

RESPONDING TO A SHIFT IN THE TECTONIC PLATES OF CONSTITUTIONAL INTERPRETATION: THE FRAMERS' BENCHMARK FOR A MINIMUM ACCEPTABLE THEORY

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The tectonic plates of constitutional interpretation are once again shifting.¹ Originalism and Living Constitutionalism have long been the settled ground upon which decades of decisions have been reached and rationalized. These theories have withstood tremors of discontent and shocks over underlying principles.² Still, they have not meaningfully drifted nor been dislodged.³ The resulting stability has been self-reinforcing. For example: originalist opinions today become tomorrow's precedent; dicta extolling the proper analysis under Living Constitutionalism in a recent decision forms the basis for a law school class discussion in the future, etc.

All else equal, this interpretative entrenchment has a number of benefits with respect to a constitutional order. Beyond offering some degree of predictability to parties and the public, the longevity of this interpretative period has permitted a fuller and more thoughtful

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1. See J. Joel Alicea, *Practice-Based Constitutional Theories*, 133 YALE L. J. 568, 572–73 (2023) (“[W]e appear to be entering a period of rapid and significant change in the practices surrounding constitutional adjudication.”); see also William A. Kaplin, *The Process of Constitutional Interpretation: A Synthesis of the Present and a Guide to the Future*, 42 RUTGERS L. REV. 983, 987 (1990) (suggesting that prior to the late 1950s scholars allocated comparatively less attention to theories of interpretation, which were fewer in number then); cf. CASS R. SUNSTEIN, HOW TO INTERPRET THE CONSTITUTION 9–10 n.5 (2023) [hereinafter, SUNSTEIN HOW TO] (contending that “the reasonable candidates for a theory [of interpretation] that an external observer might favor are already present[.]”).

2. See, e.g., Lawrence Solum, *Legal Theory Lexicon: Living Constitutionalism*, LEGAL THEORY BLOG (Nov. 25, 2018), <https://lsolum.typepad.com/legaltheory/2018/11/legal-theory-lexicon-living-constitutionalism.html> [hereinafter Solum *Lexicon*] (outlining the manifold versions of each major theory of interpretation).

3. *Id.*

analysis of each theory.⁴ But years of application to increasingly complex cases have come at a cost: the creation of a longer record from which critics and opponents can identify interpretative limits and errors. The Court's decision in *Bostock v. Clayton County*,⁵ for instance, caused an earthquake among originalists concerned that the theory did not necessarily bring about their ideological desires.⁶ Likewise, some proponents of Living Constitutionalism recognized the theory's limits upon the Court overturning *Roe v. Wade*.⁷ These two decisions have exacerbated feuds within interpretative camps and accelerated the tension between the respective camps.⁸

In the tumult of interpretative disarray and dissension, a new landmass has formed in the form of a novel and burgeoning theory of interpretation. "Common Good Constitutionalism," as coined and expounded on by Adrian Vermeule,⁹ has attracted significant scholarly and popular attention.¹⁰ Other tectonic activity suggests that this may be the first among many theories seeking to claim more interpretative territory.¹¹ Constitutional scholars, perhaps sensing the shifts underway, have started examining what qualifies as a "good" or acceptable theory of constitutional interpretation.¹²

This essay contributes to that effort by detailing the Founder's Benchmark for a Minimum Acceptable Theory ("MAT"). Though the Framers themselves lacked an accepted, coherent interpretative theory,¹³ they designed the Constitution with three specific principles in

4. See Alicea, *supra* note 1, at 577.

5. 590 U.S. 644 (2020).

6. Compare Senator Josh Hawley, Address to the Senate (June 16, 2020) (speaking on how *Bostock* "represents the end of the conservative legal movement"), with Mark Tushnet, *Bostock and Originalism*, YALE UNIV. PRESS, (July 15, 2020), <https://yalebooks.yale.edu/2020/07/15/bostock-and-originalism>.

7. Frederic J. Frommer, *Justice Ginsburg Thought Roe was the Wrong Case to Settle Abortion Issue*, WASH. POST (May 6, 2022), <https://www.washingtonpost.com/history/2022/05/06/ruth-bader-ginsburg-roe-wade>.

8. Caitlin B. Tully, *The Liberal Giant Who Doomed Roe*, SLATE (June 25, 2023), <https://slate.com/news-and-politics/2023/06/john-hart-ely-dobbs-roe-legacy.html> (discussing tensions among lawyers on the left side of the political spectrum).

9. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION (2022).

10. See, e.g., William Baude & Stephen Sachs, *The "Common-Good" Manifesto*, 136 HARV. L. REV. 861 (2023).

11. See Solum *Lexicon*, *supra* note 2; see generally Cass R. Sunstein, *Thayerism*, (Sept. 14, 2022) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4215816) [hereinafter Sunstein *Thayerism*].

12. Compare Kenneth R. Thomas, *Selected Theories of Constitutional Interpretation*, CONG. RSCH. SERV., Feb. 15, 2011 ("Whether it is necessary to have a unified method of constitutional interpretation to analyze all aspects of the Constitution is itself a matter of debate."), with Cass R. Sunstein, *"Fixed Points" In Constitutional Theory* at 2 (Harv. Pub. L. Working Paper, Paper No. 22-23, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4123343, [hereinafter Sunstein *Fixed*] (arguing that judges inevitably must choose between different theories of interpretation based on the consequences of those choices).

13. See Kaplin, *supra* note 1, at 983; cf. SUNSTEIN HOW TO, *supra* note 1, at 21 ("Since the founding of the American Republic, there have been many such theories [of interpretation].")

mind: maintenance of a workable government,¹⁴ avoidance of unchecked or arbitrary power,¹⁵ and recognition of the people as sovereigns.¹⁶ The MAT identifies cases aligned with those principles and gauges whether a theory would reach the result intended by the letter and spirit of the Constitution.

Other benchmarks can and should develop to test the merits of different theories of interpretation.¹⁷ The MAT, though, should be a part of any such testing. A theory that fails these conditions is likely to direct the law and, by extension, the American public away from the core tenets of our Constitution.¹⁸ That said, the cases relied on here to benchmark a theory against the MAT should not be regarded as final. I welcome scholarly deliberation on which cases (and opinions) best assess a theory's fidelity to the letter and spirit of the Constitution.

This article proceeds in three parts. Part I provides background on theories of interpretation and their two features: descriptive components and normative ends. It includes a review of the need for and nature of theories of constitutional interpretation as well as an introduction to the Basic Requirements of such a theory: specifically, understandability, replicability, and practicality. Part I concludes with an overview of why theories that rely on fixed sources of evidence and specify objective normative ends better align with those Basic Requirements.

Part II reviews the need for assessments of theories of interpretation and examines the usefulness of Cass Sunstein's "fixed points" assessment. Finding Sunstein's assessment inadequate, Part III introduces and explains the Minimum Acceptable Theory discussed above. It argues that Sunstein's test does little to meaningfully evaluate theories because it only provides an indication of whether that theory aligns with the ideological preferences of the assessor. The MAT, in contrast, offers a narrower and more objective benchmark: whether the theory aligns with three aspects of the spirit of the Constitution. Part IV concludes with questions ripe for additional inquiry by scholars.

14. THE FEDERALIST NO. 4 (John Jay); NO. 37 (James Madison); NO. 78 (Alexander Hamilton).

15. THE FEDERALIST NO. 9 (Alexander Hamilton).

16. THE FEDERALIST NOS. 45–51 (James Madison).

17. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989) (listing "consistency and predictability" as important values for assessing a theory of interpretation); Sunstein *Fixed*, *supra* note 12, at 2.

18. See James F. Byrnes, *The Constitution and the Will of the People*, 25 AM. BAR ASS'N J. 667, 667 (1939) (contending that '[m]ost of our constitutional changes . . . have come about through judicial construction,' though acknowledging that these changes do not qualify as Article V amendments); see also THE FEDERALIST NO. 9 (Alexander Hamilton) (enumerating five distinguishing factors of America's republic, including checks and balances, separation of powers, an independent judiciary, a representative form of government, and the applicability of that form of government to more territory and people).

I. BACKGROUND ON THEORIES OF INTERPRETATION

Defined, accepted, and implemented theories of interpretation did not come into being upon the ratification of the Constitution.¹⁹ Following the Court seizing the power of substantive judicial review in *Marbury v. Madison*, however, jurists soon needed some approach to evaluate the merits of different laws rather than merely assessing the procedures used to enact those laws.²⁰ Jurists did not readily adopt any one theory.²¹ This Part initially covers the need for such theories. Next, it introduces the core components of any such theory and argues that theories should prioritize consideration of certain descriptive components and avoid pursuit of normative ends. Finally, it reviews the extent to which popular theories heed that guidance.

Before moving on, it is important to briefly explore the proper scope of judicial review in our constitutional order.²² The scope of judicial review has been subject to tremendous debate.²³ More specifically, whether the judiciary should have the final and authoritative say over “what the law is” has been contested since the founding.²⁴

Despite aspects of the proper role of the judiciary being continually challenged, consensus has emerged around a few aspects of that role: first, that the Constitution, given that it is the “basis on which the whole American fabric has been erected,”²⁵ stands apart from other sources of law and, consequently, deserves special treatment from judges;²⁶ and, second, judges have an obligation to “decide cases on the basis of public and predictable rules, applied in an even-handed manner, upon which persons can rely in the conduct of their lives.”²⁷ What is less agreed upon is under which circumstances, if any, judges ought to regard the Constitution as a sword that steers the country toward lofty, unwritten ends such as “justice” or as a

19. See Sunstein *Thayerism*, *supra* note 11, at 3 (noting that the Framers disputed the extent of judicial review and did not have an agreed upon and explicit theory or theories of interpretation).

20. See *The Court and Constitutional Interpretation*, SUP. CT. (last accessed Feb. 21, 2024), <https://www.supremecourt.gov/about/constitutional.aspx> (“[I]t is evident that constitutional interpretation and application were made necessary by the very nature of the Constitution.”).

21. See Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L. J. 73, 80–81 (2003).

22. See *infra* Part III.

23. See Sunstein *Thayerism*, *supra* note 11, at 3.

24. See generally William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L. J. 1, 3 (1969).

25. *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

26. Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 15 (1990); THE FEDERALIST NO. 78 (Alexander Hamilton) (“A constitution is, in fact, and must be regarded by the judges, as a fundamental law.”).

27. Post, *supra* note 26, at 16.

shield that prohibits certain outcomes but otherwise permits the political branches and people authority to direct the country.²⁸

As will be detailed below,²⁹ a comparison of the Articles of Confederation (“the Articles”) with the Constitution suggests the framers conceived of the Constitution as a shield. Any other approach necessarily infringes on the power of the political branches, states, and, most importantly, people to shape their government. Judicial decisions seeking and reaching subjective goals have two detrimental effects: with respect to the issue at hand, such decisions make it harder to redirect the country toward the will of the people, which imposes the burden of contesting those decisions on the public; and, with respect to the constitutional order, such a practice cements a flawed practice of judicial amendment of the Constitution, which decreases an already diminishing use of Article V’s amendment provisions, as intended by the Framers.³⁰

Judicial review, of course, is here to stay. Defenders of the constitutional order have a responsibility to make sure that judicial review relies on theories that align with both our legal system and the spirit of the document itself. The remainder of this Part addresses that first requirement.

A. *The Need for and Nature of Theories of Constitutional Interpretation*

The need for cognizable theories of interpretation emerges from at least two facts: first, the Constitution lacks sufficient clarity to allow for a purely textual analysis;³¹ and, second, our lower-case constitutional order (and, generally, the Rule of Law) mandates that jurists explain their reasoning—an obligation that includes discussion of their interpretative choices.³²

Resolution of ambiguity and explanation, though, are not sufficient for an acceptable theory. Perhaps it goes without saying, but theories must also be understandable, replicable and consistent, and practical.³³ An understandable theory is one with a methodology and set of aims capable of being grokked, minimally, by jurists and advocates and, ideally, by laypeople. A confusing or incomplete theory does little to resolve ambiguity. To the extent it does provide any clarity, it will likely be fleeting because its value will diminish as norms, values, and conditions change.

28. See Byrnes, *supra* note 18, at 671 (“There can be no justification for pessimism regarding the future of constitutional government in these United States unless it is based on the theory that the Constitution should be the weapon and the court the agency by which the will of the people must be defeated.”).

29. See *infra* Part III.

30. See *infra* Part III.

31. Post, *supra* note 26, at 14 (“A meaning [of a constitutional provision] that has ceased to be plain cannot be made so by sheer force of will.”).

32. Post, *supra* note 26, at 14–15; see Byrnes, *supra* note 18, at 668 (explaining the importance of courts thoroughly detailing their reasoning).

33. See Post, *supra* note 26, at 16–17.

A replicable and consistent theory, upon being applied by two different interpreters, leads to similar conclusions.³⁴ Theories subject to a wide range of outcomes when applied to the same facts avoid robust assessment because, in practice, that single theory is actually several, if not a dozen, different theories depending on the interpreter.

Finally, a practical theory proves useful to jurists and advocates alike. This requirement depends on several factors. For one, if a theory does not respect the institutional capacity of courts—i.e., constraints on the time and resources available to judges and clerks, then its value will wane. The usefulness of a theory also diminishes if advocates cannot rely on it to shape arguments grounded in positive law that comport with our adversarial adjudicatory system. Theories carry the additional burden of supporting the legitimacy of the Constitution.³⁵ Even a thorough explanation of an otherwise arbitrary decision or of a decision that is contrary to the “letter and spirit”³⁶ of the Constitution is unacceptable.³⁷

To summarize, patent and latent ambiguity in the Constitution necessitates the use of theories of interpretation. Respect for the fairness and legitimacy concerns inherent to our constitutional order and the Rule of Law requires users of these theories to justify the use of that theory as well as explain how it was applied. Whether a theory deserves adoption hinges on several considerations. Adoption turns on a theory’s adherence to what I call the “Basic Requirements”: understandability, replicability and consistency, and practicality. The next section analyzes what constitutes fulfillment of those Basic Requirements.

B. *Classifying Theories of Interpretation*

All constitutional theories have two features that correspond to the Basic Requirements.³⁸ The first feature is the descriptive component of a constitutional theory—“acknowledg[ment of] certain features of the constitutional order as social realities that exist apart from what *ought* to be the case.”³⁹ The second feature is the normative ends or dead ends set by that theory.⁴⁰ Normative ends include any ideological, policy, or moral goal that turn on a subjective belief

34. See *id.* (reasoning that any group of law students could apply clear theories independently to reach the same conclusion).

35. See Alicea, *supra* note 1, at 623–25; Kaplin, *supra* note 1, at 983 (“Interpretation . . . goes to the heart of the matter. It is through the process of interpretation that we give meaning and therefore life to the Constitution.”).

36. Vanhorne’s Lessee v. Dorrance, 2 U.S. 304, 310 (1795); Ware v. Hylton, 3 U.S. 199, 249,251 (1796) (Paterson, J., concurring) (supporting an interpretation of an “instrument” based on its “letter and spirit”); see Martin v. Hunter’s Lessee, 14 U.S. 304, 351 (1816); M’Culloch v. Maryland, 17 U.S. 316, 421 (1819).

37. See *infra* Part III.

38. Alicea, *supra* note 1, at 581.

39. *Id.* at 579.

40. *Id.*

in how the world ought to be. Normative dead ends, on the other hand, refers to states of the world that ought to be avoided. As explained in the remainder of this section, what a theory lists among its descriptive components and regards as its normative (dead)ends determines whether that theory satisfies the Basic Requirements of an interpretive framework.

i. Descriptive Components

A descriptive component is one that adherents to that theory regard as necessary to consider in any constitutional interpretation. The weight of that consideration, though, may vary. The text of the Constitution, for instance, at least minimally informs “any plausible constitutional theory.”⁴¹ Many theories likewise give some authority to intent expressed by drafters.⁴² A theory’s set of descriptive components and the weight afforded to those components can significantly shape the sort of interpretations reached by that theory.⁴³

There is no explicit prohibition on the sorts of interpretative evidence a theory can regard as a descriptive component. Some components, such as the text of a document, are fixed. Components of this kind will be viewed and applied in the same way by any interpreter.⁴⁴ For sake of illustration, unambiguous text as a descriptive component should evade distortion. Such text has the same meaning whether you apply Common Good Constitutionalism, Living Constitutionalism, Originalism, or some other theory.⁴⁵

Other components, like the intentions of drafters, are far more variable. Different interpreters, for example, may rely on different evidence of those intentions.⁴⁶ The same outcome may occur with respect to descriptive components that may change in quality or quantity over time (i.e., documents may get lost, destroyed, or damaged, become harder to interpret, lose (or gain) credibility, etc.). The upshot is that variable descriptive components diminish the consistency and uniformity of a theory of interpretation.

Given the choice between a theory that consulted more variable descriptive components, placed more interpretative weight on those components, and a theory that instead relied more on fixed descriptive components, preference should be given to the latter. Comparison of theories on different ends of the fixed-variable descriptive component spectrum against the Basic Requirements makes this

41. *Id.*

42. *See generally* Sunstein *Fixed*, *supra* note 12, at 5–9 (summarizing various theories of interpretation).

43. *See* Kaplin, *supra* note 1, at 988 (“Primary sources in the law are the root sources—the original raw material from which all interpretation derives.”).

44. *See* Sunstein *Fixed*, *supra* note 12, at 1.

45. *See generally id.* at 5–9 (defining various theories of interpretation and applying arguments regarding fixed points).

46. *Id.*

clear. With respect to understandability, replicability and consistency, and practicality, a theory with greater emphasis on fixed descriptive components will earn higher marks.

ii. Normative (dead)ends

Unlike descriptive components, which are always necessary for the reasoned resolution of ambiguity (a theory cannot, for instance, clarify the meaning of “high crimes and misdemeanors”⁴⁷ without consulting the text or other evidence), normative ends are not always required to answer an interpretive question. By way of example, if the text itself is clear (i.e., a member of the House cannot be under the age of twenty-five), then the interpreter need not examine normative ends to conclude whether that is the “best” interpretation. For sake of clarity, the term “normative ends” refers to the aims of theory, if any.⁴⁸ A theory with no affirmative ends but rather a set of outcomes it seeks to avoid can be thought of having normative dead ends. A theory’s interpretative aim (or lack thereof) is important because that goal will inform which descriptive components it consults, how it weighs those components, and what justifies use of that theory over others.⁴⁹

Akin to descriptive components, normative ends also fall along a spectrum. In this context, that spectrum spans from objective to subjective.⁵⁰ Stability as manifested through adherence to *stare decisis*, in comparison to alternatives, tends to be more objective as an aim of interpretation.⁵¹ In contrast, whether an interpretation aligns with a set of canonical cases or “fixed points,” as defined by any interpreter, constitutes a subjective normative end given the dearth of limits as to which cases may be selected for inclusion.⁵²

When assessed against the Basic Requirements, an objective set of normative ends or dead ends wins out. A subjective set is likely to be less understandable. As explored further below,⁵³ absent a lengthy explanation (and perhaps even with it), why one person’s set of canonical cases or fixed points is preferable to those identified by another may be unclear to legal actors. In contrast, objective normative ends can undergo open and meaningful challenges such that

47. See Amy McKeever, *Here’s how Scholars Interpret ‘Treason, Bribery, or Other High Crimes and Misdemeanors’*, NAT’L GEOGRAPHIC (Jan. 13, 2021), <https://www.nationalgeographic.com/history/article/how-scholars-interpret-treason-bribery-high-crimes-misdemeanors>.

48. Cf. Alicea, *supra* note 1, at 579 (asserting that all theories have a normative aim because their adherents seek judges and other actors to adopt their respective theory).

49. *Id.* at 579–80.

50. Cf. Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of “This Constitution”*, 72 IOWA L. REV. 1177, 1192 (1987) (asserting that the line between subjective and objective theories of interpretation “is illusory and does not accurately describe the current line of division” between proponents of different theories).

51. See David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 YALE L.J. 1717, 1740–41 (2003); see also Alicea, *supra* note 1, at 586.

52. See *infra* Part II.

53. See *infra* Part II.

their content can be clarified over time in line with the Basic Requirements.⁵⁴

Subjective normative ends also perform worse with respect to replicability and consistency for the same reason such ends tend to evade understandability. Judges are not robots that can ignore their prior experiences nor entirely eliminate their biases.⁵⁵ Subjective ends invite or, minimally, allow judges to consider those idiosyncrasies.⁵⁶ A more concise and specific normative end or dead end can diminish the distortive effect of a judge's unique experiences and perspectives.

Finally, a subjective set of normative ends is less practical. This is the case because arguing for that set of aims is arguing for one's personal view of the law—generally not the sort of argumentation that is favored by jurists nor practiced by advocates.⁵⁷ The subjective goals of individuals, civic groups, and the public writ large should inform governance through the political process, not the courts.⁵⁸

On the whole, theories that consult fixed descriptive components (or afford them more weight) and objective normative ends or dead ends seem most likely to satisfy the Basic Requirements. The next section reveals that few popular and emerging theories of interpretation. Particular focus is directed to Common Good Constitutionalism, Living Constitutionalism, and Originalism, each of which rely on both fixed descriptive components and objective ends.

This finding matters for two reasons. First, it means that the most commonly used theories lack the fundamental elements of a sound interpretative framework. Common Good Constitutionalism, Living Constitutionalism, and Originalism may not reliably and clearly resolve ambiguity and, to the extent that they do, jurists and other legal actors may have difficulty justifying and explaining their use of that particular theory. Second, and more problematically, use of subjective normative ends by Common Good Constitutionalists and Living Constitutionalists threaten to violate the “letter and spirit” of the Constitution by significantly infringing upon the sovereignty of the people.⁵⁹ This latter issue is addressed more fully in Part II.

54. See *supra* Part I (B).

55. Justin D. Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 Fla. L. Rev. 63, *passim* (2017).

56. See Byrnes, *supra* note 18, at 670 (maintaining that because “judges are human” their respective interpretations of the Constitution will not be entirely neutral).

57. See *infra* Part II.

58. See Eugene W. Hickok, Jr., *The Birth of the “Living” Constitution*, 14 COLONIAL LAWYER 6, 12 (1984) (“Under a republican constitution, public opinion matters, and the Court, as one of three political institutions, has always, after a fashion, reflected prevailing public sentiment. But the institution devised by the framers for insuring that public opinion influences government is the legislature, not the Court.”).

59. See *infra* Part III.

C. *The Descriptive / Normative Framework Applied to Common Good Constitutionalism, Living Constitutionalism, and Originalism*

Application of this fixed/variable descriptive component and objective/subjective normative end framework to existing, popular theories demonstrates that no such theory is well-positioned to satisfy the Basic Requirements. For the sake of simplicity, I describe the theories in broad terms. I encourage other scholars to contest both how these theories are defined here as well as my rationale for placing them in their respective positions within the Basic Requirements framework. Such debate should produce clearer understandings of the theories and foster necessary conversation about their respective descriptive components and normative ends.

i. Common Good Constitutionalism

Common Good Constitutionalism, according to its main exponent Adrian Vermeule, directs legal actors to apply “core precepts of the classical legal tradition” to constitutional questions.⁶⁰ Though Vermeule introduced the theory in April 2020,⁶¹ Common Good Constitutionalism has already generated substantial scholarly analysis and popular interest.⁶² This amount of attention combined with the dearth of case law applying the theory renders Common Good Constitutionalism ripe for analysis pursuant to both this framework and, as set forth below, to the MAT.⁶³

Popular attention to Common Good Constitutionalism suggests that it may have legs as an alternative to Living Constitutionalism and Originalism.⁶⁴ If that is indeed the case, then it is important to assess the theory’s strengths and weaknesses prior to widespread adoption by jurists. Moreover, the absence of consideration of the theory in case law means that it remains relatively untainted by a diversity of interpretations.⁶⁵ Untainted and untested by myriad applications,

60. Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL’Y 103, 106 (2022).

61. Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/> [<https://perma.cc/KWB5-DMJH>].

62. See, e.g., Brian Leiter, *Politics by Other Means: The Jurisprudence of “Common Good Constitutionalism”*, 90 UNIV. CHI. L. REV. 1685 (2023); Ian Ward, *Critics Call it Theocratic and Authoritarian. Young Conservatives Call it an Exciting New Legal Theory.*, POLITICO (Dec. 12, 2022), <https://www.politico.com/news/magazine/2022/12/09/revolutionary-conservative-legal-philosophy-courts-00069201>; Samantha Perri, *The Corporate Origins of Common Good Constitutionalism*, FLAW (Jan. 25, 2023), <https://theflaw.org/articles/the-corporate-origins-of-common-good-constitutionalism>.

63. See Ward, *supra* note 62.

64. See *id.*

65. As of February 26, 2024, a LexisNexis search conducted for cases referring to “Common Good Constitutionalism” turned up zero responses. *But see* Casey & Vermeule, *supra* note 60, at 107 (arguing that many legal scholars have started incorporating the framework into their scholarship).

the theory is more easily analyzed and provides a good case study for how other novel theories may be assessed down the road.⁶⁶

With respect to descriptive components, Common Good Constitutionalism falls somewhere between “fixed” and “variable.”⁶⁷ On the one hand, the theory explicitly identifies an explicit universe of interpretative sources.⁶⁸ One such source is the idea of virtue of *epikeia*, which relates to legal justice and, when properly applied, aids a legal actor in interpreting the “literal text to track a reasonable account of the common good.”⁶⁹ The tenets and principles of the classical legal tradition represent another source: Vermeule argues that the American constitutional order rests, not upon positive law, but upon the *ius gentium*⁷⁰ or “the law of nations or peoples.”⁷¹ He supports this claim, in part, by highlighting several specific instances in which U.S. Supreme Court Justices have informed their interpretation by consulting that alternative body of legal principles.⁷² Finally, Common Good Constitutionalism consults two additional sources: *ius naturale*, or natural law for background principles,⁷³ and “the overarching principle of *bona fides*, good faith.”⁷⁴

On the other hand, whereas Vermeule regards components like *epikeia* as fixed⁷⁵ and has no problem identifying a “body of hard-won and deeply-embedded principles and policies,”⁷⁶ scholars have contested Vermeule’s conception of these components as stagnant, identifiable, and reliable.⁷⁷ And, tellingly, observers of the Supreme Court do not share in Vermeule’s characterization of certain cases as emblematic of judicial recognition of the classical legal tradition.⁷⁸ Most problematic for Vermeule, is the idea of another source of law beyond the Constitution is antithetical to the Framers’ understanding

66. *But see* Casey & Vermeule, *supra* note 60, at 107 (arguing that many legal scholars have started incorporating the framework into their scholarship).

67. Brennan Buhr, *Making Judges Moral: Originalism and the Practice of Common Good Constitutionalism*, 37 NOTRE DAME J. L. ETHICS & PUB. POL’Y 582, 590 n.37 (2023).

68. Peter Leithart, *Common Good Constitutionalism*, THEOPOLIS (Sept. 19, 2022), https://theopolisinstitute.com/leithart_post/common-good-constitutionalism.

69. VERMEULE, *supra* note 9, at 77–78.

70. *Id.* at 85.

71. *Id.* at 3.

72. *See generally id.* at 61–89 (analyzing Justice Harlan’s dissent in *Lochner*, the majority and dissent in *Riggs v. Palmer*, and in *United States v. Curtiss-Wright Export Co.* and arguing that certain opinions within those cases explicitly consider the descriptive components at the foundation of Common Good Constitutionalism).

73. *Id.* at 79.

74. *Id.* at 70.

75. VERMEULE, *supra* note 9, at 79 (asserting that *epikeia* is “not the use of individualized standards of value” and is instead “bounded by its own intrinsic limits.”).

76. *Id.* at 68.

77. *See* Leiter, *supra* note 62, at 1692–93 (discussing the difficulty of defining related concepts such as “the moral well-being” of the community).

78. VERMEULE, *supra* note 9, at 72 (acknowledging that legal scholars have a very different understanding of the reasoning behind the majority and dissent in *Riggs*).

as written text with a definite and complete meaning.⁷⁹ With respect to normative (dead)ends, the theory ends up on the “subjective” side of the ledger despite claiming to be “objective.”⁸⁰ Early adopters of Common Good Constitutionalism assert that the theory merely seeks the ends set forth by the classical legal tradition.⁸¹ Attempts to frame this as an objective pursuit emphasize that the theory mandates fidelity to an independent and (to some) immutable external body of law.⁸² Vermeule writes that application of the theory boils down to “adapting” and “harmonizing” positive law to background norms with ancient roots.⁸³ But analysis of those ends cannot simply take Vermeule and others at their word. Such a termination would incorrectly label a theory that incorporates by reference an externally determined “end” as objective even if that end is in and of itself subjective.

Vermeule’s anticipated application of Common Good Constitutionalism by judges makes the subjective nature of the theory’s ends even more apparent. The primary tasks of a jurist employing Common Good Constitutionalism include:

ask[ing] what the public authority has done by ascertaining what the authority has said; and secondarily . . . ask[ing] whether the court faces a nonstandard case in which the authority’s rational ordering *for the common good* has been imperfectly captured by what the authority has said, read in light of larger background principles.⁸⁴

The relative clarity and simplicity of this framework gives the impression of jurists having their discretion cabined. Vermeule maintains that judges employing the theory “are not to directly decide for themselves . . . what the common good requires.”⁸⁵ Yet, he does not deny that the “harmonization” of the law to that common good necessitates that the judge identify what constitutes the common good and whether it has been “captured.”⁸⁶ If the common good were in-

79. See William Pryor Jr., *Politics and the Rule of Law*, HERITAGE FOUND. (Oct. 20, 2021); Christopher R. Green, *“This Constitution”: Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1674 (2009) (concluding that the Constitution’s text assumed its meaning at the time of the Founding); see also Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1738, 1754 (2007) (“The aim of interpretation is to understand the constitutional commitments that have actually been made by the American people in history, not the commitments that one or another philosopher thinks they should have made.”).

80. See generally Leiter, *supra* note 62, at 1700.

81. Casey & Vermeule, *supra* note 60, at 104–05 (defining common good constitutionalism as “nothing more than the core precepts of the classical legal tradition translated, adapted and applied to current constitutional debates.”).

82. See VERMEULE, *supra* note 9, at 90.

83. *Id.*

84. *Id.* at 83.

85. *Id.*

86. *Id.*

deed fixed, well-known, or at least broadly agreed upon, then perhaps Vermeule and others could accurately conceive of this an objective task but, as made clear by Brian Leiter, no such conception of the common good exists.⁸⁷

Leiter challenges the idea of a shared common good by looking for (and failing to find) some underlying rationale for things Vermeule situates in that category.⁸⁸ Vermeule, as understood by Leiter, lists “a system of military honors, the moral well-being of the community [and the environment], and the protection of certain truths, including perhaps religious ones” as features of the common good.⁸⁹ No clear rationale explains this specific list.⁹⁰ Instead, it appears as though Vermeule has crafted the common good to fit his picture of an ideal community (other legal actors using the theory seem likely to do the same).⁹¹

Though proponents of this theory argue that these ends do not amount to “whatever subjective preferences any particular official might desire to impose,” their argument in the alternative is not persuasive.⁹² They maintain that the framework requires legal actors to consult a “millennia-old legal framework, worked out over time by a succession of the greatest lawyers in Europe, the British Isles, and the Americas.”⁹³ Yet Common Good Constitutionalism subscribers fail to acknowledge that just because an end has been refined over time does not render that an objective end.⁹⁴

If Vermeule is taken at his word, this theory may reduce some subjectivity by more or less requiring actors to view the law through a Western lens; however, the use of that perspective does not prevent actors from nevertheless interpreting the Constitution in a highly subjective manner.⁹⁵ Casey and Vermeule admit as much when they quickly cite “an extremely rich and extensive philosophical debate in the natural law tradition” over what constitutes human flourishing.⁹⁶ Rather than attempt to aid legal actors in how to consistently and logically resolve issues in light of that debate, Casey and Vermeule provide a breezy overview of the idea of flourishing and a bespoke conception of the common good.⁹⁷

Incorporation of the classical legal tradition by Common Good Constitutionalism prompts its adherents, including judges, to read “substantive moral principles that conduce to the common good”

87. Leiter, *supra* note 62, at 1694.

88. *Id.* at 1692–94.

89. *Id.* at 1694, 1694 n.47.

90. *Id.* at 1694.

91. *See id.* at 1691–92.

92. Casey & Vermeule, *supra* note 60, at 109.

93. *Id.*

94. *See* Leiter, *supra* note 62, at 1686–87.

95. *See* Pryor, *supra* note 79.

96. Casey & Vermeule, *supra* note 60, at 114.

97. *Id.* at 114–15.

into the Constitution.⁹⁸ This is not an objective task but rather one that depends on how one defines “the sources of man’s highest temporal happiness.”⁹⁹ A range of such definitions exist across the legal community. Few legal actors agree on “the structural political, economic and social conditions that allow communities to live in accordance with the precepts of justice.”¹⁰⁰ Vermeule’s contention otherwise lacks support, rendering his theory out of compliance with the Basic Requirements.

ii. Living Constitutionalism

A living constitution, per Professor David A. Strauss, “evolves, changes over time, and adapts to new circumstances, without being formally amended.”¹⁰¹ Living Constitutionalism as an interpretive theory posits that “the legal content of constitutional doctrine does and should change in response to changing circumstances and values.”¹⁰² Though several other conceptions of the theory exist,¹⁰³ Critics, too, have their own conception of Living Constitutionalism. According to one such critic, Harry Jaffa, the theory relies on “‘overarching principles’ whose application seems to be virtually uncontrolled by the specific provisions of the text,” and completely unhindered by “anything that those who drafted and those who ratified such provisions might have meant by them.”¹⁰⁴ As will be argued in more detail below, reliance on such principles allows Living Constitutionalists to circumvent the “letter and spirit” of the Constitution by permitting legal actors to give meaning only to those aspects that align with their views.¹⁰⁵

The descriptive components of Living Constitutionalism vary from case to case and by interpreter because the theory demands consultation of the social mores of the time.¹⁰⁶ The underlying basis of Living Constitutionalism would collapse if this were not the case. Charles Reich made this point when he argued that in “a dynamic so-

98. William H. Pryor Jr., *Against Living Common Goodism*, 23 FEDERALIST SOC’Y REV. 24, 26 (2022).

99. Casey & Vermeule, *supra* note 60, at 105 n.1.

100. *Id.* at 111.

101. David A. Strauss, *The Living Constitution*, UNIV. CHI. SCH. L. (Sept. 27, 2010), <https://www.law.uchicago.edu/news/living-constitution>.

102. Solum *Lexicon*, *supra* note 2; *see also* Lawrence B. Solum, *Originalism Versus Constitutionalism: The Conceptual Structure of the Great Debate*, 133 NW. L. REV. 1243, 1248 (2019) (challenging those who regard living constitutionalism as simply the idea of a dynamic constitution).

103. Solum *Lexicon*, *supra* note 2.

104. Harry V. Jaffa, *What Were the “Original Intentions” of the Framers of the Constitution of the United States?*, 10 U. PUGET SOUND L. REV. 351, 356 (1987) (internal quotations omitted).

105. *Id.*

106. Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1355 (2009).

ciety” constitutional provisions must “keep changing in its application or even lose [their] original meaning.”¹⁰⁷ U.S. Supreme Court Justice William Brennan, Jr. similarly called for consideration of “modern circumstances.”¹⁰⁸ And though Brennan and other Living Constitutionals concede that “[t]he Framers discerned fundamental principles” when drafting the Constitution, the theory does not require complete adherence nor even deference to those principles.¹⁰⁹ Brennan distinguishes between those higher level aims (which he never specifies) and “the particular contours” of those aims.¹¹⁰ Whereas the former have and should be accepted, Brennan argues that the latter amount to “precise, at times anachronistic, contours” that need not bind contemporary interpreters of the Constitution.¹¹¹ Generally, Living Constitutionalism specifies few specific and fixed descriptive components.

With respect to normative (dead) ends, Living Constitutionals often specify vague principles, such as “human dignity,” as the theory’s constitutional North Star.¹¹² Defenders of this approach argue that the Constitution has long been regarded as a means to realizing the imprecise but necessary end of the government adequately responding to crises.¹¹³ Chief Justice Marshall in *McCulloch v. Maryland*, for instance, concluded that the document is “intended to endure for ages to come, and consequently must be adapted to the various crises of human affairs.”¹¹⁴

With such lofty and ambiguous aims, constitutional interpretation under Living Constitutionalism becomes “an evolutionary process”¹¹⁵ that invites subjectivity into constitutional interpretation.¹¹⁶ Acceptance and adoption of this iterative and ongoing process empowers (or enables) legal actors to continually unearth the meaning of the Constitution as is necessary to bring it into alignment with the current popular understanding of principle X or Y.¹¹⁷ Explored in more detail below, this approach facilitates excessive judicial intervention into the questions best left to the people and their representatives.¹¹⁸

107. Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 735 (1963).

108. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 437 (1986).

109. *See id.*

110. *Id.*

111. *Id.*

112. Jaffa, *supra* note 104, at 357.

113. Hickok, *supra* note 58, at 6.

114. 17 U.S. 316, 415 (1819).

115. Jaffa, *supra* note 104, at 356.

116. ANTONIN SCALIA & AMY GUTMANN, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 45 (Gordon S. Wood et al. eds., 1997).

117. Jaffa, *supra* note 104, at 357.

118. *See infra* Part II.

In short, the ambiguous normative aims of Living Constitutionalism unmoor the document from its descriptive grounding and permits it to drift into unintended waters—often times, waters intended to be the sole domain of the people.¹¹⁹

iii. Originalism

Originalists, in general, base their interpretations on “the language of the Constitution and the resurrected understanding of the Framers at the time the Constitution was drafted and ratified.”¹²⁰ Put differently, subscribers to this theory solely (or predominantly) uncover the original meaning of the Constitution by conducting a “historical analysis of the surviving records of the events surrounding the adoption of the particular constitutional clauses in question.”¹²¹

Whether this evidentiary base requires placing originalism in the “fixed” descriptive bucket turns on the extent to which those evidentiary sources change or receive different weight when employed by different interpreters.¹²² If such evidence remained the same across time and in every interpretative context, then surely originalism would fit in that bucket. However, history is subject to change in the sense that our understanding of the actions and intentions of our predecessors may rapidly evolve as new sources emerge and the credibility of old sources shifts or even completely diminishes.¹²³

Even to the extent the availability and content of such sources remains constant, interpretation of them can vary widely.¹²⁴ Each year that passes since the ratification of the Constitution introduces greater odds of the original background principles becoming “obscure.”¹²⁵ Originalists have acknowledged as much but they have yet to reach consensus on the proper remedy.¹²⁶ And, of course, some questions may not find an answer in any currently available source. For instance, even the most thorough summary of a vote taken by the

119. Jaffa, *supra* note 104, at 358–59 (“[I]t is the will of the people, not the will of judges, that the courts are entrusted to carry out.”).

120. Clinton, *supra* note 50, at 1183.

121. *Id.*

122. *Id.* at 1270.

123. *Id.* at 1185 (“[T]hose who purport to rely on history too often have their history backwards.”); *see id.* at 1207 (observing that Washington and Madison did not agree on “the appropriate historical sources to consult” when interpreting the Constitution); MARY SARAH BILDER, MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION 5 (2017).

124. *See, e.g.,* Clinton, *supra* note 50, at 1205 (detailing how Madison claimed to have a different recollection and interpretation of Convention debates than other delegates); *id.* at 1206 (contrasting the proper interpretative weight assigned to state ratification debates by Washington and Madison).

125. Gregory E. Maggs, *A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397, 418 (2017).

126. *See id.* (describing different approaches to defining “original meaning”).

Convention delegates may not fully disclose the motives and intentions of each member.¹²⁷ So, despite Originalism seeking “fixed” descriptive components, the theory as applied relies on variable descriptive components. It follows that the theory lies somewhere in the middle of this spectrum.

On the normative question, Originalism, to the chagrin of some of its adherents,¹²⁸ should be labeled as objective. Adherents to Originalism regard themselves as being bound by the outputs of its methodology.¹²⁹ This disciplined approach, if followed, prevents judges from searching for an interpretation that aligns with some normative end. Given that avoidance of any specific result, Originalism is perhaps best thought of as having a normative dead end. In other words, Originalism guides judges to *avoid* answering questions reserved for the people and political branches. Lawrence Solum refers to this forbearance as Originalism’s “constraint principle.”¹³⁰ Pursuant to this principle, legal actors, including jurists, “should not engage in constitutional construction that effectively amends the Constitution.”¹³¹

Judge Pryor looks to the Supreme Court’s decision in *Bucklew v. Precythe*¹³² for an example of how this dead end or “constraint principle” plays out in practice.¹³³ The majority in *Bucklew* employed Originalist thinking to conclude that the Constitution permits capital punishment.¹³⁴ By extension, the Court reasoned that “the judiciary bears no license to end a debate reserved for the people and their representatives.”¹³⁵ This conclusion clearly distinguishes Originalism from Common Good Constitutionalism and Living Constitutionalism. To varying degrees, these latter theories task judges with filling in constitutional ambiguity with cement formed by normative assessments. Originalism, in stark contrast, not only does not set forth such a normative end, but actively steers judges toward a normative dead end: preventing an interpretation that contradicts the original meaning of the Constitution.

Yet, Originalism does not instruct judges to necessarily avoid entering what Lawrence Solum refers to as “construction zones” or “areas of doctrine where the linguistic meaning of the text would need

127. Letter from James Madison to Professor Davis (1832), *quoted* in Clinton, *supra* note 50, at 1212.

128. *See* Senator Josh Hawley, *supra* note 6.

129. Pryor, *supra* note 79, at 2.

130. Lawrence Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (Apr. 3, 2019) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215) [hereinafter, *Solum Constraint*].

131. *Id.* at 3.

132. 139 S. Ct. 1112 (2019).

133. *Id.* at 1117.

134. *Id.* at 1122–23.

135. *Id.* at 1123.

to be supplemented by precisification or default rules.”¹³⁶ Many adherents of the theory accept such supplementation so long as it draws exclusively on some historically reliable and authoritative source of information.¹³⁷ In other words, though Originalism “prevent[s] judges from ‘enact[ing]’ their personal policy preferences in the guise of interpreting the words of statutes and the Constitution,”¹³⁸ the theory does not prevent a judge from nevertheless addressing open questions of law (and policy).¹³⁹

The space left for Originalist judges to insert the theory’s conception of a proper resolution manifested in *Bostock v. Clayton County*.¹⁴⁰ In that case, Justice Gorsuch justified a broad conception of “because of sex” based on his prediction of how people in 1964 (the date of passage of the act in question) would have understood that phrase.¹⁴¹ He averred that this deference to the normative ends desired by the enacting public would prevent legal actors from “add[ing] to, remodel[ing], updat[ing], or detract[ing] from old statutory terms” and, thereby “amending statutes outside the legislative process reserved for the people’s representatives.”¹⁴² And, yet, it appears as though Justice Gorsuch and the Court did just that.

As noted by Justice Alito in dissent, the construction offered by the majority directly conflicted with one of the surest manifestations of the will of the people: decades of Congress rejecting legislation that would have amended the act to comport with the majority’s decision.¹⁴³ Justice Alito, citing Justice Scalia, maintains that originalism does not authorize judges to “update old statutes so that they better reflect the current values of society.”¹⁴⁴ The fact that Justices Gorsuch and Alito disagree about whether the majority actually amended the law in this case makes clear that Originalism, when wielded by an array of legal actors, may produce divergent results and, in some cases, deny the contemporary public the chance to resolve policy questions.

Leading and emerging theories of constitutional interpretation do not satisfy the Basic Requirements of a sound interpretive framework as expressed through their descriptive components and normative ends. Common Good Constitutionalism and Living Constitutionalism seek subjective aims.¹⁴⁵ To varying degrees, each of the three also consider variable descriptive components.¹⁴⁶ Even if the

136. *Solum Lexicon*, *supra* note 2.

137. *See Ward*, *supra* note 62.

138. Tushnet, *supra* note 6.

139. *Id.*

140. 140 S. Ct. 1731 (2019).

141. *Id.*; *see also* Tushnet, *supra* note 6.

142. *Bostock*, 140 S. Ct. at 1738.

143. *Id.* at 1755 (Alito, J., dissenting).

144. *Id.* at 1756 (Alito, J., dissenting).

145. *See Leiter*, *supra* note 62, at 1685–86; *see also Solum Lexicon*, *supra* note 2.

146. *See Clinton*, *supra* note 50, at 1207; VERMEULE COMMON GOOD, *supra* note 9, at 72; Lund, *supra* note 106, at 1369–70.

structure of these theories underwent some alteration to better align with the Basic Requirements that would not mark the end of assessing their respective merits.¹⁴⁷ A theory that includes only fixed descriptive components and objective normative ends may still undermine the constitutional order, which, of course, is an unacceptable outcome.¹⁴⁸ The next Part introduces and critiques one framework for evaluating whether a theory would help or hinder our constitutional order. Finding that framework problematic, the penultimate Part of this article outlines a means of assessment that better aligns with the “letter and spirit”¹⁴⁹ of the Constitution.

II. ASSESSMENTS OF THEORIES OF INTERPRETATION

The proliferation of different theories of interpretation has given rise to debates about which, if any, should garner more use among jurists.¹⁵⁰ This Part examines existing means of assessing such theories. The first section reviews assessment of a theory against the role of judges in our constitutional system. The second section investigates Cass Sunstein’s “fixed points” assessment and concludes that it does not provide much by way of helping identify superior theories.

A. *Assessing a Theory’s Alignment with the Role of the Judiciary as Envisioned by the Framers*

As a threshold matter it must be pointed out that all such theories should align with “the role of judicial review within American democracy.”¹⁵¹ This means the power to “say what the law *is*,” the oft-quoted expression penned by John Marshall in *Marbury v. Madison*.¹⁵² When Marshall seized this power for the court, though, he did not simultaneously acquire for the branch the power to say “what the law *ought to be*.”¹⁵³

Judges specifically, the courts generally, and every other branch may only exercise their respective constitutionally assigned powers. That is why, for instance, Marshall noted that “the legislature may [not] alter the constitution by an ordinary act.”¹⁵⁴ The same is true, of course, of the other branches. They, too, lack the authority to unilaterally amend the Constitution.¹⁵⁵ Marshall continues that the alternative—allowing a branch to take action in contradiction to the text of the Constitution—would “reduce[] to nothing what we have

147. See Alicea, *supra* note 1, at 579–82.

148. See Sunstein *Fixed*, *supra* note 12, at 9–10.

149. See *Ware*, 3 U.S. at 251.

150. See Alicea, *supra* note 1, at 579 (explicating that all constitutional theories emerge from a normative belief that judges ought to use that theory before others).

151. Post, *supra* note 26, at 15.

152. 5 U.S. 137, 177 (1803) (emphasis added).

153. *Id.*

154. *Id.*

155. See *id.* at 179–80 (“[T]he framers of the constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature.”).

deemed the greatest improvement on political institutions—a written constitution.”¹⁵⁶

At the heart of judicial review is fidelity to and protection of the “principles and theory of our government.”¹⁵⁷ Any acceptable theory of interpretation must, too, align with the principles and theory of our government. Note, though, that judicial review, an expansive but not unlimited power, does not authorize the courts to go searching for some conception of those fundamental aspects of our Constitution.¹⁵⁸

Marshall made the limits on judicial review clear by enumerating the principles and theory he so fiercely sought to defend. From the reverence he and the members of the Founding Generation held for a written constitution, Marshall drew several principles. Chiefly, the written constitution “form[s] the fundamental and paramount law of the nation.”¹⁵⁹ In turn, constitutional law constitutes “superior, paramount law, unchangeable by ordinary means.”¹⁶⁰ Moreover, limits on the government committed to that written constitution may not be “mistaken, or forgotten,” and must “confine the persons on whom they are imposed.”¹⁶¹ The imposition of such limits not only reflects the fundamental nature of constitutional law but also serves to prevent any undue accumulation of power by a branch or constitutional actor.¹⁶² Marshall paid comparatively less attention to the singular theory in question, which he simply stated as the invalidation of any act “repugnant to the Constitution.”¹⁶³

The Founding Generation, though, acknowledged that the text of any written legal instrument could not contain the entirety of its meaning.¹⁶⁴ Instead, then and now, statutory and constitutional interpretation require separate consideration of the “letter *and* spirit” of the instrument.¹⁶⁵ In 1796, for instance, Justice Paterson in a concurrence in *Ware v. Hylton* looked to the “letter and spirit” of the treaty between Britain and the United States to derive the intention of its drafters.¹⁶⁶ According to Justice Paterson, “considerations de-

156. *Id.* at 178.

157. *See id.* (labeling as unacceptable a doctrine that would “subvert the very foundation of all written constitutions.”).

158. *See id.* at 177 (stressing that the theory and principles of government are attached to a written constitution).

159. *Id.*

160. *Id.*

161. *Id.* at 176–77.

162. *Id.* at 178.

163. *Id.* at 177.

164. William Anderson, *The Intention of the Framers: A Note on Constitutional Interpretation*, 49 AM. POL. SCI. REV. 340, 346 (1955).

165. *See Ware*, 3 U.S. at 251 (J. Paterson, concurring) (analyzing whether a certain interpretation fell “within both the letter and spirit of the instrument.”).

166. *Id.* at 249.

ducible from the situation of the parties; and the reasonableness, justice, and nature of the thing, for which provision has been made” could “illustrate” that spirit.¹⁶⁷

Several state courts applied this interpretative approach when analyzing the Constitution. In 1847, the Court for the Correction of Errors in New York identified a “gross violation of the letter and spirit of the Constitution.”¹⁶⁸ Similarly, in 1803, the Supreme Court of Virginia determined that their interpretative authority ended with the “letter and spirit” of the legal instrument at issue.¹⁶⁹ The Justices left the “consequences” of any such instrument “to the wisdom of another [branch].”¹⁷⁰

Subsequent decisions by the Supreme Courts followed the lead of those other courts. In *Martin v. Hunter’s Lessee*, the Court concluded that its appellate power reached cases pending in state court;¹⁷¹ it reasoned that such an interpretation of the Judiciary Act aligned with “the letter and spirit of the Constitution.”¹⁷²

As mentioned above, few theories disregard the letter of the Constitution. Most theories demand adherence to unambiguous textual provisions.¹⁷³ This approach follows the will of the framers who intended the plain text of the document to produce a consistent and clear interpretation.¹⁷⁴ Gouverneur Morris, one of the main drafters, claimed to have “rejected redundant and equivocal terms.”¹⁷⁵ Subsequent scholarly analysis of the detailed nature of several constitutional provisions likewise suggests that “the delegates principally relied on the precision of their language in the constitutional text to impart controlling meaning to their constitutional acts.”¹⁷⁶ Given the general convergence with respect to prioritization of and deference to unambiguous text, the crux of evaluating theories of interpretation resides in the extent to which that theory reflects the “spirit” of the document.¹⁷⁷ The drafters expected this may be the case in some situations. Morris argued that interpretation of the Constitution required an examination of both “the plain import of the words” and

167. *Id.*

168. *Striker v. Kelly*, 1 Lock. Rev. Cas. 442, 451 (N.Y. 1847).

169. *Tabb v. Baird*, 7 Va. 475, 482-83 (1803).

170. *Id.* at 483.

171. 14 U.S. 304, 351 (1816).

172. *Id.*

173. Cf. Eliot T. Tracz, *Textualism and the Living Constitution*, 60 IDAHO L. REV. 243 (2024); Austin Peters, *Are They All Textualists Now?*, 118 Nw. U. L. Rev. 1201 (2024); *contra* Jonathan Adler, Justice Kagan Throws Down the Gauntlet: We Are Not “All Textualists Now,” *The Volokh Conspiracy* (July 1, 2022), <https://reason.com/volokh/2022/07/01/justice-kagan-throws-down-the-gauntlet-we-are-not-all-textualists-now> (summarizing a change in Justice Kagan’s stance with respect to the seeming universal embrace of textualism).

174. Clinton, *supra* note 50, at 1191–92.

175. *Id.* at 1208 (quoting Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814)).

176. *Id.* at 1192.

177. See *Ware*, 3 U.S. at 251 (applying an interpretation method based on the “letter and spirit of the instrument”).

“the *general* tenor and object of the instrument.”¹⁷⁸ How to assess whether a theory aligns with this “general tenor” requires a more extensive analysis, set forth in Part III. Prior to introducing that more detailed assessment, this Part concludes with an analysis of whether Cass Sunstein’s assessment measures a theory’s fidelity to the Constitution’s spirit.

B. Assessing a Theory Pursuant to Sunstein’s “Fixed Points” Test

Theories as well as assessments of those theories provide a broad range of “spirits.” Some, such as Vermeule improperly source this “spirit” from legal concepts and theories that predate the Constitutions by centuries.¹⁷⁹ Others maintain that the spirit is that possessed by the public at the time of the founding as expressed by public texts, declarations or intonations by the Framers, or some combination of both.¹⁸⁰ Another set of interpreters look to the contemporary spirit of the instrument as conveyed by, for lack of a better phrase, vibes.¹⁸¹ One group, led by Sunstein, identifies the spirit as an ever moving target that manifests through alignment with canonical cases that embody the spirit as perceived by the interpreter.¹⁸² Each of these conceptions look far beyond the Constitution for the instrument’s spirit, despite the fact that looking elsewhere for that spirit contradicts the guidance offered by the drafters and earliest interpreters of the document.¹⁸³ Worse yet, each of these conceptions undercuts the will and ability of the people to determine the content and meaning of *their* Constitution.¹⁸⁴ This usurpation occurs as a result of the theory or assessment instructing (or, minimally, encouraging) judges to *reread* the Constitution, which qualifies as effectively *amending* it.¹⁸⁵ Sunstein’s inclusion of an indeterminate and external spirit in his assessment of theories of interpretation is particularly troubling—such an assessment must be particularly defensive of the people’s sovereignty. The alternative risks giving a stamp

178. Clinton, *supra* note 50, at 1208 (quoting Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814)).

179. VERMEULE, *supra* note 9, at 1.

180. Post, *supra* note 26, at 17 (“[T]he meaning of the Constitution is better ascertained through strong evidence of the intent of the Framers than through fidelity to past precedents and doctrine.”).

181. *Id.* at 18–19 (identifying a theory of interpretation from Justice Brennan’s dissent in *Marsh v. Chambers*, 463 U.S. 783 (1983), that Post refers to as “responsive,” and likely falls within the “living constitutionalism camp.”).

182. SUNSTEIN HOW TO, *supra* note 1, at 13.

183. *See infra* Part III.

184. *Ullmann v. United States*, 350 U.S. 422, 428 (1956) (“Nothing new can be put into the Constitution except through the amendatory process [and n]othing old can be taken out without the same process.”).

185. *Id.*

of approval to a theory that entrenches members of the judiciary as tactic amenders of the Constitution.¹⁸⁶

On its face, Sunstein's "fixed point" assessment seems as though it cabins judicial discretion and narrows the realm of permissible theories of interpretation. It does neither. Here's a brief summary of the assessment:

[P]eople have some exceptionally strong convictions about what the Constitution must mean, forbid, or require, and . . . it would take a great deal to dislodge those convictions. It follows that people must explore how their firm judgments about particular cases (racial segregation, compulsory sterilization, sex discrimination, gun control) fare under potential theories of interpretation. If a theory would override those judgments, then that theory should be questioned.¹⁸⁷

He provides an example application of this test: if a theory "license[d] the Supreme Court to strike down the Social Security Act, [it] might not be so appealing."¹⁸⁸ Absent from this conclusion is any sort of analysis of the *legal reasoning* behind that *policy outcome*. Application of the fixed points approach situates courts as defenders of policy goals rather than of the Constitution.¹⁸⁹ In doing so, this assessment rewards theories that perpetuate a troubling degree of tolerance for judicial "rereading" of the Constitution.¹⁹⁰

Sunstein tries to distinguish "fixed points" that reflect canonical cases such as *Brown v. Board of Education* from "fixed points about morality and justice."¹⁹¹ But Sunstein only makes matters worse by listing a set of abstract commitments that people may opt to include in their own set of "fixed points."¹⁹² What's more, he accepts that these "fixed points" may actually be better characterized as floating points that turn out "not to be so fixed."¹⁹³ It is unclear how a test of uncertain and changing content will serve any meaningful role in the evaluation of theories.¹⁹⁴ Also problematic, Sunstein anticipates that fixed points today may not be the proper set of fixed points tomorrow.¹⁹⁵ However, he does not explain when and why such a fixed

186. See George Tsebelis, *The Time Inconsistency of Long Constitutions*, 42 BULL. AM. ACAD. ARTS & SCI. (2017) ("A rigid Constitution gives the constitutional courts more discretion to interpret the constitution (without fear that they will be overruled).").

187. SUNSTEIN HOW TO, *supra* note 1, at 12–13.

188. *Id.* at 13.

189. *Id.*

190. See Jill Lepore, *The United States' Unamendable Constitution*, NEW YORKER (Oct. 26, 2022), <https://www.newyorker.com/culture/annals-of-inquiry/the-united-states-unamendable-constitution>.

191. SUNSTEIN HOW TO, *supra* note 1, at 13.

192. *Id.* (listing, for example, "a commitment to self-government," to "freedom of religion," and to the permissibility of government-imposed taxes).

193. *Id.*

194. See Alicea, *supra* note 1, at 571–72 (noting that which cases express our social practices is subject to substantial debate).

195. SUNSTEIN HOW TO, *supra* note 1, at 14.

point should be displaced.¹⁹⁶ These issues beg the question of how any theory of interpretation can reliably be assessed against Sunstein's goal posts that are subject to change for any reason the assessor deems fit.¹⁹⁷

The flaws with Sunstein's test do not end there. Missing from his own list of canonical cases—*Brown*, for instance—is consideration for and assessment of the theory of interpretation that led to that decision.¹⁹⁸ Scholars across the political spectrum and jurists with a variety of interpretative preferences have flagged that *Brown* may have over relied on social science.¹⁹⁹ Sunstein passes over the core and exclusive role of judges, which is interpreting the law, and instead accepts that judges should accept any theory that reaches their preferred policy aims.²⁰⁰ This failure to consult the methodology underlying canonical cases conflicts with the idea that “[t]he use of improper methods in reaching decisions has its own results that detract from any good to be achieved,” as noted by Lino Graglia.²⁰¹ Sunstein's indifference to the underlying method also fails to recognize that “the use of proper methods lends some assurance that the good results desired will in fact be achieved and, if achieved, will come to be seen as good.”²⁰²

In conclusion, the “fixed point” framework deserves emulation only to the extent those fixed points are indeed fixed and aligned with the letter and spirit of the Constitution. To Sunstein's credit, he appears to be somewhat aware of that important caveat. He notes the limited value of assessing theories based on their compliance to an abstract set of values.²⁰³ “It is hopeless to try to justify a theory of interpretation,” Sunstein contends, “by pointing to some large-sounding word, such as ‘legitimacy’ or ‘democracy’ or even ‘interpretation.’”²⁰⁴

196. Alicea, *supra* note 1, at 571–72 (reviewing the transition from *Plessy* to *Brown* under a “social practices” framework).

197. See Ackerman, *supra* note 79, at 1750 (highlighting that the existence of “[a] blur of legal landmarks . . . in the collective consciousness” means that different individuals likely have different lists of what makes up the core of constitutional law).

198. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 529 (1980).

199. Stephen Breyer, *What Researchers Need to Know about Law and the Courts*, in *THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS* 74, 76 (Michael J. Saks & Charles H. Baron eds., 1978); see Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 633 n.54 (1985) (critiquing scholars who fault the use of social science at one period of time but accept or even praise judicial consideration of science that furthers with their views); but see John Minor Wisdom, *Random Remarks on the Role of Social Sciences in the Judicial Decision-Making Process in School Desegregation Cases*, 39 L. & CONTEMP. PROBS. 134, 139–40 (1975) (questioning if scholars have exaggerated the *Brown* Court's reliance on social science).

200. See generally SUNSTEIN HOW TO, *supra* note 1, at 8–9.

201. LINO A. GRAGLIA, *DISASTER BY DECREE* 260 (1976).

202. *Id.*

203. SUNSTEIN HOW TO, *supra* note 1, at 11.

204. *Id.*

Yet, Sunstein's own conception of the "fixed point" assessment does just that by justifying theories based on a "large-sounding" phrase: "make our constitutional order better."²⁰⁵ Within this broad concept, he includes a hodgepodge of cases and a smorgasbord of principles, such as cabining judicial discretion, protecting freedom of speech, limiting torture, and advancing the rule of law.²⁰⁶ If employed by judges, the pursuit of a "better" constitutional order authorized by this assessment does nothing to stop the democratically-destructive practice of *rereading* the Constitution.²⁰⁷ Though Sunstein acknowledges that the Constitution should only "change" if amended,²⁰⁸ he undermines that conclusion by allowing for the "meanings of its terms" to shift through judicial interpretation.²⁰⁹ That's a distinction without a difference from the perspective of the people as sovereigns. In either case, constitutional law has been altered without their formal participation and consent in violation of Article V of the Constitution.²¹⁰

The assessment of interpretive theories outlined in the next subject improves Sunstein's test by explicitly and narrowly defining what will protect (*rather than "better"*) our constitutional order as set forth by the Framers. In doing so, the assessment distinguishes between, on one hand, theories that adhere to the spirit of the Constitution as manifested by the document's structure and purpose (as opposed to the intentions of specific individuals) and, on the other hand, theories that invite legal actors to breach those lines.

III. THE FRAMERS' BENCHMARK FOR A MINIMUM ACCEPTABLE THEORY BASED ON THE STRUCTURAL SPIRIT OF THE CONSTITUTION

With respect to the litany of indeterminate or underdetermined provisions of the Constitution, how to honor the spirit of the Constitution comes down to finding (and only when necessitated by ambiguous text, relying on) the most explicit manifestations of that spirit.²¹¹ Reliance on any other type of source is likely to produce an inaccurate or incomplete conception of that spirit given that "[t]he deepest political differences in American history have always been

205. *Id.* at 16.

206. *Id.* at 11–12.

207. See Michael Stokes Paulson, *Does the Constitution Prescribe Rules for its Own Interpretation?*, 103 NW. L. REV. 857, 859 (2009).

208. SUNSTEIN HOW TO, *supra* note 1, at 17.

209. *Id.*

210. Paulson, *supra* note 207, at 862.

211. Underdetermination, as defined by Solum, "may occur if the Constitution contains provisions that are vague or open textured." Solum *Lexicon*, *supra* note 2; see also Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 462–63 (2016) (discussing how indeterminate or underdetermined textual provisions require interpretation); THE FEDERALIST NO. 78 (Alexander Hamilton) (calling on judges to issue decisions that comport with the "tenor" of the Constitution).

differences concerning the meaning of the Constitution, whether as originally intended, or as amended.”²¹²

The shifting motivations, understandings, and knowledge of any specific individual, group, or court renders theories based on intentions unreliable and unaligned with the spirit of the Constitution.²¹³ Even the *Federalist* authors disagreed about fundamental aspects of the Constitution. Madison and Hamilton, for instance, presented divergent conceptions of the distribution of power between the states and the national government.²¹⁴ The contested nature of most aspects of the Constitution suggests that its spirit emerges from and reflects compromises made by Framers more so than their individual conclusions.²¹⁵

I do not believe that this assessment is “the only game in town.”²¹⁶ In fact, I encourage other scholars to contest and refine its criteria as well as to offer their own benchmarks. Though some believe that the universe of theories of interpretation is finite and final,²¹⁷ I expect that a new generation of legal actors applying the Constitution to a novel set of challenges will not settle for the interpretive frameworks of their forefathers. The debates that will inevitably arise from the introduction and application of new theories should be moderated and shaped by assessments such as, but not limited to, the MAT.

A. *Reliable Sources of the Spirit of the Constitution*

Constitutional interpretation untethered to the document’s history is contrary to the very idea of a written constitution.²¹⁸ Not all historical sources, though, should receive the same interpretive weight. As discussed in more general terms above,²¹⁹ sources that only provide subjective analysis of the meaning of the Constitution likely merit less consideration in constitutional interpretation. Understandings of constitutional provisions held by single Framers, for instance, do little to contribute to judicial scrutiny of that provision.²²⁰ Who, for instance, should count as a Framers? Should Thomas

212. Jaffa, *supra* note 104, at 354.

213. See Anderson, *supra* note 164, at 347–48.

214. *Id.* at 345.

215. By way of example, Massachusetts instructed its delegates to the Constitutional Convention “not to accede [sic] to any alterations or additions that may . . . interfere” with the provision of the Articles of Confederation that guarantee the ability of states to exercise near complete control over their respective delegates to Congress. Mass. S. Amend. to the H.R. Res., 9 Mar. 1787 (on file with author). Eventually, the people of Massachusetts surrendered this position. *Id.*

216. Cf. Sunstein *Fixed*, *supra* note 9, at 15.

217. See SUNSTEIN HOW TO, *supra* note 1, at 9–10 n.5 (speculating that “the reasonable candidates for a theory that an external observer might favor are already present[.]”).

218. Cf. Maggs, *supra* note 125, at 400 (taking no position “on whether or to what extent courts must follow the original meaning” and leaving consideration of research related to the original meaning of the Constitution to the discretion of the interpreter).

219. See *supra* Part I.

220. See Maggs, *supra* note 125, at 419.

Jefferson despite his absence from the Convention?²²¹ Of qualifying Framers, which of their statements deserve interpretive consideration? Does it matter that the *Federalists* were written after the Convention, for a specific audience, and in pursuit of a specific end?²²² Of those views deemed relevant, what is the formula for knowing which of those express the intentions of more than just one individual? How should the relatively few areas of clear consensus among the Framers color the analysis of the whole document?²²³

This Part argues that comparison of the Articles of Confederation to the Constitution not only qualifies as the sort of objective analysis that should inform judicial analysis of the Constitution but also merits significant interpretative weight. This aligns with William Anderson's observation that the convention delegates achieved "a considerable area of agreement" on just two aspects of the Constitution: first, the "general objectives as set forth in the Preamble" and second, "the general plan of the Constitution" given that "it was at least better than the scheme of the Articles of Confederation."²²⁴

Though other objective sources exist,²²⁵ the Articles of Confederation deserve prioritization for several reasons. First and foremost, understandability and objectivity. Comparison of the structures set forth under the Articles and the Constitution provides information about the "original, objective meaning" of the latter;²²⁶ the same is true of comparisons of the text of the documents.²²⁷ In both cases, the interpreter takes on the objective task of looking "for reasonable inferences that might be drawn from the comparison."²²⁸

Second, replicability and consistency. In addition to the Articles lending themselves to objective analysis, the contained nature of this interpretative source as well as the relative availability of documentary evidence about its drafting, render the Articles helpful to a range of legal actors, regardless of ideology and background.²²⁹

221. See Anderson, *supra* note 164, at 343–44.

222. See *id.* at 344–45.

223. See *id.* at 341–42.

224. *Id.* at 342.

225. See generally Maggs, *supra* note 125, at 424 (noting that dictionaries from the Founding Era may provide the "original, objective meaning" of constitutional terms).

226. *Id.* at 419; see also Harry W. Jones, *The Articles of Confederation of a Federal System*, in *ASPECTS OF AMERICAN LIBERTY: PHILOSOPHICAL, HISTORICAL, AND POLITICAL* 126, 142–43 (George W. Corner ed., 1977) (observing a "manifest and striking" similarity between the Articles and Constitution with respect to their respective allocations of national and state functions).

227. See Maggs, *supra* note 125, at 418–19; Jack Rakove, *The Legacy of the Articles of Confederation*, 12 *PUBLIUS* 45, 46 (1982) ("Certain provisions of the Articles were either incorporated intact in the Constitution or established precedents expanded upon by the Convention.").

228. Maggs, *supra* note 125, at 419.

229. See Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation*, 60 *TENN. L. REV.* 783, 792–93 (1993).

Third, practicality. A broad set of legal actors have accepted such analysis as a valid and useful source of constitutional interpretation.²³⁰

Fourth, and most importantly for the purposes of this article, interpretive value. The Articles-Constitution comparison provides clear insights into the spirit of the latter.

*B. The Minimum Acceptable Theory of Interpretation
Based on the Three Aspects of the Spirit of the
Constitution as Revealed by the Articles of
Confederation*

By looking at the Framers' reasons for departing from the Articles and the structural and textual differences between the governing documents, the spirit of the Constitution becomes more visible. Three aspects of that spirit emerge. The first is a desire for a workable government as indicated by the departure from the Articles themselves. The second is a recognition that the centralization of power for a workable government must be countered by a balanced distribution of those powers to branches capable of checking one another. The third is that the people must retain the ultimate authority to alter that allocation and distribution of powers as indicated by an accessible amendment process (at least one that was intended to be accessible) and the vesting of sovereignty in the people.

A theory that fails to align with these aspects of the spirit of the Constitution would likely not earn the support of the Framers who made the deliberate and difficult decision to move on from the Articles—hence, the idea of the Minimum Acceptable Theory.²³¹ This section outlines the rationale for the three aspects discussed above and introduces illustrative cases of those aspects that assessors can use to evaluate a theory against the MAT.

i. The First Prong of the MAT: A
Workable Government and *Chadha*

Though many people look to the Articles as a failed and flawed charter, several scholars insist that the Articles and Constitution have more in common than the popular retelling may suggest.²³² A more precise comparison indicates that the Constitution represents “a series of pragmatic compromises that codified and expanded on

230. Maggs, *supra* note 125, at 399 (noting that as of 2017 “[m]embers of the Supreme Court have cited the Articles of Confederation in ten constitutional cases since John Roberts became Chief Justice[.]”); *id.* at 413 (“Those who worked on the drafting and ratification of the Articles of Confederation undoubtedly learned important lessons in nation-building.”); see Merrill Jensen, *The Articles of Confederation*, in *FUNDAMENTAL TESTAMENTS OF THE AMERICAN REVOLUTION* 49, 49 (Library of Congress 1973) (regarding the Articles of Confederation as one of the four texts most worthy of study with respect to understanding the Revolutionary Era); Rakove, *supra* note 227, at 46.

231. See Maggs, *supra* note 125, at 425–27.

232. Freedman, *supra* note 229, at 826–27; Rakove, *supra* note 227, at 46.

existing practices and impliedly sanctioned flexible interpretation in . . . implementation.”²³³ The Constitution amounted to a continuation of the Framers’ “trial-and-error evolution” of how best to design a functioning government—a process that included creating and abandoning the Articles.²³⁴

The similarities between the two charters make their differences all the more valuable with respect to interpretation. Consider that in the transition from the Articles to the Constitution only two changes “mark[ed] a sharp break with the past,” one of which being a decrease in the barriers to amendment.²³⁵ That specific departure reflects the broader purpose of the Convention, as detailed by Madison. He instructed that “[i]n expounding the Constitution and deducing the intention of the Framers, it should never be forgotten, that the great object of the Convention was to provide . . . a remedy for the defects of the existing one.”²³⁶ The desire among the delegates for an “adequate government” even drove them to bypass the amendment procedures contained in the Articles.²³⁷ Lowering the bar to amendment was a clear manifestation that the Framers intended to clear the path for a government better able to correct its structural flaws.²³⁸

Of course, the Constitution also aimed to correct more specific flaws within the Articles. Among many others, some key issues that Framers sought to address with the Constitution included the inability of the government under the Articles to raise and collect sufficient funds to cover the essential expenses of a national government,²³⁹ to unite around shared foreign policy stances,²⁴⁰ to raise and support sufficient armed forces to rebut threats and attacks from enemies,²⁴¹ and to respond to states obstructing congressional activity due to Congress’s inadequate authority and powers.²⁴² It follows that an interpretation of the Constitution that creates arbitrary limits on the government’s ability to solve problems contradicts the spirit of the document. As set forth by *McCulloch*, the Framers aimed to avoid the “embarrassments” that resulted from feeble national government specified by the Articles.²⁴³ Centuries later, though, in *INS v. Chadha*,

233. Freedman, *supra* note 229, at 826–27.

234. Freedman, *supra* note 229, at 827; see Rakove, *supra* note 227, at 54 (sharing Edmond Randolph’s recognition of constitution-making as a science) (internal citation omitted).

235. Freedman, *supra* note 229, at 791.

236. Letter from James Madison to Professor Davis (1832), *quoted* in Clinton, *supra* note 50, at 1212. Notably, Madison had a relatively short list of issues with the Articles. See *id.*

237. THE FEDERALIST NO. 40 (James Madison).

238. See *Farwell Address, 19 September 1796*, FOUNDERS ONLINE NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/05-20-02-0440-0002> (last visited Oct. 10, 2024) (“If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way the Constitution designates.”).

239. See Maggs, *supra* note 125, at 415.

240. *Id.* at 415–16.

241. *Id.* at 416.

242. *Id.*

243. 17 U.S. 316, 406–07 (1819).

the majority of the Supreme Court failed to recall and follow that spirit.²⁴⁴

In that case, despite the executive and legislative branches consenting to Congress retaining a veto over certain actions taken by executive officials and agencies, the majority declared the entire practice of legislative vetoes unconstitutional.²⁴⁵ They rightfully noted that “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.”²⁴⁶ In short, they gave a nod to the importance of a workable government. The majority likewise admitted that the wisdom of the courts does not amount to much with respect to assessing the merits of statutes and that such acts deserve judicial deference so long as they do violate the Constitution.²⁴⁷

The *Chadha* Court, though, made a fatal error by not specifying that such a violation ought to be explicit and not the product of a judicially contrived series of inferences drawing on different parts of the Constitution. As pointed out by Justice White in dissent, the Court ought not enforce supposed constitutional limits any further than is necessary to resolve the case at hand.²⁴⁸ The alternative, broad decisions that brush away consensual efforts by the political branches to maintain the efficacy of the government as per the spirit of the Constitution, is exactly the sort of rigidity that sowed the seeds of the Articles’ demise.²⁴⁹

The legislative veto took on many forms, only one of which was at issue in *Chadha*.²⁵⁰ The majority did not appreciate this distinction and instead entirely invalidated a “central means by which Congress secure[d] the accountability of executive and independent agencies.”²⁵¹ In short, the majority forced Congress into a Hobson’s choice that would result in either “major national problems [being] unresolved” or “unaccountable policymaking by those not elected to fill that role.”²⁵²

This error was magnified by two additional considerations. First, the record did not indicate any evidence of Congress exploiting the legislative veto to aggrandize its own powers.²⁵³ In fact, the veto helped preserve the balance intended by the Framers by serving as “a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Art. I as the Nation’s

244. 462 U.S. 919 (1982).

245. *Id.* at 955.

246. *Id.* at 944.

247. *Id.* at 967 (White, J., dissenting).

248. *Id.*

249. *Id.* at 959–60 (Powell, J., concurring).

250. *Chadha*, 462 U.S. at 1002, 1007–08 (White, J., dissenting).

251. *Id.* at 967–68 (White, J., dissenting).

252. *Id.* at 968 (White, J., dissenting).

253. *Id.* at 974 (White, J., dissenting).

lawmaker.”²⁵⁴ Second, the constitutional lines the majority relied on to declare the practice unconstitutional—bicameralism and presentment—simply did not apply to the case at hand.²⁵⁵ As bluntly (and accurately) restated by Justice White: “The power to exercise a legislative veto is not the power to write new law without bicameral approval or Presidential consideration.”²⁵⁶

The upshot is that the Constitution was not meant to undermine the viability of the very government it created. Instead, the drafters expected and encouraged the political branches to resolve constitutional questions in a way that allowed the government to deal with the “exigencies of the country.”²⁵⁷ A theory of interpretation should incorporate this idea of a workable, functional government pursuant to the very spirit of the Constitution. One way to test whether a theory meets that test is to see how it would adjudicate *Chadha*. Does the theory permit flexibility that does not explicitly violate any part of the Constitution or does the theory imagine and enforce unspecified limitations? Though I believe that this is an undeniable aspect of the spirit of the Constitution, I do not contest the idea that other cases may serve as more precise benchmarks of a theory’s fidelity to this spirit. For instance, *Myers v. United States* could serve as a test of whether a theory recognizes the importance of a functional, energetic executive.²⁵⁸ Similarly, Justice Frankfurter’s concurrence in *Youngstown* may help assessors determine if a theory recognizes the weight of practice in constitutional interpretation.²⁵⁹ Many more such cases may also aid in this prong of the MAT; I welcome your suggestions. The key is that the theory does not authorize courts to stand in the way of the government’s efforts to “respond to the demands and needs of modern society,” absent some explicit constitutional limit²⁶⁰ as detailed in the second prong of the MAT.

ii. The Second Prong of the MAT:
Unchecked, arbitrary power and
Gundy

Denial of unchecked, arbitrary power constitutes the second aspect of the spirit of the Constitution and second prong of the MAT. “Separation of powers,” according to Jaffa, “was generally understood to be an indispensable feature of free government” at the time of the Founding.²⁶¹ As much as the Framers wanted a workable government, they intentionally developed lines between branches that

254. *Id.* (White, J., dissenting).

255. *See id.* at 954–55.

256. *Chadha*, 462 U.S. at 980 (White, J., dissenting).

257. *Texas v. White*, 74 U.S. 700, 725 (1868).

258. 272 U.S. 52 (1926).

259. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

260. Byrnes, *supra* note 18, at 671.

261. Jaffa, *supra* note 104, at 360.

they intended to thwart excessive power accumulating in any one branch or individual.²⁶²

Under the Articles, the Framers struggled to characterize and, by extension, constrain the (albeit limited) powers wielded by the legislature.²⁶³ The Confederation Congress,²⁶⁴ for instance, created several bodies equivalent to executive agencies under the Constitution to assist with the execution of its laws.²⁶⁵ Likewise, the Congress exploited its ambiguous role to pass legislation with no clear basis in the Articles.²⁶⁶

The decision to consolidate more power within the national government required a distribution of that power across several branches. As summarized by Rakove, “[a] Congress endowed with such broad legislative power [as set forth by the Constitution] could no longer be constituted as a unicameral assembly.”²⁶⁷ The Framers also opted against allowing Congress to exercise the executive and judicial powers afforded to it under the Articles.²⁶⁸ In sum, the Framers responded to fears of an “overmighty” centralized government by “devising the array of checks and balances” that makeup the Constitution’s separation of powers.²⁶⁹

The judicial branch was intended to help enforce these lines.²⁷⁰ When and if “shifting winds” result in one branch receiving “added power,” the Court must intervene if the branch does not wield the power responsibly or if the people do not have the means to hold that branch accountable for the use of that power.²⁷¹ Absent the Court serving as this Constitutional backstop, the Framers noted that “no other body” existed to provide “such a protection.”²⁷²

262. Rakove, *supra* note 227, at 55–56.

263. *Id.* at 56.

264. Maggs, *supra* note 125, at 403. (Note that some scholars refer to this Congress as the “Congress of the Confederation” or “Continental Congress.”)

265. *Id.* at 407 (listing the creation of “a Board of Treasury, a Board of War, a Board of Admiralty, and a Department of Foreign Affairs.”)

266. *U.S. Timeline - The 1780s*, AM.’S BEST HIST., <https://americasbesthistory.com/abhtimeline1781m.html> (last visited Sept. 30, 2024) (“It was not known at the time whether the Continental Congress even had such an authority to charter [a national bank].”).

267. Rakove, *supra* note 227, at 55.

268. *Id.*

269. *Id.* at 56.

270. *Art. III Section 1.2 Historical Background on Judicial Review*, LIBR. CONG. CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-2/ALDE_00013513/ (last visited Mar. 2, 2024) (Though the power of judicial review is not explicitly outlined in the Constitution, it is widely agreed that the Framers assumed the judiciary would exercise such power. During the Virginia Convention, for instance, Chief Justice John Marshall remarked that if Congress “were to make a law not warranted by any of the powers enumerated, it would be considered by the judge as an infringement of the Constitution which they are to guard . . . [t]hey would declare it void . . . [t]o what quarter will you look for protection from an infringement on the constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection.”); *see also* JONATHAN ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 371–72 (1836).

271. *See* Byrnes, *supra* note 18, at 670–71.

272. ELLIOT, *supra* note 270, at 553–54 (quoting Chief Justice Marshall).

Gundy v. United States serves as a benchmark case for a theory's fidelity to preventing unchecked, arbitrary power.²⁷³ In that case, Congress delegated to the Attorney General the authority to "specify the applicability" of the Sex Offender Registration Notification Act (SORNA) to offenders convicted before the statute's enactment.²⁷⁴ The majority gave Congress the benefit of the doubt with respect to sufficiently cabinining the Attorney General's discretion so as to prevent an unconstitutional delegation of legislative power.²⁷⁵ Though the Court argued that it has long permitted Congress to take action as required by the "necessities of government," it failed to adequately weigh the branch's obligation to identify and enforce the limitations intended by the Framers.²⁷⁶

A theory that sufficiently embodies this aspect of the spirit of the Constitution ought to follow Justice Gorsuch's approach in his *Gundy* dissent. More generally, a theory should analyze Separations-of-Powers questions pursuant to first principles.

Justice White outlined the nature of that inquiry in his *Chadha* dissent: "[T]he purpose of separating the authority of Government is to prevent unnecessary and dangerous concentration of power in one branch."²⁷⁷ Justice Gorsuch conducted such an inquiry by closely scrutinizing whether Congress had made such efforts in granting such broad powers to the Attorney General.²⁷⁸ His analysis detected several concerns that should have caught the attention of the majority.²⁷⁹ The discretion afforded to the Attorney General permitted him to impact an unpopular community, to impose criminal sanctions on members of that community, and to do so with little to no guidance from Congress.²⁸⁰ Perhaps more problematically, Congress' delegation served to undermine the people's ability to hold their representatives accountable for a controversial piece of legislation.²⁸¹

Here, again, I welcome suggestions for other cases that can adequately benchmark whether a theory prevents usurpations of power. *NFIB v. Sebelius*²⁸² may serve as another test case—if a theory opts to follow Chief Justice Roberts's in applying a Schrödinger's-cat analysis to the constitutionality of a provision (permitting Congress to write laws that may be or may not be constitutional depending on the perspective of the interpreter), then the theory likely conflicts with this

273. 588 U.S. 128 (2019).

274. *Id.* at 133–34 (Gorsuch, J., dissenting) (quoting 34 U.S.C. § 20913(d)).

275. *Id.* at 147.

276. *Id.*

277. *Chadha*, 462 U.S. at 998 (White, J., dissenting).

278. *Gundy*, 588 U.S. at 149–69 (Gorsuch, J., dissenting).

279. *Id.* at 149–56.

280. *Id.*

281. *Id.* at 149.

282. 567 U.S. 519 (2012).

spirit of the Constitution. Other test cases exist²⁸³ and should be evaluated given the importance of making sure a theory does not excuse the accumulation of power in any government actor solely because of flawed precedent.

iii. The Third Prong of the MAT: Popular Sovereignty and *New York*

The third aspect of the spirit of the Constitution as indicated by comparison to the Articles of Confederation and the final prong of the MAT is recognition of the sovereignty of the people. The Framers made two key departures from the Articles of Confederation in drafting the Constitution: first, the Framers made the substantive decision to lower the barriers to amending the Constitution; second, they made the procedural decision to refer the Constitution to the people for ratification.²⁸⁴ These explicit and significant decisions cannot go unacknowledged by a theory of interpretation. A theory that does not regard the amendment process as the appropriate way to alter the Constitution or denies the sovereignty of the people categorically fails the MAT. Though the Framers did not advocate for excessive use of the Article V process,²⁸⁵ they sought “to establish a routine method for reforming the government when change was needed”²⁸⁶ or, minimally, a “realistic process for change.”²⁸⁷ Such a process would align with the other aspects of the spirit of the Constitution, especially a workable government. Framers observed that the government under the Articles floundered, in part, because of the high barriers to amendment.²⁸⁸ Charles Pinckney, for one, argued that “the depressed situation of the Union” emerged from the unanimous consent required to amend the Articles.²⁸⁹ A lower threshold for amendment would have ushered in necessary reforms, which may have produced a far better state of public affairs.²⁹⁰

Critically, the Framers situated the amendment power in the American people.²⁹¹ President Washington, for instance, held the people responsible for righting any wrongs with the Constitution via

283. See, e.g., *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 505–06 (2010) (“Perhaps the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent [for Congress’ action].”).

284. See Freedman, *supra* note 229, at 791.

285. *Art. V Historical Background on Amending the Constitution*, LIBR. CONG. CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artV-2/ALDE_00013047/ (last visited Oct. 10, 2024) (noting that the Convention rejected much lower thresholds for amendment, such as amendment by states with no role for Congress).

286. Marcia L. Whicker et al., *The Constitution Under Pressure: The Amendment Process*, 15 J. POL. SCI. 60, 61 (1987).

287. Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561, 1563 (1998).

288. *Id.* at 1563–66.

289. Charles Pinckney, *Observations on the Plan of Government Submitted to the Federal Convention of May 28, 1787*, reprinted in THE RECORDS OF THE FEDERAL CONVENTION OF 1787: VOL. 3, at 120 (Max Farrand ed., 1911).

290. *Id.*

291. See Chemerinsky, *supra* note 287, at 1576.

amendment.²⁹² Perhaps anticipating efforts to usurp that power and responsibility, he added that the Constitution remains “sacredly obligatory upon all” unless and until “changed by an explicit and authentic act of the whole people.”²⁹³ Washington was not alone in regarding the amendment process as an important source of popular power over the contents of the Constitution. As reported by David Kyvig, the presence of Article V may have convinced otherwise skeptical states to ratify the Constitution.²⁹⁴ It flies in the face of logic to presume that the inclusion of Article V in the Constitution would assuage the fears of such states if they believed the process was intended or likely to be especially onerous.

Today, however, many Americans have become accustomed to the idea of the Constitution being changed almost exclusively via judicial amendment;²⁹⁵ some even advocate for it.²⁹⁶ Others have convinced themselves that this was the intent of the Framers all along.²⁹⁷ Defenders of such a practice usually try to obscure that unconstitutional act by suggesting the Court merely updates, rereads, or the Constitution.²⁹⁸ Erwin Chemerinsky, for instance, contends that the Constitution “relies on a judiciary with the authority to interpret and adapt the constitution to a world so vastly different from the Framers could have imagined.”²⁹⁹

Members of the Founding Generation did not intend for the courts or congress to clandestinely convert the Constitution on behalf of the people.³⁰⁰ At various points in time, the Court has admitted as much. In *South Carolina v. United States*, the majority explained that “[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now.”³⁰¹ Though the Court acknowledged that the powers granted therein may lead to new applications as time passes and novel contexts emerge, it made clear that such bespoke applications “in no manner abridges the fact of [the Constitution’s] changeless nature and meaning.”³⁰² Likewise, three Justices joined Justice Sutherland’s dissent in

292. *Farwell Address, 19 September 1796*, FOUNDERS ONLINE NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/05-20-02-0440-0002> (last visited Oct. 10, 2024).

293. *Id.*

294. DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995* at 81, 85 (1996).

295. Ackerman, *supra* note 79, at 1741–42.

296. Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545, 549 (2006) (suggesting that originalism “provides its proponents a compelling language in which to seek constitutional change through adjudication and politics.”).

297. Chemerinsky, *supra* note 287, at 1569.

298. *See, e.g., id.* at 1564.

299. *Id.*

300. George Mason, for instance, advocated for “easy, regular” amendment via Article V. *THE RECORDS OF THE FEDERAL CONVENTION OF 1787: VOL. 1*, 203 (Max Farrand ed., 1911).

301. 199 U.S. 437, 448 (1905).

302. *Id.* at 449.

West Coast Hotel Co. v. Parrish, in which he declared, “[t]he judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation.”³⁰³

The primacy of the text of a written constitution transcends even case law and instead rests at the foundation of our system of government. “A principal share of the benefit expected from written constitutions,” noted Judge Cooley, “would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion.”³⁰⁴ Fidelity to this core tenet requires that courts hold as true and sacred that the meaning of constitution provisions is changeless, whereas “their application . . . is extensible.”³⁰⁵

The modern difficulties associated with amending the Constitution via Article V do not justify judicial seizure of that power. Surely if the Framers had intended as much, they would not have granted the least democratic branch the most control over the meaning and contents of the Constitution. Chemerinsky and others, though, commonly confuse contemporary barriers to amendment to reflect the Framers’ desires to hinder such amendment.³⁰⁶ At risk of excessive repetition, the proper perspective of Article V is in reference to the amendment process under the Articles—a comparison that makes clear the Framers had no such desire.³⁰⁷ This approach directly undermines Chemerinsky’s point. As summarized by Akhil Reed Amar, “the kinetic interplay between the old [provision for amendment under the Articles] and the new Article V helped propel the Constitution forward.”³⁰⁸ The ratifiers perceived Article V as a “workable amendment mechanism” that would allow for the correct of laws “as needed.”³⁰⁹

A theory’s respect for Article V as the sole means to amend the Constitution may turn on that theory’s resolution of the facts at issue in *New York v. United States*.³¹⁰ In that case, Congress developed a regulatory scheme that required “states to either clean up low-level radioactive waste or assume responsibility for any damages caused by the waste.”³¹¹ The majority held that despite the Commerce Clause authorizing Congress to regulate the interstate market in waste disposal,³¹² the Constitution prohibits Congress from mandating that states perform certain tasks, “unless it does so through a generally

303. 300 U.S. 379, 404 (1937) (Sutherland, J., dissenting).

304. THOMAS COOLEY, 1 A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 124 (8th ed. 1927).

305. *Id.*

306. See Chemerinsky, *supra* note 287, 1569.

307. Freedman, *supra* note 229, at 791.

308. AKHIL REED AMARA, AMERICA’S CONSTITUTION: A BIOGRAPHY 286 (2006).

309. DARREN PATRICK GUERRA, PERFECTING THE CONSTITUTION: THE CASE FOR THE ARTICLE V AMENDMENT PROCESS 75–93 (2013).

310. 505 U.S. 144, 147 (1992).

311. Eric J. Segall, *Constitutional Change and the Supreme Court: The Article V Problem*, 16 U. PA. J. CONST. L. 443, 448 (2013).

312. 505 U.S. at 160.

applicable law.”³¹³ Segall observes that the majority had no textual or structural support for this prohibition;³¹⁴ in fact, the majority went so far as to disclaim the Tenth Amendment serving as a legal foundation.³¹⁵

The *New York* Court effectively “overturn[ed] the exercise of concededly valid congressional exercises of enumerated powers based solely on the Justices’ idiosyncratic and shifting ideas of appropriate federalism values.”³¹⁶ That is why Segall regards *New York* as a prime example of the Court amending the Constitution while bypassing Article V’s requirements.³¹⁷ In stark contrast to decisions in which the Court attempts to decipher “vague constitutional text,” when the Court blatantly modifies, ignores, or otherwise does not enforce explicit textual provisions, then it engages in amendment of the Constitution in defiance of Article V.³¹⁸ It follows that a theory that upholds the people’s role as sovereigns and responsibility for amending the Constitution would avoid following the reasoning employed by the *New York* majority. Other cases that may serve as reliable benchmarks for this aspect of the spirit of the Constitution include *Printz v. United States*³¹⁹ and *NFIB v. Sebelius*.³²⁰ The key is that a theory recognizes the constrained role of the courts when it comes to interpretation—not even *McCulloch* embraced the idea that the Court should take the lead in updating the Constitution for modern times. Instead, Marshall specified that the powers of Congress may be adjusted to respond to such crises.³²¹

The contemporary headwinds with respect to amending the Constitution should not be regarded as an invitation for courts to substitute their will for that of the people. To the extent that process has become unacceptably difficult, the burden rests with the people to overcome those barriers or alter the process. The fact that some theories and ideologies accept and embrace this idea should cause celebration among those seeking to defend the constitutional order.³²² The alternative amounts to a seizure of the people’s power and *responsibility* to amend *their* Constitution. Few can deny that “constitutional evolution is essential for the document to deal with modern problems,”³²³ but, at least among legal actors, none should accept that courts should oversee that evolution.

313. Segall, *supra* note 311, at 448 (summarizing the majority opinion).

314. *Id.*

315. 505 U.S. at 156.

316. Segall, *supra* note 311, at 450.

317. *Id.* at 445, 447–48.

318. *Id.* at 451.

319. 521 U.S. 898 (1997).

320. 567 U.S. 519 (2012).

321. *McCulloch*, 17 U.S. at 421.

322. See, e.g., Chemerinsky, *supra* note 287, at 1568 (“Originalists believe that the Constitution should evolve solely by amendment.”).

323. *Id.* at 1569.

Returning to the Basic Requirements of an interpretive theory, the Articles of Confederation—specifically its text and structure—qualify as fixed descriptive components that should influence interpretation of the Constitution.³²⁴ Further, adherence to the interpretive lessons gleaned from that comparison amounts to a normative dead end more so than directing legal actors to interpret the Constitution in a way that furthers subjective aims.³²⁵ Even if a theory embraces the Articles in those two interpretive tasks, it must still comport with both the letter and spirit of the Constitution. Three aspects of that spirit emerge from looking at motives of the Framers in creating the Constitution as well as the textual and structural differences between the Articles and the Constitution: a workable government, prevention of unchecked, arbitrary power, and respect for the people as sovereigns. Fidelity to these aspects makes up the Minimum Acceptable Theory, which serves as a durable benchmark for current and future theories of interpretation.

IV. CONCLUSION

Interpretive theories come and go.³²⁶ Those certain of the correctness (and superiority) of one theory ought heed Oliver Wendell Holmes Jr.'s reminder that “[c]ertitude is not the test of certainty.”³²⁷ “[S]hifts in the balance of power on the Court can have profound effects in unsettling and then sometimes resettling norms of interpretive practice.”³²⁸ One such shift appears to be underway.³²⁹ A new wave of theories of interpretation has appeared on the horizon.³³⁰ Which of these theories, if any, merits adoption by legal actors should be determined by the theory's satisfaction of the Basic Requirements—understandability, replicability and consistency, and practicality—and a thorough vetting against the letter and spirit of the Constitution.

Current assessments, such as Sunstein's “fixed point” test, will not adequately evaluate theories pursuant to that standard. In contrast, the Minimum Acceptable Theory test proposed here includes only the most reliable sources of information as to the spirit of the Constitution. In turn, it assesses theories against three simple, immutable tests: whether the theory undermines a workable, effective government as indicated by that theory's alignment with the reasoning in the *Chadha* dissent; whether the theory fails to prevent the unchecked, arbitrary use of power as indicated by its approach to

324. Maggs, *supra* note 125, at 418–19.

325. *Id.*

326. See, e.g., Clinton, *supra* note 50, at 1184–85 (describing legal realism and noting that we have entered a “post-legal realist world.”).

327. Oliver Wendell Holmes Jr., *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).

328. RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 91, 92 (2018).

329. Alicea, *supra* note 1, at 572–73.

330. *Id.* at 573.

Gundy; and, whether the theory fully recognizes the people as sovereigns as expressed by the dissent in *New York*.

The MAT is not perfect. I anticipate and welcome suggestions about how to refine the criteria as well as which opinions serve as the most precise benchmarks of fidelity to those criteria. I also welcome and encourage scholars to propose other evaluations.

The meaning of *our* Constitution is shaped by theories of interpretation.³³¹ It follows that all of us or “We the People” should have a role in dictating the use and content of different theories.³³² In practice, of course, there are no present means to facilitate such a participatory discussion.³³³ That is precisely why theories of interpretation should be judged against the MAT and the Basic Requirements. On the descriptive side, theories that do well on the MAT will recognize the structural protections the Framers intended to preserve the people’s liberty; on the normative side, theories that earn high marks on the MAT will aim to do no more than to reinforce those protections given modern challenges.

Tolerance for “large-scale changes” to our Constitution via judicial judgments has crowded out the role intended for the people with respect to updating the Constitution via Article V.³³⁴ Accustomed to the Court writing “superprecedential”³³⁵ decisions and Congress passing “landmark statutes”³³⁶ that makes up for a dearth of popular political action, the people “have lost [their] ability to write down . . . new constitutional commitments in the old-fashioned way [via Article V].”³³⁷ This is no small problem for a country that imagines itself living under a written Constitution.³³⁸

Judicial review has transformed into judicial supremacy and authorized judicial activism to such an extent that the people have lost their sense of responsibility for formally amending the Constitution, as required.³³⁹ Theories of constitutional interpretation that explicitly or implicitly encourage judges to read the law in light of some normative end have perpetuated this usurpation of power.

331. Kaplin, *supra* note 1, at 983.

332. *Id.* at 984 (“As the debate [about the interpretation of our Constitution] has progressed, it has become increasingly abstract and esoteric as commentators sometimes address themselves only to other well-versed academics.”).

333. *Id.* at 983–84.

334. See Sunstein *Fixed*, *supra* note 12, at 13–14.

335. Ackerman, *supra* note 79, at 1752, 1752 n.6 (referring to U.S. Supreme Court opinions “generated as crucial points in the complex institutional process through which the American people exercise their popular sovereignty” and that “crystallize fixed points in our constitutional order.”).

336. *Id.* at 1742.

337. *Id.* at 1741.

338. *Id.*

339. *Id.* at 1742–1743 (“We the People can’t seem to crank out messages in the way described by Article V of our Constitution. Our writing machine has gone the way of the typewriter.”).

