Interpreting an Unamendable Text

*Thomas W. Merrill**

"A state without the means of some change is without the means of its conservation."

-Edmund Burke[1]

Many of the most important legal texts in the United States are highly unamendable. This applies not only to the Constitution, which has not been amended in over forty years, but also to many framework statutes, like the Administrative Procedure Act and the Sherman Antitrust Act. The problem is becoming increasingly severe, as political polarization makes amendment of these texts even more unlikely. This Article considers how interpreters should respond to highly unamendable texts. Unamendable texts have a number of pathologies, such as excluding the people and their representatives from any direct participation in legal change. They also pose an especially difficult problem for interpreters, since the interpreter cannot rely on the implicit ratification of its efforts that comes about when an enacting body reviews and does not amend the efforts of the interpreter. Trapped in a one-sided echo chamber, the interpreter will increasingly rely on precedent as a source of legitimacy for its interpretive efforts. This, however, introduces other pathologies, including second-order unamendability, since the interpreter cannot overrule many of its precedents without also calling into question its fidelity to law. The Article suggests two interpretive strategies as a partial way out of this trap. One is to adopt a general "amendability canon" to the effect that disputes should be resolved under the more amendable text, when both an unamendable and a relatively more amendable source of law are available. The other, paradoxically, is to interpret unamendable texts in a Burkean, status-quo oriented

* Charles Evans Hughes Professor, Columbia Law School. I have benefitted from comments on earlier versions of this paper from participants in workshops at Columbia, Cornell, Duke, and Virginia law schools and the Princeton political science department. Thanks in particular for suggestions from Jessica Bulman-Pozen, John Duffy, Jeffrey Gordon, David Pozen, Sai Prakash, Dan Richman, Fred Schauer, Peter Strauss, Keith Whittington, and Ryan Williams. Excellent research assistance was provided by Alexander Gross and Bruce Pettig.

1. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 19 (J.G.A. Pocock ed., Hackett Publ'g Co. 1987) (1790).

fashion. This will discourage attempts to achieve legal change through interpretation of unamendable texts and encourage efforts to achieve such change through other means, such as new legislation and regulation, which will be inherently more amendable.

INTRODUCTION

All interpretation of legal texts involves an enactor who promulgates the text and an interpreter who interprets the text. Often, they interact. The enactor promulgates a text, the interpreter interprets the text, the enactor responds by amending the text, the interpreter interprets the amended text, and so forth. This reciprocal interaction is generally healthy. The back-and-forth between the enactor and the interpreter provides valuable feedback for both. The enactor, by reviewing the issues of interpretation that arise, gains insight into which provisions of a text need to be reconsidered or clarified. The

interpreter, by observing which interpretations have been overridden, gains increased confidence in the interpretations that have been allowed to stand. In an ideal world, regular interaction between the enactor and the interpreter should strengthen the efforts of both.[2]

It is not my purpose here to describe the optimal degree of amendability of different texts, from the perspective of ideal system design. Presumably, one would want to strike a balance between change and stability, between political responsiveness and entrenchment of important values. The Constitution, which establishes the general framework of government, should be highly stable—that is, somewhat difficult to amend. Statutes and regulations that establish fiscal and monetary policy should be relatively easy to change, in response to ever-changing economic conditions. Although I believe that legal change is both desirable and inevitable, I make no effort to develop a theory of the optimal rate of change here.

Instead, this Article explores the consequences for interpretation when the back-and-forth between enactor and interpreter disappears, and the legal text is perceived to be effectively unamendable. No legal text is completely immune from change. But some are perceived by interpreters as having an extremely low probability of amendment. The U.S. Constitution, which is now widely declared to be virtually impossible to amend, is the most prominent example.[3] But there are also a number of important framework statutes, such as the Administrative Procedure Act, the Sherman Antitrust Act, and the Voting Rights Act, which are widely assumed to

---

2. As support for these propositions, I offer the views of three American jurists, none of whom are or were reticent about using the judicial office to advance their views of appropriate policy. Justice William O. Douglas: "Congress is not omniscient; no matter how careful the draftsman, all contingencies cannot possibly be foreseen. . . . That is why constant legislative reappraisal of statutes as construed by the courts . . . is a healthy practice." William O. Douglas, *Legal Institutions in America*, *in* LEGAL INSTITUTIONS TODAY AND TOMORROW: THE CENTENNIAL CONFERENCE VOLUME OF THE COLUMBIA LAW SCHOOL 292 (Monrad G. Paulsen ed., 1959). Justice Anthony M. Kennedy: "Our legal system presumes there will be continuing dialogue among the three branches of Government on questions of statutory interpretation and application." United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 503 (2012). Justice Roger Traynor of the California Supreme Court: "[C]ourts and legislatures [have] a symbiotic relationship, each drawing on the actions of the other. Legislatures pass[ ] statutes whose applicability to specific situations [is] uncertain; courts undert[ake] the applications; legislatures revise[ ] if they [find] a specific application offensive." G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 255 (3d ed. 2007).

3. *See, e.g.*, Rosalind Dixon, *Updating Constitutional Rules*, 2009 SUP. CT. REV. 319, 319 (referring to the "virtual impossibility of formal amendment to the Constitution under Article V"); Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859, 874 (2007) (noting that amendment of the U.S. Constitution is made "almost impossible by the difficulties placed in its path"); Henry Paul Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32, 35 (2004) (describing the Constitution as "practically unamendable").

be impervious to amendment, at least as to their core provisions.[4] Indeed, a growing list of regulatory statutes, including the major federal environmental statutes and the National Labor Relations Act, have resisted all attempts at legislative revision in recent years, even in the face of dramatic technological and economic changes that would seem to cry out for some adjustment.[5] Recent empirical studies indicate that there has been a pronounced falloff in the number of congressional overrides of judicial interpretations of statutes in recent years, with the decline especially steep after 1998.[6]

The reasons why high-level federal enactments are increasingly difficult to amend are both structural and political. Structurally, the nation's top-tier institutions for achieving change in enacted law—including the constitutional amendment process and the Congress—suffer from what Neil Komesar calls constraints of scale.[7] That is, they do not have the ability to expand their output to keep up with the demand for legal change. We have eighteenth-century legal institutions designed for a simpler era with a much smaller and more homogenous population. Constraints of scale mean legal texts that have always been difficult to amend become ever-more unamendable, as the finite resources available to change legal texts must compete against ever-growing lists of candidates for change.

Another and more troubling reason for rising unamendability is political polarization. The two major political parties are becoming

---

4. The Administrative Procedure Act ("APA"), originally adopted in 1946, was augmented by several amendments in the 1960s and 1970s, but since then, proposed modifications have generally failed. *See* Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1234–35 (2015). The Sherman Act, originally adopted in 1890, was substantively amended in 1937 only to be restored to its earlier form by subsequent amendment in 1975. *See* Andrew S. Oldham, *Sherman's March (in)to the Sea*, 74 TENN. L. REV. 319, 366 n.306 (2007). Key provisions of the Voting Rights Act have proven difficult to amend; most recently, in 2006, Congress reauthorized the Act without change to the coverage formula that was based on 1960s and 1970s election data. *See* Richard L. Hasen, Shelby County *and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 717–718 (2014); *see also* Shelby County v. Holder, 133 S. Ct. 2612, 2629 (2013) (striking down the coverage formula and observing it was based on facts "having no logical relation to the present day").

5. The Clean Air Act has not been significantly amended since 1990, notwithstanding the rise of concern over climate change. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014). The National Labor Relations Act has defied amendment for seventy years, notwithstanding a dramatic decline in private-sector unions. James J. Brudney, *Gathering Moss: The NLRA's Resistance to Legislative Change*, 26 ABA J. LAB. & EMP. L. 161 (2011).

6. Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1340–41 (2014). The number of overrides post-1998 falls to about three per year, relative to roughly fifteen per year in the 1990s, which the authors term the "golden era" of overrides. *Id.* at 1332. The authors attribute the falloff to acrimony in Congress following the Clinton impeachment.

7. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 142–49 (1994).

much more differentiated ideologically.[8] Ideological polarization makes it more difficult to agree on constitutional amendments, which require supermajorities in both houses.[9] It also makes it more difficult to enact ordinary legislation, given the implicit supermajority requirements embedded in the legislative process, such as bicameralism, presentment, and the Senate's rules for ending debate. The polarization of the parties is mirrored by geographic polarization, with urban areas and college towns, especially on the coasts, becoming homogeneously Democratic, and areas in between, especially in the South and the Great Plains, becoming predominately Republican.[10] Geographic polarization compounds the problem of unamendability. Clearly, it makes it all the more difficult to secure the agreement of three-fourths of the States needed for any constitutional amendment. And given the overconcentration of Democratic voters in urban areas, with Republican voters more disbursed across rural districts, geographic polarization increases the probability of prolonged divided government, with Republicans more likely to control the House of Representatives and Democrats remaining relatively more competitive in races for the Senate and the Presidency.[11]

As I use the terms, amendable and unamendable refer to the probability of override of an interpretation by the enacting body, as perceived by an interpreter. The decision rule that governs amendment

---

8. *See* Freeman & Spence, *supra* note 5, at 14–15, 88–93; Richard L. Hasen, *End of Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205 (2013); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Politics in America*, 99 CALIF. L. REV. 273 (2011).

9. U.S. CONST. art. V (requiring that amendments be proposed by "two thirds of both Houses"). An alternative form of proposing amendments, which has not been used, is by application of two-thirds of the several states. *Id.* Under either path, ratification requires the assent of three-fourths of the several states. *Id.*

10. BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART (2009). Bishop's depiction of an America sorting itself geographically into rival political camps has been challenged by Morris Fiorina and colleagues, who emphasize a broad consensus within the electorate about many policy questions. MORRIS P. FIORINA ET AL., CULTURE WAR? THE MYTH OF A POLARIZED AMERICA (2006); *see also* Ryan Stickler, *A "Sorted" America? Geographic Polarization and Value Overlap in the American Electorate*, 97 SOC. SCI. Q. 439, 453 (2016) (characterizing Bishop's thesis as "overblown"). Other political scientists find that partisan polarization and sorting have occurred both at the elite level and within the electorate. *See, e.g.*, Alan I. Abramowitz, *The New American Electorate: Partisan, Sorted, and Polarized*, *in* AMERICAN GRIDLOCK: THE SOURCES, CHARACTER AND IMPACT OF POLITICAL POLARIZATION 19–45 (James A. Thurber & Antoine Yoshinaka eds., 2015) [hereinafter AMERICAN GRIDLOCK]. But, whether or not the ultimate cause is grounded in policy disagreement, there seems to be little denying that different regions of the country have differential allegiance to the two dominant political parties, hence the familiar identification of "red states" and "blue states." *See, e.g.*, Ron Johnson et al., *The Growing Spatial Polarization of Presidential Voting in the United States, 1992–2012: Myth or Reality*, 49 POL. SCI. & POL. 766 (2016) (finding "clear evidence" that the nation has become more spatially polarized, at least in presidential voting).

11. *See, e.g.*, Abramowitz, *supra* note 10, at 41.

of the text by the enacting body—simple majority, supermajority, double supermajority and so forth—is obviously an important factor in determining the perceived probability of override, but it is not the only one. A high degree of political polarization within the enacting body is also clearly relevant. So too is the degree of veneration with which the text is held by the citizenry. This applies particularly to the U.S. Constitution, which Thomas Jefferson complained was viewed by some "with sanctimonious reverence," like "the ark of the covenant, too sacred to be touched."[12] But the veneration factor may also affect the probability of amendment of certain statutes which have endured for a long time, and have taken on symbolic importance, like the Sherman Antitrust Act and the Voting Rights Act.

As a descriptive matter, I argue that when there is little or no prospect of amendment, the interpreter will increasingly substitute analysis of *precedent* interpreting the text for interpretation of the text itself. In effect, the process of interpretation is transformed into a species of common law incrementalism.[13] One obvious reason is that an unamendable text often accumulates a large body of interpretive precedent, which is more on point and accessible to interpreters than is evidence about the meaning of the text itself. Another, and less obvious reason, is that once the interpreter is cut off from any constructive interaction with the enacting body, the interpreter cannot rely on implicit ratification of its interpretive efforts when the enactor leaves its interpretations undisturbed. Justifying outcomes in terms of precedent thus becomes a substitute for enforcing the will of the enacting body, in an effort to preserve the authority of the interpreter.

As interpretation evolves into common law incrementalism, the consequences for the interpreter are both constraining and liberating. The process is constraining because most precedent is entrenched and cannot be overruled without undermining the impression that the interpreter is bound by law. Thus, it will be difficult to revisit most interpretations—no matter how erroneous they come to seem. It is liberating insofar as the common law system permits elaborations and qualifications on what has been previously decided. Thus, insofar as the outcome can be framed as an interpretation of interpretive precedent, interpreters are free to advance their policy preferences. If the policy preferences of interpreters are sufficiently heterogeneous, the process

12. SANFORD LEVINSON, CONSTITUTIONAL FAITH 9 (1988) (quoting Letter from Thomas Jefferson to Samuel Kerchival (July 12, 1816)).

13. By this I mean that individual controversies are resolved by reasoning from prior precedent rather than by interpreting the language of the text. For recognition of the dominance of common law incrementalism in constitutional law, see generally DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

can proceed for some time with high levels of public approval. Unfortunately, the Supreme Court has devolved into two blocks of Justices, whose preferences are strongly correlated with the political party that appointed them.[14] The result is a widespread perception that, within the policy space left by the system of precedent, it has become a "political court."[15] If this perception persists, it is a fair concern that it will eventually undermine the Court's standing with the public and compromise its ability to command obedience to its interpretations of federal law.[16]

Fortunately, we are not trapped in a world in which the only option is extreme stasis in enacted law, with change relegated to marginal adjustments by interpreters tweaking precedents. We have a variety of options for generating legal policy, many of which are more amendable than the Constitution and framework federal statutes. New rights regimes, like protection for the aged and the disabled, can be adopted as statutes rather than constitutional amendments, making them relatively more amendable in light of experience. Congress can delegate broad policy discretion to administrative agencies, which automatically makes policy more amendable than if it is hard-wired into a statute. Legal issues involving social policy can be left to state and local governments, where they are more susceptible to revision than if decreed by the federal government. And administrative agencies at both the federal and state level can make policy using instruments having different degrees of amendability. Still, the extreme unamendability of the Constitution and many important framework statutes is cause for great concern. Enough to warrant a new look at the implications of amendability for norms of legal interpretation.

---

14. Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301.

15. Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 39 (2005).

16. *See, e.g.*, Vanessa A. Baird & Amy Gangl, *Shattering the Myth of Legality: The Impact of the Media's Framing of Supreme Court Procedures on Perceptions of Fairness*, 27 POL. PSYCHOL. 597, 607 (2006) ("[O]ur results suggest that perceptions of fairness are adversely affected when people receive information about a politically charged Court, indicating a likely decline in public support for the institution if citizens came to see judicial deliberations to be . . . politically driven . . . ."); Brandon L. Bartels & Christopher D. Johnston, *Political Justice? Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process*, 76 PUB. OPINION Q. 105, 113 (2012) (noting that "[t]o the degree . . . the process . . . becomes more visibly politicized, we should expect citizens' differentiation of the Court from the explicitly political branches to decrease, leading to even further politicization"); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 659–60 (1992) ("To the extent that the Court becomes politicized or perceived as such, it risks cutting itself off from its natural reservoir of goodwill and may become reliant for basic institutional support on those who profit from its policies. This is a risky position for any institution to adopt."). For recent evidence that the public increasingly perceives the judiciary as afflicted by political bias, see S.I. Strong's book review, *How Legal Academics Can Participate in Judicial Education: A How-to Guide by Richard Posner*, 66 J. LEGAL EDUC. 421, 422 n.5 (2017).

The normative theory I develop argues that courts and other tribunals confronted with a highly unamendable text should try, where possible, to shift legal policymaking toward texts that are relatively more amendable. Obviously, there are limits to how far any interpreter can nudge the legal system toward the use of more amendable sources.[17] And the basic structure of government established by the Constitution and the institutional choices reflected in framework statutes cannot be interpreted away. Nevertheless, I argue that there are two general interpretive strategies that would assist in moving the structure of government in the direction of greater amendability. The first is to embrace a general "amendability canon" favoring the resolution of disputes in accordance with the more amendable text, whenever two or more texts are available as a source of authority. The second is to embrace a Burkean approach to the interpretation of unamendable texts, meaning that such texts would be interpreted in accordance with their established or settled understanding, as opposed to either their original meaning or a meaning the interpreter thinks would produce a better or more just outcome.

These proposals seem paradoxical at first: If texts cannot be amended, it would seem perhaps that they should be regularly "updated" through interpretation. But avoiding reliance on unamendable texts and interpreting unamendable texts to conform to the legal status quo will reduce the returns to interest groups from seeking legal change through interpretation of unamendable texts. This, in turn, will cause such groups to redirect their energies toward obtaining legal change through other avenues, which will nearly always mean that the change will be embodied in a relatively more amendable form. Thus, over time, increasing reliance on amendable texts and a status-quo oriented mode of interpretation of unamendable texts will tend to shift the locus of legal authority away from unamendable toward more amendable texts, which should produce a legal system more receptive to give-and-take between enactor and interpreter.

The Article proceeds as follows. Part I offers an overview of why unamendable texts are problematic, both from the vantage of the development of public policy and from the perspective of interpreters. Part II develops a descriptive account of how interpreters are likely to respond to different texts, depending on their perception of the probability of amendment. I argue here that interpreters will be aware of, and will adjust their interpretive behavior in response to, texts that

17. *Cf.* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 120 (2006) (emphasizing the lack of realism in any proposal that requires "some threshold or critical mass of coordinated judicial action to provoke desirable legislative reactions").

are either highly amendable or highly unamendable. Texts with a modest, but not an especially high or low probability of amendment, will likely elicit what we think of as ordinary textual interpretation: analysis of the meaning of the words, the context in which the words appear, and various canons of interpretation. Part III develops the normative argument that interpreters faced with highly unamendable texts should strive to displace reliance on such texts as much as possible, in an effort to push public policy in the direction of relatively more amendable enactments.

I. WHY UNAMENDABLE TEXTS ARE PROBLEMATIC

Before turning to questions about the relationship between interpretation and the amendability of texts, it is worth briefly considering some of the reasons why highly unamendable legal texts are problematic. This is relevant both in considering how interpreters are likely to respond to such texts, and as a normative matter how interpreters should respond to such texts.

Unamendable texts have several serious disadvantages not shared by amendable texts. One obvious problem goes by the name "dead hand control."[18] Over time, new technologies emerge, wealth and population grow, and social and political values change. The concerns that motivated the enacting body are likely to become increasingly obsolete. Amendable texts can be modified to accommodate these changes. Unamendable texts raise the prospect that the living will increasingly find their aspirations frustrated by the concerns of those who lived long ago. Parts of the unamendable text may be sufficiently vague that updating through interpretation is possible. But nearly all texts contain at least some rule-like provisions that defy change through interpretation.[19] As time marches on, some of these provisions

18. Thomas Jefferson is usually cited as the original source for this concern. As he wrote to Madison, " '*[T]he earth belongs in usufruct to the living*' . . . the dead have neither powers nor rights over it." Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392 (Julian Boyd ed., 1958); *see also* ROBERT BORK, THE TEMPTING OF AMERICA 167–71 (1990); Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152, 164–69 (Larry Alexander ed., 1998). *See generally* Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 169, 192–202 (2008) (arguing that the case for enforcing the original meaning of enactments based on democracy cannot be sustained for provisions more than one hundred years old); Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606 (2008) (examining the relationship between arguments about dead hand control and theories of constitutional interpretation).

19. *See* JACK M. BALKIN, LIVING ORIGINALISM 42 (2011) (noting that the Constitution contains many specific rules that have a plain meaning); Dixon, *supra* note 3, at 320. For evidence that the Court tends to apply originalist methods in cases involving constitutional rules, but not

may become increasingly questionable. Why must every state have two senators? Why must all civil controversies involving twenty dollars or more be tried by juries?[20] Other provisions establish institutions, impose limits on eligibility for office, or allocate powers in ways that cannot be plausibly interpreted away. Do we really need the Electoral College? Why must the president be a natural born citizen? Why should the residents of the District of Columbia be deprived of representation in Congress?[21]

Another disadvantage of unamendable texts is that they impoverish the information needed to develop public policy under conditions of uncertainty. The back-and-forth made possible by an amendable text allows two different institutions, with very different capacities and perspectives, to weigh in sequentially on the evolution of public policy, after observing the work product of the other. The result is likely to be better policy than if either were to act alone. This could be either because many minds consider the problem from different perspectives,[22] or because the process allows for experimentation with different approaches followed by assessment of the results.[23] Both explanations reflect an appropriate degree of epistemological modesty about social policy. Determining the right answer is not a matter of discovering immutable truths, but drawing on disbursed information to produce incremental adjustments.[24]

Perhaps most importantly, an unamendable text inevitably drains authority away from the people. Forget the debate about whether honoring the intentions of a long-dead enactor is or is not consistent with popular sovereignty.[25] If a text is unamendable, the people will be cut out of any strong influence over what the law will be *in the future*. The authority to achieve legal change will be relocated away from the process of enactment and amendment of texts—

in cases involving constitutional standards, see Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639, 1658–80 (2016).

20. U.S. CONST. art. I, § 3, cl. 1; *id.* amend. VII.

21. *Id.* art. II, § 1; *id.* art. II, § 1, cl. 5; *id.* art. I, § 8, cl. 17 (authorizing creation of a "district" to serve as the seat of national government and differentiating it from a state).

22. *See* ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 163–86 (2008) (comparing, from a many-minds perspective, formal constitutional amendment relative to judicial interpretation of the Constitution).

23. There is an extensive and growing literature, sometimes called new governance theory, on the importance of adaptability in the development of regulatory policy. *See, e.g.*, Charles F. Sable & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011).

24. On these grounds, Ozan Varol has argued that there is wisdom in adopting temporary constitutions, which can be revised in light of experience and reduce the "error costs" of durable constitutions. Ozan O. Varol, *Temporary Constitutions*, 102 CALIF. L. REV. 409, 421–27 (2014).

25. For discussion, see KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW chs. 4–5 (1999); Primus, *supra* note 18.

something over which the people have at least an indirect say through elections of representatives—and given over to the interpreters, who typically are not elected and once chosen are largely immune from removal from office. And given their relative isolation from public oversight, the interpreters are more likely to respond to elite opinion, rather than public opinion.[26] Any system of government that claims to rest on the authority of "We the People" should be dismayed by the prospect that its most important laws are unamendable.[27]

Against these disadvantages, one might think that a highly unamendable text would at least enhance the stability of a legal system, promoting reliance on the values enshrined in a text impervious to formal change. In fact, recent empirical studies by comparative constitutional law scholars suggest the opposite may be true. Highly unamendable constitutions have a significantly *shorter* life expectancy than ones that are relatively more amendable.[28] Drawing upon both international comparisons and studies of the constitutions of the fifty states,[29] these scholars conclude that longevity and amendability form an inverted "U" curve, with constitutions that are very easy to amend and those that are very difficult to amend having significantly shorter life spans than those in the middle. The United States, which has the

26. For evidence that the Supreme Court is more influenced by elite opinion than by popular opinion, see Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1566–80 (2010); Richard Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103.

27. The perception that constitutional law has become the exclusive province of courts and that this is in fundamental tension with our basic commitment to democracy animates a large literature on what is called "democratic constitutionalism." *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004). For a useful overview and synthesis, see David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2053–64 (2010). Democratic constitutionalism, in its various forms, seeks to maintain the hegemony of constitutional law relative to ordinary legislation and administrative action but somehow inject more popular participation into its formulation. The proposal here, in contrast, is to de-emphasize constitutional law and other types of highly unamendable law, at least as sources of legal change, and to place greater emphasis on relatively more amendable forms of law, which will be subject to greater democratic influence. For a relatively unusual effort within the literature on democratic constitutionalism to identify an institutional innovation that would promote more amendability, see Daniel E. Herz-Roiphe & David Singh Grewal, *Make Me Democratic, but Not yet: Sunrise Lawmaking and Democratic Constitutionalism*, 90 N.Y.U. L. REV. 1975, 1998 (2016).

28. ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 140 (2009).

29. For international comparative studies, in addition to ELKINS ET AL., *id.*, see AREND LIJPHART, PATTERNS OF DEMOCRACY 216–31 (1999); Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 237 (Sanford Levinson ed., 1995) [hereinafter RESPONDING TO IMPERFECTION]. Lutz also relies on a comparative analysis of U.S. state constitutions. *Id.*; *see also* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1666–68 (2014).

oldest continuing constitution and the one that is perhaps the most difficult to amend,[30] is a major anomaly here. By the law of averages, the U.S. Constitution should have lasted about thirteen years.[31]

As comparative constitutional scholars also observe, the more difficult it is to amend a constitution, the more likely it is that alternative mechanisms of change will come to the fore.[32] These include, perhaps most frequently, overthrowing the constitution and adopting a new one, or simply ignoring the constitution.[33] Another hypothesized means of achieving constitutional change—and the one directly relevant to the topic of this Article—is through judicial interpretation. Indeed, it is commonly asserted that revisionist interpretation of the U.S. Constitution is what has allowed this document to remain in effect, though amended only infrequently, for almost 230 years.[34]

Yet there are serious limitations to securing change through interpretation. Change through interpretation is not always possible. Sometimes the text incorporates a rule as opposed to a standard.[35] Other issues will evade review because no one has standing or the issue is regarded as a political question unfit for judicial resolution.[36] Moreover, this mode of change must be mediated through legal arguments pitched to interpreters, which necessarily precludes many

30. *See* LIJPHART, *supra* note 29, at 222 (describing the U.S. Constitution as having the "least flexible" amendment procedure of thirty-six democratic nations studied).

31. *See* ELKINS ET AL., *supra* note 28, at 140 tbl.6.4 (showing predicted life expectancy of constitutions at thirteen years as the difficulty of amendment approaches the maximum); *see also* Lutz, *supra* note 29, at 262 tbl.14 (showing average duration of national constitutions as thirty-seven years with an amendment difficulty of 3.01 or higher); *id.* at 257 (computing the degree of difficulty of amending the U.S. Constitution as 5.80). One can argue that the durability of the U.S. Constitution is due to it being a uniquely good constitution. *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013). Something other than the salutary features of the text must be at work in accounting for its durability, however, since the U.S. Constitution was widely copied in Latin America in the nineteenth century, and nearly all the imitations have disappeared. ELKINS ET AL., *supra* note 28, at 25.

32. *See, e.g.*, Lutz, *supra* note 29, at 245 ("A low amendment rate associated with a long average constitutional duration strongly implies the use of some alternative means of revision to supplement the formal amendment process.").

33. ELKINS ET AL., *supra* note 28, at 56.

34. *See, e.g.*, LIJPHART, *supra* note 29, at 229 (classifying the United States as combining the highest degree of constitutional rigidity with the greatest degree of activist judicial review); *id.* at 265 (suggesting that the inordinate difficulty of amending the U.S. Constitution "led to an unusually (and some would undoubtedly say 'inordinately') heavy reliance on innovative judicial interpretation"); Versteeg & Zackin, *supra* note 29, at 1702.

35. Dixon, *supra* note 3, at 320. Numerical thresholds, such as the minimum age requirement for the president, the number of senators from each state, and the right to trial by jury in federal civil cases involving more than twenty dollars, are clear examples of rules that defy change through interpretation.

36. For an overview of standing requirements and other limits on justiciability, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 49–266 (7th ed. 2015).

types of considerations supporting or opposing change. To be sure, there may be indirect forms of feedback that influence interpreters. The interpreter's efforts may be subject to criticism by academics, editorial writers, and political figures, and the interpreter may be subject to various threats such as court packing, loss of jurisdiction, and so forth.[37] But these indirect feedback mechanisms are highly imperfect.[38] They do not require any constructive participation by the enacting body in the development of policy. They can also backfire, at least in the short term, if the interpreter perceives the feedback as attempted intimidation. This may cause the interpreter to dig in its heels in order to maintain a reputation for independence and consistency.[39]

Perhaps most seriously, change through interpretation of unamendable texts generates its own second-order form of unamendability. This is because of the problem of legitimacy facing the interpreter when the back-and-forth with the enactor shuts down. Once the text comes to be perceived as effectively unamendable, the interpreter increasingly runs the danger of being identified as a usurping lawgiver rather than an interpreter. As we will see in the next Part, the interpreter trapped in such a situation is likely to fall back on precedent interpreting the text as the source of authority for its decisions—because decision according to precedent is regarded as a form of law-constrained behavior. Textual interpretation gives way to common law incrementalism. This mode of interpretation, however, places a large brake on the prospects of achieving change through interpretation, if only because precedents must be followed by the interpreter if the interpreter has any hope that they will be respected by other actors.[40]

As precedent piles up particularizing the generalities found in the unamendable text, the prospect for change through interpretation may dim even further, if pervasive doubts about the legitimacy of the

37. The U.S. Supreme Court is occasionally claimed to be an instrument of popular opinion based on the existence of these sorts of indirect feedback mechanisms. *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

38. Like the possibility of amendment, the prospect of adopting jurisdiction-stripping measures and other forms of congressional retaliation may have receded in recent years with the increasing ideological polarization of Congress. In this environment, members of Congress may be primarily interested in making symbolic statements that resonate with their respective electoral bases, rather than enacting legislation that limits the authority of the Supreme Court. *See* Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337, 1339 (2006).

39. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992) (plurality opinion) ("[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.").

40. *See id.* at 866 (noting that "frequent overruling would overtax the country's belief in the Court's good faith").

interpreter's exegesis of the text result in agitation to return to the text's "original meaning."[41] Commentators hostile to current doctrine will have little difficulty pointing out that the law as reflected in the body of interpretation differs from what the enacting body intended or understood.[42] The only commands that deserve the appellation "law," the critics will insist, are the ones that were adopted by the enactors.[43] From this perspective, common law incrementalism begins to look more and more like a shaky tower on a weak base.[44] To the extent this perspective takes hold—and there is evidence it is taking hold[45]—the process of interpretation will introduce a further inhibition on the prospects for legal change.

The sclerotic effect of a precedent-based gloss on the Constitution or framework statutes is obscured by the emphasis of legal theorists on certain dramatic shifts in interpretation by the Supreme Court, such as the repudiation of *Plessy v. Ferguson* by *Brown v. Board of Education*,[46] the retrenchment from the liberty of contract regime associated with *Lochner v. New York*,[47] or the overruling of *Bowers v. Hardwick* in *Lawrence v. Texas*.[48] But this ignores the stickiness of doctrine in most areas of public law, where overruling is rare and past

41. For a compendium of sources on the emergence of the originalism movement, see ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007).

42. *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (documenting the various ways in which the modern administrative state is inconsistent with the original understanding of the Constitution); Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 STAN. L. REV. 1237, 1237 (2017) (arguing that modern equal protection jurisprudence is inconsistent with the text of the Equal Protection Clause).

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

44. Comparative constitutional law scholars observe that "the fixation on a constitution's original meaning is almost uniquely American. Foreign constitutional authors and interpreters do not generally share the American obsession with the stability of the original text and its meaning." Versteeg & Zackin, *supra* note 29, at 1669. This American "obsession," I would argue, is directly attributable to the unamendability of the Constitution and the growing sense that the burgeoning common law exegesis on the document lacks the legitimacy of the original document.

45. I would cite the proliferating efforts of scholars to justify significant judicial revisions in constitutional law as being consistent with originalism. *See, e.g.*, BALKIN, *supra* note 19 (arguing that vague constitutional provisions like the Equal Protection Clause were originally understood to require interpretation in the manner of a "living" constitution); ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 152, 154–55 (2011) (restating the views of Professor Solum that originalism properly understood leaves large room for "construction" of abstract, general, and vague language consistent with a variety of approaches that permit judicial updating); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2359 (2015) (defining originalism as including a commitment to interpretation through evolving precedent).

46. Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).

47. 198 U.S. 45 (1905).

48. 539 U.S. 558, 560 (2003).

precedents cannot always be distinguished in ways that allow for basic course corrections. Some examples include: (1) the narrow interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment in the *Slaughter-House Cases*, which has never been revisited (notwithstanding persistent academic criticism);[49] (2) the approval in *Humphrey's Executor v. United States* of for-cause limitations on presidential removal of the heads of independent agencies, which continues to be followed although it undermines the most plausible instrument of presidential control over a significant portion of the administrative state;[50] (3) the imposition of mandatory warnings for criminal suspects as a prophylactic rule in *Miranda v. Arizona*, followed by the insistence that the decision was based on the Court's authority to interpret the Constitution and cannot be revised legislatively;[51] (4) the adoption in *Buckley v. Valeo* of the distinction between expenditures and contributions for purposes of assessing the constitutionality of campaign finance laws, which has shaped all subsequent decisions and has arguably made rational campaign finance regulation impossible;[52] and (5) the decision in *City of Philadelphia v. New Jersey* that garbage disposal is subject to the Dormant Commerce Clause, which has invalidated nearly all subsequent attempts to

49. 83 U.S. 36 (1872); *see* McDonald v. City of Chicago, 561 U.S. 742, 758 (2010) (refusing to reconsider the *Slaughter-House Cases*' holding); Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001) (noting widespread scholarly agreement that the *Slaughter-House Cases* do not present "a plausible reading of the Amendment").

50. 295 U.S. 602 (1935). *Humphrey's Executor*, which involved the commissioner of an independent agency, was extended to an (assertedly) inferior executive officer in *Morrison v. Olson*, 487 U.S. 654, 709 (1988). The Court appeared to have second thoughts about the wisdom of creating executive officers insulated from presidential control in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), but rather than overrule *Humphrey's Executor* and *Morrison*—which would entail repudiating precedent—it adopted the rather silly rule that the Constitution prohibits two layers of for-cause protection for executive officers. On why presidential authority to remove principal officers at-will makes more sense as a device for assuring accountability to the president throughout the executive branch, see Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014).

51. Miranda v. Arizona, 384 U.S. 436 (1966). When presented with a challenge to the precedent based on a subsequent congressional enactment, the Court upgraded the prophylactic rule to a constitutional command in *Dickerson v. United States*, 530 U.S. 428 (2000).

52. 424 U.S. 1, 143 (1976); *see, e.g.*, Anthony J. Gaughan, *The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform*, 77 OHIO ST. L.J. 791, 792 (2016) ("[T]he Supreme Court has barred Congress from acting on popular support for comprehensive reform of the system . . . [because] the *Buckley* ruling prohibits Congress from establishing limits on overall campaign spending . . . ."); Burt Neuborne, *One Dollar–One Vote: A Preface to Debating Campaign Finance Reform*, 37 WASHBURN L.J. 1, 32–39 (1997) (describing the practical difficulties for campaign finance reform engendered by *Buckley*'s expenditures-contributions distinction).

require recycling of waste at its source.[53] The list could be extended indefinitely.

The fundamental weakness of updating an unamendable text through interpretation is captured by Justice Scalia's metaphor of the common law as a Scrabble Board: "No rule of decision previously announced [can] be erased, but qualifications [can] be added to it."[54] Because previous decisional rules ordinarily cannot be erased—no matter how erroneous they come to seem—they are locked in. Yet at the same time, the system permits elaborations and qualifications on what has been previously decided. So interpreters are free to advance their policy preferences, insofar as they can be framed as "qualifications" to the existing body of precedent. If the policy preferences of interpreters come to be strongly correlated with the political party that appointed them—as has happened in recent years—then the interpreter will be condemned as a "political court,"[55] even if the decisional space in which it operates is highly constrained. The net result is the worst of both worlds as a mechanism for change: the options for change are highly limited and yet the change agent is increasingly vulnerable to charges of illegitimacy.[56] How long such a system can persist is an open question.

II. HOW INTERPRETERS RESPOND TO PERCEPTIONS OF AMENDABILITY

In this Part, I consider what interpreters are likely to know about the amendability of different enacted texts and how they are likely to react to these perceptions when called upon to interpret the text. What follows does not purport to be a complete theory of interpretive behavior. Obviously, many factors influence the way interpreters construe legal texts, including the legal norms or conventions that govern the interpretational process. Instead, I will isolate one variable—the interpreter's perception of the probability of override of the interpretation by the enacting body—that has rarely

53. 437 U.S. 617 (1978); *see* C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 389–95 (1994) (following *Philadelphia* and invalidating a town ordinance that directed waste flow to a local transfer station); Dan T. Coenen, *Where* United Haulers *Might Take Us: The Future of the State-Self-Promotion Exception to the Dormant Commerce Clause Rule*, 95 IOWA L. REV. 541, 548 n.32 (2010) (citing cases decided after *Carbone*, most of which resulted in invalidation of challenged ordinances); Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. REV. 529, 533 (1994) (noting, on the eve of the *Carbone* decision, that courts following *Philadelphia* "invariably invalidate flow control" ordinances).

54. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 8 (1997).

55. Posner, *supra* note 15, at 76–77.

56. *See supra* note 13.

been factored into previous accounts seeking to explain the interpretive process.[57] I conclude that perceived amendability will directly influence the interpretive process only in extreme cases—where the interpretation is perceived to be either highly likely or highly unlikely to be amended. Given that the U.S. Constitution and many important federal statutes are now highly unlikely to be amended, it is likely that the interpretive process will be significantly affected by the remote prospect of override by the enacting body.

A. Sources of Perceived Amendability

There are four sources of information that plausibly allow interpreters to form judgments about the probability of amendment of a text they are charged with interpreting: the procedural difficulty of securing an amendment of the text, the historical probability of securing an amendment of the type of text in question, the length of time the specific text has remained unamended, and other cultural knowledge about the propriety of amending the particular type of text in question.

1. Procedural Barriers to Amendment

The first source of information is the procedural difficulty of securing an amendment of the text. The procedural barriers to amendment range from very low (high probability of amendment) to extremely high (low probability of amendment). The full range of possibilities is easier to see if we include administrative texts along with statutes and constitutional provisions.

The most easily amended legal texts are probably "guidance" materials issued by administrative agencies such as a press release or agency enforcement manual.[58] There are no formal procedures for issuing such guidance. If an interpreter construes one of these pronouncements in a way the agency dislikes, it is relatively easy to issue a clarifying statement that effectively amends the original guidance document. Likewise, executive orders of the president are easy to amend—the president, or the president's immediate successor,

57. The principal exceptions are various strategic actor or "separation of powers game" theories that posit courts interpret statutes with an eye to the likely legislative response. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 138–57 (1998); John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992). As noted below, these theories founder in all but the most extreme cases of amendability or unamendability because of the low probability of legislative override.

58. *See* Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1466–68 (1992).

merely has to sign a new executive order superseding or amending the old one.[59]

Moving up the ladder of procedural difficulty a notch, we encounter agency pronouncements set forth in policy statements or interpretive rules published in the Federal Register or embodied in an adjudicative order released by the agency.[60] It is somewhat more difficult to amend these texts. Amending a policy statement or interpretive rule published in the Federal Register requires a further publication in the Federal Register.[61] Clarifying or overruling a pronouncement contained in an adjudicative order will probably require issuing a pronouncement in a subsequent adjudication, or possibly issuing a legislative rule.

Advancing further along the procedural spectrum, we come to agency rules having the force of law. Such a rule can be amended only by issuing another rule having the force of law,[62] which ordinarily means engaging in notice-and-comment procedures as required by the APA, publication of the new rule in the Federal Register, and waiting the minimum time for the new rule to take effect.[63] This is clearly the most procedurally difficult form of administrative amendment.

When we turn to legislation, the procedural hurdles to amendment become significantly higher. Enacting a federal law requires the concurrence of the House and Senate to the same text, and either the agreement of the president or a two-thirds vote of each chamber overriding the president's veto. This has rightly been described as functionally equivalent to a supermajority voting rule.[64] In recent years, legislative amendment has become even more difficult

59. *See* KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER (2001).

60. *See generally* Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803 (2001).

61. *Compare* 5 U.S.C. §§ 552(a)(1)(D)–(E) (2012) (amendments of "statements of general policy or interpretations of general applicability formulated and adopted by the agency" must be published in the Federal Register), *with* 5 U.S.C. § 552(a)(2)(B) (statements of policy and interpretation not published in the Federal Register must be made available for public inspection and copying).

62. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1206 (2015) (finding agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance"); *see also* 5 U.S.C. § 551(5) (defining "rule making" to include "amending" or "repealing" a rule).

63. 5 U.S.C. § 553.

64. *E.g.*, John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 773–74 (2002).

because of the need in many cases to obtain the vote of sixty senators to end debate on a proposed measure.[65]

The U.S. Constitution, on any account, falls far toward the high-difficulty end of the spectrum. Indeed, the U.S. Constitution, on the conventional view, is "unusually, and probably excessively, difficult to amend."[66] The principal procedure for amendment, set forth in Article V, requires an affirmative two-thirds vote of both houses of Congress and ratification by the legislatures of three-fourths of the states.[67] According to one study, the only national constitution more difficult to amend than the U.S. Constitution was the Constitution of Yugoslavia adopted in 1946, which of course no longer exists.[68]

The ultimate in unamendability in the U.S. context, which is unique, is the provision of Article V that says no state, without its consent, can be deprived of its equal representation in the Senate.[69] Absent unanimous consent, the only way to amend this provision, presumably, would be a revolution overturning the entire Constitution.[70]

2. Historical Incidence of Amendment of the Type of Text in Question

A second source of data that interpreters can take into account in predicting the ease of amendment, without regard to the procedural difficulty of amendment, is the actual rate of amendment of the type of

---

65. *See* VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 27, 57, 66 (2016) (highlighting the significance of Senate Rule 22 in reinforcing the supermajority barriers to the enactment of federal legislation).

66. Lutz, *supra* note 29, at 265.

67. U.S. CONST. art. V.

68. Lutz, *supra* note 29, at 261 tbl.11.

69. U.S. CONST. art. V (setting forth the procedures for amending the Constitution and then stating, "Provided . . . that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate"). Conceivably, one could use two amendments: the first amending the Article V requirement of unanimous consent and the second amending Article I to require the Senate to be apportioned on the basis of population. This, of course, would subvert the plain intention of Article V. Some foreign constitutions, such as the German Basic Law, make certain rights explicitly unamendable. *See* GRUNDGESETZ [GG] [BASIC LAW], art. 79(3), *translation at Basic Law of the Federal Republic of Germany*, GESETZE IM INTERNET, http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf (last visited Jan. 6, 2018) [https://perma.cc/TP69-BQHF] (prohibiting amendment of select provisions of the constitution, including the bill of rights).

70. I will not pursue the question whether it is meaningful to speak of amendment of authoritative texts outside the formal channels of amendment, such as Article V in the case of the Constitution, or the procedures for enacting a law under Article I, Section 7 in the case of a federal statute. I accept the view, which is conventional in legal circles, that amendment of the text is secured only through the designated formal process. *Compare* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); *and* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994), *with* David R. Dow, *The Plain Meaning of Article V*, *in* RESPONDING TO IMPERFECTION, *supra* note 29, at 117.

legal text at issue. There are no published data of which I am aware estimating the frequency with which administrative interpretations are overridden by higher administrative authority. One gets the impression this happens with some regularity, but there are no empirics backing this up.

Recent scholarship has supplied us with some data about the frequency of amendment of state constitutions. On average, state constitutions are either replaced or revised by amendment roughly every three years.[71] This is a rate of revision far higher than exists for the federal Constitution. Moreover, a significant portion of these amendments are designed to override judicial interpretations of the state constitution.[72] There are evidently no data dealing with the frequency of state legislative overrides of state statutory interpretations. State governments have also become more polarized in recent years, but at least in states where a single party holds both chambers of the legislature and the governorship, "polarization need not slow down a unified party leadership intent on making far-reaching policy changes."[73] This presumably includes overrides of unwanted interpretations of state law.

With respect to legislative overrides of federal statutory interpretations, we have more data. Most studies have focused on Supreme Court decisions and have sought to identify which ones have been overridden by Congress. The most comprehensive study, by Matthew Christiansen and Bill Eskridge, finds that Congress has on average overridden Supreme Court decisions about six times per year since 1967.[74] Their data do not indicate what percentage of statutory interpretation decisions this represents. Other studies show a relatively low rate of statutory interpretation overrides. A comprehensive study of all Supreme Court statutory interpretation decisions from 1969 to 1988 revealed that 2.7 percent were overridden by Congress.[75] A study

71. Versteeg & Zackin, *supra* note 29, at 1674.

72. John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983 (2007) (noting that at the state level, "court-constraining amendments have been enacted for a wide range of purposes and on a regular basis throughout American history").

73. Boris Shor, *Polarization in American State Legislatures*, *in* AMERICAN GRIDLOCK, *supra* note 10, at 220.

74. Christiansen & Eskridge, *supra* note 6, at 1356 tbl.2 (showing 286 overrides in forty-five years, or an average of just over six overrides per year). An earlier study by Eskridge, which covered a much shorter period (1967–1990), found a higher rate of overrides. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 335–36, 338 (1991).

75. Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMPLE L. REV. 425, 445 (1992). An older study found only twenty-one congressional overrides of Supreme Court statutory interpretation decisions in the

limited to preemption cases between 1983 and 2003 found that just 2.4 percent were overridden or modified by Congress.[76] A study of tax legislation found that 5.7 percent of Supreme Court tax decisions were overridden or modified over a fifty-year period.[77]

An alternative strategy is to begin by identifying legislation that explicitly overrides a judicial decision. Interestingly, a sample of one hundred such statutes gathered by Jed Barnes (from 1976 to 1990) reveals that only twenty-six percent of the overrides involved Supreme Court decisions. The others were decisions by courts of appeals, district courts, the tax court, and military tribunals.[78] This suggests that the universe of statutory overrides is roughly four times larger than revealed by the studies that focus only on the Supreme Court. But it would also seem that, for any particular court, the numbers are not large. As previously noted, the Christiansen & Eskridge study finds a notable falloff in overrides of Supreme Court interpretations since 1998; presumably this carries over to the larger universe of overrides as well. Collectively, these studies suggest that legislative overrides of statutory interpretation decisions are "relatively rare,"[79] although they occur with enough frequency that interpreters are surely aware of the possibility.

The Constitution, as one would expect, stands out as uniquely difficult to amend based on general frequency of amendment. According to one count, there have been eleven thousand attempts to amend the Constitution since 1789, of which only twenty-seven have succeeded.[80] Eleven of these amendments (including the Twenty-Seventh) were part of a deal to secure ratification of the original document, and ten of these amendments were ratified within the first two years. The balance of sixteen amendments works out to one amendment every fourteen years. Perhaps more to the point, only five amendments have been adopted to overturn judicial interpretations of the Constitution.[81] This is one every

---

immediate post–World War II era. Note, *Congressional Reversal of Supreme Court Decisions: 1945–1957*, 71 HARV. L. REV. 1324, 1326 (1958).

76. Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1612–13 (2007).

77. Nancy C. Staudt et al., *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954–2005*, 82 N.Y.U. L. REV. 1340, 1354, 1384 (2007) (reviewing 279 Supreme Court tax decisions and finding that sixteen led to "an actual override or modification").

78. JED BARNES, OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT–CONGRESS RELATIONS app. at 197–209 (2004) (my calculation is based on the description of overrides in the appendix).

79. Solimine & Walker, *supra* note 75, at 438.

80. Dixon, *supra* note 3, at 342.

81. The Eleventh Amendment overturned *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). The Fourteenth Amendment overturned *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). The

forty-five years. Clearly, an interpreter of the Constitution, looking at the empirical record, would conclude that the odds of having an interpretation reversed by amendment are exceedingly low.

3. Longevity of the Specific Text in Question

A third source of predictive data is the length of time the specific text in question has remained unamended. Section 1 of the Sherman Act, which reads the same as when it was enacted over 125 years ago, probably has a very low probability of being amended in the future.[82] The National Labor Relations Act, originally adopted in 1935 and significantly amended in 1947, has defied amendment for the last seventy years, notwithstanding tremendous changes in American labor markets, including the percentage of the workforce represented by unions.[83] There have been no significant additions to the suite of federal environmental statutes since 1990, more than a quarter century ago. At the other extreme, a more recent enactment like the Dodd-Frank Act presents much greater uncertainty about the likelihood of amendment. An interpreter would likely put a higher subjective probability of amendment on such an enactment because political support remains in flux.[84] Most of the provisions of the Constitution have remained unchanged for nearly 230 years. What are the chances that the Commerce Clause or the First Amendment will be amended in the future? Given the failure to amend these provisions in the last 230 years, notwithstanding the enormous social and technological changes that have occurred, the odds are vanishingly small.

4. Cultural Attitudes Toward Amendment

A fourth and more qualitative source of information consists of general cultural knowledge about attitudes toward amendment.[85] One

Sixteenth Amendment overturned *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895). The Twenty-Fourth Amendment overturned the holding of *Breedlove v. Suttles*, 302 U.S. 277 (1937), overruled by *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), insofar as the earlier case upheld the constitutionality of a poll tax on federal elections. Finally, the Twenty-Sixth Amendment overturned *Oregon v. Mitchell*, 400 U.S. 112 (1970).

82. *See* Oldham, *supra* note 4, at 349.

83. *See* Brudney, *supra* note 5.

84. The House of Representatives recently adopted a bill that would repeal or amend significant portions of the Dodd-Frank Act. Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017). As this Article is written, it is unclear what action the Senate will take.

85. *See generally* Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT'L J. CONST. L. 686 (2015) (arguing, based on comparative data, that "amendment culture" is more predictive of the rate of amendment of constitutions than is amendment difficulty); Ozan O.

point of contrast here is between amendments overriding statutory interpretation decisions and amendments overriding constitutional decisions. Everyone acknowledges that Congress is entitled and even encouraged to override statutory interpretation decisions.[86] To be sure, congressional engagement is understood to be more intense in some areas than in others. For example, it is well known that congressional oversight of tax decisions is especially close.[87] Knowing this, interpreters probably increase their subjective estimate of the probability of amendment in these areas. In contrast, other statutes, like the Voting Rights Act, have attained the status of "quasi-constitutional law" or "super-statutes,"[88] and are extremely difficult to amend, in part because of the support they enjoy from vested interests, but also because they have taken on the quality of moral imperatives.[89]

With respect to the Constitution, a combination of attitudes conspires to make the prospect of amendment extremely remote. There has long been a view that the Constitution is the "sacred symbol of nationhood,"[90] bequeathed to us by the all-wise and all-knowing founding fathers, and to which all elected officials take an oath of obedience. Not surprisingly, those who embrace this view are often hostile to the idea of amendment.[91] The prospect of amendment is also anathema to legal elites, because it is feared it would open the door to amendments that would put at risk certain favored policies, such as abortion rights.[92] In any event, all efforts to initiate the constitutional

---

Varol, *Constitutional Stickiness*, 49 U.C. DAVIS L. REV. 899 (2016) (noting that history and constitutional starting points constrain constitutional choices across a wide variety of societies).

86. *See, e.g.*, Ruth Bader Ginsburg, *Communicating and Commenting on the Court's Work*, 83 GEO. L.J. 2119, 2125 (1995) (commenting that "[w]hen Congress is not clear, courts often invite, and are glad to receive, legislative correction").

87. Staudt et al., *supra* note 77. Jed Barnes's study of overruling statutes from 1976 to 1990 found that twenty percent involved tax statutes. BARNES, *supra* note 78, at 197–209.

88. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1394–1409 (2015).

89. The history of the Voting Rights Act reveals that the formula for determining covered jurisdictions subject to preclearance review under Section 5 remained unchanged through repeated reenactments—and indeed, enjoyed increasing margins of support in Congress over time—even after the Supreme Court had raised questions about whether it had become outdated. *See* Shelby County v. Holder, 133 S. Ct. 2612, 2619–21 (2013).

90. Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 17 (1984); *see also* LEVINSON, *supra* note 12, at 22 ("[T]he belief in some kind of transcendent origin of the Constitution obviously contributes to according it utmost devotion.").

91. MICHAEL KAMMEN, A MACHINE THAT WOULD GO BY ITSELF 207, 381–82 (1987) (citing persons opposed to any amendment of the Constitution).

92. *See, e.g.*, Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 161 (1993) (quoting Thomas Foley, then Speaker of the House, as vowing, "On my watch, I'm not going to have the Constitution amended, if I can avoid it"); Laurence H. Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 PAC. L.J. 627,

amendment process have failed in recent years. There have been a few close calls, like the efforts to amend the Constitution to require a balanced budget[93] and to permit flag desecration laws.[94] But no amendment to the Constitution has been proposed and ratified in over forty years.[95]

B. Amendability and Interpreter Behavior

There is substantial political science literature on whether interpreters factor the prospect of override into their interpretive behavior. One school of thought, which goes by the names "separation of powers" theory or "strategic actor" theory, posits that interpreters consider the possibility of override by the enacting body. Not wishing to have their interpretations undone, interpreters trim their sails in light of their perception of the preferences of the enactor so as to minimize this risk.[96] Another school of thought argues that the prospect of override is too remote to have an appreciable impact on interpreters.[97] Interpreters who sit on multimember panels (such as appeals courts) may anticipate the views of other individuals on the panel and will occasionally adjust their views in anticipation of these views.[98] But they will not adjust their interpretive behavior in response to the presumed views of the enacting body.

---

635 (1979) (stating that a constitutional convention "would inevitably pose enormous risks of constitutional dislocation").

93. JAMES V. SATURNO & MEGAN SUZANNE LYNCH, CONG. RESEARCH SERV., R41907, A BALANCED BUDGET CONSTITUTIONAL AMENDMENT: BACKGROUND AND CONGRESSIONAL OPTIONS 13–24 (2011), https://fas.org/sgp/crs/misc/R41907.pdf [https://perma.cc/8XEB-VAR3] (detailing the history of congressional consideration of balanced budget amendment proposals between 1956 and 2011).

94. Charles Tiefer, *The Flag-Burning Controversy of 1989–1990: Congress' Valid Role in Constitutional Dialogue*, 29 HARV. J. ON LEGIS. 357, 377–78 (1992).

95. American history has witnessed other periods when many years elapsed without a constitutional amendment. Sixty-one years passed between 1804 and 1861 without an amendment, and forty-three years passed between 1870 and 1913 without an amendment. In both instances, the quietude ended with a burst of amending activity. *See* John R. Vile, *American Views of the Constitutional Amending Process: An Intellectual History of Article V*, 35 AM J. LEGAL HIST. 44, 67 (1991). It is always possible, of course, that this pattern could repeat itself again.

96. *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 57, at 138–57; *see also* LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 119–23 (1997); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992).

97. Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1457–59 (2001); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997).

98. Modification of views in response to other participating judges on appeals courts is well established empirically. *See, e.g.*, Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006).

I offer two hypotheses in response to this literature. The first is that whether interpreters adjust their behavior in response to the views of the enacting body is likely a function, at least in significant part, of their perception of the probability of override by the enacting body. If the probability of amendment is perceived to be high, interpreters will likely heed the current views of the enacting body. As the perceived probability becomes progressively more remote, the interpreter will give less and less thought to the current views of the enacting body. The second hypothesis is that if we have entered an era in which the probability of amendment of certain enacted texts like the Constitution is extremely low, the interpreter is likely to shift to a different mode of decisionmaking altogether. The text will effectively disappear and will be replaced by a form of common law incrementalism.

To flesh these hypotheses out, I will briefly consider three different situations, which can be considered as approximate points along what is necessarily a continuum: the interpreter faced with a highly amendable text, the interpreter faced with a text of moderate amendability, and the interpreter faced with a highly unamendable text.

1. Interpretation of Texts of High Amendability

When the prospect of override by amendment is high, I hypothesize that interpreters will seek to conform to the current view of the body with the power to override their interpretations. In other words, the interpreter will deploy the general interpretational strategy developed by Einer Elhauge, who argues (on normative grounds) that interpreters should construe ambiguities in statutes so as to reach outcomes that correspond to the *current enactable preferences* of the enacting body.[99]

This conjecture rests on the assumption that interpreters are averse to having their interpretations overridden by amendment. We have it on good authority that judges do not like being reversed by higher courts.[100] There are a number of plausible reasons for this.

---

99. EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION (2008).

100. RICHARD A. POSNER, HOW JUDGES THINK 141 (2008). For empirical evidence supporting the proposition that district court judges decide cases so as to limit the risk of reversal by the court of appeals, see Stephen J. Choi, Mitu Gulati & Eric Posner, *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals*, 28 J.L. ECON. & ORG. 518 (2011). For studies supporting fear of reversal as a motivating factor, see Lawrence Baum, *Lower-Court Response to Supreme Court Decisions: Reconsidering a Negative Picture*, 3 JUST. SYS. J. 208 (1978); and Joseph L. Smith, *Patterns and Consequences of Judicial Reversals: Theoretical Considerations and Data from a District Court*, 27 JUST. SYS. J. 28, 30 (2006). For skepticism that fear of reversal plays a

Partly it is a matter of not wanting time and effort to go to waste. Partly it is a reputational concern; reversal implies professional criticism. Partly it is simply "amour propre" as Judge Posner puts it.[101]

At least some of these reasons also apply to override by amendment. Certainly the desire not to have one's work go to waste is equally applicable. One could argue that reversal by amendment is less of an implied criticism than reversal by a superior tribunal. The higher tribunal bases its decision on the same factors as the interpreter, whereas the amending body may not disagree with the interpretation but may simply conclude that the law should be changed. Still, no one likes to be repudiated, and having an interpretation overridden is likely to be aversive to the interpreter.

Frank Cross and Blake Nelson argue that the evidence is "thin" that judges take the risk of override by Congress into account in the way they interpret statutes.[102] But if, as other evidence suggests, the probability of legislative override of statutory interpretation decisions is generally quite low, this is as one would expect. The question is, what will interpreters do if the prospect of override is much higher? We know district court judges worry about reversal by appeals courts (which happens frequently),[103] and it is plausible that agency interpreters worry about override by agency officials when agency officials can easily amend agency regulations. Courts may take the possibility of override into account in specific contexts, like tax legislation, where legislative oversight is intense and revision is more common.[104] The assumption that interpreters care about the possibility of override seems reasonable based on our general knowledge about human behavior; absent more conclusive evidence that interpreters are indifferent to this risk, I will proceed on the premise that this assumption is valid.[105]

"dominant" role in lower court decisionmaking, see David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579, 600 (2003).

101. POSNER, *supra* note 100, at 70.

102. Cross & Nelson, *supra* note 97, at 1457.

103. *See* Choi et al., *supra* note 100 (citing rates of reversal).

104. Jed Barnes reports that following tax overrides, "courts strived to apply statutory language literally, even if adhering to the statute's plain language produced absurd policy results." BARNES, *supra* note 78, at 178–79. He attributes this to the nonpartisan nature of most tax questions, but the greater frequency of overrides in this area could also explain the judicial behavior.

105. A potential test of the assumption of aversion to override was created by Article 33 of the Canadian Charter of Rights and Freedoms, which allows an act of parliament or a provincial legislature to operate "notwithstanding" a provision in the Charter's list of fundamental freedoms. *See generally* Jeffrey Goldsworthy, *Judicial Review, Legislative Override and Democracy*, 38 WAKE FOREST L. REV. 451 (2003); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 275–99 (1995). The intention was to allow legislative overrides of judicial interpretations of the Charter. For various reasons, however, it is generally agreed that Article 33 has not been used much to

As matters currently stand, the only context in which interpreters face a high probability of override is when the text has been adopted by an administrative agency, which can override an interpretation by issuing an interpretive rule or policy statement, or, in some contexts, by amending a legislative rule. It is certainly plausible that an *agency* official (such as an administrative law judge) interpreting an administrative text will be in a good position to know which interpretation is likely to conform to the wishes of current top-level officials.[106] Although the data is sparse, there is reason to believe that such an agency interpreter will adopt interpretations of the agency text that conform to the wishes of the top-level administrative officials.[107] I am not suggesting that the interpretation will be completely unprincipled. Standard interpretational conventions will impose their constraints on the interpreter. But the agency interpreter will exploit the discretion inherent in being able to pick and choose among different canons of interpretation in order to avoid, if possible, override by top-level officials.[108]

---

override judicial decisions; consequently, the Canadian Supreme Court does not face a prospect of override significantly different from that of the U.S. Supreme Court. *See* Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 54 (2016) (noting that "the notwithstanding power has not been used by the federal Parliament, and 'some commentators discern a nascent convention that it should not be' " (quoting Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 OXFORD J. LEGAL STUD. 421, 425 (2012))).

106. There are a number of differences between courts and agencies as interpreters, including the greater security of tenure enjoyed by federal judges relative to administrators. Perhaps more importantly, administrative agencies are free to communicate to legislators about pending interpretational questions, *see* Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 333 (2013), whereas courts regard such communications as impermissible. This surely gives agencies better information about the current preferences of the legislature (or at least of legislative committees). These and other relevant differences are outside the scope of this Article.

107. One study of intake decisions by state administrators under the Social Security Disability program finds that outcomes are influenced by knowledge of high reversal rates by the relevant federal administrative law judge ("ALJ"). Lael R. Keiser, *Understanding Street-Level Bureaucrats' Decision Making: Determining Eligibility in the Social Security Disability Program*, 70 PUB. ADMIN. REV. 247, 251–52 (2010). Another study finds that ALJs rule in favor of the agency a very high percentage of the time (even under a restrictive definition of success). David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1172–90 (2016) (defining success as the SEC securing one hundred percent of the relief sought). There are a variety of explanations for this (most of the cases turn on factual issues). Interestingly, however, the survey finds that ALJs frequently cite administrative decisions in their opinions, whereas Article III district courts almost never cite administrative authority. *Id.* at 1187–88.

108. Arguably one should distinguish between interpreters (like ALJs) subject to internal review by superiors (like agency heads) and interpreters subject to external review by other enacting or reviewing bodies. Internal review is more like the district court/court of appeals relationship. Specifically, there is no evidence that interpreters like ALJs regard the possiblility of override by Congress any differently than courts do—which is to say no evidence that they do not conform to the moderate amendability hypothesis rather than the high amendability hypothesis. I am indebted to Jeffrey Gordon for this point.

It is also plausible to think that a *judicial* interpreter faced with a highly amendable administrative text will seek to avoid override. Indeed, any override here would be especially aggravating, since judges are used to reversing agencies, not the other way around. The awkward position of the judge asked to interpret a highly amendable agency regulation may explain the emergence and persistence of what is known as *Seminole Rock* or *Auer* deference.[109] Under this doctrine, courts accept any reasonable agency interpretation of its own regulations. The agency interpretation can come from any source, including an agency opinion letter or amicus brief.[110] Although much criticized,[111] *Seminole Rock*/*Auer* deference directs judges to embrace the understanding of the regulation currently advanced by the agency that promulgated the regulation. In the context of a highly amendable agency text, it functions to eliminate a high likelihood of override.[112]

2. Interpretation of Texts of Moderate Amendability

When interpreters perceive that there is some chance of amendment, but the probability is low, I posit that interpreters will engage in "ordinary" textual interpretation. There is obviously considerable dispute about what constitutes ordinary interpretation.[113] Some argue that the interpreter should look primarily to the meaning the words would convey to a reasonable reader of the text.[114] Others say the interpreter should resolve uncertainties by considering the intent

109. Auer v. Robbins, 519 U.S. 452, 461 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 417 (1945).

110. *See, e.g.*, Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 613–15 (2013) (deferring to interpretation in government amicus brief).

111. For an overview of the controversy about *Seminole Rock*/*Auer* deference, see Kevin O. Leske, *A Rock Unturned: Justice Scalia's (Unfinished) Crusade Against the* Seminole Rock *Deference Doctrine*, 69 ADMIN. L. REV. 1 (2017). The most far-reaching criticism is that the doctrine violates norms of separation of functions, which parallel the constitutional concept of separation of powers. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996).

112. A somewhat parallel phenomenon occurred during the period when the Federal Sentencing Guidelines were mandatory but subject to revision by the Federal Sentencing Commission, an administrative body. The Supreme Court announced that it would generally decline to resolve circuit conflicts about the meaning of the guidelines, since these conflicts could be eliminated by appropriate revisions by the Commission. *See* Braxton v. United States, 500 U.S. 344, 347–48 (1991).

113. For a general discussion of the techniques used in statutory interpretation, see, for example, KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION (2013); and ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

114. *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006).

or the purpose of the enactment.[115] Without denying the importance of these disagreements, there is nevertheless a common core of consensus that ordinary textual interpretation seeks to determine what the enactment meant at the time it was enacted. Thus, the interpreter engaged in ordinary textual interpretation will pay close attention to the language of the text, the context in which that language appears, and various canons of interpretation, both those that reflect generalities about linguistic meaning and substantive canons that reflect long-standing value judgments (such as the rule of lenity in criminal cases).

One reason for asking what the text meant at the time it was enacted is that enactments of moderate amendability are likely to be relatively up to date. This also means, given recent trends, the text is likely to be rather detailed.[116] Finally, it means the text will not be encrusted with a long history of interpretive precedent. All of which greatly increases the probability that the interpreter will focus on what the enacting body meant, rather than looking to interpretive precedent. The only way to resolve the question of interpretation will be by engaging directly with the words of the text, its context, and canons of interpretation in resolving questions about the meaning of the text.

In cases of moderate amendability, the interpreter will also have increased confidence about resolving questions using ordinary norms of textual interpretation. The perception that the enacting body is engaged, at least to a degree, in a back-and-forth process with the interpreter will reinforce the interpreter's understanding that its role is to engage in good faith interpretation of what the enacting body decided. If the enacting body, in its present or future incarnation, disagrees with the outcome, it has the capacity to adopt a corrective amendment. The interpreter's awareness of the potential for override, even if the odds are low in any particular instance, is thus liberating. On the one hand, the interpreter need not worry about the current views of the enacting body—the probability of override in any particular case is not great. On the other hand, the interpreter need not worry that it will bear ultimate responsibility for whatever outcome is reached. Because of the potential for revision by the enacting body, responsibility

115. *See, e.g.*, Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117 (2009).

116. For the growth of the use of complex and detailed omnibus statutes by Congress, see generally Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 760–61 (2014).

for the policy can legitimately be attributed to the enactor, not the interpreter.[117]

The upshot is that in cases of moderate amendability, the interpreter, while exercising a significant measure of freedom in pursuing its own conceptions of sound interpretation, will attempt to act as the faithful agent of the original enacting body.[118] This is probably the situation that prevails with respect to judicial interpretation of tax statutes, criminal statutes, bankruptcy laws, and other statutory regimes where there has been (at least until recently) a small but significant level of legislative override of judicial interpretations.

There is some evidence, admittedly anecdotal, suggesting that this is in fact the pattern we perceive. Consider in particular judicial interpretations of federal criminal statutes. As commentators have observed, a pattern emerged in the 1980s and 1990s in which federal courts, including the Supreme Court, adopted narrowing interpretations of federal criminal statutes.[119] Often these narrowing interpretations were justified in part by the rule of lenity.[120] The Department of Justice, during this period, actively monitored such decisions. When the Department identified decisions that it regarded as unduly constraining prosecutorial discretion, it would consult with the Judiciary Committees of the House and Senate, proposing language that would override these decisions. The Judiciary Committees, reflecting a general public attitude of hostility toward crime and accused criminals,[121] on multiple occasions added language to criminal

---

117. This explains why a significant number of Supreme Court decisions applying what I have called ordinary textual interpretation include invitations to Congress to override the interpretation reached by the Court. For examples and discussion of their significance, see Lori Hausegger & Lawrence Baum, *Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation*, 43 AM. J. POL. SCI. 162 (1999); and Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503 (1996).

118. Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565 (2010) (characterizing both textualism and originalism as modes of "faithful agent" interpretation); *see also, e.g.*, Richard H. Fallon, Jr., *On Viewing Courts as Junior Partners of Congress in Statutory Interpretation Cases: An Essay Celebrating the Scholarship of Daniel J. Meltzer*, 91 NOTRE DAME L. REV. 1743 (2016) (characterizing the normal role of the interpreter in statutory cases as serving as the "junior partner" of the enacting body).

119. Christiansen & Eskridge, *supra* note 6, at 1333–40, 1361; Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 764 (1999).

120. Christiansen & Eskridge, *supra* note 6, at 1324.

121. *See, e.g.*, Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 731 (2005):

> [T]he public has expressed a relatively high level of concern with crime and sentencing, which creates pressure on elected officials to stay on top of sentencing developments. Elected officials therefore have an incentive either to engage in "police patrol" oversight,

law reform legislation overriding decisions identified by the Justice Department as unduly constraining. What emerged was a pattern in which some but by no means all Supreme Court decisions narrowly interpreting federal criminal laws were overridden during this period.[122]

What is striking about the back-and-forth between the Congress and the Court on criminal law during this period is that there is no evidence the Court changed its interpretational approach in response to override. The Court continued episodically to render narrowing interpretations of criminal statutes.[123] Justices committed to the rule of lenity continued to invoke the rule of lenity.[124] There was no suggestion in the overriding legislation that Congress regarded the Court as having acted improperly in interpreting the statutes in the way it did. Nor is there any suggestion in the Court's opinions that it regarded the overriding amendments as a signal of displeasure on the part of the Congress. If anything, the moderate level of amending activity seemed to reinforce the Court's confidence that its job is to interpret the criminal laws in accordance with its best reading of the text and its conception of sound interpretational principles. It could do so, secure in the knowledge that if the resulting interpretations were deeply unsatisfactory to the political branches, the statutes would be amended. In short, a moderate degree of amendability seemingly increases the confidence of the interpreter to do its job, without succumbing to excess

---

> or to pay attention to the "fire alarms" raised by the press and public when sentences are perceived as too lenient or a crime problem appears to be getting worse.

122. For example, see *Hubbard v. United States*, 514 U.S. 695 (1995), modified by the False Statements of Accountability Act of 1996, Pub. L. No. 104-292 § 2, 110 Stat. 3459; *Ratzlaf v. United States*, 510 U.S. 135 (1994), overridden by the Money Laundering Suppression Act of 1994, Pub. L. No. 103-325, tit. IV, § 411, 108 Stat. 2160, 2243, 2253 (amendment to 31 U.S.C. § 5322(a)); *McNally v. United States*, 483 U.S. 350 (1987), which applied the rule of lenity to interpret a statute in favor of the defendant and was overridden by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; and *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997), which narrowly interpreted coverage of the mail fraud statute and was modified by the Taxpayer Browsing Protection Act of 1997, Pub. L. No. 105-35, 111 Stat. 1104.

123. *E.g.*, United States v. Santos, 553 U.S. 507 (2008), *superseded by statute*, Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617.

124. For recent Supreme Court decisions invoking the rule of lenity, see *Yates v. United States*, 135 S. Ct. 1074, 1088–89 (2015), where the plurality opinion by Justice Ginsburg narrowly interpreted a criminal provision of the Sarbanes-Oxley Act by invoking the rule of lenity; *Abramski v. United States*, 134 S. Ct. 2259, 2280 (2014) (Scalia, J., dissenting); *Burrage v. United States*, 134 S. Ct. 881, 891 (2014), which declined to adopt the government's permissive interpretation of "result from" based, in part, on the rule of lenity; *Robers v. United States*, 134 S. Ct. 1854, 1859 (2014), which held the rule of lenity inapplicable to the facts of the case, but noted that there are circumstances where it is applicable; and *United States v. Castleman*, 134 S. Ct. 1405, 1416 (2014), which held the same. *But see Burrage*, 134 S. Ct. at 892 (Ginsburg, J., concurring) (disagreeing with the majority's use of the rule of lenity); Sekhar v. United States, 133 S. Ct. 2720, 2730 (2014) (Alito, J., concurring) (concurring in the opinion, but also arguing that the Court could have reached the same decision by applying the rule of lenity).

concern about the current preferences of the enacting body—or to high levels of anxiety about making irreversible errors.

3. Interpretation of Highly Unamendable Texts

What if the text is perceived to be highly unamendable? One might think that as the risk of override disappears, interpreters will simply write their policy preferences into the law. This is the vision of interpretation propounded by the so-called attitudinal school of political science.[125] There is extensive and growing empirical evidence that ideological preferences do account for much of the variance in voting on the Supreme Court—and on the courts of appeals as well.[126] But a more sophisticated consideration of the situation of the interpreter suggests that this is not realistic for most interpreters. Nor is it realistic for the Supreme Court.

The general pattern we perceive in the interpretation of unamendable texts is that, over time, interpretation of the text is gradually displaced by interpretation of *precedent* interpreting the text. After enough precedent accumulates, the process resembles incremental common law development rather than ordinary textual interpretation. There are some obvious reasons for this. As the precedent piles up and the text recedes into the past, the precedent provides a body of authority that is much more on point and accessible than the original understanding of the text. For example, if one wants to know whether the examination of an automobile or its contents by the police is a "search" subject to the Fourth Amendment, the many decisions of the Supreme Court on this topic provide much better guidance than asking what the founding generation understood by the word "search" in 1791.[127]

---

125. *E.g.*, SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946–1992 (1995); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

126. For a recent comprehensive study see LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE 101–51 (2013), which found a substantial ideological effect on Supreme Court decisions; and *id.* at 153–99, which similarly found significant ideological influence on court of appeals decisions, although less than in the Supreme Court. *See generally*, Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 243 (1999) (aggregating results of 140 research papers to find that the political party appointing judges explains between thirty-one and forty-eight percent of the variance in voting behavior).

127. For an overview of the extensive precedent on automobile searches, see Rachael Roseman, *When Autonomous Vehicles Take Over the Road: Rethinking the Expansion of the Fourth Amendment in a Technology-Driven World*, 20 RICH. J.L. & TECH. 1, 16–32 (2013). Efforts to extract guidance from originalist sources are apt to generate principles at considerable variance from current law. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

The reasons for turning to precedent run deeper, however. The basic problem of an interpreter faced with an unamendable text is that the interpreter can no longer draw on its interaction with the enacting body as a source of legitimacy for its efforts. When interpreters construe texts that are unamendable, there is no back-and-forth with the enacting body, and thus the interpreter cannot draw upon the legitimacy associated with the enacting body's active participation in generating legal norms. The interpreter construing an unamendable text thus faces a potential challenge to its legitimacy not present when interpreting an even moderately amendable text. How can the interpreter convince the relevant audience or audiences that its interpretation should be obeyed when the silence of the enacting body is likely a function of the unamendability of the text rather than its instructions to the interpreter?[128] The answer, it seems, is that the interpreter will rely on precedent. At least in legal regimes with a common law heritage, decision according to precedent is regarded as a legitimate form of adjudication.[129] The interpreter can maintain its authority to act, when the signals from the enacting body blink out, by shifting to the mode of common law adjudication.

When an administrative interpreter encounters a highly unamendable text, it is most likely going to be a statute or a constitutional provision. There may be a small number of agency regulations or adjudicatory decisions that have been on the books a very long time and have been repeatedly enforced by courts, making it difficult for the agency to consider amending them.[130] In any event, given that the text is unamendable, legislative override is no longer a concern. What the agency has to worry about is judicial reversal.

---

128. Legitimacy will be a concern even if the interpreter enjoys life tenure or some other strong form of job security. Formal independence does not automatically translate into institutional authority. If the interpreter renders decisions that defy the expectations of its relevant audience or audiences, the interpreter will be subject to criticism and potentially even defiance. Loss of support from the relevant audiences may translate into diminished support from the political branches. And the interpreter will be dependent on the support of the political branches for funding, staff support, and enforcement of its orders. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 984–86 (2002).

129. *See, e.g.*, RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 56 (1961) (exploring the role of precedent in justifying judicial decisionmaking).

130. Rule 10b-5 in the securities law context might be an example. *See* Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b-5 (2016); *cf.* Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 HARV. L. REV. 961, 965 (1994) (arguing for agency amendment of 10b-5 and challenging the widespread view that "[t]he implied Rule 10b-5 private right, which the Supreme Court has frequently reaffirmed, is . . . an immutable fixture of the securities law landscape, changeable, if at all, only by Congress").

If interpretation of the unamendable text is reviewable by the courts, an agency interpreter will probably be drawn to extrapolating from judicial precedent in resolving any ambiguity. Since the courts will probably have the last word in interpreting the unamendable text, the agency interpreter, to avoid reversal, will attempt to anticipate the judicial interpretation, and judicial precedent is the best source of data for doing this. This analysis suggests that, notwithstanding the Supreme Court's controversial decision in *Brand X*,[131] agencies will be reluctant to contradict judicial interpretations, at least where an unamendable text is involved.

Judicial interpretation of an unamendable text depends on whether we are speaking of lower courts or the Supreme Court. Lower courts will behave like administrative interpreters in resolving ambiguities in unamendable texts. Since the issue will ultimately be resolved (if an appeal is pursued) by a higher court, the lower court will attempt to anticipate the preferences of the higher court, most typically by extrapolating from higher court precedent.[132] So lower courts will also respond to unamendable texts by following or extrapolating from precedent.

The Supreme Court presents the most interesting situation in interpreting unamendable texts. One might assume the Supreme Court would simply interpret the unamendable text so as to advance its own policy preferences. It is clear, however, that ideology does not explain everything the Court does.[133] The Court, when confronted with an unamendable text like the Constitution, does not simply announce a normative preference and then interpret the text so as to maximize this normative goal. Instead, the process of interpretation is considerably more constrained. One source of constraint emphasized by many writers is fear of retaliation in a variety of forms short of override by

131. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (holding that agency interpretations of ambiguous statutes eligible for deference under *Chevron* displace previous judicial interpretations). A more recent decision declined to apply *Brand X* to an interpretation of the Treasury Department overriding one of the Court's own precedents construing the tax code, suggesting that the Justices' support for the idea of allowing agencies to overrule its own interpretations is shaky. United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 486–90 (2012).

132. *See* Choi et al., *supra* note 100 (examining federal appellate court affirmance trends and hypothesizing that the lower court judges write opinions to try to maximize affirmance rates).

133. *See, e.g.*, Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM & MARY L. REV. 1671 (2015) (developing evidence that the Justices divide on jurisprudential as well as ideological preferences); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992) (presenting evidence that the Court is partially constrained by legal sources). For experimental evidence that judges are more capable of adhering to legal constraints than are nonjudicial actors, see Dan M. Kahan et al., *"Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349 (2016).

amendment—professional criticism, threats to curtail jurisdiction, threats to cut budgets or deny raises, or public protest.[134]

Another, and probably more important, source of constraint is the Court's understanding that its ability to influence other actors to conform to its judgments is grounded in the perceived legitimacy of its behavior. Like other courts, the Supreme Court's legitimacy ultimately rests on the perception that its decisions are grounded in law.[135] Only by reaching results that appear to be grounded in law can the Court ensure that lower courts, agencies, and other actors will perceive its interpretations as legitimate, and will follow them.[136]

How does all this translate into modes of interpretation? Where the text is vague and there is no prospect of amendment, as in much of constitutional law, the Supreme Court will give pride of place to its own precedents in order to cultivate an appearance of legality and reinforce its reputation for adherence to its own prior judgments.[137] For the most part, judicial precedent in effect becomes "the constitution."[138] This sharply constrains the Court's freedom to pursue its policy preferences. In effect, nearly every decision must be capable of being reconciled with the Court's growing body of precedent, which will greatly limit the

134. *See* FRIEDMAN, *supra* note 37 (describing the influence of the relationship between the Supreme Court and the American public on Supreme Court decisionmaking); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1833 (2005) ("Justices who defy aroused public opinion risk, and know that they risk, provoking a political backlash that ultimately could cause their doctrinal handiwork to collapse.").

135. Martin Shapiro, *Courts of Law, Courts of Politics*, *in* COURTS AND THE POLITICAL PROCESS: JACK W. PELTASON'S CONTRIBUTIONS TO POLITICAL SCIENCE 101 (Austin Ranney ed., 1996); *see also* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 28–36 (1981) (exploring the role and rationalization of courts as lawmakers). The Court has acknowledged as much. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) (plurality opinion) (observing that the Court's legitimacy is "a product of substance and perception" that it is a court of law).

136. *See* Editorial, *The Supreme Court as Partisan Tool*, N.Y. TIMES, Apr. 4, 2017, at A22 (observing that "[w]hat matters is that Americans believe they are governed by law, not by whatever political party manages to stack the Supreme Court").

137. As my colleague Henry Monaghan has argued, if the Supreme Court does not take its own precedent seriously, eventually the rest of society will not either. Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979).

138. *See* STRAUSS, *supra* note 13, at 33 ("Pick up a Supreme Court opinion in a constitutional case, at random. . . . [T]he text of the Constitution will play, at most, a ceremonial role. Most of the real work will be done by the Court's analysis of its previous decisions."); David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929, 934–35 (2008) (describing how precedent plays "a vital rule in the evolution of constitutional doctrine"). A more quantitative study, although somewhat dated, indicates that more than eighty percent of the authorities relied upon by some of the Justices are precedents. Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567, 594 (1991).

options.[139] Still, as any Supreme Court advocate will tell you, in the sharply contested cases (such as those that divide the lower courts) it is usually possible to reach a relatively more liberal or relatively more conservative outcome, each appropriately rationalized in terms of precedent. And indeed, we have seen in recent years that cases of high political salience tend to be resolved 5-4, with a liberal block of Justices endorsing relatively liberal results, a conservative block of Justices endorsing relatively conservative results, and Justice Anthony Kennedy swinging back and forth from one block to another to form a majority.[140]

There are relatively few empirical studies examining how interpretation is affected by a large accumulation of precedent, but such studies as exist are largely consistent with these conclusions.[141] One study, by Stefanie Lindquist and Frank Cross, focuses on the federal courts of appeals. They suggest that the development of precedent initially has a constraining effect on judges, but as precedent accumulates (and the text remains unamended), ideological preferences become more prominent.[142] The explanation they offer is that "the proliferation of available prior decisions . . . expands judges' discretion to decide cases in accordance with their attitudes simply because they have more precedents from which to choose."[143]

A more recent study, by Lawrence Solan, involves a careful tabulation of citations to precedent in contested statutory interpretation decisions by the Supreme Court.[144] He finds little overlap in the precedents cited by the Justices in their dueling opinions. Instead, opinion writers cite and quote from prior opinions that support the result they wish to reach and largely ignore contrary authority. The author ruefully notes that "[t]hese cases show relative uniformity in

139. On the path-dependent nature of common law systems more generally, see Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001).

140. *See* Devins & Baum, *supra* note 14 (detailing the historical developments of the Supreme Court that culminated in its current partisan divide).

141. Two large-scale studies show a strong correlation between judicial ideology and citations of precedent. *See* Anthony Niblett & Albert H. Yoon, *Friendly Precedent*, 57 WM. & MARY L. REV. 1789, 1819 (2015) (finding that "the ideological composition of federal appellate panels—whether a Democratic or Republican President appointed members of the panel—powerfully predicts the type of precedent they include in their opinions"); Anthony Niblett & Albert H. Yoon, *Judicial Disharmony: A Study of Dissent*, 42 INT'L REV. L. & ECON. 60, 61 (2015) (finding that on divided appeals panels "[p]recedents that are cited only by the majority are strongly correlated with the ideology of the majority judge; precedents that are cited only by the dissent are strongly correlated with the ideology of the dissenting judge").

142. Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1204 (2005).

143. *Id.*

144. Lawrence M. Solan, *Precedent in Statutory Interpretation*, 94 N.C. L. REV. 1165 (2016).

placing precedent above serious inquiry into legislative intent as a value in statutory interpretation."[145]

Two comments about the implications of these studies before we move on. First, they do not establish that interpreters engage in conscious manipulation of precedents in justifying their decisions. All they show is that a proliferation of precedent tends to increase discretion, and interpreters will use this discretion to reach results consistent with their ideological priors. In doing so, it is entirely conceivable that interpreters sincerely believe the precedent that supports their preferred result is "better reasoned" or more "on point" than contrary precedent.

Second, these studies do not call into question the proposition that heavy reliance on precedent in interpretation is highly constraining, in the sense that early or key precedents set the law down a path that is very difficult to reverse. What they suggest is that as precedent accumulates, interpreters have increasing discretion to make small-scale adjustments in the law, and that they will do so in ways that are strongly influenced by their policy preferences. Interpretation of highly unamendable texts thus yields a world in which fundamental course corrections in the law are nearly impossible, while minor adjustments are achieved in ways that appear increasingly to be driven by political rather than legal values. Interpreters disguise this through extensive citation of precedent, but the close correlation between outcomes and partisan affiliation is increasingly hard to ignore—and poses a potentially serious challenge to the legitimacy of the interpretive enterprise.

III. INTERPRETING THE UNAMENDABLE: NORMATIVE THEORY

As a normative matter, the best solution to the growing unamendability of foundational U.S. law would be to lower the procedural barriers to amendment, making what are now unamendable texts more amendable. In some contexts, such as reducing the opportunities for filibustering in the Senate, institutional reform that lowers the barriers to amendment may be possible and would be desirable. With respect to the Constitution, however, it is presumably impossible to lower the barriers to amendment because the procedures for amending a text are themselves unamendable. What then, if anything, can interpreters do to reduce the disadvantages associated with unamendable texts?

145. *Id.* at 1215.

The most constructive thing interpreters can do is to adopt a strategy analogous to what the Europeans call subsidiarity.[146] The principle of subsidiarity requires that centralized institutions refrain from regulating problems that can be competently regulated by more decentralized institutions. My suggestion is that interpreters should refrain from resolving disputes in accordance with highly unamendable texts if a relatively more amendable text is available to resolve the controversy. I do not suggest that the locus of legal authority can or should always be pushed toward maximum amendability. Resolving all disputes in terms of policy statements issued by administrative agencies or presidential executive orders would sacrifice too much stability in return for greater amendability. And there are many issues in a highly interdependent world that state and local governments are not competent to regulate. Nevertheless, given the prospect of extreme unamendability that currently afflicts the Constitution and many framework federal statutes, a sound strategy would be to seek a general shift toward sources of law that are relatively more amendable.

Such a shift toward greater amendability could be achieved in significant degree by Congress. For example, Congress could foreswear the practice of enacting highly detailed statutes that "micromanage" particular problems and resolve instead to delegate broad rulemaking authority to administrative agencies to tackle identified problems. This would have the effect of substituting administrative regulations (relatively more amendable) for statutory directives (relatively less amendable). Similarly, Congress could avoid federalizing areas of social policy that can be adequately handled by state and local governments, allowing these policy issues to be resolved in a relatively more amendable legal form. It is probably unrealistic, however, to expect Congress to embrace any general program of promoting greater amendability. The incentives run in the wrong direction: the less amendable the legislative enactment, the greater the credit legislators can claim with interest groups that favor the law or with political supporters who embrace the policy.[147]

A more plausible strategy is to try to influence those who are tasked with interpreting unamendable texts. In this spirit, I will offer

146. George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 339 (1994).

147. *Cf.* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975) (developing a model based on interest-group theory that presumes legislators prefer outcomes of long duration). In theory, there could be a trade-off between the credit legislators obtain from adopting permanent statutes as opposed to the frequency with which they adopt statutes. But given the constraints on the volume of legislation Congress can produce, adopting frequent legislation is not an option.

two suggestions for interpreters. One is to adopt a general canon of interpretation favoring the resolution of disputes in the name of the more amendable text. The other is to interpret relatively unamendable texts in a Burkean, status-quo oriented fashion, in order to create incentives for future lawmaking to occur in relatively more amendable formats.

A. The Amendability Canon

One general strategy for interpreters is to adopt what I will call an "amendability canon." Specifically, whenever a dispute can be resolved under either the authority of a relatively unamendable text or a relatively more amendable text, the more amendable text should be the preferred basis for decision. Thus, if a dispute can be resolved either under the Constitution or a federal statute, the statute would be the preferred basis for decision.[148] If a dispute can be resolved under a federal statute or a federal administrative regulation, the administrative regulation should be the preferred basis for decision. And if a dispute can be resolved under federal law or state law, state law would be the preferred basis for decision. As with other canons of interpretation, the amendability canon would establish a presumption favoring one source of law over another, but the presumption could be overcome if other interpretive sources strongly support a contrary source.

As stated, the amendability canon sounds like a novel idea, and in its broad sweep, it would be. But it is important to note that there are a variety of existing interpretive canons and doctrines that yield the same or a similar result, albeit on a more particularized scale. The main function of the amendability canon would be to provide a further reason in support of these more particularized canons, as well as a rationale for choosing the more amendable text in contexts where no existing canon supports this approach.

With respect to constitutional questions, consider the list of avoidance canons enumerated by Justice Brandeis in his famous concurring opinion in *Ashwander v. TVA*.[149] These include, among

148. Under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, and general principles of jurisprudence, there is an established hierarchy of legal authority in which the Constitution stands on the top, followed by federal statutes, followed by federal regulations, followed by state law, and so forth. Obviously, if there is a conflict, the superior source of law trumps an inferior source. The proposed amendability canon would only apply in cases where an inferior source of authority—and therefore a more amendable one—is not in conflict with superior sources.

149. 297 U.S. 288, 341–56 (1936) (Brandeis, J., concurring). *Ashwander* rejected, in a shareholder derivative suit, a constitutional challenge to the Tennessee Valley Authority; Justice

others, that (1) courts will not pass on constitutional questions unless absolutely necessary to the decision; (2) courts will not formulate rules of constitutional law broader than required to decide the precise issue presented; (3) courts "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of"; and (4) courts will construe statutes, where fairly possible, so as to avoid the need to decide constitutional questions.[150] The Court has often applied these canons to avoid reaching constitutional issues. For example, employment discrimination cases against governmental units are generally resolved, if possible, under Title VII rather than the Equal Protection Clause.[151] Although Title VII is also relatively unamendable, it is unquestionably easier to change than Section 1 of the Fourteenth Amendment, and indeed was substantially amended in 1991 to override a series of Supreme Court interpretations.[152]

Another striking instance of the preference for statutory and regulatory resolutions relative to constitutional ones is provided by the doctrine that has evolved to determine whether a private right of action for damages is available for constitutional violations. After recognizing an implied right of action directly under the Constitution in *Bivens*,[153] the Court began backtracking, noting that courts should hesitate to recognize such a right of action if alternative remedies are "adequate" or "meaningful."[154] It is now well established that direct actions under the Constitution are disfavored, provided some nonconstitutional remedy is available, even one that is not an "equally effective substitute."[155] Although the Court's retrenchment from *Bivens* appears to be motivated largely by a desire to discourage excessive litigation against the government,[156] a sounder basis would be that the presumption against implied constitutional remedies forces litigants to

Brandeis concurred on the ground that the constitutional questions could have been avoided by holding that conditions for filing a derivative suit had not been met. *Id.*

150. *Id.* at 346–48.

151. *See, e.g.*, Ricci v. DeStafano, 557 U.S. 557, 593 (2009) ("Petitioners are entitled to summary judgment on their Title VII claim, and we therefore need not decide the underlying constitutional question.").

152. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.). It is interesting that much of the 1991 Act was justified as "restoring" interpretations of original civil rights acts which the Supreme Court had recently sought to change. The Court, in other words, was accused of disturbing the legal status quo through dynamic interpretation.

153. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 400–02 (1971).

154. Schweiker v. Chilicky, 487 U.S. 412, 423 (1988).

155. Bush v. Lucas, 462 U.S. 367, 378 (1983).

156. *See, e.g.*, Wilkie v. Robbins, 551 U.S. 537, 561 (2007).

resolve their disputes with the government under relatively more amendable sources of law.

Turning to the choice between statutory and administrative resolution of disputes, we also find existing doctrines that promote administrative sources of resolution. One very important understanding here is that courts will virtually never invalidate a delegation of authority from Congress to an administrative agency on the ground that the law is insufficiently specific.[157] The nondelegation doctrine may not be dead, but it is sufficiently toothless that it allows a very extensive transfer of regulatory authority from the legislature to various administrative bodies. This course allows policy to be made in relatively more amendable forms.

Another interpretational canon, which has never been forthrightly discussed by the Court but exerts a powerful influence on the law, is that congressional grants of authority to agencies to engage in "rulemaking" are presumed to confer authority to make substantive rules having the force of law.[158] Although it has a dubious pedigree,[159] this doctrine obviously facilitates a large-scale transfer of legal authority from statutory to regulatory law. If every agency authorized to make "rules" can adopt substantive legislative rules, much more law can be generated by agencies than would be the case if a more explicit conferral of such authority were required. This in turn allows the center of lawmaking authority to shift from relatively unamendable to more amendable sources.

The *Chevron* doctrine, which requires courts to defer to reasonable administrative interpretations of statutes, is a more familiar interpretive doctrine that also has the effect of shifting authority toward agencies.[160] *Chevron* deference only applies to agency interpretations set forth in regulations or adjudications having the force of law.[161] This means, however, that when agencies implement statutory commands in one of these formats, the authority to determine the meaning of the statute, when it is unclear, is given to the agency rather than the courts. If questions are resolved as a matter of judicial interpretation of statutes, this has a tendency to lock in the meaning of the law, since courts follow a strong rule of stare decisis in matters of

157. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2103–09 (2004).

158. *E.g.*, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 377–85 (1999).

159. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002) (detailing the gradual emergence of the understanding that general rulemaking grants confer legislative rulemaking authority).

160. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

161. United States v. Mead, 533 U.S. 218, 226–27 (2001).

statutory interpretation.[162] Agencies, in contrast, are regarded as relatively more free to change their understandings of statutes, through appropriate rulemaking or adjudicatory formats, as long as they give reasons for the change. Deferring to agency interpretations therefore has the effect of shifting authority from the judicially construed statute to agency regulations and adjudications, which are inherently easier to amend. *Chevron* has been defended in terms of greater agency accountability (through presidential oversight) and expertise relative to courts. But the doctrine also has the effect of shifting the locus of legal authority to a more amendable source.

Similarly, the *Seminole Rock*/*Auer* deference doctrine has the effect of transferring the locus of legal authority from agency regulations to agency policy statements and briefs. Judicial interpretation of agency regulations will tend to lock in the meaning of regulations, making change relatively costly; the agency would have to promulgate a new regulation. By deferring to agency interpretations of regulations, the meaning can change more easily, simply by promulgating a new agency interpretation.[163]

If the choice is between some type of enacted text and common law, the matter is complicated. Enacted law is generally preferable, because it holds forth greater promise of give-and-take between the enacting body and the interpreter. But if the common law has not been superseded by enacted law and is regarded as settled, it should be followed pursuant to the general principle of Burkean interpretation discussed in the next Section. The question is particularly important in administrative law, where the Court has developed a number of doctrines that would have to be regarded as administrative common law, such as the *Chevron* doctrine and the *Seminole Rock*/*Auer* doctrine previously discussed. These should probably be regarded as settled, leaving it to Congress to modify or repudiate them. As a general matter, however, courts should exercise caution in creating new forms of administrative common law, since these doctrines generate their own form of second-order unamendability characteristic of common law

162. *See, e.g.*, *id.* at 247–50 (Scalia, J., dissenting) (arguing that judicial interpretation of statutes inevitably leads to "the ossification of large portions of our statutory law"). The *locus classicus* of statutory stare decisis is *Flood v. Kuhn*, 407 U.S. 258 (1972), which declined to overrule precedent holding that professional baseball does not involve interstate commerce and hence is not covered by the antitrust laws.

163. Arguably too easily, as suggested by the Court's decision carving out an exception from *Auer* deference for regulatory interpretations on which parties have relied in structuring their businesses. Christopher v. Smithkline Beecham Corp., 567 U.S. 142, 155–58 (2012).

more generally.[164] At least episodically, the Court has perceived the wisdom of this approach.[165]

With respect to state law, one current canon that embodies a preference for devolution of authority is the presumption against preemption.[166] The presumption has been criticized on a variety of grounds.[167] Nevertheless, it again illustrates how existing law includes interpretive conventions that mirror a more general amendability canon. Once we understand why a preference for amendability makes sense, the traditional canon appears in new light and gains new plausibility. Other federalism-based doctrines also have the effect of preserving state law in the face of federal mandates by requiring a clear statement from Congress before broadly written federal regulations or conditional spending requirements apply to states.[168] These are typically justified in terms of preserving state sovereignty, but they also have the effect of preserving control by more amendable law.

B. Burkean Interpretation of Unamendable Texts

A second and probably more important interpretive strategy is to adopt a general practice of interpreting unamendable texts in a Burkean fashion. One might think that if a text is unlikely to be amended interpreters should do whatever they can to update the text through interpretation. In other words, unamendable texts should be interpreted in a "dynamic" fashion, in order to make the understanding of the text conform as much as possible with the aspirations and values of today.[169] I will argue, however, that Burkean interpretation of

164. For a variety of perspectives, see John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2015); and Gillian Metzger, *Foreword: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012).

165. For decisions disapproving of administrative common law regarded as inconsistent with the APA, see *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015); *Darby v. Cisneros*, 509 U.S. 137 (1993); and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

166. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

167. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 290 (2000) (arguing that the presumption is contrary to the language of the Supremacy Clause); *see also* Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, *in* FEDERAL PREEMPTION 166, 166–67 (Richard A. Epstein & Michael S. Greve eds., 2007) (arguing that the presumption ignores the need in select areas for uniform rules). For a defense of the presumption, see Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 265–69.

168. *E.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (clear expression of intent required before federal statute will be interpreted to constrain state rules regarding tenure of state judges); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (conditions attached to federal grants to states must be imposed unambiguously).

169. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

unamendable texts will do more, in the long run, to shift the locus of legal authority to relatively more amendable texts, and that such a shift is preferable to updating unamendable texts through change-promoting interpretation.

1. What Is Burkean Interpretation?

Edmund Burke was a British politician and man of letters of the eighteenth century.[170] His thinking was complex; he supported the American colonists in their struggle against Britain and backed the demands of Asian Indians for greater regulation of the East India Company. But he is best known for his strong denunciation of the French Revolution.[171] Although Burke never wrote about the interpretation of enacted law, his views about the French Revolution have been invoked as a model for how judges should go about interpreting a text like the Constitution. Burke thought the French Revolution was deeply misguided because it was based on abstract ideals and ignored established traditions and institutions that reflect an embedded wisdom which cannot be reduced to any simple formula. As he put it, the "private stock of reason" in each person is small, and "individuals would do better to avail themselves of the general bank and capital of nations and of ages."[172]

Translating Burke's skepticism about abstract theories of government into an approach to legal interpretation presents a number of issues.[173] As used here, Burkean interpretation would construe ambiguous or vague provisions in unamendable texts so as to preserve the settled meanings of those texts and any established social practices challenged as violating such texts. In a word, Burkean interpretation seeks to enforce the legal status quo.[174] It tries to discover the existing "equilibrium" or the "institutional settlement" associated with the text, and to remain faithful to that understanding.[175]

---

170. For an extensive treatment of Burke's life and thought, see CONOR CRUISE O'BRIEN, THE GREAT MELODY: A THEMATIC BIOGRAPHY OF EDMUND BURKE (1992).

171. BURKE, *supra* note 1.

172. *Id.* at 76.

173. For two especially illuminating discussions, see CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS 35–121 (2009); and VERMEULE, *supra* note 22, at 57–122. Earlier efforts include Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 513 (1996); and Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

174. *See* Merrill, *supra* note 167.

175. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 119 (1994) (describing the principle of institutional settlement as accepting the "distinction between settled law and the

Burkean interpretation, by adopting the settled meaning of a text, will obviously lean heavily on precedent. In this sense it does not represent a radical departure from current Supreme Court practice, which as we have seen relies overwhelmingly on precedent in interpreting unamendable texts. But there is an important difference. The Court, in its current incarnation, views the system of interpretive precedent the way an aggressive post-Realist common law court regards the common law: as a flexible tool of interstitial lawmaking.[176] Established rules of decision are rarely disturbed, but the court regards itself as free to add qualifications, consistent with precedent, that either expand or contract the scope of the textual provision in question. The Burkean view of precedent, in contrast, is that precedent is evidence—particularly important evidence—of what the law *is*. That precedent should be read the way a lawyer anxious to advise a client about the state of the law would read it—by trying to ascertain its fair import—not the way an advocate would use it to advance a cause.

Supreme Court precedent is not the sole source that should be consulted in trying to ascertain the settled meaning of an unamendable text. High court precedent should be supplemented by other types of evidence, including consensus among lower courts about the meaning of an enactment, the interpretation of other enactments containing similar provisions, "negotiated" understandings about the division of power between the political branches, and long-standing conventions or practices that have emerged over time and enjoy widespread acquiescence.[177] In seeking the established meaning, the Burkean interpreter will want to consider a variety of sources—anything that sheds light on the way the legal community, explicitly or implicitly, understands the provision in question. This should also include substantive canons of interpretation (like the rule of lenity), which can be regarded for these purposes as distillations of conventional wisdom

law-that-is-not-but-ought-to-be"); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994).

176. Justice Scalia provides an inimitable characterization of the common law method in Scalia, *supra* note 54, at 3–9. Specifically, Scalia characterizes the common law judge as a broken-field runner, "distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law." *See id.* at 9.

177. *See* Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1620–31 (2014) (interbranch consensus); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012) (similar); Merrill, *supra* note 167, at 517–18 (lower court precedent); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1181–93 (2013) (conventions). For a particularly nice account of how practice under the Constitution can evolve in ways unanticipated by the text, see Joel K. Goldstein, *Constitutional Change, Originalism, and the Vice Presidency*, 16 U. PA. J. CONST. L. 369 (2013).

bearing on the provision in question.[178] In processing the information provided by these sources, the Burkean assumes the role of synthesizer or integrator who seeks to extract the decisional rule that fits or coheres best with all relevant data that has accumulated over time.[179]

Burkean interpretation can be contrasted to both originalism and dynamic interpretation. In contrast to originalism, the Burkean interpreter seeks to uncover the settled meaning of a text as it exists *today*, not the meaning when the text was enacted. When we speak of settled meaning, we refer to the meaning a text has come to have, not the meaning it had when it was adopted. In contrast to dynamic interpretation (which comes in a variety of flavors), the Burkean interpreter seeks to discover the settled meaning of the text, not to manipulate the precedents in such a way as to promote change by making the meaning better, more just, or more pragmatic. Thus, the Burkean interpreter eschews the perspective of the lawyer-as-advocate—the brief writer—who tries to expansively interpret some authorities, and minimize others, in the interest of supporting the result desired by a particular client, cause, or political party.

The Supreme Court has recently rendered two examples of Burkean interpretation, which illustrate how this approach would operate and provide some cause to hope that it might be adopted more generally. In *NLRB v. Noel Canning*,[180] a key question was whether the Recess Appointments Clause[181] permits the president to make temporary appointments only when a vacancy arises while the Senate is in recess, or if this power also applies to vacancies in existence when the Senate goes into recess. The Clause had never been interpreted by the Court, and its language was probably more compatible with the first interpretation. Justice Scalia, in an opinion for four Justices, relied heavily on the language of the Clause and would have limited the power to vacancies that arise during a recess.[182] Justice Breyer, writing for the majority, conceded that this reading of the language was arguably more "natural," but he thought the text was not conclusive either way. What

178. *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 941–50 (1992) (arguing that the canons of interpretation promote continuity in the law).

179. A different principle of integration is reflected in Ronald Dworkin's idea of interpretation as integrity. *E.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986). For Dworkin, the interpreter must make a conscientious effort to account for all previous interpretations, but in integrating these sources the interpreter selects the interpretation that yields the "best" meaning in the sense of the one that does the most to advance morality. *Id.* at 225–50. Burkean interpretation is essentially Dworkin's method of integrity without the heavy moral gloss.

180. 134 S. Ct. 2550, 2567 (2014).

181. U.S. CONST. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.").

182. *Noel Canning*, 134 S. Ct. at 2606–18 (Scalia, J., concurring in the judgment).

was decisive was historical practice over the past 200 years: presidents had consistently interpreted the Clause to apply to preexisting vacancies, and the Senate had not disputed this practice for nearly three-quarters of a century.[183] This tradition, he concluded for the majority, "is long enough to entitle the practice 'to great regard in determining the true construction' of the constitutional provision."[184] Here we see Burkean interpretation in its nearly pure form. Long-standing practice, acquiesced in by the affected departments of government, reveals the settled meaning of the Clause. The effect is to validate the legal status quo.

Two terms later, the Court confronted the question whether the states, in drawing legislative districts, may use total population as a baseline for apportionment or must use a more restrictive measure based on the number of eligible voters. The petitioners in *Evenwel v. Abbott*[185] argued that the more restrictive measure based on eligible voters was required by the Constitution. The United States, as *amicus curiae*, argued that a total population baseline was required. The Court rejected both positions, holding that it was permissible for Texas to use total population, as it had done in the matter before the Court. Writing for six Justices, Justice Ginsburg relied in part on constitutional history, in part on prior decisions, and in part on "settled practice."[186] The history included both the provision of the original Constitution that based apportionment among the states on the basis of total population and the decision of the framers of the Fourteenth Amendment to do the same.[187] Statements from past opinions could be quoted on either side, but Justice Ginsburg found it more significant that the Court had consistently evaluated state apportionment schemes based on a total population, rather than an eligible voter, baseline.[188] Settled practice sealed the matter: "Adopting voter-eligible apportionment as constitutional command would upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have followed for decades, even centuries."[189] As in *Noel Canning*, the effect was to interpret the Constitution as incorporating the status quo and to reject pleas to handcuff other governmental actors through novel readings of an unamendable text.

183. *Id.* at 2573 (majority opinion).
184. *Id.*
185. 136 S. Ct. 1120 (2016).
186. *Id.* at 1132.
187. *Id.* at 1127–30.
188. *Id.* at 1131.
189. *Id.* at 1132.

2. Why Be Burkean?

There are multiple reasons to endorse a Burkean approach to interpreting unamendable texts, and it is not my objective here to canvas all those reasons or offer a complete defense of Burkean interpretation.[190] Instead, in keeping with the theme of the Article, I offer just one: Burkean interpretation of unamendable texts should promote governance by means of relatively more amendable texts instead of unamendable texts. This is because status-quo reinforcing interpretation, by definition, is inhospitable to efforts to achieve deliberate legal change through interpretation. Burkean interpretation aspires to discover and enforce what the law is, not to make it better. Knowing this, advocates of social change will direct their energies elsewhere. The most promising strategy is to advocate for the adoption of new laws or regulations that prescribe the desired change. These new laws will nearly always be incorporated in relatively more amendable texts; at the very least they will be more amendable than the most highly unamendable texts, like the Constitution. Thus, the locus of social policy will shift "downward" from the unamendable to the amendable. Over time, this process will cause relatively more law to occupy forms that are amendable than will be the case if social change is achieved through interpretation of unamendable texts.

Constitutional law is filled with examples in which the recognition of new rights by the courts has been frustrated by status-quo oriented interpretation, only to be followed by the creation of similar (in many cases more robust) rights by way of legislation. Thus, the Supreme Court, reflecting a cautious interpretive approach, has rejected claims that discrimination against the poor, the homeless, the elderly, or the disabled is subject to heightened scrutiny under the Equal Protection Clause.[191] In response, Congress has adopted statutory regimes that provide significant protections for two of these categories of individuals, and the federal government and the states have jointly taken steps to address the others.[192] Or, consider the

190. *See* Merrill, *supra* note 167, at 515–21 (listing as other reasons in support of Burkean interpretation protecting rule of law values, preserving continuity with the past, and comporting with skepticism about the powers of human reason). The ultimate justification for Burkean adjudication likely resides in a conception of courts as impartial dispute resolution tribunals. To resolve disputes impartially, the tribunal must apply settled law, not change the law.

191. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985) (disability); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976) (age); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (wealth); Lindsey v. Normet, 405 U.S. 56, 73–74 (1972) (housing).

192. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34 (2012); Equal Opportunity for Individuals with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012). Education and housing have been addressed by large federal grants supplemented with state appropriations. Many state courts have entered judgments requiring equalization of funding

Supreme Court's decision in *Kelo v. City of New London*,[193] rejecting the claim that economic development takings violate the "public use" provision of the Takings Clause. The decision was firmly grounded in the status quo, following roughly a dozen Supreme Court precedents that refused to put any teeth in the public use requirement.[194] Yet the outcome was harshly condemned, with opinion polls showing that most of the public disapproved of the decision.[195] The result was widespread agitation for greater protection of property rights, which eventually yielded new laws in some forty-five states restricting the use of eminent domain.[196] If, as I suspect, the more extreme of these new laws come to be seen as unwise, it is better that they have been adopted as state constitutional provisions and statutory limitations, rather than as an interpretation of the U.S. Constitution. The new protections against eminent domain embodied in state law are relatively amendable; a Supreme Court interpretation of the Constitution would be difficult to dislodge.

Another way to make the general point is in terms of the distinction between the "Big C" and the "little c" constitutions, as recently developed by Bill Eskridge and John Ferejohn.[197] The Big C Constitution is the unamendable piece of parchment displayed under glass at the National Archives. It is the document whose interpretation is at issue in cases we identify as presenting formal claims of constitutional law. The little c constitution is composed of framework statutes and embedded practices that also prescribe the workings of government and the rights of citizens against the government. The Big C Constitution governs only a small subset of the things that government officials do and only a fraction of the interactions between the government and its citizens. Most government activity and interactions are governed by the little c constitution. This complex of legislation is supplemented by a vast body of administrative regulations, judicial interpretations, and informal conventions. It is, if you will, the American equivalent of the unwritten English constitution—a set of practices and norms that govern the conduct of

among school districts. For an overview, see James E. Ryan & Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?*, 22 YALE L. & POL'Y REV. 463 (2004).

193. 545 U.S. 469, 485 (2005).

194. *Id.* at 477–90 (citing cases).

195. Janice Nadler et al., *Government Takings of Private Property*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 286–301 (Nathaniel Persily et al. eds., 2008).

196. Dana Berliner, *Looking Back Ten Years After* Kelo, 125 YALE L.J. FORUM 82, 84–85 (2015).

197. *See* WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010).

public officials, even if not set forth in a single document and even if subject to continual evolution over time in response to changing circumstances.[198]

Interpreting the Big C Constitution in a status-quo reinforcing fashion will tend to shrink recourse to the Big C Constitution in devising responses to new social problems and will correspondingly increase reliance on the little c constitution. This has already happened to a very significant extent. The fraction of social problems addressed by high-level unamendable texts is tiny compared to the proliferation of issues generated by our complex and growing society. The locus of governmental authority has steadily shifted from courts applying common law and common law constitutionalism to administrative agencies. Adopting a mode of interpretation that accelerates this trend will help reduce government by unamendable text and replace it with government by amendable text, which is on the whole a good thing.

Against the incentive effects of Burkean interpretation, consider the alternative of originalism. Originalism, if done in a fashion truly faithful to the expectations of the enactors, would tend to exacerbate the disadvantages of unamendable texts.[199] The problem of dead hand control would become more severe if texts adopted long ago were faithfully interpreted as embodying the understanding of long-dead enactors. And the people would become progressively more disenfranchised as the law that governs them recedes into the past and the prospect of popular participation in revising that law becomes increasingly remote.

Burkean interpretation is also superior to dynamic interpretation in its various guises. Dynamic interpretation admittedly ameliorates some of the disadvantages of unamendable texts. Specifically, it selectively mitigates the dead hand problem. Interpretation of vague provisions like the Equal Protection and Due Process Clauses becomes a kind of rolling constitutional convention composed of the current Supreme Court Justices.[200] Being creatures of their time, the Justices who favor this approach can update the meanings of these texts to reflect contemporary values. Proponents of dynamic interpretation frequently hail its capacity to achieve a de facto

198. *See* A.W. BRADLEY & K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 20–31 (12th ed. 1997) (describing the unwritten rules of the English constitution).

199. *See generally* Merrill, *supra* note 118, at 1567–69 (characterizing originalism as a form of faithful agent interpretation).

200. President Woodrow Wilson was evidently the first to characterize the Supreme Court as a "constitutional convention in continuous session." John R. Vile, *American Views of the Constitutional Amending Process: An Intellectual History of Article V*, 35 AM. J. LEGAL HIST. 44, 57–58 (1991).

amendment of the text, at least the vague provisions, as a great virtue.[201] The Court has agreed up to a point, purporting to adopt a more flexible approach to stare decisis in constitutional cases in order to facilitate judicial reinterpretation of the unamendable.[202]

But dynamic interpretation does not solve the other problems associated with an unamendable text. It does not solve the dead hand problem posed by the rule-like provisions of an unamendable text. Because they have a clear meaning, these provisions continue to defy change through interpretation.[203] Nor does it permit updating of provisions that are not justiciable, because of standing limitations or otherwise. Nor does dynamic interpretation yield the back-and-forth between enactor and interpreter associated with amendable texts, with its healthy potential for experimentation and revision. Nor does it solve the problem of excluding the people from active participation in determining the content of the law. Indeed, if anything, dynamic interpretation makes interpretation even more of an elite enterprise, confined to judges and lawyers—a closed circle from which ordinary voters are excluded.

Dynamic interpretation is also troubling because it would likely be highly unstable unless leavened with a heavy dose of Burkean interpretation. Consider so-called pragmatic interpretation, as relentlessly espoused by Judge Posner.[204] Interpretation of texts drawing on cost-benefit analysis, as urged by Judge Posner, would be sensitive to changes in the measurement of variables or the discovery of new variables. Interpretation drawing upon moral reasoning is similarly subject to shifting perspectives. The problem is compounded when we consider that different interpreters are likely to have different views about what kind of change to promote through interpretation. Burkean interpretation has a theory that collectively binds interpreters—they are bound by the meanings of texts that can be regarded as settled. Originalist interpretation has a theory that collectively binds interpreters—they are bound by the understanding of the enacting body. What is it that binds one judge or interpreter to the dynamic analysis carried out by another judge or interpreter? Dynamic interpretation is only controlling if one agrees that the analysis is correct. If interpreter No. 1 disagrees with a dynamic analysis rendered

201. *E.g.*, BALKIN, *supra* note 19, at 277–319; STRAUSS, *supra* note 13, at 33–53.

202. *E.g.*, Payne v. Tennessee, 501 U.S. 808, 828 (1991).

203. BALKIN, *supra* note 19, at 39–49.

204. *See, e.g.*, POSNER, *supra* note 100. For some earlier versions of Posnerian pragmatism, see, for example, RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 57–96 (2003); RICHARD A. POSNER, OVERCOMING LAW 387–405 (1995); and RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 454–69 (1990).

by interpreter No. 2—either because No. 1 has better data, or thinks she is smarter, or thinks her values are superior—No. 1 has no reason to follow the lead of No. 2. A world of dynamic interpretation undiluted by a significant commitment to Burkean interpretation would therefore be a world of continuous revisiting of past decisions, dramatic shifts in legal understanding with new appointments, and rampant overruling of prior interpretations.

The impossibility of pure dynamic interpretation reveals that any project of reform-through-interpretation rests on the faith (or hope) that law-changing interpretations will be formulated by "good" interpreters, which will then be regarded as binding on other interpreters as a matter of Burkean practice. But of course, it is equally possible that innovations will be adopted by "bad" interpreters, which will also be regarded as binding in the future. The combination of dynamic interpretation today but Burkean constraint tomorrow makes the future of law dependent on the vagaries of the judicial appointments process, which is in turn a function of the outcome of elections and the timing of judicial resignations. If dynamic interpretation is unworkable if not supplemented by a large dose of Burkean interpretation, perhaps interpreters should be consistently Burkean.[205]

A shift to Burkean interpretation would not banish discretion from the practice of interpretation.[206] Discretion will always be present, especially at the level of the Supreme Court. If the result is foreordained by settled law, the matter will not be litigated—at least not to higher level appeals tribunals. But the question always remains how interpretive discretion is to be exercised when the matter is disputed. The Burkean never forgets that her ultimate task is to settle disputes between antagonists in a way that both can recognize as being consistent with existing law. The objective is not to use the case as a vehicle for promoting social change that the interpreter regards as desirable. Achieving social change is best left to the other branches and

205. Similar comments apply to originalism. Justice Scalia notoriously described himself as a "faint-hearted" originalist, because he was unwilling to enforce original understandings against interpretations of the Constitution that are settled. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862, 864 (1989). Justice Thomas's contributions to originalism consist largely of separate concurring and dissenting opinions in which he suggests that issues should be reconsidered in future cases in light of evidence of original meaning. *E.g.*, Kelo v. City of New London, 545 U.S. 469, 506 (2005) (Thomas, J., dissenting) (urging future reconsideration of "public use" in light of original understanding). When assigned to write for the Court, he reverts to standard modes of opinion writing, heavily oriented to precedent. *E.g.*, Utah v. Strieff, 136 S. Ct. 2056 (2016) (applying Supreme Court precedent to uphold search following arrest against Fourth Amendment challenge). Why keep agitating for originalism if unwilling to stand behind it?

206. *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedent*, 87 VA. L. REV. 1 (2001) (noting that the *Chevron* doctrine presupposes that enactments often have multiple permissible meanings).

units of government. Put another way, the Burkean regards interpretation like completing a jigsaw puzzle, by finding the piece with the color and contour that fits into what has been laid down before. It is not like Scrabble, trying to add new words to the board that score the most points. Admittedly, it is ultimately a matter of attitude. But attitude matters, perhaps more than fidelity to any theory, doctrine, or interpretive technique.

C. Incentive to Amend

A final consequence of declining to seek change through interpretation of unamendable texts is that this would create a greater incentive to formally amend these texts. If we accept that all constitutions and framework laws must be changed to reflect changing economic, social, and cultural conditions, and if we assume that one pathway to change (interpretation) is significantly constrained by the normative propositions here set forth, then pressure should build to try to achieve change the right way—through formal amendment. Thus, an increased use of avoidance doctrines and a status-quo oriented approach to interpretation should result, at least at the margins, in an increase in the use of formal amendment as a vehicle for change.[207]

Consider this: in 1935–36, President Franklin Roosevelt and his advisers gave serious thought to seeking one or more amendments to the U.S. Constitution to provide a legal foundation for the New Deal legislation that had recently been invalidated by the Supreme Court.[208] Roosevelt decided this was too risky and instead embarked on the Court-packing plan. We will never know for sure whether the amendments would have been adopted if they had been pressed by Roosevelt.[209] But surely their chance of being approved would have been much higher if the Court had not "switched" in 1937 and begun approving the New Deal innovations under a revised interpretation of the Constitution. The decisions by the President and the Justices during this fateful period set us down our present path, where constitutional change is achieved not by amendment, but by appointing new Justices to the Court. In a period of political and geographic polarization, it is not clear that we can get back to a better path,

207. *See* Boudreaux & Pritchard, *supra* note 92, at 157 (developing the argument that "at the margin," expansive interpretation of the Constitution "deters constitutional amendment through Article V").

208. For a recent account, see JAMES F. SIMON, FDR AND CHIEF JUSTICE HUGHES 268–69, 283–91, 294, 306–12 (2012).

209. For evidence that Roosevelt could have obtained one or more amendments had he sought them, see DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at 305, 314 (1996).

although the odds would go up a bit if the Court would forswear amendment-by-interpretation.

In the end, I am skeptical for several reasons that the normative approach to interpretation I have outlined would result in a significant increase in the rate of formal amendments of the Constitution and other framework statutes. The structural impediments to amendment, including the limited capacities of top-tier institutions and increasing political and geographic polarization, combined with the cultural hostility to tinkering with venerable texts, create a strong headwind against formal amendment. The proposition that judicial resistance to innovation will induce democratic institutions to innovate bears a resemblance to the claim that courts should always enforce the literal meaning of a text in order to create an incentive for enactors to be more careful in drafting.[210] Even with a discernible rise in this kind of "textualist" approach to statutory interpretation, there is little evidence that Congress has responded by expanding the use of staff that might be able to assure more careful drafting. A more likely response to the approach I have outlined would be a shift from seeking change through interpretation of the Constitution and other unamendable texts to seeking change through more amendable sources of law. But an increase in the rate of amendment should not be entirely ruled out and would be a welcome development.

CONCLUSION

The United States has operated under the same written Constitution longer than any other democratic government. The longevity of the U.S. Constitution is often celebrated, but it is also a great puzzle. Comparative studies examining other nations, as well as the fifty states in the U.S. that also operate under written constitutions, suggest that a framework law as difficult to amend as the U.S. Constitution should have been tossed aside long ago. How is it possible that this one has endured?

My explanation is along the following lines. The U.S. Constitution is for the most part a sparse, skeletal document, designed to establish a national government of minimal powers. Even in its original, minimalist form, the Constitution contemplated that most of the operating institutions of the national government would be established by legislation adopted by Congress. Over the years,

210. *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2505–06 (2015) (Scalia, J., dissenting) (arguing the Court's refusal to enforce the plain meaning of the text of the Affordable Care Act "encourages congressional lassitude").

especially in the twentieth century, Congress has used its legislative powers to create an enormous federal governmental apparatus, including entities like the Federal Reserve Board and the Environmental Protection Agency that would have astonished the founding generation. The Supreme Court has abetted the process by interpreting select clauses of the Constitution, such as the power to regulate commerce among the states, in an extremely expansive fashion, while interpreting other clauses, which might be read as protecting private economic rights, more narrowly.[211] The upshot is that Congress has been allowed to establish, by legislation, a little c constitution that dwarfs the Big C Constitution in its significance. The little c constitution, which depends on legislation for its source of authority and is often implemented by administrative regulation, is necessarily much more amendable and therefore more adaptive than the Big C Constitution. The Big C Constitution continues to dictate the basic structure of the top-tier institutions of the national government—the two Houses of Congress, the separately chosen president, the independent judiciary—all of which remains unamendable.[212] But below the top tier, the little c constitution reigns supreme, and has been endowed with enough flexibility to allow the overall system to survive. The original text endures as an object of veneration that helps hold the country together; meanwhile, most of the actual structure and function of government is determined by an unwritten constitution that continually evolves.[213]

The basic point I wish to make is that we should not complacently assume this elaborate "workaround" will continue to function well in the years ahead.[214] As Stephen Griffin has written, "the difficulty of amendment may be one of the most serious political problems facing the United States as the Constitution enters it[s] third century."[215] The problem is compounded by political and cultural factors, including political and geographic polarization and veneration

211. For the details, see, for example, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888–1986, at 205–73 (1990).

212. *Cf.* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (arguing that the "apex" of our federal government is subject to the limits of the written constitution but that agencies operating below the apex are not).

213. *Cf.* ELKINS ET AL., *supra* note 28, at 20 ("One of the reasons that the U.S. Constitution works (legitimate critiques notwithstanding) is that political life has grown around it and adapted to its idiosyncratic edicts.").

214. *Cf.* Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2009) (describing workarounds to achieve politically popular goals that are prohibited by the Constitution's provisions).

215. Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, *in* RESPONDING TO IMPERFECTION, *supra* note 29, at 37, 52.

of the Constitution as a sacred secular text, which combine to make the prospect of amendment dimmer today than ever before. And similar political and cultural factors make amendment of framework laws establishing the little c constitution increasingly problematic as well.

Nor should one assume that dynamic interpretation of unamendable texts is the solution to this problem. As a predictive matter, interpreters will not generally respond to unamendable texts by assuming the mantle of change-promoting interpretation. If anything, the isolation of interpreters from healthy back-and-forth with enactors is likely to introduce its own rigidity, in the form of slavish devotion to precedent and caution about promoting change that cannot be easily reversed. Rather than urging interpreters to promote change, a better solution is to urge them to adopt the amendability canon and to be consistently Burkean, at least when confronted with a highly unamendable text. This will tend to channel the forces demanding legal change into texts which are necessarily more amendable, and hence less subject to the pathologies associated with unamendable texts.