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INTERPRETING AN UNAMENDABLE TEXT

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INTRODUCTION

All legal interpretation involves an enactor who promulgates a text and an interpreter who interprets the text. Often, they interact in a "dialogic" fashion. 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 process between the enactor and the interpreter provides valuable feedback for both. The interpreter, by observing which interpretations have been accepted by the enactor and which ones have been overridden by amendment, gains important information about its interpretative efforts. The enactor, by reviewing the issues of interpretation that arise, gains insight into which provisions of a text need to be reconsidered or clarified. In an ideal world, regular interaction between the enactor and the interpreter would foster a spirit of cooperation in pursuit of a joint endeavor. At a minimum, which is to say in a less than ideal world, the prospect of override by amendment will constrain the interpreter from deviating too far from the preferences of the enactor.

This paper explores the consequences for interpretation when a 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

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prominent example. But there are also a number of important framework statutes, like the Administrative Procedure Act, the Sherman Act, and the various Civil Rights Acts, which are widely assumed to be impervious to amendment, at least as to their core provisions. As to such unamendable texts, the back-and-forth that characterizes interpretation of amendable texts disappears. The interpreter stands alone as a source for determining the meaning of the law.

Unamendable texts have one important advantage: they promote reliance on the policies reflected in the text. For example, if an unamendable text says that property can never be taken by the government without payment of just compensation, this enhances the security of property rights. The disadvantages of unamendable texts, which I regard as more significant, derive from the elimination of the back-and-forth between enactor and interpreter that characterizes amendable texts. Any text tends to become obsolete over time. An unamendable text can be changed only through interpretation, which is not always possible, especially when the text incorporates a rule. Also, the process of change-through-interpretation is impoverished by the lack of constructive participation by the enactor. This may inhibit experimentation with different policies, or lock in suboptimal policies that the interpreter, for its own institutional reasons, is reluctant to change. And making policy through interpretation of unamendable texts effectively disenfranchises the people from participating, through periodic elections, in the evolution of legal policy.

What then are we to do if it turns out that many of our most important laws – such as the Constitution – are effectively unamendable? I argue in this paper that the best strategy is to interpret unamendable texts in such a way that legal policymaking is redirected toward texts that are more amendable. In general, this means pushing the locus of legal authority "downward" as

much as possible , from the Constitution to legislation, from legislation to administrative regulation, and from federal to state and local laws.

I argue that there are two interpretative strategies for achieving such a devolution in the sources of legal authority. The first is to embrace a general canon of interpretation favoring the resolution of disputes in accordance with the more amendable text, whenever two or more texts are available as a source of authority. We already have a number of interpretational conventions that work to this end – such as the *Ashwander* canons of avoiding constitutional rulings if other grounds for decision is available, the *Chevron* and *Seminole Rock/Auer* deference doctrines that favor administrative over judicial interpretations, and the presumption against preemption. But recognizing a broader mandate in favor of amendability would provide a stronger foundation for these doctrines, and would open up possibilities for additional constructional preferences that have a similar effect.

The second general strategy is to adopt a nondynamic approach to the interpretation of unamendable texts. This seems paradoxical at first. It also runs counter to the Supreme Court's current approach to overruling precedent, which is to favor more frequent change in interpretation with respect to the Constitution, precisely on the ground that it is so difficult to amend.[1] I argue, however, that interpreting unamendable texts nondynamically – which I understand to mean giving them their current, conventionally established meaning -- will reduce the returns to interest groups from seeking legal change through interpretation. This, in turn, will cause interest groups to redirect their energies to obtaining legal change through other avenues, which will nearly always mean that the change will be embodied in a relatively more amenable

[1] E.g., Payne v. Tennessee, 501 U.S. 808, 828 (1991).

text. Thus, over time, a stand-pat mode of interpretation of unamendable texts will tend to shift the locus of legal authority away from unamendable toward more amendable texts, which would tend produce a legal system more receptive to change, experimentation, and popular participation in the formation of legal policy.

I. SOME PRELIMINARY CLARIFICATIONS

Let me lay the groundwork for the discussion that follows by offering some clarifications about what I mean by interpretation, how I understand the distinction between dynamic and nondynamic interpretation, and what I regard as the salient distinctions between different approach to interpretation of legal texts.

A. What is Interpretation?

When I speak about interpretation, I am referring to the process of attributing meaning to texts that are regarded by legal observers as lacking a plain meaning with respect to the legal dispute at issue.[2] Virtually all legal interpreters agree that the text is controlling when its meaning is plain. The need for interpretation arises only when the meaning of the text is not plain. Of course, some interpreters find ambiguity virtually everywhere; others can tease plain meaning out of seemingly vague or ambiguous directives. I will not explore the roots of this divergence in perception here. I assume that there is such a thing as an enacted law with a plain meaning. The discussion that follows concerns only texts that do not have a plain meaning, according to the lights of the ordinary or normal legal observer.

[2] I do not here pursue the distinction between interpretation of a text (determining its semantic meaning) and construction of a text (determining its application in particular circumstances). *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMM. 95 (2010). The present discussion lumps interpretation in the sense of sematic meaning and construction together under the rubric "interpretation."

When I speak of legal texts, I am referring to formal enactments that contain an agreed upon statement authoritatively expressed in particular words. Typically, these texts will be understood by legal actors to be legally binding on all persons subject to their terms. But I will also occasionally refer to other legal texts, such as interpretative rules issued by administrative agencies, which may not technically be legally binding and are intended to have only persuasive force. I am not concerned with interpretation of legal sources other than enacted texts, such as interpretation of precedents or the common law.

B. Dynamic and Nondynamic Interpretation

In what follows I will frequently distinguish between dynamic and nondynamic interpretation of legal texts, borrowing these terms from Bill Eskridge.[3] By dynamic interpretation, I mean an interpretation that changes the meaning of the legal text, relative to what would have been predicted in a poll of informed legal observers prior to the act of interpretation. By nondynamic interpretation, I mean an interpretation that adopts the meaning of the legal text that would have been predicted in a poll of informed legal observers prior to the act of interpretation. I have no precise number in mind for what percentage of observers would have to agree on a meaning before one could identify the interpretation as being dynamic or nondynamic. The baseline I have in mind could be called the "consensus" or the "conventional" view. If the view of informed legal observers is divided, or if most have no view about the proper meaning, then any interpretation would have to be regarded as not reflecting any change in the consensus understanding, and hence would be counted as nondynamic.

Another way to put the matter would be to ask: What would a conscientious lawyer advise a client about the meaning of a provision if asked for her honest assessment without

[3] WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

regard to the interests of the client? (Perhaps the client is interested only in determining litigation risk.) Presumably such a lawyer would scour the relevant authorities, and armed with this information, would make an educated guess as to what a legally trained interpreter would most likely conclude. If the interpreter subsequently deviates from what such a lawyer would advise, the interpretation would be dynamic. If consistent with the advice, it would be nondynamic. In short, nondynamic interpretation is conventional, predicable, no surprises. Dynamic interpretation is new, different, surprising.

C. Three Modes of Interpretation

The distinction between dynamic and nondynamic interpretation does not map directly onto other distinctions about interpretative method that are currently the subject of considerable debate. It will be useful at times to refer to some of these distinctions, which for present purposes I will group broadly into three general categories -- what I will call faithful agent, integrative, and normative modes of interpretation.[4]

Faithful agent theories adopt a principal-agent model of interpretation. When the text is not plain, the interpreter is cast in the role of subordinate agent, seeking in good faith to discern the instructions of the enacting body, who is understood to be the principal.[5] All faithful agent theories are originalist, in the sense that they seek to understand the meaning the text was designed to communicate when it was enacted. Nevertheless, there are important (and often bitterly opposed) sub-modes within the faithful agent camp. Textualists say enactments should

[4] *See generally* Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565 (2010) (developing this taxonomy more completely).

[5] *See, e.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 15-16 (2001).

be interpreted in accordance with the meaning an ordinary reader of the text would attribute to it at the time of enactment.[6] Intentionalists say enactments should be interpreted in accordance with what the enacting body collectively intended the command to mean. Purposivists also call upon the idea of corporate or collective understanding, but cast this at a higher level of generality or abstraction.

Integrative theories cast the interpreter in the role of synthesizer or integrator who draws on a variety of sources of meaning in an effort to fix the meaning of a textual ambiguity. The sources of meaning for the integrative interpreter include previous judicial decisions construing the provision in question, administrative interpretations, other enactments containing similar provisions, and substantive canons of interpretation, which can be regarded for these purposes as distillations of conventional wisdom bearing on the provision in question.[7] Like faithful agent interpretation, integrative interpretation comes in different varieties, depending on the principle of integration that the interpreter adopts. One principle of integration, which can be called Burkean, adopts tradition as the principle of integration. The task of the Burkean interpreter is to uncover the evolved tradition about what the text means. Thus, for the Burkean, conventional interpretation implicitly adopts the status quo as a normative baseline for engaging in interpretation. A very different principle of integration is reflected in Ronald Dworkin's idea of interpretation as integrity.[8] For Dworkin, the interpreter must make a conscientious effort to

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[6] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws* 17, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

[7] *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992) (arguing that the cannons of interpretation promote continuity in the law).

[8] E.g., RONALD DWORKIN, LAW'S EMPIRE (1986).

account for all previous interpretations, but in integrating these sources the interpreter selects the interpretation that yields the "best" meaning, understood to be the one that most conforms with morality.

Normative theories, the third category, are quite simply those that seek to resolve an ambiguity in a text in accordance with some conception of the good. Sometimes, the conception of the good is framed in terms of political morality, political justice, or human rights. The notion is that there are certain universal moral truths that interpreters should draw upon in construing enacted texts.[9] Another prominent strand, which has been tirelessly promoted by Judge Richard Posner, goes by the name of pragmatism.[10] In Posner's version of pragmatism, the good tends to be defined in terms of cost-benefit analysis. An interesting variation on this version of normative interpretation, associated with Adrian Vermeule, draws on considerations of institutional choice.[11] This would resolve interpretational questions by making generalized judgments about which institution is most likely to make interpretations that maximize benefits net of costs, and then adopting the interpretation offered by that institution. One can imagine other forms of normative interpretation as well, such as "critical" theories of interpretation that emphasize the need to interpret texts giving special attention to the perspectives of historically disadvantaged groups.

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[9] *See, e.g.*, JAMES E. FLEMMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY (2006).

[10] See, e.g., RICHARD A. POSNER, HOW JUDGES THINK (2008). 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).

[11] *See generally,* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006).

There is no strict one-to-one correspondence between any of these theories of interpretation and what I have called dynamic and nondynamic interpretation. It depends significantly on the age of the text and how often it has been interpreted. With respect to recently enacted texts, or texts that have never been interpreted, the faithful agent approach may be the one that is most likely to generate a consensus meaning, and hence to yield a nondynamic interpretation if the consensus is followed. With respect to texts that have been around for a long time, and have been the subject of frequent interpretation, integrative interpretation, at least of the Burkean variety, is probably the approach that is most likely to yield a consensus view, and if followed, a nondynamic interpretation. Where texts have been frequently interpreted over a long span of time, switching to faithful agent interpretation is very likely to generate a dynamic rather than a nondynamic interpretation.[12] Normative or broad purposive interpretations are probably most likely to yield dynamic interpretations. But I would not rule out the possibility that even normative interpretation might, on some occasions, be more likely to yield an interpretation congruent with the consensus view than would either faithful agent or integrative interpretation.

The basic point is that the distinction between dynamic and nondynamic operates independently of different modes of interpretation commonly debated in contemporary interpretation theory. Dynamic interpretation probably correlates most closely with normative interpretation, and nondynamic interpretation with integrative interpretation of the Burkean variety. But there are circumstances where these correlations will not hold.

[12] Consider, for example, a ruling interpreting the Fourteenth Amendment according to the original public meaning or the intentions of the framers to preclude challenges to the differential treatment of men and women. This would reflect an avulsive change in the current consensus view of legal observers, and hence would be a dynamic interpretation.

II. AMENDABLE AND UNAMENDABLE TEXTS

We are now in a position to consider a distinction that has heretofore played little role in discussions of legal interpretation: that between amendable and unamendable texts. As the terms suggest, amendable texts are ones that the enacting body can change in the future. Unamendable texts are impervious to change. Certainly as applied to law, the distinction describes a continuum. Nearly all legal texts fall somewhere in between the poles of completely amendable and completely unamendable. Nevertheless, some very important legal texts, most notably the U.S. Constitution, lie close to the unamendable end of the continuum, and this may be a critical factor in thinking about how they should be interpreted.

To find examples of texts that are almost completely amendable and unamendable we probably have to look outside the law. An example of an (almost) completely amendable text might be Francis Lieber's discussion of a housekeeper's instruction to a domestic to "fetch some soupmeat."[13] The instruction, presumably oral, contains many potential ambiguities, as Lieber discusses. Nevertheless, if the domestic were to interpret the instruction in a way that was disagreeable to the housekeeper, it would be virtually costless to amend the instruction the next time the domestic is sent on a similar errand. For example, if the domestic returns with chicken when the housekeeper wanted beef, the instruction could be amended the next time to "fetch me some beef soupmeat." The amendment would be nearly costless – the addition of one word to a verbal instruction. It is hard to imagine any imperative text that could be amended at a lower cost.

[13] FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 17-20 (2nd ed. 1880), reproduced in HENRY HART AND ALBERT SAKS, THE LEGAL PROCESS 1114-15 (Eskridge & Frickey eds. 1994).

An example of a text that is completely unamendable might be a foundational religious document like the Bible. Such texts are commonly regarded as being divine in origin – the "word of God." Absent further divine intervention, it would be improper for human agents to attempt to modify the text in the future. Different shades of meaning might be introduced through translation from one language to another. But no deliberate modification of the text by human agents would be permitted. This suggests that disputes about biblical interpretation should bear similarities to disputes over highly unamendable legal texts like the Constitution. An indeed, we find that biblical exegesis often features disputes pitting "literal" interpretation on the one hand against "metaphoric" interpretation on the other.

With respect to legal texts, amendability ranges from very high (low cost to amend) to extremely low (high cost to amend). The full range of possibilities is easier to see if we include administrative texts along with statutes and constitutional provisions.

Some administrative texts, such as pronouncements by agency officials contained in press releases, amicus briefs, opinion letters, and the like, are extremely easy to amend. Likewise, executive orders of the President are easy to amend – the President merely has sign a new executive order superseding or amending the old one. Other administrative texts, like regulations adopted after notice and comment rulemaking, are more difficult to amend, but still change fairly frequently, either in response to problems that emerge through the enforcement process or changes in administration policy.

Statutes are generally harder to amend than administrative texts. Even within the world of statutes, however, some statutes, as a practical matter, are much harder to amend than others. An example of a relatively amenable statute might be a rider inserted each year into an omnibus

appropriations bill by a powerful member of one of the appropriations committees. As long as the member holds her committee position, a change in wording or elimination of the rider altogether should be relatively easy for the member to achieve in any given year. Other statutes, like the Social Security Act, are much more difficult to amend, because of the enormous number of stakeholders and associated reliance interests involved. Still others, like the Voting Rights Act, have attained the status of "quasi-constitutional law" or "super-statutes,"[14] 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.[15]

The U.S. Constitution, on any account, falls far toward the unamendable pole of the spectrum. Indeed, the U.S. Constitution, on the conventional view, is "unusually, and probably excessively, difficult to amend."[16]

There are advantages and disadvantages to amendable and unamendable legal texts, considered as ideal types at the ends of a spectrum. The principal advantage of an unamendable text is that it promotes stability to a greater extent than does an amendable text. With respect to framework laws like the Constitution and statutes organizing the government, stability may be a virtue in its own right, insofar as it discourages efforts to change the rules of the game for

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[14] Guy-Uriel E. Charles & Luis Fuentes-Rolwer, *Superstatutory Interpretation* (draft).

[15] 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 re-enactments -- 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, Ala. v. Holder, 133 S.Ct. 2612, 2619-21 (2013).

[16] Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 237, 261 (Sanford Levinson, ed. 1995).

partisan advantage. Stability may also be desirable, insofar as we have a great deal of confidence in the desirability of the policies incorporated in the text. For example, if the text guarantees free speech and prohibits discrimination against racial minorities, and we think these are good policies, we may want to lock in these policies by incorporating them in an unamendable text. Of course, if the text's endorsement of these policies is kept deliberately vague, in order to facilitate fine tuning through future interpretation, then the policies will also be vulnerable to being watered down or discarded through future interpretation.[17] Even if the text contains some provisions we do not like, we may conclude that on balance it is likely to promote more good than bad, and on this basis we may prefer to make it very difficult to amend in order to forestall changes that would cause the balance to deteriorate.[18]

These are powerful arguments. Unfortunately, relatively unamendable texts have other serious disadvantages not shared by amendable texts.

One problem is dead hand control. *Tempora mutantur* --times change. New technologies emerge; wealth and population grow; social and political values change. The concerns that motivated the original enacting body may become increasingly obsolete over time. Amendable texts can be changed to accommodate economic, social, and political change. Unamendable texts raise the prospect that those now living will increasingly find their aspirations frustrated by the ideas of persons long dead.[19] Parts of the unamendable text may be sufficiently vague that

[17] As Madison put it, there are limits to how far "parchment barriers" can provide a secure source of protection for rights. THE FEDERALIST NO. 48 (James Madison).

[18] E.g., John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 Geo L. J. 1693 (2010).

[19] See Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606 (2008).

updating through interpretation is possible. But nearly all texts contain at least some provisions that are clear rules, and these will defy change through interpretation.[20] As time marches on, some of these rules may become increasingly questionable. Why must every State have two Senators? Do we really need the electoral college? Why must the President be a natural born citizen? In extremis, the stability of the entire system could be threatened by the inability to secure amendment of a dysfunctional provision.

Another advantage of amendable texts is that they provide a sounder basis for developing 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.[21] An unamendable text, in contrast, requires that policy adjustments be made, if at all, in an echo chamber of interpreters. To be sure, even if a text is unamendable, there may be indirect forms of feedback designed to influence the interpreter. The interpreter's efforts may be subject to criticism by academics, editorial writers, and political figures, the interpreter may be subject to various threats such as loss of jurisdiction, and so forth.[22] But these indirect feedback mechanisms are

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[20] See JACK M. BALKIN, LIVING ORIGINALISM 42 (2011) (noting that the Constitution contains many specific rules that have a plain meaning).

[21] 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).

[22] 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. BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

highly imperfect. Perhaps most notably, they do not require any constructive participation by the enacting body in the development of policy, just sniping at the interpreter. They can also backfire, at least in the short term, if the interpreter perceives the feedback as attempted intimidation.[23] This may cause the interpreter to dig in his or her heels, in order to maintain a reputation for independence and consistency.

Third, and most decisively, an unamendable text inevitably drains authority away from the people. Forget all the debate about whether honoring the intentions of a long-dead enactor is or is not consistent with popular sovereignty. 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 from the process of enactment and amendment of texts – something over which the people have a 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. [24] 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.

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[23] See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, [jump cite] (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.").

[24] For evidence that the 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).

A final point of relevance is that relatively unamendable texts are becoming ever-more difficult to amend. Perhaps the most basic reason for this is that the nation's top tier political institutions – including the constitutional amendment process, the Congress, and for that matter the Supreme Court – suffer from what Neil Komesar calls constraints of scale.[25] That is, they do not have the ability to expand their output in such a way as 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. The system lacks the capacity to generate the legal change needed in today's world, characterized by much greater size, complexity and more rapid economic and social change. One can think of top tier political institutions as a pipe of fixed dimensions, through which more and more water seeks to flow. The predictable result is that the water begins to back up. Constraints of scale mean that relatively unamenable legal texts become ever-more unamendable, as the finite resources available to change these texts must compete against ever-growing candidates for change.

Another reason for rising unamendability is political polarization. The two major political parties are becoming much more differentiated ideologically, as conservative southern Democrats turn into Republicans and liberal northern Republicans turn into Democrats. Ideological polarization makes it more difficult to agree on constitutional amendments, which require supermajorities in both houses. It also makes it more difficult to enact ordinary legislation, given the implicit supermajority requirements embedded in the legislative process, such as bicameralism and the Senate rules for ending debate. The polarization of the parties is mirrored by geographic polarization. Urban areas, especially on the coasts, are becoming homogeneously Democratic, whereas rural areas and small towns, especially in the South and the

[25] NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 142-49 (1994).

Great Plains, are becoming solidly Republican. Geographic polarization compounds the problem of unamendability, given that representation in the House and Senate is defined geographically, and that three-fourths of the States must agree to any constitutional amendment.

Happily, we are not trapped in a world in which the only option is extreme unamendability We have a variety of options for generating legal policy, many of which are relatively more unamendable that 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. And administrative agencies can elicit different degrees of reliance from the regulated community by adopting policy in instruments having different degrees of amendability.[26] Still, the extreme unamendability of the Constitution and many important framework statutes like the APA is cause for great concern. I will return to this subject later.

III. INTERPRETION AND AMENDABILITY – POSITIVE THEORY

In this Part, I provide the sketch of a positive theory about the relationship between amendabilty and interpretation. The theory is grounded in a simple relationship between amendability and interpretative discretion: The more amendable a text, the more the interpreter will be constrained to conform to the preferences of the body with the authority to amend. Conversely, the less amendable the text, the more the interpreter will be at liberty to adopt an interpretation that advances the interpreter's own preferences. I will first describe the

[26] Thomas W. Merill, *The Accardi Principle*, 74 GEO WASH. L. REV. 569, 613 (2006).

assumptions underlying the theory, and then will tease out some implications for how differently situated interpreters will gravitate toward different modes of interpretation depending on degree of amendability of the text.

A. Different Interpreters

The following account will make frequent reference to both courts and administrative agencies as interpreters, so it is appropriate to begin with some general observations about the institutional characteristics of each as interpreters of legal texts.

The first and most widely recognized point of distinction is that courts are relatively less accountable to the public through periodic elections. Federal judges are appointed by the President and confirmed by the Senate; after which they enjoy life tenure as long as they engage in good behavior. State judges are also appointed in some states. In others, they are elected or are subject to retention elections; but even in these states contested judicial elections are uncommon. Administrative agencies, in contrast, are appointed and often overseen by an executive officer who stands for periodic elections that are normally sharply contested. As the Supreme Court has put it, "[w]hile agencies are not directly accountable to the people, the Chief Executive is," and agencies are accountable to the Chief Executive.[27] The "countermajoritarian" nature of courts is probably exaggerated, just as the political accountability of agencies is often overstated. Still, there is a solid core of truth to the generalization that courts are more immune to the tides of popular opinion, and hence somewhat less likely to take transient public sentiment into account in interpreting a text, than are administrative interpreters.

[27] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

A second and less commonly noted difference is that courts are insulated from direct contact with the political officials who enact the texts that require interpretation. Courts engage in interpretation in the course of resolving particular cases. Yet various rules of procedures and norms of due process prohibit judges from engaging in ex parte communications about pending cases. Thus, it would be highly improper for a judge to pick up the phone and consult with a key legislator about how to interpret a statute in a case pending before the court. Administrative agencies are subject to no such compulsory insulation. To be sure, administrative law judges are barred from engaging in ex parte communications about adjudications pending before them.[28] But administrative law judges do not have the last word on important questions of interpretation within an agency; such questions are invariably resolved by the heads of agencies. And agency heads are "constantly communicating and negotiating with Congress over how to administer (and whether to amend) the statutes in their charge."[29]

A third difference concerns intellectual skills and orientations. Judges are typically comfortable doing (or consuming) traditional legal research: examining texts, parsing precedents, considering arguments about legislative history or canons of interpretation. They are rarely familiar with social science research nor are they comfortable digesting quantitative empirical studies. Agencies typically employ lawyers who possess skills similar to those of judges in handling traditional legal research. But they also rely on scientists, economists, and policy experts in rendering decisions, and the input of these persons with more wide ranging intellectual backgrounds will invariably have an impact on how agencies interpret texts. In short, judges are

[28] 5 U.S.C. § 557(d).

[29] Nicholas Parrillo, *Leviathan and Interpretative Revolution: The Administrative State, the Judiciary, and the Rise of Legislative history, 1890-1950*, forthcoming Yale L. J. (draft at 10).

more likely to be comfortable with traditional modes of interpretation, such as faithful agent or integrative interpretation; agencies are more likely to be comfortable with normative interpretation, especially of a utilitarian or cost-benefit variety.

B. Two Assumptions

The theory is built on two assumptions. The first assumption is that both judges and administrative officials can estimate, however imprecisely, where on the spectrum between amendable and unamendable most legal texts lie. A second assumption is that interpreters do not like to have their interpretations overridden. Everything else equal, interpreters will prefer interpretations that minimize the risk of override.

There are four sources of information that plausibly allow interpreters to form judgments about the likelihood 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 general category of text in question, the length of time the current version of the text in question has remained unamended, and other cultural knowledge about the propriety of amending the particular type of text in question.

The first source of predictive data is the procedural difficulty of securing an amendment of the text. Here, the most easily amended texts are probably various types of informal "guidance" materials issued by administrative agencies. 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.

Moving up the ladder of procedural difficulty a notch, we encounter agency pronouncements set forth in policy statements or interpretative rules published in the Federal Register or embodied in an adjudicative order released by the agency. It is somewhat more costly to amend these texts. Amending a policy statement or interpretative rule published in the Federal Register is likely to require, by convention if not by law, a further publication in the Federal Register. Clarifying or overruling a pronouncement contained in an adjudicative order will probably require issuing another pronouncement in a subsequent adjudication, or possibly 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,[30] which ordinarily means engaging in notice and comment procedures as required by the APA, publication of the new rule in the Federal Register, waiting the minimum time for the new rule to take effect, and so forth. This is clearly the most procedurally costly form of administrative amendment.

When we turn to legislation, the procedural hurdles to amendment become significantly higher still. 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.[31] In recent years, legislative amendment has become even more

[30] See, e.g., Appalachian Power Co. v. EPA, 208 F.3d 1015, 1028 (D.C. Cir. 2000).

[31] E.g., John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, [jump cite] (2002).

difficult, because of the need in many cases to obtain the vote of 60 Senators to end debate on a proposed measure.

The Constitution is the most daunting legal text to amend, in terms of prescribed procedures. 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. This is a double supermajority rule.

The ultimate in unamendability, 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.[32] Absent unanimous consent, the only way to amend this provision, presumably, would be by revolution overturning the entire Constitution.

A second source of data that interpreters can take into account in predicting the ease of amendment is the observed rate of amendment of the general category of legal text over time. 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.

With respect to legislative overrides of statutory interpretations, we do have some data. Perhaps the best known study, by Bill Eskridge, found that Congress amends statutes to override Supreme Court decisions about 12 times per year; it acts to override lower court decisions about

[32] 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.").

35 times per year.[33] His data did not reveal what percentage of all statutory interpretation decisions this represents. Other studies suggest that the percentage of decisions overridden or modified is relatively small. A comprehensive study of all Supreme Court statutory interpretation decisions from 1969-1988 revealed that 2.7% were overridden by Congress.[34] A study limited to preemption cases between 1983 and 2003 found that just 2.4% were overridden or modified by Congress.[35] A study of tax legislation found that 5.7% of Supreme Court tax decisions were overridden or modified over a 50 year period.[36] Collectively, these studies suggest that legislative overrides of statutory interpretation decisions are "sporadic, not obviously predictable, and relatively rare."[37] I assume that experienced interpreters have an intuitive grasp of this empirical reality.

The Constitution, as one would expect, stands out as uniquely difficult to amend based on general frequency of amendment. The basic document, ratified in 1789, has been amended only 27 times in 222 years. Eleven of these amendments (including the controversial Twenty-Seventh Amendment) were part of a deal to secure ratification of the original document, and 10 of these

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[33] William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 335-36, 338 (1991). The data cover the period 1975-1990.

[34] Michael E. Solimine and James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMPLE L. REV. 425, 445 (1992).

[35] 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).

[36] 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, 1384 (2007). An older study found only 21 congressional overrides of Supreme Court statutory interpretation decisions in the immediate post-World War II era. Note, *Congressional Reversal of Supreme Court Decisions: 1945-1957*, 71 HARV. L. REV. 1324, 1336 (1958).

[37] Solimine and Walker, supra at 438.

amendments were ratified within the first two years. The balance of 16 amendments works out to one amendment every 14 years. Perhaps more to the point, only five amendments have been adopted to overturn judicial interpretations of the Constitution.[38] This is one every 44 years. Clearly, an interpreter of the Constitution, looking at the empirical record, would conclude that the odds of having the interpretation reversed by amendment are exceedingly low.

A third source of predictive data is the length of time the particular text in question has remained unamended. Section 1 of the Sherman Act, which has remained unamended for 120 years, probably has a very low probability of being amended in the future. At the other extreme, a recent enactment, like the Dodd-Frank Act or the Affordable Care Act, presents much more uncertainty about the likelihood of amendment. An interpreter would likely put a higher subjective probability of amendment on such an enactment, because the policy remains in flux. Most of the provisions of the Constitution have remained unchanged for 222 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 222 years, notwithstanding the enormous social and technological changes that have occurred, the odds are vanishingly small.

A fourth and more qualitative source of information consists of general cultural knowledge about attitudes toward amendment. One 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. To be sure, congressional engagement is understood to be more intense in some areas than in others. For example, it is well known that

[38] The Eleventh (Chisholm v. Georgia), Fourteenth (Scott v. Sanford), Sixteenth (Pollock v. Farmers' Loan), Twenty-fourth (poll tax), and Twenty-sixth (18 year-old vote).

congressional oversight of tax decisions is especially close.[39] Knowing this, interpreters probably increase their subjective estimate of the probability of amendment in these areas.

When we turn to the Constitution, the attitude, at least among elites, is increasingly one of disapproval of amendments. The reason for this appears to be anxiety that opening the door to amendments would put at risk certain positions generally favored by elites, such as abortion rights, separation of church and state, and gun control. In any event, all efforts to initiate the constitutional amendment process have failed in recent years. There have been a few close calls, like the effort to amend the Constitution to permit flag desecration laws.[40] But no amendment of the Constitution has been proposed and ratified in over 40 years.

The second assumption is that interpreters are averse to having their interpretations overridden by amendment. We have it on good authority that judges do not like being reversed.[41] There are a number of plausible reasons for this. 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.[42]

At least some of these reasons also apply to reversals by amendment as well as by higher courts. Certainly the desire not to have one's work go to waste is equally applicable. One could argue that reversal by an amending body is less of an implied criticism than reversal by a

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[39] Staudt, supra.

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

[41] RICHARD A. POSNER, HOW JUDGES THINK 141 (2008).

[42] Id. at 70.

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 lose, 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 legislative override into account in the way they interpret statutes.[43] 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 lower courts worry about reversal by higher courts, 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 frequent. Clearly more evidence is needed before we can say that interpreters pay no attention to the prospect of override by the enactor.

In short, I assume that interpreters have some basis for predicting the likelihood that their interpretation will be overridden by amendment, and that they have a general aversion to such reversals.

C. Implications for Interpretative Mode

Translating these assumptions into predictions about interpretation is slightly more complicated. Let us start with a text that is perceived as being highly amendable. Here I

[43] Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1457-59 (2001).

hypothesize that, all else being equal, the interpreter will want to conform to the expectations of the *amending body*. This follows in a straight forward manner from the twin assumptions that the interpreter can predict the probability of amendment and is averse to the prospect of an override by amendment. Under these circumstances, the interpreter will be motivated to adopt an interpretation that minimizes the risk of override, which is to say, an interpretation that conforms to the preferences of the amending body. Stated another way, the interpreter will deploy the general interpretational strategy advocated by Einer Elhauge, who argues that interpreters should construe ambiguities in statutes so as to reach outcomes that correspond to the *current enactable preferences* of the legislature.[44]

A central difficulty posed by Elhauge's proposal is how the interpreter can know the current enactable preferences of the legislature. When we broaden the inquiry to consider a variety of interpreters and texts, we can gain some further insight here.

Consider first an *administrative* official (e.g., an ALJ) interpreting an *amendable administrative* text. Such an official is likely to have excellent information about the preferences of the top level agency officials who have the authority to amend the text. After all, the interpreter is an employee of the agency, understands the recent trajectory of the agency's policy, has paid close attention to the actions and pronouncements of the individuals who currently hold top positions in the agency, and has frequent interactions, formal and informal, with other agency employees. Such an interpreter is in a good position to know which interpretation is likely to conform to the wishes of the top level officials, and hence to minimize the risk of override.

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

I predict that such an interpreter will adopt a dynamic approach to interpreting the text, deploying faithful agent, normative, and integrative ideas, in whatever priority or combination, in order to reach the preferred interpretation, that is, the one that conforms to the wishes of the top level officials. I am not suggesting that the interpretation will be completely unprincipled. Each mode of interpretation imposes its own constraints on the interpreter. But the agency interpreter will exploit the discretion inherent in being able to pick and choose among different modes of interpretation in order to avoid, if possible, override by top level officials.

What about an *administrative* interpreter confronted with an amendable *statute*? Here too, one would expect the administrator to have excellent information about the preferences of the current legislature, or at least about the committees and the legislative staff that oversee the agency and regularly interact with its officials. The agency will be anxious to avoid override, but also to avoid irritating its congressional overseers in ways that might elicit unpleasant oversight hearings or compromise pending budget requests. So here too, one would expect the agency to engage in a dynamic approach to interpretation, designed to conform its understanding of the statute to the preferences of the current powerbrokers in the legislature.

A possible complication is the role of the courts, insofar as they have authority and are likely to be asked to review the agency's exercise in statutory interpretation. If the statute is amendable, one would expect the courts to employ *Chevron* or some other deference doctrine and to defer to the agency's interpretation, as discussed momentarily. If courts behave as the theory suggests they should, then the agency will be free to pursue its dynamic approach to interpretation, without worrying about conforming to judicial preferences. If courts fail to perceive the wisdom of following the agency's lead, then the incentives for the agency become more complicated. It will have to weigh the risk of judicial reversal against the risk of legislative

override (and/or retaliation). In any event, the agency's preference for dynamic interpretation, including normative interpretation, underscores the wisdom of allowing agencies to engage in modes of interpretation different from those most commonly deployed by courts. [45]

Consider now a *judicial* interpreter faced with an amendable *administrative* text. Like the agency interpreter, the judge will want to avoid the risk of override. Indeed, any override here would be especially aggravating, since judges likely regard administrative agencies as occupying an inferior position in the government hierarchy. Judges are used to reversing agencies, not the other way around. Unlike the agency interpreter, however, the judge will have little or no insight into the current policies or preferences of top level agency officials. What is the judge to do?

The awkward position of the judge asked to interpret an easily-amended agency regulation may explain the emergence and persistence of what is known as *Seminole Rock* or *Auer* deference.[46] Under this doctrine, courts should 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. [47] Although much criticized,[48] the *Seminole Rock*/*Auer* doctrine allows courts to tap into the superior knowledge of the agency about the

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[45] See KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 146-158 (2013); Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005).

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

[47] *See, e.g.*, Decker v. Northwest Env. Defense Ctr., 133 S.Ct. 1326 (2013) (deferring to interpretation in government amicus brief).

[48] See, e.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996).

enactable preferences of top level agency officials. By deferring to the agency interpretation, the court eliminates the risk of embarrassing override. *Seminole Rock/Auer* deference is a species of nondynamic integrative interpretation. It directs judges to embrace the conventional understanding of the regulation, as expressed by the agency that promulgated the regulation. In the context of an amendable agency text, it functions to reduce the likelihood of override.

Let us now turn to the situation discussed at length by Elhauge, where a *judicial* interpreter is faced with an amendable *statute*. As in the case of the administrative text, the judge is likely to have very little insight into the preferences of the current legislature about how the statute should be interpreted. How would a judge proceed in these circumstances in order to avoid legislative override?

One possibility, addressed by Elhauge, is for the judge to adopt a faithful agent mode of interpretation, or as he puts it, the judge would use legislative intent as revealed by the legislative history. The argument is that, absent better evidence about current preferences, the historical preferences of the *enacting* legislature are likely to provide a rough guide to enactable preferences of the *current* legislature. [49] Another possibility is to examine other recent legislative action (including ratifications of previous interpretations) as a guide to current preferences.[50] This is a species of integrative interpretation. A third possibility is to defer to agency interpretation of the statute, as under the *Chevron* doctrine, on the theory that the agency is likely to have a much better clue about current enactable preferences than the court does.[51]

[49] ELHAUGE, supra at 115-34.

[50] Id. at 70-78.

[51] Id. at 79-111.

Again, this is a species of integrative interpretation. However the judge proceeds, he or she is likely to adopt a nondynamic form of interpretation, in order to minimize the risk of override.

Elhauge's general theory of enactable preferences works extremely well as a predictive guide to judicial interpretation of statutes – at least in the case of a statute perceived to be easily amendable. A judge faced with such a text will incline, all else being equal, to adopt the interpretation that reflects the preferences of the current legislature. Note that, in reaching such outcomes, the judge will pick and choose among various faithful agent and integrative theories, depending on the circumstances. What the judicial interpreter faced with an amendable text will not do, in contrast to an administrative interpreter, is engage in dynamic interpretation of the text, especially of the normative variety. The judge's normative views may or may not coincide with the preferences of the current legislature.

What if the text is perceived to be unamendable? We can start again with an administrative interpreter. When an *administrative* interpreter encounters an *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. Rule 10-b(5) in the securities law context might be an example. 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. And since the courts do not have to worry about legislative override either, the courts are likely to be much more aggressive advancing their own interpretation than they will be in the case of an amendable text.

If interpretation of the unamendable agency regulation, statute, or constitutional provisions 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, of course, is a form of nondynamic integrative interpretation. This analysis suggests that, notwithstanding *Brand X*,[52] agencies will be reluctant to depart from judicial interpretations, at least where an unamendable text is involved. If the unamendable text is not subject to judicial review, for example if it concerns nonjusticiable military or foreign affairs functions, the agency interpreter will either attempt to anticipate the preferences of those higher in the executive hierarchy, as in the case of the amendable administrative text, or will seek guidance in internal executive branch conventions (precedents).

Judicial interpretation of *unamendable texts* depends, first of all, 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. So lower courts will respond to unamendable texts using nondymanic, integrative interpretation.

The Supreme Court presents the most interesting situation in interpreting unamendable texts. At first pass, one might assume that the Supreme Court would simply interpret the

[52] National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005) (holding that agency interpretations of ambiguous statutes eligible for deference under *Chevron* displace previous judicial interpretations).

unamendable text so as to advance its own policy preferences – the vision of the Court propounded by the so-called attitudinal school of political science.[53] There is extensive and growing empirical evidence that ideological preferences do account for much of the variance in voting in the Supreme Court (and on the courts of appeals as well).[54]

It is clear, however, that ideology does not explain everything. 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 amendment – professional criticism, threats to curtail jurisdiction, threats to cut budgets or deny raises, public protest.[55] 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 predictability of its behavior. If the Court were highly unpredictable, it could work its will only by reviewing a huge number of cases, something it lacks the institutional

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

[54] See, e.g., Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUSTICE SYS. J. 219, 243 (1999) (aggregating results of 140 research papers to find that the political party appointing judges explains 38 percent of the variance in voting behavior).

[55] FRIEDMAN, THE WILL OF THE PEOPLE, supra. The prospect of jurisdiction stripping and other forms of congressional retaliation may have receded in recent years with 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 (2006).

capacity to do. By honoring its own precedents, the Court ensures that lower courts, agencies, and other actors also honor its precedents.

How does all this translate into modes of interpretation? Where the text is unamendable, as in constitutional law, the Supreme Court is likely to pursue integrative interpretation as a dominant strategy, in order to cultivate an appearance of legality. For the most part, judicial precedent in effect becomes "the constitution."[56] But given its freedom from override, the Court will be strongly tempted strike out in new directions in particularly high- stakes cases. It can do this by shifting to normative interpretation, as in *Brown v. Board of Education*, *Roe v. Wade*, or *Lawrence v Texas*. Or –ironically – it can on occasion adopt faithful agent interpretation, when this happens to generate an outcome preferred by the majority, as in *District of Columbia v. Heller*. In other words, when the text becomes unamendable, integrative interpretation will be the norm, punctuated by episodic moments of opportunism when the Court shifts to dynamic interpretation, of either faithful agent or normative mode, in order to advance its own policy preferences. The exact balance between nondynamic and dynamic interpretations of unamendable texts will be determined by a subtle calculation by the Justices – never expressly articulated – about how frequently and how far they can advance their own preferences without losing the capacity to command obedience from other institutions based on the perception that their rulings are grounded in law.

IV. INTERPRETING THE UNAMENDABLE – NORMATIVE THEORY

I turn now to a normative question: how should interpreters interpret an unamendable text? Recall the discussion in Part II about the advantages and disadvantages of amendable and

[56] *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

unamendable texts. Unamendable texts promote stability, and can provide greater security for valued social policies like the protection of free speech. But unamendable texts have significant disadvantages – dead hand control, lack of constructive give-and-take with the enactor in the development of policy, and transfer of legal authority away from the people. My own take, which serves as the starting point for the discussion here, is that the disadvantages of unamendable texts outweigh the advantages, especially as the pace of economic and social change accelerates and the need for legal revision increases. The first best solution would be to lower the procedural barriers to amendment, making what are now unamendable texts more amendable. This is presumably not possible, because the procedures for amending a text are, for the most unamendable texts, themselves unamendable. What then, if anything, is the second-best solution? Is there some way interpreters can reduce the disadvantages associated with unamendable texts?

I argue here that the second-best solution is to adopt a general strategy for allocating legal authority akin to what the Europeans call subsidiarity.[57] That is to say, legal authority should be assigned to the lowest level in the established hierarchy that is competent to regulate the matter in question. The established hierarchy in the U.S. is: Federal Constitution > federal statute > federal legislative regulation > federal executive order > federal agency interpretative rules and precedents> state constitution > state statute > state legislative regulation> state executive order> state agency interpretative rules and precedents.[58] This also roughly corresponds to the hierarchy

[57] George Berman, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 339 (1994).

[58] I recognize that there is uncertainty about whether federal agency interpretative rules and precedents are superior to state law. My own view is that federal agency action trumps state law under the Supremacy Clause only when the agency acts with the force of law. Thomas W. Merrill, *Preemption and Instittutional Choice,* 102 NW U. L. REV. 727, 760-66 (2008).

of unamendability. Thus, by shifting authority downward in the hierarchy, we move "up" in terms of amendability. No one would suggest that the locus of legal authority should always be pushed downward as much as possible. There are many issues in a highly inter-dependent world that state and local governments are not competent to regulate. Moreover, such a radical shift would sacrifice too much stability in return for greater amendability. A better strategy would be to seek a general shift one or two notches downward toward sources of law that are relatively more amendable. Thus, decisions now governed by the Constitution should be displaced by federal statutes, decisions now governed by federal statutes would by displaced by federal administrative regulations or by state law, and so forth.

Such a shift toward greater amendability could be achieved by Congress. For example, Congress could foreswear the temptation to enact 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, reserving federal authority for problems that are truly interstate in their dimensions. 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.

Nevertheless, the Court has said that agency interpretative rules and precedents are entitled to some deference in matters of preemption of state law. Wyeth v. Levine, 555 U.S. 555 (2009). So legal authority at the bottom of the federal hierarchy has some capacity to displace state legal authority, even of the highest order.

A slightly more plausible strategy is to try to influence those who are tasked with interpreting unamendable texts. In this spirit, I will offer two suggestions for interpreters. One is to adopt a general canon of interpretation favoring the resolution of disputes in the name of relatively more amendable texts. The other is to interpret relatively unamendable texts nondynamically, in order to create incentives for future lawmaking to occur in relatively more amendable formats.

A. The Canon Favoring Amendable Texts

One general strategy for interpreters would be to adopt a general canon favoring amendable texts. Specifically, whenever a dispute could be resolved under either the authority of a relatively unamendable text or a relatively more amendable text, the more amendable text would be the preferred basis for decision. Thus, if a dispute could be resolved either under the Constitution or a federal statute, the statute would be the preferred basis for decision. Whenever a dispute could be resolved under a federal statute or a federal administrative regulation, the administrative regulation would be the preferred basis for decision. And whenever a dispute could be resolved under federal law or state law, statute law would be the preferred basis for decision. As with other canons of interpretation, the preference for the more amendable text would establish a presumption favor one outcome over another, but the presumption could be overcome if other interpretative sources strongly support a contrary outcome.

As stated, the canon favoring amendable texts sounds like an entirely novel idea, and in its broad sweep, it would be. But it is important to note that there are a variety of existing interpretative canons and doctrines that yield the same or a similar result, albeit on a more particularized scale. The main function of the canon favoring amendability 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*.[59] These include, among others, that (1) courts will not pass on constitutional questions unless absolutely necessary to decision; (2) courts will not formulate rules of constitutional law broader than require 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.[60] 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.[61] Although Title VII, in its core provisions, is also relatively unamendable, is it unquestionably easier to change than Section one of the Fourteenth Amendment.

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

[59] 297 U.S. 288, 341-56 (1936).

[60] Id. at 346-48.

[61] 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.").

an implied right of action directly under the Constitution in *Bivens*,[62] the Court began backtracking, noting that courts should hesitate to recognize such a right of action if alternative remedies are "adequate" or "meaningful."[63] It is now well established that direct actions under the Constitution are disfavored, provided any other nonconstitutional remedy is available, even one that is not an "equally effective substitute." [64] Although the Court's retrenchment from *Bivens* appears to be motivated largely by concerns about promoting excessive litigation against the government,[65] a sounder basis would be that the presumption against implied constitutional remedies forces litigants to 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 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.[66] Although having a dubious pedigree,[67] this doctrine obviously facilitates a large scale transfer of legal authority from statutory to regulatory law. If every agencies authorized to make "rules and

[62] Biven v. Six Unknown Named Agents, 403 U.S. 388 (1971).

[63] Schweiker v. Chilicky, 487 U.S. 412 (1988).

[64] Bush v. Lucas, 462 U.S. 367 (1983).

[65] See, e.g., Wilke v. Robbins, (2007).

[66] E.g., AT&T Corp. v. Iowa utilities Bd., 525 U.S. 366 (1999).

[67] See Thomas W. Merrill and 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).

regulations" 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 interpretative doctrine that also has the effect of shifting authority toward agencies. *Chevron* deference only applies to agency interpretations set forth in regulations or adjudications having the force of law. This means, however, that when agencies implement statutory commands in one of these formats, the authority to determine the meaning of the statute 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 statutory interpretation. 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 downward 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 relatively easily, simply by promulgating a new agency interpretation.

With respect to state law, the current canon that embodies a preference for devolution of authority is the presumption against preemption. [68] The presumption has been criticized of late, perhaps rightly so, because it does not differentiate between situations where a uniform rule is necessary and when it is superfluous. Nevertheless, it again illustrates how existing law includes interpretative conventions that mirror a more general preference for amendable over unamendable texts. Once we understand why a preference for amendability makes sense, the traditional canon appears in new light, and gains new plausibility.

B. Nondynamic Interpretation of Unamendable Texts

A second and equally important interpretative strategy is to adopt a general practice of interpreting unamendable texts nondynamically. Superficially, this seems wrong. If a text is unlikely to be amended, it would seem that interpreters should do whatever they can to update the text through interpretation. In other words, unamendable texts should be interpreted dynamically, in order make the understanding of the text conform as much as possible with the aspirations and values of today. I will argue, however, that nondynamic interpretation of 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 interpretative gymnastics.

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

1. Why Be Nondynamic?

The basic case for nondynamic interpretation of unamendable texts is that this will promote the substitution of amendable for unamendable texts. This is because nondynamic interpretation, by definition, is inhospitable to efforts to achieve deliberate legal change through interpretation. Nondynamic interpretation aspires to discover and enforce what the law is, not to make it better. It enshrines the legal status quo. Knowing this, advocates of social change will direct their energies elsewhere. The most promising strategy is to advocate for the adoption of new laws 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 unamendable text that resist change through nondynamic interpretation. 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 nondynamic 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 nondynamic interpretative approach, has rejected the claims that discrimination against the elderly or the disabled are subject to heightened scrutiny under the Equal Protection Clause.[69] In response, Congress adopted statutory regimes that provide significant protections to

[69] See City of Cleburne, Tex. 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).

both categories of individuals.[70] Or, consider the Supreme Court's decision in *Kelo v. New London Connecticut*,[71] rejecting the claim that economic development takings violate the "public use" provision of the Takings Clause. The decision was firmly grounded in nondynamic interpretation, following roughly a dozen Supreme Court precedents that refused to put any teeth in the public use requirement. Yet the outcome was harshly condemned, with opinion polls showing that nearly 90 percent of the public disapproved of the decision.[72] The result was widespread agitation for greater protection of property rights, which eventually yielded new laws in some 43 states restricting the use of eminent domain.[73] If, as I suspect, the more extreme versions 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 revise.

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.[74] The Big C Constitution is the unamendable piece of parchment under glass at the National Archives.

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[70] Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (2006); Equal Opportunity for Individuals with disabilities Act, 42 U.S.C. §§ 12101-12213 (2006).

[71] 545 U.S. 469 (2005).

[72] Janice Nadler et al., *Government Takings of Private Property*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily et al. eds 2008).

[73] Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100 (2009).

[74] WILLIAM N. ESKRIDGE, JR. AND JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010).

It is the document whose interpretation is at issue in cases we identify as presenting 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 most interactions involving government and citizen, are governed by the small c constitution. The small c constitution includes statutes that establish government agencies and delineate their powers, impose tax obligations, create government benefit programs, control the procedure followed by government actors, protect citizens against race and gender discrimination, age discrimination, unfair treatment based on disability, and so forth and so on. This enormous complex of legislation is supplemented by a vast body of administrative regulations, judicial interpretations, and informal administrative norms. It is, if you will, the American equivalent of the English constitution – a set of practices and norms that govern the conduct of public officials, even if not written down in a single document and even if subject to continual evolution over time in response to changing circumstances.

Interpreting the Big C Constitution in a nondynamic 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 small c constitution. This has already happened to a very significant degree. The capacity of the judiciary to tackle new social problems 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 to administrative agencies. Adopting a mode of interpretation that accelerates this trend will help reduce government by unamendable text and replace it by government by amendable text, which is on the whole a good thing.

2. How to be Nondynamic

Even if it is granted that nondynamic interpretation will lead to a substitution from relatively more unamendable tomore amendable texts, what approach to interpretation is most likely to yield nondynamic results? Generally speaking, integrative interpretation of the Burkean variety holds forth the best promise of achieving such an outcome. To be sure, virtually any theory of interpretation can probably yield up either dynamic or nondynamic results. It is more a matter of attitude than of methodology. Still, a general preference for Burkean interpretation is more likely to produce nondynamic results than any other current approach to interpretation, at least as applied to old texts that have been the subject of significant interpretation over time.

Burkean interpretation is a species of integrative interpretation, and as such it draws upon a variety of evolved sources, including prior judicial precedent, agency precedent, legislative ratification, other enactments, and canons of interpretation. The Burkean interpreter seeks to integrate these diverse sources into a coherent story about the meaning of the text. The objective is to account for all official expressions about the meaning of the text. For the Burkean interpreter, the principle that knits these diverse sources together is tradition. The Burkean interpreter seeks to discover what the law is, not to make it. The various sources familiar to the integrative interpreter, such as precedent, are for the Burkean interpreter evidence of what active participants in the legal system regard the text to mean today.

Another source of evidence about what the law means, for the Burkean, is existing practice under the law. Unless there is persuasive evidence of corruption or other malfeasance in the operation of legal institutions, the common understanding of the law's requirements should be reflected in the practice of legal institutions. It follows that, for the Burkean interpreter, direct

evidence about existing practice should also be important in determining the settled meaning of the law.[75]

Another way to put this, at least in constitutional cases, is that the Burkean interpreter will consider evidence about the evolved state of the small c constitution in determining the meaning of the Big C Constitution. The small c constitution is a product of texts that are subordinate to the Big C Constitution, and which have evolved into settled practices that organize government and shape citizen expectations. The small c constitution, in other words, reflects existing practice, and as such is probative of the settled meaning of the Big C Constitution, as far as the Burkean is concerned. This does not mean that the small c constitution should displace the big C constitution – that the written constitution should be disregarded in favor of something like the English constitution. The Big C Constitution is the supreme law of the land, and when its meaning its plain it must be enforced according to its terms. But it does mean that when the Big C Constitution is ambiguous, the interpreter should look to the small c constitution as it applies in the relevant area, and should strive to construe the Big C Constitution in a way that protects and preserves the small c constitution.

The strategy of assuring that the meaning of the Big C constitution conforms to the small c constitution also directly advances the objective of pushing the sources of law downward toward more amendable texts. Under the *Ashwander* canons previously mentioned, there is no need to adjudicate and enforce the Big C Constitution if it does not go beyond applicable provisions of the small c constitution. This means that most disputes can be resolved by considering the application of an amendable text, without any resort to the Big C Constitution.

[75] As any experienced appellate lawyer will tell you, a good brief does in fact strive to inform judges about existing practice, whether it be under a "Background" section or the "Statement of Facts" or otherwise.

Against the virtues of Burkean interpretation, consider the alternative of faithful agent interpretation. Faithful agent interpretation may be a sensible interpretative strategy as applied to amendable texts. On balance, however, faithful agent interpretation, if done in a truly "faithful" fashion, would tend to exacerbate the disadvantages of unamendable texts. The problem of dead hand control will become more severe if texts adopted long ago are faithfully interpreted as embodying the instructions of long-dead enactors. The absence of give-and-take between the enactor and interpreter becomes more consequential as the "give" recedes into the distant past, and is replaced only by "take." And the people will 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. The flip side, of course, is that faithful agent interpretation will also enhance the main advantage of an unamendable text – its stability and promotion of reliance interests.

Normative interpretation is even less likely to fit the bill. Normative interpretation admittedly ameliorates some of the disadvantages of unamendable texts. Specifically, it mitigates the dead hand problem. Interpretation of the unamendable Constitution becomes a kind of rolling constitutional convention composed of the current Supreme Court Justices. Being creatures of their own time, the Justices will presumably update the meaning of the text to reflect contemporary values. Proponents of normative interpretation frequently hail its capacity to achieve a de facto amendment of the text, or at least its vague provisions, as a great virtue. The Court has agreed up to a point, adopting a uniquely flexible approach to stare decisis in constitutional cases in order to facilitate judicial reinterpretation of the unamendable.

But normative 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 plain meaning, these provisions continue to defy change through interpretation. Nor does normative interpretation yield the give-and-take 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 normative interpretation makes interpretation even more of an elite enterprise, confined to judges and lawyers – a closed circle from which ordinary voters are excluded.

Normative interpretation is also troubling because it would likely undermine the one virtue associated with an unamendable text – its promotion of stability. Normative interpretation is highly unstable. Interpretation of texts using cost-benefit analysis, as urged by pragmatists like 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 how to promote the good through interpretation. Faithful agent interpretation has a theory that collectively binds interpreters – they are bound by the instructions of the enacting body. Integrative interpretation similarly has a theory that collectively binds interpreters – they are bound by precedent or by propositions about the meaning of texts that can be regarded as settled. What is it that binds one judge or other interpreter to the normative analysis carried out by another judge or interpreter? Normative interpretation is only controlling if one agrees that the analysis is correct. If you disagree with a normative analysis rendered by someone else – either because you have better data, or you are smarter, or your values are superior – you have no reason to follow the lead of the other normativist. A world of normative interpretation would therefore be a world of continuous

revisitings of past decisions, dramatic shifts in legal understanding with new appointments, and rampant overruling of prior interpretations.

Perhaps Burkean interpretation of unamendable texts is overly weak medicine; perhaps we should go further and embrace the highly deferential review associated with James Bradley Thayer and his rule of clear mistake.[76] Thayer argued that courts should enforce unambiguous constitutional commands against contrary legislation. But when faced with an open-ended or ambiguous constitutional provision, they should always defer to legislative judgments of constitutionality. Thayer openly worried about the unamendable nature of the Constitution and the asymmetry this creates: laws that are invalidated can only be re-adopted by constitutional amendment; laws that are sustained can be repealed by ordinary legislation. He also worried that vigorous judicial review in the name of unclear constitutional commands will eviscerate the willingness of elected officials to take constitutional limitations seriously.

Thayer was on to something, at least when we consider the problem of the unamendable text. Relative to Burkean interpretation, his proposed approach would have an even more powerful effect on relocating authority toward relatively more amendable texts. Generalizing, Thayerian deference would say that any ambiguity in an unamendable text should be interpreted in the way the immediately subordinate political actor would prefer to have it interpreted. Ambiguities in the Constitution would be interpreted the way Congress would have them interpreted, ambiguities in statutes would be interpreted in the way agencies would have them interpreted, and so forth. Systematically adopted, this kind of deference would push authority

[76] James Bradley Thayer, *American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

for making legal policy away from interpretation of higher order texts to enactment of lower order texts, making the law generally more amendable.

Although Thayerian deference has elicited some recent academic support,[77] it nevertheless would have consequences that make it undesirable as a general solution to the problem of unamendable texts. Perhaps most notably, Thayerian deference would concentrate interpretative authority in a way that would undermine the checks and balances inherent in our system of government. Under Thayer's approach, if the branches disagree about the proper allocation of authority, or the federal government disagrees with one or more States, the matter would almost automatically be resolved by a single entity -- Congress. This would concentrate too much interpretative authority in a single institution, which would often be concerned about advancing its own institutional prerogatives. Burkean interpretation, in contrast, allows disputes between governmental institutions to be resolved in a more impartial manner. Disputes between different governmental institutions will be resolved by the courts in accordance with what they perceive to be the settled equilibrium that has been reached, up to that point in time, about the proper division of authority as between the contending institutions.

Thayerian deference also greatly undermines the ability of actors to rely on the policies reflected in unamendable texts. If ambiguities in those texts are always resolved by the political institution that is most responsive to popular sentiment, abrupt or unanticipated changes in meaning cannot be ruled out. Burkean interpretation promotes reliance on the policies incorporated in unamendable texts. The interpreter will give these texts their settled meaning, which is presumably the meaning that most actors will rely on in any event.

[77] ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006).

Consequently, although Burkean interpretation provides only a mild incentive to redirect legal authority to more amendable texts relative to the powerful medicine of Thayerian review, the Thayerian cure might be worse than the disease. It would shift interpretative authority over unamendable texts from courts to more responsive political actors. But in so doing, it would also deprive us of the some important virtues of judicial review, namely impartiality and consistency. Burkean interpretation, although to a lesser degree than Thayerian deference, also pushes the development of legal policy downward toward greater reliance on amendable texts. Yet it does so in a way that affords a better prospect of preserving the values we associate with the rule of law.