitutionality of a statute do not mention it. But the evidence from mere omission is generally weak and particularly so here. It might be that in some cases the result was so obvious that the standard might not have mattered and thus was not mentioned. Moreover, as this Article has shown, a very large number of judges do mention the standard, including six from the pre-Marshall Court and Chief Justice Marshall himself—the justice who wrote the vast majority of constitutional decisions for his Court. There is nothing to suggest that these statements would not guide their practice even in cases not mentioned. Indeed, in the *Ravara* case, the standard is not mentioned in the reports of the case.[302] Yet on recollection Justice Iredell believed it dispositive for the other judges who sat with him.

The evidence also shows that the obligation of clarity coexisted with a confident practice of discovering meanings even in situations that might initially seem unclear by the application of methods that over the centuries had been designed to elucidate meaning. No judge ever suggested that he was upholding legislation on less than the best reading of a statute, and most judges applied methods to elucidate the meaning of a statute they initially found obscure or difficult. Jurists believed that meaning could be discovered, and they had tools for systemically discovering or clarifying it—tools that focused on information that would reduce the uncertainty that remains when viewing the text alone.[303] The judge is to "weigh[ ] every consideration," in the words of Justice Iredell, to form a judgment even if that enterprise is difficult.[304] Even when the imperfections of language frustrate fixing meaning on the basis of the text considered in isolation, there are, as Chief Justice Marshall observes in *Gibbons*, well-settled rules that are able to aid the judge.[305]

To be sure, the capacity of legal methods to reduce uncertainty does not necessarily imply that the uncertainty can be reduced sufficiently to meet the clarity standard. But given that meaning is in principle discoverable or at least capable of disciplined elucidation, according to the jurisprudential views of the time, and that the appli-

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302 *See supra* notes 245–248 and accompanying text.

303 *See* Solum, *supra* note 56, at 460–61.

304 Hayburn's Case, 2 U.S. (2 Dall.) 409, 412 (1792) (quoting Letter from James Iredell and John Sitgreaves to George Washington, *supra* note 180).

305 *See* Gibbons v. Ogden, 22 U.S. 1, 187–88 (1824); *see also supra* notes 284–285 and accompanying text.

cation of legal methods reduces uncertainty, the most important barrier to that certainty is the lack of confidence that a judge has been able to bring to bear all relevant information to the problem. In the years before there was a text—in the years of judging the legality of government action in England in which judicial duty first was born—it would not be surprising that the judicial obligation of clarity may have been not infrequently decisive. But as judicial review came of age under a written constitution subject to elucidation by rules of interpretation, it became less often decisive in fact.

Three other points of importance emerge. First, there is only one relatively clear express suggestion that a standard of clarity should be applied differently depending on the legal issue presented. That suggestion came in *Kamper*, when Judge Roane indicated that in cases concerning the scope of judicial power, the judiciary, being self-interested, should demand particularly clear evidence before striking legislation down.[306] One might think this suggestion is not inconsistent with the concern about judicial impartiality in the republican theory of judicial review.[307] Nevertheless, there is no hint of it in other cases, such as *Marbury* itself, and thus it cannot be said to be a well-established rule.

Second, there is no statement that the judicial obligation of clarity, such as it was, should apply differently depending on whether a state or federal law was alleged to have violated the Constitution. This conclusion that the requirement of clarity applies generally also flows from its source: it was jurisprudential in nature rather than connected to a theory of the relation of the federal government to the states.

Third, there is no substantial evidence that the obligation of clarity varied depending on the amount of deliberation and consideration of constitutional issues that legislatures provided. Indeed, it would

306 *See* Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 39 (1793) (requiring "clear evidence" when judges own powers are at stake and suggesting that in these types of cases judges should "distrust their own judgment if the matter is doubtful"). This suggestion casts doubt on the view of Dean Treanor that judicial review was less deferential when it came to legislation that invaded the province of judges or juries. *See* Treanor, *supra* note 64, at 517; *see also* William Michael Treanor, *Against Textualism*, 103 Nw. U. L. Rev. 983, 997 (2009). Treanor has no express statements that suggest the standard was less deferential. Although it is true that he shows that many more cases of invalidation came in these areas, the total number is still quite small. Moreover, there is also a question of selection bias: perhaps because of the political issues at the time, like the problems of retaliating against loyalists through removing their due process and trial rights, legislatures were more prone to remove judicial and jury protections than commit other violations.

307 For a discussion of these concerns, see *supra* Section III.D.

have often been difficult to carry out such an analysis because debates on state and federal legislation were not always readily available. Nor was the theory of harmonization dependent on actual deliberation. It seemed to reflect a view that it was the nature of political actors to try to reflect proper reasoning.

Now it is true that nothing in the record rules out considering the amount of deliberation. In particular, it seems likely that those who were moving toward more pragmatic theories of interpretation, like James Madison, would be open to proportioning their obligation of clarity to the depth of legislative deliberation. Madison suggested the relevance of deliberation in the not unrelated question of the appropriate degree of weight to be given to precedent:

> Serious danger seems to be threatened to the genuine sense of the Constitution, not only by an unwarrantable latitude of construction, but by the use made of precedents which cannot be supposed to have had in the view of their Authors the bearing contended for, and even where they may have crept through inadvertence into acts of Congress, and been signed by the Executive at a midnight hour, in the midst of a group scarcely admitting perusal, and under a weariness of mind as little admitting a vigilant attention.[308]

For this reason, as suggested above, it would perhaps be possible for the Court to include such considerations in the standard of clarity to be applied. It could justify changing the rule by pointing out that it is much easier for the Court to gauge the amount of deliberation Congress provided to the constitutionality of the legislation than it was at the time of the Constitution's enactment.

V. Thayer's Own Clear Mistake

We are now in a position to understand the nature of Thayer's own clear mistake about constitutional deference. He quoted some of the early statements reviewed here in his historical analysis, which was undoubtedly his strongest originalist support for his "clear mistake doctrine"—the notion that legislation should be upheld unless it violated the constitutional understanding of any rational person.[309]

But he misunderstood these cases because of his own very different premises about law. He quoted the legal refrains without understanding the underlying jurisprudential music at the time of the

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308 Letter from James Madison to James Monroe (Dec. 27, 1817), *in* 3 Letters and Other Writings of James Madison, *supra* note 140.

309 Thayer, *supra* note 10, at 144.

ratification period and early Republic. Unlike the enactors and judges of the early Republic, he believed that judicial review is an action inherently political, not legal.[310] Like the positivists of his time and unlike the enactors and judges of the early Republic, he believed that much legal text is inherently unclear and not subject to clarification.[311] Thus, he took expressions of constitutional deference as an obligation by which judges are supposed to defer to any interpretation that a "rational person" might conceivably embrace[312]—a fundamentally different standard from the clarity standard, particularly when joined with the tools for clarification available to those schooled in law.

First, Thayer believed that constitutional law is a political function that differs fundamentally from other applications of law. He described judicial review thus: "In simple truth, while this is a mere judicial function, it involves, owing to the subject-matter with which it deals, taking a part, a secondary part, in the political conduct of government."[313] He criticized as "severe" Marshall's argument in *Marbury* that judicial review flows from treating the Constitution like other law except that the Constitution controls when the two conflict.[314] According to Thayer, Marshall's analysis was "corrected" by the cases proclaiming the practice of judicial deference.[315]

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310 In this respect, Thayer has often been seen as proto-Progressive, aiming to protect social reform. *See, e.g.*, Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1167–68 (2011). But that view has been sharply contested. *See* Mark Tushnet, *Thayer's Target: Judicial Review or Democracy?*, 88 NW. U. L. REV. 9, 9–10 (1993). Thayer was certainly different from the many later progressives in making a sharp distinction between review of federal and state legislation under the Constitution. *See* Edward A. Purcell, Jr., *Learned Hand: The Jurisprudential Trajectory of an Old Progressive*, 43 BUFF. L. REV. 873, 892–93 (1995) (book review) (distinguishing Thayer from subsequent progressive thinkers in this regard). One strand of his thinking lies in a strong nationalism that wants to get the courts out of the way of Congress's capacity to keep the Union together. This notion seems consistent with his Civil War experience in which he set up a Union news service and in which he lost close relatives and his commitment to the rights of African-Americans. *See* G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48, 64–65 (1993). Politically, he was a leader of the Mugwumps, nationalists who bolted from the Republican Party because of its growing corruption. *See* Jay Hook, *A Brief Life of James Bradley Thayer*, 88 NW. L. REV. 1, 6 (1993). As a Boston Brahmin, he hoped that national legislative politics could be reclaimed by enlightened statesmen. White, *supra*, at 81–82.

311 Thayer, *supra* note 10, at 144.

312 *Id.*

313 *Id.* at 152.

314 *Id.* at 139.

315 *Id.* at 139–40. As discussed above, this view seems wrong as well. Marshall's use of the term "repugnant" signaled the obligation of deference that he made even more explicit in later cases. *See supra* notes 266–270 and accompanying text.

Thayer's understanding of judicial review as a partly political rather than a strictly legal enterprise is also made clear by his sharp distinction between constitutional review of federal law and of state law.[316] For state laws he saw no need for deference:

> But when 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. Fundamentally, it involves the allotment of power between the two governments,—where the line is to be drawn. True, the judiciary is still debating whether a legislature has transgressed its limit; but the departments are not co-ordinate, and the limit is at a different point. The judiciary now speaks as representing a paramount constitution and government, whose duty it is, in all its departments, to allow to that constitution nothing less than its just and true interpretation; and having fixed this, to guard it against any inroads from without.[317]

But as this Article has shown, Thayer has an incorrect understanding of the wellsprings of judicial review. It was rooted in the judicial duty of law application and was not understood as more political than any other application of law. The notion that the Constitution was law and was to be applied as a matter of ordinary judicial duty was shared by essentially all jurists.[318] Far from seeing the requirement of clarity in invalidation as stemming from the notion that judicial review was a particularly political aspect of law, it came from fear that judges needed to be sure they were elucidating the meaning of the law to show that they made the decision based on legal considerations rather than policy. That was the essence of the republican theory of judicial review. Nothing makes this clearer than Marshall's embrace of the requirement of clarity along with his "severe" arguments for judicial review.[319]

Moreover, there are no jurists or scholars in the original Republic who called for a judicial obligation of clarity in evaluating federal law while arguing against its existence when evaluating state law. That null set is not surprising because the republican theory of judicial review was rooted in confidence in the impartiality of national judges in keeping states and the national government within their respective spheres.[320]

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316 *See* Tushnet, *supra* note 310, at 9–10 (observing that this discrepancy is widely noted).

317 Thayer, *supra* note 10, at 154–55.

318 HAMBURGER, *supra* note 24, at 543; *supra* notes 128–134 and accompanying text.

319 *See* Thayer, *supra* note 10, at 139; *supra* Section IV.D.

320 *See supra* Section IV.E.

Second, Thayer was of the view that law or at least constitutional law is open to many interpretations, necessarily giving undisciplined discretion to the judge. He writes:

> [T]he constitution often admits of different interpretations; that there is often a range of *choice* and judgment; that in such cases 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.[321]

The repetition of the word "choice" emphasizes his view that judges inhabit a world of discretion and judicial lawmaking.

It is not surprising that Thayer took this view. Between the early Republic and Thayer's time, Blackstone had been dethroned as the reigning jurisprudential theorist. John Austin, writing under the influence of Jeremy Bentham, believed that judges made law and did not discover it.[322] He called it a "childish fiction" that judges did not make law—a barb almost certainly aimed at Blackstone.[323] The "indefiniteness" in terms of law was "incorrigible" and thus judicial legislation was inevitable.[324] Law in general was the command of some sovereign—either the legislature or the judiciary in its interstices.[325]

Thayer, like many of the leading legal intellectuals of the postbellum era, was influenced by Austin.[326] Because James Bradley Thayer believed that justices were often lawmaking in the interstices of the law where meaning ran out, it is not surprising that he interpreted the comments about the obligation of clarity as a command against judicial lawmaking in such gaps. Constitutional review did not need to fill in these gaps. The legislature, Austin's primary sovereign, could do so instead.[327] But, as this Article has shown, the jurisprudence of the

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321 Thayer, *supra* note 10, at 144 (emphasis added).

322 *See* Wilfrid E. Rumble, *The Legal Positivism of John Austin and the Realist Movement in American Jurisprudence*, 66 CORNELL L. REV. 986, 1018 (1981).

323 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 654–55 (Robert Campbell ed., 4th ed. 1873). Professor Rumble quotes this remark and argues that Austin was disagreeing with Blackstone. Rumble, *supra* note 322, at 1018 n.168.

324 2 AUSTIN, *supra* note 323, at 1001.

325 *Id.* at 632.

326 *See* WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 169 (1994).

327 Thayer's contemporary and friend, Oliver Wendell Holmes, also rejected classical jurisprudence. He believed that policy and the lessons of history largely filled the interstices of law. *See* White, *supra* note 310, at 69. And when he came to interpret the Constitution, he was often loath to overturn the results of democratic deliberation when the Constitution did not provide a very clear direction to do so. *See* David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 453 (1994). To be sure, Holmes's commitment to restraint was

Framing and the early Republic did not generally contemplate judicial lawmaking in Austin's sense. Judges were to elucidate law through legal methods. The reason for judicial deference was not that law could not be elucidated in a disciplined way, but rather that all the entities within the government, the legislature and the judiciary, were trying to discover the true nature of the law and that deference was a check on judicial passion. For Thayer, text that was unclear on its face inevitably generated an arbitrary discretion. But for the Framers' generation the meaning of an unclear text could either be discovered or be largely elucidated by legal methods.[328]

Thayer's legacy continues even in the words often used in modern times to describe deference to the constitutional determinations of the legislature. The term usually used is "restraint," which reflects a notion that judges are exercising an interstitial sovereign power that needs to be restrained to make sure it does not encroach on the greater sovereign power of the democratically elected legislature. In contrast, the term deference seems to be more consistent with the theory of the Framerss time. Both the legislature and judiciary were engaged in a search for correct interpretation—perhaps through means of legal elucidation. The judiciary declined to displace legislation when it could not come to a clear view to the contrary because it needed clarity to justify replacing the judgment of a coordinate branch engaged in the same enterprise. Or to put it another way, there was less focus on the restraint of judges when there was greater confidence in their constraint by legal methods.

VI. Present Implications of an Originalist View of the Duty of Clarity

As Thayer's clear mistake about the doctrine of clear mistake suggests, originalism often requires a historical analysis before one can grasp its implications for current jurisprudence. In this instance, the result of historical inquiry is to show that judges should require clarity about the meaning of a constitutional provision before using it to invalidate legislation. But the first obligation of a justice is to use the rich array of legal methods and mechanisms to clarify the meaning

complex, and based on metaphysics of indifference in addition to any jurisprudential roots. *Id.* at 498, 510.

328 Thayer also simply exaggerates the standard that was applied by jurists in the Founding era for finding clarity in interpretation. Thayer argues that a court may strike down a statute only if its interpretation of the Constitution is not "open to rational question." Thayer, *supra* note 10, at 144. This goes beyond the tenor of the language in the cases he quotes and is belied by the judicial practice of subtle clarification this Article has described. *See id.* at 145–46.

of ambiguous or vague text. Only if these kinds of analyses fail to clarify whether the legislation conflicts with the correct meaning of the Constitution, should the judiciary uphold the statute.

This Part explores what this obligation of clarification and clarity should mean for modern practice. Section IV.A accepts the premises of the jurisprudence on which this originalist conception of clarity and clarification is based and explores how considerations in the modern era may change its frequency of deployment. Section IV.B suggests that two important recent Supreme Court opinions appropriately employed methods of clarification to invalidate legislation. Section IV.C asks what originalists should do if the jurisprudential assumptions behind the clarification and clarity approach turn out to be wrong.

A. What Does the Modern Era Tell Us About How Often the Duty of Clarity Will Be Decisive?

Assuming one accepts the jurisprudential views underlying the process of clarification, how often will such practices fail to clarify meaning? Or, to put it in another way, how often will a court meaning that upholds the legislation be in relative equipoise with a meaning by which it would be struck down, preventing a court from coming to the clear and stable judgment that justifies displacing that of the political branches? It is difficult, if not impossible, to quantify the number of such circumstances. But there are some considerations relevant to considering the question.

First, the many different types of considerations that can be used to clarify meaning, even if with difficulty and labor, make it less likely that a judge will be left without a clear judgment. Even in the event that some considerations point in one direction and others in another direction, it will not often be the case that they are of similar weight, thus allowing a judgment about a persuasively better or worse reading of the Constitution.

Second, in one important respect, constitutional interpreters today have an advantage over constitutional interpreters of the early Republic. Because of the amount of information that is now online, interpreters can canvass all the considerations in a far more systematic way than in the early Republic.[329] This ease of access represents the culmination of a trend that has been accelerating throughout human history. Information is continually being made more broadly availa-

329 *See* JOHN O. MCGINNIS, ACCELERATING DEMOCRACY: TRANSFORMING GOVERNANCE THROUGH TECHNOLOGY 149–61 (2013).

ble as well as better categorized and analyzed.[330] Legal search in the broadest possible terms has reflected this trend.[331] In this era, "big data," to use the modern term, brings us closer in some ways to the distant past than were interpreters of the early Republic to the more recent past of the Founding.[332] One reason that this development is so helpful to originalist interpretations is that such interpreters are able to look at public understandings and meanings.[333] The availability of evidence may reduce a very important reason for finding a meaning unclear—namely the concern that more information may turn up to trump the view based on the current information available to the judicial decisionmaker.[334]

Some might argue that jurists of the past had a better sense of the evidence simply because that was their era. There is some reason to doubt this claim. They had their own experiences, to be sure, but that is a small subset of the experiences of all the people at the time. Indeed, their local experience may be a source of bias, particularly when they lack access to the universe of relevant information about the public meaning of a provision and the accepted rules of interpretation.[335]

The most important countervailing factor (and it is a very important one) is that we are farther away from the Framing. Thus, the problems jurists deal with are generally likely to be more distant from

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330 *Id.*

331 For a general discussion of how the availability of better information changes the nature of legal search and thereby of law, see John O. McGinnis & Steven Wasick, *Law's Algorithm*, 66 FLA. L. REV. 991 (2014).

332 For an excellent example of big data at work in legal analysis, see Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

333 *See* Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 Nw. U. L. REV. 923, 926 (2009) (describing the idea of "original public meaning in originalism").

334 Consider this analogy: Assume a world of perfect information for jurors, i.e., a world in which they knew everything relevant to the incidents related to a prosecution of a crime and in which they knew they knew everything relevant. That would be a world where jurors would be less likely to acquit on the basis of the very stringent standard of proof that applies in criminal cases rather than on the belief that the defendant was innocent because they would not be concerned that some information would turn up to change their judgement. It is not implausible to believe that a jurist in a world of big data and with superb access to past records could know almost everything relevant to public information that bears on interpreting the Constitution according to original meaning. In any event, he would have much greater knowledge than jurists in the past and consequently much less need to resort to judicial deference, if the basis of that deference was fear that the discovery of better information would impugn his decision.

335 Another counterargument is that they had a better sense of the language and customs and thus a better feeling for meaning. That is to some extent true, but even that linguistic competence is something of a double-edged sword. Everyone in an era has associations that may give language peculiar connotations. From another era it may be paradoxically easier to see usage and custom more objectively.

those the Framers had in mind. Of course, that distance does not mean the Constitution is not applicable—as Marshall said, it was written to last indefinitely.[336] Its principles and its occasional standards can be applied to situations its enactors never imagined. Nevertheless, assuming that some provisions are vague or ambiguous, it may be necessary to resort to clarifications that are influenced by the expected applications or purposes of the enactors.[337] Such methods may tell us less about the appropriate interpretation of the principle the more distant we are from the Framers because the analogies drawn will be less proximate or more forced.

B. Recent Examples of the Correct Interpretive Method in Light of the Judicial Duty of Clarity

Here are two modern examples in which the Justices on the Supreme Court, despite their obligation of finding clarity before displacing legislation, were right to consider an interpretation of the Constitution at variance with the federal legislation by clarifying the meaning of the text through various considerations. It is beyond the scope of this Article to establish that these elucidations are correct. The point is that assuming that these are the relevant and correct materials of interpretation, the Justices' use of them is consistent with the elucidation and clarity approach implicit in judicial review of the background rules that guide its exercise.

The question of whether Congress could use its authority under the Commerce Clause to impose an individual mandate for citizens to buy health insurance was the first constitutional issue addressed in Chief Justice Roberts's opinion in *National Federation of Independent Business v. Sebelius*.[338] Whether a mandate is a regulation of commerce among the states is not clear from an initial glance at the text of the Constitution. A doctrine of constitutional deference that simply permitted Congress to employ any plausible interpretation of the text would likely have required upholding the mandate.

But although the Chief Justice did begin with language suggesting that a certain degree of deference toward Congress was appropri-

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336 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406–08 (1819).

337 There has been a substantial debate over the use of expected applications. *Compare, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293–95 (2007) (condemning the use of expected applications to interpret constitutional provisions), *with* John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 371–73 (2007) (supporting the use of expected applications as potential evidence of public meaning even if meanings are not constituted by expected applications).

338 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

ate,[339] he went on to clarify the meaning of the Clause to hold that Congress did not have such power. First, he noted that "[t]he power to *regulate* commerce presupposes the existence of commercial activity to be regulated."[340] Chief Justice Roberts further clarified the meaning of "regulate commerce" by applying an antisurplusage canon:

> If the power to "regulate" something included the power to create it, many of the provisions in the Constitution would be superfluous. For example, the Constitution gives Congress the power to "coin Money," in addition to the power to "regulate the Value thereof." And it gives Congress the power to "raise and support Armies" and to "provide and maintain a Navy," in addition to the power to "make Rules for the Government and Regulation of the land and naval Forces."[341]

The Chief Justice also observed that: "If the power to regulate the armed forces or the value of money included the power to bring the subject of the regulation into existence, the specific grant of such powers would have been unnecessary."[342] Thus he concluded that the better reading of the Commerce Clause did not include the power to mandate an activity.[343]

The recent case of *District of Columbia v. Heller* provides another instance where the Court used methods of clarification to interpret the Second Amendment.[344] The debate in the case turned on the question of whether an individual has a right to own and use arms in connection only with a militia or to possess and own arms unconnected to militia service, making them available for traditionally law-

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339 *Id.* at 2579 ("'Proper respect for a coordinate branch of the government' requires that we strike down an Act of Congress only if 'the lack of constitutional authority to pass [the] act in question is clearly demonstrated.'" (quoting United States v. Harris, 106 U.S. 629, 635 (1883))). Justice Roberts suggests that deference is due in part to limit judges' role to legal rather than policy decisionmaking.

340 *Id.* at 2586. The dissenters who joined with the Chief Justice on this point agreed that to create commerce was fundamentally different from making a rule to adjust or prohibit it. *Id.* at 2644 (Scalia, J., dissenting).

341 *Id.* at 2586 (majority opinion) (citations omitted).

342 *Id.*

343 I leave to one side consideration of Chief Justice Roberts's opinions on the Necessary and Proper Clause and Taxing Power. Whatever its power on other points, Justice Ruth Bader Ginsburg's dissent does not undermine the clarifying power of the Chief Justice's for the Constitution's language. She provides many instances of activities that can be mandated by the Constitution, *id.* at 2627 (Ginsburg, J., dissenting), but these activities are, as Chief Justice Roberts notes, encompassed by some provision of the Constitution other than the Commerce Clause, *id.* at 2586 (majority opinion).

344 District of Columbia v. Heller, 554 U.S. 570, 576 (2008).

ful purposes like self-defense.[345] The Court per Justice Scalia argued that the second reading is better than the first: "The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose."[346] Justice Scalia noted that "[t]he Amendment could be rephrased, 'Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.'"[347]

To bolster his position that the ablative absolute at the beginning of the sentence does not modify the rest of the sentence, Justice Scalia observed that the relevant canon of interpretation at the time of the Framing posited that a prefatory clause could clarify an ambiguity, but could not otherwise limit or expand the operative clause.[348]

Again, the point here is not to defend the Court's linguistic analysis or the historical provenance of this particular canon. Instead it is to say that if this linguistic analysis was sound and this was indeed the relevant canon of interpretation (and the dissent does not dispute the canon), that using the linguistic analysis and the canon to clarify the relation between the preamble to the operative clause would be wholly consistent with the kind of obligation of clarity exercised by judges in the Founding generation.[349]

C. Modern Objections to the Duty of Clarity

This Section focuses on how an originalist should proceed if this view of clarification and obligation of clarity turns out to be premised on jurisprudential error. There are in fact two possible jurisprudential errors that are interrelated. First, the methods of clarification may not be of much help in discerning a legal meaning of a constitutional provision that is clearly better supported than others. Second, even after

345 *See id.* at 577.

346 *Id.*

347 *Id.*

348 *See id.* at 578.

349 Some may think that *Heller* either is an indictment of originalism or of the failure of judicial deference because the four dissenters argued against the majority by using history as their primary weapon. *See id.* at 637 (Stevens, J., dissenting). But Nelson Lund correctly questions "the assumption that originalism fails whenever a large number of words can be piled up on each side of a disputed issue." *See* Nelson Lund, *The Cosmic Mystery of Judicial Deference: J. Harvie Wilkinson III's Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance* 101–02 (George Mason Law & Econ. Research Paper Series, Working Paper No. 12–84, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2188553. As he notes, the claim that "an issue does not a have a clear, correct answer because people dispute the answer" is a very strange assumption for anyone to make, let alone a judge." *Id.* at 102.

the application of legal methods, the ambiguities and vagueness in the Constitution may be pervasive. Although claims that the Framers' jurisprudential premises are far from proven, if shown, they would have important implications for originalist jurisprudence. In particular, the new originalists accept that the Constitution is, in important respects, irreducibly vague and thus the question of how to integrate the judicial obligation of clarity with their theory is an important and live one.[350]

The first objection to the traditional methods of clarification is that rules for clarification are not useful. Karl Llewellyn, for instance, famously argued that many of the canons of interpretation were contradictory, thus allowing judges to do whatever they wanted.[351] This kind of realist claim is obviously in very substantial tension with the classical jurisprudence that underlies a judicial process of clarification through interpretive rules.

The second and more sweeping objection is that so much of the Constitution is so irreducibly unclear that it is impossible to gain much in the way of clarification and thus the union of clarification and clarity is a mirage. H. L. A. Hart's version of positivism famously contended that many legal provisions even in non-constitutional law are open-textured in that they are ambiguous or vague.[352] Hart argued that there are substantial gaps or penumbras in written law and judges make discretionary decisions about the content of this law within the penumbra.[353] Some have asserted that the inherent nature of constitutional law—its tendency to speak in generalities, its origins in compromise, or its need for legitimacy in a society of diverse moral views—make such ambiguity and vagueness even more pervasive than in ordinary legislation.[354] Under this view, judges may well have substantial interstitial lawmaking power that is not hedged by interpretive rules, contrary to the views at the time of the Founding and the early Republic.

It is hardly clear that these objections are valid. As to the realist critique of clarification, the fact that different canons sometimes point

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350 Lund, *supra* note 349, at 101.

351 Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 396 (1950).

352 *See* H. L. A. HART, THE CONCEPT OF LAW 126–28 (1961).

353 *Id.* Canons of interpretation cannot cure the indeterminacy because they also partake of the open-textured nature of language. *Id.* at 123.

354 *See, e.g.*, Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 877 (2003). I have disagreed with some of these claims elsewhere. *See* McGinnis & Rappaport, *supra* note 69, at 771–75.

in different directions does not render them useless because the scope of their application and their weight differ depending on the circumstances. As Geoffrey Miller has observed, "the fact that the maxims may work against each other . . . does not establish the . . . confusion posited by Llewellyn's model. It is simply a matter of competing inferences drawn from the evidence."[355]

More generally, different considerations, from expected applications to invocations of purpose, often have to be weighed against one another to determine what is the best interpretation of the language at issue. But this process is no different from other evidentiary processes that gather sometimes conflicting facts and come to a conclusion. Law is itself a complex social fact and its proof requires the gathering, evaluation, and weighing of evidence.

Second, the claim of the necessity of judicial lawmaking is at variance at least with how the vast majority of judges claim to operate in deciding cases even today. Generally judges do not say they are operating within a realm of policy discretion. Ronald Dworkin first noted this problem with positivist claims about discretion.[356] Dworkin then argued that moral principles fill the gaps of the law.[357] But resorting to moral principles does not look like the description of how most judges claim they are operating either, even in the vast majority of close cases. Instead, in hard cases without precedent on point, judges generally make their decisions by weighing canons of interpretation, purposes of provisions, and their expected applications—the very kind of materials to which jurists of the Founding generation appealed.[358]

Of course, far more has and can be said on this subject. For instance, it is possible to argue that judges inhabit a world of false consciousness or are strategically suppressing admissions of their discretionary authority to better enhance their prestige, to bamboozle the public, or to fend off political assaults on their power. But these claims are hard to prove (or disprove) and far beyond the scope of this Article in originalist reconstruction.

But let us assume these objections do have merit. They raise the issue of what originalists should do if a premise of originalism or

355 Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1202; *see also* SCALIA & GARNER, *supra* note 285, at 60–61 (quoting and expanding on Miller).

356 *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 34–45 (1978).

357 *Id.*

358 *See generally* SCALIA & GARNER, *supra* note 285, at 1–28 (discussing the history of statutory interpretation).

originalist method turns out to be false.[359] In that case, originalists should try to approximate the original Constitution as closely as possible. In other words, originalists should use tools to clarify meaning whenever they are available. If the Constitution as a matter of fact contains provisions of such ambiguity or vagueness that they cannot be clarified through the application of rules of interpretation, then the obligation of clarity requires them to yield to Congress's judgment so long as it is not outside the scope of irreducible ambiguity or vagueness. In that case, the legislature's action would not pose an "irreconcilable variance," in Hamilton's words, with the Constitution.[360] Nothing about the relative difficulty of determining meaning, however, undermines the obligation of clarity itself.[361] Given the understanding of judicial duty, judges should be required to follow the obligation even if turns out to be more far ranging than was expected as a matter of fact.[362] A clear constitutional principle must be applied even to a changing world.

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359 The Supreme Court has itself struggled with the implications of changes in jurisprudential view. *See* Linkletter v. Walker, 381 U.S. 618, 622–24 (1965) (applying a rule prospectively despite view that a formal understanding of law in which judges discovered but did not make law would bar prospective decisions).

360 THE FEDERALIST NO. 78, *supra* note 130, at 525.

361 The best counterargument is that deference too was premised on a jurisprudence that has also disappeared. If the idea of deference was premised on the notion that all political actors are seeking to capture a law that is in some sense discoverable with right reason, that premise too does not comport with a realist word. Nevertheless, the rule of deference was not directly expressed in terms of a jurisprudential idea. It simply took the form of requiring the judiciary to form a judgment about higher law that was clear enough to displace that of other actors. This duty was either part of judicial duty at the time or a well-established background rule by which that duty was exercised. As a result, it is a premise that is not easily set aside, even when its jurisprudential origins are impugned. Or to put it another way, the overriding character of the judiciary was that it operated according to legal duty. If the law does not clearly guide its judgment, its duty is at an end.

362 One other argument for not following the obligation of deference is rooted in the claim of the "second-best." In the context of originalism, an argument of the second-best suggests that failures to follow originalism can be compensated by other adjustments to the original meaning so that the Constitution so interpreted comports more with the original Constitution than it would without the adjustment. *See* Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 3–4 (1994). Assuming that the other branches of government now exercise substantially more power than that contemplated by the Constitution, one possible compensating adjustment would be to give the judiciary more power by eliminating the obligation of deference. I am skeptical of such arguments generally. For the same reason that Justices are unlikely to make good policy decisions—their insularity, class homogeneity, and smallness of number—they are unlikely to make sound compensating adjustments. Moreover, it is not difficult to see that one adjustment may lead to the need for yet another adjustment. The "second-best originalism becomes the first best recipe for nonoriginalism." *See* MCGINNIS & RAPPAPORT, *supra* note 23, at 96.

D. The Duty of Clarity, Construction, and the New Originalism

This understanding of clarity and clarification as part of the originalist method also has implications for the current debate about the place of construction within originalism. Some new originalists have sought to recast originalism by making a strong distinction between language in the Constitution that is clear and language that is not.[363] For clear language, interpretation governs and the process of interpretation should seek to discover the original meaning. Unclear language, in contrast, creates a so-called construction zone, when conventional legal meaning runs out.[364] Within the construction zone, the constitutional decisionmaker appeals to materials extraneous to the Constitution to give provisions legal effect.[365]

Assuming that the new originalists are correct that there are substantial gaps in the legal meaning of the Constitution where construction is appropriate, an important further question is what actors in the constitutional system should do the constructing. The judicial obligation of clarity bolsters those who believe that construction is largely or even entirely carried out by the political branches, when the political branches are charged in the first instance with making an interpretation in the course of their duties as when Congress passes legislation.[366]

If legislation can fit within the ambit of the construction zone, judicial duty would not require or indeed permit the Court to invalidate it. Or to put it another way, a constitutional conclusion that is within the construction zone cannot be in "manifest contradiction" to the Constitution's meaning.[367] There would thus be no room for construction in the course of judicial review.

One possible remaining justification for some measure of construction consistent with the judicial obligation of clarity might open up if one accepted that the judges were given a delegation to liquidate unclear parts of the Constitution though the application of legal meth-

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363 For a characteristic discussion by a new originalist, see Randy E. Barnett, *Interpretation and Construction*, 34 HARV J.L. & PUB. POL'Y 65, 66 (2011).

364 Solum, *supra* note 56, at 469–72.

365 It is not at all clear that this distinction sits easily with jurisprudence at the time of the Framing. MCGINNIS & RAPPAPORT, *supra* note 23, at 144–48.

366 *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 3–9 (1999) (viewing construction as a largely political process that fills out constitutional indeterminacies).

367 It might be possible for new originalists to argue that the obligation of judicial deference applies only to the original Constitution and the Bill of Rights, but, to my knowledge, no such argument has been made.

ods.[368] But even in this view, construction would provide more limited authority than that sought by some new originalists for constitutional construction.[369] This delegation would permit judges to use legal methods in which they have an expertise to make coherent and consistent constructions. It could not be easily extended to the use of extraconstitutional materials in which they have no greater expertise than does the legislature, such as moral philosophy.[370] In other words, even under this view, the range of permissible materials for construction may be relatively narrow.

In short, if the conception of judicial duty offered here is accurate, a central thesis of the new originalists—that interpretation runs out when a provision is irreducibly ambiguous or vague—supports the authority of the political branches, rather than the judiciary, to construct the constitutional order.[371] The judiciary should not engage in construction in the exercise of judicial review because it can set aside the constitutional judgments of the other branches only when they conflict with a meaning of the Constitution which the judiciary finds to be clear.[372] And construction only applies in cases when meaning is not clear. Whatever construction occurs should occur outside the judicial branch. The judicial role is limited to interpretation through the process of legal clarification.

Conclusion

An inquiry into judicial deference from an originalist perspective yields a mixed conclusion. Those who framed the Constitution and rendered justice in the early Republic did understand judicial duty as requiring a clear incompatibility between the Constitution and a statute before displacing the latter by the former. This duty of clarity

368 *See supra* notes 135–148 and accompanying text.

369 On the range of different extra-constitutional considerations that might guide construction, see Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. Ill. L. Rev. 1935, 1951–53.

370 *See id.* at 1951 (giving moral theory as an example that could furnish material for constitutional construction).

371 Solum, *supra* note 56, at 461.

372 *Id.* The now common view is that the move of new originalists in adopting construction has deprived them of one of the traditional virtues of originalism—judicial constraint. *See, e.g.*, Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 Geo. L.J. 713 (2011). But under the view offered here, new originalism, if correctly understood, may offer substantial judicial restraint instead of judicial constraint. To be clear, many new originalists would chafe under the limitations to such judicial construction, but it is not clear how they can avoid them if deference is part of the originalist method, either as an aspect of judicial duty or as a background rule of judicial obligation.

reflected deep jurisprudential currents that all actors were attempting to discover the natural wellsprings of law. But jurists of the time also believed text was capable of disciplined elucidation that guided judgment, particularly with the help of traditional legal tools like canons of interpretation and consideration of the purpose of provisions. Thus, in this world, the duty of clarity in the course of judicial review was quite consistent with aggressive attempts to canvass "every consideration" to clarify the meaning of the Constitution.

The analysis here has methodological implications for originalism more generally. In coming to the conclusion that an obligation of judicial clarity is an originalist method, it rejects a wooden textualism that has no place for this obligation because it is not expressly mentioned in the Constitution. Instead, the text must be understood as containing legal concepts, like judicial power, that are more complicated than ordinary language might suggest. Confirming this background understanding is the overwhelming acceptance of a duty of clarity by judges in the early Republic. But in considering this background, many previous analysts, most famously James Bradley Thayer, have been misled into thinking that judicial deference is more encompassing and central to constitutional jurisprudence than it is because they regard judicial review through their own jurisprudential prism—a product of a certain form of Enlightenment thinking—rather than that of the Founding era. The common law inheritance of the Constitution, in all its mazy nature,[373] is with us still.

373 *Cf.* Gilbert K. Chesterton, *The Rolling English Road*, *in* THE COLLECTED POEMS OF G. K. CHESTERTON 188, 188–89 (1946) (contrasting the winding roads of England with straight avenues of France and the continent).