

THE COSTS OF SUPREME COURT DECISIONS:
TOWARDS A BEST COST-AVOIDER THEORY OF CONSTITUTIONAL LAW

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ABSTRACT

Supreme Court decisions have costs, and seldom are they higher than in constitutional cases. Consider how Dred Scott relegated free people to slavery, and how a civil war soon followed. Or how Black Americans suffered under Jim Crow for decades after Plessy. Or how in the wake of Korematsu, thousands of innocent Japanese-Americans were detained in incarceration camps until the end of World War II.

Sometimes, however, groups that lose at the Court have something more to say about their fates. The Article V amendment process is usually only a trifling part of this story; these groups are far more likely to engage in sub-constitutional efforts to avoid their harms. For example, after the Supreme Court overruled Lochner, industries protected their bottom lines by raising prices and reducing employment. After Brown, some white families sent their children to private schools or moved to the suburbs. And after the Court invalidated fair share fees in Janus v. AFSCME, Council 31, public sector unions successfully persuaded workers to pay dues voluntarily. Not all Supreme Court defeats, it seems, inflict equally inescapable harms. Or in the language of law and economics, some groups are better able to avoid the costs of an adverse Supreme Court ruling than others.

Constitutional law should take account of this fact. If virtually everyone agrees that neither the Court nor elected lawmakers will get every close constitutional question right, we may as well ask whether there is a way to minimize the costs created when either one is at risk of getting the Constitution wrong. This is a best cost-avoider theory of constitutional law: in hard constitutional cases, the Supreme Court should rule against the group that can best avoid the costs of an adverse decision.

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INTRODUCTION

When it comes to the Supreme Court and our Constitution, Americans these days can't seem to find much common ground.¹ But here are two propositions with which everyone agrees: The Supreme Court gets the Constitution wrong in some awfully important cases. And those errors inflict significant costs. *Dred Scott v. Sanford* relegated untold numbers of free people to slavery, and a civil war soon followed.² Black Americans suffered for decades under a pernicious regime of Jim Crow laws upheld by the Court in *Plessy v. Ferguson*.³ Millions of children were left to toil, often in perilous conditions, after the Court struck down federal child labor regulations in *Hammer v. Dagenhart*.⁴ And in the wake of *Korematsu*, tens of thousands of innocent Japanese-Americans were held in incarceration camps until the end of World War II.⁵ If one looks too closely at the Supreme Court's painful record of erroneous constitutional decisions, the costs seem almost too great to bear.

But the truth is, many of the costs of the Court's constitutional decisions cannot be traced back to clear errors—or at least, not to errors that are universally regarded as such at the moment of decision. Instead, many of the costs of constitutional rulings these days stem from the fractious way in which the Court decides hard cases. For now that disagreements among discordant groups in our pluralistic society wind up routinely before the Court as hard questions of constitutional law, destructive, winner-take-all battles over the Constitution's meaning have become a fixed part of our constitutional culture.⁶ Ostensibly, the Court attempts to “solve” these major societal divisions by choosing winners who are worthy of our constitutional regard (and losers who are not), all on the basis of uncertain and deeply-contested legal materials. But in truth the winner of these battles is pre-ordained by politics, as the votes cast in major cases are a known

¹ Consider the heated debate over the confirmation of Justice Brett Kavanaugh; how the Supreme Court's public approval rating hovers just around 50%; and how 49% of Americans believe the Supreme Court should base rulings on what the Constitution “means in current times,” while 46% believe rulings should be based on its original meaning. See Jeffrey M. Jones, “Americans Still Closely Divided on Kavanaugh Confirmation,” Gallup, October 3, 2018; Gallup Poll, “Supreme Court,” online at <https://news.gallup.com/poll/4732/supreme-court.aspx>; Jocelyn Kiley, “Americans divided on how the Supreme Court should interpret the Constitution,” Pew Research, July 31, 2014.

² See Don E. Fehrenbacher, *The Dred Scott Case 567* (1978) (arguing that *Dred Scott* was “a conspicuous and perhaps an integral part” of producing “enough changes of allegiance . . . and enough intensity of feeling” to bring about a violent political revolution).

³ 163 U.S. 537 (1896).

⁴ 247 U.S. 251 (1918).

⁵ 323 U.S. 214 (1944).

⁶ See *infra* part I.A.2.

function of the political party of each Justice’s appointing president.⁷ And so the Court wades further and further into the depths of a crisis of public legitimacy. As a group of Senators recently wrote in a jaw-dropping amicus brief directed at the Justices themselves, “[t]he Supreme Court is not well.”⁸ If it ever served the role of a “unifying, national institution,”⁹ those days are gone: the Court today is every bit as polarized—and every bit as polarizing—as the rest of our politics.¹⁰

Constitutional law scholarship has two very different kinds of responses to these felt truths. One camp of thinkers—call them judicial optimists—believes that the costs of Supreme Court decisionmaking can be eliminated, or at least justified, if only the Justices would adopt the correct theory of constitutional interpretation.¹¹ (Unsurprisingly, subscribers to this view often have just the right theory on offer.) A second camp—call them judicial pessimists—believes that the costs of the Supreme Court are inevitable.¹² A leading proponent of this position has accordingly called for “taking the Constitution away from the courts” altogether.¹³ But optimists have a chilling response: without judicial review, won’t our elected officials err just as badly and harm the people just as much—or worse?¹⁴

In this Article, I hope to chart a new path between these positions—a new approach to adjudicating hard cases that can minimize the costs of Supreme Court error and dial back the Court’s increasingly polarizing role in our politics. Judicial optimists, I want to suggest, are right that courts can play a positive part in facilitating the resolution of constitutional disputes between discordant groups in our pluralistic society. But the pessimists are also right that no existing interpretive theory is capable of revealing the one, correct answer to many difficult and important constitutional controversies. So long as the Justices are in the business of determining the meaning of our Constitution, they will often get it wrong.

How, then, should the Supreme Court decide constitutional disputes? The key is to give up our obsession with the unattainable goal of getting every hard constitutional case “right,” and to focus instead on what happens after the Court issues a ruling that might be wrong.

⁷ See *infra* n.68.

⁸ Brief of Senators Sheldon Whitehouse, Mazie Hirono, Richard Blumenthal, Richard Durbin, and Kristen Gillibrand as *Amici Curiae* in Support of Respondents in No. 18-280, *New York State Rifle & Pistol Ass’n, Inc. v. City of New York* at 18.

⁹ Garrett Epps, “Requiem for the Supreme Court,” *The Atlantic*, Oct. 7, 2018.

¹⁰ See *supra* n.1.

¹¹ See *infra* Part I.B.1.

¹² See *infra* Part I.B.2.

¹³ Mark Tushnet, *Taking The Constitution Away From The Courts*, 1999.

¹⁴ See, e.g., Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. Ill. L. Rev. 673, 683.

Towards A Best Cost-Avoider Theory of Constitutional Law

In our constitutional order, Supreme Court rulings represent the final word on the Constitution's meaning.¹⁵ Yet that's not the end of the story. Sometimes the people and entities that are adversely affected by a debatable ruling have something more to say about their fates. In theory this could involve using the Article V amendment process to overturn the adverse decision, but that is as difficult as it is rare.¹⁶ Far more often a response involves *sub*-constitutional efforts to avoid a decision's costs. For example, public sector unions beset by the invalidation of fair share fees in *Janus v. AFSCME, Council 31* responded by lobbying states for legislation to enhance their ability to persuade workers to join voluntarily—and by rallying potential members to do exactly that.¹⁷ A number of unions have even reported gains in membership rates in *Janus's* wake.¹⁸ Or consider how after the Supreme Court overruled *Lochner*, industries that encountered increased labor costs due to newly-upheld minimum wage and maximum hour regulations simply reduced employment.¹⁹ Or take the aftermath of *Brown v. Board of Education*, during which many white parents who did not want their children to attend integrated public schools responded by sending their children to private schools or moving to outlying suburbs.²⁰

Of course, not every group is able to avoid the costs of an adverse Supreme Court decision. Consider again the plight of black Americans after *Plessy*, child laborers after *Hammer*, and incarcerated Japanese-Americans after *Korematsu*. Or more recently, consider how a sizable majority of Americans thinks *Citizens United* was wrongly decided, yet has been unable to enact a constitutional amendment or alternative approach to regulate corporate campaign expenditures.²¹

The history of Supreme Court constitutional decisions—and, more importantly, what happens in their wake—teaches us a simple fact. Some

¹⁵ *Cooper v. Aaron*, 358 U.S. 1 (1958).

¹⁶ Cf. U.S. Const. Amend. XI (overruling *Chisholm v. Georgia*, 2 U.S. 419 (1793)); *id.* Amend. XIV (overruling *Dred Scott v. Sandford*, 60 U.S. 383 (1857)); *id.* Amend. XVI (overruling *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895)).

¹⁷ See, e.g., N.J. Stat. Ann. § 34:13A (granting unions greater access to employee contact information and the right to meet with new employees); H.B. 1017, 2018 Gen. Assemb. Reg. Sess. (Md. 2018) (same for Maryland state employees).

¹⁸ See Rebecca Rainey and Ian Kullgren, "1 Year After Janus, Unions Are Flush," *Politico*, May 17, 2019.

¹⁹ See Jonathan Grossman, "Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage," 101 *Monthly Labor Review* 23 (1978) (concluding that the 25 cent minimum wage "caused about 30,000 to 50,000 to lose their jobs").

²⁰ 347 U.S. 483 (1954); see, e.g., James S. Coleman, "School Desegregation and Loss of Whites from large Central-City School Districts" (1975) (finding a causal relationship between school desegregation and white flight to private and suburban schools).

²¹ Greg Stohr, "Bloomberg Poll: Americans Want Supreme Court to Turn Off Political Spending Spigot," Sept. 28, 2015 (finding 78% say *Citizens United* should be overturned).

groups are able to undo the costs produced by adverse rulings, while others aren't. This shouldn't be surprising; not all costs are equally easy to fix. Or in the language of law and economics, some groups are better able to avoid the costs of an adverse Supreme Court decision than others.²²

Constitutional law should take account of this fact. If virtually everyone agrees that neither the Supreme Court nor our lawmakers will get every hard constitutional question right, we may as well ask if there is a way to minimize the costs that are created when either one gets the Constitution wrong. One way to do that is for the Court to decide close cases systematically in the direction that would maximize the odds of both sides getting what they want—the winning side by virtue of the Court's decision and the losing side by virtue of other, sub-constitutional means to avoid their costs. This is a best cost-avoider theory of constitutional law: in hard constitutional cases, the Supreme Court should rule against the group that can best avoid the costs of an adverse decision.

The Article proceeds in four parts. Part I motivates the paper by establishing that there are indeed costs worth avoiding. In the realm of Supreme Court constitutional rulings, those costs come in two forms: error costs and decision costs. Part I describes these costs and explains why the common responses offered by judicial optimists and pessimists, although valiant and influential, are less than satisfactory.

Part II introduces best cost-avoider theory as an alternative approach to constitutional cases raising a substantial risk of error. It begins by situating the theory within a robust conversation in multiple fields of private law. Take, for example, the contract law doctrine of *contra proferentem*, the rule of interpretation against the draftsman. The rule applies when the terms of a contract are ambiguous and the usual tools of contract interpretation “fail[] to elucidate the contract's meaning.”²³ When that happens, as Justice Gorsuch recently explained, courts “often resolve contractual ambiguities against the party who wrote the agreement, in part on the theory that the drafter *might have avoided the dispute* by picking clearer terms.”²⁴ Part II.A describes this and other examples in contract, tort, and property law to show that best cost-avoider reasoning is a widely accepted adjudicatory approach that could be modified for use in constitutional law, too.²⁵

²² See George L. Priest, “The rise of law and economics: a memoir of the early years,” in Francesco Parisi and Charles K. Rowley (eds.), *The Origins of Law and Economics* 369 (noting that Guido Calabresi's “best cost-avoider” theory of law and economics “has been widely adopted in judicial decisions”).

²³ 11 Williston on Contracts, § 32:12, “Contra proferentem: Ambiguities are interpreted against the drafter” (4th ed. 2019).

²⁴ *Scenic Am., Inc. v. Dep't of Transp.*, 138 S. Ct. 2 (2017) (Statement respecting denial of certiorari) (Gorsuch, J.) (emphasis mine).

²⁵ See *infra* Part II.A.

Part II.B turns to the task of describing how that approach might work. It starts by piercing through the façade that the only way to counteract the costs of an adverse Supreme Court ruling is to amend the Constitution. Other, more attainable (and thus for present purposes, more important) avoidance strategies exist, too. For one thing, groups can try to change public law through sub-constitutional efforts, whether by repealing the legislation they unsuccessfully challenged in court or by enacting a less restrictive alternative if their preferred law has been invalidated. Perhaps more significantly, groups may also be able to avoid their costs through private ordering. Public sector unions that succeed in persuading workers about the benefits of dues-paying membership avoid the costs imposed by *Janus* much as if the Constitution were amended to overrule it. The same might be said of industries that offset their increased wage costs by reducing employment or raising prices after *Lochner*'s overruling. Part II.B surfaces and classifies these public and private cost avoidance techniques.

Armed with a sense of what cost avoidance can look like in constitutional law, Part II.C explains how courts could go about identifying the best cost avoider in individual cases. It examines the scope of hard cases to which the theory sensibly applies, how each group's costs are to be defined, and what exactly courts are to compare—the ease of avoiding costs, not the severity of the (often incommensurable) costs themselves.

Part III offers a glimpse of best cost-avoider theory in action.²⁶ It explains how cost-avoider theory is consistent with some canonical cases in our constitutional history: it correctly reveals *Dred Scott* and *Lochner* to be erroneous, yet it also gets *Brown* right. Part III also shows that the theory is capable of offering meaningful direction in some difficult disputes of more recent vintage, such as *Janus* and *Masterpiece Cakeshop*. Part III concludes by teasing out important theoretical and practical implications.

Part IV presents the normative case for best cost-avoider theory. Part IV.A explains how the theory minimizes judicial error costs by “allocating [them] to those . . . [who] could avoid [them] most cheaply.”²⁷ Part IV.B shows how the theory reduces decision costs. For one thing, the theory offers a way to preserve the judiciary's institutional legitimacy in these difficult times. We hear a lot these days about how five conservative Justices are poised to restore the “lost Constitution”;²⁸ we hear a lot about

²⁶ I really mean a glimpse. As a first entry in what I hope is a larger conversation about best cost-avoider reasoning in constitutional law, there are undoubtedly many questions concerning implementation that I cannot anticipate (much less respond to convincingly).

²⁷ Guido Calabresi, *The Cost of Accidents* 135 (1970).

²⁸ See, e.g., Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2013); Dan McLaughlin, “Clarence Thomas's Quest to Recover the Lost Constitution,” *The National Review*, June 6, 2019.

how the left wants to pack the Supreme Court in response.²⁹ As Professor Michael McConnell has eloquently argued, it's time we "hear more about judicial humility."³⁰ A best cost-avoider theory of constitutional law speaks in just this register. It candidly recognizes the limits of judicial knowledge. And so it proposes a vision of constitutional law that is deferential to the agency of the people involved in each dispute; deferential to the fact that these people will keep fighting to secure their interests even if the Court rules against them, as well as the reality that different groups often face radically different costs in doing so. What is more, best cost-avoider theory is neither inherently liberal nor conservative in its method and outcomes—another virtue for purposes of institutional legitimacy.

Finally, Part IV.B suggests that the theory has the potential to moderate the Court's polarizing role in society by producing a generative mode of constitutional argument. As Professor Jamal Greene recently observed, the Supreme Court's current approach to constitutional decisionmaking "coarsens us" as a people, because it pushes litigants to frame disputes as "battle[s] between those who are of constitutional concern and those who are not."³¹ But once one admits that the honest answer to some hard constitutional questions is "I don't know," the result can be liberating for our constitutional dialogue. Under a best cost-avoider theory, litigants earn nothing by arguing that their opponents possess "no rights the law is bound to respect."³² The theory instead calls on the parties to suggest solutions to the underlying dispute—different public and private avoidance techniques that either side can take to undo the costs of an adverse decision. By reorienting constitutional law towards this constructive mode of argument, best cost-avoider theory's greatest virtue may be its potential to transcend today's all-or-nothing culture of constitutional warfare.

I. THE COSTS OF SUPREME COURT DECISIONS

For a best cost-avoider theory of constitutional law to make any sense, we must first be convinced that there is some cost to be avoided. In other fields of law the costs are self-evident. For example, Guido Calabresi's pioneering work, *The Costs of Accidents*, proposed a tort law theory for avoiding the obvious costs of automobile accidents.³³ But the analogous

²⁹ See, e.g., Joan Biskupic, "Democrats look at packing the Supreme Court to pack the vote," CNN.com, May 31, 2019.

³⁰ Michael McConnell, *The Importance of Humility in Judicial Review: A Comment on Dworkin's 'Moral Reading' of the Constitution*, 65 Ford. L. Rev. 1269, 1292 (1997).

³¹ Jamal Greene, *Foreword: Rights as Trumps?* 132 Harv. L. Rev. 28, 34 (2018).

³² *Id.* at 79.

³³ Calabresi, *supra* n.27. A note about terminology. Calabresi uses the phrase "cheapest cost avoider," whereas I use another term popular in the literature—"best cost

costs may not be immediately apparent in constitutional law, where (apart from Justice Breyer’s bicycling fiascoes³⁴) talk of accidents and costs is less customary than talk of courts adjudicating rights and making rules.

The picture changes once one thinks of the Supreme Court itself as a possible source of costs. Part I.A identifies two kinds of costs of Supreme Court decisionmaking—error costs and decision costs. Part I.B explains why traditional responses to these costs are unconvincing.

A. Two Kinds of Costs

Many of the costs of Supreme Court constitutional decisions stem from erroneous rulings. But other costs are the product of the Court’s particular approach to deciding hard, divisive, and momentous questions of constitutional law; costs that would exist even if the ultimate outcome of a given case cannot be deemed to be clearly erroneous. One can think of the former set of costs as *error costs* and the latter as *decision costs*.³⁵

1. *Error Costs*

The Supreme Court errs with surprising frequency, and those errors impose significant costs on our society. As to the frequency of error, take it from the Court itself: the Court regularly confesses its own mistakes.³⁶ According to the last count maintained by the Congressional Research Service, the Supreme Court has expressly overruled itself 236 times, conceding in the process that some 321 prior decisions were incorrect. And

avoider.” See Priest, *supra* n.22. I do so because I find it less intuitive to think of cost avoidance in the context of constitutional law in terms of “cheapness” or “expensiveness.” Whereas it is sensible to say that a car manufacturer can avoid an accident more cheaply than a pedestrian by installing some safety device at \$X price, *id.* at 137, talk of monetary cost seems inapt when speaking of, say, the ability of Japanese-Americans to obtain their freedom from internment camps. And indeed, the “cheapest” cost avoider framing is itself inapt to several private law contexts, where the cost of avoiding some harm is better expressed in terms of ease than raw finances. See *infra* Part II.A (describing best cost avoider rule in rear-end traffic collisions, where the trailing driver is held liable not because it is “cheaper” in pure monetary terms to avoid an accident, but because it is easier).

³⁴ See Melisa Goh, “Justice Breyer Fractures Shoulder in (Another) Bike Accident,” April 27, 2013, NPR.

³⁵ See Cass Sunstein, *One Case At A Time* 47-50 (1999) (distinguishing between decision costs and error costs).

³⁶ It has done so four times in just the past two terms. See *Knick v. Township of Scott*, 588 U.S. ___ (2019), overruling *Williamson Cnty Regional Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *Franchise Tax Board of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019), overruling *Nevada v. Hall*, 440 U.S. 410 (1979); *South Dakota v. Wayfair*, 585 U.S. ___ (2018), overruling *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967); *Janus*, 585 U.S. ___ (2018), overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

this list is only the tip of the iceberg.³⁷ In Justice Brandeis’s immortal words, we leave some Supreme Court constitutional errors in place under the doctrine of *stare decisis* because “in most matters it is more important that the applicable rule of law be settled than that it be settled right.”³⁸ The existence of an error-insulation rule implies that mistaken Supreme Court rulings aren’t just some stroke of bad luck—they are a regular occurrence.

Proving that these erroneous decisions inflict severe costs on our society probably requires little more than a see cite to cases like *Dred Scott*, *Plessy*, and *Korematsu*. But to fully appreciate the need for a constitutional theory that cares less about getting cases right than about what happens after the Court gets cases wrong, it is worth lingering for a moment on the painful consequences of Supreme Court error. So I touch here on two somewhat less heralded decisions: *Prigg v. Pennsylvania* and *Hammer v. Dagenhart*.

Prigg v. Pennsylvania involved the prosecution of a slave catcher under a Pennsylvania law making it a felony to take a person from the commonwealth into slavery.³⁹ Prigg, the slave catcher in question, had kidnapped a woman named Margaret Morgan, along with her two children, and sold them into slavery.⁴⁰ Strong historical evidence suggests that Morgan herself was not a fugitive slave, and that her children were born free.⁴¹ Yet the Supreme Court struck down Pennsylvania’s law as a violation of the Fugitive Slave Clause⁴² using dubious reasoning,⁴³ effectively creating a constitutional immunity for slave catchers to kidnap whomever they might please—free Blacks included—to be sold into slavery. As Jamal Greene has lamented, “the human tragedy of [*Prigg*] is breathtaking.”⁴⁴ Such is the cost of Supreme Court constitutional error.

Hammer v. Dagenhart. In 1910, Lewis Hine published an image of a young boy laboring at a coal mine. The boy’s face and body are covered in

³⁷ See *The Constitution of the United States: Analysis and Interpretation* 2623-2635 (2016). The list is underinclusive for another reason and overinclusive, too. Underinclusive because it only includes express overrulings and their “functional equivalent.” *Id.* However, some cases are implicitly overruled without being included by name in the list. See, e.g., *id.* at 2632 (referring to but not naming “numerous other cases” that fall under *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984)). The list is overinclusive because a few of the listed cases involve non-constitutional rulings.

³⁸ *Burnet v. Coronado Oil & Gas*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

³⁹ 416 U.S. 539 (1842).

⁴⁰ *Id.*

⁴¹ See Allan Vought, “Sacrificing Margaret Morgan, Hartford’s little known role in the origins of the Civil War,” Feb. 21, 2018, *The Baltimore Sun*.

⁴² U.S. Const. art. IV, § 2, cl. 3;

⁴³ *Prigg*, 41 U.S. at 613; see also Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 428-29 (2011); Sanford Levinson, *Is Dred Scott Really the Worst Opinion of All Time? Why Prigg Is Worse Than Dred Scott*, 125 Harv. L. Rev. F. 23 (2012).

⁴⁴ Greene, *supra* n.43 at 428.

black oil as he struggles to carry two heavy buckets across a barren wasteland. Hine's caption reads: "Shorpy Higginbotham, a 'greaser' . . . at Bessie Mine of the Sloss-Sheffield Steel and Iron Co. in Alabama. Said he was 14 years old, but it is doubtful. . . . [He] is often in danger of being run over by the coal cars."⁴⁵

Hine's photos helped spur national popular opposition to child labor. In 1916, Congress enacted the Keating-Owen Act, which banned the shipment in interstate commerce of any commodity manufactured using labor from children under age fourteen.⁴⁶ But the Supreme Court struck down the law in *Hammer v. Dagenhart*, reasoning that it exceeded Congress's commerce power by intruding into a "matter purely local in its character."⁴⁷

Children across the nation felt the brunt of the *Hammer* decision. During the nine months when the Keating-Owen Act was enforced, child labor inspectors found children under the age of fourteen working in fewer than half of the 689 facilities examined.⁴⁸ The Act was starting to have its intended effect. Yet that momentum was lost after the Act was invalidated: inspectors discovered in one state that 47 out of 53 factories were employing children *under twelve*.⁴⁹ The scope of this problem is hard to exaggerate: as of the 1910 census, more than 1.6 million children between the ages of ten and fourteen worked.⁵⁰ Many of these children worked demanding jobs in coal mines, glasshouses, textile mills, and sweatshops.⁵¹ And as Lewis Hine's photo of Shorpy Higginbotham revealed, some were in constant risk of injury or even death. These harms lasted for more than two decades up until the Court's decision to overrule *Hammer* in *United States v. Darby*.⁵²

In each of these cases, what matters is not simply that the harmed groups lost. By definition, every case has a losing party that in some sense bears costs from the adverse ruling. But when the Supreme Court *correctly* decides a constitutional case, those costs (such as they are) are just a proper byproduct of our constitutional system. The error costs inflicted by cases like *Prigg* and *Hammer* thus occur because the losing groups should have prevailed under what is now understood to be the right constitutional interpretation. When the Supreme Court wrongly relegates free people into slavery and wrongly leaves thousands of children to labor in dangerous conditions, well, that is a matter of real regret. We care about the Supreme

⁴⁵ See Alan Taylor, "Child Labor in America 100 Years Ago," *The Atlantic*, Jul. 1, 2015 (photo number 7).

⁴⁶ *Hammer*, 247 U.S. 268 at n.1.

⁴⁷ *Id.* at 276.

⁴⁸ John A. Fliter, *Child Labor in America: the Epic Legal Struggle to Protect Children* 88 (2018).

⁴⁹ *Id.* at 95.

⁵⁰ Hugh D. Hindman, *Child Labor: An American History* 31 (2002).

⁵¹ *Id.* at 89-212.

⁵² 312 U.S. 100 (1941).

Court's susceptibility to constitutional error precisely because of the great costs those errors can inflict.

Of course, most Supreme Court decisions are not obviously erroneous at the time when they are decided, at least not erroneous in the way we now understand cases like *Dred Scott* and *Plessy*. (If the errors were so obvious, presumably the Court would not have succumbed to them in the first place). In fact, as Professor Jamal Greene has argued, there is a sense in which even decisions like *Dred Scott* had plausible claims of accuracy at the moment of decision under then-prevailing legal norms.⁵³ So at least as of the time when they are issued, the Court's contentious constitutional rulings are better thought of as presenting *hard cases* rather than clear mistakes.

The lack of an easy, objective way to quickly identify Supreme Court error substantially expands the implications of constitutional error costs.⁵⁴ For the risk that the Court will impose such costs exists not merely in a few cases where it happens to make some obvious error, but rather in all cases where the correct outcome is uncertain under existing legal norms.⁵⁵ That means the potential for producing error costs arises in a significant portion of the Court's current docket, given that most of the cases it decides nowadays have already divided the lower courts.⁵⁶ Or put another way, to avoid the error costs of the next *Prigg* or *Hammer*, a conscientious Justice would need to take into account the risk that her preferred mode of legal analysis might lead to err in *any* hard case, because the next *Prigg* or *Hammer* won't be obvious at the outset. The human costs of Supreme Court error are high, but the costs of identifying and fixing those errors using our existing tools of legal interpretation may be higher still.

2. *Decision Costs*

To many, the tremendous toll of erroneous Supreme Court rulings may be reason enough to think twice about the Court's current approach to hard cases. But the way in which the Court resolves these cases produces yet another significant set of costs for society, separate and apart from any resulting errors. These costs can be conceptualized as *decision costs*.⁵⁷

⁵³ See Greene, *supra* n.43 at 463.

⁵⁴ Of course, some constitutional theorists argue that there *is* an objective way to identify (and fix) Supreme Court error, if the Court would simply adopt their preferred theory of interpretation. See *infra* Part I.B.1. I evaluate these arguments below. See *id.*

⁵⁵ See *infra* text accompanying notes 214-23 (discussing hard cases).

⁵⁶ Stephen M. Shapiro, et al., *Supreme Court Practice* 241 (2013) (noting that roughly 70% of cases granted in the 1993 Term implicated a conflict among lower courts).

⁵⁷ Professor Sunstein describes decision costs as the burdens facing judges in adjudicating a case, whether due to the lack of information or the difficulty reaching consensus. See Sunstein, *supra* n.35 at 47-48. I agree that such costs exist, but my focus

To understand this kind of costs, start with four facts about many of the major constitutional disputes the Court is asked to resolve, as well as the Court's decisional approach.⁵⁸ First, as noted, today's constitutional disputes typically turn on hard questions in the sense that reasonable arguments can be made on both sides of the case under accepted theories of constitutional interpretation.⁵⁹ The existence of reasonable disagreement gives rise in turn to a significant universe of people with fair reason to believe they have been wronged by any given hard constitutional decision.

Second, these hard constitutional questions frequently determine the outcome of deeply important and salient issues of public policy. Just this Term, for instance, the Court will decide cases involving Second Amendment limits on New York City's ability to regulate guns;⁶⁰ the use of excessive force by law enforcement in the context of a cross-border shooting of an unarmed 15-year-old Mexican national;⁶¹ and the use of publicly funded school vouchers to attend religious private schools.⁶² Cases in prior terms have attempted to resolve the constitutionality of partisan gerrymandering,⁶³ the Trump Administration's travel ban from predominantly Muslim countries,⁶⁴ and the financial underpinning of America's public sector unions,⁶⁵ just to name a few. The Court's final word on the winners and losers of these Olympian disputes thus triggers intense feelings among the public not just because the correct answers are so hard to discern, but also because they matter so much to so many.

Third, the Supreme Court believes it is capable of discovering and announcing the single correct answer to these hard questions of dire social significance through skillful legal interpretation—interpretation that ordinary Americans are evidently unable to perform on their own. As Professor Pamela Karlan has argued, the Justices now display a growing sense of their own “superiority at resolving constitutional controversies,” a sense that is rooted in constitutional theory's increasing confidence that “it can deliver ‘right answers’ to even difficult constitutional questions.”⁶⁶

here is on a different kind of cost—the costs that society bears in terms of increased polarization and distrust for the Court due to its present approach to deciding hard cases.

⁵⁸ To be sure, the same arguments about error and decision costs might be made in statutory cases, too. I discuss this potential implication further below, *see infra* Part III.C.3.

⁵⁹ See Ronald Dworkin, *Hard Cases*, 88 Harv. L. Rev. 1057 (1975).

⁶⁰ *New York State Rifle & Pistol Association v. City of New York*, No. 18-280.

⁶¹ *Hernandez v. Mesa*, No. 17-1678.

⁶² *Espinoza v. Montana Department of Revenue*, No. 18-1195.

⁶³ *Rucho v. Common Cause*, 588 U.S. ____ (2019).

⁶⁴ *Trump v. Hawaii*, 585 U.S. ____ (2018).

⁶⁵ *Janus v. AFSCME, Council 31*, 585 U.S. ____ (2018).

⁶⁶ Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 Harv. L. Rev. 1, 68 (2012)

Fourth, notwithstanding the Justices' apparent belief that they are discerning answers based on neutral application of constitutional theory, the reality is that their decisions largely reflect their own political preferences, or at least those of the political party of their appointing presidents.⁶⁷ And the public knows it. According to one recent survey, 57% of respondents reported being "extremely concerned" that the Court makes decisions "based on a political agenda instead of the law"; by contrast only 11% reported high confidence in the Court's ability to "put[] politics aside."⁶⁸

The confluence of these factors leads to two important kinds of decision costs worthy of our concern: polarization and the erosion of public confidence in the Court. As to polarization, when the Supreme Court decides momentous and divisive issues of public policy using the ostensible rubric of constitutional law, the result is to invite destructive modes of argument into our constitutional culture and, worse yet, to normalize them. It is one thing, in other words, for discordant groups in society to try to persuade elected officials to adopt (or reject) a given policy using crass arguments about their opponents; it is quite another for the Supreme Court to rely on such arguments as a routine part of deciding *what our Constitution means*. Yet that is what constitutional law looks like today.

Consider, for example, the arguments made in *Janus*, the 2018 case resolving the constitutionality of public sector union fair share fees. The anti-union worker in the case, Mark Janus, argued in his brief to the Court that the Framers "would have been aghast at governments regimenting their workforces into involuntary, artificially-powerful factions for petitioning the government for a greater share of scarce public resources."⁶⁹ Public sector unions responded by proclaiming that workers like Janus have absolutely "no right to object to conditions placed upon the terms of employment," even "including those which restrict[] the exercise of constitutional rights."⁷⁰ Or consider the nature of argument in *Masterpiece Cakeshop*, which considered whether a religious baker possessed a First Amendment right to refuse to bake a cake for a gay couple's wedding notwithstanding a contrary obligation under state anti-discrimination law. The baker asserted that the gay couple had failed even to advance a

⁶⁷ See Adam Feldman, "Differences Between 'Obama' and 'Trump' Judges, While Sometimes Subtle, Can't Be Denied," *Emprical SCOTUS*, Dec. 4, 2018 (concluding that "[P]artisanship, at least in terms of appointing president, helps to dictate the decisions of federal judges in complex cases moving through the federal judicial hierarchy.").

⁶⁸ Memorandum from Geoff Garin et al., Hart Research Assocs., to Alliance for Justice, Views of the Supreme Court on Eve of the Health Care Ruling (June 11, 2012), https://www.afj.org/wp-content/uploads/2013/09/corporate_court_polling_memo.pdf.

⁶⁹ Reply Brief for Petitioner Mark Janus 11

⁷⁰ Brief for Respondent American Federation of State, County, and Municipal Employees, Council 31 at 18.

“plausible reading of the First Amendment,”⁷¹ whereas the couple responded by belittling the baker’s expressive interest in his wedding cakes as “far-fetched” and “misguided.”⁷² Or take a recent death penalty case in which the State accused a death penalty inmate of making a “facially implausible [claim]” to “delay his sentence for over four years.”⁷³ The inmate responded that the State’s position would “reward the ignorance of state officials” and lead to “predictably cruel executions.”⁷⁴

Put simply, the Supreme Court is not a neutral, dispassionate arbiter of social dissensus. It is instead a reflection—and worse yet, a source—of pervasive polarization within society. For when the Court views itself as the final authority on the one and only true meaning of a given constitutional provision, it is only natural for contestants to disparage and denigrate even the most reasonable claims made by their opponents. A litigant can win, after all, either by persuading the Court that her position is unassailably correct or by showing how her opponent’s position is worthy of ridicule. The result, as Jamal Greene has observed, is a destructive mode of constitutional argument that “diminishes us” by “leaving us farther apart at the end of a dispute than we were at the beginning.”⁷⁵

The Court’s belief in its ability to identify the singular correct meaning of the Constitution does not only create incentives for competing litigants to tear down the constitutional status of their opponents—it also gives the Court a false sense of its own power to resolve social controversies. One thinks of Chief Justice Roger Taney, who apparently believed that ruling definitively on Congress’s power to enact the Missouri Compromise in *Dred Scott* would end the national debate over slavery.⁷⁶ One consequence of excessive judicial certitude, in other words, is the risk that the Court will use its considerable power to further polarize our society.

⁷¹ *Id.* (emphasis added).

⁷² Brief for Respondents Charlie Craig and David Mullins at 19.

⁷³ Brief of Respondents 48 in No. 17-8151, *Bucklew v. Precythe*.

⁷⁴ Reply Brief of Petitioner Russell Bucklew at 1-2.

⁷⁵ Greene, *supra* n.31 at 34. To be clear, Greene’s target is the Court’s categorical approach to rights, which he criticizes in favor of a proportionality frame. *See id.* I wish only to add here that our constitutional discourse suffers the same corrosive effect when the Court acts on the overly-simplistic view that there is only one correct answer to any given constitutional dispute. Admitting the possibility of multiple plausible constitutional outcomes (and thus the risk of error and attendant harm from either resolution) allows the Court to acknowledge the reasonable claims to constitutional solicitude made by each side—and to rule with the objective of enabling both sides to attain their desired ends.

⁷⁶ *See* James F. Simon, *Lincoln and Chief Justice Taney* 117-20 (2006); *see also Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 1001 (1992) (Scalia, J., concurring in part and dissenting in part) (making a similar argument about the Court’s abortion jurisprudence).

A second, related kind of decision cost that arises from the Court's approach to resolving major hard cases is the public's loss of confidence in the judiciary.⁷⁷ Not only is the public divided on matters ranging from the Court's approach to constitutional cases,⁷⁸ to its membership and size,⁷⁹ but the Court is increasingly the subject of criticism from our leaders. One 2020 Democratic Presidential hopeful recently lamented that “[w]e are on the verge of a crisis of confidence in the Supreme Court.”⁸⁰ Indeed, after spending most of the 2000-2010 decade with a public job approval rating around 60%, the Court has since experienced a sharp regression—in all but one year after 2010, the Court's job approval rating has been below 50%.⁸¹

If the Court didn't act as though it alone possesses the answer to hard constitutional questions with wide-ranging implications for society, perhaps the public would not be so weary of it.⁸² Or perhaps the story would be different if decisions were less transparently a function of the Justices' political affiliations. But when the answers to major social controversies are rendered from on high based on the apparent political preferences of nine unelected Justices, it is no small wonder that talk of court packing, term limits, and jurisdiction stripping are in the news.⁸³ When the Justices are viewed as mere “politicians in robes”⁸⁴—and when the Court is perceived as just another partisan institution—nobody wins. Certainly not the Court itself. And certainly not the people who are left to ponder the point of participating in democratic politics when the whole game seems rigged.

B. Existing Responses

What should we do about the costs of Supreme Court constitutional decisions? In some sense, this question has motivated much of the field of

⁷⁷ This loss of confidence corresponds to what Professor Richard Fallon has described as the court's “sociological” legitimacy, as opposed to its moral or legal legitimacy. See Richard H. Fallon, Jr., *LAW AND LEGITIMACY IN THE SUPREME COURT* 21 (2018).

⁷⁸ See *supra* n.1.

⁷⁹ *Id.*; see also “Voters Favor Term Limits For Supreme Court But No More Members,” Mar. 20, 2019, Rasmussen (finding 27% of respondents favor adding Supreme Court Justices, 51% oppose, and 22% are undecided).

⁸⁰ Sen. Kamala Harris, quoted in Burgess Everett & Marianne Levine, “2020 Dems warm to expanding Supreme Court,” *Slate*, Mar. 18, 2019.

⁸¹ See Gallup Poll, “Supreme Court,” *supra* n.1.

⁸² See Karlan, *supra* n.66 at 28 (“The Court's dismissive treatment of politics raises the question whether, and for how long, the people will maintain their confidence in a Court that has lost its confidence in them.”).

⁸³ See *supra* n.79; Gregory Koger, “How a Democratic Congress can push back against the Supreme Court,” *Vox*, Nov. 12, 2018, online at <https://www.vox.com/mischiefs-of-faction/2018/11/12/18080622/democratic-congress-against-supreme-court> (proposing that Congress strip the Supreme Court of jurisdiction in campaign finance and voting rights).

⁸⁴ Eric J. Segall, *Supreme Myths: Why the Supreme Court is Not A Court and its Justices are Not Judges* at ix (2012).

constitutional law. After all, if everyone thought the Court was resolving all constitutional cases correctly and that its decisions produced no adverse costs for society, how much would be left to say?

Academic responses tend to fall into two camps. *Judicial optimists* believe that error costs and decision costs can be eliminated, or at least justified, if only the Court would apply this (or that) interpretive approach. *Judicial pessimists*, by contrast, believe that these costs are intractable—so much so that society would actually be better off leaving interpretive authority over the Constitution to some other body.⁸⁵

The pessimists are right in part, or so I will argue here. No matter what theory of constitutional interpretation one subscribes to, the Supreme Court will never stop erring and thus imposing painful costs upon the American people. But the pessimistic prescription does not follow. The Court can—and should—retain a role in resolving constitutional disputes. It’s just that this role should focus less on getting hard cases right than on minimizing the costs produced when the Court gets cases wrong. The balance of the Article explores what such a focus might look like.⁸⁶

1. *Judicial Optimists*

The most logical response to the costs of Supreme Court error is to fix it. In this sub-part, I canvas some of the leading theories for how the Court might accomplish this—originalism, pluralism, political process theory, common law constitutionalism, and moral readings.⁸⁷ My aim is to show how each of the theories is ultimately incapable of yielding a single “correct” outcome in hard constitutional disputes due to methodological disagreement and evidentiary indeterminacy.⁸⁸ And none of the theories would mitigate the Supreme Court’s decision costs, either.

Originalism. To originalists, the solution to judicial error is to restore the Constitution’s original meaning. The problem is, even assuming nine originalist Justices were confirmed, they would quickly find themselves charging their colleagues with mistakes in important cases. Begin with the basic disagreement over what it is originalists are trying to discover in the first place. For decades, originalists sought to recover the original intentions

⁸⁵ There are, of course, some theories in the space between. See *infra* n.152.

⁸⁶ See *infra* Parts II & III.

⁸⁷ For a discussion of other leading theories, see the books cited *infra* at n.88.

⁸⁸ I am not the first to levy this critique, so I will paint quickly and with broad strokes. For fuller accounts of the flaws in grand theories of constitutional law, see Mark V. Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (1988); J. Harvie Wilkinson III, *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance* (2012); Daniel A. Farber & Suzanna Sherry, *Desperately Seeking Certainty: The Misguided Question for Constitutional Foundations* 8 (2002).

of the framers.⁸⁹ After blistering critique,⁹⁰ this approach has largely given way to a search for the Constitution's original public meaning.⁹¹ Still, a number of well-known scholars continue to defend the importance of the framers' intent,⁹² and the Court's originalist opinions rely on such intentions.⁹³ So which outcome does originalism declare "correct" when original public meaning and original intentions diverge?⁹⁴

Now suppose a group of originalist Justices could agree on the primacy of original public meaning. There would still be disagreement over how to interpret historical evidence that is often "contradictory, incomplete, or severely compromised."⁹⁵ Prominent originalists have labored to evade this historical indeterminacy problem. Professors John McGinnis and Michael Rappaport have argued, for example, that courts should use the "interpretive methods that the [Constitution's] enactors would have deemed applicable," including a general rule in favor of whichever interpretation "ha[s] the stronger evidence in its favor"—perhaps something like a preponderance of the evidence standard for close questions of constitutional law.⁹⁶ Yet notice the implication: to admit that a preponderance of the evidence standard is needed to resolve hard constitutional disputes is all but to concede that some cases will be decided incorrectly. After all, the side that claims 51% of an incomplete and ambiguous body of evidence often winds up wrong.⁹⁷

⁸⁹ See, e.g., Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 3 (1997) (arguing that the "original intention of the Framers . . . is binding on the Court"); see also Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 Geo. L.J. 713, 728-29 (2011).

⁹⁰ Colby, *supra* n.89 at 720-22.

⁹¹ *Id.* at 722-724.

⁹² See, e.g., Larry Alexander, *Simple Minded Originalism*, in *The Challenge of Originalism: Theories of Constitutional Interpretation* 87 (Grant Huscroft & Bradley W. Miller eds., 2011); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 Nw. U. L. Rev. 703 (2009)

⁹³ See, e.g., *Arizona v. Inter-Tribal Council of Arizona, Inc.*, 570 U.S. 1, 26 (2013) (Thomas, J., dissenting) (arguing that "[t]he Framers did not intend to leave voter qualifications to Congress").

⁹⁴ As is perhaps true of a case like *Brown v. Board of Education*? See Andrew Coan, *Living Constitutional Theory*, 66 Duke L.J. 99, 107 (2017).

⁹⁵ Colby, *supra* n.89 at 723; see also Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 Harv. J. L. & Pub. Pol'y. 437 (1996).

⁹⁶ John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution* 116, 142 (2013). William Baude and Stephen Sachs have argued that "the original meaning of the Constitution is the ultimate criterion for constitutional law, including of the validity of other methods of interpretation." William Baude, *Is Originalism Our Law?*, 115 Colum. L. Rev. 2349 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 Harv. J.L. & Pub. Pol'y 817 (2015). Under original law originalism, judges may rely on any and all arguments that "lawfully derive from the law of the founding." William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 Nw. U. L. Rev. 1455, 1458 (2019).

⁹⁷ See, e.g., every episode of Law and Order in which the initial suspect (against whom the bulk of the evidence points) is not the actual perpetrator. More seriously, see Vern

In any case, most originalists think the Constitution's original public meaning is "thinner" than McGinnis and Rappaport believe,⁹⁸ myself included.⁹⁹ That is, most originalists today believe in the existence of a "construction zone"—a set of cases where the original public meaning is consistent with multiple possible outcomes and thus where it is necessary to consider normative values outside the Constitution to decide who wins.¹⁰⁰

But just which normative values should be decisive? As Professors Will Baude and Stephen Sachs lament, "what these normative considerations are, and hence what's supposed to happen in these construction zones, can seem awfully indeterminate."¹⁰¹ Here are just a few possibilities suggested in the literature. Courts should decide cases in the construction zone under a "presumption of liberty."¹⁰² Courts should perform constitutional construction using "all of the modalities of constitutional argument."¹⁰³ Courts should engage in constitutional construction by "ascertaining and adhering" to the "spirit" of the constitutional text.¹⁰⁴ It is not hard to see how originalist justices applying these varied approaches to constitutional construction could reach divergent outcomes, all in good faith.

The proof is in the pudding. Consider a sample of recent disagreements between originalists. Justice Scalia supported a weak non-delegation doctrine; Justice Thomas does not.¹⁰⁵ Justice Scalia argued that the Confrontation Clause applies to statements made to police "for the purpose of . . . proving some fact"; Justice Thomas thought otherwise.¹⁰⁶ Justice Thomas believes the Constitution permits successive prosecutions of a defendant by a state and Federal government; Justice Gorsuch does not.¹⁰⁷

Walker, 62 Brook. L. Rev. 1075, 1104 (1996) ("[T]here are serious difficulties with attempts to justify a 0.5 decision rule on the argument that it minimizes the rate of error.").

⁹⁸ See Heidi Kitrosser, *Interpretive Modesty*, 104 Geo. L. J. 459, 462 (2016).

⁹⁹ See Aaron Tang, *Rethinking Political Power in Judicial Review*, 106 Calif. L. Rev. 1755, 1796 n.246 (2018)

¹⁰⁰ See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const. Comm. 95 (2010); Randy Barnett, *Interpretation and Construction*, 34 Harv. J. L. & Pub. Pol'y 65 (2011); Keith Whittington, *Constitutional Construction* 5-9 (1999).

¹⁰¹ William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079, 1128 (2017)

¹⁰² Randy Barnett, *Restoring the Lost Constitution* (2013).

¹⁰³ Jack Balkin, *Living Originalism* 256 (2011).

¹⁰⁴ Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 Geo. L. J. 1 (2018)

¹⁰⁵ Compare *Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001) (Scalia, J.) (applying "intelligible principle" test); with *Dep't of Transportation v. Ass'n of Am. RR*, 135 S. Ct 1225, 1240-46 (Thomas, J., concurring in judgment) (challenging this approach).

¹⁰⁶ *Michigan v. Bryant*, 562 U.S. 344, 380-81 (2011) (Scalia, J., dissenting); compare *id.* with *id.* at 378 (Thomas, J., concurring) (arguing that the Confrontation Clause applies to statements made to police with "sufficient formality and solemnity").

¹⁰⁷ Compare *Gamble v. United States*, ___ S. Ct. ___ at *16 (2019) (Thomas, J., concurring) ("[T]he historical record does not bear out my initial skepticism of the dual-

Until originalism as a family has the tools to declare one side of these disputes “correct” and the other “erroneous,” originalists will lack a single solution to the problem of constitutional error.

Pluralism. Originalism is hardly unique in its inability to reveal a single true meaning in hard cases. Take constitutional pluralism, the widely-held view that “there are multiple legitimate methods of interpreting the Constitution.”¹⁰⁸ Professor Phillip Bobbitt articulated an influential version of pluralism as comprising six modalities of argument: historical, textual, structural, doctrinal, ethical, and prudential.¹⁰⁹ Professor Richard Fallon identifies a somewhat different (though overlapping) list: arguments from text, the framers intent, constitutional theory, precedent, and values.¹¹⁰ More recently, Professor Mitchell Berman has argued that constitutional rules should be derived from claims on a set of constitutional principles grounded in social facts.¹¹¹ Under “principled positivism,” acceptable arguments include those sufficiently “taken up” by the relevant actors.¹¹²

To describe constitutional pluralism is almost to reveal its vulnerability to error. Consider the problem of intra-method disagreement. The crux of the challenge stems from what Fallon famously recognized as pluralism’s “commensurability problem”: what should judges do in cases where the various modes of constitutional argument conflict?¹¹³ For pluralism to eliminate judicial error costs, there must be a method for caching out these conflicts. But pluralists cannot agree on what that method is.

Start with Fallon’s “constructivist coherence” theory. The first step is to “assess and reassess the arguments in the various categories in an effort to understand each of the relevant factors as prescribing the same result.”¹¹⁴ If that fails, the next step is to rank the modes of argument hierarchically.¹¹⁵ Fallon suggests the following order: text, history, theory, precedent, values.

sovereignty doctrine”), *with id.* at *30 (Gorsuch, J., dissenting) (“[T]h[e] ‘separate sovereigns exception’ to the bar against double jeopardy finds no meaningful support”).

¹⁰⁸ Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 Tex. L. Rev. 1753, 1753 (1994).

¹⁰⁹ Phillip Bobbitt, *Constitutional Interpretation* 12-13 (1991)

¹¹⁰ Richard H. Fallon Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189 (1987).

¹¹¹ Mitchell N. Berman, *Our Principled Constitution*, 166 U. Pa. L. Rev. 1325, 1412 (2018).

¹¹² *Id.* at 1331. Jack Balkin has introduced a set of eleven “topics” of constitutional argument to guide constitutional construction once original meaning runs out. See Jack Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 Const. Comm. 145, 244 (2018). And Professor Richard Primus has argued that judges should select methods of argument based on the nature of the constitutional question. Primus, *When Should Original Meanings Matter?* 107 Mich. L. Rev. 165 (2008).

¹¹³ Fallon, *supra* n.110 at 1191.

¹¹⁴ *Id.* at 1193.

¹¹⁵ *Id.* at 1243.

Bobbitt disagrees. “[I]t is a fundamental part of my views,” he argues, “that the modalities . . . are incommensurable” when they conflict.¹¹⁶ When that happens, Bobbitt proposes that “the resolution of such conflicts” be left to “the conscience of the decider.”¹¹⁷ This is hardly a way to fix constitutional error; presumably the Justices in *Dred Scott*, *Hammer*, and *Korematsu* followed their “consciences,” too.

Berman rejects both views. He instead conceives of all acceptable arguments (assuming agreement on whether a given kind of argument is sufficiently taken up by the relevant actors¹¹⁸) as being depicted by arrows with differing thicknesses and lengths depending on their general and case-specific force.¹¹⁹ To know what the law “is,” one draws all possible arrows with the right lengths and widths and then decides which outcome is right given her overall impression of the picture.¹²⁰

A body of pluralist Justices that is divided with respect to these approaches would inevitably disagree, leaving the losing side to make credible claims of constitutional error. And this is before one considers the problem of indeterminacy *within* each category of argument: there is no reason to think all fair-minded pluralists will agree on the initial question of whether arguments from text point this way rather than that (or arguments from history, structure, precedent, or consequences and so on).¹²¹ In the end, pluralism may fairly describe how we *do* constitutional argument, but that’s a far cry from pointing to the correct answer in hard cases.

Political Process Theory, Common Law Constitutionalism, & Moral Readings. Three other leading theories suffer from comparable problems. In *Democracy and Distrust*, John Hart Ely argued for aggressive judicial review in cases where those in power “systematically disadvantage[e] some minority out of simple hostility,”¹²² a concept neatly captured in *Carolene Products* Footnote 4’s suggestion of special solicitude for “discrete and insular minorities.”¹²³ But the identification of “discrete and insular minorities” is itself a value judgment that turns on one’s political beliefs

¹¹⁶ Phillip Bobbitt, *Reflections Inspired By My Critics*, 72 Tex. L. Rev. 1869, 1954 (1994) (criticizing theories that suggest “a hierarchical arrangement”).

¹¹⁷ *Id.* at 1874.

¹¹⁸ Berman, *supra* n.111 at 1383-90.

¹¹⁹ *Id.* at 1394-95

¹²⁰ *See id.* at 1395-1410 (providing examples).

¹²¹ *See* Balkin, *supra* n.112 at 232-33.

¹²² *See* John Hart Ely, *Democracy and Distrust* 103 (1980). He also argued for aggressive judicial review when those in power “chok[e] off the channels of political change,” though this “access prong” has proven less controversial than its companion “prejudice prong,” which I focus on here. *Id.*; *see also* Aaron Tang, *Reverse Political Process Theory*, 70 Vand. L. Rev. 1427, 1438 (2017).

¹²³ 304 U.S. 144, 152 n.4 (1938).

and values.¹²⁴ Indeed, as Professor Bruce Ackerman argued, if the concern for such minorities is their inability to participate fairly in the political process, shouldn't we be just as concerned with "members of anonymous or diffuse groups who . . . have the greatest cause to complain that pluralist bargaining exposes them to systematic—and undemocratic—disadvantage"?¹²⁵ Put simply, two jurists who are equally concerned with protecting the health of the political process might well come out in opposite directions in a given case due to their prior views about politics itself.¹²⁶

Under common law constitutionalism, a theory most associated with Professor David Strauss,¹²⁷ the Constitution's text is "treated more or less the same way as precedents in a common law system": its effects are not "fixed at [the time of] adoption" and different provisions can be "expanded, limited . . . or all-but-ignored," depending on "subsequent decisions and judgments about the direction in which the law should develop."¹²⁸

It is hard to quibble with the descriptive power of this argument—courts do usually reason from precedent in constitutional cases.¹²⁹ But that's different from arguing that common law constitutionalism will eliminate error in hard cases. That position is harder to sustain because of how the theory directs judges to act. Judges should follow precedent unless it is insufficiently clear to direct a result; in that case they should rule in the way that is "more fair or is more in keeping with good social policy."¹³⁰ The trouble is, notions of fairness and policy are up to the eye of the beholder. And five (or nine) of our Justices could easily err in their estimations.

A similar problem plagues Professor Ronald Dworkin's moral readings theory. On this theory, judges must "find the best conception of constitutional moral principles . . . that fits the broad story of America's historical record."¹³¹ Perhaps there is much to be said about this as an aspirational account.¹³² But it leaves much wanting as a prescription for

¹²⁴ See Bertrall Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 Calif. L. Rev. 1565 (2013) (arguing that the Warren Court understood politics in pluralist terms, justifying enhanced protection for minority groups, but later Courts have adopted a contrary public choice theory).

¹²⁵ Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713 (1985).

¹²⁶ For a deeper discussion of the critiques of political process theory, see Tang, *Reverse Political Process Theory*, *supra* n.122 at 1441-47.

¹²⁷ See David Strauss, *The Living Constitution* (2010).

¹²⁸ David Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 Harv. L. Rev. 1, 4-5 (2015).

¹²⁹ See Strauss, *supra* n.137 at 33.

¹³⁰ *Id.* at 38.

¹³¹ See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 11 (1996).

¹³² See James E. Fleming, *Fidelity to Our Imperfect Constitution* (2015). *But see* McConnell, *supra* n.30 (criticizing moral reading theory).

eliminating constitutional error (unless one happens to believe in the soundness of opinions like, “We like Rawls, you like Nozick. We win, 6-3. Statute invalidated.”¹³³). The dictates of moral philosophy, much like the role of precedent, the meaning of a complex historical record, and the weight of various modes of constitutional argument, are up for grabs. Sometimes the Justices will get them right, but sometimes they won’t.

* * *

Let us make the assumption that originalists (or constitutional pluralists) find a way to unify around a single originalist (or pluralist) method. Let us further assume that the evidence within that theory’s preferred mode(s) of argument is suddenly the subject of consensus. Even with these assumptions, the optimists’ position would still face a fatal problem: not disagreement *within* each family of theories, but *between* them.

The Supreme Court today is made up of some originalists and some pluralists, with a further divide within each group, for example between pluralists who prioritize textual and purposive arguments.¹³⁴ There have been political process and common law Justices in other eras, too.¹³⁵ Unless one thinks this is likely to change—that all (or even a majority) of the Justices are suddenly going to agree on a single interpretive approach—then we are destined to have a Court that actually decides cases under a kind of constitutional eclecticism.¹³⁶ That fact should dishearten any optimist. For unless one believes the single, correct way to determine the true meaning of our Constitution is to run it through the blender of whatever hodgepodge of theories are then held by the nine members of the Supreme Court, constitutional error costs seem all but inevitable.

And what of decision costs? None of the foregoing theories avoids them, because each theory requires the Court to make difficult judgments based on contested values, all while calling on the parties to argue over who is ultimately worthy of constitutional regard and who is not. Indeed, some of the theories, if adopted, might be even more polarizing than the Court’s current eclectic approach: imagine a Court that rules against a group because it rejects the group’s moral principles as “[in]consistent with

¹³³ Ely, *supra* n.122 at 58.

¹³⁴ See John F. Manning, *The New Purposivism*, 2011 Sup. Ct. Rev. 113, 136 (2011) (describing Justice Kagan as a textualist and Justice Breyer as a purposivist).

¹³⁵ For an example of a common law constitutionalist, see Justice Benjamin Cardozo. See Strauss, *supra* n.127 at 80. Earl Warren is often considered a process theory judge. See Ely, *supra* n.122 at 220-21 n.2.

¹³⁶ See Jeffrey A. Pojanowski, Kevin C. Walsh, *Enduring Originalism*, 105 Geo. L.J. 97, 135-36 (2016); Lawrence B. Solum *The Constraint Principle: Original Meaning and Constitutional Practice* 8, unpublished manuscript online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215.

America's historical record."¹³⁷ And while some members of the public will happen to agree with individual case outcomes, the Court's constant intervention in major societal disputes (all under the aegis of some "cosmic" theory of constitutional law,¹³⁸ knowable only to the Justices themselves) will drain the public's confidence over time, especially if the Court's rulings continue to reflect the political views of a bare majority of the Justices.

2. *Judicial Pessimists*

In part because of the endemic flaws in judicial optimism, a chorus of leading voices has taken a decidedly more cynical view of the Supreme Court's role in constitutional law. I touch here on three influential accounts.

In 1999, Professor Mark Tushnet advanced a controversial proposal: America should do away with judicial review.¹³⁹ Tushnet recognized the currents against him,¹⁴⁰ but he was firm in at least two convictions. First, there is no way to "fix" the Supreme Court so as to prevent error costs.¹⁴¹ And second, doing away with judicial review would make America a better place because it would "return all constitutional decision-making to the people acting politically" through their elected officials.¹⁴² This second conviction was itself rooted in two beliefs: that "[t]he effects of doing away with judicial review . . . would probably be rather small," and that once freed from the "judicial overhang," legislators "might not do such a bad job of interpreting the . . . Constitution" themselves.¹⁴³

Five years later, Professor Larry Kramer published another challenge to judicial review, one rooted in the history of the people's role in constitutional law.¹⁴⁴ Kramer shows that "for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing the Constitution," and that "the people themselves," not courts, had "[f]inal interpretive authority."¹⁴⁵ While it is not always clear what popular constitutionalism would mean in practice,¹⁴⁶ Kramer points

¹³⁷ See Dworkin, *supra* n.131 at 11.

¹³⁸ See Wilkinson, *supra* n.88.

¹³⁹ Tushnet, *Taking The Constitution Away From The Courts* (1999).

¹⁴⁰ *Id.* at 173 ("I realize that I am swimming upstream.")

¹⁴¹ *Id.* at 157 ("Suppose that somehow we managed to get all the judges to agree on a single approach to interpreting the Constitution. Even so, we would find judges reaching wildly divergent results.")

¹⁴² *Id.* at 154.

¹⁴³ *Id.* at 154, 129

¹⁴⁴ Kramer, *The People Themselves* (2004).

¹⁴⁵ *Id.* 8; *see id.* at 9-206.

¹⁴⁶ See Lawrence B. Solum & Larry Alexander, *Popular? Constitutionalism?* 118 Harv. L. Rev. 1594, 1617-18 (2005).

at times to the role of “mobs” or “crowd action” in directly enforcing the law as well as congressional and presidential action.¹⁴⁷

Professor Jeremy Waldron also condemns general review. He points to two main problems: it obscures the “real issues at stake when citizens disagree about rights” by focusing debates on “side-issues about precedent, texts, and interpretation” and it is “politically illegitimate” insofar as it “disenfranchises ordinary citizens” in favor of unelected judges.¹⁴⁸

Tushnet, Kramer, and Waldron levy forceful attacks against judicial review. And in one sense, eliminating judicial review would eliminate Supreme Court decision costs: the Court cannot polarize society or diminish the public’s confidence in the judiciary through constitutional cases if it is powerless to decide them. But those costs would not disappear altogether—they would simply be transferred to other institutions once legislatures and executive officials are left with unchecked decisionmaking authority.

With respect to error costs, perhaps Tushnet is correct that leaving the final word to legislatures would lead to fewer constitutional errors than judicial review. One thing we know for sure is that legislative supremacy would lead to *different* instances of error. Sure, *Dred Scott* and *Hammer v. Dagenhart* wouldn’t have happened without judicial review, but neither would *Brown v. Board of Education*. States would still be free to criminally punish private intimate conduct between members of the same sex,¹⁴⁹ and no Court could enjoin the government from imprisoning those who publish “false, scandalous, and malicious writing[s]” against our leaders.¹⁵⁰ As Dean Erwin Chemerinsky powerfully argues, “[t]hroughout history, [legislative] majorities have persecuted racial, religious, and political minorities.”¹⁵¹ Maybe on balance that’s a better world to live in than a world where nine unelected judges invalidate laws they ought to leave in place based on whatever medley of interpretive theories they happen to hold at the time. But are those really our only choices?

* * *

I want to suggest that they aren’t. There is another option, and the first step to seeing it is to shift our focus from how the Court interprets the

¹⁴⁷ See Kramer, *supra* n.144 at 27 (discussing mobs, or crowd action); *id.* at 249 (describing presidential and congressional efforts to reign in the courts). Yet Kramer seems also to reject legislative supremacy and a departmental model in which the branches of government would share interpretive authority. *id.* at 58 (“[Legislative supremacy] would have been inconsistent with the whole framework of popular constitutionalism In fact, neither branch was authoritative because interpretive authority remained with the people.”)

¹⁴⁸ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L. J. 1346, 1353 (2006).

¹⁴⁹ *Bowers*, 478 U.S. 186.

¹⁵⁰ Sedition Act of 1798, 1 Stat. 596.

¹⁵¹ Chemerinsky, *supra* n.14 at 683.

Constitution to what happens afterwards. It is this change in orientation that opens the possibility of a best cost-avoider theory of constitutional law.¹⁵²

None of this is to suggest that scholars of constitutional law should stop the vital work of theorizing how to interpret and apply the Constitution. My point is that while those debates are happening—that while our actual Supreme Court continues to decide cases using an eclectic approach that has produced scores of painful, erroneous rulings over the years—we also need a theory of judicial review for the here and now that reduces the costs of Supreme Court decisionmaking. We need a second best theory that takes seriously the fact of constitutional error and the great harm it can cause.¹⁵³

II. TOWARDS A BEST COST-AVOIDER THEORY OF CONSTITUTIONAL LAW

Justice Robert Jackson famously wrote that Supreme Court Justices “are not final because we are infallible . . . we are infallible only because we are final.”¹⁵⁴ The truth is that the Supreme Court is neither. Jackson’s refrain humbly admits the Court’s propensity to err,¹⁵⁵ but this Part will suggest that the Court’s decisions are not always final in an important sense, either.

True, under *Cooper v. Aaron*,¹⁵⁶ the Court is the final expositor of the Constitution’s meaning. But it does not have the final word on the underlying disagreements between groups in our pluralistic society—the stuff that people argue over and that eventually winds its way up to the Supreme Court in the form of a case caption. To the contrary, groups adversely affected by the Court’s rulings can sometimes counteract the resulting costs through a variety of avenues. Not every group will have the equivalent ability to do so, however; some costs are easier to avoid than

¹⁵² In fairness, a number of other theories fall somewhere in between the optimists’ and pessimists’ position. Judge Posner’s pragmatism agrees that error is inevitable in hard cases, but he does not call for the Constitution to be taken away from judges. See Richard A. Posner, *Against Constitutional Theory*, 73 NYU L. Rev. 1 (1998). Professor Michael Dorf has argued for “experimentalist courts” that respond to indeterminacy by issuing “frameworks for resolution.” Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. Rev. 875, 886 (2003). And Professor Cass Sunstein’s judicial minimalism also recognizes the limits of judicial knowledge, but he calls on judges to decide cases incrementally rather than eliminating judicial review. See Sunstein, *supra* n.35 (1999). Professor Sunstein’s approach is particularly laudable for its desire to minimize judicial error costs by minimizing the reach of any given ruling. See *id.* at 49-50. But it still requires courts to declare a “winner” to hard and divisive constitutional disputes with substantial societal implications, a declaration that itself entails polarization and public confidence decision costs. See *infra* n.313.

¹⁵³ Cf. Adrian Vermeule, *Hume’s Second-Best Constitutionalism*, 70 U. Chi. L. Rev. 421, 421-22 (2003) (describing the idea of second best constitutionalism).

¹⁵⁴ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., dissenting).

¹⁵⁵ See also Part I.A.

¹⁵⁶ 358 U.S. 1 (1958).

others. This fact gives rise to a different way of thinking about hard constitutional cases where the Court risks wrongly imposing costs on a group that should prevail. In such cases, the Court should rule against the group that can best avoid the costs of an adverse ruling.¹⁵⁷

This Part introduces a best cost-avoider decision theory in the field of constitutional law. Part II.A begins by situating the theory within the broader legal landscape. It turns out that in private law disputes, courts routinely acknowledge the possibility of error, and they frequently respond using cost-avoider reasoning—that is, they decide close cases against the best cost-avoider. Part II.B explores what it means for affected groups to “avoid” the costs of constitutional error. Part II.C describes how best cost avoider theory could be implemented in constitutional cases.

A. Best Cost-Avoider Theory in Private Law

At least since Abram Chayes’s influential article, *The Role of the Judge in Public Law Litigation*,¹⁵⁸ scholars of constitutional law have had reason to remind themselves of the relative novelty of modern constitutional litigation in the broader landscape of what courts do. Constitutional cases are not the only game in court; in fact they’re more the exception than the norm. As Chayes wrote, “[i]n our received tradition, the lawsuit is a vehicle for settling disputes between private parties about private rights.”¹⁵⁹

Courts do a lot differently when deciding private law disputes.¹⁶⁰ One notable difference for present purposes is how they approach uncertainty about the law. Rather than evincing a singular obsession with getting the law “right” in these situations, private law courts often think about how the parties might have prevented the harm in the first place. Which party, these courts often ask, was best situated to avoid the costs in question?

Start with tort law. In *The Costs of Accidents*, Calabresi made the novel suggestion that the costs of automobile accidents might be minimized by “requir[ing] allocation of accident costs to those acts or activities . . . which could avoid the accident costs most cheaply.”¹⁶¹ A pair of concrete examples can help reveal this idea’s intuitive force.

¹⁵⁷ In the absence of transaction costs, it wouldn’t matter how the Court ruled in the first instance, since groups would just bargain to the most efficient outcome. See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960). But of course such costs do exist in constitutional law. See John Ferejohn, Barry Friedman, *Toward A Political Theory of Constitutional Default Rules*, 33 Fla. St. U. L. Rev. 825, 855 (2006) (“[T]he transaction costs of contracting pale in comparison to those in the constitutional realm.”).

¹⁵⁸ 89 Harv. L. Rev. 1281 (1976).

¹⁵⁹ *Id.* at 182.

¹⁶⁰ *Id.* at 1282-83 (listing the “defining features” of private law civil adjudication)

¹⁶¹ Calabresi, *supra* n.27 at 135.

Suppose you are driving your car in a rush to get to an appointment. The car in front of you slows suddenly, and you cannot stop your vehicle in time. Who should be liable for the ensuing crash? As all graduates of drivers education classes ought to (but perhaps don't) know, the general rule is that a driver who collides with the rear of a stopping vehicle will be held liable for the accident.¹⁶² This is true even if the driver of the lead vehicle may be at some fault; for instance if he fails to use a signal before he stops.¹⁶³

Why is this the rule? One way to understand it is through the lens of cost-avoider reasoning. For rather than engaging in the difficult task of determining who is at greater fault in any given accident, tort law imposes liability on the trailing driver because he is the easier (i.e., better) cost avoider. Whereas trailing drivers can generally avoid rear-end collisions with relative ease, simply by leaving ample distance to the vehicle in front of them, lead drivers may not be able to anticipate events that require them to stop suddenly (such as a deer leaping into the road¹⁶⁴). Structuring liability in this way incentivizes drivers to trail at greater distances, maximizing the odds that no accident will happen in the first place.

A second tort law example involves the common law rule that trains have the right of way at railroad crossings over wagons, cars, and like vehicles.¹⁶⁵ Again, this is not a rule aimed at getting hard cases “right” in the sense of ascertaining who is at greater fault in any given collision between a train operator and the driver of a vehicle crossing the tracks; often times it will be hard to know who was more negligent or whose negligence played a greater contributing role in an accident. The rule is instead rooted in an effort to avoid accidents with the greatest ease. As the Supreme Court once explained, given its heavy “character and momentum,” a train “cannot be expected [to] stop and give precedence to an approaching wagon to make the crossing first: it is the duty of the wagon to wait for the train.”¹⁶⁶ Car (or wagon) drivers are the best cost avoiders because they can stop more quickly, and so such vehicles should yield to oncoming trains.

¹⁶² See, e.g., *Filippazzo v. Santiago*, 716 N.Y.S.2d 710 (N.Y. App. Div. 2000).

¹⁶³ *Id.*

¹⁶⁴ See, e.g., *Cerilli v. Comm'r, Dep't of Correction*, No. HHDCV166068641S, 2018 WL 650305, at *1 (Conn. Super. Ct. Jan. 5, 2018)

¹⁶⁵ See, e.g., *Grand Trunk Ry. Co. of Canada v. Ives*, 144 U.S. 408, 431 (1892) (“A traveler upon a highway, when approaching a railroad crossing, ought to make a vigilant use of his senses of sight and hearing, in order to avoid a collision. . . . If by neglect of this duty he suffers injury from a passing train, he cannot recover of the company, although it may itself be chargeable with negligence.”). Credit for this example and the example discussed *infra* at nn.169-70 is due to Professor Herbert Hovenkamp, who discusses them in *Fractured Markets and Legal Institutions*, 100 Iowa L. Rev. 617 (2015).

¹⁶⁶ *Cont'l Imp. Co. v. Stead*, 95 U.S. 161, 164 (1877).

Cost-avoider reasoning is prevalent in contract law, too. The leading example is the rule of interpretation against the draftsman, or *contra proferentem*. The Restatement of Contracts describes this rule as follows: “In choosing among the reasonable meanings of a [contract], that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.”¹⁶⁷ As Justice Gorsuch recently observed, we utilize this rule to “resolve contractual ambiguities” precisely because “the drafter might have avoided the dispute by picking clearer times.”¹⁶⁸ Rather than fixating on the search for the single “right” meaning of an ambiguous contract provision, in other words, *contra proferentem* instructs courts to rule against the best cost avoider.

A similar rationale explains the contract law rule governing property that is damaged at a particular moment in time: after a sale is executed, but before possession is transferred. Suppose you agree to buy a house. But before the transaction closes and you acquire possession from the seller, a rainstorm causes flooding in the basement. Who should be liable for the repairs? Under the common law of contracts, the answer is the seller.¹⁶⁹ As Williston explains, “the practical advantages of leaving the risk with the [seller] until transfer of possession are obvious. . . . [I]t is wiser to have the party in possession of property care for it at his peril.”¹⁷⁰ Or put another way, the seller is the better cost avoider because she can more easily avoid the rain damage (for example by detecting and patching a leak) than a buyer who cannot yet enter the property. Just as with the other examples, imposing liability on the best cost avoider maximizes the odds of preventing the underlying harm to begin with.

Best cost-avoider rules have also been suggested in property law, most notably in academic discussions of private nuisance. Calabresi foresaw this possibility (albeit in passing),¹⁷¹ and Professor Frank Michelman expanded on it in an influential book review.¹⁷² In a subsequent work, Calabresi and Professor Douglas Melamed argued that property law rules make sense

¹⁶⁷ Restatement (Second) of Contracts § 206 (1981).

¹⁶⁸ *Scenic Am., Inc. v. Dep’t of Transp.*, 138 S. Ct. 2 (2017) (Statement respecting denial of certiorari) (Gorsuch, J.)

¹⁶⁹ See Samuel Williston, *The Risk of Loss After an Executory Contract of Sale in the Common Law*, 9 Harv. L. Rev. 106, 122 (1895); see also, e.g., § 1. Risk of Loss Unif. Vendor & Purchaser Risk Act § 1.

¹⁷⁰ See Williston, *supra* n.169 at 122.

¹⁷¹ See Calabresi, *supra* n.27 at 254 (applying cheapest cost avoider reasoning to the problem of a “factory near a residential area [that] results in an air pollution problem”). Coase also anticipated the possibility of best cost-avoider reasoning in nuisance law. See Coase, *supra* n.157 at 41 (suggesting nuisance rule against lower cost avoider).

¹⁷² See Frank I. Michelman, *Pollution As A Tort: A Non-Accidental Perspective on Calabresi’s Costs*, 80 Yale L.J. 647, 667-73 (1971).

when it is possible to determine whether a polluter or pollutee is the best cost avoider.¹⁷³ Thus, the polluter should be deemed liable in a nuisance lawsuit—and be enjoined from further polluting—if the polluter is the best cost avoider.¹⁷⁴ Conversely, if pollutee plaintiffs can avoid the costs of pollution more easily, their private nuisance claims should fail.¹⁷⁵

In sum, cost-avoider decision rules are common across private law fields.¹⁷⁶ Their wisdom lies in the instinct that it is sometimes better to structure liability in a way that encourages the parties to avoid their costs altogether than to engage in a single-minded pursuit of the most “fair” or “right” outcome amidst legal and factual uncertainty. Indeed, this approach to legal decisionmaking is a staple of the law and economics movement.¹⁷⁷ Yet prominent scholars have recognized that for all of the advances the movement has brought to private law, law and economics has had little influence on constitutional law.¹⁷⁸ This is especially true of constitutional interpretation.¹⁷⁹ One hopeful contribution of this Article is thus to suggest a way in which the teachings of law and economics might be brought to bear on disputes in constitutional law.

B. Avoiding Costs in Constitutional Law

But for a best cost-avoider theory to work in constitutional law, we first need to know more about the precise ways in which the relevant costs might be avoided. In the private law contexts just described, it’s fairly obvious. The best cost avoiders can simply change their behavior: drivers should

¹⁷³ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1118-19 (1972). A property law rule would also make sense, Calabresi and Melamed argue, if (contrary to common experience) transaction costs are low. *Id.* at 1119.

¹⁷⁴ *Id.* at 1118. For a nuanced argument that injunctive and damages remedies should turn on the facts of each case, see A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 Stan. L. Rev. 1075 (1980).

¹⁷⁵ Calabresi & Melamed, *supra* n.173 at 1118.

¹⁷⁶ Professor Richard Re has suggested a kind of best cost-avoider approach to the problem of Supreme Court cases that are decided without a majority vote. See Richard M. Re, *Beyond the Marks Rule*, 132 Harv. L. Rev. 1942, 1969 (2019) (“[T]he law of precedent should place burdens on the ‘cheapest precedent creator’”).

¹⁷⁷ See, e.g., Calabresi, *supra* n.27; see also *supra* n.22 & accompanying text.

¹⁷⁸ See Robert D. Cooter & Michael D. Gilbert, *Constitutional Law and Economics* 34, in *Research Methods in Constitutional Law: A Handbook* (Malcolm Langford & David S. Law eds., 2018) (arguing law & economics “has had little impact on constitutional law”). For a recent law and economics argument in the context of equal protection law, see Andrew T. Hayashi, *The Law and Economics of Animus*, online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3468455.

¹⁷⁹ One notable exception is Professors Cooter and Gilbert, whose “incentive principle of interpretation” calls on constitutional interpreters to first decide the underlying purpose of a constitutional provision and then ask which of the available interpretations would create the best incentives for achieving that purpose. *Id.* at 8.

leave ample space to the vehicle in front of them, contract drafters should take care to avoid ambiguity, and so on.

Yet what does it mean to avoid the costs of Supreme Court error? (I will return to the task of reducing Supreme Court decision costs below).¹⁸⁰ There is a sense in which the notion of avoiding the costs of potential Supreme Court error presses up against our most basic assumptions about the Constitution. As Professor Barry Friedman puts it, short of amending the Constitution or convincing five Justices to change an existing rule, “[t]here is no overriding the Court.”¹⁸¹ So talk of avoiding the error costs of a Supreme Court decision may seem a bit beside the point.

But this is only true of the *judicial* part of the story. Once it ends, the people can—and often do—write additional chapters.¹⁸² Groups that come out on the losing end of Supreme Court cases can respond outside the judicial system in any number of ways. For present purposes, I want to draw a distinction between two kinds of responses: *public* and *private* avoidance. By public avoidance, I mean efforts to undo the costs of an adverse ruling by changing public law through democratic processes. By private avoidance, I mean efforts to counteract the costs of an adverse ruling that rely on private ordering rather than changes to the law. The sub-parts that follow explore these avoidance techniques in closer detail.

1. *Public Avoidance*

One way a group may try to avoid the costs of a Supreme Court loss is to change public law through the democratic process. Such cost avoidance comes in two flavors: constitutional amendments and ordinary legislation.¹⁸³

Constitutional amendments speak for themselves. After all, the most direct way for a group to counteract the costs it suffers when the Supreme Court adopts an adverse interpretation of the Constitution is to change the Constitution. The swift response by states after *Chisholm v. Georgia* offers the cleanest example.¹⁸⁴ Dismayed by the Supreme Court’s holding that they were amenable to suits brought by citizens of other states in federal

¹⁸⁰ See *infra* Part IV.B.

¹⁸¹ Barry Friedman, *The Will of the People* 5 (2009)

¹⁸² Scholars have recognized this point, but drawn different lessons from the continued involvement of the people in solving their problems. See, e.g., Bruce Ackerman, *We The People: Transformations* (1998) (arguing that the people have amended the Constitution outside the Article V process during certain “transformative moments”); Kramer, *supra* n.144 (arguing that the history of popular involvement in constitutional interpretation shows that the people, not the Supreme Court, have the final word on the Constitution).

¹⁸³I examine public avoidance and its role in constitutional interpretation more fully in previous work. See Tang, *Rethinking Political Power*, *supra* n.99.

¹⁸⁴ 2 U.S. 419 (1793).

court, the states rallied to propose the Eleventh Amendment to overrule *Chisholm* “at the first meeting of Congress thereafter.”¹⁸⁵

Of course, amending the Constitution is the most difficult avoidance technique to implement given the arduous Article V amendment process.¹⁸⁶ The combination of the amendment process’s directness and difficulty may explain why the academy has yet to consider a cost-avoider theory of constitutional law: if the most apparent way to avoid an adverse Supreme Court constitutional ruling is the Herculean task of amending the Constitution, such a theory would seem to contribute little practical value.

But constitutional amendments aren’t the only way for adversely affected groups to redress their costs. One tactic that also operates through public law is avoidance via legislation. At first blush, this might sound impossible: how can a group avoid a constitutional ruling by the Supreme Court via ordinary legislation, given that state and federal statutory law is subservient to the Constitution under the Supremacy Clause?¹⁸⁷ It turns out there are two possible pathways whose availability depends on the relationship between the losing group and the law initially under attack.

The first pathway involves a group that has failed in its effort to get some existing law or policy declared unconstitutional. In this scenario, public avoidance via legislation means going back to the democratic process to repeal the policy at issue. California’s experience with affirmative action in higher education provides one example. In 1978, Allan Bakke, a white applicant to the University of California Davis Medical School, sued to enjoin the school’s policy of setting aside a certain number of spots for minority applicants.¹⁸⁸ The Supreme Court ruled 5-4 in Bakke’s favor, but Justice Powell provided a fifth vote for the proposition that race could still be considered in university admissions if it were used as just one among many factors.¹⁸⁹ After the University of California revised its policy accordingly, opponents of affirmative action succeeded in counteracting their costs via public avoidance: they enacted Proposition 209, which banned state institutions from considering race in higher education.¹⁹⁰

¹⁸⁵ *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

¹⁸⁶ U.S. Const. art. V (requiring ratification by three-fourths of all of the States).

¹⁸⁷ See U.S. Const. art. VI (“This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . anything in the Constitution or Laws of any State to the contrary notwithstanding.”).

¹⁸⁸ *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 288-89 (1978) (opinion of Powell, J., announcing the judgment of the Court).

¹⁸⁹ *Id.* at 318.

¹⁹⁰ See Cal. Const. art. I, § 31(a) (“The state shall not . . . grant preferential treatment . . . on the basis of race . . . in the operation of . . . public education.”).

Public avoidance of this sort is not always feasible, however. In *Bowers v. Hardwick*, the Supreme Court upheld a Georgia law criminalizing consensual sexual conduct between two adults of the same sex.¹⁹¹ To undo the costs of that ruling via legislation, proponents of LGBT rights would have needed to persuade state lawmakers to repeal the statute—a tall task in light of then-prevailing prejudice.¹⁹² Or consider the inability of disfranchised blacks to change public law so as to repeal harmful Jim Crow laws after *Plessy v. Ferguson*.¹⁹³ Public avoidance by repealing existing legislation is thus largely a function of political power: the greater political clout a group has, the more likely it will be able to undo the costs of an adverse ruling through this route.¹⁹⁴

The second pathway of public avoidance via ordinary legislation involves groups who originally prevailed in securing some policy in the democratic process, only for the Supreme Court to deem it unconstitutional. In this scenario, re-enacting the same exact law is not an option, but there may exist other legislative solutions that do not run afoul of the Constitution. Alternative solutions of this kind actually play a substantial role in constitutional analysis in the first moment: the entire purpose of strict scrutiny’s “least restrictive alternative” test is to identify less harmful legislative means through which groups can attain their desired ends.¹⁹⁵

Examples of this kind of public avoidance abound. Consider *Bakke* again. Before affirmative action opponents in California avoided the costs of *Bakke*’s holding that race may still be used in university admissions by enacting Proposition 209, *proponents* of affirmative action actually succeeded in public avoidance of their own. Recall that the Supreme Court’s formal judgement in the case was to invalidate the University of California, Davis’s quota-like race-based admissions policy because it did not treat race as just one factor among many in the admissions process.¹⁹⁶ Or in the language of strict scrutiny, the University’s use of race was not the least restrictive alternative—it was not “necessary . . . to the accomplishment of its purpose”—given the availability of admissions policies that take a greater variety of considerations into account.¹⁹⁷ So

¹⁹¹ 478 U.S. 186 (1986).

¹⁹² In 1986, 57% of respondents believed that “gay or lesbian relations between consenting adults” should not be legal. Gallup, *Gay and Lesbian Rights*, online at <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx>.

¹⁹³ See, e.g., Donald E. DeVore, *Defying Jim Crow: African American Community Development and the Struggle for Racial Equality in New Orleans, 1900-1960* (2015).

¹⁹⁴ See Tang, *Rethinking Political Power*, *supra* n.99.

¹⁹⁵ See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. Rev.* 1267, 1326 (2007).

¹⁹⁶ *Bakke*, 438 U.S. at 320 (opinion of Powell, J.).

¹⁹⁷ *Id.* at 305, 315.

affirmative action supporters had available a clear public avoidance technique after *Bakke*: simply enact a new affirmative action policy that treats applicants in a more holistic manner. And, in fact, supporters of affirmative action prevailed on the University of California to do exactly that—UC-Davis Medical School implemented a new race-conscious admissions policy shortly after *Bakke* was decided.¹⁹⁸

Efforts by public sector unions after the Supreme Court’s recent decision in *Janus* offer another example. After the Court invalidated laws in more than twenty states permitting public sector unions to collect fair share fees from all represented workers for the costs of collective bargaining,¹⁹⁹ public sector unions in a number of states convinced state legislatures to pass new laws preserving their ability to persuade workers to join and pay dues voluntarily.²⁰⁰ Some states have also enacted laws permitting unions to charge nonmembers for the costs of representation in disciplinary and grievance matters,²⁰¹ a less restrictive alternative that the *Janus* majority itself relied on to strike down fair share fees.²⁰² Combined with the unions’ private avoidance efforts discussed more below, the effect of these laws has been to mute the anticipated adverse impact of *Janus*.²⁰³

2. *Private Avoidance*

Public avoidance techniques are important, but they are not the only strategies that groups have to avoid the costs of an adverse Supreme Court decision. Such groups can also engage in private ordering. This is another important reason to look to private law fields for lessons in constitutional adjudication: in those fields, the easiest strategies that the parties can use to avoid their costs involve shifts in private conduct rather than efforts to change public law. To wit, a driver can far more easily avoid liability for a rear-end collision by leaving a greater distance to the car in front of her than by lobbying the legislature to change the rear-end collision rule.

Two categories of private avoidance are worth focusing on. The first and most important category involves *case-specific* changes in private conduct; that is, changes that are tailored to the particular costs that a group will suffer should it lose a given dispute. Discerning avoidance strategies

¹⁹⁸ Terry Eastland & William J. Bennett, *Counting By Race* 194 (1979) (“After *Bakke*, UC-Davis proceeded automatically to award each minority applicant five points.”)

¹⁹⁹ *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2485-86 (2018).

²⁰⁰ *See supra* n.17.

²⁰¹ *See, e.g.*, N.Y. Sess. L. 2018, ch. 59, § 4.

²⁰² *Janus*, 138 S. Ct. at 2468-69.

²⁰³ For discussion of unions’ private avoidance efforts, *see infra* n.207. For the muted impact post-*Janus*, *see supra* n.18. I myself was incorrect in estimating the adverse effects of *Janus* on unions. *See* Tang, *Life After Janus*, 119 Colum. L. Rev. 677, 696 (2019) (collecting expert projections of budget losses ranging from 20% to 71% after *Janus*).

of this kind will therefore require case-by-case consideration of the underlying disagreement and the costs that each group seeks to avoid.

The aftermath of the *Lochner* era provides a good example. During that era, the Supreme Court invalidated minimum wage, maximum hour, and other economic regulations on the view that they impeded liberty of contract (if enacted by states) or exceeded Article I (if enacted by Congress).²⁰⁴ After the Court reversed course in *West Coast Hotel v. Parrish*,²⁰⁵ a clear loser emerged: industries who suddenly faced increased labor costs. These industries could have engaged in public avoidance—perhaps by lobbying to repeal the burdensome wage and hour laws, or trying to amend the Constitution. But two easier private avoidance techniques were available given the case-specific costs that industries suffered: industries could offset the increased wage costs by reducing employment and raising prices.²⁰⁶

Janus offers another example. After the Supreme Court invalidated public sector unions' primary source of financial security—state fair share laws requiring all workers in a bargaining unit to pay for the union's costs of collective bargaining—unions responded by redoubling their efforts to persuade workers of the importance of voluntary dues-paying. By engaging workers in one-on-one conversations and educating them about the union's valuable services, the major public sector unions have so far averted major losses; many have even reported membership gains.²⁰⁷ This is cost avoidance by private ordering: public sector unions have used the power of organizing to counteract the financial losses feared in *Janus*'s wake.

A second kind of private avoidance technique is not case-specific. Whenever a group loses in the Supreme Court, there is always the option—at least in theory—to move. As Professor Ilya Somin has argued, “foot voting” is “a central feature of the American experiment and its relative success.”²⁰⁸ The basic notion is that when the Supreme Court rules against you, you can always move to a jurisdiction where you will no longer suffer your cost, either because the law or facts on the ground are different. Somin notes, for example, that some black Americans were able to “flee[] the Jim

²⁰⁴ See David A. Strauss, *Why Was Lochner Wrong?* 70 U. Chi. L. Rev. 373, 376 (2003) (“During the *Lochner* era, the only constitutional principles that the Supreme Court enforced regularly and systematically were . . . freedom of contract, as in *Lochner*, and federalism-based limits on Congress's power” under the Commerce Clause).

²⁰⁵ 300 U.S. 379 (1937) (upholding Washington state minimum wage law).

²⁰⁶ See *supra* n.19; see also Daniel Aaronson, “Price Pass-Through and the Minimum Wage,” *The Review of Economics and Statistics*, Vol. 83 at 158, 169 (2001) (“restaurant prices rise with increases in the wage bill that result from minimum-wage legislation”).

²⁰⁷ See *supra* n.18; Heather Gies, *Disaster Averted: How unions have dodged the blow of Janus*, Salon, Jan. 14, 2019; Kate Andrias, *Janus's Two Faces* 2019 Sup. Ct. Rev. 22, 53-54.

²⁰⁸ Ilya Somin, “Foot-Voting Nation,” in *Our American Story: The Search for a Shared National Narrative* 123, 124 (Joshua A. Claybourn, ed.) (2019).

Crow era South” after *Plessy* and move to jurisdictions with more favorable laws, thereby avoiding the decision’s costs.²⁰⁹ Conversely, many white families chose to vote with their feet after *Brown*, moving to outlying suburbs with fewer black families.²¹⁰ Of course, foot voting will be a less realistic avoidance strategy in some constitutional disputes than others, since some losing groups may lack sufficient means to move.

Two points of contrast are worth noting. First, adversely affected groups may prefer private avoidance strategies over public avoidance for a simple reason: it is more within their control. Industries that reduced employment or raised prices after *Lochner* needed approval no legislator’s approval to do so; neither does the union that wishes to organize its workers.

Second, the constitutional law avoidance techniques just discussed differ from the avoidance strategies in the private law contexts in one significant sense. In the private law examples, cost avoidance was purely *retrospective* given that the cost to be avoided had already occurred by the time the parties arrive in court. Private law courts use cost-avoider reasoning to rule against parties who could have avoided the cost before it happened (e.g., a car accident), but there is nothing the parties can do to avoid the cost after the fact (since the accident cannot be undone).

In constitutional law, the notion of cost avoidance is both retrospective and prospective. That is, the losing side in a Supreme Court case could have acted differently to avoid the Court’s intervention in the first place. Industries, for example, could have just complied with minimum wage laws and reduced employment instead of suing to block the laws. But the losing side can also avoid the costs of an adverse ruling *after* the Court decides: once *Lochner* is overruled, businesses can still reduce employment and raise prices to protect their bottom lines. This additional flexibility increases the attractiveness of cost-avoider reasoning in constitutional law because it affords groups an even greater ability to counteract their costs.

C. Identifying the Best Cost Avoider in Constitutional Law

With a fuller grasp of the public and private techniques that losing groups have for avoiding the costs of adverse Supreme Court decisions, it is now possible to engage with the core inquiry demanded by a best cost-avoider theory of constitutional law: how should the Court decide who is the best cost avoider in any given case?²¹¹ This sub-part presents the theory

²⁰⁹ *Id.* at 130.

²¹⁰ See Charles T. Clotfelter, *After Brown: The Rise and Retreat of School Desegregation* 8 (2004) (noting after *Brown* that “suburban school districts were the most obvious alternative to city school districts with high . . . proportions of minority students.”)

²¹¹ For simplicity, I refer to the Supreme Court as the relevant decision maker. But lower courts could benefit from the same theory, too. I thank Sandy Levinson for this point.

and examines four sources of potential uncertainty, each of which is denoted below in italics. Here is the theory in its most elemental form:

The Supreme Court should decide *hard* constitutional cases against the *group* that can *best* avoid the *costs* of an adverse decision using either public or private avoidance techniques.

What counts as a hard case? The first question concerns the scope of constitutional cases to which best cost-avoider theory should apply. The theory obviously has no role to play in at least some constitutional disputes. Suppose, for example, the State of California were to argue it is entitled to three Senators in the next session of Congress. There would be no reason to identify a best cost avoider because the Constitution itself clearly resolves this question.²¹² But in other cases, the Constitution does not speak with great clarity, leaving open the possibility of multiple understandings that are consistent with one's preferred interpretive theory.²¹³ These are the "hard" cases that would benefit from a cost-avoider decision theory.

But just how hard must a constitutional question be? The quicker one is to declare a question "hard," the greater the potential role for a cost-avoider theory. This implicates a notoriously difficult problem of proof that pervades law generally, and I cannot do it full justice here.²¹⁴ One way to think about the problem conceptually, however, is to think about it in the familiar terms of standards of proof. One *could* (although legal scholars usually do not²¹⁵) think about the process of answering any legal question as entailing a standard of proof. As Professor Gary Lawson has argued, constitutional law seems to use a best-available-alternative standard under which courts adopt the constitutional interpretation that is better than all other options, no matter how close or uncertain the evidence is.²¹⁶ But one could also imagine courts applying a preponderance of the evidence or beyond all reasonable doubt standard.²¹⁷ Under such an approach, a court would adopt whichever constitutional interpretation meets the specified standard of proof. If the standard is not met (e.g., if *no* interpretation satisfies the preponderance or beyond a reasonable doubt threshold), then courts would do something else. (Others have argued that the "something

²¹² Art. I, § 3, cl. 1 (Senate "shall be composed of two Senators from each State.").

²¹³ This is another way to describe the construction zone. *See supra* n.100. Or in another sense, to say that a case is "hard" is just another way of saying a case lacks legal clarity. *Cf.* Richard M. Re, *Clarity Doctrines*, 86 U. Chi. L. Rev. 1, 15 (2019).

²¹⁴ Other scholars have, however. To my mind, the best and most thorough work is Gary Lawson's *Evidence of the Law* (U. of Chicago Press, 2017).

²¹⁵ *See id.* at 114.

²¹⁶ *Id.* at 202-03.

²¹⁷ *See supra* nn.96-97 & accompanying text (discussing preponderance of the evidence standard for constitutional law).

else” should be to defer to whatever the legislature has enacted,²¹⁸ but of course that option is only as good as our legislatures.²¹⁹ And so this Article proposes a different option—ruling against the best cost avoider.)

So to return to the problem, what standard of proof should be adopted in a best cost-avoider theory of constitutional law? Should the theory be used to settle constitutional cases in which no interpretation is proven beyond a reasonable doubt standard—likely a large set of cases given the difficulty of most modern day constitutional disputes? Should it be used only in cases where the interpretive evidence is in complete equipoise—a much smaller set of cases? Or perhaps somewhere in between?

Unless one thinks the Constitution itself somehow implicitly answers this question,²²⁰ we will need to justify an answer by normative argument. My own view is closer to that of Professor Heidi Kitrosser, who has argued that “[w]here more than one historically plausible meaning [of the Constitution] exists, interpreters should refrain from deeming one the ‘best’” because doing so creates “a false veneer of certainty.”²²¹ After all, the history of Supreme Court constitutional error and its resulting costs shows that this false sense of certainty is often pernicious in effect.²²² For that reason—because the stakes of an erroneous constitutional interpretation can be so great—my own view is that the Supreme Court would do well to adopt a more humble view of its interpretive abilities.²²³ Put another way, any constitutional case that raises a substantial risk of error (whether because there is little evidence bearing on the Constitution’s meaning in the first place, or because the interpretive evidence that exists is in conflict) is the kind of “hard case” to which best cost-avoider theory ought to apply.

I hasten to note that even if one does not agree with my own somewhat thinner view of the Constitution’s ability to dictate clear outcomes in many modern day cases, that does not mean best cost-avoider theory has no role to play.²²⁴ Judges can agree on the soundness of cost avoider reasoning as

²¹⁸ See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893).

²¹⁹ See *supra* nn.149-51 & accompanying text.

²²⁰ See McGinnis & Rappaport, *supra* n.96.

²²¹ Kitrosser, *supra* n.98 at 466. Note that one need not be an originalist for the standard of proof question to matter. Pluralism, common law constitutionalism, and moral readings can also be consistent with multiple potential outcomes in cases, where an answer can be derived from the operative standard of proof.

²²² See *supra* Part I.A.

²²³ Cf. Lawson, *supra* n.214 at 205 (arguing that “the standard of proof may be dependent on the stakes involved in the relevant decision”).

²²⁴ Relatedly, it is possible (perhaps even likely) that Justices will suffer from a degree of overconfidence bias, refusing to acknowledge the possibility of cases being hard in light of years of experience resolving close cases. (I thank Richard Re for this observation). But one can imagine an institutional response that does not depend on individual Justices

a decision rule even if they disagree as to the scope of the rule's application.²²⁵ The doctrine of *contra proferentem* is one example—judges generally agree that it is a valid tool for resolving ambiguous contracts, even though they often disagree over which contracts are in fact ambiguous (or how quickly to find ambiguity).²²⁶ Disagreement over a rule's *scope*, in other words, need not impugn a rule's wisdom or force.²²⁷

What are the relevant groups? In the private law best cost avoider contexts, it is easy enough to know the identity of the comparators whose ease of avoidance courts are to consider: the people on either side of the case caption. Contracting Party A (the drafter) is sued by Party B (the non-drafter), so we compare the avoidance strategies possessed by A and B.

The same approach would be too constricted in constitutional law. As Professor Chayes observed long ago, constitutional litigation implicates “a host of important public and private interactions—perhaps the most important in defining the conditions and opportunities of life for most people . . . [that] can no longer be visualized as bilateral transactions between private individuals.”²²⁸ In such cases, it is “the group” that is “the real subject or object of the litigation,” not merely the named plaintiff and defendant.²²⁹ And so courts seeking to compare avoidance strategies in constitutional law should look to those groups, not just the named parties.²³⁰

Thus, for example, in a case like *Brown v. Board of Education*, the question is not whether the parents of Linda Brown would be able to avoid the costs of a Supreme Court loss more easily than would the Topeka Board of Education. *Brown* obviously implicated vital interests far beyond those two. As a result, the relevant comparators must be broadened in two important senses. First, we care not only about the consequences suffered by named parties, but by all similarly situated people: we care about how difficult it would be for *all* affected black students (and their parents) to avoid the harms of segregation were the practice to be upheld. Second, and

candidly admitting difficulty—for example, a rule under which any case that yields a 5-4 vote on the merits is “hard” and thus merits best cost-avoider analysis. My gratitude to Andrew Guzman for this suggestion.

²²⁵ To be clear, the theory could still function even if only some Justices believed it was an appropriate decision rule (perhaps because the others think it their duty to search out the meaning of “the law,” no matter how uncertain it may be). In that scenario, the Justices who follow best cost-avoider theory would act as tie-breakers in the event of disagreement among those who do not. I thank Richard Fallon for flagging this point.

²²⁶ See, e.g., *Lamps Plus v. Varela*, 139 S. Ct. 1407, 1417-19 (2019) (disagreeing with dissent's conclusion that *contra proferentem* ought to apply to arbitration clause at issue).

²²⁷ Cf. *Kisor v. Wilkie*, ___ S. Ct. ___ (2019) (“The [*Auer*] deference doctrine we describe is potent in its place, but cabined in its scope.”).

²²⁸ Chayes, *supra* n.158 at 1291.

²²⁹ *Id.*

²³⁰ I examine the group identity problem more fully at Tang, *supra* n.99 at 1787-88.

perhaps less obviously, we care about the groups whose actual interests are furthered by challenged laws, not about the government units that seek to defend those laws.²³¹ It is the underlying groups who would stand to lose if their desired laws are invalidated, and it is they who would work to avoid the costs of a loss moving forward. So in *Brown*, a court would examine the avoidance options of white parents who oppose school integration.²³²

How are each group's costs to be defined? Up to this point, I have assumed that the costs, or harms, that each group seeks to avoid in the aftermath of an adverse constitutional ruling are susceptible to uncontroversial identification. But that is not necessarily so. One can imagine quite different characterizations of the costs caused by a Supreme Court loss, depending on who one asks. Judges at some remove from the underlying controversy might describe the nature of a cost quite differently than those who suffer it firsthand, and opposing litigants will obviously have their own (likely less charitable) description.

The Supreme Court's ruling in *Citizens United* offers an example of this phenomenon. Supporters of the Bipartisan Campaign Reform Act (BCRA), which prohibited corporations and unions from using general treasury funds to advocate for political candidates,²³³ have one view of the costs they suffer due to the Court's invalidation of the corporate expenditure ban: *Citizens United* has allowed "corporate spending [to] drown[] out the voices of individual citizens."²³⁴ The conservative five-Justice majority in *Citizens United* characterized the cost that might be suffered by the law's supporters in narrower terms, as the possible risk of *quid pro quo* corruption.²³⁵ And some have framed the interests of BCRA's supporters more derisively, as a failed effort to "silence corporate speech."²³⁶ Which of these is the correct description of the "cost" that campaign finance proponents suffered in *Citizens United's* aftermath?

Rather than asking the Court to define what a group's "real" costs would be were they to lose, the Court should be deferential to the descriptions of

²³¹ That is, unless the government is litigating in its own right. *Cf.*, *Chisholm v. Georgia*, discussed *supra* at nn.184-85.

²³² In this sense, best cost avoider theory diverges in practice from strict scrutiny's least restrictive alternative inquiry. Under that test, the Court considers whether the *state* can achieve *its* interests through other alternatives. But the state is only a stand-in for the interests of groups who support the underlying laws. Best cost avoider theory maintains that we should consider the possible burdens to those underlying groups directly.

²³³ See 2 U.S.C. § 441b(b)(2).

²³⁴ See, e.g., Natalie Simpson, "Reform the Right Way: Efforts to Overturn Citizens United," Common Cause, June 29, 2018.

²³⁵ *Citizens United*, 558 U.S. at 356 (recognizing as valid the interest in "prevent[ing] corruption or its appearance").

²³⁶ Sean Parnell, "New York City politicians try to silence corporate speech," *Institute For Free Speech*, May 20, 2011.

costs made by those who would suffer them. There are two reasons for this approach. First, the Justices do not have any particular wisdom in defining the nature of costs that groups would suffer, especially in comparison to the injured groups themselves. Second, and just as importantly, paternalistic attempts by the Court to declare what a group's cost or harm *really is* would invariably engender backlash and jeopardize the Court's legitimacy.²³⁷ Far better, then, for the Court to take each group's professed costs seriously and evenhandedly. So those who supported BCRA's corporate expenditure ban should be free to describe the costs of an adverse ruling as they see fit, as should the corporations on the other side.

Deferring to each group's description of its own cost leads to a potential problem, however. Might a group frame its costs in a way that leads to artificially difficult (or even impossible) avoidance options, thereby enhancing its ability to prevail? Groups can engage in this kind of gaming in at least one particular direction²³⁸—they may characterize their cost in a circular fashion, as the inability to have the law say what they want it to say. For example, supporters of campaign finance restrictions might describe their cost in *Citizens United* as the inability to have federal law prohibit corporate campaign expenditures. Such a description would frustrate best cost avoider theory because it would define the cost in a way that is impossible to avoid except by a favorable judicial ruling: the only way to have federal law prohibit corporate expenditures is to uphold BCRA, which is precisely the legal outcome campaign finance supporters want. Groups in the converse position, who wish to have a law invalidated, may make a similar move. For example, industries that sought to strike down minimum wage laws as a violation of the liberty of contract during the *Lochner* era might frame their cost as the loss of their constitutional liberty of contract. The only way to avoid that cost would be for the Court to adopt the industries' preferred constitutional interpretation.

There is a clean answer to this kind of gamesmanship, however: judges should not credit cost descriptions that amount to the inability to have the law say what a group wants it to say. Not only are such claims tautological (“we adopt Smith's interpretation of the law because Smith would like the

²³⁷ Consider, for example, the public backlash after the Court effectively minimized the costs suffered by slaves in *Dred Scott* by holding that they are simply the “property” of white men for purposes of the Constitution. 60 U.S. at 452..

²³⁸ Groups may also try to frame their costs at too general a level of abstraction. For instance, campaign finance groups may argue that invalidating the corporate expenditure ban will “destroy democracy.” The Court should respond by requiring a specific description of the causal pathway—e.g., democracy may be destroyed due to outsized corporate influence in elections. It is this actual causal mechanism that should serve as the focus of the parties' arguments over avoidance strategies, since undoing the mechanism will undo the cost. I owe thanks to Richard Fallon for identifying this concern.

law to say what he wants it to say”), but they also obscure what is really at stake in constitutional disputes. People support laws not because of some abstract utility they get from having certain words enshrined in a legal code, but because of the real life effects those laws have. So it is those underlying effects that best cost-avoider theory aims to grapple with.

A prohibition against circular cost descriptions may help shed light on the Supreme Court’s animus case law, which holds that moral disapproval is not a valid state interest.²³⁹ To defend this rule, one need not argue that it is impermissible for people to express moral disapproval of certain groups in society—indeed the First Amendment protects such speech.²⁴⁰ The problem is instead that defending a law by reference to its supporters’ desire for the law to express their disapproval is circular: the only way to avoid the cost the law’s supporters fear is to leave the law in force. Thus, in a case like *Obergefell v. Hodges*, opponents of same sex marriage should not be able to describe the cost of an adverse ruling as the inability to have state law express their moral disapproval. The reason is not that everyone must support same sex marriage, but rather that such a cost description is tautological. Whether states may enact laws disapproving such marriage *is the question before the court*; a group’s desire for the law to express that disapproval is not an answer, but rather a restatement of the question.

How should the ease of avoidance strategies be determined? That brings us to a final source of possible uncertainty: how to determine the ease of a given cost-avoidance strategy. As an initial matter, it is important to emphasize that it is the ability each group has to avoid its costs that is to be compared, not the severity of the costs themselves. The costs themselves will often be incommensurable, such that any comparison would involve subjective, and quite likely contentious, value judgments. A judicial declaration that “the Second Amendment guarantees a right to own handguns in one’s home because gun owners would suffer greater costs from an adverse ruling than gun control proponents” would be hard to ground objectively and would inevitably inflame public sentiment (as would the inverse). The Court should instead send the even-handed message to all comers that their costs will be taken seriously; close cases

²³⁹ See, e.g., *United States v. Windsor*, 570 U.S. 744, 770 (2013) (refusing to uphold laws that have “the purpose and effect of disapproval of [a] class”); *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (O’Connor, J., concurring) (“Moral disapproval . . . is an interest that is insufficient to satisfy rational basis review”).

²⁴⁰ See *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (“Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992).

will not be decided by a judicial guess as to which group really has more important interests at stake.

The ease of avoiding a given group's cost, however, is more objective. One need not take a view on the importance of individual gun ownership to agree that it would be easier for gun rights proponents to oppose gun control measures in the legislature than it would be for gun control proponents to amend the Constitution.²⁴¹ This is not to suggest that comparing the ease of the parties' avoidance strategies will never be hard; there will assuredly be some close cases where the costs of an adverse ruling would be similarly difficult for either group to avoid.²⁴² But as the next section will show, best cost avoider-theory can offer meaningful direction in many of our nation's foundational precedents as well as some important present-day disputes.

With the relative ease of avoiding each group's costs front and center (rather than the severity of the costs themselves), a final issue emerges: should the Court limit its comparison to each group's avoidance strategies in a vacuum, or should it also take into account each group's *actual ability to implement its strategies*? To put a more concrete face on the question, consider the public avoidance option available to black parents in *Brown*.²⁴³ One might argue in theory that black parents had an easy avoidance technique: they could simply persuade their local school boards to adopt integration policies voluntarily. After all, local school board policies are generally among the easier kinds of laws for a dedicated group to change, at least if considered in a vacuum.²⁴⁴ But of course such an argument elides reality. To conclude that black parents could respond to an adverse ruling

²⁴¹ For a fuller discussion of how avoidance costs might have been helpful in deciding *D.C. v. Heller*, see Tang, *supra* n.99 at 1811-15.

²⁴² To put all (or at least more) of my cards on the table, I think abortion is perhaps the most prominent such example. If *Roe* were overturned, pro-choice groups would point to the costs to maternal health and child welfare that will result once women in many states no longer have access to safe procedures. See Adam Rogers, "Abortion Bans Create A Public Health Nightmare," *Wired*, May 21, 2019. Pro-life groups, by contrast, would point to the death of millions of innocent unborn human beings should *Roe* be upheld. See National Right to Life Mission Statement, <https://www.nrlc.org/about/mission/>. Public avoidance costs are a close question: while pro-choice groups may fight to oppose abortion bans in state legislatures (a route that, although difficult, is still easier than pro-life groups working to amend the Constitution), pro-life groups could also avoid their costs by supporting laws that prevent conception in the first place. (Indeed, to this point, only 4% of all Americans oppose birth control. See Pew Research Center, "Very few Americans see contraception as morally wrong," online at <https://www.pewforum.org/2016/09/28/4-very-few-americans-see-contraception-as-morally-wrong/>.) As for private avoidance, affluent women in states with abortion bans might be able to fly to obtain a procedure in other states, but that option would not be available to women with fewer means.

²⁴³ As I explain in Part III.A, *Brown* is best understood as a private avoidance case.

²⁴⁴ See Grace Chen, *Public School Boards Demystified: How Parents Can Influence the Board's Decisions*, *Public School Review*, Aug. 6, 2018.

in *Brown* by “simply” persuading school boards to change their policies is to ignore rampant prejudice and political disfranchisement.

Such an approach would also be at odds with the purpose of best cost-avoider theory. As Professor Michael McConnell has observed, when it comes to constitutional interpretation, “form must follow function.”²⁴⁵ Because the function of cost-avoider theory is to minimize the costs of Supreme Court error by ruling against the party that can avoid its costs most easily, the theory must take into account not just the abstract difficulty of a given strategy, but also each group’s actual ability to employ it.

III. BEST COST-AVOIDER THEORY IN ACTION

Sometimes it is easiest to evaluate a theory by seeing it in action. This part takes that observation to heart, applying best cost-avoider theory to some historic and recent cases. I do not claim to comprehensively or conclusively apply the theory in these examples; that would be a book-length project. My goal is instead to briefly sketch out how the theory might function in some important controversies, showing in the process that the theory is consistent with major cornerstones of our constitutional canon and capable of offering direction in difficult present-day disputes. An ensuing sub-part considers some implications of this exercise.

A. Settled Cases

One way to test a theory of constitutional law is to stack it up against the lodestars of our constitutional history. To have any chance at being persuasive, a theory must (at least) show how *Dred Scott* and *Lochner* were wrong while getting *Brown* right.²⁴⁶ This sub-part takes up that task.

Dred Scott. Nowadays, *Dred Scott* is an easy target for criticism.²⁴⁷ That hasn’t always been the case.²⁴⁸ In fact, Professor Mark Graber has offered surprisingly strong evidence that “the result in *Dred Scott v. Sandford* may have been constitutionally correct,” even if Chief Justice Taney’s opinion was far from flawless in reaching that result.²⁴⁹ As Graber

²⁴⁵ Michael W. McConnell, *On Reading the Constitution*, 73 *Corn. L. Rev.* at 359 (1988).

²⁴⁶ See Mark Graber, *Dred Scott and the Problem of Constitutional Evil* 15 (2006) (“Contemporary constitutional theory rests on three premises: *Brown* was correct, *Lochner* was wrong, and *Dred Scott* was wrong.”); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 *Harv. L. Rev.* 963, 1018-19 (1998) (describing the “the academic theory canon,” which “consists of cases and materials that are sufficiently important . . . that any theory of constitutional law must account for them”—including *Brown*, *Lochner*, and *Dred Scott*).

²⁴⁷ See Greene, *supra* n.43 at 387-96 (collecting evidence of opposition to *Dred Scott*).

²⁴⁸ *Id.* at 437 (“the Justices of the Supreme Court did not seem to identify [*Dred Scott*] as uniquely sinful in the way it is thought of today until well into the 1960s”).

²⁴⁹ Graber, *supra* n.246 at 4 (emphasis in original);

points out, “[m]uch historical evidence supports [Taney’s] conclusions that freed slaves could not become American citizens and that slavery could not be banned in the territories west of the Mississippi.”²⁵⁰ Professor Jamal Greene notes similarly that “anticanonical cases [like *Dred Scott*] must, on some replicable metric, be correct” under then-prevailing legal norms.²⁵¹

Let us assume for present purposes that *Dred Scott* presented a close case at the time of decision, such that it raised a substantial risk of error. How would the case come out under best cost-avoider theory?

The theory’s starting point is to identify the relevant groups in the dispute along with the costs they would suffer from an adverse ruling. On one side are slaves like Dred Scott, who travelled to free territory and thus stood to gain their freedom under the Missouri Compromise. A ruling against Scott would result in this group continuing to be subjected to chattel slavery. On the other side are slave owners who fear the loss of their slaves if the Court were to rule in Scott’s favor.

The next step is to identify and compare each group’s avoidance strategies. Slave owners were clearly the best public cost avoiders: it would have been easier for them to lobby to repeal the Missouri Compromise than it would be for slaves to overrule *Dred Scott* via Article V. Slave owners also had a far easier private avoidance strategy: to avoid the cost of having to free slaves who previously entered free territory, owners could simply refrain from taking their slaves into free territory.²⁵² Private avoidance for slaves, by contrast, involved the mortally dangerous prospect of escape, which often entailed leaving behind one’s loved ones.²⁵³ Slave owners were thus the best cost avoiders, and so the Court would have ruled against them.

Lochner. The *Lochner* era encompasses a period of our constitutional history in which the Court invalidated economic regulations (such as minimum wage and maximum hour laws) under two rules of constitutional law: a robust view of the liberty of contract protected against state legislation under the Fourteenth Amendment and a narrow view of Congress’s Commerce Clause power.²⁵⁴ Scholars have vigorously debated

²⁵⁰ *Id.* at 46; *see also id.* at 46-76 (recounting this historical evidence).

²⁵¹ Greene, *supra* n.43 at 463; *see also id.* at 408-11 (listing possible defenses of *Dred Scott*’s outcome, even if Chief Justice Taney’s opinion erred in other ways).

²⁵² The applicable private avoidance strategy is somewhat different in *Dred Scott*’s own case, since Scott was taken to free territory by a prior owner and then later sold to the respondent John Sanford. *Dred Scott*, 60 U.S. at 431. Yet persons in Sanford’s position could avoid their costs by refusing to buy slaves who had been taken to free territory.

²⁵³ *See generally* Eric Foner, *Gateway to Freedom: The Hidden History of the Underground Railroad* (2016).

²⁵⁴ *See* David A. Strauss, *Why Was Lochner Wrong?* 70 U. Chi. L. Rev. 373, 376 (2003) (“During the *Lochner* era, the only constitutional principles that the Supreme Court

both rules. Whereas some criticize the Court's liberty of contract rulings as an interpretively indefensible,²⁵⁵ others defend them as a natural reading of a Fourteenth Amendment that would have been acutely concerned with the right of freed slaves to have a say in their employment relationships.²⁵⁶ Likewise, there is evidence that Congress's Article I power to regulate interstate commerce could refer either to the narrow concept of trade or exchange,²⁵⁷ or to a much broader notion of social intercourse.²⁵⁸

The Court could try to sort through the forceful, conflicting arguments on each of these questions and reach what one hopes is the right outcome. Or it could acknowledge each question's difficulty and rule using a best cost-avoider approach aimed at maximizing the odds that each group in the underlying dispute can still get what it wants.

Starting with the costs suffered by groups on both sides, it seems clear that the businesses that sought to strike down minimum wage and maximum hour laws were concerned with the economic harm of increased labor costs. A loss for workers, by contrast, would reinstate the very costs that the underlying state and federal laws sought to regulate—inadequate wages, excessive hour requirements, child labor, and the like.²⁵⁹

There are strong reasons to think businesses were the best cost avoider. Public avoidance for workers would have entailed amending the Constitution to override the Court's liberty of contract and Commerce Clause interpretations. Businesses, by contrast, had the easier option of fighting in the legislature to repeal (or reduce the burdens of) the challenged

enforced regularly and systematically were . . . freedom of contract, as in *Lochner*, and federalism-based limits on Congress's power" under the Commerce Clause).

²⁵⁵ See, e.g., Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 44 (1990); Ely, *supra* n.122 at 14-18 (rejecting *Lochner* because "'substantive due process' is a contradiction in terms—sort of like 'green pastel redness'").

²⁵⁶ See Greene, *supra* n.43 at 419 ("It is no stretch to argue that . . . the Fourteenth Amendment granted to former slaves . . . the right to bargain freely over the terms of their employment relationships."); William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 Harv. L. Rev. 513, 532 (1974) (similar). Still others defend the liberty of contract as the descendant of Jackson Era opposition to class legislation. See Howard Gillman, *The Constitution Besieged* (1993).

²⁵⁷ See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 112-25 (2001) (surveying contemporary dictionaries, Madison's notes of the constitutional convention, the Federalist Papers, and state ratification conventions to conclude that the original meaning of "commerce" was "trade or exchange" of goods).

²⁵⁸ See Balkin, *supra* n.103 at 149-59 (amassing evidence of this broad understanding).

²⁵⁹ Professor David Bernstein has argued that the maximum hour law in *Lochner* was supported by workers and large bakeries together in an effort to drive out smaller bakeries. Bernstein, *Rehabilitating Lochner* 23 (2011). This would complicate identification of the best cost avoider if smaller businesses were less able to avoid their losses than large businesses. The implication, though, is simply that attempts to drive out competition using economic regulation might not pass muster on best cost-avoider theory.

economic regulations. More significantly, businesses had powerful private avoidance strategies: reduce employment or raise prices to offset increases in labor costs.²⁶⁰ In fact, that is precisely what happened.²⁶¹ Workers lacked any such alternative—the dearth of jobs paying a higher wage or requiring fewer hours is what motivated the legislation in the first place.²⁶²

Brown. Whether the Equal Protection Clause, as it was originally understood, forbids segregation in public education is a question that has occupied constitutional law scholars for some time. For a period, the consensus seemed to be that originalism was impossible to square with *Brown*. Professor Alexander Bickel wrote in a 1955 Harvard Law Review article that the “obvious conclusion” from an examination of evidence surrounding the Fourteenth Amendment’s ratification was that the Amendment “as originally understood” was not meant to apply to segregation.²⁶³ Professor Michael Klarman noted that “contemporaneous state practices render [*Brown*’s] interpretation fanciful; twenty-four of the thirty-seven states then in the union either required or permitted racially segregated schools.”²⁶⁴ But in a later work, Professor Michael McConnell unearthed powerful evidence that “between one-half and two-thirds of both houses of Congress voted in favor of school desegregation” shortly after the Amendment’s ratification—votes that quite plausibly suggest an alternative understanding of the Amendment’s meaning.²⁶⁵

Assume for now that the interpretive question is a hard one. Best cost-avoider theory would have little difficulty resolving the case. On one side are white parents who supported segregation and who faced the self-avowed

²⁶⁰ Critically, individual businesses did not face any competitive disadvantage in doing so because the challenged regulations applied on a general basis, such that all similarly situated businesses would face the same increased labor costs. And to the extent such regulations might impose outsized burdens on small employers, many of those burdens are alleviated by statutory exemptions. *See, e.g.*, 29 U.S.C. § 203(s)(1)(A)(ii) (FLSA does not apply to businesses whose annual gross volume of sales is less than \$500,000).

²⁶¹ *See supra* n.19; Daniel Aaronson, “Price Pass-Through and the Minimum Wage,” *The Review of Economics and Statistics*, Vol. 83 at 158, 169 (2001) (“[R]estaurant prices rise with increases in the wage bill that result from minimum-wage legislation”). A recent study on the implementation of a national minimum wage in the United Kingdom found no adverse effect on corporate profit margins. *See* Rebecca Riley & Chiarra Rosazza Bondibene, *The Impact of the National Minimum Wage on UK Businesses* 18 (2015). *But see* Mirko Draca, et al., *Minimum Wages and Firm Profitability*, 3 *American Economic Journal: Applied Economics* 129, 141 (2011) (finding modest decline in profits).

²⁶² *See generally* Grossman, *supra* n.19.

²⁶³ Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 *Harv. L. Rev.* 1, 58 (1955).

²⁶⁴ Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 *Mich. L. Rev.* 213, 252 (1991).

²⁶⁵ Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 *Va. L. Rev.* 947, 953 (1995).

harm of having to send their children to schools with black classmates. On the other side were the parents of black children who would have been subjected to separate schools were the Court to rule against them.

The white families were the best cost avoiders, though the reason has nothing to do with any public avoidance option available to either group. Black families in segregated communities faced steep costs in any effort to convince white officials to adopt integration voluntarily.²⁶⁶ And over time, pro-segregation white families were forbidden to adopt legislative alternatives promising integration in name only,²⁶⁷ leaving a constitutional amendment as the only true public avoidance option.

White families who opposed integration did have meaningful private avoidance options, however. A substantial number responded to *Brown* by sending their children to private segregation academies—more than 300,000 white students attended such schools according as of 1969.²⁶⁸ Other white families voted with their feet by moving to school districts where few black families resided.²⁶⁹ For example, in the three years after a federal district court ordered Louisville public schools to desegregate, white enrollment fell by a staggering 21 percent.²⁷⁰ Black families, of course, had far less access to similar private avoidance strategies; there were no private integration academies in the South, and foot voting would have entailed a far costlier journey in search of integrated school districts.²⁷¹ And so best cost-avoider theory would lead to the correct outcome in *Brown*, too.²⁷²

²⁶⁶ See, e.g., *supra* n.193.

²⁶⁷ See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971) (rejecting school board's proposed integration plan as insufficient and upholding a court-appointed expert plan's use of redrawn school maps and inter-district bussing); *Green v. County School Board*, 391 U.S. 430, 439 (1968) (rejecting free choice plans that purport to allow integration but that in fact result in continued segregation); *Griffin v. Cnty Sch. Bd. of Prince Edward*, 377 U.S. 218 (1964) (striking down school board's decision to close down its public schools and provide tuition support for racially segregated private schools).

²⁶⁸ *Time*, "Private Schools: The Last Refuge," November 14, 1969. Significantly, seven states established state-funded private school tuition grant programs to assist poor white families in avoiding integration. See Jerome C. Hafter & Peter M. Hoffman, *Segregation Academies and State Action*, 82 Yale L.J. 1436, 1440 (1973). Federal courts eventually invalidated these programs, but not before they assisted thousands of white children. See *Coffey v. State Educ. Fin. Comm'n*, 296 F.Supp. 1389 (S.D. Miss. 1969). Nonetheless, I acknowledge that in the absence of such scholarships, best cost-avoider theory raises the question of what to do when a group *generally* possesses ample ability to avoid its harms, but some individual members lack similar means. At a first approximation, courts might compare avoidance costs of mean or modal group members.

²⁶⁹ See Clotfelter, *supra* n.210 at 81-86 (canvassing considerable evidence of white flight to suburbs in response to desegregation); Coleman, *supra* n.20.

²⁷⁰ Clotfelter, *supra* n.210 at 75.

²⁷¹ Cf. Somin, *supra* n.208 (discussing foot voting by black Americans after *Plessy*).

²⁷² To be sure, integration advocates may object to whites' private avoidance, but that is a policy objection, not a constitutional one. Cf. *Pierce v. Soc'y of the Sisters of the Holy*

B. Live Disputes

Best cost-avoider theory would also provide direction in some more recent constitutional disputes that have troubled the Supreme Court. I touch here on two²⁷³: the right to refuse to support the bargaining activities of a public sector union in *Janus* and the right to refuse to bake a custom wedding cake for a gay couple in *Masterpiece Cakeshop*.²⁷⁴

Janus. As noted already, *Janus* concerned a fight between public sector unions and objecting workers over the constitutionality of state laws requiring the workers to pay a share of the union's collective bargaining costs.²⁷⁵ The Court initially upheld such laws in *Abood v. Detroit Board of Education*, reasoning that any harm to objecting workers was justified by the state's important interests in promoting labor peace and preventing free riders.²⁷⁶ But the Court overruled that judgment in *Janus*.²⁷⁷

Intellectual honesty compels the admission that this is a hard question of constitutional law. At its core, the majority's analysis turned on two points. The first was not much a matter of dispute: objecting workers' First Amendment interests are impinged when they are forced to finance speech on matters of public concern by an entity with which they disagree.²⁷⁸ And the second is forceful in its own right: there are less-restrictive means to support public sector unionization that do not involve compelling objecting workers to support the unions.²⁷⁹ On the other hand, Professors Eugene

Names of Jesus & Mary, 268 U.S. 510, 534-35 (1925) (upholding the "liberty of parents and guardians to direct the upbringing and education of children under their control").

²⁷³ I discuss other recent cases in *Rethinking Political Power in Judicial Review*, *supra* n.99. For example, I argue that *Heller* and *Citizens United* should come out differently in view of the lower-cost public avoidance options available to gun rights activists and corporations. *See id.* at 1810 & 1813 (explaining how both groups have the clout to oppose legislation, whereas opponents would have less ability to amend the Constitution). Private avoidance strategies bolster this conclusion, given the alternatives available to gun owners to defend themselves and engage in the safe use of recreational firearms and the fact that corporations could support candidates via segregated PACs. *See infra* text accompanying nn.390-92. Another area of law ripe for best cost-avoider analysis is the Dormant Commerce Clause, where the ability of affected groups to undo economic harms via public avoidance plays a role in the Court's analysis. *See id.* at 1780-81; Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 Wisc. L. Rev. 125, 131-41.

²⁷⁴ 138 S. Ct. 1719 (2018).

²⁷⁵ 138 S. Ct. 2448.

²⁷⁶ 431 U.S. 209, 224-25 (1977). By free riders, the Court meant workers who would opt out of paying fair share fees for economic reasons if given the choice, but who would continue to receive the benefits of union representation under state law. *Id.* at 222.

²⁷⁷ 138 S. Ct. at 2486.

²⁷⁸ *Id.* at 2464. Both the dissent in *Janus* and *Abood* itself agreed with this assessment. *Id.* at 2489 (Kagan, J., dissenting); *Abood*, 431 U.S. at 225.

²⁷⁹ The majority pointed to states where members voluntarily pay dues as well as fee-for-service models in which unions charge objecting workers for grievance representation. *Id.* at 2468-69. I have previously suggested that states may directly reimburse a union for

Volokh and William Baude have cogently argued that the right to free *speech* should not apply to laws compelling *financial support* for speech one disagrees with—for if it did, taxpayers would be free to opt out of funding huge swaths of government speech, too.²⁸⁰

The Court could decide the case as though only one side has valid constitutional arguments, implicitly telling the other that its costs are not worthy of constitutional recognition. Or it could acknowledge the credible arguments and important interests on both sides and rule instead on best cost-avoider grounds. Under that approach, one affected group comprises public sector unions and their members, who fear the budgetary losses of an adverse ruling. A ruling in the unions' favor, by contrast, would result in dignitary and economic costs to objecting workers who would be required to pay in support of speech with which they disagree.

As mentioned earlier, the unions have been able to avoid budgetary losses through a powerful blend of public and private avoidance strategies. On the public side, they've succeeded in persuading a number of state legislatures to enact laws enhancing their ability to meet with new workers so as to persuade them of the benefits of union membership.²⁸¹ Other states have adopted the very fee-for-service suggested by the *Janus* majority.²⁸² And on the private side, nothing beats good old fashioned organizing: as Mary Kay Henry, President of the Service Employees International Union explained, "*Janus* was seized on by us and other parts of the labor movement as an opportunity to re-educate and activate our members."²⁸³

Objecting workers, by contrast, faced more difficult avoidance strategies. One option would have been to lobby to repeal fair share fee laws on a state-by-state basis. While that approach succeeded in a handful of purple states, it was impractical in a number of remaining staunchly pro-labor states. As to private avoidance, workers could have in theory voted with their feet by moving to right-to-work states or quitting their public sector jobs for non-unionized private sector ones. But as Professor Benjamin Sachs has noted, such movement is often accompanied by economic loss, adverse health effects, and psychological and social instability.²⁸⁴ Public sector unions were thus the better cost avoider.

its legitimate bargaining costs. See Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 N.Y.U. L. REV. 144 (2016).

²⁸⁰ Eugene Volokh and William Baude, *Compelled Subsidies and the First Amendment*, 132 Harv. L. Rev. 171 (2018).

²⁸¹ See *supra* n.17.

²⁸² See *supra* nn.201-02.

²⁸³ Rainey, *supra* n.11; see also Gies, *supra* n.207.

²⁸⁴ Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 Colum. L. Rev. 800, 837-38 (2012).

Masterpiece Cakeshop. Writing for the majority in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, Justice Kennedy described the case as “difficult” four times in the introduction alone.²⁸⁵ That is unusual, but the case is perhaps unusual in its degree of difficulty.

The major question was whether the Free Speech Clause forbids a state to compel a commercial, religious baker to make a custom cake for a gay couple’s wedding.²⁸⁶ At the outset, as Justice Kennedy noted, “the free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech.”²⁸⁷ Yet a contrary conclusion would itself lead to hard-to-stomach consequences, such as the possibility that a Jewish baker might be forced to bake a cake for a neo-Nazi wedding.²⁸⁸ On the other hand, a ruling in the baker’s favor would create tension with case law upholding the Civil Rights Act’s prohibition against religiously motivated racial discrimination.²⁸⁹ Perhaps because of these difficulties, the Court punted, ruling in the baker’s favor on a fact-specific Free Exercise ground.²⁹⁰

But how might the case have come out under an approach aimed at redressing the costs feared by both sides of the dispute? The Court would begin by deferring to both sides’ reasonable characterizations of their costs. So a ruling against the baker would result in the cost of forcing him and similarly situated vendors to participate in wedding ceremonies in violation of their consciences. By contrast, the opposite ruling would result in social stigma against gay and lesbian couples, subjugating them to exclusion from places of public accommodation and thus second-class citizenship simply due to their sexual orientation.

Which group was better positioned to avoid its costs? Vendors like Jack Phillips. With respect to public avoidance strategies, it would undoubtedly be costlier for LGBT groups to amend the Constitution than it would be for vendors like Phillips to lobby for targeted exemptions from state anti-discrimination laws.²⁹¹ And as for private avoidance, a vendor in Phillips’s

²⁸⁵ 138 S. Ct. 1719, 1723 (2018).

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Cf.* Brief for the United States as Amicus Curiae Supporting Petitioners in *Masterpiece Cakeshop*, No. 16-111 (arguing that a ruling against *Masterpiece Cakeshop* would permit a state to force a graphic designer to design a flier for a “neo-Nazi group”).

²⁸⁹ See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, n.5 (1968).

²⁹⁰ *Masterpiece Cakeshop*, 138 S. Ct. at 1729-31 (identifying evidence of religious hostility on the part of Colorado Civil Rights commissioners).

²⁹¹ A majority of states currently do not protect persons from discrimination by public accommodations on the basis of sexual orientation. See *LGBTQ Americans Aren’t Fully Protected From Discrimination in 30 States*, Freedom For All Americans, online at <https://www.freedomforallamericans.org/states/>.

position could avoid personal involvement in an objectionable ceremony simply by providing the couple a customized cake that was designed and baked by another baker.²⁹² Gay couples, by contrast, might be able to avoid the harm of exclusion from public accommodations through the private option of foot voting—that is, by moving to a jurisdiction with such tolerant social conditions that discrimination on the basis of sexual orientation does not occur.²⁹³ But such a move would involve a steeper cost than requiring vendors like Masterpiece Cakeshop to contract out with third parties for objectionable weddings. As a result, the Court would rule against Phillips not because his claims are meritless, but rather because his costs—sincere and weighty as the Court must accept it to be—are more easily avoided.

C. Implications

By this point, readers likely have questions about the theory's implications. I hope to respond to some of those concerns here. I consider three potential implications in particular: Do the above examples yield any helpful rules of thumb as to how cases are likely to turn out? Can courts really administer the theory? And might best cost-avoider theory be utilized more broadly, for example in hard statutory interpretation cases?

1. *Rules of Thumb?*

The foregoing historic cases and recent disputes may yield some helpful rules of thumb. Two tendencies in the cases are worth examining. First, best cost-avoider theory reflects a soft preference for deference to legislative outcomes over a judicial declaration that a law is unconstitutional,²⁹⁴ since it will typically be easier for a losing group to move for repeal of existing legislation than to amend the Constitution. Second, if a case involves competing groups with appreciably different levels of political power, the theory is inclined to rule against the more powerful group to the extent such power correlates with greater access to public (and perhaps private) avoidance strategies.²⁹⁵ But for several reasons, neither tendency is close to absolute.

²⁹² I am not the first to suggest this alternative. See Greene, *supra* n.31 at 124.

²⁹³ One might argue that the gay couple can avoid their harm simply by going to another baker to get a wedding cake. But the ability to purchase a cake is not the *sine qua non* of the couple's harm; that harm is instead the stigma they suffer as second-class citizens who lack access to public accommodations that are freely open to all others, simply on account of their sexual orientation. By analogy, black Americans would obviously be harmed if the Constitution were construed to grant white supremacist store owners a First Amendment right to deny them service. That harm would not be abated simply because black Americans might be able to shop at other storefronts.

²⁹⁴ See Thayer, *supra* n.218.

²⁹⁵ See Tang, *supra* n.99.

As to the general preference for deference to legislators, there will be many occasions when the group seeking to defend a law is actually better positioned to avoid the costs of an adverse ruling, such that the theory points in favor of invalidation. *Brown* is a good example: even though white parents were the ones asking the Court to defer to existing segregation policies, the fact that those parents had readier access to private avoidance options (i.e., private schools and moving to outlying suburbs) made them the better cost avoider than black parents pursuing integration.²⁹⁶ Moreover, sometimes the group seeking to defend a law will have access to a public avoidance strategy that is easier to achieve than a constitutional amendment; an example here is how public sector unions have been able to lobby for state laws granting greater workplace access to meet with and persuade potential members.²⁹⁷

With respect to the theory's general disposition against more powerful groups, there will be times when a less powerful group is actually the better cost avoider in light of the particular nature of underlying dispute. Consider the aftermath of *Bakke*, when supporters of affirmative action were able to convince the University of California, Davis Medical School to reinstitute a race-conscious admissions policy that did not rely on quotas.²⁹⁸ Less powerful groups can also have easily accessible private avoidance strategies. Take a case like *Illinois v. Wardlow*, which held that a criminal suspect's "unprovoked" and "[h]eadlong flight" upon seeing police officers raised sufficiently reasonable suspicion to warrant a *Terry* stop.²⁹⁹ While criminal suspects as a class are less politically powerful than police officers (and the general crime-fearing public), such suspects have an easy way to avoid the costs of an adverse ruling—don't engage in such flight.³⁰⁰ And so cost-avoider theory would weigh against them.

²⁹⁶ Another potential example is *Kelo v. City of New London*, which considered the constitutionality of a city's use of eminent domain for the purpose of a private economic development plan. 545 U.S. 469 (2005). Best cost-avoider theory arguably weighs in favor of invalidating the city's policy—and ruling for the private homeowners—because developers can typically avoid the costs of holdouts by modifying their development plans and using thoughtful negotiation techniques; private homeowners lack any comparable alternatives. See Ilya Somin, *The Grasping Hand* 322-26 (2015).

²⁹⁷ See nn.17 & 281.

²⁹⁸ See *supra* nn.196-98. I acknowledge that this example evinces my belief that supporters of affirmative action were the less powerful group than opponents of affirmative action. I base this judgment on the success of Proposition 209, a California initiative that invalidated affirmative action in the state by majority vote. See *supra* n.190. But if one thinks affirmative action opponents were actually the weaker group despite the success of Proposition 209, then the proposition's success itself shows how public avoidance can still result in the theory's preferring more powerful groups on a case-by-case basis.

²⁹⁹ 528 U.S. 119, 124 (2000).

³⁰⁰ I do not mean to minimize the very real possibility that certain persons would feel legitimately in personal danger upon seeing "a four car caravan" of police officers. *Id.* at

The defeasible role of political powerlessness underscores how best cost-avoider theory differs from another constitutional theory to which it bears some surface-level similarities: John Hart Ely's political process theory.³⁰¹ While best cost-avoider theory shares Ely's concern for situations in which majorities legislate to the disadvantage of powerless minority groups, the underlying reason for that concern is distinct. Ely argued for heightened judicial intervention into laws burdening such minority groups because that is what he believed the Constitution *requires*—in his view, the Constitution was “overwhelmingly dedicated to concerns of process and structure, and not to the identification and preservation of specific substantive values.”³⁰² Ely was thus a judicial optimist at heart, in the sense that he believed the task of identifying powerless minority groups was necessary to determining the Constitution's proper application. That approach, however, entails the same kinds of error and decision costs as the other optimist theories.³⁰³ Best cost-avoider theory disclaims any ability to tell us what the Constitution requires in hard, contentious cases; indeed, it is precisely the difficulty and divisiveness of these cases that leads to the theory's suggestion that courts should minimize costs instead of attempting to definitively resolve social controversies through some best guess as to the Constitution's meaning.

Because of these divergent normative underpinnings, the two theories also operate on different considerations. Ely conceived of powerlessness as an exclusive on/off switch: groups that are so the victim of prejudice that they “keep[] finding [themselves] on the wrong end of the legislature's classifications” get the benefit of strict scrutiny in all cases, while laws that do not burden such groups are presumed constitutional.³⁰⁴ Best cost-avoider theory looks at a wider range of factors in a more nuanced way.

121. But as Justice Sotomayor recently noted, this is a situation when personal safety actually coincides with the best strategy for avoiding a warrantless *Terry* stop. See *Utah v. Strieff*, 579 U.S. __ (2017) (Sotomayor, J., dissenting) (“For generations, black and brown parents have given their children ‘the talk’—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.”).

³⁰¹ See Ely, *supra* n.122.

³⁰² *Id.* at 92. Many have found this claim itself to be problematic; as Professor Laurence Tribe argued, “[r]eligious freedom, antislavery, private property: much of our constitutional history can be written by reference to just these . . . substantive values. . . . [w]hat is puzzling is how anyone can say, in the face of this reality, that the Constitution is or should be predominantly concerned with *process* and *not* substance.” Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063, 1067 (1980).

³⁰³ See *supra* Part I.B.

³⁰⁴ See Ely, *supra* n.122 at 152, 147 (describing “special scrutiny” of laws relying on suspect classifications). I am setting aside laws burdening political *access*. See *supra* n.122.

The theory cares, for example, whether a group (powerless or otherwise) can easily avoid the costs of an adverse ruling through private ordering given the nature of the underlying dispute³⁰⁵—a concern that escaped Ely’s attention. Cost-avoider theory is also sensitive to different levels of power: laws burdening powerful groups are especially worthy of our trust,³⁰⁶ and even if a group is not so powerless as to qualify as a suspect class, its relative lack of influence might still matter.³⁰⁷ Finally, best cost-avoider theory can work even if no power differential exists at all. One can imagine a case implicating competing groups of similar clout (or occasions where both groups claim political disadvantage).³⁰⁸ In such cases, Ely’s theory would presumably have little to say except to apply a general presumption of constitutionality.³⁰⁹ Under best cost-avoider theory, by contrast, such cases would turn on the specific strategies each group has to avoid its costs given the specific nature of the case at hand.

A search for rules of thumb raises another set of potential questions, this one from the perspective of future actors (whether people or courts) seeking direction from prior Supreme Court decisions. That is, what kind of guidance or precedential effect would an opinion based on best cost-avoider reasoning provide in future cases? At a first cut, it’s clear that the answer must be “less”—or at least, less guidance than is offered by the Court currently given its “law-declarer” disposition.³¹⁰ The premise of a best cost-avoider opinion, after all, is that an underlying constitutional question is too difficult to answer definitively without a significant risk of error, such that the case should be resolved narrowly against the best cost avoider.³¹¹

In this sense, cost-avoider theory’s closest theoretical progenitor may actually be Professor Cass Sunstein’s judicial minimalism, which advocates narrow rulings over broad ones and shallowly-reasoned opinions over

³⁰⁵ See, e.g., *supra* nn.299-300 & accompanying text.

³⁰⁶ See Tang, *supra* n.99.

³⁰⁷ Take, for example, the *Kelo* case, where private homeowners who are the subject of eminent domain are surely not a discrete and insular minority, but are perhaps less powerful than economic developers. See Somin, *supra* n.296 at 82.

³⁰⁸ Perhaps *Masterpiece Cakeshop* is an example, where religious groups who oppose same sex marriage and the LGBT community have both pointed to political headwinds.

³⁰⁹ See Ely, *supra* n.122 at 103 (arguing that court should “intervene[] *only* when the . . . political market is systematically malfunctioning”) (emphasis added).

³¹⁰ Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L. Rev. 1901, 1952 (2016); see also Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 Colum. L. Rev. 665, 668-69 (2012).

³¹¹ In this respect, one might think of the theory as turning on remedial considerations rather than on constitutional meaning. For where the meaning is underdeterminate, courts consider the implications of a remedial ruling in either direction, aiming to minimize the harmful effects of a potentially erroneous decision. I thank Stephen Rich for this point.

deeply-reasoned ones.³¹² For like minimalism, a court that decides cases under best cost-avoider theory “is intensely aware of its own limitations,” it “attempts to promote the democratic ideals of participation, deliberation and responsiveness,” and therefore “leaves many things undecided.”³¹³

That is not to say, however, that the theory would result in decisions offering no precedential value. Cost-avoider decisions would still guide future courts in a fashion much like the common law: future cases raising the same legal question and operative facts (i.e., similar affected groups, costs, and avoidance options) would presumptively come out the same way. For example, the first time the Court confronted an ordinary state minimum wage or maximum hour regulation enacted during the *Lochner* era, it would explain that the businesses opposing the regulation are better cost avoiders than the blue-collar workers who supported it.³¹⁴ If a similar law were challenged by businesses in another state on similar facts, the first decision would hold strong precedential weight. But if a case arose concerning a different economic regulation enacted for different reasons—perhaps a demonstrable desire by big corporations to drive out small competitors—then that might lead to a different cost-avoider analysis and outcome.³¹⁵ The point is, when the Court’s objective is to minimize error and decision costs, the facts of each case will matter if affected groups’ possess materially different avoidance capacities from one case to the next.

2. *Is The Theory Administrable?*

I hope the example cases show how best cost-avoider theory can produce useful rules of thumb for relevant actors. At the same time, I must also concede that the cases reveal how best cost-avoider decisionmaking

³¹² See Sunstein, *supra* n.35 at 10.

³¹³ *Id.* at ix-x; see also *infra* Part IV.B (describing how best cost-avoider reasoned opinions can incentivize competing groups to propose and agree on legislative solutions to hard cases). Best cost-avoider theory differs from minimalism in that the latter theory still requires courts to issue difficult and contentious judgments on the Constitution’s meaning that reject some groups’ claims for constitutional recognition. Although deciding such cases as narrowly as possible can reduce the resulting error costs and degree of polarization and judicial distrust, it does not obviate the costs of the substantive constitutional judgment itself. Thus, for example, a “narrow” decision in *Dred Scott* might have avoided the question of whether slaves are “property” triggering the protections of the Fifth Amendment Due Process Clause and ruled against Scott on the ground that black Americans are not “citizens” for the limited purposes of Article III diversity jurisdiction. See *Dred Scott*, 60 U.S. at 426-27 (deciding Article III jurisdiction issue); *id.* at 452 (going on to decide Due Process issue as well). But such a narrow ruling would have accomplished little in the way of error and decision cost reduction.

³¹⁴ See *supra* nn.254-62 & accompanying text.

³¹⁵ See *supra* n.259. Such a fact-sensitive approach wouldn’t be available under a law-declarer model in which the Court issues a broad ruling interpreting the liberty of contract so as to uphold all economic regulations.

would seem to entail a substantial departure from the status quo. It is no small thing to suggest that Justices who have long believed they possess special insight in resolving hard, contested questions of constitutional law should suddenly see their role as partners in dialogue with affected groups, all with the goal of doing as little harm as possible.³¹⁶ Nor is it self-evident that the essential task they would be called on to do instead—to compare the relative ease of various approaches for securing each group’s interests—is within the judiciary’s capacity. Still, I want to suggest a few reasons why the departure might not be as dramatic as it first appears.

As an initial matter, cost-avoider arguments will not even enter the Court’s decisionmaking calculus in a meaningful set of constitutional cases. As noted earlier, the theory’s justification is the presence of a hard question of law that raises a substantial risk of error.³¹⁷ If a constitutional case can be resolved relatively uncontroversially using the usual tools of constitutional interpretation, then that should be the end of the Court’s analysis.³¹⁸ True, my own view is that many contentious constitutional cases at the Court these days are hard ones.³¹⁹ But not all of them. Every Term the Court decides some important and divisive constitutional cases unanimously;³²⁰ that is a pretty good indication of an “easy” case.

What is more, even in hard cases in which cost-avoider analysis would be warranted, it is worth noting that sometimes the best cost avoider will itself be hard to determine.³²¹ And so the Court would continue to resolve such cases using the familiar modes of argument that it currently considers—arguments based on the Constitution’s text and original meaning, history, structure, precedent, prudential concerns and the like.³²²

³¹⁶ See *supra* n.224. I note also that if one cannot imagine a world in which Supreme Court opinions candidly admit the Court’s inability to discern a correct legal answer, the Court could use best cost-avoider theory as an unspoken, *implicit* ground of decision, rather than an explicit one. Under such an approach (which I thank Carlton Larson for flagging), a Court would vote on cost avoider grounds but couch its opinions in the same way it currently does. Such an approach would reduce error costs, but might leave in place many of the polarization-type decision costs discussed earlier, see *supra* I.A.2.

³¹⁷ See *supra* text accompanying notes 212-27.

³¹⁸ Cf. Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399 (1985).

³¹⁹ See *supra* n.224.

³²⁰ See, e.g., *Timbs v. Indiana*, 586 U.S. ____ (2019) (unanimously incorporating Excessive Fines Clause against the states); *District of Columbia v. Wesby*, 583 U.S. ____ (2018) (unanimously holding that officers had probable cause to arrest partygoers at a house despite contrary District Court and Court of Appeals rulings); *Gill v. Whitford*, 585 U.S. ____ (2018) (unanimously vacating lower court decision in favor of plaintiffs’ gerrymandering claim due to lack of standing); *Packingham v. North Carolina*, 582 U.S. ____ (2017) (unanimously striking down state law prohibition against sex offender access to social media under First Amendment).

³²¹ See, e.g., *supra* n.242 (identifying abortion as a hard case under cost avoider theory).

³²² See *supra* nn. 108-112 & accompanying text.

Finally, it is important to recognize how courts today *already* engage in analyses that are substantially similar to that which is called for under best cost-avoider theory. From familiar tests in constitutional law like strict scrutiny and undue burden analysis, to cost-avoider rules established across a range of subjects in private law, courts are well-versed in the task of deciding which course of action among a menu of alternatives would be best-suited to accomplishing a given end.

Take strict scrutiny, one of the most familiar tests in all of constitutional law. Under it, a law will be deemed unconstitutional unless the law serves a compelling interest and no “less restrictive alternative[] would be at least as effective” in achieving that interest.³²³ What is the less restrictive alternative prong of this test if not a call to compare the relative ease of competing legislative alternatives (i.e., public avoidance options)?

Consider a First Amendment case like *Ashcroft v. ACLU*, where the Supreme Court upheld a preliminary injunction against a federal statute criminalizing the knowing posting of content that is “harmful to minors.”³²⁴ Crucial to the Court’s analysis was its view that there existed “plausible, less restrictive alternatives” to criminal punishment.³²⁵ In particular, the Court agreed with the district court’s finding that filtering software can be installed on computers used by children that would be both less speech-restrictive and just as effective for protecting children.³²⁶ Critically, the Court concluded that this filtering software is a readily “available,” or easy to implement, alternative because even though Congress could not require parents to use it, “Congress undoubtedly may act to encourage the use of filters” through financial and other programs.³²⁷ Or put in the language of public avoidance, the Court had little difficulty finding that those who wish to protect minors from harmful content have an easy alternative to avoid the costs of a ruling striking down the existing criminal prohibition: amend the law to facilitate use of filtering software instead.³²⁸

³²³ *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665 (2004); *see also generally* Fallon, *supra* n.195.

³²⁴ 542 U.S. 656; 47 U.S.C. § 231(a)(1).

³²⁵ *Ashcroft*, 542 U.S. at 666.

³²⁶ *Id.* at 667-68.

³²⁷ *Id.* at 669.

³²⁸ In reaching this conclusion, the Court relied heavily on facts developed in the district court—a sign that the usual process of fact-finding at trial can help courts to evaluate the relative ease and effectiveness of avoidance options. *Id.* at 666-68. One complication, however, is that costs may be imposed on groups that are not technically before the Court as parties. *See supra* text accompanying notes 228-32. In such cases, a court could enable further fact-finding by recognizing party-interveners and relying on amicus briefs. *See Fed. R. Civ. P.* 24.

Courts also already engage in constitutional analysis involving the evaluation of private avoidance strategies. For example, *Planned Parenthood v. Casey*'s undue burden test can be understood as asking whether a given abortion regulation would pose too great an obstacle in view of other private means women may use to obtain the procedure.³²⁹ Thus, in *Whole Woman's Health v. Hellerstedt*, the Court invalidated a state law requiring abortion providers to have admitting privileges at a hospital within 30 miles and to satisfy the standards imposed on surgical centers.³³⁰ That law posed an undue burden, the Court reasoned, because it would lead to the closure of all but seven or eight of Texas' abortion clinics, such that roughly 750,000 women across the state would be left to reside more than 200 miles from an abortion provider.³³¹ Or framed in the language of best cost-avoider theory, women in Texas would be unable to avoid the costs of an adverse ruling through private means because of the difficulties involved in "travel[ing] long distances to get abortions in crammed-to-capacity superfacilities" where patients are "less likely to get . . . individualized attention" from their medical providers.³³²

Indeed, the Court ultimately ruled against the State in *Hellerstedt* not only because of the lack of easy private avoidance options for adversely affected women, but also because of the presence of an easy way to avoid costs on the other side of the issue—the state's desire to protect maternal health.³³³ For even as women would face steep costs in travelling long distances to wait for procedures at overcrowded facilities, there was ample evidence that the State could protect maternal health equally effectively by leaving in force the existing regulations on abortion providers, which had already proven to be effective.³³⁴ Put simply, *Hellerstedt* bottoms out on a direct comparison of avoidance options between affected groups—exactly the kind of comparison called for under best cost-avoider theory.

³²⁹ 505 U.S. 833, 877 (1992) ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."). My point here is not to offer a view on whether *Casey*'s undue burden standard is correct, but rather that worries about judicial capacity to consider private avoidance should be minimal given how the Court already does so in its existing jurisprudence. I thank Scott Altman for this point.

³³⁰ 136 S. Ct. 2292 (2016).

³³¹ *Id.* at 2301-02.

³³² *Id.* at 2318.

³³³ Texas argued throughout the case that its interest in enforcing the admitting privileges and surgical center requirements was to protect maternal health in the event of complications from a procedure. *Id.* at 2311.

³³⁴ *Id.* at 2311-12 (State concedes that admitting privilege requirement would not have helped "even one woman obtain better treatment"); *id.* at 2315 ("The record makes clear that the surgical-center requirement provides no benefit").

Finally, it is worth reiterating that courts also have extensive experience fashioning cost-avoider rules outside the constitutional law context. From tort law rules governing liability in rear-end traffic collisions and collisions involving trains and vehicles, to the contract law rules of *contra proferentem* and sellers' liability when property is damaged prior to transfer of possession, casebooks are replete with instances when courts have sensibly determined the party that is best positioned to avoid some cost.³³⁵

To be sure, the private law examples are disanalogous in some respects. The costs in the private law cases stem from accidents or otherwise undesired events; the costs in the constitutional cases stem from judicial decisions. But that is a distinction without a meaningful difference. In fact, the desire to avoid judicial error costs has motivated a substantial body of law and literature in the field of antitrust.³³⁶ Relatedly, unlike the forward-looking nature of cost avoidance in constitutional law, the costs in private law cases have already occurred; the vehicle accident or property damage cannot be undone, it can only be compensated. Yet as noted earlier, that is a reason to *prefer* cost-avoider theory in constitutional law because it gives affected groups greater flexibility to protect their interests.³³⁷

Perhaps more significantly, one might object that the private law cases involve costs from accidents and the like that are readily reducible to *financial* terms.³³⁸ The costs in constitutional law are rarely financial, by contrast; the harm of an adverse ruling against either set of parents in *Brown*, or slaves in *Dred Scott*, or the baker or gay couple in *Masterpiece Cakeshop* are dignitary in nature and thus difficult to quantify or compare.

I agree that this is a significant disanalogy; the question is what it portends. One indisputable takeaway is that the normative engine that undergirds cost-avoider theory in the private law fields—the pursuit of economic efficiency—cannot justify the theory's use in constitutional law. Yet that has been clear from the outset: the goal here is not to maximize economic efficiency, but to minimize judicial error and decision costs.³³⁹

One might also think the inability to reduce to financial terms the harms experienced by competing groups in a constitutional case renders problematic the comparative exercise required by cost-avoider theory. But that is a category mistake: best cost-avoider theory is not concerned with

³³⁵ See *supra* Part II.A.

³³⁶ See Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 2-3, 15 (1984) (setting forth influential argument for judicial error-cost minimization approach to antitrust law); see also Bill Dodge, *The Case for Punitive Damages in Contracts*, 48 Duke L. J. 629 (1999) (arguing for judicial error-cost minimization in contract law of punitive damages).

³³⁷ See *supra* p.34.

³³⁸ Though not always—for example in accidents involving death or serious injury.

³³⁹ See *supra* Part I.A (describing error and decision costs).

the relative size or intensity of harm felt by competing groups, but rather the relative ease of *avoiding* those harms.³⁴⁰ We don't rule against the drafter in cases involving ambiguous contracts because she suffers lower costs in the contract dispute; we rule against her because she could have avoided the dispute more easily in the first place.

Finally, one might retort that our inability to reduce groups' avoidance strategies themselves to monetary terms is problematic. On this view, the fly in the cost-avoider ointment is the fact that the ease of private and public avoidance strategies is hard to quantify: how much does it cost public sector unions, really, to persuade state legislatures to adopt laws enhancing workplace access, or to better organize their members? Conversely, how much would it cost objecting workers to quit their jobs and find non-union work? Yet if we can't quantify the ease of either side's avoidance options in monetary terms, how are courts to choose the best cost avoider?

This objection proves too much, for it would doom cost-avoider theory in the private law setting, too. Courts do not try to quantify the financial cost to rear drivers of leaving more distance to the cars in front of them, and they certainly don't try to compare those costs to any supposed monetary price that leading drivers would encounter in the panoply of situations when they might need to stop suddenly.³⁴¹ Nor is *contra proferentem* concerned with comparing the drafter's monetary cost of writing a contract more clearly against her counterparty's monetary cost of negotiating changes to the contract. These private law rules are administrable not because each party's ease of avoidance is readily translated into dollars and cents, but because ease of avoidance is something courts can compare directly using a measure of common sense.³⁴² It isn't clear why the same comparative exercise would suddenly become impossible in constitutional law.

3. *A Best Cost-Avoider Theory of Statutory Interpretation?*

A final set of implications looks outward, to other domains of Supreme Court decisionmaking. If constitutional law cases raise error and decision

³⁴⁰ Indeed, any effort to compare harms in highly divisive cases (e.g., "the gay couple denied service in *Masterpiece* suffers a weightier harm than the religious baker who would be compelled to bake a cake") would only exacerbate the decision costs of polarization and institutional distrust. *See supra* text accompanying nn. 233-37. It is precisely because we can't say with objective confidence which side in these disputatious cases suffers greater harms that it makes sense to credit both sides' experience of substantial injury. *See id.*

³⁴¹ *See supra* n.33.

³⁴² Though of course some constitutional law cases actually might be translatable to monetary terms. *Brown* may be such an example: one might, in theory, have attempted to quantify the cost for white families to attend a private segregation academy or move to an outlying suburb and compare it to the same cost for black families to relocate to northern jurisdictions where school integration was occurring voluntarily.

costs potentially justifying a different mode of adjudication, what about hard statutory interpretation cases, too?³⁴³

In one respect, this is already well-trodden ground. Professors Bill Eskridge, Cass Sunstein, and Guido Calabresi have gestured at resolving statutory ambiguities in favor of disadvantaged groups.³⁴⁴ And Professor Einar Elhauge has built out a more detailed theory of preference-eliciting default rules under which courts should rule in hard statutory cases against “politically powerful group[s] with ready access to the legislative agenda” because such a result is “more likely to be corrected by the legislature.”³⁴⁵

Each of the above scholars has grounded his claim in a prediction about legislative responses to an adverse court decision—that is, in the relative ease of public avoidance. But none has identified the significance of *private* avoidance. Yet it is quite possible that this is the kind of response that most groups in society are likely to utilize when on the losing end of a Supreme Court statutory interpretation ruling; after all, it is the rare occasion when Congress these days responds to a Supreme Court statutory decision by clarifying the law.³⁴⁶ And so rather than focusing solely on the political clout of the parties to a statutory case as a proxy for legislative correction, the Court might do well to attend to private avoidance strategies as well.³⁴⁷ What that approach might look like, and what its normative implications

³⁴³ Although I do not have space to explore it here, I note that a similar argument might be advanced in other fields, for example in hard cases of administrative law.

³⁴⁴ William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 153 (1994) (courts “ought to consider, as a tie-breaker, which party . . . will have effective access to the legislative process if it loses its case”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 483 (1989) (“[C]ourts should resolve interpretive doubts [in statutes] in favor of disadvantaged groups.”); Guido Calabresi, *A Common Law for the Age of Statutes* 125 (1982) (courts should place statutory burdens on party with “ready access to legislative reconsideration”).

³⁴⁵ Einer Elhauge, *Statutory Default Rules* 152 (2008). Elhauge’s theory is especially well-reasoned, for in cases where a statute’s meaning is unclear, “significant differential odds of legislative correction exist,” and the “interim costs” of a ruling against the more powerful group are acceptable, then such a ruling would be likely to “maximiz[e] political satisfaction” because it would either provoke a legislative response if the ruling is incorrect or be correct in the first instance. *Id.* at 155.

³⁴⁶ See Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1332 fig.1, 1341 (2014) (identifying sharp decline in Congressional overrides after 1998).

³⁴⁷ Consider the private avoidance options available in a case like *Epic Systems Corp. v. Lewis*, in which the Court deemed permissible employer-imposed class action waivers in arbitration agreements. 138 S. Ct. 1612 (2018). Individual employees are all but powerless to avoid the costs of that ruling, since the cost of arbitrating an individual wage or hour claim is prohibitive and the waivers themselves are effectively non-negotiable. But employers might have easy private means to avoid the costs of a ruling invalidating class action waivers: they can require the losing side in a class action arbitration to pay for the costs of attorneys’ fees. See *Daniels v. Encana Oil & Gas (USA) Inc.*, No. 2017 WL 3263228, at *6 (D. Colo. Aug. 1, 2017) (upholding loser-pays fee shifting provision).

might entail, is beyond the scope of this paper. But to the extent hard statutory cases may impose error costs and heighten polarization and distrust of the judiciary, it is worth exploring whether best cost-avoider theory might yield benefits across a wider range of the Court's docket.

IV. WHY BEST COST-AVOIDER THEORY?

This part presents the normative case for a best cost-avoider theory of constitutional law. The theory is attractive for two reasons. It minimizes the error costs that the Court risks inflicting in hard cases. And it reduces decision costs by preserving the judiciary's legitimacy and transforming the polarizing nature of argument at the Court in a more generative direction.

A. Minimizing Error Costs

Under the simplest view of the Supreme Court's role in deciding constitutional cases, the Court's job is merely to "call balls and strikes."³⁴⁸ The Court's task becomes much trickier, however, once one admits that the Constitution does not supply clear answers in a range of hard cases,³⁴⁹ and that, to continue with the baseball analogy, many of the pitches it sees nowadays are stalls and brikes.³⁵⁰

Richard Posner famously argues that in these cases—cases in which "the orthodox legal materials of decision run out,"³⁵¹—judges should behave pragmatically, "deciding cases in a way that will produce the best results in the circumstances rather than just deciding cases in accordance with rules created by other organs of government."³⁵² In hard cases, in other words, judges should choose whichever outcome they believe will lead to the greatest social welfare.

Although seductive, there are serious problems with this idea. For one thing, it is grounded in what Professor Adrian Vermeule has identified as a nirvana fallacy³⁵³—Posner assumes the best about judges' ability to "produce the best results" even as he assumes the worst about the ability of the "other organs of government," i.e., popularly-elected legislators.³⁵⁴ For another thing, hard constitutional cases often involve clashes between

³⁴⁸ Opening Statement of then-Judge John Roberts during Senate Judiciary Committee nomination hearings. Sept. 12, 2005.

³⁴⁹ See *supra* n.100 & accompanying text.

³⁵⁰ Cf. Mark T. Williams, "MLB Umpires Missed 34,294 Ball-Strike Calls in 2018. Bring on Robo-umps?" *Bostonia*, Apr. 9, 2019.

³⁵¹ Richard Posner, *How Judges Think* 324 (2008).

³⁵² Richard Posner, "Pragmatic Adjudication," in *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture* 243 (Morris Dickstein, ed., 1998).

³⁵³ Adrian Vermeule, *Judging Under Uncertainty* 40 (2006).

³⁵⁴ Posner, *supra* n.352 at 243.

important values that are incommensurable.³⁵⁵ A decision that gun owners should prevail over gun control proponents because five Justices deem it the “best result” for society is unlikely to inspire much confidence in the judiciary (and quite likely to inflame the public’s appraisal of the Court).³⁵⁶

Best cost-avoider theory supplies a different, more modest route of decisionmaking. For if the Supreme Court is unable to get the Constitution right in all cases and unable to accurately identify welfare-maximizing outcomes, perhaps a different objective should guide decisions: minimization of error costs.³⁵⁷ Best cost-avoider theory achieves this goal by attending to each group’s relative ability to attain its desired ends through efforts outside the judiciary. In doing so, the theory maximizes the odds of an outcome in which neither group suffers costs in the long-run because the group that loses in court has the greatest ability to prevail outside it.

Best cost-avoider theory thus shares the intuition that underlies the medical profession’s Hippocratic Oath: “First, do no harm.”³⁵⁸ Put another way, if the Court cannot reliably know how the Constitution resolves the next *Dred Scott* or *Plessy*, and if it cannot be trusted to choose the socially optimal outcome either, then perhaps the wisest course is to rule with an eye towards doing no harm. On that view, groups that are better positioned to mitigate their own harms would lose their requests for the Supreme Court to intervene. But that loss would represent only the start—not the end—of the story: losing groups would remain free to secure their interests on their own using any private or public avoidance strategy at their disposal.

B. Reducing Decision Costs

When the Supreme Court attempts to settle fiery social controversies by declaring (politically predictable) winners and losers on deeply-contested questions of constitutional law, its decisions both undermine the court’s public legitimacy and contribute to an increasingly polarized society.³⁵⁹ Best cost-avoider theory is responsive to both of these decision costs.

³⁵⁵ To his credit, Posner recognizes this problem in later work. See Posner, *How Judges Think*, *supra* n.351 at 242 (admitting that in hard cases, “[t]here may be no objective method of valuing the competing interests”).

³⁵⁶ Again, Posner deserves credit for recognizing this critique. See *id.* (criticizing *Roe* as a poorly executed attempt at balancing the interests in maternal choice and fetal life).

³⁵⁷ Cf. Sunstein, *supra* n.35 at 49-50 (discussing judicial minimalism’s goal of reducing error costs); Mitchell N. Berman, *Constitutional Decision Rules*, 90 Va. L. Rev. 1, 86 (2004) (describing how decision rules may be motivated by desire to minimize error).

³⁵⁸ Daniel K. Sokol, “‘First do no harm’ revisited,” *The British Medical Journal*, Oct. 25, 2013. As Sokol notes, the command to is probably misattributed to the Hippocratic Oath, which refers to abstaining from harm (and does not place foremost weight on it).

³⁵⁹ See *supra* Part I.A.2.

1. *Institutional Legitimacy*

Few close followers of the Supreme Court would dispute that, from the standpoint of public confidence, the Court is “in a weaker position now than at nearly any point in modern history.”³⁶⁰ In my view, public worries over the Supreme Court’s legitimacy stem from two sources: judicial hubris and judicial partisanship. Best cost-avoider theory attends to both problems.

Recapping a recent Supreme Court Term comprised of several rulings that revealed the Court’s “deep distrust of democratic processes,” Professor Pamela Karlan posed a harrowing question: “[t]he Court’s dismissive treatment of politics raises the question whether, and for how long, the people will maintain their confidence in a Court that has lost its confidence in them.”³⁶¹ This is the price of judicial hubris in a nutshell. When the Court acts as if it alone knows the one true answer to hard questions of constitutional law, it is no wonder that the people grow weary of its reign. As Karlan puts it, “if the Justices disdain us, how ought we to respond?”³⁶²

To a Court serious about recovering its public image, the antidote to judicial hubris is good old-fashioned judicial humility. I am certainly not the first to suggest as much; a rich tradition of scholarship sounds in pleas for judges to adopt a more modest view of their abilities and role.³⁶³ But of course a call for judicial humility is only ever one part of any prescription. Humility connotes deference to some other source of authority on hard questions of constitutional law, and what that other authority is matters a great deal. Judicial humility cannot run in favor of public opinion polls, for example, for at least sometimes the Constitution must “serve as a limitation on the popular will,” not a reflection of it.³⁶⁴ Nor can it mean unbridled judicial deference to lawmakers.³⁶⁵ That kind of humility would only be as good as our legislatures, a debatable proposition given the history of cases like *Plessy*, *Korematsu*, and *Bowers*.³⁶⁶

³⁶⁰ Amelia Thomson-DeVeaux and Oliver Roeder, “Is The Supreme Court Facing A Legitimacy Crisis?” Oct. 1, 2018, FiveThirtyEight.

³⁶¹ Karlan, *supra* n.66 at 28.

³⁶² Karlan, *supra* n.66 at 71. Even those who are skeptical of the need to fix the Supreme Court worry about its lack of humility. See, e.g., Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 Yale L.J. Forum 93, 107 (2019) (“If the Supreme Court needs saving—a doubtful proposition to begin with—it will be saving from itself, and from too broad a conception of its own legal omnipotence.”)

³⁶³ See, e.g., Kitrosser, *supra* n.98; McConnell, *supra* n.30; Sunstein, *supra* n.35; Thayer, *supra* n.233; Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 Harv. L. Rev. 1, 62 & n.347 (2011)

³⁶⁴ See Friedman, *supra* n.181 at 15.

³⁶⁵ See Thayer, *supra* n.233. For a recent proponent of this theory, see Eric J. Segall, *Originalism as Faith* at 187 (2018).

³⁶⁶ See *supra* nn.14 & 149-51.

I envision instead a Court that no longer views itself the final arbiter of social controversies based on its divination of legal “materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”³⁶⁷ A Court that is instead deferential to the views and experiences of the actual groups who are at odds over some important policy and who stand to win or lose some vital interest as a result. A Court, in other words, that trusts the people to sort out their underlying disputes more than it trusts its own interpretive powers. In this respect, the kind of humility that can preserve the judiciary’s public standing may resemble that described in important work by Professor Reva Siegel. As Siegel argues, “[i]n our constitutional culture . . . ordinary citizens understand themselves as authorized to make claims about the Constitution’s meaning and regularly act on this understanding in a wide variety of social settings and through an array of practices”—practices that “regularly inform” the work of judges.³⁶⁸ Under best cost-avoider theory, judges would pay closest attention to a particular practice: how affected groups respond to adverse decisions.

But hubris alone does not account for the Court’s legitimacy crisis; it works in tandem with the public’s increasing perception that the Court is just another partisan institution. As a recent survey revealed, the proportion of respondents who believe the Supreme Court acts based on politics rather than the law outnumbered those who believe the Court puts politics aside by a staggering five-to-one ratio.³⁶⁹ Or as Eric Segall provocatively argues, people increasingly believe these days that “the Supreme Court is not a court and its Justices are not judges”; they are “politicians in robes.”³⁷⁰

A theory of constitutional law that is stridently conservative or liberal with respect to its methodology and outcomes would only add fuel to this partisan fire. So any attempt to bolster the judiciary’s legitimacy via constitutional theory must be non-partisan with respect to both method and outcomes.³⁷¹ Best cost-avoider theory succeeds on both fronts.

³⁶⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

³⁶⁸ Reva B. Siegel, *Text in Contest: Gender and the Constitution from A Social Movement Perspective*, 150 U. Pa. L. Rev. 297, 345 (2001)

³⁶⁹ See *supra* n.69.

³⁷⁰ Segall, *supra* n.84 at ix. This is not a new argument, of course. Scholars associated with the critical legal studies movement have long shared a view that “in some interesting sense law is politics.” See Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 Yale L.J. 1515, 1518 (1991). What is new is the increasing degree to which true or not, the public has resigned itself to this view.

³⁷¹ For a recent essay advancing another theory aimed at bolstering judicial legitimacy in light of rampant partisanship, see Zachary S. Price, *Symmetric Constitutionalism: An Essay on Masterpiece Cakeshop and the Post-Kennedy Supreme Court*, 70 Hastings L.J. 1273, 1278 (2019) (arguing for “symmetric constitutionalism,” an “ethos in which courts,

Neutral as to methods. Best cost-avoider theory works neatly with theories commonly associated with both sides of the political spectrum. For new originalists, the theory offers one answer to the puzzle of what courts ought to do in the construction zone.³⁷² On this view, best cost-avoider theory could not be used to arrive at an outcome inconsistent with a provision's original meaning; that meaning constrains constitutional law.³⁷³ But when original public meaning is consistent with both outcomes in a case such that there is a real risk of error, the Court would rule against the group that can best avoid the costs of an adverse decision.³⁷⁴

For non-originalist constitutional pluralists—that is, those who do not believe the available choice set of outcomes in constitutional cases should be constrained by original public meaning—best cost-avoider theory can supply a potential answer to the problem of incommensurability.³⁷⁵ When all modalities of constitutional argument point in the same direction, the case is easy and there is no risk of error to justify recourse to best cost-avoider reasoning. But when the modalities conflict and arguments point in competing directions, the risk of error surfaces. Best cost-avoider theory could then intervene as a kind of prudential decision rule aimed at minimizing the costs of error.

Best cost-avoider theory may also appeal to popular constitutionalists. We have already seen the strong reasons to be pessimistic about judicial supremacy.³⁷⁶ But the flipside of taking the Constitution away from the courts is leaving the Constitution to politicians.³⁷⁷ Best cost-avoider theory presents an alternative kind of popular constitutionalism, an approach that leaves the final resolution of constitutional disputes to the people actually involved in them. Thus, for example, a best cost-avoider approach to *Lochner* would have required the Court to disclaim any special or final insight on the constitutional status of the liberty of contract, and to rule instead in the direction that would best allow both affected groups to secure their interests. On this view, the people's ultimate authority in resolving constitutional controversies lies not in some mythical ability to issue

when possible, favor outcomes, doctrines, and rationales that distribute benefits across the country's major ideological divides").

³⁷² See *supra* nn.100-104.

³⁷³ See *Solum, supra* n.136 at 8.

³⁷⁴ As noted above, other normative questions must be answered to know exactly how great a role best cost-avoider theory might play for new originalists, such as whether one holds a thin or thick view of original meaning's ability to settle modern disputes. See *supra* nn. 214-23 & accompanying text.

³⁷⁵ See *Fallon, supra* n.110 at 1191.

³⁷⁶ See *supra* Part I.B.2.

³⁷⁷ See *supra* nn.149-51 & accompanying text.

authoritative interpretations of the Constitution;³⁷⁸ the authority is instead found in the people's ability to fight for their rights via sub-constitutional public and private strategies.

Neutral as to outcomes. Best cost-avoider theory is also plausibly neutral with respect to the political valence of case outcomes in that it does not point reliably in favor of liberal or conservative preferences. The recent cases discussed in Part III illustrate this point, as the theory supports conservative preferences in cases like *Janus* while also reinforcing the progressive position in *Masterpiece Cakeshop*.³⁷⁹ This outcome heterogeneity is no accident, because the best cost avoider in any given dispute will typically depend on case-specific nuances that are not susceptible to broad generalization.³⁸⁰ Thus, unless one political party somehow systematically favors lower cost avoiders than the other, the theory will not produce politically predictable outputs.

2. *Polarization, or Towards A Generative Supreme Court*

One criticism of the normative case I've presented so far is that it may be guilty of a nirvana fallacy of its own.³⁸¹ Supreme Court error is inevitable, I have argued, in light of the Justices' inability to accurately apply (or settle on) a single coherent theory of constitutional interpretation.³⁸² But the same might be said of best cost-avoider theory. How can we be sure the Justices would apply the theory correctly, even were they to adopt it? This concern is especially potent if one subscribes to the view that judges are merely politicians in robes.³⁸³ If that is right, then the Justices might merely use best cost-avoider theory as another excuse to arrive at whatever outcomes they find subjectively desirable. So much, then, for minimizing error or preserving the judiciary's legitimacy.

I think this critique misses the mark. As I hope is shown by the example cases above,³⁸⁴ best cost-avoider theory can provide meaningful guidance in at least some cases where originalism (or pluralism or common law constitutionalism) is unable to distinguish among plausible conflicting outcomes. Thus, for example, it is one thing for a Justice to cloak a subjective preference for laissez faire economics in reasonable arguments about the original meaning of "liberty" in the Due Process Clause or the meaning of "commerce" in Article I, Section 8, Clause 3 (or in arguments

³⁷⁸ See *supra* n.145 & accompanying text.

³⁷⁹ See *supra* Part III.B.

³⁸⁰ See *supra* Part II.B.2.

³⁸¹ Cf. *supra* n.353 & accompanying text.

³⁸² See *supra* Part I.B1.

³⁸³ See *supra* n.370.

³⁸⁴ See *supra* Part III.

about constitutional structure, theory, or precedent).³⁸⁵ It is quite another to argue that it would be easier for working class-Americans to avoid the harms of paltry wages and oppressive hours by amending the Constitution than it would be for industries to avoid the harms of increased labor costs by reducing employment levels or raising prices.³⁸⁶

But suppose you disagree. Even then, best cost-avoider theory would still hold a process-dependent virtue. For even if the theory can be manipulated to arrive at the Justices' preferred policy outcomes, the process of deciding cases under best cost-avoider reasoning would produce a benefit in and of itself: the reduction of polarization through a less divisive form of constitutional argument.

I have already described the polarizing and destructive nature of present day argument before the Supreme Court.³⁸⁷ Best cost-avoider theory offers a different vision of the Supreme Court's role. It views the Supreme Court as just *one part* of our nation's mechanism for resolving complex and deep-seated social disagreements, not the be-all and end-all. For rather than treating the Court as some special source of final wisdom on the Constitution's meaning that can solve all of society's problems, the theory requires participants to identify ways in which affected groups may work to secure their interests outside the courtroom.³⁸⁸ In this respect, a Court that decides constitutional cases using best cost-avoider reasoning engages in a generative exercise—generative in the sense of creating incentives for the parties to propose solutions to the underlying dispute, rather than encouraging a winner-take-all battle in which the losing side is told it is of no constitutional regard.³⁸⁹ For example, rather than doing battle over whether the baker lacks any expressive interest in his custom wedding cakes whatsoever,³⁹⁰ or whether the gay couple fails to suggest even a “plausible” understanding of the First Amendment,³⁹¹ the briefing in a case like *Masterpiece Cakeshop* would focus on proposing and exploring ways in

³⁸⁵ See *supra* nn.254-58 & accompanying text.

³⁸⁶ Cf. *supra* nn.260-62 & accompanying text.

³⁸⁷ See *supra* text at notes 70-75.

³⁸⁸ In this respect, a best cost-avoider theory may share a virtue with Professor Bill Eskridge's pluralism-facilitating theory of judicial review: it lowers the stakes of politics. See William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy By Lowering the Stakes of Politics* 114 Yale L. J. 1279, 1303-10 (2005) (arguing that courts should clear out obsolescent laws and refuse to sanction state animus towards out-groups).

³⁸⁹ As an adjudicatory approach that aims to reduce discord among social groups, best cost-avoider theory shares ambitions with what Professor Reva Siegel has described as an “anti-balkanization” view of the Equal Protection Clause. See Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 Yale L.J. 1278 (2011).

³⁹⁰ See *supra* n.73.

³⁹¹ See *supra* n.72.

which both sides might protect their concededly important interests through legislation or private ordering.

Cost-avoider theory may actually prove to be solution-generating in an even more proactive sense. For one implication of the theory is that it would create incentives for groups to reach compromises in order to make it easier for their opponents to achieve their interests outside the courts. Consider, for instance, the avoidance techniques available in *Citizens United*. One private avoidance technique that corporations might have used if BCRA's corporate expenditure ban were upheld is to engage in express advocacy through segregated political action committees (PACs) funded by voluntary contributions from persons affiliated with each corporation.³⁹² One problem with that avoidance strategy's effectiveness, however, is the fact that federal campaign finance law separately limits individual donations to segregated corporate PACs to \$5,000 per year.³⁹³ A Court committed to best cost-avoider reasoning would create incentives for campaign finance reformers to meet corporations halfway. By supporting legislation that would raise the \$5,000 limit on contributions to corporate PACs, reform proponents could reduce the corporations' costs of avoiding an adverse ruling and increase their own odds of prevailing.³⁹⁴

Best cost-avoider theory thus presents a solution-forcing approach to hard constitutional cases. It transforms constitutional argument into a constructive exercise where contestants fight to win by identifying and proposing answers that both sides can live with. And it encourages the parties to strike compromises that make it easier for their opponents to achieve their interests. These are virtues worth pursuing, even if the Justices may sometimes get the best cost avoider wrong.

CONCLUSION

³⁹² See, e.g., *Citizens United*, 558 U.S. at 415 (Stevens J., dissenting) (describing the segregated fund alternative in which corporate stockholders and their families can "pool their resources to finance electioneering communications").

³⁹³ See "Limits on Contributions received by the SSF," Federal Election Commission website, available online at <https://www.fec.gov/help-candidates-and-committees/taking-receipts-ssf/limits-contributions-received-ssf/>.

³⁹⁴ This point resembles, but is not identical to, Calabresi's rough guideline of allocating liability to the "best briber" in cases where the best cost avoider is not clear. See Calabresi, *supra* n.27 at 150. Calabresi's bribery concept works by minimizing transaction costs such that the market itself can find the true best cost avoider. *Id.* Here, by contrast, groups have incentive to "bribe" their opponents in the sense of giving them a legislative victory (e.g., increasing the limits on individual contributions to segregated corporate PACs) that in turn reduces their avoidance costs in the underlying constitutional dispute. A similar strategy might help in hard cases such as the right to an abortion. See *supra* n.243. For example, pro-life groups could reduce the costs of avoidance for pro-choice groups by crafting exceptions to their proposed abortion restrictions that would protect women who lack the financial means to obtain the procedure out-of-state.

American courts have long recognized limits on their ability to pierce through ambiguous texts and uncertain evidence to find the single correct answer to hard questions of contract and tort law.³⁹⁵ Rather than plowing ahead and issuing legal determinations that will often be erroneous, these courts have often chosen to decide on a different basis: they have ruled against the best cost avoider.³⁹⁶

I have argued that the Supreme Court should do the same in hard cases of constitutional law. But as the private law examples also reveal, a best cost-avoider theory is more than a theory of judicial review; it is a decision rule whose effects reach far beyond the courts.³⁹⁷ In this sense, best cost-avoider theory is a broader theory of constitutional law, for it is capable of shaping the constitutional understandings and relationships of the American people writ large. After all, in the private law settings, the overarching purpose of best cost-avoider rules is to encourage the parties to take ownership over their fates and prevent harms before they happen—be they car accidents, contract disputes, or property damage. The same could be true of constitutional disputes, too. If hard constitutional questions were decided against the best cost avoider, litigants would find reason to candidly assess their options for securing their interests through alternative public and private means. Groups that enjoy easy avoidance options would do well to take them up instead of going to court, since litigation would be costly and fruitless. And groups less capable of avoiding their costs would find incentive to make compromises that help their opponents achieve their interests outside of court.³⁹⁸

A best cost-avoider theory of constitutional law, in other words, would teach competing groups in our ever complex and polarized society to stop looking to the Supreme Court for answers to every dispute with constitutional dimensions. It would teach groups to reflect first on how they and their opponents might attain their desired ends on their own, without ever stepping into a courtroom. Of course, the theory recognizes that some groups will be able to protect themselves more easily than others. Ruling against these groups because they are the best cost avoider isn't likely to make them happy (no happier, at least, than the motorist who must pay because he was the best cost avoider of a rear-end collision). But maybe,

³⁹⁵ See *supra* Part II.A. The first reference to *contra proferentem* in the Supreme Court, for example, occurred in 1806. See *Manella, Pujals & Co. v. Barry*, 7 U.S. 415, 432 (1806).

³⁹⁶ See *id.*

³⁹⁷ Indeed, the theory could also supply a mode of reasoning to shape the behavior of legislators and executive officials who decide in the first instance whether to enact or enforce policies of questionable constitutionality.

³⁹⁸ See *supra* text accompanying notes 392-94.

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just maybe, it can show the people that *we* are the ones we've been waiting for—not nine unelected Justices on the Supreme Court.