Originalism and the Challenge of Change: Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions

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Articles

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LEE J. STRANG*

INTRODUCTION

One of the most persistent criticisms of originalism¹—and also one of the most powerful—is that originalism is not a viable interpretative methodology because of the tremendous technological, social, cultural, religious, and moral change² that has occurred since the Constitution’s

1. By originalism I mean the interpretative methodology which holds that the Constitution’s original meaning—the publicly understood meaning of the Constitution’s text when it was ratified—is its authoritative meaning. See Lawrence B. Solum, Semantic Originalism 2 (unpublished manuscript) [hereinafter Solum, Semantic Originalism], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 (“[T]he fixation thesis is the claim that semantic content of the Constitution . . . is fixed at the time of adoption.”); see also Lawrence B. Solum, District of Columbia v. Heller and Originalism, 103 Nw. U. L. Rev. (forthcoming May 2009) (manuscript at 2, on file with The Hastings Law Journal).

2. By the phrase "moral change" I mean that members of society today understand morality differently than the various Framers and Ratifiers of the Constitution. Perhaps the prime example of this is whether and how justice is due to black Americans. The original Constitution—that is, the

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original meaning was created. The Constitution’s original meaning arose in contexts so dramatically different from our own, the criticism goes, that a Constitution whose meaning was limited by those contexts would be unworkable in today’s world.

This form of criticism of originalism—what I label the challenge of change—is pervasive. Justice Stevens, no fan of originalism, has chastised originalists on the Supreme Court for failing to recognize that “our understanding of the Constitution does change from time to time.” In the academy, Mark Tushnet is representative when he claimed that “the general problem of originalism . . . is that social change makes it a theory of constitutional interpretation that regularly fails to provide guidance on matters of contemporary constitutional controversy because it disregards the complexities of . . . the current situation.” Nor is this a new critique. Justice Douglas anticipated this argument in 1949, writing that today’s judge cannot let “men long dead and unaware of the problems of the age in which he lives do his thinking for him.” Indeed, even scholars sympathetic to originalism, who argue that the Constitution’s original meaning is one means of ascertaining authoritative constitutional meaning, find the challenge of change compelling.


7. See, e.g., Larry Kramer, *Fidelity to History—and Through It, 65* Fordham L. Rev. 1627, 1636 (1997) (“Indeed, it is doubtful that the Framers understood the process of accommodation and adjustment as broadly as I am suggesting; they probably envisioned a more bounded period of
The challenge of change is especially pronounced in our society because we have both a written Constitution and a society that has undergone tremendous change in the period during which the Constitution has been in force. Relatedly, originalism, by arguing that the Constitution's authoritative meaning is its historically-bounded meaning, ties itself to the “writtenness” of the Constitution and thereby opens itself to the challenge of change.

Originalism’s proponents have not answered the challenge of change. Instead, they have only noted the challenge in passing and infrequently offered terse, often tentative responses. Justice Scalia, the most prominent judicial proponent of originalism, has even conceded the force of the challenge of change. Speaking of the punishments permitted in 1791, he “doubt[ed] whether any federal judge—even among the many who consider themselves originalists—would sustain” public lashing or branding of the right hand “against an eighth amendment challenge.” Unfortunately, Justice Scalia failed to explain why this is consistent with a principled originalism, and he appeared to concede that it was not: “I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.” This Article, by contrast, will provide the first systematic description of the tools originalism possesses to meet the challenge of change.

experimentation after which things would either have settled into place or we would try again. But doesn’t a conception that recognizes continuing evolution make sense, especially in light of our actual experience with governing?); Craig S. Lerner, Originalism and Criminal Law and Procedure, 11 Chap. L. Rev. 277, 281 (2005) (“The basic criticism [of] originalism, of course, in bare bones, is that the cultural, technological, legal environment has been so transformed over the past 210 years that the original meaning of the Constitution does not and should not provide any or much guidance.”); Robert J. Pushaw, Jr., Methods of Interpreting the Commerce Clause: A Comparative Analysis, 55 Ark. L. Rev. 1185, 1186 (2003) (“We then applied the insights of originalism that retain vitality in addressing modern problems arising under the Commerce Clause, given the intervening two centuries of change reflected in legislative practice and judicial precedent.”).

8. See Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 100–17 (2004) (arguing that the Constitution’s “writtenness” is central to originalism); see also Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review 50 (1999) (arguing that “a written constitution requires an originalist interpretation”).

9. Although he did not seek to comprehensively answer the challenge of change, Christopher Green did thoroughly explain one of originalism’s tools to meet the challenge: the sense-reference distinction from the philosophy of language. Christopher R. Green, Originalism and the Sense-Reference Distinction, 50 St. Louis U. L.J. 555: 555–56 (2006).

10. See, e.g., Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning 208 (1999) (arguing that constitutional construction can enable the Constitution’s original meaning to meet changing circumstances); Wolfe, supra note 2, at 213–15 (noting that, over time, “the framers (and ratifiers) will not have thought of an increasing number of problems arising” because of societal changes).


12. Id. at 864.
The challenge of change misses its mark. Originalism has the interpretative tools to be sufficiently flexible in the face of changed societal conditions. These six tools are: (1) an originalism of principles (standards, and rules); (2) abduced-principle originalism; (3) indeterminate and underdeterminate original meaning; (4) Article I and state police power; (5) Article V; and (6) nonoriginalist precedent. I will explain them below. In addition, however, I will show that originalism retains sufficient inflexibility to possess the necessary virtue of having "critical bite."

One of the six tools that originalists have used, but which they have failed to articulate, is what I will label abduced-principle originalism. Abduced-principle originalism, as I will describe it below, takes two forms. The first form is where an interpreter abduces a legal norm—a rule, standard, or principle—that fits the contemporary uses of the constitutional term or phrase and thereby makes explicit the coherent original meaning of the term or phrase that lay behind the uses. The second form is where an interpreter abduces a legal norm that fits the discrete practices that the Framers and Ratifiers understood the constitutional text in question to prohibit, require, or permit. This form and should be utilized only when there is no coherent original meaning. Abduced-principle originalism is central to originalism’s ability to surmount the challenge of change.

This Article has four parts. First, it explains what originalism is. Second, it reviews the challenge of change and how it has arisen because of the tension between our written Constitution and our changed society. Third, it describes the ways in which originalism appropriately mediates that tension. These include six tools that I will explain in depth. Lastly, this Article shows that, despite originalism’s ability to meet the challenge of changing social circumstances, it retains the virtue of sufficient inflexibility to maintain the critical bite necessary for an interpretative methodology to be principled.¹⁴

I. EXPLANATION OF ORIGINALISM AS AN INTERPRETATIVE METHODOLOGY

Originalism, in its most prominent current incarnation—often referred to as the "New Originalism"—is the interpretative

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¹³. I use the phrase "Framers and Ratifiers" throughout this Article to refer to those persons who drafted the Constitution and who authoritatively adopted it.

¹⁴. Originalism thereby avoids the opposite problem of being so accommodating of change that it becomes nothing more than the best policy of the moment.

methodology under which the Constitution’s original meaning is authoritative.\textsuperscript{16} The Constitution’s original meaning is the publicly understood meaning of the Constitution’s text when it was ratified. For instance, when the original Constitution\textsuperscript{17} was drafted and ratified, the text’s meaning in light of society’s linguistic practices from 1787 to 1791 is its original meaning.

To ascertain the Constitution’s original meaning, one would, after studying the text and structure of the Constitution, review the debates surrounding the drafting and ratification of the text in question, the broader societal use of those terms, and the historical, cultural, religious, and philosophical background against which the Constitution’s text took on conventional linguistic meaning. One may also ascertain and employ the pertinent interpretative conventions of the time,\textsuperscript{18} although there is substantial disagreement in originalist circles on this point.\textsuperscript{19} Through this largely historical inquiry, one would ascertain the text’s publicly understood meaning at the time of its ratification. As Keith Whittington summarized, "[d]iscovering which of those meanings the Founders intended requires historical investigation."\textsuperscript{20}

For example, to ascertain the original meaning of "Religion" in the First Amendment, one would look to how the term was used elsewhere in the Constitution and the debates surrounding the drafting and ratification of the First Amendment. One would also look to the broader public debate over the First Amendment (and the Religious Tests Clause\textsuperscript{21}). From there, one would look to the historical, cultural, religious, and philosophical usages of the term “Religion” in society at or preceding that time. From these sources, one can reconstruct the

\textsuperscript{16} See Whittington, supra note 8, at 35 (“The critical originalist directive is that the Constitution should be interpreted according to the understandings made public at the time of the drafting and ratification.”).

\textsuperscript{17} By the “original Constitution” I mean the Constitution as amended by the Bill of Rights.


\textsuperscript{19} See Solum, Semantic Originalism, supra note 1, at 19–21 (describing the variance among originalists).

\textsuperscript{20} Keith E. Whittington, Dworkin’s “Originalism”: The Role of Intentions in Constitutional Interpretation, 62 Rev. Pol. 197, 214 (2000).

\textsuperscript{21} U.S. Const. art. VI, cl. 3.
linguistic practices of society in 1791 and determine the original meaning of "Religion."\[22\]

Originalists have offered a stunning variety of justifications for originalism and the authoritativeness of the Constitution's original meaning. For instance, the prominent originalist Randy Barnett, in his elegant *Restoring the Lost Constitution*, has argued that originalism ensures that natural rights are protected by the legitimate law making processes that the Constitution's original meaning "locks in."\[23\] Other originalists have used different foundations.\[24\]

Below, in Part III, section C, subsection four, I more fully explain my own justification for originalism and how this unique foundation better enables originalism to meet the challenge of change. In brief, as I have argued elsewhere,\[25\] the Constitution's original meaning is binding because it enables our society to pursue the common good effectively and, in turn, it enables each member of society to pursue his own good. The Constitution's original meaning is the mechanism by which the Framers and Ratifiers communicated to members of our society their authoritative, prudential, social-ordering decisions on how to pursue the common good.\[26\] To best grasp the meaning of the Framers' and Ratifiers' communications, interpreters must engage in a historical inquiry to determine the contextualized meaning of the Constitution: its original meaning.\[27\]

Despite the flowering of originalist scholarship over the past thirty years, and its increasing sophistication,\[28\] originalists have not responded to the challenge of change. Indeed, given the pervasiveness of


\[23\] Barnett, supra note 8, at 109.


\[25\] Strang, supra note 24.

\[26\] See Whittington, supra note 20, at 213 ("[M]eaning arises through the act of communication between the author and the reader.").

\[27\] See id. at 212 (arguing that the historical context in which a text is written is necessary to determine the text's meaning).

nonoriginalist critiques based on changed social conditions, originalists' failure to take notice threatens the originalist project. Below, I describe how originalism has ample resources to meet the challenge of change.

II. THE CHALLENGE OF CHANGE

A. UBQUITOUS SOCIAL CHANGE

One of the most oft-repeated criticisms of originalism is that it is not a viable interpretative methodology because it would bind today's society to the legal norms of the vastly different society that enacted the Constitution. Daniel Farber, for instance, has argued that "[w]hat is wrong with originalism is that it seeks to block judges from even considering these later developments, which on their face seem so clearly relevant to the legitimacy of [statutes under constitutional challenge]."  

Farber found that the Second Amendment provided a good example of originalism's inability to meet the challenge of change. The subject matter of the Second Amendment, argued Farber, changed in ways that undermined application of the Amendment to today's circumstances. The need to protect both the ability of states to fend off an aggressive federal government via a well-armed militia and the ability of individuals to fend off criminals has been dramatically reduced by the rise of the federal regulatory state. A similar argument based on changed circumstances appeared in Justice Breyer's dissent in *Heller v. District of Columbia.*

Claims such as Farber's and Breyer's are attractive because, absent a good reason, legal norms should change to meet new circumstances in the society the norms govern. Legal norms that do not fit the circumstances of their society cannot effectively coordinate the activities of the society's members. This disjunction, this lack of fit, between legal norms and social circumstances was the motivation for the progressive and legal realist movements. Proponents argued that, for example, the Supreme Court's liberty of contract doctrines, which hailed from an earlier, simpler time, could not effectively deal with the problems that arose in a newly urbanized, industrialized society.

29. Farber, supra note 3, at 192.
30. Id. at 189–92.
31. Id.
32. Id.
33. See 128 S. Ct. 2783, 2866–67 (2008) (Breyer, J., dissenting) (arguing that the rise of urbanization and police forces, among other changes, make modern application of the Second Amendment's original meaning problematic).
34. See John Finnis, Natural Law and Natural Rights 231–33 (1980) (describing the need to coordinate members of society in their pursuit of their goods).
The examples of change are numerous.\textsuperscript{36} Technological change is one of the clearest examples of the phenomenon. The society that gave us the original meaning of the Commerce Clause did not have methods of communication and transportation—in fact, likely could not have imagined our methods—that today are commonplace. The Internet, for instance, transports, in the form of electrons and light, everything from pictures to songs to books to conversations. The closest analogy in 1789, at the ratification of the Commerce Clause, was traditional mail service. Critics have not failed to focus on technological change.\textsuperscript{37}

But technology is not the only area of dramatic change. Society’s religious and cultural life has also been altered by the passage of time. The United States of 1791, when the First Amendment was ratified, was more Christian than today’s United States. The percentage of Americans identified as Christians was, as one would expect given immigration patterns, high.\textsuperscript{38} Many states retained state established churches and, even those that did not, officially recognized Christianity, or at the very least theism.\textsuperscript{39} Today, by contrast, though Americans likely remain the

\textsuperscript{36} Richard Fallon has summarized the challenge of change facing originalism:
Most of the Constitution was written over two hundred years ago by an exclusive group of white males, many of them slaveholders. The nation was still predominantly agrarian at the time of the Constitution’s ratification; the principal commerce was maritime.\ldots \textsuperscript{37} The United States was not a world power. No one contemplated Social Security, Medicare, or a nationally funded welfare system. In peacetime, the national government was expected to play only a minimal role. The most transformative amendments to the Constitution came a century later, following a bloody civil war. Even then, women remained excluded from the franchise and, almost without exception, from the professions. Public education remained inchoate; there were few great state universities.


\textsuperscript{38} See \textit{Paul Johnson, A History of the American People} 204 (1997) (“The Americans were overwhelmingly church-going, much more so than the English\ldots”).

\textsuperscript{39} See \textit{Robert L. Cord, Separation of Church and State: Historical Fact and Current Fiction} 3 (1982) (“A great many of the early American settlements were formed by dissident religious minorities fleeing from the Protestant establishments of England, Ireland, and Scotland. Paradoxically many Europeans who fled to the New World to escape established religion agreed that the Church and State should be combined in their new settlements.”); \textit{see also id.} at 4 (describing some of the legal privileges religion, and Christianity, possessed); Strang, \textit{supra} note 22, at 220–24 (describing the post-Revolutionary state experience).
most religious Western country,\(^{40}\) the rate of Christian identification has diminished,\(^{41}\) and Christianity no longer has a legally sanctioned position.

Culturally, the society of 1789, or 1868 for that matter, was more "conservative," as that term would be employed today in political discourse, regarding many important issues. Possibly the most dramatic change is in the area of sexual mores. While perhaps honored in the breach, norms governing human sexuality privileged married, heterosexual sexual intimacy.\(^{42}\) Today, by contrast, marriage as the sole forum for sexual intimacy sounds quaint.

The rise of urbanization and industrialization present the changes that likely most altered the daily life of average Americans. Until 1910, the United States was primarily a rural nation with its people living either on farms or in small farm communities.\(^{43}\) Thereafter, and increasingly, Americans lived in larger urban areas.\(^{44}\) Relatedly, Americans of previous generations worked in agriculture or smaller businesses but, since the late-nineteenth century, Americans have increasingly come to work in larger businesses focusing on industrial or other commercial endeavors.\(^{45}\) And today, the American economy is postindustrial.

Criminal procedure offers a good vehicle to see the tension between change and the Constitution because it is an area of the law in which many of society's changes intersect.\(^{46}\) Technology has led to investigative techniques inconceivable to Americans in 1791,\(^{47}\) societal changes have

\(^{40}\) See Andrew Greeley, *Religion in Britain, Ireland and the USA*, in *British Social Attitudes: The 9th Report* 53 (Roger Jowell et al. eds., 1992) (finding that the United States is markedly more religious than England and Western Europe).


\(^{44}\) Id.


\(^{46}\) See Allen, *supra* note 3.

\(^{47}\) For example, the use of wiretapping that does not physically invade the property of the suspect, as was the issue in *Katz v. United States*, 389 U.S. 347, 348-49 (1967).
led to the existence of a class of previously unknown professional government employees who enforce the law and investigate wrongdoing, and changes in our sense of justice have led, for example, to appeals as of right for criminal defendants. In each of these instances, the Supreme Court responded to change by crafting a nonoriginalist legal norm which the Court justified by reference to societal changes.

One aspect of change that I will single out for special discussion is alteration of social morality. Over time, Americans have changed their beliefs regarding the licitness of many activities. Many of these changes have found sanction in differing interpretations of (and amendments to) the Constitution. For example, the late-nineteenth and early-twentieth century constitutional protection of economic activity from governmental regulation later gave way. The constitutional protection and then abandonment of that protection reflected changing social morality.

A moral realist could argue that the licitness of the subjects regarding which society's view changed did not, in fact, change. For instance, it has always been wrong, the realist would state, for the government to treat people differently because of their race, regardless of society's recognition of that fact. In other words, nothing has changed other than perceptions.

Recognizing the validity of the realist's claim, it is still the case that changes in society's views on morality are changes that the law should, generally, take into account; that the law should fit. Moral realists, including Saint Thomas Aquinas, recognize this.

48. This change has resulted in the Court, for example, creating the Miranda warnings as a mechanism to enforce the Fifth Amendment. See Miranda v. Arizona, 384 U.S. 436, 468-69 (1966).


50. Morton Horwitz has argued that the constitutional sanction given to "liberty of contract" was a reflection of the dominant class's perception that freedom to contract was morally privileged and the state was a neutral arbiter between citizens. HORWITZ, supra note 35, at 19-20, 33-36.

51. See JOHNSON, supra note 38, at 766-68 (describing Franklin Roosevelt's court packing plan and the Supreme Court's switch).

52. HORWITZ, supra note 35, at 19-20, 33-36.

53. See Geoff Sayre-McCord, Moral Realism, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta et al. eds., 2005), http://plato.stanford.edu/entries/moral-realism ("Moral realists are those who think that... moral claims do purport to report facts and are true if they get the facts right."). For an example of moral realist claims, see ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 17 (1999), stating that "new natural law" theorists claim that "basic practical principles... state[] truths about what ought to be done."

Perhaps more importantly, the change in morality that has occurred is not that Americans believe that only their perception of what is licit has changed. Instead, Americans believe that they have come to a better, more accurate, understanding of what in fact is licit. On this reading of change, some—especially critics of originalism—perceive the Constitution’s norms as unable to (change to) fit this new, correct understanding of what is licit. The originalist Constitution is therefore an obstacle to achieving substantive justice because of its inability to accommodate this change.

Since it is unlikely that many will contest the claim that there has been great change over the past two centuries, I will not further belabor the point other than to sound a note of caution. The transformation in American society over the past two centuries can be and has been exaggerated. A standard criticism of originalist claims in the scholarly literature and Supreme Court opinions is that the factual presuppositions that initially supported the original meaning have changed so dramatically that it no longer makes sense to follow the original meaning. Of course, if the factual presuppositions that undergirded the original meaning have not been altered, or at least not materially so, this regularly proffered criticism loses much of its strength.

For example, in the Religion Clause context, proponents of nonoriginalist interpretations of the Clauses often claim that a nonoriginalist interpretation is necessary because the Framers and Ratifiers in 1791 could not have foreseen the rise of religious pluralism and hence did not take that fact into account when crafting the Clauses. Laurence Tribe argued along these lines that “changed circumstances” resulting in more religious pluralism than in 1791 have made it “inevitable that the Supreme Court would modify the narrow understanding of ‘religion.’” Similarly, Dean Chemerinsky claimed in his popular case book that “[t]he problems of using history in interpreting the Religion Clauses are compounded by the enormous changes in the country since the First Amendment was adopted. The country is much more religiously diverse today than it was in 1791.”

This claim underestimates the scope of religious pluralism at the time of the framing and ratification. It further underestimates the Framers’ and Ratifiers’ knowledge of their world’s religious pluralism and the history of religious pluralism. They were concerned with

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56. Laurence Tribe, Constitutional Law 1179-80 (2d ed. 1988). I have previously reviewed the literature in this area, including the constant refrain of the rise of religious pluralism. See Strang, supra note 22, at 204–10.
religious pluralism; in fact, religious pluralism on the state and local level was the primary motivation for the inclusion of the Religious Tests and Establishment Clauses.\textsuperscript{58}

The religious pluralism in 1791 America, it is true, consisted mostly of Protestant Christianity. However, within Protestant Christianity, there was a wide variety of doctrines and practices.\textsuperscript{59} Further, the existence of a relatively large Catholic population centered in Maryland,\textsuperscript{60} along with vibrant Jewish communities, expanded the scope of religious pluralism yet further.\textsuperscript{61} The Framers and Ratifiers were also aware of religious pluralism—including atheism—throughout history and its continuing existence in many parts of the world, especially in the Far East and among the tribes that peopled the American frontier.\textsuperscript{62} Given their concern with and knowledge of religious pluralism, the standard criticism of the Religion Clauses' original meaning is, at a minimum, overstated.

Perhaps surprisingly, in a post–New Deal and regulatory legal practice that has made such claims commonplace, the challenge of change was not forcefully articulated until the latter part of the nineteenth century.\textsuperscript{63} As Jonathan O'Neill has shown in his study of the history of originalist arguments in American law, from the framing and ratification until the end of the nineteenth century, originalist arguments dominated constitutional law.\textsuperscript{64} However, with the advent of progressivism in the political sphere and legal realism in the legal sphere, originalism was first challenged and then eclipsed.\textsuperscript{65}

The time period of the rise of the challenge of change to originalism bolsters my claim that the challenge of change arises out of the tension

\textsuperscript{58} See Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 301 (1998) (noting that the Religious Tests Clause was "a further gesture of religious inclusiveness and tolerance"); see also id. at 32 (finding that the Establishment Clause "also prohibited the national legislature from interfering with, or trying to disestablish, churches established by state and local governments"); id. at 34 (noting that the Establishment and Religious Tests Clauses were meant to protect the religious pluralism of the states and localities); Steven D. Smith, The Jurisdictional Establishment Clause: A Reappraisal, 81 Notre Dame L. Rev. 1843, 1851–52 (2006) (arguing that Americans wanted the states to retain jurisdiction over religion).


\textsuperscript{60} Johnson, supra note 38, at 55–61.

\textsuperscript{61} Id. at 305–07.


\textsuperscript{63} See Barry Friedman & Scott B. Smith, The Sedimentary Constitution, 147 U. Pa. L. Rev. 1, 4 (1998) ("Until the latter half of the nineteenth century, constitutional theory and practice sought a relative continuity with the Founders' design. Since that time, however, as the nation has experienced constant change, a different strain of thought—the idea of a 'living Constitution,' one that is interpreted as evolving to keep pace with current events—has competed with originalism.").

\textsuperscript{64} O'Neill, supra note 28, at 12–28.

\textsuperscript{65} Id. at 28–42.
between our written Constitution and societal change. Prior to the end of the nineteenth century, there had not yet been sufficient change to make that tension problematic.

B. THE "CHALLENGE" OF CHANGE

Why is this dramatic societal change a "challenge" to originalism? The argument, reconstructed, goes like this: (1) the failure of legal norms to fit their society impedes the ability of those norms to serve their social coordinating function; (2) the Constitution’s legal norms are embodied in its original meaning; (3) the Constitution’s original meaning is context dependent; (4) the context in which the Constitution’s original meaning was created is vastly different from our own; (5) the legal norms embodied in the Constitution’s original meaning do not fit today’s society; and, consequently, (6) the Constitution’s original meaning fails to effectuate the Constitution’s social-ordering function.

Originalists agree that, to function effectively, legal norms must be able to adequately perform their social coordination function. Performance of their social-ordering function requires an adequate level of fit. For instance, property law norms taken from an England whose conception of ownership was grounded in feudalism do not work in today’s America, where ownership is focused on the individual. Hence, property law is replete with cases rejecting the common law rule in favor of a modern reform.

Further, originalists agree that the Constitution’s original meaning embodies legal norms. As I explain below, originalists, when interpreting the Constitution, seek to derive usable legal norms from the Constitution. Usable legal norms are typically identified as including rules, standards, and principles. Originalists also agree that the Constitution’s original meaning is the publicly understood meaning of the Constitution’s text when it was ratified. Hence, a public’s understanding of constitutional text—not to mention the norms embodied in the text itself—will vary depending on then-existing social practices, and economic, technological, cultural, and other circumstances. For example, a society in which the legal traditions include, as a bedrock
concept, sovereign immunity, will interpret Article III's grant of jurisdiction to federal courts differently than would a society that lacked the concept of sovereign immunity. As I described above, the context in which the Constitution was ratified was different from our own: in some cases, such as technology, dramatically so.

However, originalists can rightly reject (5), and consequently the conclusion (6), because they can show that, even though the Constitution's original meaning was created in a different social context, the original meaning does fit today's social reality and does perform its social-ordering function, or that any unfitting original meaning is no longer authoritative. I describe how in Part III, below.

Of course, the Constitution itself provides for changing its meaning through Article V. Critics of originalism often dismiss this option as impractical given the perceived strong need for change and the difficulty of effecting change through amendment. I will discuss the power of these criticisms below. Even assuming, however, that Article V is a practical method to alter the Constitution's meaning, originalists should explore other legitimate avenues by which originalism accommodates change for at least two reasons. First, there is a widespread perceived need to meet changing social circumstances. Second, as I laid out earlier, there has been dramatic societal change in the last two centuries.

Lastly, it is important to note that all interpretative methodologies, to a greater or lesser degree, have to address the challenge of change. Originalism, though, is in principle particularly challenged because of its special rootedness in history. The challenge of change has generated a cottage industry of interpretative methodologies that try to "thread the needle" between originalism and nonoriginalism in order to permit change, but not too much.

Bruce Ackerman's work is likely the best example of this phenomenon, but there are many others. Ackerman argued that

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69. Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It) 160 (2006).

70. See generally Bruce Ackerman, We the People: Foundations (1991) [hereinafter Ackerman, Foundations]; Bruce Ackerman, We the People: Transformations (1998) [hereinafter Ackerman, Transformations]; Bruce Ackerman, The Living Constitution, 120 Harv. L. Rev. 1737 (2006).

71. See, e.g., Sotirios A. Barber & James E. Fleming, Constitutional Interpretation: Basic Questions 165 (2007) (adopting Dworkin's moral reading of the Constitution, which "is a kind of textualism" because it "describes the text as what it facially appears to be," but in its best light); Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 239 (2d ed. 1986) (arguing that the Supreme Court should enforce fundamental values with widespread—or what will soon be widespread—acceptance); Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution i–11 (1996) (arguing that although the framers and ratifiers textually embodied authoritative concepts, such as equal concern and respect in the
American democracy is "dualist" because there are two forms of lawmaking: ordinary or normal, and higher lawmaking.\(^7\) Higher lawmaking occurs when "the People," create or adopt the law, and ordinary lawmaking is everything else.\(^2\) Through this dichotomy, Ackerman is able to preserve what are, in his view, constitutional amendments, without opening the floodgates to nontextual change. Such "amendments," including the changes that occurred to constitutional law during the New Deal, are not formalized in the Constitution's text, but they are part of the Constitution nonetheless because they were the product of higher lawmaking.

While there is much that is intriguing about Ackerman's dualist understanding of American constitutional law, I will show that originalism itself has the resources to meet the challenge of change without the difficulties that accompany dualism.\(^4\)

In fact, in many areas of constitutional law, it is likely the case that originalism is more open to changed social conditions than nonoriginalist methodologies. This is because the Supreme Court has constitutionalized many areas of social life that, under an originalist methodology, would remain in the hands of legislatures. Abortion is likely the most prominent example of this phenomenon.\(^5\) Prior to Roe, states were largely free to respond to their citizens' perception of abortion's licitness. Following Roe, a nonoriginalist decision, the ability of democratic bodies to respond to change was significantly limited. This phenomenon has occurred repeatedly over the nation's history. The Lochner era is another such instance.

\(^{72}\) See ACKERMAN, FOUNDATIONS, supra note 70, at 6–7.

\(^{73}\) Id.

\(^{74}\) See infra Part III.

\(^{75}\) See Roe v. Wade, 410 U.S. 113 (1973).
III. THE SIX MECHANISMS BY WHICH ORIGINALISM ACCOMMODATES CHANGE

A. INTRODUCTION

There are at least six interpretative tools by which originalism can accommodate social change. These mechanisms—individually to a greater or lesser degree but, when taken as a whole—sufficiently meet the challenge of change. Below, I describe each mechanism.

Abduced-principle originalism is the most innovative of these six mechanisms. It provides a method to articulate determinate original meaning when none would otherwise exist.

B. AN ORIGINALISM OF PRINCIPLES (STANDARDS, AND RULES)

Legal norms, including those embodied in the Constitution’s original meaning, could theoretically exist at an infinite number of levels of abstraction, from a very particularized rule to a broadly encompassing principle. Legal philosophers, however, have often analytically divided the possible levels of abstraction of legal and other norms using a tripartite division: rules, standards, and principles. Using this framework—and adding another analytic tool, abduced-principle originalism—I will argue that originalism is well equipped to tackle social change. While originalists have hinted at the possibility of an originalism of principles, none have explicated it.

As a general matter, the more frequently the Constitution’s original meaning—especially regarding its more important clauses—is abstract

76. Although I label this mechanism an originalism of principles, all three types of norms result
from using the mechanism, including standards and rules, not only principles.

77. There is substantial disagreement on what the differing types of legal norms are and the
respective characteristics of those types. See Steven J. Burton, Judging in Good Faith 168 (1992)
(“Few agree either on what rules are, or on what roles rules play, by contrast with other legal
standards.”). The tripartite division of legal norms adopted in this Article reflects a common
convention. See Legal Theory Blog, Legal Theory Lexicon: Rules, Standards, and Principles,
http://lsolum.typepad.com/legaltheory/2008/06/legal-theory-le.html (June 1, 2008, 14:56 EST) (giving
this division).

78. See, e.g., Robert H. Bork, The Tempting of America: The Political Seduction of the Law
162–63 (1990) (arguing that the judicial role includes applying constitutional principles to new
circumstances); Charles Fried, Sonnet LXV and the “Black Ink” of the Framers’ Intention, 100 Harv.
L. Rev. 751, 758 (1986) (stating that the “general terms” of the text “are capable of governing
particular cases not envisaged by their authors” (citation omitted)); Michael W. McConnell, On
Reading the Constitution, 73 Cornell L. Rev. 359, 361–62 (1987) (arguing that constitutional
principles may be applied to new circumstances); see also Green, supra note 9, at 567 n.36 (listing
sources who suggest the possibility of applying principles to different situations than originally
envisioned).

79. By “more important clauses,” I am referring to those portions of the Constitution that have
the highest product of frequency of use, broadness of coverage of social life, and the centrality of those
facts of social life covered. As an example, the Commerce Clause is more important than the Third
rather than particularized, and the more the original meaning edges toward greater abstraction when it is abstract, the better originalism can accommodate change. This is done by applying the constitutional norm to new situations. As Keith Whittington has argued, "the Constitution will undoubtedly extend to new situations over time because entirely new fact situations arise or because political change has brought certain aspects of the text into greater prominence." Conversely, if the Constitution's original meaning consists primarily of particularized norms and does so frequently, then originalism will be less able to meet the challenge of change. In other words, if the Constitution's original meaning is composed more often of Privileges or Immunities Clauses, rather than Presidential Eligibility Clauses, it has a greater ability to tackle the challenge of change.

The first type of legal norm is the rule. One of the characteristics of rules is that they cover a limited number of social circumstances. They take the form of: if fact(s) A (B, C, etc.) exist(s), then result(s) X (Y, Z, etc.). Rules are limited by the limited number of facts they cover. Rules become operative only in those situations characterized by the limited universe of facts listed in a rule's application clause. Rules have an on-off quality. Only if the limited number of pertinent facts exists does the result follow. They are also limited in the consequence(s) that a judge is authorized to employ (listed in the consequence clause) if the rule's facts exist.

A common example of a rule is: if a person drives over the applicable speed limit, the driver will receive the applicable fine. There are three facts from the rule's application clause: a person, a speed limit, and the person driving in excess of the applicable speed limit. If one of those three facts is absent, the rule is inapplicable and the consequence is inapplicable. If all three facts are present, then the judge must order the person to pay the applicable fine. The judge cannot impose on the violator of the rule a different punishment because the judge is limited to the consequence stated in the rule.

Rules often employ—and are most "rule-like" when they employ—non-value-laden, relatively nonabstract, facts and consequences. For Amendment's prohibition on quartering soldiers. See U.S. Const. amend. III.

80. The situations could be new because situations of this type did not exist before, or they could be new because they have not previously been subject to litigation.
81. Whittington, supra note 8, at 104–05 (citations omitted).
83. In the example used in the text, the application clause governed situations with fact(s) A (B, C, etc.).
84. In the example used in the text, the consequence clause included result(s) X (Y, Z, etc.).
85. See Pierre J. Schlag, Rules and Standards, 33 UCLA L. Rev. 379, 381–83 (1985) (distinguishing rules from standards based on whether the considerations employed by the norm are
instance, using the rule from the previous paragraph, the universe of facts to which the rule applies does not call—at least not in the vast majority of situations under which the rule would be invoked—for a judge to employ contested, value-laden judgment. Instead, each fact is fairly clearly defined as a social phenomenon.86 Similarly, the consequence is the relatively clearly defined payment of a monetary fine. Rules may employ value-laden and abstract facts and consequences,87 but in doing so they lose some of their most attractive quality: their determinacy.88

Rules can have exceptions89 and even exceptions to exceptions.90 For instance, if facts A, B, and C, then result Y, unless fact D obtains, in which case result not-Y, unless fact E also exists, in which case result Y. In practice, however, rules encompass relatively few facts and even fewer exceptions. This is because rules lose their determinacy of application the more facts and exceptions they contain.91

Standards are less constraining than rules.92 They lack the on-off quality that characterizes rules. Instead of a particular result following from the existence of a specified (list of) fact(s), a standard directs the decision maker to take into consideration a set of factors that will guide the decision maker’s decision. No one factor is determinative, and the factors that guide the decision maker may themselves have varying weights and hence influence on the decision maker’s decision.

The standard provides the universe of factors that the decision maker must utilize, but how the factors interact to produce a result is

“empirical” or “evaluative,” with the former constituting rules and the latter standards).


87. In the agency context, for instance, section 220 of the Restatement (Second) of Agency provides a nonexhaustive list of considerations to determine whether an agent is a servant or independent contractor. RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958). Many of the listed considerations require the exercise of considerable judgment, at least in some cases. For instance, one of the factors is whether the agent “is engaged in a distinct occupation.” Id. § 220(2)(b).


90. For a prominent contrary view see Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 115–16 (1991).

91. This is one reason why courts, when faced with a purported rule that is riddled with exceptions, will often reformulate the rule to better fit the exceptions and case law in the area. See Schlag, supra note 85, at 429.

92. For a good example of how rules and standards operate differently, see id. at 379–80, describing the disagreement between Oliver Wendell Holmes and Benjamin Cardozo over the standard of care for automobiles crossing railroad tracks, with Holmes advocating use of a rule and Cardozo proposing a standard.
not—or at least not necessarily—predetermined. The factors could each have a specific weight, and the decision maker must determine on which side the different factors fall and then balance the two sets of factors. Or, the standard could direct that the factors will have different weights depending on their interrelationship. Additionally, standards may, like rules, utilize elements that are value-laden or abstract and hence provide less constraint to the decision maker.

A common example of a legal standard from agency law is the test to determine whether a servant acted within the scope of his employment when committing a tort, thereby subjecting his principal to liability. When faced with a suit by an injured plaintiff who is seeking to recover from the tortfeasor’s employer, the Restatement (Second) of Agency section 228 directs courts to utilize four considerations to decide the issue. The Restatement (Second) of Agency limits courts’ considerations to those elements listed in section 228. As noted earlier, many standards give more weight to some factors than to others, and section 228 does this. Comment b indicates that the Restatement’s drafters thought that, if two particular considerations were present, then “there is an inference that it was within the scope of employment.”

Principles, like standards, provide reasons that decision makers must utilize. Unlike standards, however, principles do not preclude the decision maker from employing additional considerations in making a decision. Instead of providing the tools to resolve a particular issue, as do rules and standards, principles have, in the words of Ronald Dworkin, “gravitational force.” That is, principles push or pull a decision maker in one or another direction—they put their thumb on the scale, so to speak. In the legal realm, principles often do this by organizing the subsidiary legal materials: the rules, standards, cases, statutes, and legal practices.

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93. See Burton, supra note 77, at 51–62 (discussing different understandings of weighing and balancing of reasons).
94. See Restatement (Second) of Agency § 219(1) (1958) (“A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.”).
95. Id. § 228.
96. See id. (stating that conduct of a servant is within the scope of employment “if, but only if” the four considerations are present).
97. Id. § 228 cmt. b.
99. See Burton, supra note 77, at 170 (“Principles have legal implications mainly when they contribute reasons for or against the classification of a case . . . .”)
100. Especially in the common law context, principles are less constraining than rules or standards. They do not—at least not usually—dictate the outcome of a particular case. They offer reasons, sometimes more and sometimes less strongly. Principles do not, therefore, vigorously constrain decision makers. In rare cases, given the thickness of our legal practice’s legal materials, especially judicial precedents, a judge will have direct recourse to the principle that fits and justifies that area of
The most famous example of this in the jurisprudential literature is
an 1889 case, Riggs v. Palmer.\(^{101}\) There, the New York statute of wills, if read according to the conventional meaning of its text, appeared to require that the named beneficiary under the testator's will inherit despite the fact that the beneficiary murdered the testator.\(^{102}\) The New York Court of Appeals rejected that reading of the statute.\(^{103}\) Instead, the court held that a common law principle—"[n]o one shall be permitted to profit by his own fraud or to take advantage of his own . . . wrong"—limited the application of the statute's rule.\(^{104}\) The applicable legal principle, held the court, organized the subsidiary legal materials, including the statute's rule, to reach a conclusion contrary to the statute's conventional meaning.\(^{105}\)

The relatively clean trichotomy described above does not account for the frequency with which legal norms possess aspects of multiple types of legal norms. "Most legal norms are hybrids, in that they have both rule-like and standard-like elements."\(^{106}\)

In this Article, the aspect of these three basic legal norms with which I am most concerned is their ability to apply to new situations. I will focus on the relative abstraction of the norms, or their component parts, because this characteristic most readily permits a norm to apply to new circumstances. Principles generally have, to a greater extent than rules or standards, the ability to apply to new circumstances because of their relatively greater abstraction. Principles are not limited, in the manner of rules or standards, to a fact or discrete set of facts. Principles also, unlike rules or standards, use component parts that cover a broad range of social phenomena. Lastly, principles often employ component parts that require value judgments. None of this is to say, however, that rules do not have the capacity to apply to new situations; only that they do not have as great a capacity as do principles and standards.\(^{107}\)

\(^{101}\) 22 N.E. 188 (N.Y. 1889); see also Ronald Dworkin, Law's Empire 15-20 (1986) [hereinafter Dworkin, Law's Empire] (using Riggs to explain the role of principles in our legal practice); Dworkin, supra note 98, at 23 (same).

\(^{102}\) Id.

\(^{103}\) Id. at 191.

\(^{104}\) Id. at 190.

\(^{105}\) For another example of the courts' use of legal principles, this time from the property law context, see Strang, supra note 68, at 948-49, describing the California Supreme Court's use of legal principles to organize subsidiary legal materials in Tenhet v. Boswell, 554 P.2d 330 (Cal. 1976).


\(^{107}\) See McGinnis & Rappaport, Original Interpretive Principles, supra note 18, at 379-80 (describing how rules can apply in ways contradictory to their creators).
Principles (along with other legal norms, but to a greater degree than those other norms) can apply in ways unforeseen by their author(s). In the Fourth Amendment context, for example, the Supreme Court has repeatedly faced cases that presented circumstances unforeseen (and unforeseeable) by the Amendment’s Framers and Ratifiers. A good illustration of this is Kyllo v. United States. There, the Court faced the question of whether a thermal image scan of a house, which revealed information about the house’s interior, was a search within the Fourth Amendment’s meaning. The Court ruled that the image scan was a search. The Court relied, in part, on the reasoning that the Constitution guaranteed a minimum level of protection for homes and that the Court must ensure that new technology does not erode that protection. 

To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment.

The Court applied the Fourth Amendment’s principle of special protection to the home to a situation unforeseen by the Framers and Ratifiers.

In fact, later judges applying a legal principle may apply it to situations known to exist by the principle’s author(s), but in a manner contrary to how the principle’s author(s) did or would have applied it.

108. A likely example of a legal rule applying in a manner unforeseen and differently from the expectations of the text’s framers and ratifiers is the Twenty-Fifth Amendment. The Twenty-Fifth Amendment concerns the President’s “death.” U.S. Const. amend. XXV, § 1. At the time the Amendment was ratified, in 1967, the nearly universal legal definition of death was irreversible circulatory or respiratory cessation. See Gregory Bassham, Original Intent and the Constitution: A Philosophical Study 82 (1992) (discussing this example). Today, death is defined as brain death. Id. Given the background against which the Amendment’s framers and ratifiers worked, and their goals, it is likely that the term’s original meaning is what, in fact, constitutes death. This would include today’s more accurate conception of death.

109. By authors of principles I am referring to, in the context of legal enactments, the authoritative person or persons who enacted the legal principle into law.


111. Id. at 29–30.

112. Id. at 40.

113. Id. at 34, 40.

114. Id. at 34.

115. This phenomenon may expand, beyond the two identified by Christopher Green, the class of situations in which application of the text may lead to results contrary to what the Framers and Ratifiers would have done. See Green, supra note 9, at 580–81 (listing, as instances where applications of constitutional text may change from what the Framers and Ratifiers expected, ignorance and error regarding the “facts about the world”). If Green included within the category of “facts about the world” moral facts, then Green’s list was complete. For instance, if the Equal Protection Clause embodies the moral principle of equal concern and respect, see Dworkin, supra note 71, at 9–10, and the framers and ratifiers of the Fourteenth Amendment believed that racially segregated schools were consistent with that principle, they were incorrect, and Green may say factually incorrect. A proper interpretation of the Clause, and its principle of equal concern and respect, requires elimination of segregated schools. However, Green indicates that correctable Framer and Ratifier error does not include errors of political morality. Green, supra note 9, at 580–81.
A possible example of this is the relationship of the Equal Protection Clause to de jure segregation. It is clear that a large number of the framers and ratifiers of the Clause believed that the Clause was consistent with racial segregation. The framers and ratifiers of the Clause were, therefore, relatively familiar with the same factual circumstances that the Supreme Court would later face in *Brown v. Board of Education.* If, as some have argued, the Equal Protection Clause embodies a relatively abstract moral principle of equality, then the framers' and ratifiers' mistaken application of that principle to racial segregation (and their conclusion that segregation does not violate the principle) does not impede later interpreters from reaching a different result.

This possibility draws on Ronald Dworkin's concepts-conceptions distinction, and it shows that the distinction is consistent with originalism. Dworkin has prominently imported the philosophical distinction between concepts and differing conceptions of those concepts into constitutional law. The Constitution, according to Dworkin, embodies "broad and abstract" "moral principles." The Framers and Ratifiers, authoritatively adopted binding concepts, but they did not intend to bind—indeed, could not bind—later interpreters to their conceptions of those concepts.

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116. I indicate that this is a "possible" example because whether the Equal Protection Clause in fact embodies the moral principle of equal concern and respect, as opposed to a less abstract moral norm or a relatively narrow rule, is an issue I do not address here. However, I do argue later that the Clause is likely an example of where abduced-principle originalism applies. See infra Part IV.


118. The extent of the framers' and ratifiers' familiarity with the negative effects of racial segregation on equality is unclear. For instance, the *Brown* Court itself argued that public education in 1954 was dramatically more important and its impact better known than in 1868. See *Brown* v. Bd. of Educ., 347 U.S. 483, 489-90, 493 (1954) (noting the changes in public education and education's importance generally).

119. *Id.* at 487-88.

120. See, e.g., Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 82 (1990) (arguing that *Brown* was correct because it advanced the principle of "equality before the law" which was "written into the text"); *Dworkin,* supra note 71, at 10 (stating that the Equal Protection Clause embodies "the principle that government must treat everyone as of equal status and with equal concern").

121. See Whittington, *supra* note 29, at 201-02 (describing Dworkin's use of the concepts-conceptions distinction in terms of principles and rules).

122. *See Dworkin,* supra note 71, at 7-12 (describing this distinction).

123. *Id.* at 2.

124. *See id.* at 9 (stating that it is what the Framers and Ratifiers "intended to say," and not their
Using Dworkin's terminology, the framers and ratifiers of the Equal Protection Clause adopted an abstract concept of equality. Their own conception of equality—under which segregation was consistent with equality—was flawed and is not binding on subsequent interpreters. Subsequent interpreters remain free to adopt a different conception of equality.

In sum, if the Constitution's original meaning is composed relatively more often of principles, and principles of a relatively high level of abstraction, rather than rules or standards, then the original meaning can readily apply to new circumstances. By contrast, rules created in the different society of 1787 will strongly bear the mark of that society and will be relatively more bounded by the facts as they existed in that society.

It is uncontroversial that the Constitution embodies all three types of legal norms. A commonly given example of a constitutional rule is the requirement that the President be thirty-five years of age. The Clause states that if a person is (1) thirty-five, (2) years, and (3) of age, then the person can be President. The Clause limits the relevant universe of facts to a small number: three. It requires that those three facts must be present in order for a person to be President. In addition, each of the three facts is relatively free of ambiguity and vagueness, and hence their application to concrete cases is relatively determinate.

The relative "ruleness" of the Clause does create difficulty in responding to change. Arguably, as presently constituted, the Clause does not take into account the relatively longer maturation period for modern Americans in contrast to the founding generation. Members of the founding generation, at a relatively young age, performed at the

"expectations" about application, that are binding).

125. I am not making any claim here regarding whether the Equal Protection Clause, in fact, embodies an abstract moral principle. As I articulate below, the type of legal norm that constitutional text embodies is a historical question. See infra notes 153–59, 188–98 and accompanying text.

126. See BARNETT, supra note 8, at 123 (explaining the different types of standards embodied in the Constitution); DWORKIN, supra note 71, at 7–9 (discussing various constitutional clauses as examples of the different types of norms and levels of abstraction contained in the Constitution); Whittington, supra note 20, at 202 (using as examples of constitutional clauses of varying degrees of abstraction the Cruel and Unusual Punishment Clause and Article II's age requirement for Presidents); id. at 216 ("There is little question that the Founders meant to convey principles through their use of relatively broad language.").

127. U.S. Const. art. II, § 1, cl. 5; see also BARNETT, supra note 8, at 123 (commenting that this provision is the "most oft-cited example of" a "rule-like" provision).

128. U.S. Const. art. II, § 1, cl. 5.

129. One could also say that there are four requirements to be President. The fourth requirement would be that one must be a "person." See id.

130. See BARNETT, supra note 8, at 119 (distinguishing these two concepts).
highest levels of state and society, and with exemplary skill. For example, some of the most influential and important members of the Philadelphia Convention—including Alexander Hamilton and Edmund Randolph—were below thirty-five, and James Madison was only thirty-six. Indeed, the average age of members of the Convention was forty-two. Today, by contrast, it is rare for persons of that young age to play important roles in society. The average age today of members of Congress is fifty-seven years, “among the oldest of any Congress in U.S. history.”

A possible example of a standard is the Necessary and Proper Clause. The Clause permits Congress to enact laws that are both “necessary” and “proper” to the execution of Congress’ enumerated powers. Scholars have argued that judges, when faced with the question of whether a statute is constitutional under the Necessary and Proper Clause, must utilize a number of elements to make the determination. Judges must, of course, determine whether the statute is necessary, and proper, but both elements can be further particularized. A statute is necessary if it is more than simply convenient, but it need not be indispensible or absolutely necessary. Also, a statute is proper only if: (1) it does not violate individual rights, (2) it does not violate the separation of powers, and (3) it does not violate federalism. A judge, therefore, must utilize all of these elements to arrive at a conclusion of whether a given statute is constitutionally necessary and proper.

The Necessary and Proper Clause has a relatively robust capacity to apply to new circumstances. Its component parts are relatively capacious in their sweep, in that they can bring within their sway statutes addressing any subject within Congress’ enumerated powers. Justice

131. For example, the thirty-six-year-old James Madison was one of the principal authors of the Federalist Papers, an “incomparable exposition of the Constitution, a classic in political science unsurpassed in both breadth and depth by the product of any later American writer.” Richard B. Morris, The Forging of the Union, 1781–89, at 309 (1987).


136. Id.


139. Lawson & Granger, supra note 137, at 326–34.
Scalia's concurrence in *Gonzales v. Raich* is an example of how the Clause may apply to unforeseen activities—the market for illicit drugs—that Congress seeks to regulate under its Article I powers.140

Scholars have argued that Article IV's Privileges and Immunities Clause141 embodies the principle that states must give citizens of other states the rights a state gives its own citizens. Akhil Amar has called this the "interstate-equality principle."142 This principle applies to new forms of state discrimination against noncitizens. For instance, in *Saenz v. Roe*, the Court struck down a California statute that gave reduced welfare benefits to new residents during their first year of residency.143

Given that the Constitution does contain, not only rules, but also more capacious standards and principles, which of these types of legal norms predominates in frequency, and regarding the most important constitutional provisions, is an empirical question. Critics of originalism have not, to my knowledge, provided significant evidence on this point.

Instead, originalist scholarship has identified many and important constitutional provisions the original meaning of which is a standard or principle.144 This finding fits both the historical data from the period of the framing and ratification, and what reasonable persons would do when creating the Constitution in the context of the framing and ratification.

First, the Framers and Ratifiers were cognizant of the challenge of change.145 Philip Hamburger summarized the history finding that the Framers and Ratifiers "strove for a constitution that would survive changes in American society and therefore attempted to exclude from the Constitution all that might become obsolete."146 They had witnessed the Articles of Confederation's inability to adapt to the changes that took place following the Revolution and its consequent failure.147 To ensure that the Constitution would not meet the same fate, the Framers and Ratifiers attempted to include only those provisions that would not, with time, become obsolete.148 One of the mechanisms they utilized to achieve their goal of permanence was to give the national legislature

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140. 545 U.S. 1, 33-42 (2005) (Scalia, J., concurring).
141. U.S. CONST. art. IV, § 1, cl. 1.
144. Over the past twenty-five years, there has been a flowering of scholarship aimed at identifying the Constitution's original meaning. See, e.g., O'NEILL, supra note 28, at 192.
146. Id. at 325.
147. Id. at 276.
148. Id. at 242.
discretion to meet unforeseen situations. Another mechanism was to embody principles in the Constitution’s text, principles that would apply to changed future circumstances.

This makes sense if one is creating a governmental structure intended to be a “novus ordo seclorum: a new order of the ages.” A reasonable person in the position of the Framers and Ratifiers would “draw their Constitution loosely enough so that it might live and breathe and change with time.”

The question of which type of legal norm a constitutional text embodies is primarily an empirical and not a normative question. To determine what form the legal norm in question takes, one must conduct a historical inquiry into the original meaning of the constitutional text. That inquiry will reveal, if the historical data is sufficiently determinate, whether the original meaning is a legal rule, standard, or principle.

The inquiry is historical and not normative because the purpose of interpreting the Constitution is to advance the common good which, in turn, requires respecting the authoritative, prudential, social-ordering decisions embodied in the Constitution’s text. In other words, one is seeking to best understand the communication from the Framers and Ratifiers to society, and thereby respect their authority to resolve social coordination problems. This is a question of historical fact.

Consequently, Ronald Dworkin’s attempt to make originalism the “best it can be” through use of what he has labeled, “semantic” originalism, fails to respect the Framers’ and Ratifiers’ authority. Dworkin has argued that interpreters should distinguish between two forms of Framer intent: abstract or semantic intent, and concrete or application intent. Using his distinction between concepts and

149. Id. at 287–97.
150. See Christopher Wray, Originalism and Criminal Law and Procedure, 11 CHAP. L. REV. 277, 292 (2005) (stating that “there are very broad terms reflecting broad principles that the framers chose deliberately knowing that they were not going to be able to anticipate techniques and technologies”). There are, however, other circumstances that may have pushed the Framers and Ratifiers to a more rule-like original meaning in some contexts. They may have meant, because they recognized that a particular issue was or may become contested, for some constitutional text to embody their particular understanding. See Whittington, supra note 20, at 221–22.
151. McDonald, supra note 62, at 262.
152. Id. at 293.
153. See Bassham, supra note 108, at 79–83 (arguing that it is an empirical question whether the Framers’ and Ratifiers’ semantic intentions were to adopt natural kinds or conventional meanings when they drafted and ratified constitutional text).
154. See Whittington, supra note 20, at 213–14 (arguing that one must utilize a historical inquiry to determine what form of legal norm the constitutional text contained).
156. Id. at 116–17, 119.
conceptions. Dworkin claimed that later interpreters are bound by the Framers' abstract intentions, embodied in the Constitution's text, but not their concrete intentions. Dworkin has offered various reasons for choosing abstract over concrete intentions, with the most powerful being the normative claim that better interpretations result from his approach.

However, Dworkin's a priori choice of abstract over concrete intentions fails to respect the Framers' and Ratifiers' authority to resolve social coordination problems. In formulating the means to overcome specific coordination problems, and in choosing how those means would be embodied in the Constitution, the Framers and Ratifiers (usually) chose a legal norm to perform the intended coordinating function. This legal norm had a particular—(often) historically accessible—level of abstraction. The choice of legal norm and of level of abstraction was part and parcel with the Framers' and Ratifiers' choice of means to overcome the coordination problem towards which the constitutional text was aimed. Dworkin would disregard their choice.

This criticism of Dworkin's choice of abstract over concrete intentions does not mean that the Constitution's original meaning is always, or even frequently, concrete. Instead, it is an empirical question regarding what form—and level of generality—the Constitution's original meaning takes. This Article does not answer that question generally but, as noted above, the literature does suggest that the Constitution's original meaning takes all three forms with multiple levels of abstraction. Answering the question of generality by looking historically to the Constitution's original meaning also comports with the respect due the Framers and Ratifiers as authoritative lawmakers, and thereby advances the common good by ensuring the effectiveness of their authoritative, prudential, social-ordering decisions.

It may be the case that some (perhaps many) of the Constitution's norms embody, not only an abstract principle, but a principle of critical morality. Keith Whittington has similarly noted: "The question of whether a term is meant to be used in a conventional sense is a specific

157. Id. at 117.
158. Id. at 116–22.
159. See Whittington, supra note 20, at 203–07 (summarizing these arguments).
160. It is the case that, as discussed below, there was sometimes no coherent original meaning—no actual choice—regarding a legal norm. See discussion infra Part III.C.4.
162. See Whittington, supra note 20, at 208, 216 (noting the place for "moral theorizing" in originalism).
one, and turns on the intentions of the speaker.\textsuperscript{163} The difference between these two types of principles—conventional moral principles and critical moral principles—is that the first is drawn from conventional morality while the second is drawn from critical morality.\textsuperscript{164} A principle drawn from conventional morality takes its content from conventional beliefs regarding the content of the principle. This content may or may not accurately reflect the requirements of critical morality. A principle drawn from critical morality has, as its object, an accurate statement of the requirements of morality, regardless of what society believes on the subject.\textsuperscript{165}

A judge faced with the task of interpreting a critical moral norm embodied in the Constitution will use both his speculative\textsuperscript{166} and his practical reason\textsuperscript{167} to determine, respectively, how best to define and apply the moral norm in the case.\textsuperscript{168} The judge’s analysis will include determining the best conception of the critical moral norm in question.\textsuperscript{169} For instance, the judge would need to decide whether to use a conception of justice at home in the Aristotelian tradition or the Kantian tradition, or some other conception, if the case involved interpretation of the Due Process Clauses (assuming the Clauses embodied the critical moral concept of justice).\textsuperscript{170} Then, the judge would have to apply that conception of justice to the situation presented in the case.

Lastly, the well-accepted distinction in the philosophy of language, between sense and reference, bolsters my argument for an originalism of principles.\textsuperscript{171} Sense is the meaning of a text that identifies and

\textsuperscript{163} Id. at 219–20.
\textsuperscript{164} H.L.A. HART, LAW, LIBERTY AND MORALITY 20 (1963) (describing conventional morality as “the morality actually accepted and shared by a given social group,” and critical morality as “the general moral principles used in the criticism of actual social institutions including positive morality”).
\textsuperscript{165} Brian H. Bix, Raz, Authority, and Conceptual Analysis, 50 AM. J. JUR. 311, 312 (2005).
\textsuperscript{166} See AQUINAS, supra note 54, pt. I-II, Q. 79, art. 2 (describing the speculative intellect as directed toward the attainment of truth).
\textsuperscript{167} See FINNIS, supra note 34, at 100–27 (describing the requirements of practical reasonableness);
\textsuperscript{168} See Whittington, supra note 20, at 216 (“Those real moral concepts must be explored theoretically in order to be explicated and ultimately applied in a judicial context.”);
\textsuperscript{169} See Whittington, supra note 20, at 219 (“The interpreter's task [regarding conventional principles] is to discover the appropriate convention, but in the second it is to discover what [the nature of the critical moral principle] is ‘in fact.’”).
\textsuperscript{171} Gottlob Frege is credited with developing this terminology. Gottlob Frege, \textit{Uber Sinn und Bedeutung} [Sense and Reference], translated in 57 PHI. REV. 209 (1948); see Green, supra note 9, at 563–74 (providing the most thorough discussion of the distinction in the law review literature); see also
encompasses the text’s referents. A text’s sense provides the analytic mechanism connecting the text to its referents. This mechanism is the “set of identifying properties or descriptions associated with [the text].”  For instance, if the text in question is “human,” its sense is animals of the species *Homo sapiens*. Referents, by contrast, are objects in the world identified by the sense of the text in question. Recurring to our previous example of “human,” Aristotle would be a referent.

The distinction between sense and reference, and related philosophy of language concepts, helps originalism meet changing circumstances because the Constitution's sense can apply to referents not in existence when the Constitution was ratified. If, for example, the publicly understood referents of the Cruel Punishments Clause of the Eighth Amendment included ten specific examples of wicked government punishment, that does not exhaust the possible referents to which the Clause may apply. If, as is likely the case, the Clause’s sense was approximately those punishments that are, in fact, cruel punishment, then the Clause’s sense can apply to new referents not in existence when the Clause was ratified. It could apply, for instance, to the electric chair.

The Clause’s sense could also apply to known practices in ways contrary to the Framers’ and Ratifiers’ understandings. This could be the case regarding the death penalty, for instance. Despite the Framers’ and Ratifiers’ beliefs that the death penalty was consistent with the Eighth Amendment, later interpreters could legitimately conclude that the death penalty is unconstitutionally cruel if it is, in fact, cruel.

A constitutional text’s sense is analogous to the legal norms embodied in those texts, such as rules, standards, and principles, that I have been discussing above. Both a constitutional text’s sense and the

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173. For example, John Stuart Mill used the terms “connotation” and “denotation.” *John Stuart Mill, A System of Logic* 34–41 (8th ed. 1872). Rudolf Carnap also used the terms “intension” and “extension.” *Rudolf Carnap, Meaning and Necessity* 177–79 (1947); *see also* Green, *supra* note 9, at 560–61, 563–74 (describing sense and reference, and related terms).

174. U.S. CONST. amend. VIII. Here, I am focusing only on the “cruel” portion of the Clause, not its “unusual” portion.

175. The situation where a later interpreter can apply the original meaning in a way contrary to the Framers’ and Ratifiers’ understood referents may be limited to where the Constitution’s sense is a critical moral principle, not a principle of conventional morality.
legal norm it embodies are the means by which meaning is communicated; they both connect the text to its objects. The widespread recognition of the validity of the distinction between sense and reference, and its close relationship to legal norms, supports my claim that an originalism of principles can meet the challenge of change.

The distinction between sense and reference is also analogous to the distinction between legal norms and the original applications of those norms. I will discuss this relationship further in the next section, where I explain the second form of abduced-principle originalism.

C. ABDUCED-PRINCIPLE ORIGINALISM

1. Introduction

I use the label abduced-principle originalism to refer to two distinct though related phenomena. The first is where there was a societal consensus on a constitutional text’s original meaning, but that meaning was not—or at least not frequently—made explicit. The second is where there was no societal consensus on a constitutional text’s original meaning, and instead there was a consensus only on a discrete set of practices—what I label archetypal practices—that the text would permit, proscribe, or require.176

Both types of abduced-principle originalism abduce a norm—a rule, standard, or principle—to fit their respective data. They differ, however, in their respective data sets. The first form focuses on contemporary uses of the constitutional term or phrase, while the second focuses on the practices that the Framers and Ratifiers believed the term or phrase required, proscribed, or permitted.

The two forms of abduced-principle originalism are related because they utilize the same process to ascertain the Constitution’s original meaning, and both provide mechanisms to increase the area of usable original meaning. Interpreters can, in turn, apply these usable norms to new circumstances.

A note of explanation before proceeding. Although I label this mechanism abduced-principle originalism, all three types of norms are produced using the mechanism, including standards and rules.

176. At this point, I have not yet definitively determined whether the pertinent group of people to determine which practices were archetypal practices is only the Framers and Ratifiers, or if it includes the entire society, though, as my language indicates, I tentatively believe that the relevant group is the Framers and Ratifiers. Throughout my discussion of abduced-principle originalism, I will use the phrase “the Framers and Ratifiers” without distinguishing between them and the rest of society.
2. The Process of Abduction

Abduced-principle originalism relies on the form of reasoning\textsuperscript{177} variously described as "abductive inference,"\textsuperscript{178} "inductive inference,"\textsuperscript{179} and "analogical reasoning in law."\textsuperscript{180} Abduction is the process of "discovering the rules to be applied, of making sense of patterns of characteristics, and of putting characteristics into rule-like patterns."\textsuperscript{181} The process of abduction has four steps: (1) identify the data in need of explanation, (2) articulate hypotheses to explain the data, (3) test the hypotheses to determine which best explains the data, and (4) the best hypothesis is applied to new data in need of explanation.\textsuperscript{183} At step (3), the reasoning must utilize "analogy-warranting rationales" to test the possible hypotheses.\textsuperscript{183}

Abduced-principle originalism follows this process. Using abduced-principle originalism based on archetypal practices as an example: first, a judge must identify the data, the archetypal practices regarding which there was a consensus. Second, the judge must put forward possible norms that explain the data.\textsuperscript{184} Third, the judge will test the possible norms utilizing fit and, if necessary, the Framers' and Ratifiers' perspective,\textsuperscript{185} to ascertain which norm is the best explanation of the archetypal practices.\textsuperscript{186} Fourth, the judge will apply that norm in the case before him, the case that had required him to articulate the constitutional text's original meaning through the process of abduction.

\textsuperscript{177} For a basic overview of different types of arguments, see Ruggero J. Aldisert et al., Logic for Law Students: How to Think Like a Lawyer, 69 U. PITT. L. REV. 1, 1 (2007).
\textsuperscript{181} Brewer, supra note 178, at 978.
\textsuperscript{182} Id. at 947-48, 962-63, 980-81, 983.
\textsuperscript{183} Id. at 962-63.
\textsuperscript{184} In my experience, when one is engaged in the historical research to ascertain a text's archetypal practices, a number of plausible norms that could explain the practices are themselves present in the historical materials.
\textsuperscript{185} By the Framers' and Ratifiers' perspective I mean approaching a given issue with their knowledge and purposes; to approach the issue in this manner one would arrive at a conclusion that can fairly be called the Framers' and Ratifiers'.
\textsuperscript{186} Following Professor Brewer and others, I argue here that the analogy-warranting rationale against which the norms are tested is supplied by fit with the archetypal practices and the Framers' and Ratifiers' perspective.
3. **Abduced-Principle Originalism Based on Coherent, if Unarticulated, Original Meaning**

The first type of abduced-principle originalism is a method of making explicit the usable legal norms embedded in contemporary linguistic practice. It is the analysis used to derive original meaning from the contemporary uses of the term or phrase in question. Although no originalists have articulated this method, its use by originalists is pervasive. In fact, it is what most identify when they think of the process of originalist interpretation. Further, since the method simply makes explicit the constitutional text’s original meaning, my articulation of it should be relatively uncontroversial.

To uncover the original meaning of a constitutional provision, originalists investigate the historical record. Given the thick, though relatively unreflective linguistic practice during the framing and ratification period, one does not always find an explicit articulation of the meaning of a text. Instead, from reviewing the historical record, it is often clear that the text had a commonly accepted, though unarticulated public meaning. This is clear because usage of the term or phrase is consistent, and this consistency is discerned from the usages’ various contexts. In this situation, the originalist will test which of a stable of candidates for a term’s or phrase’s original meaning best fits the usages of the term or phrase.

Attempts to discern the Commerce Clause’s original meaning show use of this form of abduced-principle originalism. Randy Barnett, for instance, has used this method. Barnett surveyed the “use of the term ‘commerce’” during the period of framing and ratification, and in the Constitution itself. He sought to find a meaning that fit the numerous instances in which “commerce” was used during this period. For example, in reviewing use of the term during the Constitutional Convention, Barnett argued that the terms “trade” or “exchange” could be substituted for the term “commerce.” By contrast, the phrase “any gainful activity” was not a possible substitute. Stated differently, Barnett asked which of a stable of different plausible meanings—“trade,” “exchange,” or “gainful activity”—best fit the instances in which the term “commerce” was used.

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187. This should not be surprising. When people communicate through language, they do not stop at the completion of each term or phrase and make explicit the meaning of that term or phrase. Instead, assuming the communicants are participants in and familiar with the language’s practice, each participant assumes that the other knows the meaning of the terms and phrases used to communicate.

188. Barnett, supra note 8, at 278–97.

189. Id. at 278 (emphasis added).

190. Id. at 278–91.

191. Id. at 280.

192. Id.
Ultimately, after determining the original meaning of the component parts of the Commerce Clause, Barnett stated the Clause's original meaning in the form of a legal rule: Congress has the power "to specify how a rightful activity may be transacted[,] and the power to prohibit wrongful acts" in "the trade or exchange of goods[,] including the means of transporting them[,]... between persons of one state and another." Barnett concluded that this rule was the one that best fit the historical data—the use of the term "commerce"—of the Commerce Clause's original meaning.

Similarly, in my own research into the original meaning of the term "Religion" in the First Amendment, I found that very infrequently did the Framers and Ratifiers, much less members of contemporary society, articulate the term's meaning. But it did happen; in Noah Webster's first dictionary, for instance. This, and other early sources, provided candidate norms that I tested for fit with uses of the term "religion" during the framing and ratification period. I found that a rule—a belief in a god, with duties in this life and a future state of rewards and punishments—best fit the historical data.

This method of making the Constitution's original meaning explicit fits with how we use language. Normally, we do not articulate the meaning of terms and phrases we use because we assume that the addressees, as participants in our linguistic practice, are familiar with their meanings. There are occasions, however, where, because of miscommunication, use of a contested term, or some other reason, we must articulate the meaning of terms or phrases used.

An easy example of miscommunication would be where Thomas asks his neighbor Jacques, who is new to the United States, to "cut his grass." Jacques comes over to Thomas' with a scissors and begins to cut each blade individually. Miscommunication has occurred, so Thomas explains to Jacques that by "cut the grass" he meant for Jacques to use a lawn mower to cut the grass in his yard. Thomas, given the ubiquity of the phrase "cut the grass" in our linguistic practice, used the phrase without articulating the phrase's meaning. Only in light of the miscommunication did Thomas articulate the phrase's meaning. He drew that meaning from the phrase's conventional use. A similar phenomenon—unreflective use of language—frequently occurred at the framing and ratification.

193. This quotation was reorganized from the top of page 313. Id. at 313.
194. Strang, supra note 22, at 181.
195. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 932 (1828).
197. Id. at 182.
This first form of abduced-principle originalism is important to originalism's ability to surmount the challenge of change. It enables originalists to articulate the constitutional text's original meaning. Without it, originalists would be left with repeated uses of a term or phrase and nothing more, no legal norm that could apply to new circumstances. Originalists would have phrases like Episcopal Church, Congregationalist Church, Roman Catholic Church, Jewish synagogue, but that would be all. With it, originalists can articulate the text's original meaning and apply the norm embodied in that original meaning to new circumstances. The originalist judge would apply the norm defining "Religion" to, for instance, the Church of Jesus Christ of Latter Day Saints, which did not exist when the First Amendment was ratified.

4. Abduced-Principle Originalism Based on Archetypal Practices
   a. Introduction

From my own research, and from my review of originalist scholarship along with originalist Supreme Court opinions, I believe that there was, in some situations, no linguistic practice sufficiently determinate to say that a provision had a coherent original meaning, much less that it formed a legal norm. Instead, the historical record indicated that the Framers and Ratifiers understood the provision to require, authorize, or proscribe a discrete (set of) practice(s). It is these practices, these "data points," that form the basis for articulating an abduced legal norm.

For example, assume that when the Eighth Amendment's Cruel and Unusual Punishment Clause was ratified, there was no societal consensus on the meaning of "cruel." Instead, the Framers and Ratifiers, and the public more generally, understood that there were five punishments that the Clause proscribed as "cruel," and five more that the Clause permitted. These practices were the archetypal practices that the Framers and Ratifiers understood the Clause to proscribe and permit. Stated differently, when asked the meaning of the Clause, the Framers and Ratifiers would have explained that the Clause proscribed and permitted those specific practices. The Clause prohibited, for instance, the federal government from breaking criminals on the wheel, but it permitted the government to employ the death penalty. Beyond these

198. See Fallon, Jr., supra note 3, at 42 (explaining the necessity of norms to implement constitutional meaning).
199. See Brewer, supra note 178, at 994 ("[D]isagreement among a group of [language] users of the same term... occasions uncertainty among the group taken as a whole.").
200. Jed Rubenfeld has articulated something similar, the paradigm case. Rubenfeld, supra note 71, at 180-95.
202. The Constitution recognized the licitness of the death penalty. U.S. Const. amend. V. In fact,
ten points of consensus, however, there was no broader consensus on the term’s meaning; there simply was no coherent original meaning. The data from which the originalist must articulate the term’s original meaning are these archetypal practices.

This graph illustrates the process by which abduced-principle originalism operates.

Abduced-principle originalism starts by identifying a constitutional text for which there was no coherent original meaning, but regarding which there was a public consensus on what practices—archetypal practices—the text acted upon. Then, one must abduce a rule, standard, or principle that fits the identified archetypal practices. Next, one applies this abduced norm to a situation not covered by the archetypal practices.

Other originalists have similarly recognized that the Constitution’s original meaning “runs out.” Both Keith Whittington and Randy Barnett, following earlier scholars, have adopted a distinction between constitutional interpretation and constitutional construction.

Constitutional interpretation is the explication of the Constitution’s original meaning. Constitutional construction, by contrast, occurs when

Sir William Blackstone bemoaned the wide range of crimes for which death was the prescribed punishment. 4 WILLIAM BLACKSTONE, COMMENTARIES *19.

203. Although I was initially inclined to use the term “construct” to describe the activity in this sentence, because of its usage by Whittington and Barnett to designate creative activity, I employed another term that does not necessarily indicate creativity.


205. See BARNETT, supra note 8, at 118–30 (explaining constitutional construction and how it differs from interpretation); WHITTINGTON, supra note 10, at 5–14 (same).

206. WHITTINGTON, supra note 10, at 5.
the Constitution's original meaning is underdetermined and there is choice regarding how to construct the Constitution's meaning. 207

Barnett, Whittington, and others have not, however, addressed the possibility of abduced-principle originalism. Abduced-principle originalism can increase the relative coverage of the original meaning, and thereby decrease the relative need for construction. It does so by filling in the gaps between and beyond archetypal practices. Abduced-principle originalism will not eliminate the need for construction which, as discussed below, is itself one of the tools that originalism possesses to meet the challenge of change.

b. Theoretical and Practical Possibilities of No Original Meaning, and the Limits of Abduced-Principle Originalism

Before proceeding to further describe this second type of abduced-principle originalism, a short note on its existence and limits. Theoretically, since language is primarily the use of agreed-upon symbols to communicate meaning, 208 a failure to agree upon the meaning of symbols used to communicate may lead to a failure to communicate. In the context of constitutional interpretation and originalism, the failure of contemporaries to agree on the meaning of the terms used in the Constitution—the lack of consensus—will lead to a lack of original meaning.

It is theoretically possible that the Framers and Ratifiers failed to agree on the meaning of (portions of) the Constitution's text. For instance, the Framers and Ratifiers may have used a phrase for which there was no widespread conventional meaning. 209 This theoretical possibility shows the abstract need for some interpretative tool, like abduced-principle originalism, to address how originalism operates in these areas that lack agreement. In fact, one of the common and powerful criticisms of originalism is that it relies on linguistic consensus when none is there. 210

Further, as a practical matter, linguistic communication regularly fails, and there are instances where it appears that there was relatively little consensus on the Constitution's meaning. For example, there was a strong consensus that the Free Speech Clause prohibited prior

207. Id.
208. See Whittington, supra note 10, at 59 ("Wittgenstein's analysis of the impossibility of a private language elucidates . . . the fact that language is essentially communicative.").
209. As I discuss below, the Equal Protection Clause may be an example of this. See infra Part IV.
210. See Barnett, supra note 8, at 90 (detailing some of these criticisms); Richard S. Kay, American Constitutionalism, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 35 (Larry Alexander ed., 1998) (responding to these criticisms from an original intent perspective).
211. U.S. Const. amend. I, cl. 2
restraints on speech. There are many other aspects of the Clause, however, for which there was likely no consensus. Perhaps the most prominent example was whether the Clause protected truth as a defense to allegations of seditious libel.

It is not possible to identify specific portions of the Constitution's text for which there was no, or no significant, original meaning without significant historical research, which is beyond the scope of this Article. The theoretical possibility of no linguistic agreement, coupled with the everyday failure of language to communicate, and the preliminary evidence that at least some provisions did not have a coherent original meaning, shows the need for abduced-principle originalism.

It is more likely that there will not be a coherent original meaning if one or more of the following circumstances are present. If, when the constitutional text was drafted and ratified, the subject matter of the text was contested, it is more likely that there would not have been a coherent original meaning. Also, if the text used terms that involved substantial value choices, then agreement was less likely. Similarly, if the subject matter was relatively new, such that no societal consensus had developed around it, it is less likely that there was a coherent original meaning. Another circumstance is if the text utilized words in a nonstandard manner. Lastly, the text in question may, in fact, have been a capacious term intentionally chosen to cover and avoid resolving conflict over the text's subject matter. The theme running through these factors, and others, is the high possibility of dispute among contemporaries regarding the text's subject matter.

212. See 2 Joseph Story, Commentaries on the Constitution of the United States § 1880 (reprint ed. Carolina Academic Press 1987) (1851) ("It is plain, then, that the language of this amendment imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights."); Stanley C. Brubaker, Original Intent and Freedom of Speech and Press, in The Bill of Rights: Original Meaning and Current Understanding 85-86 (Eugene W. Hickok, Jr. ed., 1991) [hereinafter The Bill of Rights] (stating that the conventional meaning of the Free Speech Clause was that it adopted the common law which prohibited prior restraints).

213. See Leonard W. Levy, Origins of the Bill of Rights 120 (1999) ("At the time of the drafting and ratification of the First Amendment, few among them clearly understood what they meant by the free press clause.").

214. See Levy, supra note 213, at 86-88 (arguing that there are some indications that the Clause outlawed libel); id. at 120 ("Considerable disagreement existed ... on the question of whether freedom of expression meant the right to print the truth about government measures and officials if the truth was defamatory."); Story, supra note 212, § 993 (stating that the First Amendment "expand[ed]" on the common law by protecting the right to "publish what is true").

215. A clear instance of this is Article III's grant of federal court jurisdiction over nonconsenting states sued by citizens of another state. U.S. Const. art. III, § 2, cl. 5.

216. The Contracts Clause may be an example of this. U.S. Const. art. I, § 10, cl. 1.
Abduced-principle originalism operates only when there is no linguistic practice sufficiently determinate to support a determinate original meaning of a constitutional text. When there is determinate original meaning, it governs. Abduced-principle originalism does not operate when there is determinate original meaning because, as described below, that original meaning is the authoritative form in which the Framers' and Ratifiers' authoritative, prudential, social-ordering decisions were communicated. Abduced-principle originalism, by contrast, is a means of ascertaining as closely as possible the Framers' and Ratifiers' authoritative, prudential, social-ordering decisions when there is no original meaning available to consult.

Abduced-principle originalism requires interpreters, often judges, to engage in a historical inquiry. They must ascertain the archetypal practices that the text in question was understood to permit, prohibit, or require. To the extent these are difficult historical questions, abduced-principle originalism will challenge the ability of judges and others to correctly ascertain the archetypal practices. These challenges, however, are no greater than those posed by originalism generally. Therefore, the extent to which one is persuaded by originalist claims that originalism is a viable enterprise despite these challenges,217 will largely determine one's view of abduced-principle originalism's practical viability.

c. Abduced-Principle Originalism Is Originalist

The core of originalism is that the Constitution's original meaning is its authoritative meaning.218 Despite the numerous and not necessarily compatible justifications given by originalists, this core remains. Abduced-principle originalism, as a mechanism for ascertaining the constitutional text's original meaning, preserves this core. Consequently, abduced-principle originalism is likely compatible with these different originalist justifications.

I have described elsewhere the justification for originalism that I believe is the most powerful: the concept of the common good.219 Abduced-principle originalism fits with, and flows from, originalism rooted in the concept of the common good.220 Next, I briefly explain why

217. See Kay, supra note 210, at 228–29 (responding to these claims).
218. See Dennis J. Goldford, The American Constitution and the Debate over Originalism 11 (2005) (stating that originalists claim that "the original understanding of the constitutional text always trumps any contrary understanding of that text"); Solum, Semantic Originalism, supra note 1, at 2–8 (describing the fixation and contribution theses of originalism).
219. See Strang, supra note 24 (articulating this argument in greater depth).
the common good requires original meaning interpretation of the United States Constitution and how abduced-principle originalism follows from that justification. 221

The Constitution's original meaning is authoritative because it is the method of interpretation that best effectuates the Framers' and Ratifiers' (1) authoritative, (2) prudential, and (3) social-ordering decisions. Every community must make authoritative, prudential, social-ordering decisions to enable the community to pursue the common good effectively—to overcome coordination problems. 222

A decision is authoritative if it is made by the person or body with authority to make binding decisions for the community. For example, Ohio's state legislature is recognized by Ohioans as having the authority to make legal determinations for the state. Ohioans appreciate that speed limit laws passed by the state's legislature are authoritative for that reason.

A decision is prudential when there is no one uniquely or demonstrably right answer to a question of conduct, so an authoritative person or institution must use prudential judgment to choose the best answer, all things considered. For example, the question of the proper speed limit on highways has no uniquely correct answer. The legislature or administrative agency making a speed limit determination will use its prudential judgment, weigh the numerous factors that go into the determination—safety, environmental concerns, efficiency, to name a few—and make a decision.

Lastly, a decision is social ordering if it is intended to and coordinates the actions of members of a community. Returning to the speed limit context, legislative or administrative determinations regarding speed limits do, in fact, coordinate the actions of citizens of Ohio.

Authoritative, prudential, social-ordering decisions are binding on members of a society because they enable members of the society to pursue their own happiness by overcoming coordination problems. 223 For instance, speed limits are binding because they permit Ohioans to use highways reasonably effectively, and use of highways is necessary to

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221. This account is somewhat modified from my earlier account, given in Strang, supra note 24. While I believe that the account I offered in Originalism and the Aristotelian Tradition is accurate, I believe that the account I articulate here is a related, additional, and possibly more powerful, reason in support of originalism. It is possibly more powerful, I believe, because it does not rely on the contested historical claim that our society, between 1787 and 1789, adopted original meaning originalism as an authoritative interpretative convention.

222. FInnis, supra note 34, at 155, 231–32.

223. Id. at 125, 154–56, 231–33, 335.
human flourishing and would not be possible, or at least not as effectively so, absent a speed limit coordinating usage of highways.

Ohioans, to properly understand the substance of the legislature's speed limit decision, will look to the original meaning of the statute in which the legislature placed Ohio's speed limit. Ohioans will use the statute's text, structure, historical context, and other information relevant to ascertaining the meaning the legislature intended to convey to them. Ohioans' goal is to accurately understand the legislature's authoritative, prudential, social-ordering decision on speed limits.

Turning to constitutional interpretation, the Constitution embodies numerous authoritative, prudential, social-ordering decisions that have permitted our society to pursue the common good in a reasonably effective manner. We respect the Constitution's—and the Framers' and Ratifiers'—authority when we respect its pursuit of the common good. This requires following its original meaning because the Constitution's original meaning is the meaning that the Framers and Ratifiers used when putting their authoritative, prudential, social-ordering decisions into words—directions—for our society. The Constitution's original meaning is the meaning that enables the Framers and Ratifiers to communicate their decisions to us, and for Americans to coordinate their actions in accord with those decisions.

First, the Framers and Ratifiers, when engaged in the process of creating and approving the Constitution, possessed the authority to make authoritative decisions for our national society's pursuit of the common good. The Constitution was recognized as authoritative because of its origin in the authoritative process of ratification. The Constitution was recognized as authoritative when and because it was ratified in state conventions. The same remains true today, although some of our legal practices diverge.

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224. This is true at least in our society as it is presently structured.
225. See Strang, supra note 24, at 970–81 (surveying the literature supporting this point); see also Barnett, supra note 8, at 89–117 (arguing that the Framers and Ratifiers understood that the Constitution's original meaning was authoritative); Whittington, supra note 8, at 180 (same).
227. See Ely, supra note 71, at 6 ("It is also instructive that once the Constitution was ratified virtually everyone in America accepted it immediately as the document controlling his destiny.").
228. See Whittington, supra note 8, at 146 ("The astonishing acquiescence of the anti-Federalists to the result of constitutional ratification could only come from their acceptance of the Constitution itself. . . . The fact that [opponents of the Constitution accepted the ratification] is indicative of their acceptance of the Constitution as written as the authoritative expression of the popular will, binding themselves as well as their opponents."); see also 3 Records of the Federal Convention of 1787, at 372, 374 (James Madison) (Max Farrand ed., 1911) ("As the [Constitution] came from [the Framers] it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions.").
Second, the Framers’ and Ratifiers’ decisions on how to pursue the national common good most effectively, embodied in the Constitution’s text, were prudential because there were no uniquely correct answers to many of the questions they faced. Instead, the Framers and Ratifiers had to use their best judgment, in light of all the circumstances. For example, there is no uniquely correct answer to the question of how many branches the federal government should have or to the question of how old the President must be to serve. But they are questions that must be answered.

Third, the Framers’ and Ratifiers’ decisions, embodied in the Constitution, were also social ordering because they overcame the coordination problems that had plagued the Articles of Confederation by coordinating the activities of Americans. This enabled Americans to pursue their basic human goods reasonably effectively. The Commerce Clause had, as one of its chief objects, the elimination of state trade barriers. Enforcement of

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229. This is evidenced by, for instance, the Supreme Court’s constant refrain that, even in its most controversial decisions, it is interpreting the Constitution. See, e.g., Dickerson v. United States, 530 U.S. 428, 442 (2000) (“[T]he Miranda warnings are required by the Constitution . . . .”); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) (“The underlying substance of [the Court’s] legitimacy is of course the warrant for the Court’s decisions in the Constitution.”). The document in the National Archives is identified as the document signed by the Framers and approved by the Ratifiers. See Charters of Freedom—The Declaration of Independence, The Constitution, The Bill of Rights, http://www.archives.gov/exhibits/charters/chartersof _freedom_6.html (last visited May 17, 2009) (stating that the document contained in the glass case in the Archives’ rotunda was the “signed [and] engrossed parchment” from the framing Convention).

230. On exceedingly rare occasion the Court has acknowledged that a decision or line of cases was, at best, only tenuously connected to the Constitution. See, e.g., Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (“Among such cases are those recognizing rights that have little or no textual support in the constitutional language.”), overruled by Lawrence v. Texas, 539 U.S. 558 (2003). Some scholars have attempted to show that these divergent practices are legitimate. See FALLON, JR., supra note 3, at 111–26 (arguing that we have an unwritten constitution that is authoritative in a manner similar to the written Constitution, but not to the same extent).

231. See GEORGE, supra note 53, at 108–11 (discussing the concept of determinatio from the Aristotelian tradition, which is the process legislators go through, using their prudential judgment, to make the natural law determinate through positive law norms).

232. By basic human goods, I mean the analytically divisible portions of human flourishing.

233. THE FEDERALIST No. 22, at 185 (Alexander Hamilton) (John C. Hamilton ed., 1904) (“The interfering and un-neighborly regulations of some states, contrary to the true spirit of the union, have, in different instances, given just cause of umbrage and complaint to others.”).

234. See Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 807 (1976) (“The Clause was designed in part to prevent trade barriers that had undermined efforts of the fledgling States to form a cohesive whole following their victory in the Revolution.”).
the Commerce Clause has led to a prosperous national commercial market.\textsuperscript{335}

Lastly, tying the pursuit of the common good to the Constitution's original meaning, the Framers and Ratifiers communicated their decisions via the Constitution's original meaning.\textsuperscript{336} The Constitution's original meaning is, therefore, authoritative, because it is the form within which the Framers' and Ratifiers' authoritative decisions were and are communicated to members of our society, enabling Americans to pursue their own and the common good reasonably effectively. As James Madison affirmed, "I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution."\textsuperscript{337}

Abduced-principle originalism flows from my grounding of originalism in the concept of the common good. For those discrete practices regarding which there was an original meaning, it is respected by abduced-principle originalism. In other words, where the Framers and Ratifiers made an authoritative, prudential, social-ordering decision, it is respected.

The phenomenon of archetypal practices occurs generally when legislators have in mind a discrete set of problems that legislation is meant to rectify. An example from the statutory context is the Sherman Antitrust Act of 1890,\textsuperscript{238} whose primary purpose was to eliminate corporate trusts such as the Standard Oil Trust.\textsuperscript{239} However, the text employed by the legislators, for one reason or another, does not have a coherent original meaning, and consequently fails to communicate a usable legal norm. The Sherman Antitrust Act is a good example because the original meaning of section 1 was (and remains) unclear.\textsuperscript{240} We do know that section 1 was intended or understood to outlaw corporate trusts.\textsuperscript{241} By ensuring that any interpretation of section 1 outlaws corporate trusts, interpreters respect Congress' authoritative,

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\textsuperscript{236} See Strang, supra note 24, at 970-81 (surveying the literature supporting this point); see also Barnett, supra note 8, at 89-117 (arguing that the Framers and Ratifiers understood that the Constitution's original meaning was authoritative); Whittington, supra note 8, at 180 (same).
\textsuperscript{237} Letter from James Madison to Henry Lee (June 25, 1824), in 9 The Writings of James Madison 190, 191 (Gaillard Hunt ed., 1910).
\textsuperscript{238} Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2006)).
\textsuperscript{239} See Horwitz, supra note 35, at 80 ("The 'trust problem' therefore became a central issue of public policy only a few years before the Sherman Act was enacted in 1890.").
\textsuperscript{240} Phillip Areeda & Donald F. Turner, Antitrust Law: An Analysis of Antitrust Principles and Their Application § 106, at 14 (1978) ("Neither the language nor the legislative history . . . is very illuminating about what specifically is allowed or prohibited.").
\end{flushleft}
prudential, social-ordering decision to the extent there was a decision. In the same way, application of abduced-principle originalism respects the Framers’ and Ratifiers’ authoritative, prudential, social-ordering decisions.\footnote{242}{When there is a coherent original meaning of a text, it will almost always fit the archetypal situations that the text’s original meaning permitted, proscribed, or required. Of course, it is possible for the Framers and Ratifiers of the text to have been mistaken, and hence to have believed that the text in question proscribed what was permitted, permitted what was proscribed, or other variations. Many originalists make the claim that the framers and ratifiers of the Fourteenth Amendment’s Equal Protection Clause were mistaken in believing that the Clause permitted racially segregated public schools when, in fact, it proscribed such schools. See, e.g., Green, supra note 9, at 597, 608 (noting that, for example, the segregation of the District of Columbia’s schools by Congress may be evidence of “cognitive dissonance”).}

In the constitutional context, there are many instances where scholars, including original meaning originalists who purport to eschew resort to Framer and Ratifier intent, resort to the archetypal practices that the text governed. For instance, the Seventeenth Amendment provides that the “Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years.”\footnote{243}{U.S. Const. amend. XVII.}Reading only the conventional meaning of the Amendment’s text, one would conclude that popular election of senators would last for only six years.\footnote{244}{See Larry Alexander & Saikrishna Prakash, “Is that English You’re Speaking?” Why Intention Free Interpretation Is an Impossibility, 41 San Diego L. Rev. 967, 981 (2004) (using the Seventeenth Amendment to make the same point).} The Amendment’s primary purpose—that is, the archetypal practice the Amendment’s framers and ratifiers intended to prescribe—was to require permanent direct election of senators. The fact that no one interprets the Seventeenth Amendment as a six-year experiment shows that archetypal practices and legislator intent play a role in establishing the Amendment’s meaning.

Larry Alexander has argued similarly. Law, for Alexander, is “the determinations of authorities of what ought to be done.”\footnote{245}{Larry Alexander, All or Nothing at All? The Intentions of Authorities and the Authority of Intentions, in Law and Interpretation: Essays in Legal Philosophy 357, 359 (Andrei Marmor ed., 1995).} Authorities make legal determinations to resolve coordination problems and to make
moral requirements conventional, and then they put those determinations into legal texts to communicate their determinations to those governed by the authorities. Hence, the goal of interpretation is to gather the authorities' meaning that they attempted to communicate through the legal text.

Authorities will have, according to Alexander, intentions at multiple levels of generality. Interpreters, however, may not "disregard more specific intentions in favour of more general ones" because, to do so, would "convert the interpreter into the legal authority." Since legal authorities are established to make determinations, and authorities will always have multiple levels of intention that later interpreters could use to effectively reverse the authorities' specific intentions, doing so would undermine the purpose of authorities in the first instance. All authoritative determinations—if interpreters could use the authorities' general intentions to trump their specific intentions—would be subject to revision, making the authorities' authoritative determinations illusory. Likewise, any originalist abduced-principle must fit the Framers' and Ratifiers' archetypal examples and cannot eliminate their authoritative, prudential, social-ordering decision(s).

For instance, the Framers and Ratifiers of the Fourth Amendment likely understood the Fourth Amendment to give special protection to the home. The home, for a host of reasons, had a unique status. Accordingly, the Framers and Ratifiers determined that houses should be protected in a unique manner from governmental intrusion. To search a home, government agents would have to meet a high(er) threshold of cause to satisfy the Amendment's reasonableness requirement.

246. Id. at 360.
247. Id. at 360-61.
248. Id. at 361.
249. Id. at 388-89.
250. Id. at 390.
251. Id.
252. U.S. Const. amend. IV; see Amar, supra note 58, at 65-67 (noting the tremendous influence on the Fourth Amendment by the English Wilkes v. Wood case, which involved government searching Wilkes' house in retribution for his criticism of the crown); id. at 67 (arguing that the Fourth Amendment singles out homes for special protection); Levy, supra note 213, at 151 (finding that the Fourth Amendment "emerged," in part, from the "'a man's house is his castle' belief of the Framers and Ratifiers).
253. See Amar, supra note 58, at 67 ("Again, we must note that the amendment singles out 'houses' for special mention above and beyond other buildings subsumed within the catchall word effects." (emphasis omitted)); Levy, supra note 213, at 151, 166 (describing the rhetorical tradition that sought to give protection of home pride-of-place); id. at 154-56 (stating that the Fourth Amendment was a response and rejection of early colonial abuse of general warrants); id. at 155-56 (explaining a Massachusetts antecedent to the Fourth Amendment that was itself an attempt to eliminate some of the abuses of general warrants).
254. See U.S. Const. amend. IV.
When the Fourth Amendment was ratified in 1791, this special protection of the home fit well with the Amendment’s broader original meaning. The Amendment proscribed unreasonable “searches.” Searches, in 1791, meant physical intrusion, a common law trespass. The only means for a government official to search a home in 1791 was to commit a (physical) trespass on the target’s property.

How should an originalist Court rule when information regarding the interior of a house, which government officials could previously have obtained only via physical invasion, becomes available without trespass because of advances in technology? The Supreme Court faced this question in Kyllo v. United States. The Court relying, in part, on the special “Fourth Amendment[] protection of the home,” and tying its conclusion to the Amendment’s original meaning, ruled that a search had occurred. The Court, so ruling, preserved one of the Amendment’s archetypal cases.

I have argued that archetypal practices are protected under abduced-principle originalism, and that this protection follows from my grounding of originalism in the common good. In addition, the abduced norms derived through abduced-principle originalism also respect the Framers’ and Ratifiers’ authoritative, prudential, social-ordering decisions. The close fit between the abduced norm and the archetypal practices ensures that the abduced norm will advance the common good in a manner consistent with the Framers’ and Ratifiers’ authoritative, prudential, social-ordering decisions.

The abduced norm is also the Framers’ and Ratifiers’ norm because it is the norm that a reasonable Framer or Ratifier would claim if asked to articulate his reasoning behind his decisions. A reasonable Framer or Ratifier would ask what—up to that point inchoate—norm fits the archetypal practices the text prohibits, permits, or requires. By bringing forward and making explicit the inchoate norm that fits the practices identified by the Framers and Ratifiers, the process of abduced-principle

255. Id.
256. See Amar, supra note 58, at 69 (noting that the Fourth Amendment was enforced by the target’s bringing a suit for damages against the government official(s) under trespass); Bradford P. Wilson, The Fourth Amendment as More than a Form of Words: The View from the Founding, in The Bill of Rights, supra note 212, 151, 156-57 (same); see also Olmstead v. United States, 277 U.S. 438, 466 (1928) (ruling that the Fourth Amendment forbids only “actual physical invasion of his house ‘or curtilage’ for the purpose of making a seizure”), overruled by Katz v. United States, 389 U.S. 347 (1967).
257. Amar, supra note 58, at 69.
259. Id. at 37.
260. Id. at 40.
261. Id.
originalism mirrors the process utilized by the Framers and Ratifiers themselves. Lawmakers, when articulating a norm to achieve their desired objects, attempt to articulate a norm that fits the practices the lawmakers wish to proscribe, permit, or require.262

If, utilizing the process of abduced-principle originalism, an interpreter finds that more than one norm adequately fits the archetypal practices, the interpreter must then situate himself in the position of the Framers and Ratifiers. The interpreter should understand the Framers' and Ratifiers' goals, knowledge, and the background circumstances against which they worked. With this in mind, the interpreter must then choose the norm the Framers and Ratifiers would have chosen. The process of abduced-principle originalism articulates norms that are the Framers' and Ratifiers'. The culmination of this process effectuates, as much as possible, the Framers' and Ratifiers' authoritative, prudential, social-ordering decisions.

Judges utilizing abduced-principle originalism should, if more than one norm adequately fits the archetypal practices, choose the norm that, as best one can tell, the Framers and Ratifiers would have chosen. Judges cannot choose the morally best norm when that norm is not the one that the Framers and Ratifiers would have chosen. This limitation follows from my justification for originalism in the common good.

If judges could choose the morally best norm, or the most abstract or general norm, then they would effectively become the authority promulgating authoritative, prudential, social-ordering decisions. This undermines the efficacy of the initial coordination performed by the Framers and Ratifiers,263 violates the norms governing judicial office264 and, potentially worse, makes the substantive attractiveness of the norms promulgated by judges choosing the morally best norm contingent on the judges' ability to plausibly argue that their interpretation is a faithful interpretation of the constitutional text.265

One last note before proceeding. The requirements for appropriately utilizing abduced-principle originalism are relatively robust. One must ascertain the lack of a coherent original meaning for

262. See Aquinas, supra note 54, pt. I-II, Q. 93, art. 1 (stating that legislators, prior to legislating, have in their mind "the type of the order of those things that are to be done by those who are subject to his government"); see also Strang, supra note 220, at 55-56 (elaborating on the process of legislation within the Aristotelian tradition).

263. See Alexander, supra note 245, at 390.

264. At least in our society regarding constitutional judicial review. See Strang, supra note 24, at 992-97 (making this argument). Other societies, and our own when judges act in their common law capacity, permit—in fact, require—judges to issue authoritative, prudential, social-ordering decisions.

265. See Steven D. Smith, Law Without Mind, 88 Mich. L. Rev. 104, 115 (1989) ("The interpretations rendered and the results reached by presentist judges will turn . . . less on mind—on conscious human thought expressed through actual decisions—than on historical accident.").
the constitutional text in question. One must also determine the archetypal practices for the text, and then abduce a norm to fit those practices. Lastly, if necessary, one must acquire the knowledge required to situate oneself in the position of the Framers and Ratifiers to choose the abduced norm that the Framers and Ratifiers would have chosen. Each of these steps requires substantial skill, effort, and judgment.

d. Meeting the "Challenge of Change"

Regarding those provisions for which there was not a coherent original meaning, other than the social consensus on the discrete practices affected (or not affected) by the provisions, the originalist interpreter has three possible responses: (1) restrict the provision's authoritative meaning to that discrete set of practices regarding which there was a consensus; (2) abduce the rule, standard, or principle that best fits and justifies the discrete set of practices; or (3) determine which rule, standard, or principle best fits and justifies the provision's text. The originalist's correct response is, I will show below, option two: inducing the norm that best fits and justifies the archetypal practices that the constitutional provision in question was understood to require, authorize, or forbid.

Option two is the correct originalist response, first, because the resultant meaning of the provision—in the form of a rule, standard, or principle—is the Constitution's original meaning. By ensuring that the original meaning that does exist is retained, abduced-principle originalism respects the authority of the Framers and Ratifiers to make the prudential, social-ordering decisions which are embodied in the Constitution. Additionally, the norms articulated using abduced-principle originalism likewise respect the Framers' and Ratifiers' authority. Second, while option one does respect the Framers and Ratifiers' authority, option two ensures that originalism can surmount the challenge of change, unlike option one. Third, while option three can meet the challenge of change, it does not, like option two, respect the Framers' and Ratifiers' authority. Fourth, option two, unlike the first and third options, fits with how we use language.

Abduced-principle originalism permits originalism to avoid the problematic first option: limiting the Constitution's original meaning to the archetypal practices. If it were otherwise, then the problem of change would be acute. The Constitution's original meaning would be limited to the circumstances at the time of ratification. Since the discrete set of practices would not change—and most importantly, would not expand to include new practices—the Constitution's original meaning would

266. I intend option three to represent Ronald Dworkin's semantic originalism.
quickly become outdated. It would be limited to the archetypal cases existing at the time of ratification.

Assume, for instance, that the original meaning of cruel in the Cruel and Unusual Punishment Clause did not create a rule, standard, or principle. Instead, assume that the historical evidence showed that the public understanding of the Clause was that only five discrete practices were prohibited by the Clause. Given government’s ability to devise new punishments, the efficacy of the Clause would be greatly undermined if the Clause’s original meaning could not reach new punishments because it was limited to the then-existing five practices.

Abduced-principle originalism prevents this from occurring. The interpreter would abduce a rule, standard, or principle that fits the practices regarding which there was an original meaning. Abduced-principle originalism would, like the principled originalism I described above, be able to apply the abduced norm to new and unforeseen circumstances. This would include new punishments that were proscribed by the abduced norm of “cruel.”

Abduced-principle originalism results, as a practical matter, in less of a role for constitutional construction. This occurs because, prior to the abduction of a norm, the only area of determinate original meaning—the only role for interpretation—is that covered by the archetypal practices. After abduction, by contrast, the abduced norm governs substantially more area of social life, thereby determining the outcome of more cases than was the situation previously.

e. Respecting the Constitution’s Authority

Abduced-principle originalism is better than option three because it, unlike option three, respects the Framers’ and Ratifiers’ authoritative decisions. As I discussed earlier in the context of Ronald Dworkin’s semantic originalism, constitutional text is the means utilized by the Framers and Ratifiers to communicate their authoritative, prudential, social-ordering decisions. The original meaning of the text best effectuates that communication. This meaning may be, as an empirical matter, identical to the morally best conception of the text, but there is no necessary identity. Instead, ascertaining the Constitution’s original

267. U.S. Const. amend. VIII.
268. See supra Part III.C.4.c.
269. In a future article I hope to argue that the Constitution’s original meaning usually best effectuates communication from the Framers and Ratifiers to those governed by the Constitution. There are, I believe, occasions when interpreters have access to the Framers’ and Ratifiers’ intended meaning, including situations when their intended meaning deviates from the original meaning. I plan to argue that in those situations where we have access to the original intent, and when that intended meaning deviates from the original meaning, the Constitution’s originally intended meaning is authoritative.
meaning is a historical enterprise. The more accurately an interpreter engages in that enterprise, the more effectively the Constitution conveys the Framers' and Ratifiers' meaning, and the better the Framers' and Ratifiers' authoritative decisions are respected.

Imagine, for instance, that a father is coaching his son's basketball team. Assume further that the son is throwing elbows, swearing, and pushing members of the opposing team. The father yells to the son, "Play fair!" Is the father instructing the son to use his, the son's, best judgment of what "fair" is, and then abide by that conception of fair? Or, is the father instructing the son to stop throwing elbows, swearing, and pushing—that is, utilize the father's own conception of "fair"?

One answers the question of the meaning of the father's instruction using a historical inquiry. One must look at the context of the father's statement to try and ascertain the father's meaning. One does not, as Dworkin prescribes, engage in a theoretical inquiry into the morally best meaning of the term "fair." Instead, the goal of the inquiry is to understand what the father was attempting to communicate to his son.

The father is analogous to a lawmaker, and he made an authoritative, prudential, social-ordering decision for those in his charge, including his son. This hypothetical is, therefore, analogous to the Framers and Ratifiers communicating their decisions through the Constitution. To ascertain the Constitution's meaning, an interpreter must determine, as a matter of historical fact, the Constitution's original meaning, and this will not necessarily be the text's morally best meaning.

Any identity between the morally best interpretation of constitutional text and the text's original meaning is contingent. Consequently, Dworkin's semantic originalism could regularly lead to a meaning contrary to the Constitution's original meaning. When this occurs, the Constitution does not effectively convey the Framers' and Ratifiers' authoritative decisions, and their authority is not respected.

Returning to the basketball hypothetical, assume the son uses his own conception of "fair," and that the son's conception is the morally best meaning of "fair." The son then accurately applies that conception and determines that it is fair to swear at opposing players. He is not faithful to his father's instruction. Instead, he has undermined his father's authority, as coach, to make authoritative decisions for the (common) good of the team.

In all situations of which I am aware and, likely, in all possible situations that could arise that call for application of abduced-principle

270. This hypothetical is modified from one used by Keith Whittington. See Whittington, supra note 10, at 206–07.
originalism, the abduced norm will be one that plausibly fits the text. Stated differently, the resulting abuced norm would be a plausible candidate for the text’s original meaning even though there was not a sufficient linguistic consensus to make the abduced norm the original meaning.

It is theoretically possible, though not likely, for the resulting abduced norm to not be a plausible interpretation of the text in question. This is because the Framers and Ratifiers, who created and adopted the constitutional text to communicate authoritative, prudential, social-ordering decisions, were well-versed in the art of legislation and meticulous in crafting the Constitution’s text.

If the theoretical occurred, however, and the abduced norm is not a plausible interpretation of the Constitution’s text, respect for the Framers’ and Ratifiers’ authoritative decisions requires following the abduced norm despite a poor fit with the text.

For example, assume there were ten archetypal practices and that the abduced norm fit all ten of them, but the norm was not a plausible interpretation of the constitutional text. Assume further that a plausible interpretation of the text could account for nine of the archetypal practices. In this situation, respecting the Framers’ and Ratifiers’ authority requires including all ten practices. The fact that they miscommunicated—that no plausible interpretation of the constitutional text includes all ten archetypal practices—is just that, a mistake. Mistakes in communication occur in law and in life. My grounding of originalism in the concept of the common good requires interpreters to advance the common good in the manner sought by the Framers’ and Ratifiers’ even when the Framers and Ratifiers failed to articulate that manner effectively in the Constitution’s text.

f. Abduced-Principle Originalism Fits Our Use of Language

Abduced-principle originalism also fits with how we use language in everyday life. Those of us with children have had our children ask us for permission to attend events, often with friends. As the children ask to attend different events, parents make relatively off-the-cuff decisions and respond accordingly. Rarely are they conscious of explicitly utilizing a norm or set of factors in making the decisions (such as the child’s age and

271. This hypothetical is drawn from one posed by Michael Rappaport.

272. Let me emphasize that this discussion involves a situation where there is no original meaning. If there was a coherent original meaning, I tentatively think that the same result would obtain. Stated differently, I think that even when there is a coherent original meaning, interpreters should follow a contrary archetypal practice. See Strang, supra note 220, at 65 n.86 (raising the possibility of this distinction).

273. This example is modified from one given in Larry Alexander, Constrained by Precedent, 63 S. Cal. L. Rev. 1, 5–6 (1989).
the nature of the event), even though they may have used an inchoate norm or set of factors.

In these instances, parents are acting analogously to legislators because they are issuing authoritative, prudential, social-ordering decisions for their families. These decisions come packaged in relatively basic form, simple yes's or no's. Our understanding of the meaning of these decisions is limited to the discrete situations out of which the norm arose.

After these requests, decisions, and answers have occurred a number of times, assume further that a parent denied a child's request to attend an event. The child protests that the parent "isn't fair." To know whether the parent has been fair, the parent will have to determine what he has been doing. The usual way to make that determination is to ask: what norm best fits the discrete instances where the parent "legislated" in the past?

In answering that determination, the parent would hypothesize possible norms that might fit his past decisions. The parent might abduce, for example, the principle that children may only attend edifying events regarding which the children are sufficiently mature. This abduced-principle would fit the time when the parent authorized the five year old child to attend a church pageant with his teenage sister. It would also fit the instance when the parent refused to let the ten year old child attend a heavy metal rock concert with his school friends of the same age. And so on.

This principle, since it is drawn from the discrete set of situations can fairly be said to account for and represent those situations. The principle therefore respects the authoritative, prudential, social-ordering decisions of the parent qua legislator. The principle does not act in contravention of the parent's authority to make decisions regarding the children's attendance at events.

Similarly, abduced-principle originalism accounts for those discrete practices regarding which there was a coherent original meaning, where the text was understood to authorize, require, or prohibit certain practices. Each of those practices is preserved by the abduced-principle. As a result, the Framers' and Ratifiers' authority is respected.

Further, the parent can apply the abduced principle to new requests by the children. Assume that the child who protested that the parent "isn't fair" was seventeen, but the parent considered him relatively immature, and the event was a class trip to Rome. This was a question

274. See Whittington, supra note 20, at 220 ("The intentions of the speaker are critical to determining the textual referent, regardless of the reality of the concepts to which the speaker refers or of the state of the speaker's knowledge.").
the parent had never before faced. Although the trip is edifying, it is such a large undertaking that the parent believed the child was not sufficiently mature. By applying the same norm utilized previously in a principled fashion, the parent can respond that he was, in fact, fair to the child.

g. *Abduced-Principle Originalism Provides Determinate Original Meaning*

One could criticize abduced-principle originalism as unable, in principle, to provide a determinate legal norm. One could argue that there are an infinite (or at least a large) number of norms that an interpreter could fit to the discrete practices for which there was an original meaning. For example, the critic could argue that, if there were archetypal practices A, B, C, D, and E, an infinite number of norms could fit this set of practices. For example, norm X could include practices A through E. Norm Y could include practices A through E plus F. Norm Z could include A through F plus G, and so on. Stated differently, any data set can be subsumed under different descriptions because each description is slightly different.\(^{275}\)

Abduced-principle originalism avoids this criticism by requiring an interpreter to abduce that norm that most closely fits the discrete practices for which there was a coherent original meaning. This solution, first, fits the normative justification for originalism found in the concept of the common good, and, second, meets the criticism laid out above. Third, if, after exhausting the historical resources, an interpreter cannot determine which norm best fits the historical data, the interpreter should adopt that norm which a reasonable Framer and Ratifier would adopt if given the choice.

First, in most, if not all situations, it is possible for an interpreter to narrow down to one the norm that best fits the archetypal practices. This is true for a number of reasons. Primary among them is the historical accessibility of the Framers’ and Ratifiers’ context. This accessibility allows later interpreters to both identify the archetypal practices themselves and articulate a norm that, especially given the Framers’ and Ratifiers’ goals, makes sense of the archetypal practices.

Second, using the norm that most closely fits the archetypal practices flows from the normative justification for abduced-principle originalism. Abduced-principle originalism is a mechanism to allow later interpreters to broaden the reach of the Constitution’s original meaning. But it does not do so at the expense of the Framers’ and Ratifiers’ authority. The Framers’ and Ratifiers’ prudential, social-ordering decisions regarding which there was an original meaning—the archetypal practices that were

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275. *See Whittington, supra note 10, at 182 ("Both originalists and their critics have struggled with the question of the relevant level of generality at which intentions should be understood.").*
prohibited, permitted, or required—remain authoritative because they form the anchors of the abduced norm. Later interpreters thereby contribute to the advancement of the common good by ensuring that coordination problems authoritatively solved by the Framers and Ratifiers are respected.

Third, perhaps most importantly, the abduced norm formed using abduced-principle originalism is identifiably the Framers' and Ratifiers'. As I described above, norms formulated using abduced-principle originalism result from utilizing the Framers' and Ratifiers' perspective. This permits an interpreter to tie an abduced norm as closely to the Framers and Ratifiers as possible.

Of course, the methodology of abduced-principle originalism will not eliminate disagreement and the need for judges to exercise their practical and legal judgment. There are many points at which reasonable interpreters could disagree. Disagreement could arise, for instance, over whether a particular norm most closely fits the archetypal practices, or whether the norm fits all of the archetypal practices. Interpreters could also disagree over which practices are archetypal. While at one time originalists justified originalism on the grounds that it constrained judicial discretion, today originalists accept that originalism entails the exercise of judicial discretion.

Other originalists, despite not having articulated the concept of abduced-principle originalism, have utilized it in their historical research. Christopher Green, for instance, has demonstrated the necessity of abduced-principle originalism as part of his broader discussion of the philosophy of language concepts of sense and reference. Green argued that the sense of constitutional text is fixed by the Framers and Ratifiers, but that the referents of constitutional text can (and should) change in response to changed social conditions. Green noted, however, that a constitutional text's sense may not always be clear. In those situations, Green stated that an interpreter must "work backward from original reference to original sense by taking into account the original assessment of facts."
Stated differently, when the Constitution's original meaning is vague or ambiguous, Green advises interpreters to abduce the legal norm that fits the originally understood applications of the Constitutional text. As a result, the sense-reference distinction, with its wide-ranging philosophical acceptance, supports my claims regarding the plausibility of abduced-principle originalism.

D. INDETERMINATE AND UNDERDETERMINATE ORIGINAL MEANING

Essential to originalism is this limitation: the Constitution's original meaning is binding only to the extent that it is determinate. A norm is determinate if it resolves the outcome of a case. A norm is underdeterminate if it provides a range of outcomes that are consistent with but not determined by the norm. A norm is indeterminate if it does not limit the universe of possible outcomes in a case.

The scope of area governed by constitutional construction in originalism is both a theoretical and empirical issue. On the theory side, originalists diverge on whether and to what extent construction plays a role in originalism. On the empirical side, it is a historical question whether, in a given case and regarding a particular provision of the Constitution, that text's original meaning is vague or ambiguous. This Article is not the place to resolve these outstanding questions other than to note that many prominent originalists have argued that the scope of construction is broad.

An instance of where the Constitution's original meaning is likely underdetermined in the face of new technology is whether the Commerce Clause permits Congress to regulate the Internet. Using Barnett's statement of the Clause's original meaning as the basis of inquiry, it seems unclear whether the electrons crossing state lines on the Internet, or perhaps the information conveyed by the packages of electrons, constitute "trade or exchange of goods" or "the means of transporting them."
In situations where the Constitution’s original meaning is determinate, there is no flexibility: the interpreter—the courts, the President, or Congress—has no choice and must follow its mandate. However, where the Constitution’s original meaning is under- or indeterminate, Congress has the authority to make constitutional determinations, also labeled constitutional constructions. When Congress is working within the underdeterminate constitutional text, it may not violate the determinate original meaning that exists but, within those strictures, Congress can be creative. In these situations, because the original meaning is not completely (or even strongly) constraining, its rootedness in the past is not an issue and, hence, the problem of change is not an issue. Instead, Congress can use its prudential judgment to address current issues in the manner it sees fit.

Returning to the example of the Commerce Clause regulating the Internet: Congress has repeatedly passed statutes constructing its authority under the Commerce Clause. It has exercised authority to regulate the Internet. Consequently, the underdetermined nature of the Commerce Clause’s original meaning has permitted Congress to construct a response to changed technology.

Lastly, some scholars have suggested that much of constitutional law—and much of the Supreme Court’s case law—performs the function of “implementing” the Constitution. According to these scholars, the Court articulates rules, tests, and other doctrines of constitutional law that bridge the gap between constitutional meaning and the facts of the world. The Court uses implementing rules to implement both the Constitution’s original meaning and meaning constructed from the Constitution’s original meaning. An example of an implementing rule is

289. See William Lynch, The Application of Title III of the Americans with Disabilities Act of 1990 to the Internet: Proper E-Planning Prevents Poor E-Performance, 12 COMMLAW CONSPECTUS 245, 256-58 (2004) (noting that the question is an open one, and arguing that under the Court’s broad interpretation of the Clause, Congress can regulate the Internet); see also Adair v. United States, 208 U.S. 161, 177 (1908) (summarizing the Supreme Court’s then-contemporaneous understanding of the Congress’ Commerce Clause power as including the power to regulate “the transmission of messages by telegraph”), overruled on other grounds by Phelphs Dodge Corp. v. NLRB, 313 U.S. 177, 177 (1941).

290. Strang, supra note 24, at 982-1001 (offering three arguments why federal judges are bound by the Constitution’s determinate original meaning).

291. See Strang, supra note 220, at 70-72; see also WHITTINGTON, supra note 8, at 7-14 (arguing similarly).


293. For likely the most prominent example of this, see FALLON, JR., supra note 3, at 1-11.

294. Id. at 5.
the purpose test from *Washington v. Davis*.295 There, the Supreme Court required a plaintiff to show that a defendant state had purposefully discriminated on the basis of race to plead a viable Equal Protection Clause violation.296

Without committing myself to the existence and nature of implementing norms that can diverge from the Constitution’s original meaning, it is clear that the Court could modify rules that implement constitutional constructions, and in this way respond to changed social conditions. It may also be the case—although this is a subject for a future article—that the Court may alter implementing rules that implement the Constitution’s determinate original meaning. If this is true, the Court can then mitigate the tension between original meaning and changed social conditions by altering the rules implementing the original meaning.

E. ARTICLE I AND THE POLICE POWER

Article I of the Constitution grants to Congress all of the federal government’s legislative power.297 Correspondingly, state governments have plenary legislative power except where specifically restricted by the federal or state constitutions.298 This power is known as the police power.299

In those many areas where the federal or state legislatures have legislative authority, they can react to changed circumstances as their judgments dictate. Keith Whittington has similarly commented that “[t]he Constitution does more than specify rights and powers retained by the people. It also delegates power from the people to their chosen representatives in order to realize positive constitutional values.”300 The Framers and Ratifiers, in response to the recognized problem of changing social conditions, deliberately chose to enable Congress to address change.301

296. Id. at 239.
300. Whittington, supra note 10, at 207.
301. See Kay, supra note 210, at 38 ("[The Framers and Ratifiers] were well aware of the reality of change, but dealt with it by narrowing the degree to which government was constitutionalized. For most public decision-making, flexibility was ensured by leaving the political departments to deal with change, unconstrained by prior constitutional rule.").
Given the continuing existence of legislative ability to respond to changed conditions, we should not be surprised to find that there are numerous instances where Congress or the states have legislated in reaction to what was perceived as an inadequate original meaning. In the Fourth Amendment context, for instance, the Supreme Court overruled *Olmstead v. United States* in *Katz v. United States.* The *Katz* Court replaced the *Olmstead* Court’s originalist reading of the Fourth Amendment with the “reasonable expectation of privacy” concept. Congress, however, perceived *Katz*’s level of protection against wiretapping as inadequate, so it enacted Title III in 1968. A fortiori, Congress expanded protection beyond the Fourth Amendment’s original meaning, and it did so using its legislative power.

Originalism, as an interpretative theory, accords federal and state legislatures broad legislative authority compatible with the Constitution’s original meaning. This Article is not the place to make detailed claims regarding the scope of this legislative power other than to note that, particularly at the state level, under an originalist interpretation of the Constitution, states would likely have relatively broad authority to meet new challenges.

F. Article V

Of course, the Constitution contains within itself the means to modify its meaning. Article V permits amendment of the Constitution if approved by two-thirds vote of Congress and three-fourths of the states. The Framers and Ratifiers understood Article V to be a way for future generations to meet “new challenges and opportunities in the unforeseeable future [that] might require new approaches.”

There is currently a sophisticated debate over whether Article V is an attractive vehicle of amendment. The extent to which one is persuaded that Article V is sufficiently viable to permit amendment

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302. 277 U.S. 438 (1928).
304. Id. at 361 (Harlan, J., concurring).
306. 377 U.S. 483 (1964). (emphasis added)
307. AMAR, supra note 58, at 285.
308. Compare LEVINSON, supra note 69 (arguing that the Constitution is not sufficiently democratic and that Article V is not capable of being the means through which it is made more so), with Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 177 (1996) (arguing that Article V represents a good way to ensure order and stability with change).
when necessary, while at the same time sufficiently resistant to change to preserve the Constitution's enduring character, will correspond to one's view on whether and to what extent Article V helps originalism meet the challenge of change.

It is clear that Article V has not been used frequently and that part of the "blame" for that failure lies at the feet of the relatively high hurdles Article V places before proposed amendments. However, lack of amendments alone does not indicate that the Constitution is unduly difficult to amend.

It is likely that the Constitution would have been amended more frequently than it has been if the Supreme Court had hewed more closely to the Constitution's original meaning. Perhaps the best example of this occurred during the New Deal. President Roosevelt considered a written constitutional amendment to place the New Deal on solid constitutional footing.\(^3\) In the end, though, the Court's famous "switch in time" relieved the pro–New Deal pressure for formal constitutional change, and the New Deal "amendments" came in the form of judicial precedents.\(^3\)

This is simply another way of saying that there exists a prodigious number of nonoriginalist precedents that may have eliminated the popular support necessary for amendments.\(^3\) Nonetheless, absent recourse to informal amendments via judicial precedent, Article V remains a viable option.

Additionally, for many of those nonoriginalist constitutional doctrines—Ackermanian amendments—that are already in place in the form of nonoriginalist precedent, the push to eliminate them would result in quick formal amendment. For instance, Americans are fond of many of the administrative state's aspects, such as Social Security, and many of a host of national regulatory regimes. Assuming that an originalist reading of the Constitution is inconsistent with Social Security, for example, and there was a judicial threat to the program on those grounds, it is highly likely that an Article V amendment protecting it would result. This potential evinces originalism's ability to respond to change.

There is also a robust debate over whether Article V is the sole mode of constitutional amendment. Akhil Amar is a well-known originalist advocate of the position that non–Article V modes are

\(^3\)\(^9\) ACKERMAN, TRANSFORMATIONS, supra note 70, at 298–301.

\(^3\)\(^10\) Id. at 314–15; see also id. at 326–27 (quoting Roosevelt's explanation for not pursuing formal amendments).

\(^3\)\(^11\) See Strang, supra note 168, at 430 ("For originalists, the list of nonoriginalist precedents and constitutional law doctrines built on these precedents is long . . . .").
legitimate.\(^{312}\) Henry Paul Monaghan has written perhaps the best response to Amar.\(^{313}\) Although I find the evidence in favor of Monaghan's position more substantial, as I have explained elsewhere,\(^{314}\) if Amar is correct, and Article V is only one mechanism to alter the Constitution, then originalism's ability to meet the challenge of change is bolstered further.

G. **Nonoriginalist Precedent**

I have argued elsewhere that a properly understood originalism would not eliminate all nonoriginalist precedent.\(^{315}\) Here, I will briefly emphasize how originalism's response to nonoriginalist precedent helps it meet the challenge of change.

A nonoriginalist precedent is a precedent that is inconsistent with determinate original meaning. For instance, the original meaning of the Sixth Amendment right to confrontation requires the chance for actual, physical confrontation of a testimonial witness by the accused.\(^{316}\) A case that holds something other than that is a nonoriginalist precedent.\(^{317}\)

I have explained how the normative argument for originalism, rooted in the concept of the common good, and the original meaning of "judicial Power" in Article III, combine to require that judges overrule nonoriginalist precedents except when doing so would cause significant harm to the common good.\(^{318}\) When faced with a nonoriginalist precedent, a judge, exercising his habits of judicial virtue\(^{319}\) and utilizing the following three factors, must determine whether overruling the precedent would significantly harm the common good. The three factors are, (1) the degree to which the nonoriginalist precedent deviates from the Constitution's original meaning, (2) the degree to which overruling the precedent would harm rule-of-law values, and (3) the degree to which the nonoriginalist precedent instantiates nonlegal justice.\(^{320}\)

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312. See Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. CHI. L. REV. 1043, 1043-44 (1988); Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 COLUM. L. REV. 457, 457-59 (1994). Bruce Ackerman, of course, has built his dualist democracy conception on the claim that non-Article V amendments have, in fact, repeatedly occurred. ACKERMAN, TRANSFORMATIONS, supra note 70, at 350-75 (describing the process of non-Article V, New Deal constitutional "amendments").
313. Monaghan, supra note 308, at 121.
315. Strang, supra note 168.
317. See Ohio v. Roberts, 448 U.S. 56, 66 (1980) (permitting admission of an unavailable witness' statement against a criminal defendant because it bore "adequate indicia of reliability" (internal quotation marks omitted)), overruled by Crawford, 541 U.S. 36.
319. See id. at 484-86 (describing the judicial virtues necessary to make these determinations).
320. See id. at 472-79 (describing these factors in detail).
Originalism's ability to meet the challenge of change is augmented by its openness to nonoriginalist precedent. The third factor requires judges to evaluate how effectively the legal norm embodied in the nonoriginalist precedent rightly orders social relations. This inquiry encompasses the question of how well the norm fits today's society. If the norm fits changed conditions better than the original meaning, it is more likely to rightly order social relations and hence be retained.

The second factor will also, in many instances, counsel against overruling a precedent because doing so would harm rule-of-law values. In many areas of the law, nonoriginalist precedents have become embedded in the law, and social practices that fit the nonoriginalist precedents but fit less well the Constitution's original meaning, have encrusted themselves on the precedents. Overruling those precedents would, therefore, undermine rule-of-law values. This potential for harm to rule-of-law values counsels against overruling the precedents and therefore for preserving precedents that fit current social practices.

It is possible that the correct application of this methodology would permit a significant amount of nonoriginalist precedent to remain relatively undisturbed.321 There are significant reasons for thinking this is the case including the fact that many of the nonoriginalist precedents, and doctrines arose in response to (at least perceived) societal changes, and that some (or many) of these originalism can incorporate. The New Deal "transformation," for instance, was in large measure motivated, both on and off the Court, by changes in society.322 The Justices who participated in modifying constitutional doctrine repeatedly and explicitly invoked changed conditions as a justification.323 If in fact the nonoriginalist New Deal precedents are normatively attractive responses to societal change, then an originalism that can retain some of them is better able to meet the challenge of change.

IV. MEETING THE CHALLENGE OF CHANGE

The tools I outlined above provide originalism with the ability to change constitutional doctrine and other operative legal norms (such as

321. See id. at 480 ("[P]eople may have legitimate differences on the conclusion of this complex process.").


323. See, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41 (1937) (emphasizing the company's "national scale" and the national effect of its labor relations); West Coast Hotel, Co. v. Parrish, 300 U.S. 379, 390 (1937) (noting that "economic conditions ... have supervened" since the Court decided Adkins v. Children's Hospital, 261 U.S. 525 (1923)).
federal statutes) in response to changes in the broader society. They give
originalism the capacity to meet the challenge of change. A full account
on this point is beyond the scope of this Article. It would require a
description of the original meaning of all of the Constitution's provisions
(or at least the most important provisions), a recounting of societal
change (or at least the most important changes), and an explanation of
how the Constitution's original meaning accommodates the societal
change. However, below I will offer several reasons to think that
originalism can meet the challenge of change.

Despite the chorus of critics who argue that originalism fails as an
interpretative methodology because it cannot meet changed
circumstances, and the intuitive appeal of the criticism, it is a difficult
charge to measure. Even if there is rough agreement on the existence
and extent of societal change, whether a particular change or class of
changes necessitate alteration of constitutional norms is open to dispute.

By way of example, no one disputes that today's economy is more
urban, national in scope, interdependent, and dynamic than that of 1789.
However, those facts do not lead everyone to conclude that the
Commerce Clause's original meaning, which is more narrow than the
Supreme Court's current interpretation, \(^3\) is subject to criticism on that
basis. Instead, some argue that the Commerce Clause's original meaning
is either more normatively attractive than the current interpretation, \(^3\) or
that the failings of the originalist interpretation of the Clause are smaller
than the harm—however caused \(^3\) —that would arise by ruling contrary
to the original meaning. Others, of course, have come to the opposite
conclusion. \(^3\)

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324. See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 101 (2001) (“Congress has power to specify rules to govern the manner by which people may exchange or trade goods from one state to another, to remove obstructions to domestic trade erected by states, and to both regulate and restrict the flow of goods to and from other nations (and the Indian tribes) for the purpose of promoting the domestic economy and foreign trade.” (emphasis omitted)); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1454 (1987) (“The affirmative scope of the commerce power should be limited to those matters that today are governed by the dormant commerce clause: interstate transportation, navigation and sales, and the activities closely incident to them. All else should be left to the states.”).

325. Even Justice Thomas, likely the most rigorous originalist on the Court, voices concern over implementing the Commerce Clause's original meaning. See United States v. Lopez, 514 U.S. 549, 601 n.8 (1995) (Thomas, J., concurring) (“Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean.”).

326. Harm could be caused, for instance, to the legitimacy of the Court by an interpretation demonstrably at odds with the Constitution's original meaning, which many Americans believe is the Constitution's binding meaning. See Strang, *supra* note 168, at 473 n.391 (reviewing sources that support this proposition).

327. See Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the*
I will use four examples to test originalism's ability to meet the challenge of change using the tools outlined above. These examples involve aspects where many, especially originalism’s critics, believe that there are, first, changed social circumstances and, second, that these changes require changed constitutional meaning.

The Eighth Amendment’s Cruel and Unusual Punishment Clause provides a good vehicle to illustrate the role of legal standards in originalism. There has been significant debate over the Clause’s meaning and whether it is a principle of morality. Focusing on the portion of the Clause proscribing “unusual” punishments, recent scholarship has found that it prohibited punishments that were “‘contrary to long usage’ or ‘immemorial usage.’” On this reading, courts are directed to determine whether a challenged punishment is “consonant with our longstanding traditions.” Thus, if the challenged punishment was altogether new, or was meted out for a crime regarding which it had not traditionally been imposed, or was a traditional punishment that was no longer used, it was constitutionally “unusual.”

Courts can apply the legal standard embodied in the Clause to new punishments that the government may devise. Governments have been adept at devising new punishments and they have been aided by increased technical sophistication. Chemical castration, for instance, is a means to effect castration that states have recently begun to utilize given its new technical viability. An originalist court faced with an Eighth Amendment challenge to such a statute would apply the Clause’s standard—is this punishment of the sort traditionally prescribed?—to the new factual circumstance presented by chemical castration statutes. Reasonable judges may disagree over application of the standard but, in principle, originalism is able to tackle the challenge of change offered by the statutes.

The Equal Protection Clause may provide an example of the role abduced-principle originalism can play in elaborating the Constitution’s
original meaning. There is longstanding disagreement over the Clause's original meaning, and today scholars from many different perspectives have concluded that the history regarding the Clause's original meaning is opaque. As Christopher Wolfe concluded regarding Section I of the Fourteenth Amendment: "The original intention of the Fourteenth Amendment is not clear simply from a reading of it.... [T]he congressional debate on section I was quite limited.... There were contradictory statements about the meaning of different clauses, not just between the amendment's sponsors and opponents, but among its sponsors as well."

This opacity is in contrast to the Privileges or Immunities Clause. The Privileges or Immunities Clause received sustained attention during the debates over the Fourteenth Amendment, which explained its meaning. Further, it had a constitutional antecedent in Article IV, which had received sustained attention since 1789, upon which the framers and ratifiers of the Privileges or Immunities Clause could draw. Scholars, building on this, have reached—if not unanimity—then reasonable consensus on the Clause's original meaning.

The Equal Protection Clause did not receive significant attention during the framing and ratification debates and the Clause lacked antecedents. As a result, it is difficult to discern a coherent original meaning for the Clause. The framers and ratifiers clearly did, however, understand the Clause to prohibit and permit certain archetypal practices. For instance, the framers and ratifiers of the Clause intended


334. See, e.g., Christopher Wolfe, The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law 140–41 (rev. ed. 1994) ("There was clearly vagueness and some confusion in the minds of the framers about the actual language of the Amendment and its relationship to the original Constitution."); Rebecca E. Zietlow, Enforcing Equality: Congress, the Constitution, and the Protection of Individual Rights 56 (2006) ("The record is less clear [than the 1866 Civil Rights Act] with regard to which substantive rights [were] encompassed in the broadly worded provisions of the Fourteenth Amendment."); John Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L.J. 1385, 1397 (1992) ("Indeed, I hesitate to attribute to most participants in the framing and ratification of the Fourteenth Amendment any precise notion of the meaning of Section 1."); Earl M. Malz, The Concept of Equal Protection—A History of Inquiry, 22 San Diego L. Rev. 499, 540 (1985) (finding that the historical "evidence... is not entirely consistent" or is "simply ambiguous").


339. See Wolfe, supra note 334, at 140 (stating that the Clause "does not have a clear origin in a provision of the original Constitution").

340. See id. at 141 (finding that the Framers and Ratifiers had a "fairly clear" understanding of the
the Clause to eliminate the infamous Black Codes that Southern states adopted in the wake of the Thirteenth Amendment.\textsuperscript{341} Relatedly, they clearly aimed to ensure that state “lawmaking and law-enforcing machinery” was applied to all persons equally.\textsuperscript{342} The historical record is also fairly clear that the Clause permitted government to enact policies that uniquely benefited black Americans.\textsuperscript{343}

There were other practices that the framers and ratifiers understood the Clause to prohibit, permit, or require.\textsuperscript{344} These practices, regarding which there was a consensus, form the basis for an abduced legal norm. The norm must capture all of these practices. A possible approximation of the legal norm abduced from these archetypal practices would be that states must protect (and may foster) the civil rights of persons, but need not provide political rights.\textsuperscript{345} This norm, unlike the archetypal practices it is derived from, is applicable to new circumstances.

Congress’ use of conscription provides an example of constitutional construction helping originalism respond to new circumstances. The Constitution grants to Congress the powers to “raise and support Armies,” “provide and maintain a Navy,” and to “make Rules for the Government and Regulation of the land and naval Forces.”\textsuperscript{6} Most agree that these Clauses authorize Congress to enlist military personnel using voluntary means. This form of raising military personnel was used by Congress during the Antebellum Era.\textsuperscript{347}

\textsuperscript{341} Chester James Antieau, The Original Understanding of the Fourteenth Amendment 70–72 (1981); see also Robert J. Harris, The Quest for Equality: The Constitution, Congress and the Supreme Court 25 (1960) (stating that the “Black Codes[,] enacted in a number of southern states,...were designed to restore the substance of slavery in different forms by placing serious disabilities upon Negroes with respect to contract, ownership of property, access to courts, and the like”).

\textsuperscript{342} Wolfe, supra note 334, at 139.


\textsuperscript{344} Another example is that the framers and ratifiers did not understand the Equal Protection Clause to grant newly-freed black Americans the right to vote. Wolfe, supra note 334, at 138–39. This was accomplished by the Fifteenth Amendment, but the issue was central to the framing and ratification of the Clause and hence was an archetypal practice. Additionally, the framers and ratifiers saw ending the “failure [of states] to suppress private violence directed largely at Negroes” as another application the Clause would have. Harris, supra note 341. Further, they understood that the Clause would constitutionalize the 1866 Civil Rights Act. Id.

\textsuperscript{345} The distinction between civil and political rights, common at the time, included in the category of civil rights the common law rights to property, contract, and tort (and their enforcement), while political rights were those rights necessary to participate in political life, primarily voting. Antieau, supra note 341, at 18; Harris, supra note 341, at 28; William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine 125–27 (1988).

\textsuperscript{346} U.S. Const. art. I, § 8, cls. 12–14.

\textsuperscript{347} Selective Draft Law Cases, 245 U.S. 366, 384–86 (1918) (surveying Congress’ tools to raise
The question of whether or not Congress could use conscription to raise personnel for the military, however, arose in response to the new form of total war initially found in the Civil War and utilized much more robustly in the two World Wars. Total war presented a new circumstance not contemplated in 1787 to 1789, and many members of Congress (and of society more generally) believed that conscription was necessary to meet this new circumstance.

Congress' authority to construct constitutional meaning statutorily by instituting conscription enabled it to meet the challenges posed by total war. Keith Whittington has noted that the original meaning of these Clauses does not determinately answer whether or not Congress could use conscription. Consequently, the decisions by Congress to institute conscription represent a construction of the Clauses, a construction that overcame the challenge of change.

Preservation of nonoriginalist precedent is yet another tool originalists use to meet the challenge of change. As anyone who has taught administrative law will recognize, many have claimed that much of the subject matter of the course is inconsistent with the Constitution's original meaning. Some scholars have argued that administrative agencies, which blend legislative, executive, and judicial functions, violate the separation of powers. Others have suggested that the insulation of administrative agencies from the President's discretionary exercise of personnel and agency decision-making authority, especially in the context of independent agencies, violate Article II's requirement that the President wield all "executive Power." Still others have claimed that the broad delegations of legislative authority that have made the administrative state possible violate Article I's nondelegation principle.

On the other hand, proponents of originalism acknowledge that they face the widespread and plausible belief that societal change has made the continued existence of the administrative state normatively attractive. In this context, where there is deeply entrenched and widely

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348. By total war I mean warfare conducted using all of the available resources of a given society, where all of a society's servicemembers and materials are marshaled for the purpose of victory.
349. Selective Draft Law Cases, 245 U.S. at 386 (detailing Civil War conscription efforts).
351. WHITTINGTON, supra note 10, at 12 tbl.1.2.
355. See Eric R. Claeys, Progressive Political Theory and Separation of Powers on the Burger and Rehnquist Courts, 21 CONST. COMMENT. 405, 408–09 (2004) (noting that most scholars agree that "if the
relied-upon nonoriginalist precedent, originalism may counsel accepting this change to the Constitution's meaning.

I noted earlier that whether nonoriginalist precedent should be overruled depends on three factors: degree of departure from the Constitution's original meaning, harm to rule-of-law values that would be caused by overruling, and the nonlegal justness of the nonoriginalist precedent in question. Although I cannot defend this claim here, given the pervasive concern for the potentially tremendous harm to rule-of-law values caused by overruling the nonoriginalist precedent that legitimated the administrative state, it is likely that an originalist judge should not overrule those precedents. As Randy Barnett has observed, at least some aspects of the administrative state have induced reliance by citizens and originalism should respect those interests.

Assuming that the administrative state is normatively attractive, and given societal changes, originalism's ability to accommodate nonoriginalist precedent enables originalism to meet this challenge of change. In this instance, the meaning of the Constitution has effectively changed, and the new governing legal norms, embodied in the nonoriginalist precedent, adequately fit today's society.

I have shown that, using the tools I outlined above, originalism has the ability to meet the proffered challenges of change. This alone should make one wary of facile critical claims regarding originalism's ability to handle social change. In addition, however, given the theoretical capacity of originalism—using the six tools outlined above—to accommodate change, the burden is on originalism's critics. Critics must show that, in actual instances of social change, originalism must—in order to be a viable interpretative methodology—accommodate the change in question. They must show, for instance, that originalism's inability to meet the challenge of change on one or a host of issues, makes originalism more unattractive than alternative interpretative methodologies. To my knowledge, no such attempt has been made, and instead, critics often rely on superficial charges.

Even if it was shown that originalism could not accommodate an instance or instances of change, a critic would have to further establish that originalism could not adjust to the change to a sufficient degree. It might be the case that originalism's interpretative tools permit

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356. See supra Part III.G (describing how originalism accommodates nonoriginalist precedent); Strang, supra note 168, at 472–79.
357. Or, overrule and/or limit some precedent.
originalism to alter constitutional and other legal norms to some degree, but not to the ideal degree, the degree necessary to precisely fit changed circumstances. However, originalism may accommodate the change sufficiently such that the harm caused by originalism’s less precise fit with changed circumstances is acceptable, or at least acceptable in light of any costs incurred in achieving a better, more precise fit.

V. ORIGINALISM RETAINS CRITICAL BITE

An interpretative methodology must have critical bite. Critical bite is the characteristic of an interpretative methodology to do more than simply describe and restate the subject data. An interpretative methodology without critical bite would equate the Constitution’s meaning with whatever the Supreme Court rules is the Constitution’s meaning. It would not have the ability to criticize decisions as wrongly interpreting the Constitution. As a result, it would not be able to account for many of the established facets of our legal practice such as dissents, overruling precedent, and “retroactive” application of legal norms articulated in a decision.  

Originalism, even with its tools to meet the challenge of change, retains critical bite. Where there is a coherent, determinate original meaning, and where there is determinate abducted-norm original meaning, the Constitution’s original meaning presumptively governs.

The Constitution’s original meaning is often critical of current constitutional law. Large swaths of constitutional law are inconsistent with the Constitution’s original meaning, and originalism will remain critical of them.

In fact, many critics who employ the challenge of change are unhappy with originalism precisely because it contains more than de minimis critical bite. One possible example of this phenomenon is the recent proliferation of originalisms that go by various labels: “moderate,” “abstract,” “liberal,” “semantic,” and “broad.”


360. By constitutional law I mean what the Supreme Court has held the Constitution means. See Fallon, Jr., supra note 3, at 111 (describing “the unwritten constitution,” which is comprised, in part, of judicial precedent).

361. Strang, supra note 168, at 430–32 (describing the large amount of nonoriginalist precedent).

362. See Randy E. Barnett, An Originalism for Nonoriginalists, 45 Loy. L. Rev. 611, 618–19 (1999) (suggesting that if originalism had not become more compatible with “liberal” political views in the legal academy, it would not have grown in acceptance as it has).

363. See Barnett, supra note 8, at 91; Jack N. Rakove, Fidelity Through History (or to It), 65 Fordham L. Rev. 1587, 1592 n.14 (1997) (“[T]he turn to originalism seems so general that citation is almost beside the point.”).

364. Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204,
among others. Each of these originalisms seeks to, in the words of Jack Balkin—himself an "abstract" originalist—avoid "chaining ourselves to the original understanding [that] will leave our Constitution insufficiently flexible and adaptable to meet the challenges of our nation's future." Each of these originalisms has mechanisms that allow its proponents to avoid the critical bite that is unpalatable with standard originalism. Again, Balkin sees this. His "abstract" originalism permits the Constitution to "evolve over time,... leaving to each generation the task of how to make sense of the Constitution's words and principles."

Critical bite is one of originalism's primary virtues because it can constrain and channel legal change, thereby avoiding the problems associated with legal change prompted by "the passions of the moment." Entrenching constitutional meaning in the Constitution's original meaning forces legal change to occur only after prolonged societal reflection, and hopefully consensus, on the proposed change to constitutional meaning. To a certain extent, therefore, the more critical bite originalism retains, even with its tools of change, the greater its ability to encourage popular deliberation over legal change.

More importantly, originalism's critical bite calls our constitutional legal practice back to legitimacy. It stands as a reminder of constitutional meaning appropriately rooted in and respectful of the Framers' and Ratifiers' authority to make authoritative decisions for our society's pursuit of the common good.

CONCLUSION

In this Article, I argued that originalism has, within its analytical quiver, six tools that permit it to effectively surmount the challenge of
change. I described those mechanisms, paying particular attention to abduced-principle originalism because of the novelty of its articulation. I also argued that, given these tools, originalism is able to meet the challenge of change, at least sufficiently to permit originalism to remain a viable candidate for the best interpretative methodology. Lastly, I argued that originalism retains sufficient critical bite such that it remains a principled interpretative methodology.
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