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Which Original Public?

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INTRODUCTION

Original public meaning originalism[1] seeks to know what the Constitution would have meant to an ordinary person at the time a specific provision was enacted. So originalist scholars tend to look to see what the Constitution's words would have meant to an ordinary, average, or competent user of American English at the time a specific constitutional provision was adopted. In *District of Columbia v. Heller* ("*Heller*"), however, Justice Scalia's majority opinion took a more specific view of exactly who qualified as the ordinary person of interest. At one point *Heller* declares that the "Constitution was written to be understood by *the voters*."[2] Yet in the very next sentence, *Heller* notes that "meanings that would not have been known to *ordinary citizens* in the founding generation" are excluded.[3] However, these are not the same populations—or, as linguists would say, speech communities[4]—in two ways. First, many citizens could not vote, with voting limited in some states based on requirements such as property ownership, and with few women, able to vote. Second, some voters were not "ordinary," either generally or in their language use. Most, if not all, of the Founders would not fit this description.

This raises an important methodological question for original public meaning originalism. Performing original public meaning originalism requires looking at how the general public used and understood language. But which portion of the public is the correct one for determining the Constitution's meaning? *Heller* proposes two possibilities: voters and "ordinary" citizens.[5] If we go with the latter group, how would we define "ordinariness?" Yet there are

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1 This is not the only variant of originalism, but is, in the author's view, the dominant one practiced today.

2 District of Columbia v. Heller, 554 U.S. 570, 576 (2008) (emphasis added) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)).

3 *Id.* (emphasis added).

4 *See* Richard Nordquist, *A Definition of Speech Community in Sociolinguistics*, THOUGHTCO. (July 7, 2019), http://www.thoughtco.com/speech-community-sociolinguistics-1692120 [http://perma.cc/QY7Q-TA8S].

5 *See Heller*, 554 U.S. at 576–77.

other possibilities besides these two populations. What about all citizens, regardless of their "ordinariness?" Alternatively, we could look to the Constitution itself. Its preamble declares that "We the People" ordained and established it.[6] Who would have been understood to be "We the People" in 1789, and are they the proper public for originalism's inquiry? One could imagine other publics, such as everyone permanently in the United States, regardless of their ability to vote or citizenship status. Originalism has been theoretically fuzzy as to who qualifies as the original public from which meaning must be sought. This Essay seeks explore the possibilities in hopes of further theoretical refinement to enable more focused originalist methodology.

I. VARIOUS FORMULATIONS OF THE TYPE MEANING AND ORIGINAL PUBLIC

A. Scholarly

Originalist scholars have put forth various formulations of the type of meaning the Constitution contains and the relevant group to look to. For example, Professor Lawrence Solum has referred to "the conventional semantic meaning of the words and phrases" in the Constitution.[7] Professor Kurt Lash defines "original meaning as the likely original understanding of the text at the time of its adoption by competent speakers of the English language who are aware of the context in which the text was communicated for ratification."[8] Thus, Lash has sought to "identify patterns of usage that signal commonly accepted meaning."[9] Professor Christopher Green argues that "one should look for what readers of the historically-situated text would have understood the constitutional language to express."[10] He further observes that "[r]ecovering the historic textually-expressed constitutional sense requires the interpreter to put herself as much as possible in the position of informed people at the time that language was made part of the Constitution."[11] Vasan Kesavan and Professor Michael Stokes Paulsen contend that the appropriate inquiry is to determine "the meaning the language [of the Constitution] would have had . . . to an average, informed speaker and reader of that language at the time of its enactment

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6 U.S. CONST. pmbl.

7 Lawrence B. Solum, *Originalist Methodology*, 84 UNIV. CHI. L. REV. 268, 272 (2017).

8 KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 277 (2014).

9 *Id.*

10 Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON UNIV. C.R. L. J. 1, 12 (2008).

11 *Id.* at 44.

into law."[12] In other words, one must seek to understand both "the meaning the words and phrases of the Constitution would have had, in context, to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted" and the "meaning [words and phrases of the Constitution's text] would have had at the time they were adopted as law, within the [legal] and linguistic community that adopted the text as law."[13] Professor Randy Barnett posits that the Constitution's meaning is its "objective social meaning," or its "semantic meaning."[14]

According to these scholars then, the appropriate type of meaning to give the Constitution's words and phrases is based on conventional semantic meaning, commonly accepted meaning, objective social meaning, and semantic meaning.

It is not clear that these will always be the same. For example, the commonly accepted meaning may not be the conventional semantic meaning or the objective social meaning, but rather a legal meaning.

As for the appropriate population or group whose understanding is the operative one for the Constitution, while scholars agree it must be limited to those at the time of adoption or enactment, scholars don't quite agree beyond that. The populations in debate include:

- contextually aware, competent speakers of the English language;
- informed people;
- an average, informed speaker and reader of that language;
- ordinary readers, speakers, and writers of the English language, in context; and
- the legal and linguistic community that adopted the text.

Is a competent speaker, reader, and writer the same as an average one or an ordinary one? Average and ordinary might be the same, whereas being competent could mean more or less than being average or ordinary. The average person might not be competent, or the standard for being competent might be below average.

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12 Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 398 (2002).

13 Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1118, 1131 (2003).

14 Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J. L. & PUB. POL'Y 65, 66 (2011).

Also, is this a more subjective or objective standard? When these scholars refer to the average, ordinary, competent person, they could be doing so in an empirical sense. Yet it likely is being used in an objective sense, similar to the reasonable person in tort law. If that is so, it is terribly ironic because one of the reasons that gave rise to originalism—and one of its principal features used to defend its use—is that it cabins judicial discretion. But using an objective standard for the average, ordinary, or competent person at the time a constitutional provision is adopted will mean that a judge's personal views or intuition, consciously or unconsciously, will be doing a lot more work in discerning meaning.

There may be some tension as well between the formulation of the appropriate meaning and the description of the appropriate public or group. The meaning seems to focus more on the ordinary, whereas the group leaves open the door to the ordinary, average, or competent *attorney* (rather than person), considering that when the relevant language in the Constitution is legal language, contextual awareness and an understanding of the type of document being read is paramount.

B. The Supreme Court

In *Heller*, one of the most famous originalist decisions in recent memory, the Supreme Court made two claims about the basic premise of original public meaning originalism.[15] First, quoting a 1931 case, the Court declared that, "In interpreting [the Second Amendment], we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'"[16] Second, in the very next sentence, the Court stated that "[n]ormal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation."[17] These statements put forth two different considerations. One is the type of meaning the Constitution's text carries: normal, ordinary, or idiomatic meaning, but not technical or secret meaning. The other, as identified by the Court, is the group of people whose understanding we are concerned about when interpreting the original Constitution; namely, founding generation voters and

15 District of Columbia v. Heller, 554 U.S. 570, 576 (2008).
16 *Id.* (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)).
17 *Id.* at 576–77.

ordinary citizens. Compared to the scholarly formulation, this appears more subjective rather than objective in nature.

There are problems with both of these *Heller* formulations. The first focuses on meaning types. While it's not entirely clear what the majority means by "technical" language, it could be problematic for interpreting a legal document if it excludes legal meaning. For instance, as Professors John McGinnis and Michael Rappaport have pointed out, the Constitution contains terms that only have a legal meaning and lack an ordinary or normal meaning, such as *writ of habeas corpus*, *bill of attainder*, and *appellate jurisdiction*.[18] Also, some constitutional terms have both a legal and an ordinary meaning, like *treason*, *privileges*, and *necessary and proper*.[19] If legal meaning is technical meaning, then according to *Heller*, some terms would essentially have no meaning while other terms might be given a meaning that makes little sense. It is very unlikely *Heller* meant this, but further theoretical clarification is necessary.

The second formulation is focused on the relevant groups one looks at for determining their understanding of the Constitution. Here the *Heller* Court appears to put forth two groups it sees as interchangeable: voters and ordinary citizens. Only they are not. Not everyone who could vote was an "ordinary" citizen, and not every "ordinary" citizen could vote. Whether or not one could vote in the only federal election open to popular vote at the Founding—the House of Representatives—was entirely dependent on one's state eligibility requirements to vote for the largest branch of the state legislature.[20] And states varied, with some allowing women and African Americans to vote and others not.[21] Likewise, by 1792 about three states had property ownership requirements for voting. One historian estimate that, at that time, in two-thirds of the states about ninety percent of free adult males could vote, whereas in the other on-third of states it was about seventy to seventy-five percent (with the exception of New York, which was likely below seventy percent).[22]

Federal citizens were a broader category than voters, as the first federal naturalization law, enacted in 1790, only required two years residency to become a citizen (this would fluctuate

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18 *See* John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law,* 59 WM. & MARY L. REV. 1321, 1370 (2018).

19 *Id.* at 1371.

20 *See* U.S. CONST. art. I, § 2.

21 *See* THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA 113 (1997).

22 *Id.* at 114.

until settling on five years in 1801).[23] States had similar laws for becoming a state citizen,[24] though *Heller* is likely referring to U.S. citizenship. Federal citizenship in that 1790 statute was limited to "free white person[s]," indicating no limitation based on gender but certainly one based on race and color.[25] Thus, there were some who could vote but could not have emigrated to the United States and applied for citizenship, and some who were citizens (natural born or naturalized) but could not vote.

What is more, *Heller* adds the further requirement that constitutional interpretation is concerned with "ordinary" citizens. There are two ways to interpret this. One is "ordinary" in the sense of everyday Americans, which is somewhat in harmony with the idea of voters. However, James Madison, Alexander Hamilton, and John Jay, the writers of the Federalist Papers, were all citizens (and voters), but they were hardly ordinary. Thus, according to *Heller*, would it be improper to look to their understanding of the Constitution? This may be an instance of at least some members of the Court saying one thing and doing another since those justices who most consistently practice original public meaning originalism also frequently cite to the understanding of elite Americans at the Founding. But if we are to take *Heller*'s words at face value, then we would have to determine what makes someone ordinary and confirm that they are a citizen before we could look to their understanding to interpret the Constitution.

Alternatively, "ordinary" could refer to their language ability, which is consistent with the context of discussing ordinary and normal meaning as opposed to technical meaning. Thus, the relevant group would include those who are both citizens and have ordinary language use ability. This would also be a difficult empirical inquiry and might eliminate many of the more educated folks whom originalists often turn to. Admittedly, there would be a lot of overlap between ordinary citizens in the sense of overall ordinary Americans, and ordinary citizens in the narrow idea of language use. The Court has never clarified what gives one the requisite ordinariness for this inquiry.

Where did *Heller* get the idea that these particular meanings and these particular groups are the relevant ones for constitutional interpretation? It cites to nothing for the proposition that ordinary citizens are the right "public" to

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23 *Id.* at 166.
24 *Id.* at 167.
25 *Id.*

examine.[26] For the proper meanings and voters, the Court cites *Gibbons v. Ogden* ("*Gibbons*")[27] and quotes *United States v. Sprague* ("*Sprague*").[28] The quoted language from *Sprague* cites a host of sources,[29] all of which seem less than ideal as authorities on how to interpret the Constitution for two reasons. First, originalism is about the meaning of the text of the Constitution rather than the judicial gloss that has been put on the Constitution. Therefore, citing to that judicial gloss (or treatises) seems second best as compared to grounding one's authority first in the Constitution's text.[30] Even more so, these authorities all seem a bit late, given that the oldest source is dated twenty-seven years after the Constitution was adopted.

Given this, I will just look at the two oldest sources. In *Martin v. Hunter's Lessee* ("*Martin*"), the Supreme Court declared that the Constitution's "words are to be taken in their natural and obvious sense."[31] Justice Story, writing for the Court, did not cite to any authority for this statement.[32] Where does this notion come from? Further, is "natural and obvious" the same as "normal" and "ordinary?" It is not clear that it is the same, though it is possible.

As for *Gibbons*, the Court stated that "the enlightened patriots who framed our constitution, and the people who adopted it, must

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26 District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008).

27 *Id.* (citing Gibbons v. Ogden, 22 U.S. 1, 188 (1824)).

28 *Id.* at 576 (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)).

29 Martin v. Hunter's Lessee, 14 U.S. 304 (1816); Gibbons v. Ogden, 22 U.S. 1 (1824); Brown v. Maryland, 25 U.S. 419 (1827); Craig v. Missouri, 29 U.S. 410 (1830); Tennessee v. Whitworth, 117 U.S. 139 (1886); Lake Cnty. v. Rollins, 130 U.S. 662 (1889); Hodges v. United States, 203 U.S. 1 (1906); Edwards v. Cuba R. Co., 268 U.S. 628 (1925); *The Pocket Veto Case*, 279 U.S. 655 (1929); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 451 (5th ed. 1891); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 61, 70 (2nd ed. 1871).

30 *See* STORY, *supra* note 29, at 345. Story's Commentaries, which by its Fifth Edition in 1891 was being written by someone other than Joseph Story, stated that:

> [E]very word employed in the Constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are . . . fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common-sense, and cannot be presumed to admit in them any recondite meaning or any extra-ordinary gloss.

Id.; *see also* THOMAS M. COOLEY, *supra* note 29, at 66. Cooley's treatise, with the Second Edition published in 1871, declared:

> [A]s the [C]onstitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.

Id.

31 *Martin*, 14 U.S. at 326.

32 *See id.*

be understood to have employed words in their natural sense."[33] Here again, the Court cites no authority for this proposition.[34] In authoring the majority opinion, Chief Justice Marshall was perhaps writing from personal knowledge: he was from the founding generation, knew many of those who drafted the Constitution, and played a role in the Virginia ratification debates.[35] Regarding the *Gibbons* proposition, are the Framers and "the people who adopted it" (perhaps these are the ratifiers) the same as the voters? It is not clear that they are identical; they could be, or they could be a subset. Thus, from *Martin* and *Gibbons* to *Sprague* to *Heller*, the type of meaning the Constitution employs and the group whom we examine for understanding has not necessarily been consistently identified, and its origins are without clear authority.

Setting aside some of this theoretical imprecision, what type of evidence has the Court looked to in order to determine the understanding of voters or ordinary citizens? For instance, the *Heller* majority, in attempting to understand the meaning of "keep arms," looked to thirteen examples of the term being used, twelve of which were legal sources that included Blackstone's Commentaries, a 1689 English Statute, and a 1771 legal treatise.[36] Similarly, in looking at the use of "bear arms," *Heller* turned to state constitutions, state court decisions, and collected works of legal scholars from the Founding Era.[37] Legal texts seem to be weak evidence regarding how ordinary people would understand language, and instead reflect technical—rather than normal—meaning. Thus, there is tension between what the Court says it is looking for and what it actually does, at least in *Heller*.

II. LINGUISTIC CONCEPTS OF SPEECH COMMUNITIES & REGISTERS

When originalist scholars and jurists seek to identify and examine the relevant group and the appropriate type of meaning, they are tapping into two well-developed linguistic concepts: speech communities and registers.

A. Speech Communities

As Professor Lawrence Solan has pointed out, "When the legal system decides to rely on the ordinary meaning of a word, it must

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33 *Gibbons*, 22 U.S. at 188.

34 *See id.*

35 *See, e.g.*, *John Marshall: Founding Father, Founding Federalist*, HIST. ON THE NET, http://www.historyonthenet.com/founding-fathers-john-marshall-founding-father-founding-federalist [http://perma.cc/3UE5-PDGG] (last visited Apr. 8, 2022).

36 District of Columbia v. Heller, 554 U.S. 570, 582–83, 723 n.7. (2008).

37 *Id.* at 585–86.

also determine which interpretive community's understanding it wishes to adopt."[38] Linguists have a name for this: speech community. In essence, "[s]peech communities are groups that share values and attitudes about language use, varieties and practices."[39] Put another way, a group of individuals "who share the[] same norms about communication . . . [and] a knowledge of the rules for the conduct and interpretation" of language constitute a speech community.[40] While there can be some variation within any particular speech community, "[t]he differences in interpretation between members of a speech community are small and they do not interfere much with normal communication."[41]

There is debate among linguists (sociolinguists, linguistic anthropologists, and corpus linguists) about determining speech communities in the real world, because there is a certain "fuzziness" over the concept's "precise characteristics," as well as where the "boundaries [are] around some speech community."[42] For example, a broad view is that all English speakers around the globe belong to one speech community.[43] In contrast, a narrower view argues that "people who speak the same language are not always members of the same speech community," and thus, for instance, because "the respective varieties of [South Asian and U.S.] English and the rules for speaking them are sufficiently distinct," these "two populations" should be assigned "to different speech communities."[44] Likewise, "London is a community in some senses . . . however, with its 300 languages or more it is in no sense a single speech community."[45]

In contending that those interpreting the Constitution should focus on voters, ordinary citizens, or a particular time period, original public-meaning originalism is arguably attempting to define the relative speech community. This matters for originalist methodology: if we are trying to see how a given speech community understands language, we can ignore those *not* in that speech community. So, originalists could ignore documents created

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38 Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2059 (2005).

39 MARCYLIENA H. MORGAN, SPEECH COMMUNITIES 1 (2014).

40 Kamal K. Sridhar, *Societal Multilingualism*, *in* SOCIOLINGUISTICS AND LANGUAGE TEACHING 47, 49 (Sandra Lee McKay & Nancy H. Hornberger eds., 1996).

41 John Sinclair, *Meaning in the Framework of Corpus Linguistics*, 20 LEXICOGRAPHICA 20, 22 (2004).

42 *See* RONALD WARDHAUGH, AN INTRODUCTION TO SOCIOLINGUISTICS 119 (Blackwell Publ'g Ltd., 5th ed. 2010).

43 *See* Nordquist, *supra* note 4 (citing MURIEL SAVILLE-TROIKE, THE ETHNOGRAPHY OF COMMUNICATION: AN INTRODUCTION 16 (3d ed. 2003)).

44 ZDENEK SALZMANN, LANGUAGE, CULTURE, AND SOCIETY: AN INTRODUCTION TO LINGUISTIC ANTHROPOLOGY 226 (3d ed. 2004).

45 WARDHAUGH, *supra* note 42, at 126.

by those people who are foreign to the speech community. At a basic level, this is intuitive; no originalist is going to look at documents from 1789 that were created by Spaniards in the Spanish language, because such a document belongs to a different speech community. Additionally, the proper speech community could be a better concept than the groups *Heller* put forth, for example. This is because voters and ordinary citizens are groups defined more by law than by language use. Indeed, there may be little or no difference between the language ability and understanding of voters and non-voters, or ordinary citizens and non-ordinary citizens. Hence, defining the relative speech community by these mere legal groupings could make less sense.

Scholarly attempts to define the appropriate group have been more on point, focusing on the language ability of individuals. That said, a speech community of average, ordinary, or competent users of American English at the time of enactment of the relevant constitutional provision has at least two difficulties. First, how does one define average, ordinary, or competency, particularly when most of the American English language from early time periods that has survived to the present day derives from folks whose language skills were likely above average given they were societal elites who received higher levels of education? To define average, we would need to know what is both below and above average. That reconstruction seems to be a difficult task given the historical record. Second, there may not be any empirical difference between the understanding of average, ordinary American English language users and non-average, non-ordinary users. While that is an empirical question, their range of understanding may be so small that it amounts to a distinction without a meaningful difference. Perhaps ordinary or average is not overly helpful, as someone who is less proficient may be able to understand a text created by someone more proficient in the language; the less proficient person just may not be able to duplicate such proficiency. Take Shakespeare, for instance. He was no doubt an above-average user of the English language, but it appears that both the low-brow and high-brow users of English in his day understood his plays. His audiences consisted of both groups, even if both groups could not write with his skill. Thus, any focus on competency or ordinariness needs to be focused on a level of understanding rather than an ability to create in the language.

B. Registers, Genres, & Styles

Besides speech communities, originalism also appears to refer to what linguists call registers, genres, and styles. As already discussed, originalist jurists and scholars focus not only

on the type of reader, but also the context, the type of document being read, and the historical timeframe.

A register analysis would combine "an analysis of linguistic characteristics that are common in a text variety with analysis of the situation of the use of the variety."[46] This is driven by the assumption that "particular features [of language] are commonly used in association with the communicative purposes and situational contexts of texts."[47] Communication by a constitution could be quite different than a letter, a newspaper article, or even a statute. Perhaps this is what Chief Justice Marshall was referring to in *McCulloch v. Maryland* when he stated that "we must never forget that it is a *constitution* we are expounding," and that it lacks "the prolixity of a legal code."[48] Professors McGinnis and Rappaport also seem to be hinting at this concept of register in their argument that the Constitution is a legal text and should therefore be interpreted the way legal texts of the time were interpreted.[49]

A genre "perspective is similar to the register perspective in that it includes description of the purposes and situational context of a text variety, but its linguistic analysis contrasts with the register perspective by focusing on the conventional structures used to construct a complete text within the variety."[50] So, for instance, the linguistic concept of genre would focus on "the conventional way in which a letter begins and ends."[51] Perhaps the "conventional structures used to construct" a constitution do not make that much of a difference in determining the meaning of the Constitution, but it is a concept at least worth exploring.

Finally, a "style perspective is [also] similar to the register perspective in its linguistic focus, analyzing the use of core linguistic features that are distributed throughout text samples from a variety."[52] But "[t]he key difference" between register and style is that in the latter "the use of these features is not functionally motivated by the situational context; rather, style features reflect aesthetic preferences, associated with particular authors *or historical periods*."[53] Thus, references to "the founding generation," "at the time of [the Constitution's] adoption," "historically-situated text," "at the time the language was made

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46 DOUGLAS BIBER & SUSAN CONRAD, REGISTER, GENRE, AND STYLE 2 (2009).
47 *Id.*
48 17 U.S. 316, 407 (1819).
49 *See* McGinnis & Rappaport, *supra* note 18, at 1327–28, 1333–34.
50 BIBER & CONRAD, *supra* note 46, at 2.
51 *Id.*
52 *Id.*
53 *Id.* (emphasis added).

part of the Constitution," "at the time of its enactment into law," and "at the time adopted"[54] arguably tap into the linguistic concept of style—writing that will reflect the historical period in which it is produced (style), just as it will reflect the situation (register) and type of text (genre). Paying closer attention to all three of these linguistic phenomena would not only be consistent with originalist theory, doing so would refine it.

III. WHAT ARE THE POSSIBILITIES?

The above outlines several possibilities for specifying which original public (or speech community) is the appropriate or best one for constitutional interpretation from the perspective of original public meaning originalism. However, there are others besides the ones that can be gleaned from the material above. With all the groups that follow, of course, *who* is in the group will change at different points in time, either through constitutional amendments that expand who is a citizen or a voter, such as the Fourteenth and Nineteenth Amendments, or changes in state or federal law that affect various categories.

A. Voters

One possible original public are the voters at the particular time a constitutional provision at issue was interpreted. For example, 1789 for the original Constitution, 1791 for the Bill of Rights, 1868 for the Fourteenth Amendment, and so on. Of course, not every voter is qualified to vote in every local, state, or federal election because qualifications to vote in these different elections may not be the same. Thus, because originalism is based on the Constitution's text, it would make the most sense to tie the meaning of original public to the Constitution, and include voters eligible to vote in a federal election (for the House of Representatives[55] and Senate[56]), as guaranteed by the Fourteenth and Nineteenth Amendments.

There are pros and cons to such an approach. For instance, a pro is that it is voters who have the authority to make changes in our system and, at least indirectly, call the shots. While we often speak of *the people* delegating that authority to their representatives, only *voters* wield any real power. As for cons, one of the largest is how many Americans would be left out of this group. At the Founding, for instance, very few women or African Americans could vote, and not even all white males could vote.

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54 *See* discussion *supra* Part I.
55 *See* U.S. CONST. art. I, § 2.
56 *See id.* am. XVII, para. 1.

For example, women weren't guaranteed universal suffrage until 1920; up until then less than half of the states granted women that right.[57] Furthermore, at different times it is contested who could vote. Consider African American males under Jim Crow Laws. Such laws are now understood to be unconstitutional, but they were not at the time. So, would we assess who is a voter under state laws that were deemed unconstitutional when in effect, or under today's standards? And if the former, how exactly would we know who would be eligible under the arbitrary and subjective Jim Crow Laws, such as poll taxes and literacy tests, since these would vary person to person and were often enforced in such a way as to be rigged to find that the applicant failed. Thus, not using voters as the original public avoids such controversial issues. What is more, there is no clear source of authority for the claim that voters are the correct group—the *Sprague* Court appears to just have made that up.[58]

B. Ordinary Citizens

Another possibility put forth by *Heller* is making the time-appropriate original public consist of all ordinary citizens of the United States (as opposed to citizens of a state).[59] People who qualified as a U.S. citizen changed over the course of our nation's history. One benefit of this formulation, especially as compared to voters, is that it would bring in many who would otherwise be excluded. However, it also has some serious drawbacks. For example, defining ordinary seems difficult, whether ordinary in a general, overall sense or ordinary in a language-use sense. This would likely create endless debates on where to draw the line and whether a particular individual is appropriately placed in the group. Additionally, it would exclude some Americans whom we might otherwise care about in constitutional interpretation because they were too elite to qualify as ordinary, and, in fact, might significantly reduce the data we have since so many of the texts that have survived were written by individuals who are *not* very ordinary in any sense of the word. And like voters, there does not appear to be any clear authoritative sources for the proposition that this is the correct original public.

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57 *See Women's History*, NAT'L PARK SERV., http://www.nps.gov/subjects/womenshistory/19th-amendment-by-state.htm [http://perma.cc/8DG8-SPAT] (last updated July 22, 2020).

58 *See* United States v. Sprague, 282 U.S. 716, 731 (1931).

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

C. Ordinary Users of Contemporaneous American English

A broader way to formulate the original public would be to encompass all ordinary (or average or competent) users of contemporaneous American English of the relevant time period. Perhaps its greatest strength is that it avoids some of the potential exclusion problems of the previous two possibilities: states could not prevent someone from being in this category, only their own language ability would.

However, its weaknesses seem at least threefold. First, while it is technically possible to empirically determine who is an ordinary, average, or competent user of contemporaneous American English, like the previously mentioned categories, it would be a difficult enterprise and lead to a lot of additional debate and complexity. We may not have enough confidence to get it right, especially given the problem with only elite documents surviving to present day. For example, since we cannot randomly sample all types of American English language users from, say, 1789, the sample we do have is inevitably biased. Second, this formulation might exclude some voters and citizens whose language abilities are subpar or above average. Third, there is little authority for this proposed original public beyond some early cases talking about natural language (and those cases cited to nothing for support).

D. "We the People of the United States"

A group of people that can be tied to constitutional text is the Preamble's "We the People of the United States." This approach avoids many of the aforementioned pitfalls. First, it sources to a legitimate authority that originalism respects: the words of the Constitution. Second, it is more inclusive than voters or ordinary citizens, as it does not require some additional complex inquiry into whether any particular person has the requisite ordinary language ability. Third, it has democratic legitimacy in that it is "the People" who are deemed sovereign in our system. Finally, choosing "We the People" as the relevant original public has the virtue of connecting the Preamble to the Constitution in a way that it has not been, especially in originalist circles where the Preamble has not been seen to have legal effect. While it would not give the Preamble legal effect, per se, this move would infuse the words with some constitutional life by making it the basis for determining the original public when interpreting the Constitution.

Who exactly fits into this particular original public is beyond the scope of this Essay, so just a few thoughts will have to suffice. Professor Christopher Green argues that "We the People" refers to those individuals who participated in the state ratifying

conventions.[60] He bases the argument on the Article VII reference to the state ratifying conventions' authority to establish the Constitution,[61] and the Preamble's language that it was "We the People" who "ordain[ed] and establish[ed]" the Constitution.[62] He contends both are the same act: establishing the Constitution. Thus, whoever is doing it must be the same group.

While this argument has some persuasive effect, it ultimately fails for reasons based in the Constitution's text. The Preamble observes that "We the People" ordain the Constitution to provide a host of benefits "to ourselves and our Posterity." Under Green's reading, then, the benefits of the Constitution would only flow to those who participated in state ratifying conventions and their posterity. This cramped notion of who "We the People" are and thus who receive "the Blessings" of the Constitution is not one that makes much sense or has much support, either then or now (though for an originalist, only "then" would count). It would basically create two classes of Americans: those protected by the Constitution because they are descendants of state ratifiers, and the rest of us. It is hard to see that as a correct reading.

Further, such reading conflicts with the notion of popular sovereignty that undergirded the debates on the Constitution and was used by those seeking to convince others to adopt it. As Professor Akhil Amar has described, James Iredell contended during the North Carolina ratification debate that "our governments have been clearly created by the people themselves."[63] The Virginia ratifying statement declared that "the powers granted under the Constitution [were] derived from the people of the United States."[64] And in Federalist No. 84, Alexander Hamilton, after quoting the Preamble, stated that "[h]ere is a [better] recognition of popular rights," what Amar characterized as "rights of the people qua sovereign."[65] Moreover, as Hamilton put it in Federalist No. 22: "The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority."[66] While there is still some work to be done in

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60 Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1660–61 (2009).

61 *See* U.S. CONST. art. VII, para. 1.

62 U.S. CONST. pmbl.

63 AKHIL REED AMAR, AMERICA'S CONSTITUTION 11 (2005).

64 *Id.*

65 *Id.*

66 THE FEDERALIST NO. 22 (Alexander Hamilton).

clarifying who exactly "We the People" consists of at any given historical time, it is a broad, constitutionally-grounded group.

E. Anyone in the United States Permanently

Another possibility is anyone who is living in the United States on a permanent basis. Perhaps such people are not technically called "Americans," but are functionally such. This could potentially include anyone regardless of their legal status, which would have the benefit of being very inclusive. However, it has no readily apparent constitutional authority.

F. Anyone in the United States

Finally, one could imagine an original public that includes anyone on American soil at a particular time. This would avoid the problem of having to figure out if they were here permanently or not. And it would include some rather famous folks who played a role in American history, such as Thomas Paine, but who were never here for very long stretches of time. But it would also include those with little ties to the country, such as tourists or ambassadors; and outsourcing the meaning of the Constitution to them may not make sense from the perspectives of legitimacy or linguistics.

CONCLUSION

Refinements in originalism, namely corpus linguistics, have put pressure on this theory of interpretation. So far, original public meaning originalism has been content to somewhat loosely and inconsistently define the public (or group) that is appropriate for inquiry. But now that we can be more precise in originalist methodology, greater precision in originalist theory may be required. Of the various possible original publics examined in this Essay, "We the People of the United States" appears to have the most potential. Even if that is the best original public, additional work is necessary to more accurately define who that includes throughout our history.

Originalism and Constitutional Amendment

Lael K. Weis[*]

This Article examines a problem that constitutional amendment uniquely poses for originalism, namely: how should changes to a constitution's text that enact a new set of understandings be reconciled with the understandings of the constitution's framers? This issue poses a significant challenge for originalism, and yet it has been overlooked by scholarship to date. This Article is a first effort to tackle this issue. It develops an originalist approach to amendment that identifies which amendments pose the problem and that provides a method for addressing it. In developing this approach, the Article's analysis makes two significant contributions to the evaluation and understanding of originalism. First, it provides a critical missing component of originalist interpretive theory that is needed for its practical application. As this Article's central examples demonstrate, constitutional amendment poses a real challenge for originalism and not a merely hypothetical one—even for old constitutions that have proven difficult to amend. Second, by putting originalism in conversation with current debates about constitutional amendment, this Article's analysis draws attention to implications for issues concerning the scope of the amending power. The originalist approach that it develops places interpretive constraints on the amending power, requiring amenders who wish to override original understanding to do so clearly. This invites comparison with "implicit unamendability" doctrines, a controversial but increasingly common set of practices whereby courts imply strict constraints on the amending power in order to prevent its abuse. This comparison suggests that originalism may provide an attractive—albeit more limited—alternative for those who are concerned about abusive amendment but have reservations

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about implicit unamendability. In making these two contributions, this Article thus helps resituate and reinvigorate interest in originalism, demonstrating that the theory holds broad interest for constitutional theory and practice beyond narrow and technical scholarly debates between originalists and their critics.

INTRODUCTION

A significant lacuna in the scholarly literature on originalism is how such theories deal with constitutional amendment. By "originalism" I mean theories of constitutional meaning that approach constitutional interpretation much in the same way as ordinary statutory interpretation: namely, as a task that requires courts to give effect to the linguistic meaning of the instrument's text as understood in light of its drafting context,[1] which includes publicly available information about drafters' understandings and intentions. This Article addresses that lacuna. It identifies a problem that constitutional amendment uniquely poses for originalism, and it proposes an approach to that problem that is compatible with the theory's basic commitments. In doing so, however, this Article's objective is *not* to offer a defense of originalism. Its objective is rather to place the theory in a broader context than the terms in which it is usually debated, where it can be better understood and evaluated, and where it can shed light on contemporary debates about the interpretation and judicial review of constitutional amendments.

The originalist approach to amendment that this Article develops demonstrates why originalism may be attractive to those with concerns about the abuse or excessive use of a constitution's formal amendment process. More specifically, insofar as an originalist approach to amendment places an *interpretive constraint* on the amending power, it may provide an alternative to so-called "implicit unamendability" approaches,[2] whereby courts imply *strict constraints* on the amending power. Although this alternative is more limited in scope, it has several advantages to implicit unamendability doctrines because it does not rely upon a normative conception of the framing as an act of the "will of the people" or notions of the "constituent power." Or so this Article will argue. In this respect, the Article holds broad interest for constitutional theory and practice beyond narrow scholarly debates between originalists and their critics.

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1 By "drafting context," I have in mind what Lawrence Solum has referred to as the text's "communicative content" or "linguistic meaning . . . in context . . . ." *See* Lawrence B. Solum, *Communicative Content and Legal Content,* 89 NOTRE DAME L. REV. 479, 479 (2013); Lawrence B. Solum, *Originalism and the Unwritten Constitution,* 2013 U. ILL. L. REV. 1935, 1937–40 (2013).

2 *See* YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 39 (2017) (describing implicit constitutional unamendability); *see also id.* at 141–57 (applying the general theory of the amending power to implicit unamendability).

Stated in its most basic terms, the problem that constitutional amendment poses for originalism is this: how are changes to a constitution's text that enact a new set of understandings ("amenders' understanding") to be reconciled with the understandings of the constitution's framers ("original understanding") that otherwise pervade its text and structure? This problem raises several questions. In particular, how do we identify those changes that leave original understanding intact and those changes that require modifying that understanding in light of the amenders' understanding? Under what circumstances does the amenders' understanding override original understanding as a source of constitutional meaning? And, more broadly, how should originalism view the amenders' understanding of a source of constitutional meaning, given the features of the task of amending a constitution that importantly distinguish it from the task of framing a constitution? This problem presents a significant challenge for originalism. And yet, it has largely been neglected by scholarship to date.[3] This Article is a first effort to define the problem and to develop a strategy for addressing it.

The reasons why the problem has been overlooked appear to be due to the somewhat narrow terms in which originalism is typically understood and debated, which concern its merits as a method of judicial restraint, and its application to the U.S. Constitution in particular. The U.S. Constitution is very old, and although it contains many significant amendments, it has proven difficult to amend. Therefore, dealing with amendment has had no real urgency for the scholarly literature on originalism (at least insofar as the American context forms its point of departure). Nevertheless, identifying and addressing the problem that amendment poses for originalism is important for a sound understanding and evaluation of the theory.

This Article adopts a wider perspective: it focuses on originalism as a theory of constitutional meaning (as opposed to a method of judicial restraint) and situates originalism within wider global debates about constitutional amendment. As

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3 For example, Lawrence Solum has provided one of the most thorough and detailed accounts of originalism over the span of his career, articulating and addressing major objections and difficulties, with an effort to present the view in its most defensible and plausible light. And yet, as far as I am aware, he has not considered this issue. For instance, it is not considered in his most comprehensive treatment of originalism. *See generally* Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. L. & Legal Theory, Rsch. Paper No. 07-24, 2008), http://papers.ssrn.com/abstract=1120244 [http://perma.cc/CS88-58TA] ("Semantic Originalism . . . offers an account of the possibility of constitutional communication and explains how a written constitution can provide both fixed semantic content and a general framework that can be adapted to changing circumstances.").

comparative and international constitutional law scholarship has demonstrated, courts in jurisdictions outside of the United States not only use originalism,[4] but have treated originalism as a more mainstream interpretive approach.[5] This includes jurisdictions with newer constitutions, where the contemporaneity of the framing gives original meaning greater purchase. However, it also includes Australia where, as I shall describe below, the High Court has had to grapple with how to reconcile amenders' understanding with original understanding in the context of a very old and rarely amended constitution. Moreover, as I shall also consider below, there have even been changes to the U.S. Constitution that present the problem for originalism described here. How originalism deals with amendment is therefore not just an issue that holds interest for abstract or ideal constitutional theory, but an issue that has implications and consequences for constitutional practice.

The issue also has implications for contemporary debates about amendment and the amending power. Courts throughout the world have increasingly developed methods of interpreting and reviewing constitutional amendments that are designed to constrain exercises of the formal amending procedure when it produces changes that are deemed to go beyond what the constitution's framers contemplated.[6] The most sophisticated account of this development to date has theorized the phenomenon in terms of a "secondary" or "delegated" constituent power.[7] And yet, despite the evident overlap in concerns, the connection to originalism has not been pursued.[8] Here, too, the reasons for this oversight appear to be due to the narrow terms of the debate, which make thinking through the problem of how originalism ought to approach amendment seem like an unlikely place for insights. The analysis in this Article will show otherwise, demonstrating how an originalist approach to amendment draws attention to a critical weakness in the defense

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4 *See, e.g.*, Yvonne Tew, *Comparative Originalism in Constitutional Interpretation in Asia,* 29 SING. ACAD. L.J. (SPECIAL ISSUE) 719, 719–20 (2017); Yvonne Tew, *Originalism at Home and Abroad,* 52 COLUM. J. TRANSNAT'L L. 780, 780–81 (2014); Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study,* 44 VAND. J. TRANSNAT'L L. 1239, 1239–40 (2011).

5 *See* Lael K. Weis, *What Comparativism Tells Us About Originalism,* 11 INT'L J. CONST. L. 842, 844–45 (2013).

6 *See* ROZNAI, *supra* note 2, at 115–16, 126.

7 *See id.* at 118–26, 205 (providing an account of the nature of constitutional amendment powers).

8 Roznai briefly considers the extent to which the objection that originalism privileges "[t]he 'dead hand' of the past" over present majorities similarly applies to unamendability doctrines. *Id.* at 188–90. Beyond this, however, the connection is not examined.

of implicit unamendability approaches and has the potential to provide an alternative—albeit a more modest and limited one.

The discussion proceeds as follows. In Part I, I begin by briefly clarifying the basic commitments of originalism. These commitments are what account for drafters' understanding as a source of constitutional meaning. I then define the interpretive problem presented by constitutional amendment, which for the purposes of this Article refers to actual changes to a constitution's text that are brought about using its formal amendment procedure.[9] The problem occurs where: (1) discerning constitutional meaning requires consulting drafters' understanding (because the text is not conclusive); and (2) there is a mismatch between original understanding and amenders' understanding (because the relevant understandings are different, and the text does not resolve how they are meant to fit together).

I refer to this as the "incongruity problem," since it requires the interpreter to decide how to use a set of conflicting and potentially irreconcilable drafters' understandings as a source of constitutional meaning. As I shall explain, the incongruity problem presents a special problem for originalism that it does not present for non-originalism. This is a function of both the priority that originalism assigns to drafters' understanding over other possible extrinsic sources, and the privileged place that constitutional amendment occupies within originalism as the preferred and most legitimate means of changing constitutional meaning.[10]

In Parts II and III, I develop an originalist approach to amendment. There are two components to the approach. The first component, considered in Part II, involves identifying the circumstances where the incongruity problem arises, and where it is the most acute. The second component, considered in Part III,

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9 I therefore follow Roznai, who defines an "amendment" as a constitutional change effected by that constitution's formal amending procedure. *Id.* at 2. The rationale for this thin, descriptive use of the term is that it focuses attention on the issue that matters for originalism: namely, interpreting changes to *the constitution's text*. This does not however rule out further considerations, such as those concerning the object and effect of the amendment that Richard Albert uses to distinguish constitutional amendment proper (i.e., changes that are continuous with an existing constitutional order) from "constitutional dismemberment" (i.e., changes that create a fundamentally different constitutional order). *See* RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 32, 78–82 (2019).

10 For some originalists, it is the sole legitimate means. However, others recognize that there are exceptional circumstances where other methods may be permissible (e.g., where a provision is manifestly unjust and the constitution does not provide an adequate procedure for formal amendment). *See, e.g.*, JEFFREY GOLDSWORTHY, *The Case for Originalism*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 42, 59–60, 65–67 (Grant Huscroft & Bradley W. Miller eds., 2011).

involves developing a strategy for addressing the incongruity problem. This consists of an analytical framework for assessing the relative weight of amenders' understanding versus original understanding. The proposed strategy is "originalist" in the sense that it is *consistent* with originalism's basic commitments and concerns. However, it draws upon a set of theoretical resources that are not standardly found within originalism, and in this sense is novel.[11] Substantively, I argue that adopting an approach where original understanding always prevails is incompatible with the role that formal amendment occupies within originalism. Nevertheless, I maintain that there is an important sense in which original understanding should be understood as the more basic source of constitutional meaning, which has to do with the nature of "framing" as a constitutional text-producing task, reflected by procedural features that characteristically distinguish framing from amending. The status of original understanding as more basic in this sense establishes a *strong presumption* in favor of original understanding where an amendment intersects with core aspects of the framing and does not clearly convey an intent to override original understanding, but only a *weak presumption* where it does not.

An important consequence of this approach is that there are circumstances where a constitutional amendment should be "read down" to nullify its intended effect: namely, where doing so would be incompatible with the more basic status of original understanding. The potential implications of this for contemporary debates about "amendability," or limitations on the amending power, are considered in Part IV. Here I suggest that the originalist approach to amendment proposed highlights a central weakness with the most prominent defense of implicit unamendability doctrines: namely, its reliance on contestable assumptions about the character of framing as an unfettered expression of the popular will or "constituent power." This leads the view to privilege popular amending processes regardless of amendment type, and informal methods of constitutional change over formal amendment. An originalist approach to amendment places limitations on the amending power but does not require making any such assumptions about the framing. Moreover, it not only creates strong incentives for using formal amendment,

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11 In other words, the approach developed in this Article cannot be derived by way of deduction from the tenets of originalism. Thus, although I argue that there are good reasons for an originalist to adopt the proposed approach, it is not necessary (in the strict sense of required for internal logical consistency) that an originalist adopt it. *See* discussion *infra* Part III.

but for clarity and transparency about the purpose and effect of the proposed constitutional change throughout the amending process—particularly where the proposal alters key features of the constitution as originally enacted—thus reducing the risk of elite or authoritarian manipulation of popular mechanisms. On this basis, I suggest that adopting an originalist approach to interpretation—once supplemented with the theory of amendment proposed here—may provide a more limited but also more attractive alternative to implicit unamendability doctrines, particularly for newer constitutions that are easily amended and vulnerable to abuses of the amending power.

I. WHY ORIGINALISM REQUIRES A THEORY OF AMENDMENT

A. What is Originalism?

"Originalism," in the sense used in this Article, is a theory of constitutional meaning that is committed to two central theses: *textualism* and *semantic fixation*. "Textualism" refers to the view that a written law is (nothing more than) its text, including presumptions and implications that follow from its text and structure.[12] "Semantic fixation" refers to the view that the language used in a written law continues to mean what it meant at the time of the law's enactment.[13] Originalism therefore rejects so-called "living tree" approaches to constitutional interpretation, which accept that a constitution's meaning changes over time to reflect evolving social needs and values. This means that recent developments such as "living originalism"[14] or "the new textualism"[15] do not count as originalist in the sense used in this Article. Commitment to textualism is a necessary condition for a theory to count as originalist, but it is not sufficient.

There are nevertheless a variety of ways of understanding what semantic fixation requires. This, in turn, produces a variety of different originalist approaches to constitutional interpretation. My analysis will focus on what I take to be the most mainstream and well-developed variety. Sometimes

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12 Solum, *supra* note 3, at 117.

13 This terminology stems from Lawrence Solum's "fixation thesis." *Id.* at 2–4, 59–67.

14 *See* JACK M. BALKIN, LIVING ORIGINALISM (2011).

15 *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012). David Strauss coined the term "[n]ew [t]extualism" to describe Amar's work. David A. Strauss, *New Textualism in Constitutional Law*, 66 GEO. WASH. L. REV. 1153, 1153 (1998). It is unclear, however, whether Amar himself uses that term to describe his approach to constitutional interpretation.

referred to as "textualist originalism" or "public meaning originalism," this is the view that a written constitution must be interpreted in light of the context-enriched linguistic meaning of its text, including specific terms and phrases, syntax and grammar, and structural features.[16] The relevant "context" is the document's drafting and ratification, which includes publicly available information about the objectives and intentions of its drafters.[17] Proponents of originalism in the sense used here are therefore not in general concerned with discovering the drafters' "subjective intentions," understood as views about how provisions ought to apply in specific circumstances; or, at least, they do not give these kinds of intentions overriding weight.[18] Hereinafter, where I refer to "originalism," I am referring specifically to this view.

B. The Incongruity Problem

I now turn to the task of defining the challenge that constitutional amendment presents for originalism. That challenge lies in how to reconcile two or more potentially conflicting sets of drafters' understandings that inform the meaning of the constitutional text. I shall refer to this challenge as the "incongruity problem." Although this Article focuses primarily on the conflict between original understanding and amenders' understanding, it bears emphasis that the same potential for conflict arises in the case of subsequent amendments, and even between multiple "framings" in the case of constitutional systems that have arguably had more than one event that counts as a "framing."[19]

In one sense, reconciling potentially conflicting sets of drafters' understandings is a challenge that *any* approach to constitutional interpretation confronts when dealing with formal amendment. It cannot simply be assumed that original understanding and

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16 Solum, *supra* note 3, at 117.

17 Prominent defenders of this theory include legal scholars Jeff Goldsworthy and Larry Solum, as well as the late U.S. Supreme Court Justice Antonin Scalia (albeit with a lesser degree of clarity and consistency). *See, e.g.*, Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation,* 25 FED. L. REV. 1 (1997); JUSTICE ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, at vii (Amy Gutmann ed., Princeton 1997); Solum, *supra* note 3, at 1.

18 *See* Goldsworthy, *supra* note 17, at 15.

19 For example, this arguably describes both Canada (the first "framing" being the Constitution Act as enacted in 1867, and second "framing" being the 1982 Patriation of the Constitution Act and adoption of the *Canadian Charter of Rights and Freedoms*), and the United States (the first "framing" being the Constitution with the original Bill of Rights as it was adopted in 1789, and the second "framing" being Reconstruction and passage of the Civil War amendments between 1865 and 1870).

amenders' understanding neatly coincide. However, the possibility of conflict presents a special problem for originalism that it does not present for non-originalism. In order to explain why this is so, I first need to set out the incongruity problem in basic terms. The problem is defined in more detail below.

At the most general level, the incongruity problem arises where changes to a constitution's text cannot be easily compartmentalized or contained. The interpreter must consult old provisions alongside new provisions, make sense of remaining provisions in light of the removal of other provisions, or else grapple with old and new components or different versions of the same provision. All of these scenarios create the possibility of divergence between original understanding and amenders' understanding. It is *not* the case that all amendments pose the incongruity problem, however.[20] But before considering the parameters of the problem in more detail, it is important to begin by seeing why it presents a special problem for originalism that it does not present for non-originalism.

Understanding why amendment poses a special problem for originalism requires appreciating the place that amendment occupies within the theory. In virtue of originalism's commitment to textualism and semantic fixation, the theory is also committed to the view that the sole legitimate method of changing constitutional meaning is through actual changes to the constitution's text. "Informal amendment," or change to constitutional meaning brought about by methods of judicial interpretation that bypass the constitutionally prescribed amendment procedure, is generally regarded as illegitimate.[21] This includes interpretive methods that seek to "update" constitutional meaning in light of new understandings, such as changing social needs and values, emerging information and technology, developments in the natural sciences, and the like.[22]

For originalists, then, the only way that new understandings can serve as a source of constitutional meaning is through formal amendment, whether by way of alteration, replacement, deletion, or addition of a provision to the constitutional text. To be effective in this regard, however, the new understanding must *clearly* override or displace original understanding through the

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20 *See infra* Part II.

21 *See* Goldsworthy, *supra* note 17, at 51.

22 Importantly, originalists distinguish changes in a constitution's meaning from changes in the application or extension of its provisions and deny that changes in the latter entail changes to the former. *See* Goldsworthy, *supra* note 17, at 61; *see also* Solum, *supra* note 3, at 2–3.

textual change brought about by the amendment. All constitutional amendments therefore presumptively require the originalist to make an initial determination about whether original understanding survives intact. If not, then the onus is on the originalist to explain how original understanding ought to be reconciled with amenders' understanding in a way that is consistent with the theory's commitment to textualism and semantic fixation.

By contrast, constitutional amendment does not pose a special problem for non-originalism. Non-originalism can accept that constitutional meaning changes over time, quite independently of corresponding textual changes effected via formal amendment. That is because non-originalism can accept that judicial interpretation is a legitimate method of bringing new understandings to bear on constitutional meaning, at least in some circumstances. Accordingly, it is unnecessary to make the same kinds of determinations about the continuing relevance of original understanding: original understanding does not carry any special interpretive weight. Indeed, it is open to non-originalism to adopt an interpretive presumption that amenders' understanding overrides original understanding, even where the actual changes to the constitutional text do not clearly convey this. The same presumption is not open to originalism.

II. IDENTIFYING WHEN THE INCONGRUITY PROBLEM ARISES

So far, I have described the incongruity problem in basic terms in order to show why it presents a special problem for originalism. In this Part, I will define the problem with a bit more precision. The objective is to articulate the scope of the problem that originalism must address by identifying the circumstances in which the challenge of reconciling original understanding with amenders' understanding arises, and the circumstances where the challenge appears to be most acute. Not all amendments pose this problem. Moreover, there are particular kinds of amendments that seem to present the problem in a more challenging way than others. Identifying the circumstances where the incongruity problem arises, and where it is the most acute, is the *first component* of an originalist approach to amendment.

There are a variety of ways that the text of a constitution can be changed, and it will be helpful to begin by sketching these out. Formal amendment presents (at least) the following four possibilities:

1. *Modification*: the deletion, addition, or partial substitution of text within an existing provision;
2. *Replacement*: the substitution of an existing provision for a new provision;
3. *Deletion*: the elimination of an existing provision; and
4. *Addition*: the insertion of a new provision.

All four types of amendment can present challenges for interpretation. At the same time, however, it is evident that not all amendments will pose the specific interpretive problem that we are concerned with here. Bearing in mind the basic commitments of originalism, as described above, some amendments will not require inquiries into drafters' understanding at all because the meaning is clear from the resulting text and structure. Moreover, even where it is necessary to consult drafters' understanding, there may not be any conflict or incompatibility between original understanding and amenders' understanding. I will first outline this set of possibilities before turning to the types of amendments that do appear to present the incongruity problem.

A. Amendments That Do Not Pose the Incongruity Problem: Clear Overrides, Isolated Insertions, and No-Conflict Cases

To begin with, sometimes it is unnecessary to consider original understanding or, at the very least, it has limited relevance. For example, many (and perhaps most) deletions so clearly override original understanding that no conflict arises. Similarly, additions that insert a new provision that operates independently of and in relative isolation from existing provisions also typically do not pose the incongruity problem. In both of these cases, semantic fixation supplies a clear basis for using amenders' understanding to determine the meaning of the amended text. At the same time, there is no clear basis for relying on original understanding in this way. At best, original understanding has contextual relevance: that is, it may help provide information about the objectives of the amendment, and hence amenders' understanding.

Secondly, even when original understanding is relevant, sometimes there is no conflict with amenders' understanding. There are many examples of modification and replacement that are like this. For example, some modifications or replacements are designed to give effect to original understanding. This includes "corrective" amendments, which make changes to the text in order to resolve ambiguity and clarify original meaning,

and "restorative" amendments, which reverse judicial interpretations of a provision to restore original meaning.[23]

Another type of amendment that seems unlikely to pose the incongruity problem is "operational updates."[24] These are modifications or replacements that change the terms of an existing requirement, or additions that create a new requirement, in a manner that is designed to be compatible with original understanding. Possible examples include adding a mandatory retirement age for judges,[25] or revising the prescribed election cycle or term-length for elected representatives.[26] This type of amendment inserts a new constitutional requirement, and in that respect overrides original understanding. However, they are designed to operate within the existing constitutional framework, and in this respect leave original understanding intact. As a result, there is no real conflict between drafters' understandings.

In summary, the incongruity problem does not appear to arise: (1) where the amended constitutional text clearly conveys the drafters' understanding, making further inquiries into compatibility with original understanding unnecessary, as in "clear overrides" and "isolated insertions"; or (2) in "no conflict" cases, where further inquiries reveal that there is no incompatibility between original understanding and amenders' understanding, as in "corrective," "restorative," and "operational update" amendments.

In these circumstances, constitutional meaning can be settled primarily by reference to the text and does not require reconciling different and potentially conflicting sets of drafters' understandings.

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23 *See* ALBERT, *supra* note 9, at 81. Many of the examples Albert provides arise in circumstances where a provision has to be applied to a new set of circumstances not anticipated by the framers.

24 This category overlaps, albeit imperfectly, with what Richard Albert describes as "elaborative" and "reformative" amendments. *See id.* at 80–81. Both go beyond original understanding (in some case expressly overriding original understanding), but in a manner that is designed to operate consistently and in harmony with the existing constitutional framework. *See id.*

25 For example, in 1977 the Australian Constitution was amended to change the term of federal judicial appointment from life tenure to mandatory retirement at age seventy. *See Constitution Alteration (Retirement of Judges) Act 1977* (Cth) (Austl.) (altering section 72 of the Australian Constitution to include a maximum retirement age).

26 *See generally* U.S. CONST. Amend. XX, § 1. For example, in 1933 the U.S. Constitution was amended to change the date for the beginning and ending of the terms for President and Vice President, from March 4th to January 20th, in order to limit the "lame duck" after an election where the sitting President and Vice President were not re-elected. *See* John Copeland Nagle, *Lame Duck Logic*, 45 U.C. DAVIS. L. REV. 1177, 1208 (2012).

B. Amendments That Do Pose Incongruity Problem: "Gaps" and "Spill-Overs"

1. "Gaps"

Under what circumstances, then, *does* the incongruity problem prima facie arise? One possibility is that an amendment leaves a "gap" in meaning. "Gaps" are interpretive issues internal to a single provision or a set of provisions that operate closely together. They occur when an amendment modifies or replaces some of the text, but either does not fully override original understanding or else does not obviously convey the intention to do so through the relevant textual changes. Gaps thus raise questions about the extent of the continuing relevance of original understanding as a source of constitutional meaning, and how to reconcile original understanding with amenders' understanding.

The 1967 amendment to the Australian Constitution's "race power," section 51(xxvi), provides an example. The amendment modified section 51(xxvi) by deleting a single clause and leaving the rest of the text intact in circumstances where original understanding and amenders' understanding were clearly in conflict. The provision originally provided that: "The Parliament shall, subject to this Constitution, have power to make laws . . . with respect to: . . . [t]he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws."[27] It was clear at the time of the framing that the framers understood the provision to extend to the enactment of racially discriminatory laws.[28]

The 1967 amendment struck out the phrase "other than the aboriginal race in any State," so that section 51(xxvi) now provides that: "The Parliament shall, subject to this Constitution, have power to make laws . . . with respect to: . . . the people of any race for whom it is deemed necessary to make special laws."[29] It was equally clear at the time of the amending that the amenders understood the provision, thus modified, to extend only to laws that benefit aboriginal peoples.[30]

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27 *Australian Constitution* s 51(xxvi).

28 *See* Robert French, *The Race Power: A Constitutional Chimera, in* AUSTRALIAN CONSTITUTIONAL LANDMARKS 180, 182 (H. P. Lee & George Winterton eds., 2003); M. J. Detmold, *Original Intentions and the Race Power,* 8 PUB. L. REV. 244, 244 (1997); Geoffrey Sawer, *The Australian Constitution and the Australian Aborigine,* 2 FED. L. REV. 17, 20 (1966).

29 *Australian Constitution* s 51(xxvi).

30 *See infra* Part III; *see also Kartinyeri v Commonwealth* (1998) 195 CLR 337, 406–09 (Austl.) (Kirby, J., dissenting) (discussing the amenders' understanding).

Interpreting the amended section 51(xxvi) thus requires determining whether the 1967 amendment displaced the original understanding of the scope of the power, or whether original understanding continues to inform its scope, and if so, how the two ought to be reconciled.

The High Court of Australia considered this question in 1998.[31] Of the four judges who addressed the issue,[32] three held that a "bare deletion" within an existing provision cannot override the original understanding of that provision.[33] Accordingly, in the result, the power was found to extend to laws that discriminate against Aboriginal peoples as well as those that benefit them. But this approach is not obvious. For example, another possibility would have been to hold that original understanding prevails with respect to laws concerning *non-Aboriginal* peoples (the subject matter of the provision as originally drafted), while simultaneously finding that amenders' understanding prevails with respect to laws concerning *Aboriginal* peoples (the subject matter of the amendment).[34] This is not to suggest that this alternative interpretation is to be preferred. It is rather to insist that there is a genuine interpretive problem posed by conflicting drafters' understandings that the "bare deletion" approach overlooks. Further explanation is required. This shows why an originalist account of amendment is needed.

2. "Spill-Overs"

Another possible scenario that may pose the incongruity problem is where an amendment appears to have implications for the meaning of other, *un*amended provisions. I will refer to this possibility as a "spill-over," the idea being that amenders' understanding has flow-on effects for other provisions beyond the amended provision or provisions that contain the actual changes to the constitutional text. Unlike gaps, then, we are imagining cases where the original design of the constitution did not contemplate the provisions at issue as operating closely together

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31 *Kartinyeri*, 195 CLR 337.

32 Two judges, Chief Justice Brennan and Justice McHugh, declined to address the constitutional question, deciding the matter on the basis of implied repeal and the doctrine of parliamentary supremacy. *See id.* at 337–38. Notably, however, the Chief Justice had previously described the 1967 amendment as "an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial." *See Commonwealth v Tasmania* (1983) 158 CLR 1, 242 (Austl.) [hereinafter *Tasmanian Dam Case*].

33 *See Kartinyeri*, 195 CLR 363, 383.

34 *See Tasmanian Dam Case*, 158 CLR at 273. Justice Deane appears to adopt this interpretation in his opinion. *Id.*

(or, indeed, did not contemplate them at all). Thus, all other things being equal, cases where a new provision is added seem more likely to raise the possibility of a spill-over versus a gap.

One example concerns the relationship between the U.S. Constitution's Nineteenth Amendment, guaranteeing women the right to vote, and the Fourteenth Amendment's Equal Protection Clause.[35] Although the U.S. Supreme Court has not directly considered the interpretive problem that we are interested in here, Steven Calabresi and Julia Rickert have considered the issue in great depth and detail.[36] Their argument merits careful consideration.

Adopting an originalist approach to interpretation, the authors first argue that the Equal Protection Clause, contained in Section 1, should *not* be understood as narrowly confined to race-based discrimination. They point out that the text of Section 1 refers to "persons" and "citizens" and does not expressly refer to race,[37] providing that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[38]

Moreover, Calabresi and Rickert argue, historical materials from the time of the framing of the Fourteenth Amendment show that the original understanding of Section 1 is that it bans "class-based legislation" or laws that "create a caste."[39] However, as the authors also note, it is clear that the Amendment's framers did not think that sex or gender-based discrimination fell within the ambit of its prohibition.

This is evidenced in particular by the text of Section 2 of the Fourteenth Amendment, which concerns the apportionment of representatives. Section 2 expressly refers to "*male* citizens" in prescribing the consequences that the abrogation of voting rights has for apportionment. It relevantly provides that:

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35 *See* U.S. CONST. amend. XIX, § 1.

36 *See* Steven G. Calebresi & Julia T. Rickert, *Originalism and Sex Discrimination,* 90 TEX. L. REV. 1, 2 (2011).

37 *Id.* at 5.

38 U.S. CONST. amend. XIV, § 1.

39 *See* Calebresi & Rickert*, supra* note 36, at 17.

> Representatives shall be apportioned among the several states according to their respective numbers . . . But when the right to vote . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.[40]

The text of Section 2 clearly treats sex as a rational basis for discrimination in the conferral of voting rights. Therefore, on the original understanding of Section 1, the guarantee of equal protection does not appear to extend to women. Although Calabresi and Rickert advance an argument for why it does, that argument is difficult to square with originalism's commitment to textualism and semantic fixation.[41]

This is not the authors' only argument for why Section 1 extends to women, however. Their other argument relies on the Nineteenth Amendment, which provides that: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any [s]tate on account of sex."[42]

Here the authors argue that the Nineteenth Amendment "constitutionalized" the principle that sex is *not* a rational basis for the denial of civil and political rights.[43] As a result, they argue, the effect of the Nineteenth Amendment is to bring sex within the ambit of the classifications protected by the equality guarantee in Section 1, which extends to the protection of civil and political rights.[44] In other words, they argue that the amenders' understanding *spills over* to Section 1 and overrides the original understanding of that provision.[45]

From an originalist perspective, the difficulty with this line of argument is that the Nineteenth Amendment leaves the text of

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40 U.S. CONST. amend. XIV, § 2.

41 The authors concede as much, noting that the express reference to male citizens "makes it very difficult to read the original 1868 version of the Fourteenth Amendment as a bar to sex discrimination." *See* Calebresi & Rickert, *supra* note 36, at 66. For criticisms of this aspect of the authors' argument on originalist grounds, see Jack M. Balkin, *Originalism and Sex Discrimination, or, How Thick is Original Public Meaning?,* BALKINIZATION (Dec. 8, 2011, 5:55 PM), http://balkin.blogspot.com/2011/12/originalism-and-sex-discrimination-or.html [http://perma.cc/6XP3-P88N]; Ed Whelan, *Critique of Calabresi's "Originalism and Sex Discrimination"—Part 2,* NAT'L REV.: BENCH MEMO (Nov. 29, 2011, 8:56 PM), http://www.nationalreview.com/bench-memos/284381/critique-calabresi-s-originalism-and-sex-discrimination-part-2-ed-whelan [http://perma.cc/7R97-DGUW].

42 U.S. CONST. amend. XIX, § 1.

43 Calebresi & Rickert, *supra* note 36, at 2.

44 *See id.* at 11.

45 *See id.* at 2, 66–67.

the Fourteenth Amendment intact. That is, it does not delete the express reference to "*male* citizens" in Section 2.[46] Nor does it alter the text of Section 1. It is therefore unclear whether, or how far, the Nineteenth Amendment can go to override the original understanding of those provisions consistently with textualism and semantic fixation.

Drawing on this example, it may therefore be questioned whether spill-overs really fall within the ambit of the incongruity problem. There is a sense in which the very notion of amenders' understanding *spilling over* to alter the meaning of an unamended provision appears to be at odds with the basic commitments of originalism that give rise to the incongruity problem, thus placing this possibility beyond the scope of an originalist theory of amendment. For, in the case of spill-overs, the text of the provision being interpreted has not changed. So, unlike the case of gaps, it is unclear why amenders' understanding is relevant. Its relevance cannot be based on semantic fixation in these circumstances, but instead seems to rely upon a wider view of drafters' understandings as a source of meaning: for example, as evidence of changed background conditions against which unamended provisions now operate and must be interpreted. There is a worry, in other words, that spill-overs rely on amenders' understanding in an impermissible way: namely, to "update" the meaning of unchanged provisions in light of contemporary social needs and values.[47]

Spill-overs therefore pose a more challenging issue for an originalist theory of amendment than gaps. The proposition that the interpretation of a provision requires reconciling amenders' understanding and original understanding where the text of the provision remains unchanged is in tension with originalism's commitment to textualism and semantic fixation. The question is how, consistently with those commitments, textual changes external to the provision or set of provisions being interpreted can cast doubt on original understanding.

This does not mean that the type of argument that Calabresi and Rickert advance cannot be squared with originalism. However, in order to succeed, their argument requires an originalist theory of amendment. An originalist theory of amendment is needed to show why, despite leaving the text of the

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46 U.S. CONST. amend. XIV, § 2 (emphasis added).

47 Josh Blackman, *Response: Originalism at the Right Time?,* 90 TEX. L. REV. 269, 274 (2012) (critiquing Calabresi's and Rickert's argument that the adoption of the Nineteenth Amendment in 1920 affected how we should read the Fourteenth Amendment's equality guarantee).

Fourteenth Amendment intact, the understanding of those who drafted and ratified the Nineteenth Amendment is relevant to its interpretation, and why this is consistent with semantic fixation. I will return to this example in Part III to illustrate how the proposed approach can be used to support the authors' argument.

In summary, formal amendment appears to pose the incongruity problem in two types of circumstances. First, the incongruity problem prima facie arises where textual changes leave "gaps" in meaning, requiring the interpreter to decide whether and how original understanding functions as a source of meaning that "fills in" those gaps. Second, the incongruity problem prima facie arises where textual changes produce "spill-overs" in meaning, enacting a new set of understandings that put pressure on the original understanding of an unchanged provision.

In both cases, the interpreter must make an initial determination about whether original understanding and amenders' understanding differ, and then explain how they fit together as distinct sources of constitutional meaning. This task will be most challenging in cases where those understandings are contradictory or otherwise incompatible. Moreover, all other things being equal, spill-overs pose a more difficult issue for an originalist approach to amendment than gaps. That is because accepting the type of conflict between drafters' understandings that spill-overs present as a genuine interpretive problem is, or at least appears to be, in tension with originalism's basic commitments.

III. ADDRESSING THE INCONGRUITY PROBLEM

In this Part, I develop an originalist strategy for addressing the incongruity problem. The proposal is not designed to produce definitive answers; rather, the aim is to provide a set of analytical tools that originalists can apply to address the problem. In developing this strategy, it bears emphasis that the incongruity problem occupies a space where the usual theoretical resources found within originalism, and that originalists standardly rely upon to address interpretive issues, run out. As we have seen, addressing the incongruity problem requires saying something about the status of original understanding as a source of constitutional meaning in circumstances where the constitutional text has been altered, thus making the consequences of semantic fixation unclear. We have also seen that it requires saying something about the status of amenders' understanding as a source of constitutional meaning in circumstances where it intersects with unaltered constitutional text, thus going beyond what is strictly required by semantic fixation.

The proposed strategy therefore introduces a novel set of considerations to supplement existing resources within originalism. Although these considerations are not derivable from originalism's basic commitments and concerns, they are nevertheless compatible with those basic commitments and concerns. The starting point is the idea that "framing" and "amending" are distinctive acts of constitutional text-production. The distinction between "framing" and "amending" as *drafting tasks* forms the foundation both for how the approach is structured, and for defining the sets of enquiries that are used to evaluate its key elements.

In outline, the strategy developed here requires examining the *relevance* and *relative weight* of amenders' understanding versus original understanding as a source of constitutional meaning. More specifically, amenders' understanding should override original understanding only in those circumstances where: (1) it is *relevant* to the meaning of the text, and (2) it carries greater *weight* than original understanding as a source of constitutional meaning.

This analytical structure is a consequence of the status of original understanding as a *more basic* source of constitutional meaning, which—I argue—follows from the characteristic features of framing a constitution that importantly distinguish it from amending. The status of original understanding as more basic means that it is always relevant to instances of amendment that pose the incongruity problem, which, by definition, are cases where the textual changes do not clearly override or displace original understanding. By contrast, I argue, there are at least some instances of the incongruity problem—spill-overs, in particular—where the relevance of amenders' understanding cannot be established in the usual way through semantic fixation, and additional considerations are required.

The objective, then, is to identify the considerations that require evaluation within this analytical frame in order to assist the interpreter in: (a) establishing the relevance of amenders' understanding, and (b) assessing its relative weight. Here I argue that there are two key elements that require evaluation. First, *the character of the drafting task presented by the amendment*. This enquiry concerns the subject matter and purpose of the amendment. Its focal point is the extent to which the amendment concerns core elements of the constitution's overall structure and design as originally enacted, or whether it concerns matters that are peripheral to the framing qua drafting task. Second, *the character of the drafting process*. This enquiry concerns specific features of the process used to draft and propose

the amendment, including the identity of the group convened for that task and the manner and form of their engagement. Its focal point is the degree to which the process was well-suited for the drafting task.

Cumulatively, I argue, these two lines of enquiry provide a set of analytical tools that are germane to originalism and that provide originalism with a principled interpretive approach to instances of the incongruity problem that is consistent with the theory's basic concerns and commitments.

The discussion proceeds as follows. I begin by briefly explaining why originalism requires a multi-factorial evaluative framework. In particular, I show why simply adopting an overriding presumption in favor of original understanding in cases of conflict is not available as an originalist solution. I then turn to considerations that differentiate "framing" from "amending" as distinctive acts of constitutional text-production. These considerations are then used to develop the proposed strategy for addressing the incongruity problem, as outlined above. To make that discussion more concrete, I examine how the strategy could be applied to the examples described Part II.

A. Why Originalism Cannot Adopt an Overriding Presumption in Favor of Original Understanding

One might query why a multi-factorial approach is needed. After all, many proponents of originalism—including, perhaps most famously, the late Justice Scalia—favor "bright-line" rules over "balancing tests" that require evaluating and weighing different considerations.[48] Moreover, as indicated above (and as I will argue below) "founding" and "amending" are importantly distinct constitutional text-producing acts. One consequence of that distinction, to anticipate the discussion that follows, is that there is a sense in which original understanding is the more basic source of constitutional meaning, for reasons that have to do with the exceptional nature of framing a constitution as a drafting task. So, why not simply adopt a rule that where an interpretive issue poses the incongruity problem, original understanding always prevails?

There are two reasons why this solution is not available. The first is that adopting an overriding presumption in favor of original understanding is in tension with the semantic fixation

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[48] Robert M. Bloom & Eliza S. Walker, *Rules and Standards in Justice Scalia's Fourth Amendment*, 55 U. RICH. L. REV. 713, 713–14 (2021).

thesis. Semantic fixation is a general thesis about drafters' understanding as a source of meaning for a written law.[49] It does not differentiate between *types* of drafters on the basis of who they are or the nature of their drafting task, and there is no reason to think that it ought to apply any differently when the drafters are amenders as opposed to framers. Yet, adopting a rule that original understanding always prevails in cases of conflict implies that this is so.

The second reason why this solution must be rejected has to do with the place that formal amendment occupies within originalism. For the originalist, formal amendment is the most, or even the sole, legitimate means of updating constitutional meaning.[50]

Moreover, and perhaps more importantly, formal amendment is key to a significant line of defense of originalism against its critics.[51] A common criticism is the so-called "dead hand" argument, which complains that originalism is inconsistent with a commonplace view that the constitution's authority as a source of law resides in popular sovereignty.[52] The fact that a constitution prescribes a method for amendment provides originalism with a response to this criticism. It permits originalists to criticize non-originalist methods of interpretation that permit judges to update constitutional meaning in light of new understandings and values as an "usurpation" of popular sovereignty on the basis that this practice takes the amending power away from the people and places it in the hands of the judiciary.[53] Significantly, formal amendment also permits originalists to criticize non-originalism for being overly-focused on justifying these kinds of interpretive methods at the expense of developing better and more effective amendment processes, when even most non-originalists accept that judicial "updating" is only ever a second-best method of constitutional change.[54]

For these reasons, originalism cannot eliminate the incongruity problem by adopting a bright-line rule that original understanding

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49 *See generally* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015).

50 *See supra* note 9 and accompanying text.

51 *See* Lael K. Weis, *Constitutional Amendment Rules and Interpretive Fidelity to Democracy*, 38 MELB. U. L. REV. 240, 251–56 (2014).

52 *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding,* 60 B.U. L. REV. 204, 225 (1980); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 11–12 (1980).

53 *See, e.g.*, Goldsworthy, *supra* note 17, at 57–60.

54 *See* Weis, *supra* note 51, at 267–68.

always prevails.[55] Consistency with the basic commitments and concerns of originalism requires developing an approach that examines the relevance and relative weight of *both* sets of drafters' understandings as sources of constitutional meaning. These are issues that require evaluation on a case-by-case basis, having regard to the specific dimensions of particular instances of the incongruity problem, and thus necessarily involve multi-factorial and fact-specific enquiries.

B. Framing and Amending as Distinctive Constitutional Text-Producing Tasks

Having clarified why originalism requires a multi-factorial approach to address the incongruity problem, I now turn to the task of developing that strategy. The objective is to provide a set of analytical tools that can help originalism assess which drafters' understandings are relevant to amended constitutional text, and which have greater weight as a source of constitutional meaning, in circumstances where the standard theoretical resources that originalism relies upon do not provide adequate guidance. My method in pursuing this objective involves interrogating constitutional text-production activities, and proceeds from a foundational distinction between "framing" and "amending" *as tasks of constitutional text-production*. It is worth making a few initial comments about this strategy at the outset.

The first comment concerns the rationale for this strategy. Focusing on the activity of producing constitutional text reflects originalist commitments and concerns. Textualism and semantic fixation are both grounded in assumptions about the production of constitutional text—for example, that the text has drafters, and that the drafters intended to communicate something through producing text—that are key to the privileged status of the constitutional text and its drafting context as sources of constitutional meaning. Focusing on the drafting task is therefore apt to produce evaluative criteria that are consistent with originalism and that reflect its central concerns. Generating criteria based on factors external to the drafting task, by contrast, risks ferrying in assumptions about constitutional meaning that are inconsistent with originalism. But to be clear: the approach developed here cannot be derived originalism's basic commitments. As emphasized at the outset, the incongruity problem exists in a

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[55] This might nevertheless be defended as a method of judicial restraint. That would be a different kind of argument, however. As discussed at the outset, although originalism is sometimes defended as a method of judicial restraint, the focus of this Article is on originalism as a theory of constitutional meaning.

space where the resources derivable from those commitments run out, and in this respect requires a novel approach.

The second comment concerns the distinction between "framing" and "amending" that the analysis relies upon. For the purpose of drawing this distinction, the discussion focuses on central cases. In doing so, I do not deny the reality or possibility of exceptional cases that fall outside of the conceptual core. Indeed, I will ultimately argue that an important feature of the originalist approach to amendment developed here is its power to deal with exceptional cases of amending in a way that does not require relying on contentious normative assumptions about "the founding" as an act of the popular will. I return to this issue in Part IV of the Article, where I consider the extent to which an originalist approach to amendment constrains the amending power.

Bearing these considerations in mind, I begin with the basic proposition that the task of *amending* a constitution is importantly different from the task of *framing* a constitution. Amending involves changing a constitution that already exists, whereas framing involves bringing one into existence.[56] Thus, by definition and focusing on central cases, amending is narrower both in its scope and in its ambitions than framing. Framing a constitution is the project of creating a fundamental framework for governance and producing a text—typically a master text, "*the* Constitution"—that is designed to do that. Amending a constitution is a more limited project in both respects. It does not seek to establish a fundamental framework for governance. Nor does it seek to rewrite and replace the entire constitutional text. Indeed, amending presupposes structural features established by a given constitution, and the constitutional text itself, as forming the background legal framework and normative system against which amendments are proposed and debated. This includes the formal amendment procedure, which authorizes changes to the constitutional text. As with other constitutionally prescribed features, the amendment procedure must be understood in terms of the fundamental framework for governance that the constitution establishes.

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[56] This distinction is basic to the definition of amendment in central works in the literature, irrespective of whether the definition focuses on substance or procedure. *See, e.g.*, ALBERT, *supra* note 9, at 76–84 (distinguishing "amendment," or exercises of the amending power that are continuous with the constitutional order as it currently exist, from "dismemberment," or exercises of the amending power that aim to create a different constitutional order); ROZNAI, *supra* note 2, at 205 (distinguishing "amending," qua exercise of secondary or delegated constituent power, from "framing" qua exercise of primary constituent power).

This distinction between "framing" and "amending" as constitutional text-producing tasks is reflected in drafting process. Framing and amending both involve "extraordinary" processes in the sense that they use methods of legal text-production that go beyond what is used in the process of producing ordinary legislation. This reflects the fact that in both cases the text being produced is constitutional text. Nevertheless, there are some significant procedural features that are characteristic of framing, but not of amendment, and that reflect the wider scope and higher stakes of creating versus amending a constitution.[57]

To begin with, the process of drafting a constitution is characteristically time-intensive and deeply deliberative. It involves sustained discussion, debate, and engagement over an extended period of time, often spanning years, as various models are considered and drafts are written, revised, and ultimately consolidated and put forward for ratification. The process of drafting a constitution is also characteristically elite-driven. Although public consultation is common (and, indeed, often critical), the framers—in the sense of those who are directly tasked with constitution-drafting—are typically not general members of the public but individuals with specialized knowledge and expertise about matters related to constitutional settlement and institutional design.[58] This includes elected legislators or

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57 The discussion that follows makes a set of generalizations that draws upon the constitution-making resources, research and documentation that are available through the Constitutional Transformation Network ("ConTransNet") and the International Institute for Democracy and Electoral Assistance ("International IDEA"), two of the leading networks for the global transmission of information about constitution making. *See Constitutional Beginnings*, CONST. TRANSFORMATION NETWORK, http://law.unimelb.edu.au/__data/assets/pdf_file/0005/2903693/MF-Constitutional-INSIGHT-01-Constitutional-beginnings.pdf [http://perma.cc/Z6Z4-UQV3]; *Constitution-Building in States with Territorial Based Social Conflict,* CONST. TRANSFORMATION NETWORK, http://law.unimelb.edu.au/__data/assets/pdf_file/0006/2508963/Constitution-Building-in-States-with-Territorially-based-Societal-Conflict.pdf [http://perma.cc/67R9-FCNQ]; Dinesha Samararatne*, Direct Public Participation in Constitution-Making,* CONST. TRANSFORMATION NETWORK, http://law.unimelb.edu.au/__data/assets/pdf_file/0006/3037974/Policy-Brief-1-19-PublicParticipation.pdf [http://perma.cc/8RZM-NA6M]; *From Big Bang to Incrementalism: Choices and Challenges in Constitution Building*, CONST. TRANSFORMATION NETWORK, http://law.unimelb.edu.au/constitutional-transformations/MF/melbourne-forum-2017/interim-report [http://perma.cc/2RSD-8PEA]; *Implications of Culture for Constitution Building*, CONST. TRANSFORMATION NETWORK, http://law.unimelb.edu.au/constitutional-transformations/MF/melbourne-forum-2018/melbourne-forum-2018-final-report [http://perma.cc/4QCA-SVZ9]; *Constitutional Amendment Procedures*, INT'L IDEA, http://www.idea.int/sites/default/files/publications/constitutional-amendment-procedures-primer.pdf [http://perma.cc/WZ6W-2R56]; *Constitutional Beginnings: Making and Amending Constitutions*, INT'L IDEA, http://www.idea.int/sites/default/files/publications/constitutional-beginnings-making-amending-constitutions.pdf [http:// perma.cc/F8HM-DQND].

58 Examples of direct popular involvement in drafting new constitutions or major constitutional reforms are the exception rather than the rule—and arguably an exception that proves the rule. For example, see *infra* note 109 for a discussion of Iceland's recent

parliamentarians and members of the government; other political and community leaders; experienced lawyers, judges, and other legal experts; and members of the academy or other learned professions. Increasingly, constitution-making also involves participation by international experts with specialized knowledge about constitutions and constitutional design, including international non-governmental organizations (NGOs) with a focus on democracy-building and peace-keeping.[59] The process of constitution-drafting also commonly includes mechanisms for public input and consultation. However, these are often deployed after substantial drafting has taken place and used for the purpose of educating members of the general public about proposals, getting feedback about proposals, and generating support and buy-in (even where popular ratification is not formally required).

Amendment procedure and practice are far more variable. Formal amendment procedures do not, as a general matter, require the same degree of time-intensive and focused deliberation for drafting proposed changes to the constitutional text. This is not to deny that drafting an amendment can be, and sometimes is, more demanding in these ways—particularly where the subject matter is complicated or contentious. In comparison to drafting a constitution, however, it is fair to say that the level and form of engagement are in general less time and deliberation-intensive in ways that reflect the narrower scope and lower stakes of amendment. Similarly, although amendment is also frequently elite-driven in that amendment processes typically require legislative proposal and rely upon established organs of government and government-convened expert panels, there are important differences in degree. In general, the amendment process is less constrained by demands for the kinds of specialized knowledge and expertise that are characteristically required for framing. Moreover, here too there is great variation. Sometimes substantial efforts are made to engage the public at early stages of proposal and drafting, especially where the subject matter of the amendment concerns

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"crowdsourcing" experiment. Following the failure to ratify the amendment proposal produced by the Constitutional Council on that occasion, Iceland is now pursuing a Parliament-driven amendment track to achieve the desired constitutional reforms. *See* Alexander Hudson, *Will Iceland Get a New Constitution? A New Revision Process Is Taking Shape,* I-CONNECT: BLOG OF THE INT'L J. CONST. L. (Oct. 23, 2018), http://www.iconnectblog.com/2018/10/will-iceland-get-a-new-constitution-a-new-revision-process-is-taking-shape [http://perma.cc/EQ5T-2APR].

[59] *See* Cheryl Saunders, *International Involvement in Constitution Making, in* COMPARATIVE CONSTITUTION MAKING 81 (David Landau & Hanna Lerner eds., 2019).

matters of public consciousness, national identity, or social morality.[60] However, it is also the case that efforts to engage the public are sometimes very limited, occurring only after drafting has taken place and primarily utilized to inform the public (or to rally support, where popular approval is needed).[61]

Stepping back from the discussion so far, we can make two key observations about the import of the distinction between "framing" and "amending" for originalism, in light of the theory's commitment to textualism and semantic fixation. The first observation is that there is an important sense in which it appears that original understanding ought to be regarded as the *more basic* source of constitutional meaning. This has to do with the distinctive character of framing as an act of constitutional text-production. Framing involves drafting a master text that can serve as a framework for effective and good governance. Accordingly, the understanding of the drafters who in fact undertook that task (the framers) provides a more holistic and more complete picture of the overall constitutional design, and of what textual and structural features were designed to achieve, than the understandings of those who make changes to the constitution from time to time (the amenders). Indeed, original understanding forms the point of departure for proposing and drafting changes to the constitutional text. Original understanding can therefore be said to pervade the constitutional text as a source of meaning in a way that amending understandings do not.

The second observation is that there is a significant *normative dimension* to these distinctive drafting tasks. The different character of each task—both in terms of scale and subject matter—call for a different manner and form of engagement, which is reflected in the different procedures that

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60 The recent constitutional amendment repealing the prohibition on abortion in Ireland, which utilized a Citizen's Assembly composed of ninety-nine randomly-selected members of the public, provides such an example. *See* Erika Arban & Tom Gerald Daly, *Editorial—Debate Symposium: 'The Citizens' Assembly in Ireland: A Successful Experiment in Deliberative Democracy?"*, IACL-AIDC BLOG (Nov. 19, 2018), http://blog-iacl-aidc.org/debate-the-citizens-assembly-in-ireland/2018/11/19/editorial-debate-symposium-the-citizens-assembly-in-ireland-a-successful-experiment-in-deliberative-democracy [http://perma.cc/AW7W-YHGG] (blog symposium describing the process and providing critical commentary).

61 This describes standard amendment practice in Australia. Although a popular referendum is constitutionally required for ratification, and voting in a referendum is compulsory for all eligible electors, there has been little effort to meaningfully engage the public on the substantive proposal for constitutional reform. *See generally* GEORGE WILLIAMS & DAVID HUME, PEOPLE POWER: THE HISTORY AND FUTURE OF THE REFERENDUM IN AUSTRALIA (2010). *But see* discussion *infra* Section III.B.2.b. (discussing the 1967 amendment as a notable exception).

they utilize. They have different timelines, involve different degrees of deliberation and engagement, and draw upon different forms of knowledge and expertise. The characteristic procedural features of drafting a constitution reflect the gravity of the drafting task. Framing demands a higher-degree of focused deliberation and debate, and more technical and lawyerly forms of expertise, and as a consequence, framing has a longer timeline and is more heavily elite-driven. By contrast, while generally less demanding in these ways, the procedural features of proposing and drafting amendments are otherwise highly variable. Importantly, at least *some* of that variation—particularly in degree of deliberation and engagement, and in forms of knowledge and expertise—appears to reflect the variable character of amendment topics and types. Although amending is in general narrower in scope and lower in stakes than framing, there is a wide array of issues that might be addressed and objectives that might be sought in amending a constitution.[62]

These two observations—the first about *the more basic status of original understanding*, and the second about *the normative dimensions of drafting tasks*—have important consequences for an originalist approach to amendment; or so I now want to suggest. In particular, I want to suggest that they ought to bear on the assessment of the relevance and relative weight of competing drafters' understandings in cases of amendment that present the incongruity problem. Taken together, they provide an analytical structure for assessing relevance and relative weight, and they help identify factors closely related to the drafting task that require evaluation in making those assessments. I consider these issues in turn in the remainder of this section.

Before proceeding, it is important to recall that the method of analysis developed below applies only in those circumstances, identified in Part II, where the incongruity problem arises. That is, it applies only where: (i) there is a conflict or mismatch between drafters' understandings, and (ii) the amended text does not clearly convey how amenders' understanding is meant to "fit" with original understanding. As we have seen, in many cases of amendment the incongruity problem simply does not arise: either because the amendment clearly overrides original understanding,

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62 Indeed, many constitutions differentiate "higher" versus "lower" stakes issues by prescribing different procedural requirements for amending different aspects of the constitution, and in some cases forbidding amendment altogether—or else making amendment so difficult that it is practically impossible. *See* ALBERT, *supra* note 9, at 175–94 (discussing constitutions that prescribe different amendment procedures for different topics); *id.* at 140–49, 158–68 (discussing "codified" and "constructive" unamendability).

or because it is consistent with original understanding. The other essential component of the overall originalist approach to amendment offered in this Article therefore consists of a threshold determination about whether an interpretive issue poses the incongruity problem at all.

1. Analytical Structure: Establishing the Relevance of Drafters' Understandings

The analytical structure of the proposed originalist strategy for addressing the incongruity problem is derived from the more basic status of original understanding as a source of constitutional meaning. As suggested above, there is a sense in which original understanding pervades the constitutional text. Another way to think of this is in terms of "constitutional identity." For originalism, the relevant conception of constitutional identity lies in constitutional text and structure and is bounded by considerations drawn from drafting context.[63] It excludes broader considerations, such as evolving popular understandings of constitutional language and extra-legal functions of the constitution in social culture, that are incompatible with originalism as a theory of constitutional meaning. In this respect, it is a relatively "thin" conception of constitutional identity.[64] The framing creates that identity through its constitutional text-production activity, which establishes the overall design, structure, and features of a constitution that make it that particular constitution. As such, where the incongruity problem arises, *original understanding* will always be relevant to interpretation. This follows from semantic fixation: by definition, the incongruity problem only concerns cases of amendment where textual changes do not obviously override original understanding.

By contrast, in at least some possible instances of the incongruity problem, the relevance of *amenders' understanding* must be independently established. Although this does not in general appear to be an issue for "gaps," a point I return to below,[65] it is a central challenge presented by "spill-overs." As

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63 *See* Diarmuid F. O'Scannlain, *The Role of the Federal Judge in the Constitutional Structure: An Originalist Perspective*, 50 SAN DIEGO L. REV. 517, 518 (2013) ("[O]riginalism speaks not just of the meaning of the Constitution's textual provisions. It speaks also of the structure established by the Constitution . . . .").

64 This can be contrasted, for instance, with the conception of constitutional identity developed by Gary Jacobsohn, who argues that constitutional identity is a function of the social and cultural role that a constitution acquires over time through practice and experience. GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY, at xii–xvi (2010).

65 *See infra* p. 380.

discussed above, spill-overs occur where amenders' understanding is said to be relevant to the meaning of *un*amended constitutional text: a proposition that is prima facie difficult to square with semantic fixation, and in any event, clearly does not follow from it. At the same time, however, it is not obvious that spill-overs can simply be dismissed as beyond the scope of the set of interpretive problems that an originalist approach to amendment must address. For, it is not difficult to imagine amendments that result in textual changes that stand in direct conflict—or at least in serious tension—with unamended text.

In such cases, it is true that semantic fixation cannot establish the relevance of amenders' understanding to the unamended text. But it cannot *rule out* its relevance either. To do so, I want to suggest, would be inconsistent with originalism's commitment to textualism, which requires a holistic approach to constitutional interpretation. Here, too, we might helpfully draw on the idea of constitutional identity. Some amendments alter basic assumptions that underlie aspects of the design, structure, and features of a constitution that make it that particular constitution. Changes to these aspects of a constitution will often inform the interpretation of many other provisions, even where the text of a given provision is unchanged by the amendment. In such circumstances, originalism therefore must at least consider amenders' understanding as a possible source of constitutional meaning. It cannot simply be dismissed.

To illustrate why this is so, recall the example of the Nineteenth Amendment to the U.S. Constitution, discussed above. The Nineteenth Amendment did not delete the reference to "male citizens" in Section 2 of the Fourteenth Amendment. Nevertheless, it is in direct conflict with the underlying assumption of Section 2, namely, that it is constitutionally permissible to exclude women from the electoral franchise. That is by design: on any plausible view of the Nineteenth Amendment, the object of the amendment was to make this constitutionally impermissible. Viewed in this way, amenders' understanding is clearly relevant. Indeed, if this were a case of ordinary statutory interpretation, we would say that it presents an example of an implied repeal, meaning that, despite the absence of textual changes to Section 2 of the Fourteenth Amendment, the provision must be read as if the Nineteenth Amendment deleted the reference to "male."

Here, one might interject to suggest that originalism adopt the same approach to constitutional amendment. This must be resisted, however. For one thing, implied repeal only provides clear answers when there is an obvious contradiction (as in the

example) and is thus likely to be of limited assistance. But, there is a more important reason why this move is unavailable. The doctrine of implied repeal is governed by the principle of legislative supremacy, which prohibits a sitting legislature from binding subsequent legislatures.[66] Legislative supremacy is a normative principle that governs the activity of producing ordinary legislation and is based on the proposition that differently composed legislatures elected and convened at different times are equal in status.[67] As we have seen, however, another set of normative considerations governs the activity of producing constitutional text. One consequence of those considerations is that original understanding is a more basic source of constitutional meaning than amenders' understanding. In this respect, they are *not* equal in status. The doctrine of implied repeal therefore cannot simply be imported into the constitutional context to assist originalism with the incongruity problem.

Even so, the analogy to implied repeal is useful for present purposes because it helps demonstrate why semantic fixation cannot rule out amenders' understanding in the kinds of cases we are imagining. Originalism is not only committed to semantic fixation but also to textualism, and it is an imperative of textualism that constitutions, like statutes, are to be read as a "whole."[68] Textualism is not "literalism" in that textualism requires "reasonable," rather than "strict" construction, meaning that structural and contextual features of the legal text being interpreted must be given due weight.[69] Provisions must not be interpreted in isolation from each other, and later provisions that come into conflict with earlier provisions must be given full effect, meaning that they must be confronted head-on.

It follows from the textualist imperative for interpretive holism that amenders' understanding ought to be regarded as *a possible source* of constitutional meaning for a provision, even where its original text is unchanged, when it is evident from the amendment's text and drafting context that changing the

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66 *See* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283 (1989); JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES 226–28 (2010).

67 *See id.*

68 Importantly, however, this is a modest constitutional holism that is tempered by semantic fixation, and thus, should not be confused with the more ambitious constitutional holism associated with Akhil Reed Amar. *See Originalism and the Unwritten Constitution*, *supra* note 1, at 1962–65; Solum, *supra* note 3, at 107–08 (distinguishing modest holism from "organic-unity holism" and arguing that the latter is implausible as a theory of a constitutional text's communicative content).

69 *See, e.g.*, SCALIA, *supra* note 17, at 23–24.

provision's operation was among its objects. To be clear, discerning the object of an amendment is not a "holistic" evaluation of the kind associated with the "new textualism"—a set of interpretive approaches that treat the constitution as an "organic unity" or "living document." For originalism, the meaning of the constitutional text is always tied to the factual circumstances of its production: interpretive holism is therefore constrained by drafting context.[70]

The same imperative for interpretive holism applies even where the conflict is less straightforward and more indirect than in the Section 2 example. This describes the other, and more controversial, spill-over involving the Nineteenth Amendment, which has to do with the Amendment's implications for the Section 1 guarantee of equal protection. At the very least, there is a conflict where equal protection concerns voting-related matters. However, as Calabresi and Rickert point out, it is difficult to isolate voting-related matters from other matters involving civil and political rights, which suggests that the conflict may in fact be broader.[71] Here too, then, semantic fixation cannot rule out amenders' understanding as a possible source of constitutional meaning. At the same time, however, textualism does not automatically rule it in. Instead, discerning the object of amendment requires further attention to the drafting context. For, it is not obvious from the text of the Nineteenth Amendment alone that dealing more broadly with the equality of women was among its objects. If it was not, then bringing amenders' understanding to bear on the interpretation of the equal protection clause would be inconsistent with an originalist approach.

What about gaps? The discussion so far has focused on the special problem of establishing the relevance of amenders' understanding that arises in the case of spill-overs. As noted at the outset, this issue does not in general appear to arise for gaps because they are instances of the incongruity problem where the text being interpreted has been changed by amendment. Accordingly, the relevance of amenders' understanding can be established in the usual way via semantic fixation.

Even so, one might query whether there are examples involving minor textual changes that raise a possible issue of

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70 It is on this basis that Larry Solum argues that the kind of "organic holism" associated with Akhil Reed Amar is inconsistent with originalism. *See Originalism and the Unwritten Constitution*, *supra* note 1, at 1971–72.

71 *See* Calabresi & Rickert, *supra* note 36, at 11–12, 66–67.

relevance. For instance, this is one way of understanding the High Court of Australia's approach in the *Kartinyeri* case, discussed above, where the amendment to Section 51(xxvi) was characterized as a "bare deletion."[72] Qua bare deletion, one might argue—as several High Court judges and prominent originalist commentators did[73]—that amenders' understanding is irrelevant because the amendment produced no text at all. This reasoning is dubious, however. For, it is equally plausible to characterize the amendment as producing a new version of Section 51(xxvi) by re-drafting and enacting a revised version of the original text. On this view, the amendment produced a full replacement, not a bare deletion. Deciding between these two views cannot be neatly resolved by drawing on semantic fixation or by considering the text in isolation from drafting context. Here, too, it is necessary to discern the object of amendment.

In summary, then, where the relevance of amenders' understanding to the interpretive problem cannot be established in the usual way through semantic fixation—either because there is no change to the text being interpreted, or because the textual changes are relatively minor, making semantic fixation alone a controversial basis for establishing its relevance—then it is necessary to make a judgment about the object of amendment. Was the Nineteenth Amendment to the U.S. Constitution designed solely for the purpose of making it constitutionally impermissible to exclude women from the electoral franchise, or was it designed to go further, requiring the equal protection of women in relation to other matters? Was the 1967 amendment to the Australian Constitution designed to expand Commonwealth power to enact racially discriminatory laws to a different category of people, or was it designed for the more limited purpose of conferring power to enact legislation for the benefit and advancement of Aboriginal people?

As we shall see, these lines of enquiry concerning the object of amendment are also needed to evaluate the relative weight of drafters' understanding and are taken up again below. It should be emphasized, however, that the purpose of this Article is not to reach a firm position on what substantive conclusions an originalist would be likely to reach in relation to either example. The aim is to identify the concrete issues that an originalist would need to examine in order to address the conflict between

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72 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 363 (Austl.).

73 *See id.* at 363, 383; Jeffrey Goldsworthy, *Interpreting the* Constitution *in Its Second Century*, 24 MELB. U. L. REV. 677, 701–04 (2000).

drafters' understandings in instances of the incongruity problem. Analysis of the examples and any conclusions reached are included to illustrate how to apply the proposed approach.

Answering these questions evidently requires careful attention to the drafting context, which is to say, a historically embedded investigation linking the text produced with the activity of text production. For present purposes, the important thing to see is that this relies on the same kinds of extrinsic sources that originalists currently use to discern framers' understanding. This includes materials that provide evidence about the campaign for constitutional change leading to the formal proposal, records of the debates during the proposal and drafting stages, and documents containing information produced and circulated to inform and persuade the public during the ratification stage. In this respect, the kinds of enquiries required to discern the object of amendment are part and parcel of standard originalist approaches to constitutional interpretation: here, brought to bear on the distinctive task of amending (as opposed to framing) as a constitutional-text production activity.

2. Addressing the Conflict: Evaluating the Relative Weight of Amenders' Understanding

As developed so far, we have seen that the originalist approach to amendment being proposed is structured by a presumption that original understanding prevails, unless it is overridden by amenders' understanding. This presumption places an *interpretive constraint* on what an amendment can achieve in the absence of a clear and express intention to override original understanding that is manifest in the resulting constitutional text. Where the resulting text is unclear, and where there is a conflict between drafters' understandings, the incongruity problem arises. The analysis then proceeds by examining the *relevance* and *relative weight* of amenders' understanding as a source of constitutional meaning. As discussed, original understanding is always relevant given its status as a more basic source of meaning, and in many (and perhaps most) instances of the incongruity problem, the relevance of amenders' understanding is straightforward. In at least some cases, however, it will be controversial. Here, establishing the relevance of amenders' understanding requires discerning the object of the amendment.

This section provides the final component of the proposed approach, which is a method of evaluating which set of drafters' understandings ought to prevail. The proposed method is a method of "weighing." The factors used to assign "weight" to drafters' understandings involve considerations that are germane

to originalism and its emphasis on the constitution as a legal text. However, while consistent with originalism, the proposed factors go beyond the usual theoretical resources found within the theory and are neither reducible to, nor derivable from, originalism's basic commitments. They involve a wider set of concerns that attend the activity of constitutional text production and are drawn from the observation—which emerged from the discussion in Part III, Section B—that there are *normative dimensions* of the drafting process that is characteristically used to frame a constitution and that importantly distinguish that task from amending one.

The key normative consideration in play is "suitability," used here in the normatively-loaded sense of "propriety" or "fitness," rather than a mere "means-end" connection. The question is whether the *drafting process*—that is, the procedure used to produce the text—is well-suited to the *drafting task*—that is, the nature of the constitutional text-producing activity—having regard to both the subject matter and the object of amendment. There are two central propositions which are derived from the exceptional character of framing as a drafting task. Stated in their most basic terms, they are: (1) the more closely that the drafting task presented by the amendment falls *within* the core drafting tasks involved in framing the constitution ("the core"), the stronger the presumption in favor of original understanding; and (2) as a corollary, the greater the degree to which the drafting task involved in amending falls *outside* the core drafting tasks that were involved in framing ("the periphery"), the weaker the presumption in favor of original understanding.

When the presumption in favor of original understanding is strong, it can be overridden only where the process of amending approximates those features characteristically associated with framing and that speak to the status of original understanding as the more basic source of constitutional meaning. By contrast, when this presumption is weak, amenders' understanding will override original understanding so long as the process used to amend the constitution was suitable for the specific drafting task.

As a matter of constitutional interpretation then, determining which set of drafters' understandings prevails in cases of amendment that pose the incongruity problem requires two sets of enquiries into the amendment's drafting context: one corresponding to the drafting task, and the other corresponding to the drafting process. However, as we have seen, amending is highly variable in its scope, subject matter, and procedure. Accordingly, the analysis will always be case-specific, meaning that it must be conducted in light of the specific amendment, the

constitution being interpreted, and the particularities of the activities that were in fact involved in the specific act of constitutional text production. As such, it is not possible—nor indeed wise—to attempt to canvas all of the possibilities. The discussion that follows will therefore focus on identifying key factors that fall within each set of enquiries, while indicating some possible permutations by way of illustration. The discussion will also draw on the "gap" and "spill-over" examples that we have been considering to make this analysis more concrete.

a. Drafting Task: "the core" vs "the periphery"

The first set of enquiries concerns the nature of the drafting task. The emphasis here is on the object of the amendment in relation to the design and structure of the relevant constitution as it was originally enacted. In other words, what were the textual changes brought about by the amendment *designed to do*? In this respect, the enquiries required here overlap with the enquiries needed to establish the relevance of amenders' understanding in cases where it is controversial. As such, both sets of enquiries require discerning the object of the amendment. However, the focal point here differs: the concern is with the extent to which the amendment falls within the set of concerns at the core of the framing as a drafting task ("the core"). In other words, it is not simply the object of the amendment that matters but *the relationship* between the object and the core.

The concept of "the core" is closely connected to the idea of constitutional identity discussed above.[74] It includes only those elements that are essential to constitutional design and structure, and without which, a given constitution would fail to be that particular constitution. Consistent with originalism's basic commitments and concerns, those elements must be discernible from the constitution's text and structure and must also be supported by its drafting history. Determining which aspects of a constitution fall within the core will therefore depend upon the specific constitution being interpreted. At the same time, the core ought to be defined at a relatively high level of abstraction, which is to say, it should not generally be thought to concern details such as the practical operation or application of provisions, unless there is evidence that these were crucial aspects of the framing project or otherwise essential to constitutional settlement.

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74 *See* discussion *supra* Section III.B.1.

By way of illustration, the core ought to encompass basic features such as:

1. *The horizontal separation of powers:* for example, the degree to which a constitution subscribes to a strict separation of legislative and executive power, and how a constitution conceives of judicial power, including the scope of judicial power to review legislative and executive power.
2. *The vertical distribution of powers*: for example, the degree to which a constitution subscribes to federalism or other forms of subsidiarity versus a unified or centralized distribution of powers.
3. *Limitations or constraints on powers*: for example, specific topic or subject matter requirements needed to enliven legislative power, as well as requirements for the legislative supervision of executive power, rights and other guarantees.

Each of these broad categories of general features is evidently referable to various specific aspects of constitutional text and structure that can be described at different levels of abstraction. Determining which of these aspects ought to be regarded as within the core of a given constitution, and at what level of description, will require situating them within the context of the framing. Thus, although the identification of a constitution's core is a novel enquiry in the sense that it is not found within the standard originalist repertoire, it nevertheless relies upon well-established originalist methods.

For instance, drawing on the examples that we have been using, it is uncontroversial that federalism is a fundamental aspect of both the U.S. Constitution and the Australian Constitution. A prominent textual and structural feature of both constitutions is the distribution of legislative power between a national government and constituent states through the enumeration of specific topics that fall within the (mainly) non-exclusive competency of the former. Moreover, the creation of a federal system in order to better coordinate activities among existing states, constituted as self-governing entities, that pre-dated the founding was the central drafting task involved in the framing of both constitutions. It thus seems uncontroversial to say that federalism and the federal distribution of legislative power, achieved in the manner just described, fall within the core of both constitutions. Notice, however, that whether the specific enumerated topics of federal legislative power have a similar status is an open question. For example,

ensuring federal legislative power to regulate interstate trade and commerce was critical to both framing projects.[75] But the inclusion or exclusion of other topics may be debatable; a point that is discussed further below in relation to the specifics of our "gap" example.

Bearing these general considerations in mind, the task for the interpreter is to determine whether or not the amendment falls within the core. Although constitutional amendment is necessarily narrower in scope than framing, it may nevertheless fall within the core. For instance, it is uncontroversial that the object of the Fourteenth Amendment to the U.S. Constitution was to alter the distribution of powers between the national government and the states.[76] In this respect, it is exemplary of an amendment that falls within the core: indeed, it is for this reason that its drafting and ratification are often referred to in terms of "framing." Notice, however, that while the Fourteenth Amendment poses an array of questions about how the new distribution of powers it was designed to bring about ought to be understood, these are questions about how to interpret the Fourteenth Amendment in light of amenders' understanding. They are not questions about which set of drafters' understandings ought to prevail because the amendment clearly overrides original understanding. The example thus serves as an important reminder that not all instances of amendment—even those that fall within the core—give rise to the incongruity problem.

Amending also commonly concerns topics that are peripheral to the framing, in the sense that they do not fall within the set of concerns that defined the framing as a drafting task ("the periphery"). There are a variety of reasons why this may be so. For instance, perhaps the framers simply did not consider (or could not have considered) the issue. Or, perhaps it was left to be dealt with in other ways (e.g., through ordinary legislation). Or perhaps it was deferred to future generations. It bears emphasis that, in making this determination, whether or not a constitution addresses a topic is not conclusive. A constitution's silence on a topic may indicate that it falls within the periphery, but not necessarily so: it matters *why* the constitution is silent about the topic. Similarly, the fact that a constitution addresses a topic does not necessarily mean that it falls within the core: it matters *how* the constitution addresses the topic. In general, then, unless the topic of amendment concerns a prominent structural feature that is linked to constitutional identity, it will typically be

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75 *See* U.S. CONST. art. I, §8, cl. 3; *Australian Constitution* s 51(i).
76 *See* U.S. CONST. amend. XIV.

necessary to consult the body of evidentiary materials available to provide a contextual picture of the framing as a drafting task.

This leads to an important point of clarification. The foregoing discussion may give the impression that the distinction between the core and the periphery lends itself to a binary, "either-or" classification. Although some amendments may be classifiable in this way, this straightforward kind of classification is clearly not possible in all cases. The object of many amendments is more nuanced in relation to the framing project. Accordingly, while it is helpful to present the distinction in a binary way for exegetical purposes, it is more accurate to think of constitutional amendments as posing an array of drafting tasks that fall along a continuum. At one end of the continuum, there are amendments that would result in a different constitution altogether, as compared to the one produced by the framing. At the other end, there are amendments that have no relation to the central topics of the framing project at all. The nature of the determination required at this stage is therefore better regarded as one of *relative proximity* to the core versus the periphery.

To make this more concrete, it will be helpful once again to draw on our two examples. I will begin with the 1967 amendment to section 51(xxvi) of the Australian Constitution, which is more straightforward.[77] Recall that this amendment modified an existing topic of federal legislative power, extending the power to legislate with respect to "the people of any race" to Aboriginal peoples. As discussed in Part II, Section B, the object of the amendment is uncontroversial if consideration is given to its drafting context: it was clearly designed to ensure that the Commonwealth Parliament could enact legislative measures for the advancement of Aboriginal peoples.[78]

Evidentiary materials from all stages of the amendment process support this view.[79] This includes Hansard and other materials from Parliamentary discussion and debate of the proposal, informational materials circulated to members of the public ahead of ratification (which in Australia involves a referendum where voting is compulsory for all eligible electors),[80]

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77 *Australian Constitution* s 51(xxvi).

78 *See* discussion *supra* Section II.B.1.

79 *See* WILLIAMS & HUME, *supra* note 61, at 140–45; *see also Kartinyeri v Commonwealth* (1998) 195 CLR 337, 404–09 (Austl.).

80 *See Australian Constitution* s 128 ("The proposed law [for the alteration of the Constitution] shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives."); *Referendum (Machinery Provisions) Act 1984* (Cth) s 45(1) (Austl.) ("It is the duty of every elector to

and materials documenting the referendum campaign itself. This view is also supported by the text and structure of the amendment proposal, having regard to the proposal as a whole. In addition to expanding Commonwealth legislative power, the 1967 amendment removed section 127.[81] Section 127 had stated that "aboriginal natives shall not be counted" for a variety of purposes for which the Constitution uses population numbers[82]—including, significantly, the number of representatives that a State is entitled to in the lower house—and was widely perceived to be racist. The referendum campaign, which had unanimous support from the government and opposition, was run on the basis that *both amendments* were required to advance the cause of Aboriginal Australians.[83]

At the same time, however, we have seen that the resulting textual change to section 51(xxvi) does not expressly prohibit discriminatory legislation.[84] This is precisely what gives rise to the incongruity problem: there is a "gap" between the amenders' understanding and the original understanding that the text does not resolve. This interpretive puzzle concerns the scope of the power to legislate with respect to Aboriginal peoples, and, in particular, whether the original understanding of the power's scope (which would extend it to discriminatory laws) or the amenders' understanding (which would limit it to beneficial laws) ought to prevail. How should *this* particular issue be regarded in relation to the core?

As discussed above, federalism and the enumeration of topics of federal legislative power are clearly part of the core. It is unclear, however, whether the enumeration of *this* particular subject matter is properly regarded as more proximate to the core than to the periphery. Supporting such a conclusion on an originalist approach would require demonstrating that the issue was a significant aspect of the federal distribution of legislative power contemplated by the framing project in the same way—as noted above—that the power to regulate interstate trade and commerce was so regarded.

Existing scholarship examining historical materials from the time of the framing casts doubt on this proposition. Although there was some discussion in the Convention Debates concerning

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vote at a referendum.").

81 *See* WILLIAMS & HUME, *supra* note 61, at 141.

82 *See* Sawer, *supra* note 28, at 25–26.

83 *See* WILLIAMS & HUME, *supra* note 61, at 140–41.

84 *See Australian Constitution* s 51(xxvi).

whether the race power ought to be exclusive to the Commonwealth or concurrent with the States, there was no discussion of the reservation of Aboriginal matters exclusively to the States.[85] This suggests that the topic was neither critical to federation in terms of its place within the overall design, nor a matter of contention that was needed to secure constitutional settlement.[86] Moreover, commentators have observed that the power of the Commonwealth to enact laws discriminating against racial groups *other than* Aboriginal peoples was overdetermined by design, as several other enumerated topics of federal legislative power could be used for this purpose.[87] This observation suggests that section 51(xxvi) was designed to supplement related subjects of federal legislative power—such as the power to regulate migration and foreign nationals—rather than to effect a vertical distribution of legislative power that was critical to the federation project.[88]

Drawing on the foregoing considerations, the drafting task involved in the 1967 amendment to section 51(xxvi) thus appears to be better regarded as more proximate to the periphery than to the core. This means that the presumption in favor of original understanding is weak: it will be overridden by amenders' understanding so long as the drafting process involved in amending was well-suited to the drafting task, which is the second step in the analysis and taken up below.

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85 *See* French, *supra* note 28, at 182–83; Sawer, *supra* note 28, at 18. Geoffrey Sawer suggests that the lack of consideration of the issue may have to do with the fact that the only the States had mainland territory at the time of the framing; as a result, the framers may have simply regarded matters concerning Aboriginal peoples as within the range of other matters, such as land settlement, that were generally thought to fall within their general competency. *Id.* at 17.

86 As former High Court Chief Justice Robert French observed, indigenous peoples appear to be "irrelevan[t]" to the original understanding of the race power. French, *supra* note 28, at 185. Geoffrey Sawer takes a similar position, suggesting that the reservation from the original grant of power would not have prevented the Commonwealth from regulating Aboriginal affairs indirectly, through other grants of legislative power. *See* Sawer, *supra* note 28, at 24. In this respect, section 51(xxvi) can be contrasted with reservations in other grants of legislative power that are said to prevent the Commonwealth from legislating on that topic indirectly on the basis that they were expressly reserved to the States. Reservations of this kind are treated as essential terms of the federal compact and were the subject of discussion during the Convention Debates. *See, e.g.*, NICHOLAS ARONEY, THE CONSTITUTION OF A FEDERAL COMMONWEALTH: THE MAKING AND MEANING OF THE AUSTRALIAN CONSTITUTION 279–80 (2009) (discussing the granting to the Commonwealth Parliament the power to legislate "with respect to banking *other than state banking*").

87 This includes: section 51(xix) naturalization and aliens; section 51(xxvii) immigration and emigration; section 51(xxviii) the influx of criminals; section 51(xxix) external affairs. Notably, the latter three topics of federal legislative power are listed immediately following the race power in section 51. *Australian Constitution* s 51.

88 *See* French, *supra* note 28, at 181–86; Sawer, *supra* note 28, at 19–23.

Turning to our second example, how should the drafting task involved in producing the Nineteenth Amendment to the U.S. Constitution be viewed in relation to the core? Recall that the interpretive issue that we are interested in concerns the possible intersection of the Nineteenth Amendment with the Fourteenth Amendment's Equal Protection Clause (i.e., not with the Constitution as originally enacted). As discussed above, this issue only arises if the object of the amendment is plausibly viewed as guaranteeing the equal status of women as citizens. This view is not uncontested, however. On another view, its object is more narrowly confined to women's voting rights.

The narrow view is consistent with the text of the amendment, which only addresses the right to vote. However, discerning the object of an amendment is a contextual enquiry: it is not confined to its text, but requires careful examination of the available evidentiary materials that supply information about the drafting context. Existing scholarship on the Nineteenth Amendment that engages in depth with these materials, and perhaps most notably the work of Reva B. Siegel, supports the broader view.[89] As documented by Siegel, historical materials indicate that the failure of the Fourteenth Amendment to adequately deal with the "woman question" was a driving force in the campaign for the Nineteenth Amendment.[90] Moreover, historical materials show that proponents and opponents of the amendment alike understood voting as an issue about the status of women as citizens: voting was then regarded as a privilege (and not a right) of citizenship that required independence of thought and political judgment, qualities that opponents of the amendment thought that women lacked, thus making them unequal in status to adult male citizens.[91]

For the purpose of illustrating how the proposed approach would apply, we will accept the wider view. Thus understood, does the drafting task fall within the core? For the purposes of identifying "the core," the relevant framing that we are interested in here concerns Reconstruction.[92] The central project

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89 *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 949 (2002).

90 *See id.* at 974–75.

91 *See id.* at 979–80.

92 In *Leser v. Garnett*, the U.S. Supreme Court considered and rejected a challenge to the Nineteenth Amendment that was brought on the basis that it exceeded the Article V amending power. 258 U.S. 130, 136 (1922). Specifically, the Nineteenth Amendment was alleged to be inconsistent with the Article V guarantee that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." *See id.*; U.S. CONST. art. V. The essence of the argument was that prohibiting states from excluding women from the

of Reconstruction, understood as a "framing," concerned the abolition of slavery, racial equality, and a corresponding reallocation of legislative power between the federal government and the States.[93] The conventional and widely-accepted view of Reconstruction is that dealing with sexual inequality and the political rights of women were not among its objects.[94] Although there does not appear to have been consensus among the framers as to whether the equal protection clause did or could be extended to sex discrimination,[95] historical evidence supports the view that the framers of the Reconstruction amendments rejected suffragists' calls to address women's political rights, and women's suffrage in particular, either because they thought women were unfit for such rights (and therefore would not support the amendment on that basis), or else due to strategic concerns that broadening the scope of the amendments in this way defeat the proposal.[96] As a result, the amendments did not explicitly address sexual inequality beyond the implication, from reference to "male" in Section 2 of the Fourteenth Amendment, that excluding adult women from the electoral franchise remained permissible. Ensuring that the States could continue to treat women as unequal in status as citizens in this way was not important for the project of Reconstruction, however: use of the term "male" to qualify "citizens" reflected widely shared assumptions at the time, but the issue of women's status as citizens did not fall within Reconstruction's central concerns.[97]

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electoral franchise would result in newly constituted and therefore differently "represented" states in contravention of the Article V guarantee. *See Garnett*, 258 U.S. at 136. Although there is a sense in which the issue presented goes to the intersection of the Nineteenth Amendment with the "core," it does not present the kind of interpretive problem we are interested in here: it is an issue about how to interpret an express limitation on the amending power, and not about a possible conflict between drafters' understandings. An originalist would approach the interpretation and application of express limitations on the scope of amendment in usual way.

93 *See* Franita Tolson, *"In Whom Is the Right of Suffrage?": The Reconstruction Acts as Sources of Constitutional Meaning*, 169 U. PA. L. REV. 2041, 2042, 2046 (2021).

94 *See* Siegel, *supra* note 89, at 954 n.14.

95 *See* Nina Morais, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 YALE L. J. 1153, 1153 (1988).

96 *See* Calabresi & Rickert, *supra* note 36, at 51 (discussing Congressional "application intentions" in relation to sex); W. William Hodes, *Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment*, 25 RUTGERS L. REV. 26, 36–38 (1970) (discussing the view ultimately taken by the amendment's framers that Reconstruction was "the 'Negro's hour'"); Morais, *supra* note 95, at 1156–58 (discussing how women's suffrage was a key point of contention for the framers of the 14th Amendment); Siegel, *supra* note 89, at 969 n.58, 970 n.60 (discussing historical works examining debates about drafting the 14th Amendment to address the "woman question").

97 *See, e.g.*, Catherine A. Jones, *Women, Gender, and the Boundaries of Reconstruction*, 8 J. CIV. WAR ERA 111, 119 (2018).

The foregoing supports the conclusion that guaranteeing the equal status of women as citizens—which we have accepted arguendo as the historically more accurate view of the object of the Nineteenth Amendment—falls within the periphery. As a result, the presumption in favor of the original understanding of the equal protection clause, while strong in relation to race, would be weak in relation to sex.

Notice that this approach would not only strengthen Calabresi and Rickert's originalist argument, but it would also avoid the need to provide a novel account of Reconstruction as concerned with eliminating all forms of caste-based discrimination, which is the aspect of their argument that has attracted the most criticism.[98] Indeed the authors' preferred characterization of Reconstruction gives the Fourteenth Amendment's drafters' understanding *greater* presumptive weight, meaning that it would be less easily overridden by the Nineteenth Amendment's drafters' understanding. Thus, while Calabresi and Rickert' novel account of Reconstruction may be an important scholarly contribution in its own right, one might query their argumentative strategy. Insofar as a central aim of their work is to demonstrate why originalists should hold that the equal protection clause extends to sex, the approach developed here suggests that making their argument about the Nineteenth Amendment the leading argument rather than a back-up argument is the better strategy. The originalist approach to amendment proposed in this Article provides the analytical tools needed to do that.

In making this point, it again bears emphasis that it is not this Article's objective to defend particular conclusions about either example, but to develop an originalist approach to amendment. Both examples illustrate that classifying an amendment along the continuum between a constitution's core and its periphery is a matter of degree and may prove contestable in some cases, particularly where there is room for debate about the object of the amendment.[99] An originalist approach to amendment cannot resolve these kinds of disputes. It can only

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98 *See, e.g.*, Balkin, *supra* note 41; Whelan, *supra* note 41.

99 It is worth noting that the two examples we have been considering concern very old constitutions, which pose special evidentiary challenges for discerning the core simply in virtue of the passage of time since the framing. An originalist approach to amendment may prove easier to apply to newer constitutions where less time has passed since the framing, at least insofar as the relevant evidentiary materials from the constitutional drafting context are more readily available and less equivocal. I return to this point in Part IV, where I discuss the implications of an originalist approach to amendment for debates about "amendability." *See* discussion *infra* Part IV.

provide a framework that will allow originalists to identify the incongruity problem with greater precision, and to address the problem with greater clarity. These are analytical tools that the theory currently lacks. The proposed distinction between the core and the periphery is germane to originalism's commitments and concerns and provides a needed focal point for establishing the strength of the presumption in favor of original understanding.

b. Drafting Process: Suitability to the Drafting Task

Once the presumptive weight of original understanding has been established, the final step in the analysis is to determine the relative weight of amenders' understanding. This requires attending to the normative dimensions of the drafting process used to produce the amendment, as a matter of its suitability to the particular task of constitutional text production. As we have seen, not all drafting tasks are equal: it is on this basis that we have distinguished framing from amending. But the same is true *within* the category of amending. Different amendments have different objectives and, as such, place different normative demands on the activity of constitutional text production. This is reflected, for instance, in the fact that many constitutions prescribe different amendment procedures for different kinds of amendments.[100] The aim of this section is to outline the considerations that would be relevant to an originalist's assessment of suitability. Here, too, the proposed method of evaluation goes beyond existing resources in originalist theory. At the same time, it is contended that the kinds of enquiries required are compatible with the theory's central commitments and concerns.

As a threshold matter, an originalist approach to amendment requires making an initial determination that the drafting process used to produce the amendment is consistent with the constitutionally prescribed amendment procedure and other formal constitutional requirements. This includes express substantive limitations on the amending power, or "unamendability" provisions.[101] Importantly, however, the evaluation of suitability cannot be confined to formal requirements but must also examine how the procedure is conducted in practice. This includes both *the persons* who are convened for the task of amending, and *their manner and form of engagement* with the

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100 Canada's extremely complicated amending formula is exemplar in this regard. *See* Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.); *see also* Kate Glover, *Hard Amendment Cases in Canada*, *in* THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT 273, 273–76 (Albert et al. eds., 2017).

101 *See* ALBERT, *supra* note 9, at 140–49; ROZNAI, *supra* note 2, at 15.

drafting task. The evaluation of suitability extends to all stages of amending: proposing, drafting, and ratifying.

Once the threshold issue has been settled, the starting point in assessing suitability picks up from where we left off in evaluating the presumptive weight of original understanding: namely, with the relative proximity of the amendment to the core versus the periphery. All other things being equal, the greater the proximity to the core, the greater the demand for a drafting process that approximates the framing. The guiding principle here is that amendments that fall within the core are higher stakes because they go to constitutional identity: a constitution's defining features, and aspects of constitutional design that were basic to the framing project. Because they are higher stakes, they demand a higher degree of focused deliberation and debate—and more technical and lawyerly forms of expertise—than amendments that fall within the periphery.

In the absence of a clear expression of intent to override original understanding, as manifest in the text produced by the amendment and supported by its drafting context, it is therefore unlikely that amenders' understanding will prevail in these circumstances. For, as discussed in Part III, Section B, the drafting procedures used in amending—although highly variable—typically do not approximate those that are characteristically associated with framing.[102] There are, however, exceptional cases where the amendment process is conducted in such a manner, often precisely *because* the subject and object of amending fall with a constitution's core. One example is the Reconstruction amendments to the U.S. Constitution, which have been variously described as an episode of constitutional law-making analogous to that of the framing.[103] Another example is the 1982 Patriation of the Canadian Constitution and adoption of the *Canadian Charter of Rights and Freedoms*, which was a major episode of constitutional law-making involving an extended period of deliberation, debate, and negotiation between the provincial and federal governments.[104]

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102 *See* discussion *supra* Section III.B.

103 *See generally* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998). The overarching ambition of Ackerman's work is to justify major constitutional changes that fall *outside* of Article V: in the case of Reconstruction, by denying Confederate states readmission to the Union until they ratified the Fourteenth Amendment. Nevertheless, Ackerman's account highlights exceptional aspects of the processes involved in drafting, proposing, and ratifying the amendments that more closely align Reconstruction with "framing" than with "amending" as an episode of constitutional law-making. *Id.*; *see also* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 389–487 (2d ed. 2005) (describing Congressional debates in the drafting, proposal, and ratification of the Reconstruction amendments).

104 Significantly, the Patriation package included a new set of amending rules, set out in Part V of the Constitution Act 1982. It bears emphasis that the characterization of

In these kinds of cases, it is possible to overcome the strong interpretive presumption in favor of original understanding. In practice, however, there is reason to think that the incongruity problem will not often arise in these circumstances. All other things being equal, one would expect the gravity of the drafting task associated with amendments of this kind, and the correspondingly more demanding drafting procedures used to bring about constitutional change, to result in greater clarity of the amendment's intended operation in relation to existing constitutional provisions than less demanding drafting procedures. The Reconstruction amendments in the United States and the Repatriation amendments in Canada are examples of this: in both cases, the amendments were clearly designed to override and displace original understanding with respect to the matters that they addressed.[105] From an originalist perspective, the interpretive problems that they have subsequently presented in relation to existing constitutional arrangements—although often challenging—have been of the ordinary variety and not instances of the incongruity problem. Which is to say, they present interpretive problems that require discerning the meaning of the text in light of drafting context but not one of the special interpretive problems posed by conflicting sets of drafters' understandings that we have been considering.

Amendments that fall within the periphery require a different starting point because they generally do not demand the kinds of procedures that are characteristically associated with framing. Moreover, given the highly variable nature of amendment, there is far greater diversity in the kinds of procedural features that could meet the requirement of suitability. Thus, the analysis here requires attending to the specific drafting task presented by the particular amendment under consideration, which is a function of its objective. If the drafting process is well-suited to the drafting task, then amenders' understanding ought to outweigh original understanding in instances of the incongruity problem.

In conducting this analysis in periphery cases, the suitability criterion should not be given an overly strict application in terms of the required "fit" between drafting task and drafting process.

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these events as a "framing" is not due to *popular* engagement in the drafting or ratification process. *See* JEREMY WEBBER, THE CONSTITUTION OF CANADA: A CONTEXTUAL ANALYSIS 42–47 (Peter Leyland et al. eds., 2015). As Richard Albert observes, "Patriation was an agreement among elites with no direct involvement from voters." ALBERT, *supra* note 9, at 167. Moreover, it should be noted that it is a characterization that has some difficulties due to Québec's rejection of the Patriation package.

105 *See, e.g.*, James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 685–86 (2016); WEBBER, *supra* note 104, at 45.

To do so would be incompatible with the role of formal amendment in originalist theory as the most (or even sole) legitimate means of updating constitutional meaning, and as foundational to the commitment to democratic values that is claimed by most originalists. Moreover, it is a feature of the proposed approach that the requirement of suitability—as with the strength of the presumption in favor of original understanding—can be calibrated to reflect the relative degree of proximity of the amendment to the core versus the periphery.[106] The proposal defended here does not take a position on how this should be worked out in practice: any such calibration would need to have regard to the specific interpretive problem and the constitutional context in which the approach is applied.

There is a wide array of variables in amendment procedure and practice that are potentially relevant to the assessment of suitability. Although it is not possible to comprehensively define these, we can nevertheless identify some key factors and possible permutations. One important factor concerns the forms of expertise and information needed to develop and evaluate an amendment proposal. This factor is predominantly concerned with the question of *who* the amenders are. Another important factor concerns the forms of engagement used in the amendment process. This factor is predominantly concerned with the question of *how* the amenders are involved. I will begin by outlining these factors, and then briefly consider how they could be applied to the examples that we have been considering.

Starting with the first factor, the types of expertise and information required for the drafting task will vary according to the subject and object of amendment. Although public support is important for the success of any major constitutional change, some amendments impose greater demands on the need for public consultation than others. For example, some amendments concern subjects that go to social understandings and values, and are designed to make changes to a constitution

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106 This is analogous to the different requirements for means-end "fit" found in standards of review that courts use to analyze the constitutional validity of rights-impairing legislation, including the system of tiered classification-based review found in the American context, as well as the forms of proportionality testing found elsewhere. Importantly, the criterion of suitability described here should not be confused with the weaker means-end connection requirement of "suitability" found in proportionality reasoning, which only requires a rational connection between means and end. Nor, however, should it be conflated with the stricter requirement of "necessity," which performs different analytical work.

so that it better reflects the people it governs.[107] Here, one would ordinarily expect substantial public consultation at the early stages of proposing and preparing the amendment, and not just at the ratification stage. An amendment process that limited public engagement to informing the public about the proposed change, without soliciting opinions or addressing concerns, would not be well-suited to the drafting task for an amendment of this kind.

Similarly, although specialized expertise is generally required to develop workable proposals for constitutional change, some amendments impose greater demands on the need for specialized expertise. For example, some amendments are designed to make technical changes or address topics that require information or knowledge not generally held by lay-people.[108] Here, substantial public consultation may be unnecessary (or even inappropriate) during the initial stages of the drafting process where various proposals are considered and prepared. An amendment process that involved direct proposals by lay-persons, without any expert analysis of the likely effects or operation of different proposals,[109] would not be well-suited to the drafting task for an amendment of this kind.

Turning to the second factor, the forms of engagement used in the amending process will predominantly be a function of the quality and quantity of deliberation and debate. For example:

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107 The recent example from Ireland described earlier, which involved the repeal of a constitutional prohibition on abortion, again provides an illustration of an amendment of this kind. *See* Arban & Daly, *supra* note 60, at 1.

108 For example, the Australian Constitution was amended in 1910 and 1928 to vary federal fiscal arrangements in relation to State debt. *See* Australian Constitution section 105; *see also* ALBERT, *supra* note 9, at 4–6 (providing examples of "routine" and "technical" amendments).

109 It should be noted that procedures of this kind are highly unusual, even for amendments that concern non-technical topics. For instance, even Iceland's recent experiment in "crowdsourcing" constitutional change had mechanisms for expert input on the technical dimensions of the Constitutional Council's proposals before putting them forward for ratification. After delivery of the Bill containing the amendment proposals to Parliament, advice was sought from Icelandic lawyers and political scientists, the Council of Europe, the Venice Commission, and local and international constitutional law experts, including leading scholars Jon Elster and Tom Ginsburg. *See* Thorvaldur Gylfason, *Democracy on Ice: A Post-Mortem of the Icelandic Constitution*, OPENDEMOCRACY (June 19, 2013), http://www.opendemocracy.net/en/can-europe-make-it/democracy-on-ice-post-mortem-of-icelandic-constitution/ [http://perma.cc/85V8-YSCY]; *see also* Ragnhildur Helgadóttir, *Which Citizens?—Participation in the Drafting of the Icelandic Constitutional Draft of 2011,* BLOG OF THE INT'L J. OF CONST. L. (Oct. 7, 2014), http://www.iconnectblog.com/2014/10/which-citizens-participation-in-the-drafting-of-the-icelandic-constitutional-draft-of-2011/ [http://perma.cc/ZSF5-XD2R].

- How much consultation occurred and over what time period?
- Were all the relevant stakeholders consulted, and how were the different stakeholders' views accommodated?
- What information about the proposed amendment was made available, in what forms, and who had access?

It would also include variables such as the degree of consensus or strength of opinion, as these too may reveal important details about the amenders' engagement with the drafting task. For example:

- What was the nature of the campaigns for and against the amendment?
- Were the purpose of the proposed amendment and the consequences of constitutional change clearly conveyed, and fairly and accurately represented?
- What was the turnout for the referendum or other ratification procedure, and by what margin did the proposal succeed?

All other things being equal, the higher the levels of informed and deliberative engagement and the greater the agreement among the amenders, the stronger the case for overriding original understanding.

Turning to the examples that we have been considering, there is a plausible case to be made that both the Nineteenth Amendment to the U.S. Constitution and the 1967 amendment to the Australian Constitution utilized processes that were well-suited to the drafting task involved in amendment. Both amendments involved changes to constitutional powers concerning the status of groups of historically marginalized persons: indigenous peoples in the case of the 1967 amendment to section 51(xxvi) of the Australian Constitution, and women in the case of the Nineteenth Amendment to the U.S. Constitution.[110] Both amendments sought to revise existing constitutional powers, liberties and responsibilities in order to better reflect contemporary social understandings and values, and to rectify outdated assumptions about the status of those groups within the body politic.[111] The nature of the drafting task in both cases of amendment is therefore such that public engagement seems both appropriate and necessary. Neither is a technical amendment, nor does either present complexities in its intended

110 *See Australian Constitution* s 51(xxvi); *see also* U.S. CONST. amend. XIX.
111 *See* WILLIAMS & HUME, *supra* note 61, at 142; *see generally* Siegel, *supra* note 89.

operation or effect, for which it would be appropriate or necessary to rely primarily on specialized expertise.

Without attempting to comprehensively survey the relevant considerations in play in either case, leading scholarly accounts suggest that the amendment process in both cases was conducted with relatively high levels of public engagement at all stages. To begin with, whilst neither constitution formally requires public engagement at the proposal or drafting stages, it is notable that both amendments were put forward as a result of decades of campaigning at the grass-roots level: spanning from the formation of Aboriginal advocacy organizations in the 1920s to 1966 in the case of the 1967 amendment to section 51(xxvi),[112] and from the Seneca Falls Convention in 1848 to 1919 in the case of the Nineteenth Amendment.[113] Both amendment proposals were developed in response to the concerns raised by those campaigns.

The 1967 amendment to section 51(xxvi) had broad-based community support and bipartisan support in Parliament,[114] and the referendum passed with the highest levels of support of any referendum in Australian history (with 90.77% in favor).[115] Many Australians erroneously believed (and continue to believe) that the amendment granted citizenship to Aboriginal people. However, this misunderstanding is consistent with the campaign for constitutional change, which was often pitched as a campaign for the full and equal *status* of Aboriginal Australians *as citizens.*[116] Moreover, despite disagreement about the concrete policies needed to advance the cause of Aboriginal peoples, there is evidence of a widespread consensus that race should not be used as a criterion for imposing burdens or detriments.[117] This is consistent with the amenders' understanding that Commonwealth power to legislate with respect to Aboriginal peoples was limited to the enactment of beneficial laws.

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112 Larissa Behrendt, *The 1967 Referendum: 40 Years On,* 11 AUSTL. INDIGENOUS L. REV. 12, 12 (2007); JOHN SUMMERS, THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA AND INDIGENOUS PEOPLES 1901–1967 29–30 (Vision in Hindsight: Research Paper No. 10/2000-01, Parliament of Australia, Oct. 31, 2000), http://www.aph.gov.au/binaries/library/pubs/rp/2000-01/01rp10.pdf [http://perma.cc/6LAV-8BGU].

113 *See generally* I–VI ELIZABETH CADY STANTON ET AL., HISTORY OF WOMAN SUFFRAGE (Susan B. Anthony et al. eds., 2009).

114 Behrendt, *supra* note 112, at 12. Notably, Parliament did not produce a No case in this regard—as is the standard practice for referendums. HUME & WILLIAMS, *supra* note 61, at 144–45.

115 *Referendum Dates and Results*, AUSTL. ELECTORAL COMM'N, http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm [http://perma.cc/3HCY-4WVV] (updated Oct. 24, 2012).

116 *See, e.g.*, Summers, *supra* note 112, at 30 (discussing the 1938 Day of Mourning protest).

117 *See id*. at 29–31.

The Nineteenth Amendment, proposed in 1919 and ratified in 1920, was far more contested at the time.[118] Moreover, because the Article V amendment procedure does not require a referendum for ratification, public support is somewhat more difficult to ascertain. Although the amendment had no difficulty gaining the needed two-thirds approval in the House of Representatives, gaining a two-thirds majority in the Senate and of the states proved more difficult.[119] Nevertheless, looking beyond the formal amendment procedure, the level of public engagement and deliberation on the issue of inclusion of women in the electoral franchise was in many respects exceptional; particularly in respect of the citizen-led grass-roots nature of the campaign, and the duration of time (forty-one years) over which the proposed constitutional change was debated.[120] Moreover, as alluded to in the previous section, the public debate about extending the electoral franchise to women reflected broader views about the status of women as equal citizens. It was not a debate cast in narrow or technical terms.

To conclude, to the extent that both examples present instances of the incongruity problem—an issue which, we have seen, is constable in the case of our spill-over example involving the U.S. Constitution—it appears that there is a good case to be made that amenders' understanding ought to prevail. For, in both cases the presumption in favor of original understanding appears to be relatively weak, and the drafting process appears to be suitable to the drafting task. Therefore, on the originalist approach to amendment proposed here, it is possible for an originalist to hold the view that the Fourteenth Amendment's Equal Protection Clause extends to the protection of women's civil and political rights, while simultaneously accepting the standard account of the original meaning of the Fourteenth Amendment. Similarly, it is possible for an originalist to hold the view that the Commonwealth Parliament of Australia's power to legislate in respect of Aboriginal peoples pursuant to section 51(xxvi) must be used for purposes that are consistent with the advancement of Aboriginal peoples—or, at the very least, that it

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118 *See, e.g.*, W. William Hodes, *Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment*, 25 RUTGERS L. REV. 26, 46–47 (1971).

119 The proposal failed several times in the Senate before it was ultimately approved, and many States did not ratify the Amendment until much later (Mississippi was the final state in 1984). S*ee Woman Suffrage Centennial*, *Timeline: The Senate and the 19th Amendment*, U.S. SENATE, http://www.senate.gov/artandhistory/history/People/Women/Nineteenth_Amendment_ Vertical_Timeline.htm [http://perma.cc/BUK9-5L7Z] (last visited Nov. 18, 2019).

120 *See* ELEANOR FLEXNER, CENTURY OF STRUGGLE 164–70 (1959); *see generally* STANTON ET AL., *supra* note 113.

cannot be used to single out Aboriginal peoples for the purpose of subjecting them to detrimental treatment—while simultaneously accepting the standard account of the original meaning of the power granted by section 51(xxvi).

These conclusions are tentative and provided for the purposes of illustration only. The important thing to see is that the approach to amendment developed in this Article provides originalism with the analytical resources that are needed both to identify the interpretive problem posed by amendment in cases like these, and to address that problem in a way that is consistent with the commitments and concerns of originalist theory. Fully defending any substantive conclusion in either case would of course require additional argument—including a more detailed examination of the relevant evidentiary materials—and is beyond the scope of this Article.

IV. IMPLICATIONS FOR AMENDABILITY

The approach to constitutional amendment developed in this Article provides a missing component of originalist interpretive theory, which is an important contribution to contribution to scholarly enquiry in its own right. However, the approach also has important implications for contemporary debates about limitations on the amending power, or "amendability." In this respect, it holds much broader interest for constitutional theory. In this final Part, I briefly consider these implications and indicate possible lines of enquiry for future research.

As we have seen, one consequence of the originalist approach to constitutional amendment developed in this Article is that there are circumstances where an originalist will find that an amendment is ineffective to bring about its intended constitutional change as a matter of constitutional interpretation. This will occur where: (1) there is a conflict between original understanding and amenders' understanding, (2) the text produced by the amendment is insufficiently clear about the intention to override or displace original understanding, (3) the interpretive presumption in favor of original understanding is strong, owing to the amendment's proximity to the core, *and* (4) the interpretive weight of amenders' understanding is weak, owing to the drafting process being unsuitable to the drafting task.

In practice, then, certain amendments are susceptible of being "read down" in a manner that nullifies their intended effect. The approach therefore places *substantive constraints* on the amending power, albeit overridable ones. More specifically, it imposes an interpretive presumption in favor of original understanding in cases of conflicting drafters' understanding, the strength of which

is determined by the type of amendment. In this respect, there is an important and yet unappreciated sense in which originalism intersects with the development of so-called "implicit unamendability" approaches to constitutional amendment.

The term "implicit unamendability" refers to a set of doctrines that constrain the use of the amending power to make constitutional change. Unlike "express unamendability," these constraints are not found in a constitution's text: they are constraints implied by courts. As with the originalist approach to amendment, then, implicit unamendability doctrines impose *substantive constraints* on the amending power. This invites comparison.

Implicit unamendability is most commonly applied where an amendment is thought to alter "basic" or "fundamental" features of a constitution.[121] This is similar to the idea of "the core" utilized in the originalist approach to amendment proposed above, in that it relies on a conception of constitutional identity to generate constraints on formal amendment. However, it is potentially far more robust. For, unlike originalism, the considerations used to generate the content of substantive constraints on implicit unamendability approaches are not limited to text, structure, and drafting context. Rather, considerations used on such approaches extend to assumptions about the nature of the amending power, the constitution being interpreted, and, more broadly, constitutionalism itself (although these are not always explicitly articulated). This is one way in which implicit unamendability has a wider scope than originalism as a limitation on the amending power.

Moreover, unlike the originalist approach to amendment, these constraints always override the intended effect of the amendment, which is to say, even where the intended effect is clear. In this respect, implicit unamendability doctrines impose *strict* substantive constraints on the amending power and not merely presumptive ones. This is a second way in which implicit unamendability has a wider scope than originalism as a limitation on the amending power.

Implicit unamendability is a practice that has become increasingly important in recent years, in light of growing concerns about "abusive" uses of the amending power.[122] As

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121 *See* ALBERT, *supra* note 9, at 149–58 (discussing "interpretive unamendability"); ROZNAI, *supra* note 2, at 42–47, 69–70, 141–56 (describing the "basic structure doctrine" and discussing the scope of implicit unamendability).

122 *See* David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 231–39 (2013); Kim Lane Scheppele, *Autocratic Legalism*, 85 UNIV. CHI. L. REV. 545, 563–64, 582 (2018).

recent scholarship has demonstrated, formal amendment can and has been used to bring about substantial structural changes that threaten to undermine liberal, democratic constitutional orders. This is often done by autocratic or authoritarian leaders, who claim to act in the name of "the people."[123] Because these changes occur incrementally and through legal means, and because they do not obviously (or at least do not prima facie) appear to have the aim of dismantling the constitutional regime,[124] they often do not attract sufficient attention at the time that they occur, and may even occur undetected. Thus, by the time the changes have taken effect and their consequences have been felt, it may be too late to reverse course.[125] Implicit unamendability doctrines can therefore provide an important check on the amending power.

At the same time, however, there are many critics of implicit unamendability who argue that the practice cannot be justified, or else that it should only be used as a last resort. A key concern lies in the very idea of judicially-implied constraints on amendment: for many, this practice is the ultimate act of judicial activism, denying the power of the people to determine the fundamental legal framework for governance.[126] Critically, the application of implicit unamendability doctrines cut off the sole means of changing a constitution in response to binding judicial decisions about its meaning and application.

Another key concern lies in operationalizing implicit unamendability doctrines in practice: even if their use can be justified as a matter of principle, deciding which features of a constitution ought to count as "basic" or "fundamental" for the purpose of implying constraints on the amending power is highly contestable.[127] In light of these concerns, and allowing for the possibility of highly exceptional cases, some critics of implicit unamendability have argued that the only substantive

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123 *See* Landau, *supra* note 122, at 195–216; Scheppele, *supra* note 122, at 549–56.

124 As Scheppele observes, "many of the changes . . . are highly technical and therefore hard for the ordinary citizen to understand." Scheppele, *supra* note 122, at 582.

125 *See id*. at 571, 581–83. Hence, as Scheppele emphasizes, the importance of scholarship describing recognizable patterns and steps taken in eroding democratic constitutionalism through incremental, legalistic means.

126 *See, e.g.*, Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation,* 158 U. PA. L. REV. 1025, 1069–70 (2010); *see also* Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective,* 4 INT'L J. CONST. L. 460, 487 (2006); *see also* RAJU RAMACHANDRAN, *The Supreme Court and the Basic Structure Doctrine, in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 107, 107 (B. N. Kirpal et al., eds., 2000).

127 *See* Landau, *supra* note 122, at 237–38 (acknowledging this criticism, although ultimately defending the practice).

constraints on the amending power should be those that are explicit in the constitutional text.

In an important recent work, Yaniv Roznai defends implicit unamendability as a matter of constitutional theory, offering one of the most comprehensive and sophisticated accounts of the practice to date.[128] Conceptually, Roznai situates the amending power in between ordinary law-making or "constituted" power, which is legally constrained by the established constitutional order, and original constitutional law-making or "constituent" power, which is legally unconstrained, arising outside of (and giving rise to) the established constitutional order.[129] Roznai argues that the amending power is best understood as a *secondary constituent power*: "secondary" in the sense that it is delegated by "the people" to "the amenders" via a constitution's formal amendment procedure.[130] This delegation occurs at the time of the constitution's framing, understood as an act of *primary constituent power*. Formal amendment is therefore limited, on Roznai's approach, to those constitutional law-making purposes for which it is delegated, even where those limitations are not expressly stated in the constitutional text. The judicial power to review and invalidate amendments on this basis, Roznai argues, is necessary and legitimate as "a safeguard of 'the people's' primary constituent power."[131]

On Roznai's account, then, the key to both justifying implied constraints on amendment and generating the content of those constraints lies in a basic distinction between "framing" (qua exercise of primary constituent power) and "amending" (qua exercise of delegated or secondary constituent power). As such, there is a notable parallel to the originalist approach to amendment developed in this Article, which similarly rests on a distinction between framing and amending. However, as we have seen with the originalist approach, that distinction is based on the nature of framing as a *drafting task*, and not upon any assumptions about the framing as a constituent act—at least not

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128 *See* ROZNAI, *supra* note 2, at 39.

129 *See id.* at 113–22. In drawing this distinction, Roznai draws heavily on Carl Schmitt's well-known theory of popular sovereignty. *See* CARL SCHMITT, THE CONCEPT OF THE POLITICAL, 49–53 (George Schwab trans., Univ. of Chi. Press 1996); *see also* CARL SCHMITT, CONSTITUTIONAL THEORY, 269–73, 278 (Jeffrey Seitzer trans., Duke Univ. Press 2008); *see also* CARL SCHMITT, THE CRISIS OF PARLIAMENTARY DEMOCRACY, 25–31 (Ellen Kennedy trans., MIT Press 1985).

130 *See* ROZNAI, *supra* note 2, at 117–20. Roznai also describes this as an "agency" relationship, where the amenders are the agents of "the people" (the principals), or a "fiduciary" relationship, where the amenders are "trustees" of the constituent power. *Id.* at 118–19.

131 *Id.* at 196.

in the normatively-loaded sense associated with the idea of constituent power—which appeals to notions of popular sovereignty and an unfettered popular will. In this respect, I will now argue, the originalist approach draws attention to a critical weakness of implicit unamendability: namely, its reliance on the "democratic" or "popular" credentials of the drafting process.

There are two main concerns with this move. First, purely as a matter of providing sound theoretical foundations, one concern with this aspect of implicit unamendability—at least as theorized by Roznai—is that it relies upon a contentious characterization of "framing." Although Roznai's argument purports to be conceptual (i.e., about constitutionalism as such) rather than descriptive (i.e., about particular constitutions), a critical premise needed to sustain the argument is that a constitution's framing is properly understood as an act of popular will par excellence. This premise is necessary both to distinguish framing (qua act of primary constituent power) from amending (qua exercise of secondary or delegated constituent power) *and* to justify the constraints that the former exerts over the latter. Yet, as commentators have noted[132]—and as Roznai himself acknowledges[133]—this is descriptively inaccurate as a generalization about constitutions, even if it is a widely-accepted normative ideal in constitutional theory.[134]

The second concern has to do with the application of implicit unamendability doctrines in practice. The most basic difficulty lies in deciding which constitutional features enliven implicit unamendability (i.e., which features count as "basic" or "fundamental"). As Roznai correctly observes, once it has been accepted that there ought to be *some* limitations on the amending power, it isn't possible to fully resolve this matter: there will always be room for debate. The question is, therefore, how to provide courts with adequate guidance. The concern here lies in the criterion that Roznai proposes for dealing with this issue and, in particular, its implications for constitutional resilience.

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132 *See, e.g.*, Joel I. Colón-Ríos, *Enforcing the Decisions of "the People*," 33 CONST. COMMENT. 1, 3–4, 6 (2018) (book review); *see also* Jairo Lima, *Unconstitutional Constitutional Amendments: The Limits of Amending Powers*, 10 JURIS. 114, 116 (2019) (book review); *see also* Adrienne Stone, *Unconstitutional Constitutional Amendments: Between Contradiction and Necessity,* 12 ICL J. 357, 365–67 (2018) (noting that the case for implicit unamendability "waxes and wanes according to the nature of the exercise of constituent power" in the act of framing).

133 *See* ROZNAI, *supra* note 2, at 121–22.

134 As Roznai observes, "[i]n the modern era, the nation's constitution receives its normative status from the political will of the 'people' to act as a constitutional authority. The 'people' are the subject and the holder of the constituent power." *Id.* at 105–06.

Roznai's proposal involves using procedural considerations to calibrate the degree of judicial scrutiny used to review an amendment, thus avoiding the need to determine with a high degree of precision whether it alters "basic" or "fundamental" constitutional features.[135] The capacity of formal amendment to bring about changes of this kind—whatever these are determined to be—turns on the extent to which the amending procedure can plausibly be characterized as the manifestation of an unfettered "popular will," approximating the primary constituent power. Crucially, here, Roznai distinguishes amending processes that are "governmental," which rely on the ordinary organs of government such as the legislature, from those that are "popular,"[136] arguing that "the *more popular* the amendment power, the *less limited* it is."[137]

As developed by Roznai, then, implicit unamendability approaches privilege amendment processes that engage the public, regardless of the type of amendment. Moreover, and significantly, they also privilege constitutional change that occurs outside of formal amendment: because most amendment procedures are governmental in Roznai's sense, and not maximally popular, changes to basic or fundamental constitutional features will be easier to achieve through informal, revolutionary channels.[138]

In evaluating this proposal, it is important to bear in mind that growing concerns about constitutional resilience are what have made constraints on the amending power seem attractive in the first place. From this perspective, I suggest, both of these features of implicit unamendability are highly undesirable. There are two related points.

The first is that the "popular will" is highly manipulable, and perhaps especially so when invoked for the purpose of law-making on highly technical matters, which may be less well-understood by laypersons and, therefore, more vulnerable to misinformation. Although extraordinary recent events such as Brexit have drawn attention to this issue, it is not a new idea. Research in the social sciences has consistently demonstrated that procedural mechanisms for direct popular input into both ordinary and constitutional law-making are susceptible to manipulation and

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135 Roznai refers to this way of calibrating review as a "spectrum" of amending powers. *Id.* at 158.

136 *Id.* at 162–64, 169.

137 *Id.* at 170 (emphasis added). Roznai refers to this proposition as the "legitimation elevator." *Id.*

138 Roznai acknowledges this concern. *Id.* at 129–30. However, the issue is ultimately left unresolved as an issue to be dealt with in future work. *Id.* at 131.

obfuscation, and thus can be effective instruments for consolidating power and influence, whether by partisan interests, or by autocratic or authoritarian leaders.[139]

Concerns about maximally democratic procedures as vehicles for advancing partisan interests have long been raised about the citizen-driven law-making mechanisms used in many U.S. states, including popular referendums (which are relatively common in U.S. states) and popular ballot initiatives (which are less common).[140] Similar concerns have emerged in the context of popular constitutional conventions, which may only represent partisan interests while claiming the authority to speak as "the people" qua exercise of constituent power.[141] Moreover, area studies research on emerging democracies demonstrates how autocrats and authoritarians have used notions of "constituent power" and "popular will" to consolidate their power.[142]

The second and related point is that creating incentives to bring about constitutional changes outside of formal amendment compounds these concerns. Unlike formal amendment, they may not be visible *as* constitutional changes and thus may occur largely undetected.[143] But even where they are visible—as for example in the case of popular social movements or campaigns—they are less likely to be reviewable by courts on Roznai's proposed approach than a formal

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139 *See* Hanna Lerner & David Landau, *Introduction to Comparative Constitution Making: The State of the Field*, *in* COMPARATIVE CONSTITUTION MAKING 1, 6 (David Landau & Hanna Lerner eds., 2019). For a general critique of the quality of law-making through citizen-driven mechanisms as opposed to legislatures, see Philip Pettit, *Deliberative Democracy, the Discursive Dilemma, and Republican Theory*, *in* DEBATING DELIBERATIVE DEMOCRACY 138, 138 (James S. Fishkin & Peter Laslett, eds., 2003).

140 *See, e.g.*, DAVID BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY (2001); Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 UNIV. CHI. L. SCH. ROUNDTABLE 17 (1997); William B. Fisch, *Constitutional Referendum in the United States of America*, 54 AM. J. COMPAR. L. 485, 494–97 (2006).

141 *See, e.g.*, Gabriel L. Negretto, *Democratic Constitution-Making Bodies: The Perils of a Partisan Convention*, 16 INT'L J. CONST. L. 254, 255 (2018). This possibility is consistent with earlier research demonstrating a tendency for deliberative and other direct democracy mechanisms to reproduce patterns of hierarchy and privilege. *See* Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY 347, 347–48 (1997).

142 *See, e.g.*, David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923, 925–26 (2013); *see also* William Partlett, *The Dangers of Popular Constitution-Making*, 38 BROOK. J. INT'L L. 193, 196 (2012).

143 *See, e.g.*, Maciej Bernatt & Michal Ziolkowski, *Statutory Anti-Constitutionalism*, 28 WASH. INT'L L.J. 487, 488, 491–92 (2019) (demonstrating how statutes have been used as tools of constitutional erosion in Poland); Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 14 L. & ETHICS HUM. RTS. 49, 51 (2020) (demonstrating how changes to executive accountability mechanisms have been used as tools of constitutional erosion in India).

amendment with the same objective.[144] As a result, an important check on possible efforts to dismantle the constitutional order is thereby weakened.

These risks are not insignificant, particularly for newer and less stable democracies, and especially those with constitutions that are easily amended. In recent years, even as these developments in have been underway, there have been increasing demands for more direct forms of public input in constitutional law-making processes.[145] These developments, although highly varied, are driven by a widely shared premise that constitutional law's claim to authority and legitimacy is grounded in its claim to embody the principle of popular sovereignty. However, even if this premise is accepted as a matter of constitutional theory, it is suggested that there are good reasons for questioning whether the implications of this premise for *framing* a constitution are the same as those for *amending* a constitution—or, indeed, even for all instances of amending. Not all drafting tasks are the same.

Originalism does not contain these risks for constitutional resilience because it does not privilege the popular will in this way. As we have seen, broader considerations that go to the "democratic" character of the drafting process do not necessarily give greater weight to amenders' understanding. Although there may be other good reasons for building forms of popular engagement into the drafting process, what matters for the purpose of evaluating the weight of amenders' understanding as a source of constitutional meaning is not the degree to which the drafting process is describable as a manifestation of an unfettered "popular will." What matters is the extent to which the forms of popular engagement that are used are *suitable* for the particular drafting task posed by the amendment in question. Moreover, originalism clearly does not favor informal methods of constitutional change: indeed, an originalist approach to constitutional interpretation creates strong incentives for using formal amendment, as informal methods are almost always regarded as illegitimate.[146]

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144 This is the type of example that Roznai appears to have in mind in discussing Bruce Ackerman's "constitutional moments," suggesting that at least some of these episodes ought to be understood as the emergence of the primary constituent power. ROZNAI, *supra* note 2, at 127–28. The implication is that courts are justified in consolidating these via constitutional interpretation, and perhaps ought to do so.

145 *See, e.g.*, Zachary Elkins et al., *The Citizens as Founder: Public Participation in Constitutional Approval*, 81 TEMP. L. REV. 361 (2008).

146 *See* discussion *supra* Section I.B.

These points of difference suggest that an originalist approach to constitutional interpretation, once supplemented by the approach to amendment developed in this Article, could provide an alternative to implicit unamendability doctrines. Although this possibility cannot be fully examined here, I want to conclude with the suggestion that it is a topic that ought to be pursued in the scholarly literature on these issues.

In making this suggestion, however, it should be acknowledged that there is a sense in which originalism is not a *true* alternative: it is first and foremost a method of constitutional interpretation, and not a method of constraining the amending power through judicial review. The substantive constraints on the amending power that originalism can generate are therefore much more limited both in content and in operation. The content of those constraints is limited to a conception of constitutional identity that consists solely in considerations of constitutional text, structure, and drafting context. Moreover, the operation of those constraints is that of an interpretive presumption, or "clear statement rule," applied in a manner that is analogous to the principle of legality. As such, there is nothing that prevents the amenders from overriding original understanding, so long as they do so clearly and openly, meaning that the intended effect of the amendment must be clear from its text, read in light of its drafting context.

On this basis, one might object that originalism is simply too limited in scope to provide an effective constraint on the kinds of abuses of the amending power that have generated the rise of and interest in implicit unamendability doctrines. It is true that an originalist approach to amendment is more limited in these ways. Nevertheless, in response to this objection, it can be observed that these limitations in scope may also contain advantages over implicit unamendability: addressing the two key concerns noted above that critics often cite against adopting this set of doctrines, while simultaneously providing a real constraint on abuse of the amending power.

Starting with the content of its constraints on amendment, originalism's more limited conception of constitutional identity is arguably less likely to generate intractable debates than implicit unamendability doctrines. As discussed, a key difficulty with the application of implicit unamendability doctrines is how courts determine which elements of a constitution count as "fundamental" or "basic" for the purpose of enlivening judicial

review.[147] This determination turns on views about the nature of the amending power, the character of the constitution being interpreted, and constitutionalism itself. These issues are contestable and not easily resolved as they reflect different normative understandings. As such, they are apt to produce irreconcilable disagreement.

An originalist approach to amendment avoids some of these difficulties. The central determination used to address conflicts between drafters' understandings, which functions as the source of constraints on amendment, is what falls within the constitution's "core." This determination turns on views about the best account of constitutional text and structure in light of drafting context. The focal point is thus on the framing as an actual historical event, and not as a conceptual construct. It is a determination that requires examining empirical materials that provide evidence about the framing as a drafting task.

This is not to deny the possibility of disagreement. However, the disagreement purports to be predominantly empirical and historical rather than normative and philosophical, and thus at least potentially resolvable through relying on publicly available records, reports, and other documentation. Moreover, the set of enquiries is confined to a relatively narrow range of issues concerning drafting context and relies on familiar extrinsic sources, as both of the examples considered in this Article illustrate. As such, in addition to being less apt to produce intractable disagreement, originalism may also be easier for courts to apply and produce greater clarity than implicit unamendability doctrines. This may be especially true in countries with newer constitutions, where the framing is relatively recent and where evidentiary materials providing information about the drafting context may thus be more readily available and more reliable. This is significant when it has more commonly been countries with newer constitutions that have needed to limit the amending power to prevent abuse.

Turning to the operation of originalism's constraints on amendment, by functioning as a "clear statement rule" for successful formal amendment, originalism thereby produces constraints on the amending power that are less likely to raise concerns about judicial activism or a democracy-deficit of the kind that attend implicit unamendability. At the same time, although originalism's interpretive presumptions are more

147 *See supra* notes 128–139 and accompanying text.

limited in scope than implicit unamendability's strict constraints, they are nevertheless capable of curbing abusive amendment by making it more difficult for autocrats and authoritarians to pursue stealth tactics. Studies showing how amendment has and can be used to dismantle a constitutional order suggest that abusive uses of the amending power often occur undetected, either due to deliberate obfuscation and misinformation, or else due to pursuing constitutional changes that are "highly technical and therefore hard for the ordinary citizen to understand."[148] In these circumstances, the intended effect of the amendment is unlikely to be expressed with the degree of clarity—either in the text produced, or in the information that is made publicly available, or both—that is needed to overcome the interpretive presumption in favor of original understanding. This is particularly so in instances of amendment that go to the "core," where that presumption is at its strongest.

By contrast, it is not obvious that implicit unamendability has the resources to "smoke out" stealth tactics because it permits changes to "basic" or "fundamental" constitutional elements to have their intended effect so long as they utilize maximally popular procedures (in the case of formal amendment) or, alternatively, where courts deem external developments that change the operation of the constitutional system to have credentials as an expression of the "popular will" (in the case of informal amendment). It may be the case that stealth tactics or highly technical and difficult to understand amendments are unlikely to meet this criterion. As discussed above, however, the "popular will" is highly manipulable, particularly by motivated populists.

Although admittedly much more limited in scope as a method of constraining formal amendment ex post, originalism has the resources to prevent this from occurring at all. If populists wish to alter features that go to a constitution's core, then they cannot rely on informal tactics: they must use the formal amendment procedure. Moreover, they must do so clearly: by producing text that conveys the amendment's intended effect and, where the text leaves room for interpretive disagreement, by making information about the objective and aims of the proposed constitutional changes publicly available. Insofar as an originalist approach to amendment requires transparency about the impact of an amendment on existing constitutional arrangements and avoiding public misinformation or obfuscation, it may well prevent stealth

148 Scheppele, *supra* note 122, at 582.

tactics from successfully producing constitutional change in the first place. At the very least, originalism does not allow them to succeed on the basis of efforts to characterize constitutional change as an expression of the popular will.

CONCLUSION

This Article has identified a problem that formal amendment uniquely presents for originalism that has been overlooked by scholarship to date, and it has developed an originalist approach to that problem. In doing so, the analysis set forth above not only provides an important missing component of originalist interpretive theory, but helps resituate the place of originalism in contemporary constitutional law and theory. Despite the great volume and depth of scholarship on originalism, the grounds of enquiry have been framed rather narrowly, with a focus on refining technical aspects of the theory that may have little import beyond scholarly debates. For many, this frame has made originalism appear to be of predominantly academic interest, particularly among American law professors[149]—with perhaps a fleeting curiosity for the American public—where the view holds sway in debates about U.S. Supreme Court.[150]

This Article's analysis suggests otherwise. By adopting a broader perspective that brings originalism into conversation with contemporary debates in constitutional law about the amending power, it has demonstrated why originalism holds interest beyond these narrow scholarly debates. The two central examples, drawn from the United States and Australia, show that constitutional amendment presents real interpretive challenges even in countries with very old constitutions that have proven difficult to amend. Originalism holds sway with courts and jurists in both jurisdictions as a prominent, albeit often dissenting view in the United States, and as a fairly mainstream though less vigorously defended view in Australia.[151] As such, this Article provides an important set of analytical tools that are

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149 Mark Tushnet, *Academic Constitutional Theory and Judicial Constitutional Practice,* BALKINIZATION (Oct. 31, 2019, 9:34 AM), http://balkin.blogspot.com/2019/10/academic-constitutional-theory-and.html [http://perma.cc/C22W-CANA] (noting a tendency to focus on technical distinctions and other refinements, and observing that "communicating to outsiders their importance in making originalist theory coherent is, for all practical purposes, impossible"). Although Tushnet is making a general point about scholarly debates in constitutional theory, he singles out originalism in particular as an area of inquiry with limited relevance beyond the debate's interlocutors. *Id.*

150 *See* Jamal Greene et al., *Profiling Originalism,* 111 COLUM. L. REV. 356, 357 (2011); Jamal Greene, *Selling Originalism,* 97 GEO. L.J. 657, 659 (2009).

151 *See* Weis, *supra* note 5, at 849.

needed for the application of originalism to be defensible, coherent, and effective, and which the theory currently lacks.

Perhaps more significantly, the originalist approach to amendment developed here suggests several reasons why originalism may be attractive to those who have concerns about the use of formal amendment to erode core aspects of constitutional structure that are designed to secure governance under the rule of law, but who are simultaneously dissatisfied with implicit unamendability doctrines as a tool for preventing and addressing such abuses. This Article's analysis draws attention to a critical weakness of implicit unamendability in this regard: namely, its reliance on a criterion of popular sovereignty to prescribe the scope of constraints on amendment, which makes such doctrines vulnerable to exploitation by populist autocrats and authoritarians. Although originalism provides a more modest and limited set of constraints on the amending power, it is less vulnerable to this and other criticisms of implicit unamendability approaches because the constraints that it places on amendment are generated using a criterion that is based on textual considerations.

This has material implications for constitutional practice throughout the world, as a variety of constitutional systems, especially newer democracies, are increasingly facing such internal threats. Insofar as an originalist approach to amendment is an aspect of an integrated theory of constitutional meaning and approach to constitutional interpretation, then, this Article's analysis may assist in invigorating and broadening interest in what may otherwise appear to be a set of well-worn academic debates that are mainly of parochial concern.