

Amendability-Contingent Interpretation: Implications of Variance in Difficulty of Formal Constitutional Change

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Amendability-Contingent Interpretation: Implications of Variance in Difficulty of Formal Constitutional Change

DARREN R. LATHAM *

ABSTRACT

To the extent a constitutionalism embraces a text, any fully elaborated theory of interpretation must account for that text's degree of formal amendability, rendering most interpretive theories in American constitutionalism "amendability-contingent." Building on the author's prior empirical work speculating on present and historical degrees of amendability of the U.S. Constitution, this Article situates the amendability factor within the interpretive process and outlines a problematic for the resultant amendability-contingency of interpretive theories. Attempting not a comprehensive, normative critique of specific interpretive theories but to introduce the nature and scale of implications of the amendability-contingent approach, the Article focuses on how the impact of such amendability-contingency differs according to the type of constitutional questions at issue and how the amendability-conscious interpretive process is rendered more complex and variable to the extent our Constitution's formal amendability has varied over history. The Article concludes by demonstrating that the flexibility of interpretation dictated by our present low degree of amendability is formally inescapable and conservatively oriented.

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I. Introduction.....	731
II. Theoretical Implications of Variance in Contemporary and Historical Degrees of Formal Constitutional Amendability	739
A. The Amendability-Contingent Nature of American Constitutionalism.....	742
B. The Exceptionalism of Individual Rights and Distinctions Between Insider and Outsider Rights in the Theory.....	745
C. Comparative Evidence of the Necessity of Amendability- Contingency in Interpretation	747
III. Amendability-Contingent Critique of Selected Supreme Court Jurisprudence.....	748
A. Facial Critique of Legislative Power and Individual Rights Jurisprudence.....	748
B. Amendability-Contingency Theory Applied to Doctrinal Examples	755
1. Application to Legislative Power: Commerce Power.....	756
2. Application to Individual Rights.....	762
3. Special Considerations for Other Categories of Federal Power and Limitations on Federal and State Power.....	764
IV. Recognizing Amendability-Contingency: Baseline and Continuing Considerations for Interpreters.....	766
A. Overview: Amendability-Contingent Interpretation is Empirically Informed, Subject-Matter Dependent, and Historically Sensitive.....	766
B. The Generally Applicable, Threshold Empirical Assessment	768
C. The Subject-Matter Dependent and Historically-Sensitive Phase of the Interpretive Process.....	768
V. The Conservative Orientation of Amendability-Contingent Interpretation	772
A. Amendability-Contingency in Interpretation is Formally Inescapable	772
B. The Flexibility of Interpretation Dictated by Amendability- Contingency Theory Invokes a Fundamentally Conservative Philosophy	774
VI. Conclusion	776
VII. Appendix: Critiqued Precedents Referenced in Table 2.....	778

I. INTRODUCTION

To the extent a constitutionalism embraces a text,¹ any fully elaborated theory of constitutional interpretation² must account for that text's degree of formal amendability. The conceptual vagueness,³ empirical elusiveness,⁴ and historical sensitivity⁵ of amendability under our Article V⁶ render interpretive theories in American constitutionalism "amendability-contingent."

Building on my prior empirical work on the degree of amendability itself,⁷ this Article situates the amendability factor within the interpretive process and outlines a problematic for the resultant amendability-contingency of interpretive theories. This preliminary speculation targets only some examples from doctrine and history, attempting not a comprehensive, normative critique of specific interpretive theories, but to introduce the implications of the amendability-contingent approach.

To focus here only on the general significance of amendability-contingency's impact on interpretation, I postulate the following: that a constitutional text formally un-amendable by its terms should be interpreted differently than one easily amendable (say by a mere legislative majority) in at least some circumstances;⁸ that between those poles of formal un-amendability and relatively easy, majoritarian amendability lie degrees of amendability that dictate corresponding differences in interpretive approach

1. Recognizing the rich and varied discourse on ultimate foundations in constitutional theory, this Article's analysis assumes only that a substantial proportion of actors in American legal culture either start with or very quickly arrive at the United States Constitution of 1788 [hereinafter "Constitution of 1788"] in addressing questions of federal constitutional law, though most do not stop there. Moreover, the more closely interpretative theories hew to that text, the more my analysis has to say about them.

2. Without intending to take a position on the taxonomic debate, see, e.g., Lawrence B. Solum, Symposium, *The Interpretation/Construction Distinction in Constitutional Law*, 27 CONST. COMMENT. 95 (2010), for convenience, here I generally use the term "interpretation" to refer also to what might be characterized as "construction."

3. See Darren R. Latham, *The Historical Amendability of the American Constitution: Speculations on an Empirical Problematic*, 55 AM. U. L. REV. 145, 154-55 (2005).

4. See *id.* at 253-62.

5. *Id.*

6. U.S. CONST. art. V.

7. Latham, *supra* note 3 (Electronic version that preserves graphical material available at <http://www.wcl.american.edu/journal/lawrev/55/55-1.cfm>).

8. This difference reflects the idea that formal amendments sometimes are "corrections" to constitutional interpretations at odds with the wishes of a constitution-making polity, and the more difficult an interpretation is to correct, the greater diligence the interpreter should apply to the interpretation. See generally John Ferejohn, *The Politics of Imperfection: The Amendments of the Constitution*, 22 LAW & SOC. INQUIRY 501 (1997).

for at least some questions;⁹ that despite Article V's alternative for an amendment-proposing convention, as a practical matter the Constitution of 1788 is formally amendable only through amendments proposed by two-thirds majorities of both houses of Congress;¹⁰ that the congressional gatekeeping role has become far more restrictive, practically, than the Founders had imagined due to many factors, including increasing disparities between state populations (and corresponding veto power in smaller and smaller subsets of the national population through their Senate representation)¹¹ and varying but generally-diminishing appetite for the amendment process as a vehicle for actual change as opposed to individual credit seeking;¹² and that, practically, the degree of amendability has varied over our history.¹³ Though some of those assumptions are debatable as to

9. See *infra* text accompanying note 38 and Figure 1.

10. The practical unavailability of the convention method has been attributed to the inability to limit any proposed convention to a particular topic and the consequent fear of the potential unintended and undesirable consequences of an unwieldy convention. See Latham, *supra* note 3, at 154 n.16, 175-76 nn.117-19; see also Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1526 (2010); but cf. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 11 (2006) (making the case for a national referendum requesting Congress to call a constitutional convention empowered to draft a new Constitution to be submitted to the electorate). There has also been a spike in popular interest in an amending convention circa 2011, fueled by concerns as divergent as those associated with the Tea Party Movement who claim the 2010 Health Care Act, see *infra* note 23, especially its individual mandate to carry insurance, exceeds the constitutional scope of congressional power and those opposed to the Court's striking of legislation limiting corporate election spending in *Citizens United v. Fed. Elections Comm'n.*, 130 S. Ct. 876 (2010). See, e.g., Lawrence Lessig & David Segal, *Report from the Conference on the Constitutional Convention*, HUFF POST POLITICS (Sept. 30, 2011, 11:25 AM), http://www.huffingtonpost.com/lawrence-lessig/report-from-the-conferenc_b_988902.html (describing a constitutional convention conference held at Harvard in September 2011 and a web-based initiative to promote and facilitate states' calling for a constitutional convention, found at <http://callaconvention.org/>).

11. Just as a matter of voting arithmetic, it could be said to be now approximately twice as difficult to clear the Senate hurdle of congressional gatekeeping for proposed amendments as it was at the founding. In 1790, the votes of senators from states comprising as little as 14.79% of the population of all states could block a proposed amendment (the percentage of population of all thirteen states comprised by the five smallest states). See U.S. Population by State, 1790 to 2010, INFOPLEASE, <http://www.infoplease.com/ipa/A0004986.html> <http://www.infoplease.com/ipa/A0004986.html> (last visited Mar. 14, 2012) (based upon U.S. census data, listing population by state from 1790), from which the nine senators necessary to defeat a two-thirds majority of the twenty-six senators could be drawn; while in 2010, votes of senators from states comprising as little as 7.5% of the population could block a proposed amendment (the percentage of population of the fifty states comprised by the smallest seventeen, see Resident Population Data, CENSUS.GOV, <http://2010.census.gov/2010census/data/apportionment-pop-text.php> <http://2010.census.gov/2010census/data/apportionment-pop-text.php> (last visited Mar. 14, 2012)).

12. See Latham, *supra* note 3, at 159 (concluding on the basis of an empirical analysis that careerism—proposing amendments to grandstand for constituents as opposed to initiate a process thought likely to lead to formal constitutional change—increasingly dominated the congressional view of Article V over our history, with some variation).

13. The historical variability of amendability—however defined—is the primary, tentative conclusion of my prior article on amendability. See *id.* at 253-56.

existence or degree, to the extent they hold, amendability unavoidably impacts constitutional interpretation in significant ways, and minor deviations from those assumptions might only diminish, not eliminate, that impact.¹⁴

Congress's practically exclusive gatekeeping role imposes a particular layer of complexity on the amendability-contingent approach to interpretation. That congressional filter causes the effect of the degree of amendability on interpretation to vary according to the type of constitutional question at issue. That is, the impact of the amendability factor on the interpretive process may vary across different categories of constitutional questions according to the level of interest Congress would tend to have, collectively as the gatekeeper, in supporting or opposing an amendment proposal in the category.¹⁵

Briefly considering three groups of cases—decisions upholding congressional power, denying congressional power, and on constitutional questions other than congressional power—illustrates the subject-matter dependency of amendability. First, a Court decision upholding a federal act through an expansive interpretation of congressional power, in general, is very unlikely to be followed by Congress proposing an amendment to reverse that decision through a limitation of congressional power. Because the prior passage of the act evidences a congressional predisposition to the contrary, a proposed amendment is extremely unlikely to garner the requisite two-thirds majorities of both houses of the same or a similarly-comprised Congress. And the Court's decision should have considered that lack of a probable "correction" by formal amendment of an overly-broad interpretation. Conversely, that reasoning dictates that the category of interpretation most likely, in the abstract, to be subjected to a corrective

14. For instance, an interpreter who believed the Article V convention mode of amendment proposing were more practically viable than I have indicated might arrive at an interpretive theory less influenced by amendability considerations for the topical categories subject to congressional self-interest or predisposition, *see infra* Part IV.B.

15. *See, e.g.*, Kris W. Kobach, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 YALE L.J. 1971, 1974 (1994) (noting the amendment process is subject to "Congress' inherent structural interest in prolonging the tenure of its sitting members"). The general relationship between interest in amendments that varies with subject matter and likelihood of congressional response was examined in a detailed public-choice-theory analysis of Article V by Boudreaux and Pritchard, Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111 (1993), but not in relation to varying assessments of degree of amendability or the consequences for interpretive methods. Rather, Boudreaux and Pritchard focus on the role of interest groups in constitutionalism, their goals (in economic terms) of majority pre-commitment and reduction of agency costs, an economic model of the Article V process that stymies achievement of those norms, and the ways in which our Article V history validates that model. *See id.*

response from Congress would be interpretations denying the power for a congressional act.

But there is a significant caveat: that theoretical difference between decisions upholding and decisions denying congressional power translates to practical significance only to the extent that amendability in general is high enough to support a viable response—that is, only if proposed amendments are sufficiently viable options in general, which is not likely in the modern era.¹⁶ Examples of congressional responses come instead from a period in which my prior work has suggested amendability is higher,¹⁷ including the 1909 proposal to make explicit the power to tax personal income,¹⁸ ratified as the Sixteenth Amendment in 1913,¹⁹ and the Child Labor Amendment, which passed Congress in 1924 and would have granted the power to regulate child labor²⁰ that was denied by the Court as being part of the commerce power in *Hammer v. Dagenhart*.²¹ Thus, only to the extent amendments are practically viable remedies in general does an amendability-contingent theory direct a court to interpret congressional power more strictly than other types of constitutional questions.

For most categories other than legislative power, Congress is relatively more likely to offer a proposed amendment to reverse an expansive interpretation—for example, where a particular assertion of executive power has been upheld.²² In non-legislative categories, there generally will not have been either a congressional predisposition to a particular interpretation or a strong institutional self-interest in expansive powers or limiting restrictions on those powers.

Two items in recent legal and political discourse (circa 2011-2012) illustrate the above distinction between legislative power and other constitutional questions: the 2010 Patient Protection and Affordable Care Act's "individual mandate" to carry health insurance²³ (subject to challenges working their way through the federal court system between

16. See Latham, *supra* note 3, at 248-53.

17. See *infra* text accompanying note 38.

18. *Historical Highlights of the IRS*, IRS, <http://www.irs.gov/irs/article/0,,id=101101,00.html> (last visited Mar. 22, 2012).

19. See U.S. CONST. amend. XVI.

20. H.R.J. Res. 184, 68th Cong., Sec. 1 (1924); see *infra* note 130.

21. 247 U.S. 251, 276 (1918).

22. See *infra* Table 1.

23. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 119 (2010), amended by Health Care and Education Reconciliation Act of 2010 ("HCERA"), Pub. L. No. 111-152, 124 Stat. 1029 (2010).

2010 and 2012)²⁴ and individual rights challenges to state prohibitions on same-sex marriage.²⁵

Though politically polarized compared to most legislation, the individual mandate of the Health Care Act can still illustrate the dynamics of amendability-contingent interpretation. What would the congressional response be were the Supreme Court to uphold the mandate (in a decision likely to be rendered by the end of the Court's term in Summer 2012²⁶)? If Congress were composed exactly as when the mandate passed (which, after the Republican-skewed 2010 congressional elections, it will not be in Summer 2012²⁷), it is highly unlikely that sufficient numbers of original healthcare-legislation voters in both houses would reverse themselves to produce two-thirds majorities in both houses against not only the specific legislation but the general scope of congressional power it exercised—that is, the congressional predisposition is unlikely to be reversed in the supermajority numbers necessary to pass the congressional hurdle for an amendment.²⁸

But even the actual Congress—politically reconfigured by the 2010 elections, skewed against the healthcare legislation in the House, and more closely divided on it than in 2010 in the Senate²⁹—would not likely propose a constitutional amendment restricting congressional power due to (1) the magnitude of the supermajority necessary to reverse the congressional predisposition; (2) substantive complexities; and (3) factors motivating me

24. See *infra* notes 26, 144.

25. See, e.g., Clifford J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913 (2011).

26. The Court has granted certiorari for the 2011-2012 term to review Circuit Court rulings on challenges to the 2010 Health Care Act, including the individual mandate. See *Florida v. U.S. Dept. of Health & Human Serv's.*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted sub nom.*, *Florida v. Dep't of Health & Human Serv's.*, 80 U.S.L.W. 3294 (U.S. Nov. 14, 2011) (No. 11-400); *Nat'l Fed'n. Indep. Bus. v. Sebelius*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted sub nom.* *Florida v. Dep't. of Health & Human Serv's.*, 80 U.S.L.W. 3198 (U.S. Nov. 14, 2011) (No. 11-393); *U.S. Dep't. of Health & Human Serv's. v. Florida*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted sub nom.* *Dep't. of Health & Human Serv's. v. Florida*, 80 U.S.L.W. 3199 (U.S. Nov. 14, 2011) (No. 11-398), *cert. granted in part*, 2011 WL 5515165 (U.S. Nov. 14, 2011) (No. 11-400). Though a ruling is expected by (and likely not until) Summer 2012, it is possible the decision would not reach the merits, the Court holding the present challenges barred by the Anti-Injunction Act, as did the Fourth Circuit. See *Liberty Univ., Inc. v. Geithner*, 2011 WL 3962915 No. 10 2347 (4th Cir. Sept. 8, 2011).

27. The political party composition of Congress shifted towards the Republican Party in both houses between the Health Care Act's passage in early 2010 and the November 2010 elections, shifting control of the House to the Republicans with a forty-nine seat majority and narrowing the degree of Democratic control of the Senate from a fifty-nine (with two independents caucusing with Democrats) to forty-one seat majority to a fifty-one to forty-seven seat majority (with two independents). See, e.g., *2010 Election Results*, FEDERAL ELECTION COMMISSION, <http://www.fec.gov/pubrec/fe2010/tables2010.pdf> (last visited Oct. 10, 2011).

28. U.S. CONST. art. V.

29. See 2010 Election Results *supra* note 27.

to conclude our current era to be of low amendability.³⁰ First, though a successful proposed amendment would bypass the President, the magnitude of the 2010 political reconfiguration does not translate to two-thirds majorities in both houses. Second, the substantive complexities deterring a proposed amendment include (1) that a disagreement with the mandate itself as a policy choice is not necessarily a disagreement with the power to impose it; (2) that even some constitutionally opposed to the mandate may view it as more of an individual rights than a congressional power question and hence would not favor a power-focused amendment; and (3) that the specific language embodying a proposed limitation on legislative power would be difficult to agree upon. Third, many members of Congress likely harbor a pessimism about amendment success, and some a reverence for constitutional textual integrity that precludes their opposition to this particular exertion of power from fomenting large-scale support for a particularly phrased change to the constitutional text.³¹

Again, the healthcare legislation presents an example at the political extremes. For almost any other exertion of federal power upheld by the Court, there is even less chance Congress would switch its view to disavow that power in two-thirds majorities of both houses and that a supermajority would also favor a formal constitutional change to codify that view.

A decision on whether a prohibition on same-sex marriage violates individual rights invokes a different calculus. For this illustration I have assumed the general concept of gay rights still does not garner support in the majority of states, let alone a supermajority (rendering it highly improbable that two-thirds of the Senate would vote for a proposed amendment protecting gay rights or three-fourths of the states would ratify one). As detailed below, that and other considerations would classify gay rights as “outsider rights” (as contrasted with “insider rights”).³² Roughly, insider rights are those that apply to, are related to by, or otherwise induce an affinity from a national political majority at least sufficient in size to elect two-thirds of the House and Senate—for example, general property rights.³³ In an amendability-conscious theory, outsider rights lack those qualities and therefore are not likely to be vindicated by a formal constitutional amendment, even if—in the case of state infringement—the

30. See Latham, *supra* note 3, at 248-56.

31. See my hypotheses on congressional motivation in amendment-proposing activity. See *id.* at 252-56. Rather, differently composed proposed amendments limiting federal legislative power are likely to be introduced by individuals or small groups of members of Congress, for the primary purpose of seeking credit for proposing the amendment. See *id.*

32. See *infra* Part II.B.

33. See *id.*

particular infringement is committed by political majorities only in a “sub-minority” of states.³⁴

A Court decision narrowly construing the Constitution to deny an asserted outsider right is not likely to be changed by formal constitutional amendment, regardless of how high formal amendability is in the general sense.³⁵ By contrast, a flexible Court construction recognizing an asserted outsider right is reasonably under threat of rejection by amendment to the extent formal amendments in general are viable options—that is, if the degree of amendability is sufficiently high.³⁶

For those reasons, neither the lack of express constitutional text nor a theoretical possibility of adding controlling constitutional text can be reasons not to recognize an outsider right, and judges who view amendability to be generally high should be even more inclined to recognize outsider rights, since a viable amendment corrective would exist for any interpretation viewed as overly broad.

The rest of this Article interrogates the general validity of an explicitly amendability-conscious theory of interpretation in three progressively specific and practical parts. Part II contemplates the implications for interpretation abstractly, in the primary categories of questions where the degree of amendability should affect the interpretive process. Part III then preliminarily examines the workability and apparent validity of that general theory by assessing interpretations in historical cases from exemplary areas of current constitutional doctrine. When that analysis calls for an assessment of amendment difficulty for a particular historical era, I assume the degree of difficulty speculated for that era in my 2005 article on proposed amendments.³⁷ That is, I assume the following seven distinct historical eras of amendability:

34. *See id.* I use sub-minority to refer to a limited-sized minority opposition, one not large enough to block a vote that requires some supermajority. For state ratification of proposed amendments, presently under discussion, the super-minority is a number of states no larger than one quarter of the states, i.e., twelve states or fewer, thirteen states being the minimum number to defeat ratification. In the context of congressional passage of proposed amendments, sub-minorities would be one third or fewer of the House or Senate, two-thirds being the Article V thresholds for those bodies. *See* U.S. CONST. art. V.

35. *See infra* Part II.B.

36. *See id.*

37. Latham, *supra* note 3. That article analyzes longitudinal data sets of amendment-proposing and other congressional-legislation-proposing frequencies to identify historical variations in the degree to which the Article V process is used for more credit-seeking by members of Congress as opposed to serious attempts at constitutional change and combines that analysis with other numerical and historical data to reach my speculative conclusions of seven historical eras of amendability. *Id.*

Historical Era	Amendability Hypothesis ³⁸
Founding (1791 – 1812)	higher
Antebellum (1813 – 1858)	diminishing (higher to lower)
Civil War – Early Reconstruction (1859 – 1868)	sui generis
Latter Reconstruction – Gilded Age (1869 – 1886)	lower
Populist – Progressive (1887 – 1916)	increasing (lower to higher)
Suffrage – Prohibition (1917 – 1930)	higher
Modern (1931 – present)	lower ³⁹

Part IV then outlines the changes an amendability-conscious approach would impose on the intellectual process of a decision maker facing a particular interpretive question and is followed, in Part V, by a brief response to two likely facially-conservative arguments against my amendability-contingency theory.

38. The characterizations “higher” and “lower” are only relative to amendability at other points in history for the American history. They are not objective, absolute, or relative to other nations’ constitutionalism, as all periods of American history exhibit low amendability on that scale. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 362 (1994) (providing comparative “data show[ing] that the U.S. Constitution has the second-most-difficult amendment process”).

39. Latham, *supra* note 3, at 254. As set forth in that article, the demarcation of those eras and the characterization of amendability in each are very preliminary and speculative. *Id.* at 150.

II. THEORETICAL IMPLICATIONS OF VARIANCE IN CONTEMPORARY AND HISTORICAL DEGREES OF FORMAL CONSTITUTIONAL AMENDABILITY⁴⁰

The interpretive issue may be framed by considering the implications at the polar extremes: a constitutional text that is completely unalterable, formally, versus one that can be changed as easily as normal legislation.

If the constitutional text were formally immutable and contained no provision for amendment, some flexibility of interpretation would seem to be compelled under any theory of constitutionalism.⁴¹ For example, consider a version of the Constitution of 1788 that omitted Article V: even the most-strict originalists would likely agree that the adopters could not have intended that revolution would be the only accommodation to all future exigencies not contemplated by express text or that the judicial branch would have no interpretive role in making such accommodations.⁴²

40. I have previously defined “amendability” to be the degree to which a constitutional text’s formal change mechanism practically allows response to “amendment need”:

Congressional gate-keeping, with its two-thirds supermajority threshold, was one component of the 1788 adopters’ attempt to temper their own and future generations’ immediate popular will. Itself an “unconstitutional” yet necessary act, the Constitution of 1788 sought to remedy the virtual immutability of the Articles of Confederation that preceded it. The primary mechanism for constitutional change divided the process into two stages: first, congressional approval of a proposed change; then, states’ ratification. Accordingly, the adopters must have expected the change mechanism’s first stage, the congressional gate keeping function, to allow change proposals to pass to the second stage, decision by the states when actually needed.

At the same time, the adopters expected that Congress as gatekeeper would be responsive to something. I call that thing “amendment need.” Amendment need probably should signify some significant aggregate level of desire for change by “the people,” perhaps filtered by congressional judgment. And it is the level of responsiveness to amendment need, both through congressional gate keeping and post-Congress ratification that I define here to be the Constitution’s “amendability.”

Id. at 154-55 (footnotes omitted).

41. That is, I am presuming some degree of flexibility in interpretation would be preferred over political revolution as the only means of constitutional change (and would be deemed legitimate).

42. *See, e.g.*, Elizabeth P. Foley, *Sovereignty, Rebalanced: The Tea Party & Constitutional Amendments*, 78 TENN. L. REV. 751, 756, 763 (2011) (arguing, in an asserted paraphrase of the Declaration of Independence, that “[l]ongstanding governments should be tinkered with when desired and discarded *in toto* only when necessary to defend individuals’ natural rights . . . [.]” presumably as a conservative, since author later asserts that “it does not take a degree in rocket science . . . to realize that the federal government’s powers have spun out of control”) (emphasis added). As one progenitor of present conservative thinking stated, “[a] state without the means of some change is without the means of its conservation.” EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 29 (1790).

Speculation at the opposite extreme considers an Article V that required only majorities of both houses plus the President's approval to amend.⁴³ Were the written Constitution of 1788 as easily amendable (formally) as a statute, that would argue a standard of interpretation approaching the strictness of interpretation of statutes, at least for some issues such as federal power questions⁴⁴ (though it would not necessarily compel exactly the same strictness of interpretation)⁴⁵

This Article posits that to the extent the amendability of the United States Constitution has either actually varied during our history or the perception of amendability by interpreters has varied, so should the flexibility⁴⁶ of interpretation⁴⁷ on the constitutional questions where

43. As a formal matter, the United Kingdom Constitution may be considered to fall into this category, certain statutes and conventions being recognized to have constitutional status, *see, e.g.*, PETER LEYLAND, *THE CONSTITUTION OF THE UNITED KINGDOM: A CONTEXTUAL ANALYSIS* 2, 19-20 (2007), though the limits of what becomes recognized as constitutional implies a higher practical degree of amendability, *see, e.g.*, S.E. FINER, VERNON BOGDANOR, & BERNARD RUDDEN, *On the Constitution of the United Kingdom*, in *COMPARING CONSTITUTIONS* 40-101 (1995).

44. *But see infra* Part II.B and Part II.C.

45. Even though the United Kingdom Constitution is, in most regards, formally amendable by legislation only, the felt threshold for legislative variance from the limited set of prior legislation and conventions now regarded as constitutional is higher. *See* FINER, ET AL., *supra* note 43 at 100-01.

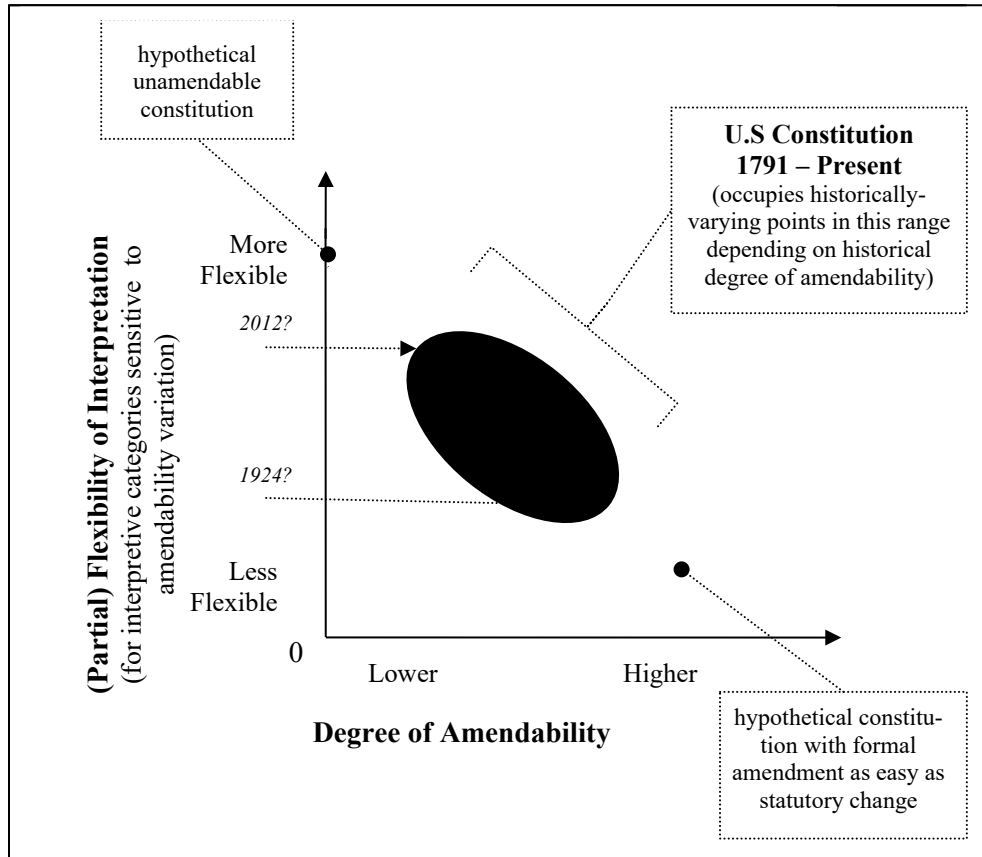
46. "Flexibility," in my usage here, admittedly is an under-defined and under-theorized concept. *See infra* note 50 and accompanying text.

47. That relationship between flexibility of interpretation and amendability seems to have been recognized by the founding Supreme Court. In *Chisholm v. Georgia*, 2 U.S. 419, 2 Dall. 419 (1793), Justice Choate justified a literalist interpretation of Article III's allowance of citizen suits against states on a perceived high amendability—despite the seeming contrasting evidence of original contrary intent that was subsequently expressed by the immediate repudiation of the Court's decision though the adoption of the Eleventh Amendment—as follows:

But still it may be insisted, that this will reduce States to mere corporations, and take away all sovereignty. As to corporations, all States whatever are corporations or bodies politic. The only question is, what are their powers? As to individual States and the United States, the Constitution marks the boundary of powers. Whatever power is deposited with the Union by the people for their own necessary security, is so far a curtailing of the power and prerogatives of States. This is, as it were, a self-evident proposition; at least it cannot be contested. Thus the power of declaring war, making peace, raising and supporting armies for public defence, levying duties, excises and taxes, if necessary, with many other powers, are lodged in Congress; and are a most essential abridgement of State sovereignty. Again; the restrictions upon States; 'No State shall enter into any treaty, alliance, or confederation, coin money, emit bills of credit, make any thing but gold and silver a tender in payment of debts, pass any law impairing the obligation of contracts;' these, with a number of others, are important restrictions of the power of States, and were thought necessary to maintain the Union; and to establish some fundamental uniform principles of public justice, throughout the whole Union. So that, I think, no argument of force can be taken from the sovereignty of States. Where it has been abridged, it was thought necessary for the greater indispensable good of the whole. *If the Constitution is found inconvenient in practice in this or any other particular, it is well that a regular mode is pointed out for amendment. But, while it remains, all offices Legislative, Executive, and Judicial, both of the States and of the Union, are bound by oath to support it.*

amendability should affect interpretation. Figure 1 illustrates this in simplified form:⁴⁸

Figure 1: Theory of Partial⁴⁹ Variance in Flexibility of Interpretation as a Function of Historical Degree of Amendability



Id. at 468 (Cushing, J.) (emphasis added).

48. The zone in which American constitutionalism falls is bounded by convex and concave arcs because, while the relationship between degree of amendability and liberality of interpretation could not be precisely linear, I do, however, argue it to be unimodal.

49. Not all categories of interpretation are sensitive to the degree of amendability. *See infra* Table 1.

While Figure 1 exhibits an inverse relationship between flexibility of interpretation and degree of amendability in general, the relationship need not be linear.

Note that “flexibility,” as used in this analysis, is somewhat vague and under-theorized. I have not intended to convey much theoretical meaning through that particular term. Roughly, it denotes the converse of narrowness or strictness in treatment of constitutional text or precedent. I believe “flexible” encompasses both “liberal” and “broad” but is less restrictive⁵⁰ and can capture interpretive moves that, while neither liberal or broad, are licensed by the practical unavailability of a formal-amendment alternative for a particular constitutional change.

My amendability-contingency theory (A) applies the above concept to American constitutionalism, recognizing (B) the special interpretive implications of individual rights—particularly those of groups who are “outsiders” with respect to the viability of benefitting from formal constitutional change.⁵¹ This introduction concludes by noting (C) that comparative evidence of other constitutional systems suggests interpretive flexibility should vary with difficulty of formal amendment.⁵²

A. *The Amendability-Contingent Nature of American Constitutionalism*

To suggest some of the ways in which attention to amendability should affect American constitutionalism, Table 1 below considers constitutional interpretation across the axes of historically-varying amendability and (a simplified subset of) federal powers and rights categories in our constitutional structure. It addresses the differences in both flexibility of interpretation and the precedential weight of such interpretations, depending on the degree of amendability and the type of constitutional question at issue, factoring in the effect of congressional inclination to promote or block an amendment on the type of issue depending on predisposition or

50. Usage varies in English-language constitutional discourse: all three terms—flexible, liberal, and broad—can be found individually used to describe the converse of strictness interpretation, suggesting they are interchangeable; but their usage in pairs suggests different meanings, *see, e.g.*, Wendy Brown Scott, *Oliver Wendell Holmes on Equality and Adarand*, 47 *HOW. L.J.* 59, 85 (2003) (“a liberal, flexible interpretation of the Constitution . . .”); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 *HARV. L. REV.* 2180, 2199 n.88 (1998) (“This argument for a narrow interpretation of Congress’s powers was rejected in *McCulloch*, and Chief Justice Marshall concluded that the enumerated powers called for a broad and flexible interpretation.”); Debra M. McAllister, *Doucet-Boudreau and the Development of Effective Section 24(1) Remedies: Confrontation or Cooperation?*, 16 *NAT’L J. CONST. L.* 153, 168 (2004) (“A broad, liberal and flexible interpretation must be given to the words ‘appropriate and just.’”).

51. *See infra* Part II.B.

52. *See infra* Part II.C.

self-interest.⁵³ Seeking focus and clarity in highlighting the shifts in interpretive mode across categories, I have made the table simple and compact through abbreviated, terse wording and explanations limited in general and to the initial descriptive cells.

Table 1: Amendability-Contingency Theory
(applied across selected categories of power or rights)

Effects of Relative⁵⁴ Degree of Amendability on Appropriate Level of Flexibility in Interpretation and on Weight of Precedent				
Type of Question	Higher⁵⁵ Amendability's Effect		Lower Amendability's Effect	
	<i>on Interpretation</i>	<i>on Weight of Precedent</i>	<i>on Interpretation</i>	<i>on Weight of Precedent</i>
Power of Congress	Stricter, except for questions of power to protect outsider rights. <i>(because a strict ruling on outsider rights is not as likely to be remedied by amendment)</i>	Higher for denials of power not "corrected" by amendment, except power used to protect outsider rights. Affirmance of power unaffected by lack of corrective amendment.	More flexible.	Unaffected by lack of corrective amendment.
Executive Power	Stricter where Congress and executive interests aligned, except where power used to protect outsiders.	Higher for denials if Congress and executive interests aligned and outsider rights not involved. Higher for pro-power ruling if executive and congressional interests opposed.	More flexible.	Unaffected by lack of corrective amendment.

53. See, e.g., Rappaport, *supra* note 10, at 1511-12 (lamenting the distortive effect of the "effective congressional veto[,] which makes "constitutional amendments that reduce or constrain Congress's power . . . unlikely to be enacted . . ."). See *infra* Table 1.

54. "Relative" because none of my seven U.S. eras of amendability exhibited truly high amendability when compared with other nations. See generally Lutz, *supra* note 38, at 365-70.

55. Only relatively higher. See generally *id.*

Type of Question	Higher Amendability's Effect		Lower Amendability's Effect	
	<i>on Interpretation</i>	<i>on Weight of Precedent</i>	<i>on Interpretation</i>	<i>on Weight of Precedent</i>
Individual Rights <i>infringed by Executive</i>	Somewhat stricter because congressional and state super-majorities might oppose executive action (less for outsider rights).	Higher (especially strong if upholds outsider right).	More flexible.	Unaffected.
<i>infringed by States</i>	Somewhat stricter because super-majorities in Congress and states could stop rogue states' infringement if Congress lacks normal legislative power (not likely for outsider rights).	Higher (especially strong if upholds outsider right).	More flexible.	Unaffected.
<i>infringed by Congress</i>	Flexible interpretation, unaffected by degree of amendability.	Higher if overturns congressional infringement (stronger if overturns infringement of outsider rights).	Flexible interpretation, unaffected by degree of amendability.	Unaffected.

In Table 1, I conclude that historically-varying amendability should produce (1) a varying flexibility of interpretation of constitutional text across categories of powers and some categories of rights, which depends on the degree of amendability, and (2) a corresponding variance in precedential weight in some of those categories.

Table 1 also notes a third axis of variation in the theory that applies to individual rights—the role of a class of individual (generally minority) interests I have termed “outsider rights.”

B. The Exceptionalism of Individual Rights and Distinctions Between Insider and Outsider Rights in the Theory

Individual rights pose special challenges to the amendability model. Different types of individual rights that each might be classified as fundamental by other criteria nonetheless are “politically viable” in the constitutional sense, to varying degrees. That is, to varying degrees, they are or are not amenable to recognition by political majorities of sufficient size to make plausible their vindication through constitutional amendment.⁵⁶ Though that variability poses a multi-faceted question of degree, for the purposes of developing the model I identify a mere binary distinction between “insider” and “outsider” individual rights.⁵⁷ For now, I remain agnostic on whether, where, and by what theory a precise dividing line could be drawn—or whether one should be drawn as opposed to defining an “insiderness”-“outsiderness” continuum—but I am confident that there are examples at the extremes on either side of any line or at opposite ends of a continuum upon which most would agree.⁵⁸

56. This constitutional political viability concept is related to but distinct from concepts associated with theories under heading Social Choice, Public Choice, or Rational Choice. *See, e.g.*, Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1227 (1994). The distinction is that choice theory deals with defects in voting systems or legislative processes that thwart the emergence of rational majority preferences, *id.*, while I am concerned here with rights not preferred by any majority.

57. While my use of the term outsider overlaps with content falling under the rubric of “outsider” or “other” in fields of social theory, I do not intend to invoke those theories directly. Instead, I reference only the concept of lack of political viability, an inability to generate voting support sufficient to surpass the congressional hurdle for proposing amendments. Social conditions well-analyzed in other fields doubtless determine the level of political viability, but here I only assume the analysis would lead to some non-viable rights claims, without taking a position on which ones they are. Obviously, I also do not intend to invoke specialized legal usages of outsider, such as in the corporate governance context, though its uses in immigration and citizenship, *see, e.g.*, LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006), and racial discrimination, *see, e.g.*, Jerry Kang, *Denying Prejudice: Internment, Redress, & Denial*, 51 UCLA L. REV. 933, 957-58 (2004), likely would inform refined application of my concept.

58. To be clear, I do not claim that the outsider rights category I have identified merits unique treatment in my theory merely because of their lack of political viability. Professor Ackerman exploded that line of thinking when he artfully dismantled the logic of using *Carolene Products* to identify interests subject to special constitutional treatment. *See* Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985). For example, rather than “discrete and insular minorities,” Ackerman argues it often is “diffuse and anonymous” minorities who are most vulnerable in our constitutional system. *Id.* at 722-24. “Discrete and insular” minorities, by contrast, due to the nature of their insularity are well-suited to vindicate their interests in the pluralist politics of our system. *See id.* at 742. But even those who cannot are not necessarily worthy of special dispensation. *Id.* Rather, Ackerman demonstrates how, despite the attempt of Stone in *Carolene Products* to process-ize constitutional adjudication, we must still ultimately resort to “the elaboration of substantive constitutional principles . . .” *Id.* at 743. I accept that conclusion but note that in a theory that contemplates the role of amendability, political viability will play a role once we have substantively identified interests worthy of protection.

Property rights may be the quintessential insider rights, while examples of outsider status are likely to be found among small racial groups, aliens, gays and lesbians historically, popularly-distrusted religious minorities such as nonbelievers and non-Judeo-Christian religions, the polyamorous, the criminally accused and convicted, assertedly-subversive speakers, et cetera. Though clear cases doubtless could be drawn from the latter group, again, line-drawing presents theoretical challenges. For example, some rights are subject to more generalized characterizations that present insider affinities—such as the categories of religious freedom in general and general freedom of expression and association.⁵⁹ Or, in the area of criminal procedure, rights such as those against self-incrimination,⁶⁰ unreasonable searches,⁶¹ and to a jury trial⁶² may have more insider affinity than others such as the right to counsel,⁶³ a jury not selected on race grounds,⁶⁴ and against certain abuses in the application of capital punishment,⁶⁵ which are rights of especially disproportionate importance to potential outsider groups like the poor and racial minorities.

While, again, the best criteria for distinguishing insider from outsider rights are debatable, rights that would be classified as outsider under any reasonable criteria are extremely unlikely to be vindicated by amendment no matter how high the degree of amendability; by contrast, clear insider rights are much more likely to be vindicated by amendment if amendability is sufficiently high.

The type of broad-based political support that characterizes insider rights was manifest in the aftermath of the Court's 2005 *Kelo v. City of New London*⁶⁶ decision. *Kelo* rejected a landowner's claim that an eminent domain taking of her property as part of a municipal economic development plan violated the public use restriction of the Takings Clause, as incorporated against the States, by effectively transferring her land to another private party (a corporation whose use of the land was contemplated to further the planned economic development).⁶⁷ Within a few years of that

59. See U.S. CONST. amend I. For instance, in Table 2, in the section examining selected individual rights decisions in the Founding Era, I have suggested executive decisions on enforcement of the Sedition Act of 1798 could be classified under either insider and outsider rights, depending on whether the infringed right is viewed as a general speech right or the speech rights of subversives. See *infra* Table 2.

60. U.S. CONST. amend V.

61. *Id.* at amend. IV.

62. *Id.* at amend. VI.

63. *Id.*

64. *Id.*

65. U.S. CONST. amend V.

66. 545 U.S. 469 (2005).

67. *Id.* at 472-77.

decision, almost every state had enacted some form of legislative or constitutional reform to restrict the eminent domain power that would have enabled the state or a sub-state entity to pursue a plan similar to that which the city of New London approved in *Kelo*.⁶⁸ And it is not hard to imagine how, were practical amendability in general not so low, the agitators for a federal anti-*Kelo* amendment might succeed.

And while applying it to interpretation through a notion of variable amendability may be novel, my recognition of the insider–outsider rights political disparity exemplified by *Kelo*-type property owners or gun owners on the one hand and terror suspects, gays, and the condemned on the other is not. It harkens to the rights critique work of the “rights critics” associated with Critical Legal Studies.⁶⁹ I view the disparity through a lens similar to theirs, though I then apply the observation instrumentally to develop a more nuanced amendability-contingent interpretive theory rather than to making a more direct normative argument.

C. Comparative Evidence of the Necessity of Amendability-Contingency in Interpretation

While there is surprisingly little discussion of such variation of interpretive mode in the American legal scholarship,⁷⁰ descriptive political science recognizes the concept. Surveying governmental characteristics of thirty-six democracies, political scientist Arend Lijphart finds a statistically-significant, moderately-strong correlation (.39) between constitutional rigidity and strength of judicial review (as he operationalizes those notions).⁷¹ While Lijphart’s analysis addresses each constitutional system as a unit,⁷² the relationship between amendability and judicial scrutiny should translate to the micro-level. And the strong empirical evidence of that relationship in the general pattern of development of primarily-western

68. See, e.g., Castle Coalition: Citizens Fighting Eminent Domain Abuse, CASTLE COALITION, <http://www.castlecoalition.org/> (last visited Nov. 27, 2011); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2101 (2009) (noting that “[f]orty-three states have enacted post-*Kelo* reform legislation to curb eminent domain”).

69. See generally Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713 (2011).

70. But see Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 112 (1999) (under the philosophy of the Rehnquist Court, the chosen interpretive method “varies with the . . . character of the right being claimed.”).

71. AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 228-30 (1999).

72. *Id.*

democracies in the past two centuries at minimum lends some normative support to the variation theory.⁷³

The following application of my amendability-contingency theory to concrete examples reveals its nuances and the challenges it would present to the established interpretive order.

III. AMENDABILITY-CONTINGENT CRITIQUE OF SELECTED SUPREME COURT JURISPRUDENCE

To illustrate the application of the theory across the seven eras,⁷⁴ I have focused on the categories of congressional power and individual rights and attempted to be agnostic in selecting an illustrative subset of “prominent cases.”⁷⁵

A. Facial Critique of Legislative Power and Individual Rights Jurisprudence

Table 2 sets forth my application analysis graphically, considering interpretive precedents for congressional power and individual rights, by amendability era (excluding the *sui generis* Civil War – Early Reconstruction Era⁷⁶) and by whether the interpretation upholds or rejects the claim.⁷⁷ Each precedent is evaluated for its flexibility, the facial conformity of that flexibility with the theory, and the facial precedential weight of the interpretation under the theory.⁷⁸

73. The United States, incidentally, is at the extreme of the thirty-six countries in both constitutional rigidity and strength of judicial review. *Id.* at 229.

74. The illustrations skip the brief third era, Civil War – Early Reconstruction, which is treated as *sui generis* in my empirical analysis of the amendability. See Latham, *supra* note 3, at 238-39.

75. For instance, as a starting point I have drawn from cases prominently featured in textbooks in significant use in Constitutional Law courses in American law schools, including the one from which I have most recently taught, ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (3d ed. 2009). However, in an attempt to fill all the cells in Table 2, I had to dig further for relatively-less-prominent cases in certain categories in some eras. See *infra* Table 2.

76. 1859 to 1868. Regarding this era’s exclusion, see *supra* note 74.

77. Most precedents are court decisions, almost all from the Supreme Court, with a few exceptions. For instance, because early Court interpretation of congressional power are sparse, I included Hamilton’s opinion on First Bank—a contemporaneous broad interpretation. Executive enforcement of the Sedition Act is used similarly, under individual rights. To achieve the visual coherence of each table, the precedents are noted by shorthand references. Though most will be familiar to most readers, each is fully cited and explained in the Appendix. See *infra* Table 2.

78. *Id.*

Table 2: Interpretations from each Amendability Era Assessed under Amendability-Contingency Theory

Founding Era (1791 – 1812): Higher Amendability				
		Legislative Power	Individual Rights	
Theorized Effect of Level of Amendability		<p><i>Stricter interpretation, except where used to protect outsider rights. Precedent weight unaffected (by lack of corrective amendment) for affirmance of power; for denials, precedent is facially strong (except if power asserted to protect outsider rights).</i></p>	<p><i>For insider rights (and remotely possibly for outsider), somewhat stricter interpretation if infringed by executive or states.</i></p> <p><i>Higher precedent weight if infringement by executive or states (especially if upholds outsider rights) or if overturns congressional infringement (especially if overturns infringement of outsider rights).</i></p>	
			Insider rights	Outsider rights
Interpretations' Conformity to Theory & Precedential Weight	positive cases	<p>First Bank of U.S. (1791) Hamilton's opinion "upholding" power to establish bank</p> <p>Flexible: facially DEVIATES.</p> <p>Weight unaffected by lack of corrective amendment.</p>	<p>Fletcher v. Peck (1810) (contract & vested rights infringed by states)</p> <p>Flexible: somewhat facially DEVIATES?</p> <p>Facially strong precedent.</p>	<p>Ky. & Va. Resolutions Against Sedition Act (1798)</p> <p>Flexible: facially conforms.</p> <p>[no precedent]</p>
	negative cases	<p>Marbury v. Madison (1803) (denies power over Court jurisdiction)</p> <p>Narrow: facially conforms.</p> <p>Facially strong precedent.</p>	<p>Executive view in enforcement of Sedition Act (1798) (speech rights in general)</p> <p>Narrow: somewhat facially DEVIATES?</p> <p>[no precedent]</p>	<p>Executive view in enforcement of Sedition Act (1798) (speech rights of subversives)</p> <p>Narrow: facially DEVIATES.</p> <p>[no precedent]</p>

Antebellum Era (1813 – 1858): Diminishing Amendability (from Higher to Lower)				
		Legislative Power	Individual Rights	
Theorized Effect of Level of Amendability	<p>Stricter interpretation at era's start, except for outsider rights protection, shifting to more flexible by era's end.</p> <p>At start, precedent weight unaffected for affirm of power but facially strong for denial (except if power asserted to protect outside rights). At era's end, when amendability low, precedent weight unaffected for all.</p>		<p>At start, for insider rights (and remotely possibly for outsider), somewhat stricter interpretation if infringed by executive or states but flexible for infringement by Congress, shifting to flexible for all interpretations by era's end.</p> <p>At start, higher precedent weight if infringement by executive or states (especially if upholds outsider rights) or if overturns congressional infringement (especially if overturns infringement of outsider rights). Weight unaffected at era's end, when amendability is low.</p>	
			Insider rights	Outsider rights
Interpretations' Conformity to Theory & Precedential Weight	positive cases	<p>McCulloch v. Maryland (1819) (Second Bank)</p> <p>Flexible: facially DEVIATES.</p> <p>Weight unaffected by level.</p>	<p>Scott v. Sanford (1857) (dicta on substantive protections of property)</p> <p>Flexible: facially conforms.</p> <p>[Not holding and overturned by 13th Amendment]</p>	<p>Worcester v. Ga. (1832) (rights of American Indians)</p> <p>Medium: facially conforms</p> <p>Especially strong precedent.</p>
	negative cases	<p>The Goliath (1858) (commerce power)</p> <p>Narrow: facially DEVIATES.</p> <p>Weight unaffected by lack of corrective amendment.</p>	<p>Barron v. Baltimore (1833) (Bill of Rights applies only to federal government, denying takings claim against state)</p> <p>Narrow: somewhat facially conforms.</p> <p>Higher weight.</p>	<p>Scott v. Sanford (1857) (citizenship issue)</p> <p>Narrow: facially DEVIATES.</p> <p>Weight unaffected and overturned by 14th Amendment.</p>

Latter Reconstruction – Gilded Age Era (1869 – 1886): Lower Amendability				
		Legislative Power	Individual Rights	
Interpretations' Conformity to Theory & Precedential Weight		Theorized Effect of Level of Amendability	<p><i>More-flexible interpretation.</i></p> <p><i>Weight unaffected by failure to overturn precedent.</i></p>	
			<p><i>Flexible interpretation.</i></p> <p><i>Weight unaffected by failure to overturn by amendment.</i></p>	
			Insider rights	Outsider rights
Interpretations' Conformity to Theory & Precedential Weight		positive cases	<p>Legal Tender Cases (1870-71) (power to compel creditors to receive federal paper money in payment of debts)</p> <p>Flexible: facially conforms.</p> <p>Weight unaffected.</p>	<p>Loan Ass'n v. Topeka (1874) (city tax to fund bonds to attract business violates "private right")</p> <p>Flexible: facially conforms.</p> <p>Weight unaffected.</p>
			<p>Trademark Cases (1879) (commerce power: registering trademarks)</p> <p>Narrow: facially DEVIATES.</p> <p>Weight unaffected.</p>	<p>Slaughterhouse Cases (1873) (14th amendment rights not to have meat processing controlled by state)</p> <p>Medium: somewhat facially DEVIATES?</p> <p>Weight unaffected.</p>
		negative cases	<p>Strauder v. WV (1880) (blacks excluded from juries)</p> <p>Medium: facially conforms.</p> <p>Weight unaffected.</p>	<p>Pace v. Ala. (1883) (higher penalties for adultery, fornication if interracial)</p> <p>Narrow: facially DEVIATES.</p> <p>Weight unaffected.</p>

Populist – Progressive Era (1887 – 1916): Increasing Amendability			
	Legislative Power	Individual Rights	
Theorized Effect of Level of Amendability	<p><i>More flexible interpretation at era's start, shifting to stricter (except for outsider-rights protection) by end.</i></p> <p><i>At era's start, precedent weight unaffected for all. At end, precedent weight unaffected for affirmance of power but facially strong for denial (except if power asserted to protect outsider rights).</i></p>	<p><i>At start, flexible for all interpretations, shifting to—for insider rights (and remotely possibly for outsider)—somewhat stricter interpretation if infringed by executive or state by era's end.</i></p> <p><i>At start, weight unaffected (while amendability low) shifting to higher precedent weight if infringement by executive or states (especially if upholds outsider rights) or if overturns congressional infringement (especially if overturns infringement of outsider rights).</i></p>	
		Insider rights	Outsider rights
Interpretations' Conformity to Theory & Precedential Weight	<p><i>positive cases</i></p> <p>Shreveport Rate Cases (1914) (commerce power)</p> <p>Flexible: facially DEVIATES.</p> <p>Weight unaffected.</p>	<p>Lochner (1905) (worker, employer economic rights)</p> <p>Flexible: somewhat facially DEVIATES?</p> <p>Moderately higher weight?</p>	<p>U.S. v. Reynolds (1914) (the indebted—compelling to work for another violates 13th Amendment)</p> <p>Flexible: conforms or somewhat facially DEVIATES?</p> <p>Especially strong precedent.</p>
	<p><i>negative cases</i></p> <p>U.S. v. E.C. Knight (1895) (commerce power)</p> <p>Narrow: facially DEVIATES.</p> <p>Weight unaffected.</p>	<p>Muller v. Or. (1908) (female workers, employer rights to contract for longer working hours)</p> <p>Narrow: somewhat facially conforms?</p> <p>Moderately higher weight?</p>	<p>Plessy (1896) (blacks excluded)</p> <p>Narrow: facially DEVIATES.</p> <p>Somewhat higher weight.</p>

Suffrage – Prohibition Era (1917 – 1930): Higher Amendability				
		Legislative Power	Individual Rights	
Interpretations' Conformity to Theory & Precedential Weight		Theorized Effect of Level of Amendability	<p><i>Stricter interpretation, except where used to protect outsider rights. Precedent weight unaffected for affirmation of power; for denials, precedent is facially strong (except if power asserted to protect outside rights).</i></p>	
			<p><i>For insider rights (and remotely possibly for outsider), somewhat stricter interpretation if infringed by executive or states.</i></p> <p><i>Higher precedent weight if infringement by executive or states (especially if upholds outsider rights) or if overturns congressional infringement (especially if overturns infringement of outsider rights).</i></p>	
			Insider rights	Outsider rights
positive cases	<p>Stafford v. Wallace (1922) (commerce power)</p> <p>Flexible: facially DEVIATES.</p> <p>Weight unaffected.</p>	<p>Adkins (1923) (employment contract rights: regulation of minimum wage for women)</p> <p>Flexible: somewhat facially DEVIATES?</p> <p>Higher weight.</p>	<p>Meyer v. Nebraska (1923), Pierce v. Soc'y of Sisters (1925) (parental rights of non-English speakers, religious minorities)</p> <p>Flexible: facially conforms.</p> <p>Especially strong.</p>	
	<p>Hammer v. Dagenhart (1918) (commerce power)</p> <p>Narrow: facially conforms.</p> <p>Facially-strong precedent. <i>(especially strong because Congress's response—proposed Child Labor Amendment—failed)</i></p>	<p>Bunting v. Or. (1917) (employment contract rights: maximum hours in mills/factories)</p> <p>Narrow: somewhat facially conforms?</p> <p>Higher weight.</p>	<p>Schenck (1919) (seditious speaker)</p> <p>Narrow—facially DEVIATES.</p> <p>Higher weight.</p>	

Modern Era (1931 – present): Lower Amendability		Legislative Power	Individual Rights	
Theorized Effect of Level of Amendability		<i>More flexible interpretation.</i> <i>Weight unaffected by failure to overturn precedent.</i>	<i>Flexible interpretation.</i> <i>Weight unaffected by failure to overturn by amendment.</i>	
			Insider rights	Outsider rights
Interpretations' Conformity to Theory & Precedential Weight	<i>positive cases</i>	NLRB (1937), Raich (2005) (commerce power) Flexible: Facially conforms. Weight unaffected.	Morehead (1936); Roe (1973); Sullivan (1964); Adarand (1995) (economic, reproductive-autonomy and bodily-integrity, press, majority-race) Flexible: facially conforms. Weight unaffected.	Brown ('54); Brandenburg (1969); Lawrence (2003) (blacks, seditious speakers, gays) Flexible: facially conforms. Weight unaffected.
	<i>negative cases</i>	U.S. v. Butler (1936), Lopez (1995) (commerce power) Narrow: facially DEVIATES. Weight unaffected.	West Coast Hotel v. Parrish (1937); U.S. v. VA (1996); Grutter (2003); Kelo (2005) (economic, historically-dominant-gender, majority-race, property) Narrow: somewhat facially DEVIATES. Weight unaffected.	Korematsu (1944); Dennis v. U.S. (1951); Bowers (1986) (racial minority, seditious speakers, gays) Narrow: facially DEVIATES. Weight unaffected.

A substantial caveat frames the threshold assessments yielded by the theory: the characterizations of holdings as “conforming” or “deviating” or of precedents as being particularly “strong” in Table 2 are mere starting points for consideration of any particular decision, based on assessment of only the general issue type and historical context of each case. In particular, the binary conformity–deviation dichotomy is relative or somewhat arbitrary, lacking a component of degree. I assess the level of conformity by either judging the relationship between the interpretation and constitutional text abstractly or relative to prior interpretations.

In reaction to those very superficial preliminary assessments, interpretive liberals would argue why *Lochner v. New York*⁷⁹ and *Hammer v. Dagenhart*⁸⁰ (though facially conforming to the theory) when considered in greater specificity and depth, really are not good decisions,⁸¹ and conservatives would similarly attempt to defend some of the more recent landmarks of the Rehnquist era.⁸²

On the other hand, if any more general support for or indictments of particular judicial philosophies are to be drawn from Table 2's demonstration of amendability-theory facial implications in broad sweep, they are likely to be found in prominent patterns scrutinized against comprehensive assessments of the cases going beyond mere facial application of amendability-contingent theory. The following section scrutinizes selected areas of doctrine for such patterns, identifying open questions regarding the theoretical correctness of modern commerce power jurisprudence,⁸³ a pattern of facial non-conformity in decisions on individual rights that seems to comport with more comprehensive critiques of those same decisions,⁸⁴ and some possible exceptions or special cases associated with amendability-conscious interpretation in the area of executive power.⁸⁵

B. Amendability-Contingency Theory Applied to Doctrinal Examples

Because the doctrinal evolution of congressional power spans all the amendability eras, and the interpretative questions it evokes are particularly sensitive to amendability variation, I focus first on the category of congressional power to illustrate the ways amendability factor may have, should have, or has influenced doctrinal development. The second part of this section then discusses examples from individual rights cases, and the third part briefly examines special considerations for additional categories of federal power and federalism limits on federal and state power.

79. 198 U.S. 45 (1905).

80. 247 U.S. 251 (1918).

81. See Julie Novkov, *Historicizing the Figure of the Child in Legal Discourse: The Battle over the Regulation of Child Labor*, 44 AM. J. LEGAL HIST. 369, 398-99 (2000); David A. Strauss, *Why was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373-74 (2003).

82. See Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 432-33 (2002); Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201, 204-05 (2000).

83. See *infra* text accompanying notes 136-42.

84. See *infra* Part III.B.2.

85. See *infra* Part III.B.3.a.

1. Application to Legislative Power: Commerce Power

Though beginning with the more general congressional power questions raised by the First Bank of the United States⁸⁶ and *Marbury v. Madison*,⁸⁷ my focus here turns to the development of the commerce power doctrine in particular.

The two major interpretations of the Founding Era (1791 – 1812)⁸⁸ are probably both consistent with amendability-contingency theory, though the first superficially appears to have deviated.⁸⁹ In 1791, majorities in Congress and the President broadly construed the implied grants of power of Article I, Section 8, to allow the creation of the First Bank of the United States.⁹⁰ Twelve years later, the Court narrowly construed the congressional power over federal jurisdiction in *Marbury*.⁹¹

At a superficial level, *Marbury* was consistent with amendability-contingency theory because the Founding Era was one of higher amendability, calling for narrower constructions, while the First Bank initially seems a departure from the theory.⁹² But the two constructions are reconciled by either a closer comparison of the interpretative moves or an argument from historical change. First, authority for the bank could be viewed as an appropriately-broad interpretation of general provisions,⁹³ while the limit on power over jurisdiction was an appropriately-narrow construction of a specific provision.⁹⁴ Moreover, the years 1789, 1790, and

86. The bank was established by federal legislation in 1791. *See* An Act to Incorporate the Subscribers to the Bank of the United States, ch. 10, 1 Stat. 191 (1791). Since there was no court challenge, for the precedent on power to establish the First Bank of the United States I rely primarily on Alexander Hamilton's official opinion supporting the constitutionality of the bank, 8 PAPERS OF ALEXANDER HAMILTON 97-98 (Harold C. Syrett, ed., 1965), provided in his capacity of Secretary of Treasury to President Washington in 1791. *Id.* Washington accepted Hamilton's advice and rejected that of Jefferson and Madison, who both then viewed establishment of the bank as beyond Congress's power. *See* THOMAS JEFFERSON, in 19 PAPERS OF THOMAS JEFFERSON 275-82 (Julian P. Boyd, ed., 1974); JAMES MADISON, *Speech in Congress Opposing the National Bank*, in JAMES MADISON: WRITINGS 480-90 (Jack Rakove ed., 1999).

87. 5 U.S. 137, 156, 174 (1803).

88. *See supra* note 39 and accompanying text.

89. *See supra* Table 2.

90. *See, e.g.*, Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L.R. 349, 360-66 (1989) (detailing the discussion of the proper interpretation or construction of the scope of federal power by members of Congress and the Washington administration in the debate over the legislation establishing the bank in 1791).

91. *See Marbury*, 5 U.S. at 138.

92. *See supra* Tables 1 and 2.

93. That is, taxing and spending, commerce, coinage, and the various other express provisions of Article I, Section 8, that Marshall cites in addressing the issue twenty-eight years later in the context of the challenge to the Second Bank, in *McCulloch v. Maryland*, 17 U.S. 316, 331 (1819).

94. U.S. CONST. art. III, § 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . .").

even 1791 (the year of the First Bank⁹⁵) may be *sui generis*—so close in time and participants to the creative enterprise of the convention as to be felt an extension of it, with reverence for and obedience to President Washington and the power of Hamilton at their heights. By *Marbury* in 1803, however, the constitutional bounds of power of all three branches were seriously contended.⁹⁶ Now it was a government more of laws than of revered men, with the accessibility—relative to later times—of the amendment alternative as an effective check on any creative impulses of the Court. That was evident as early as 1793, when Justice Cushing included high amendability among the justifications for *Chisolm v. Georgia's*⁹⁷ literalist interpretation of Article III's allowance of citizen suits against states.⁹⁸

The Antebellum Era (1813 – 1858)⁹⁹ also featured facially-deviating but perhaps reconcilable interpretations. In this Era amendability seems to have continuously diminished, from relatively high to very low. *McCulloch v. Maryland*,¹⁰⁰ coming near the beginning of the Era in 1819, superficially represents at least somewhat of a deviation from the theory as a broad interpretation of Article I powers to reach the authority to create the Second Bank of the United States.¹⁰¹ Again, though, *McCulloch* may also be read as an appropriately-broad construction of general and cumulative express grants of power, regardless of the degree of amendability at the time.¹⁰² The case of *The Goliah*,¹⁰³ coming at the very end of the Era in 1858, also deviates from the theory even though it is a narrow interpretation because amendability had by that time become low.¹⁰⁴ *The Goliah* held that the commerce power did not permit Congress to extend admiralty jurisdiction to claims for goods lost in the “internal” shipping trade of one state.¹⁰⁵ A closer reading, however, might conclude that in 1858, “regulate” and “commerce among the states,” were still very specific terms, to be interpreted narrowly¹⁰⁶ since we had not yet transformed into the modern,

95. See *supra* note 86.

96. See David E. Marion, *Judicial Faithfulness or Wandering Indulgence? Original Intentions and the History of Marbury v. Madison*, 57 ALA. L. REV. 1041, 1041-45 (2006).

97. 2 U.S. 419 (1793).

98. See *supra* note 47 and accompanying text.

99. See *supra* note 39 and accompanying text.

100. 17 U.S. 316 (1819).

101. See *id.* at 424.

102. See generally *id.* at 316.

103. 62 U.S. 248 (1858).

104. See *supra* note 39 and accompanying text.

105. *The Goliah*, 62 U.S. at 250-51.

106. See *id.*

national economy that was cited as justification for broader readings of the commerce power in the 20th century.¹⁰⁷

The Latter Reconstruction – Gilded Age (1869 – 1886) Era exhibited a stronger case of true deviation from the theory. In this era of lower amendability,¹⁰⁸ the Court both facially followed and facially deviated from amendability-contingency theory’s prescription for flexible interpretation of congressional power.

The ultimate decision in the Legal Tender Cases¹⁰⁹ (upholding paper money) seems to conform to the theory while the denial of commerce power in the Trademark Cases¹¹⁰ in 1879 deviates facially. After initially holding the Legal Tender Act unconstitutional in 1870,¹¹¹ the Court, following the addition of two new Justices,¹¹² quickly reversed itself in 1871 in the second of the Legal Tender Cases, *Knox v. Lee*.¹¹³ In addition to rejecting individual rights claims based on impairment of preexisting contractual obligations and the Takings Clause,¹¹⁴ *Knox v. Lee* adopted an implied powers analysis—in the face of strong evidence of specific original intent against the power to issue paper money—of even greater breadth than *McCulloch v. Maryland*’s.¹¹⁵ By contrast, the Trademark Cases not only rejected inclusion of a power to regulate trademarks within the narrowly-framed Copyright and Patent Clause¹¹⁶ but also rejected the more-generally-termed Commerce Clause as a source of the power.¹¹⁷ A more entrenched period of lower amendability and more expanded national economy make the Trademark Cases more of a true deviation from the theory than the *Goliath* decision twenty years earlier.

107. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

108. See *supra* note 39 and accompanying text.

109. In this article the “*Legal Tender Cases*” is in reference to the three decisions: *Hepburn v. Griswold*, 75 U.S. 603 (1870); *Knox v. Lee*, 79 U.S. 457 (1871); and *Juilliard v. Greenman*, 110 U.S. 421 (1884).

110. 100 U.S. 82 (1879) (invalidating federal law establishing federal system for registering trademarks). In the *Trademark Cases* decision, the Court concluded that the Act applied to wholly intrastate businesses and business transactions and therefore “is obviously the exercise of a power not confided to Congress.” *Id.* at 96-97.

111. See *Hepburn*, 75 U.S. at 603.

112. Justice William Strong joined the Court on March 14, 1870 and Justice Joseph P. Bradley joined the Court on March 23, 1870. *Members of the Supreme Court of the United States*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/members.aspx> (last visited April 2, 2012).

113. 79 U.S. 457 (1871).

114. *Id.* at 492-93.

115. See Gerard N. Magliocca, *A New Approach to Congressional Power: Revisiting the Legal Tender Cases*, 95 GEO. L. REV. 119 (2006).

116. *Trademark Cases*, 100 U.S. at 93, 98; U.S. CONST. art. I, § 8, cl. 8.

117. *Trademark Cases*, 100 U.S. at 96-98.

As the economy grew and nationalized exponentially in the Populist–Progressive Era (1887 – 1916),¹¹⁸ the Court’s pro-business bias yielded uneven conformity to amendability-contingency theory. The economic expansion and related problems of industrialization and urbanization presented Congress with an unprecedented impetus for federal regulation.¹¹⁹ At the same time, amendability seems to have been increasing throughout the Era, beginning at the low level of the prior era and reaching a relatively high level by 1916.¹²⁰ But the Court’s interpretations did not decrease in flexibility as would seem to be required by the theory. Rather, the Court allowed federal regulation of instrumentalities of and things in purely-intrastate commerce, either imposing little burden on or benefiting interstate business interests,¹²¹ while it parsimoniously second-guessed congressional motives and distinguished manufacture from commerce to preclude federal assistance to workers and consumers, which also benefitted those same business interests.¹²²

The next Era, Suffrage – Prohibition (1918),¹²³ is problematic for liberal views of the commerce power because amendability was relatively high then, suggesting a narrow interpretation of the power. At a superficial level, that would make *Hammer v. Dagenhart*¹²⁴ correctly decided—a conclusion facially strengthened by the failure to ratify the congressionally-proposed amendment purported to overrule it. *Hammer* held that the commerce power did not allow Congress to prohibit shipment of goods that had been the product of child labor in interstate commerce, which seems to be a very narrow reading of the commerce power.¹²⁵ On the other hand, *Stafford v. Wallace*¹²⁶ is superficially incorrect since it allowed Congress to control intra-state pricing of livestock, invoking a broad reading of the commerce power.¹²⁷

Looking beyond facial impressions, however, *Hammer*’s fidelity to amendability theory falters for two reasons. First, the case may be understood alternatively as a very broad reading of the limit on the scope of

118. See *supra* note 39 and accompanying text.

119. See *Chapter 7: Growth and Transformation*, U.S. DIPLOMATIC MISSION TO GERMANY, <http://usa.usembassy.de/etexts/history/ch7.htm> (last visited Apr. 2, 2012).

120. See *supra* note 39 and accompanying text.

121. See, e.g., *Swift & Co. v. United States*, 196 U.S. 375 (1905); *Houston, E. & W. Texas Ry. Co. v. United States*, 234 U.S. 342 (1914) (the Shreveport Rate Cases).

122. See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

123. See *supra* note 39 and accompanying text.

124. 247 U.S. 251 (1918).

125. See *id.* at 276-77.

126. 258 U.S. 495 (1922).

127. See *id.* at 513-14, 528.

all federal power said to be imposed by the Tenth Amendment,¹²⁸ which would deviate from the narrow reading compelled by the theory. Second, *Hammer* should not be accorded the stronger precedential weight normally assigned a decision denying congressional power **in** an era of higher amendability that is not overturned by a constitutional amendment. In fact, Congress did respond by passing a constitutional amendment by the requisite two-third majorities in both houses: the Child Labor Amendment.¹²⁹ While the failure of ratification of that amendment by the states arguably cemented the correctness of *Hammer*, there is another side to that story. The Child Labor Amendment was not drafted to encompass only the specific commerce power holding of *Hammer*, but rather was focused on constitutionalizing a new power, distinct from commerce,¹³⁰ which sparked an unexpected and successful lobbying campaign by business interests and proto-modern Federalists.¹³¹ By purporting to extend to Congress plenary power over “the labor of persons under eighteen years of age[,]” the amendment went well beyond the limits of the statute overturned in *Hammer*—it would have allowed Congress to completely ban labor of all workers under age eighteen, regardless whether the products of their labor were later transported in interstate commerce.¹³²

While broad in the abstract, *Stafford*’s interpretation of “commerce among the states” narrows in the context of existing precedent.¹³³ Such a precedent-sensitive approach suggests that, when assessing breadth of

128. See U.S. CONST. amend. X. As the Tenth Amendment by its express terms does not apply to powers delegated to the federal government (which, by its drafting history and comparison to the Articles of Confederation’s limit of federal power to “express” delegations) extends to implicit delegations, it cannot be the actual source for this limitation, see ARTICLES OF CONFEDERATION OF 1778, art. IX; see also U.S. CONST. amend. X; rather, the limitation is better conceived as an unstated constitutional principle of state sovereignty, historically and sometimes currently also called “dual federalism,” implicit in the structure and theory of the Constitution of 1788. See e.g., Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 14 (1950) (arguing that Tenth Amendment was not intended to affect division of power between federal and state governments).

129. H.R. 184, 68th Cong. (1924).

130. The amendment proposed by Congress provided as follows:

Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

Section 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

Id.

131. See DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE CONSTITUTION, 1776–1995, at 257–62 (1996); Novkov, *supra* note 81.

132. H.R. 184, § 1.

133. *Stafford*, 258 U.S. at 517–29.

interpretation under an amendability-contingent theory, the reference point is not only constitutional text or original meaning but also prior interpretations grounded in precedent that either were correct under the theory given the level of amendability at their time or were strengthened by subsequent failure to overturn by amendment, when relevant under the theory. *Stafford* is but a narrow extension of *Swift & Co. v. United States*,¹³⁴ which itself was in greater conformity with the theory in 1905, the middle of an era of transition from low to high amendability.¹³⁵

In the Modern Era (1931 to present),¹³⁶ the Court's quick and long-enduring shift to a very broad interpretation of the commerce power facially seems faithful to an amendability-contingent theory, while the retrenchment of the doctrine by the Rehnquist Court in the 1990s facially seems to deviate.

The degree to which the Rehnquist Court's commerce doctrine actually deviated from amendability-contingency theory, however, requires a closer analysis. It depends on the degree to which the most flexible of the "plenary power" commerce decisions—such as *Wickard v. Filburn*,¹³⁷ *Heart of Atlanta Motel, Inc. v. United States*,¹³⁸ and *Katzenbach v. McClung*¹³⁹—either had reached only the degree of flexibility warranted by the theory or, alternatively, had gone beyond that level of flexibility. That is, to the degree the earlier plenary-power decisions are overly broad, the Rehnquist retrenchment may conform to the theory. While decisions like *United States v. Lopez*,¹⁴⁰ *United States v. Morrison*,¹⁴¹ and *Printz v. United States*¹⁴² do rest on a narrower reading of commerce power than the earlier precedents, the question is whether their reading of the Commerce Clause nonetheless is sufficiently broad to conform to what the lower amendability of the Modern Era requires.

A final word on commerce: regarding the individual mandate of the 2010 Health Care Act¹⁴³ (to which the Supreme Court will hear challenges

134. 196 U.S. 375; see also *Stafford*, 258 U.S. 495.

135. See *supra* note 39 and accompanying text.

136. See *id.*

137. 317 U.S. 111 (1942).

138. 379 U.S. 241 (1964).

139. 379 U.S. 294 (1964).

140. 514 U.S. 549 (1995).

141. 529 U.S. 598 (2000).

142. 521 U.S. 898 (1997).

143. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501 (2010) (to be codified as 26 U.S.C. § 5000A), amended by Health Care and Education Reconciliation Act of 2010 ("HCERA"), Pub. L. No. 111-152, 124 Stat. 1029 (2010).

in its 2011–2012 term) if, as it seems,¹⁴⁴ federal legislative power to impose the mandate is facially within the scope of power articulated in the Court’s most recent commerce power doctrine exegesis, *Gonzales v. Raich*,¹⁴⁵ and its even more recent Necessary and Proper Clause case, *U.S. v. Comstock*,¹⁴⁶ then a justice taking an amendability-conscious approach who also views amendability to be low would likely decide in favor of federal power—given the flexibility of interpretation current low amendability dictates and the related validity of those precedents and the decisions upon which they are based. By contrast, a justice following an amendability-conscious approach would likely decide against the power only if he or she viewed amendability, empirically, as much higher currently than I have assumed here (and tentatively concluded it to be in my prior work).¹⁴⁷

2. Application to Individual Rights

Because the individual rights cases are much more numerous and each present even more distinguishing variables than commerce power cases, this Article does not present a comprehensive synthesis of them across the seven eras. But even a cursory examination of the facially least-conforming cases in Table 2, collectively, suggests the validity of the theorized effect of amendability on the interpretative process and on the insider-outsider rights distinction.

Two groups of cases that least conform, facially, with an amendability-contingent approach can be drawn from Table 2: (1) those where, under the theory, the Court would be most likely to deny a claimed right (that is, insider rights claims against executive or state infringement when amendability is high) yet upheld the right and (2) those where the theory

144. See *supra* note 26. Though opponents seemed to have strategically chosen to sue in federal circuits thought to be more conservative on federal power questions—the Fourth, Sixth, Eleventh, and District of Columbia—as of January 2012, a seven-to-three majority of the circuit court judges who had passed on the question had found the individual mandate to be within federal power. See *Liberty Univ. v. Geithner*, No. 10-2347, 2011 WL 3962915, *16-21 (4th Cir. Sept. 8, 2011) (Wynn, J., concurring) (concurring in opinion holding suit barred by Anti-Injunction Act but also asserting would hold individual mandate to be within taxing and spending power, as well as noting commerce power argument to be “persuasive”); *Id.* at *22-52 (Davis, J., dissenting) (dissenting to Anti-Injunction Act holding and stating would uphold as within commerce power); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011) (two judges concurring in opinion holding individual mandate to be within commerce power, with dissenting judge voting against); *U.S. Dept. of Health & Human Serv’s.*, 648 F.3d 1235 (two-judge majority holding individual mandate not within commerce power and dissenting judge disagreeing on that point); *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) (two-judge majority holding individual mandate within commerce power and dissenting judge not reaching merits, asserting claim barred by Anti-Injunction Act).

145. 545 U.S. 1 (2005).

146. 130 S. Ct. 1949 (2010).

147. See Latham, *supra* note 3.

would most compel upholding the right—that is, outsider rights claims when amendability was low—but the right was denied.

First, the cases upholding insider-right claims against executive or state infringement despite an era of higher amendability are *Fletcher v. Peck*,¹⁴⁸ *Lochner*,¹⁴⁹ and *Adkins v. Children's Hospital*,¹⁵⁰ upholding the contract and vested rights of real property owners,¹⁵¹ the liberty to contract of bakery owners and employees,¹⁵² and the liberty to contract of women and their employers.¹⁵³

And the outsider rights claims denied in eras of lower amendability are in *Scott v. Sandford*¹⁵⁴ (denying claims of natural born citizenship for African Americans), *Pace v. Alabama* (equal treatment for inter-race couples in adultery and fornication prosecutions),¹⁵⁵ *Plessy v. Ferguson* (equal access to public accommodations without regard to race),¹⁵⁶ *Korematsu v. United States* (the right not to be interred as presumptively disloyal due to racial heritage),¹⁵⁷ *Dennis v. United States* (the right to speak and associate on the basis of Communist Party support),¹⁵⁸ and *Bowers v. Hardwick* (the right to engage in intimate, consensual relations with an adult partner even if he or she is of the same sex).¹⁵⁹

Again, without further analysis of distinctions, all nine of those decisions are facially wrongly decided or suspect under the theory—and, strikingly, subsequent majorities of the Court, constitution revisers, or scholars have either directly or implicitly concurred in that critique of all those cases on the merits but the earliest—*Fletcher*.¹⁶⁰ The *Fletcher* Court invalidated Georgia law that had attempted to rescind (even against

148. 10 U.S. 87 (1810).

149. 198 U.S. 45 (1905).

150. 261 U.S. 525 (1923).

151. *Fletcher*, 10 U.S. at 142-43.

152. *Lochner*, 198 U.S. at 64-65.

153. *Adkins*, 261 U.S. at 561-62.

154. 60 U.S. 393 (1857).

155. 106 U.S. 583 (1883).

156. 163 U.S. 537 (1896).

157. 323 U.S. 214 (1944).

158. 341 U.S. 494 (1951).

159. 478 U.S. 186 (1986).

160. Examples overruling, distinguishing, or disapproving of the post-*Fletcher* cases include *West Coach Hotel v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins* expressly and *Lochner* implicitly (as recognized in *Planned Parenthood of Southeast Pa. v. Casey*, 505 U.S. 833, 856 (1992)); U.S. CONST. amend. XIV, § 1 (overruling *Sanford's* holding against Dred Scott's citizenship); *Brown v. Bd. of Ed.*, 347 U.S. 483, 494-96 (1954) (overruling *Plessy*); *McLaughlin v. Fla.*, 379 U.S. 184 (1964) (overruling *Pace*); *Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 215 (1995) (noting the *Korematsu* majority had "inexplicably" found the Japanese internment order to survive strict scrutiny and citing approvingly recent federal legislation apologizing for the incident); *Yates v. U.S.*, 354 U.S. 298, 320-22 (1957) (distinguishing *Dennis*); and *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overruling *Bowers*).

“innocent” subsequent purchasers) a state land sale obtained by bribery of a prior Georgia legislature, with Marshall’s opinion relying both on the Contracts Clause and on the natural-law doctrine of “vested rights.”¹⁶¹ So, in contrast to the insider rights vindicated during a time of heightened amendability in *Lochner* and *Adkins*, the *Fletcher* decision relies on a much stronger nexus to express constitutional text, at least for one of its grounds—the Contracts Clause—and can follow a close analogy to the Ex Post Facto Clause for the vested rights component.¹⁶² Moreover, *Fletcher* itself was not immune to contemporary¹⁶³ and subsequent critique.¹⁶⁴

3. Special Considerations for Other Categories of Federal Power and Limitations on Federal and State Power

The following touches on special considerations evoked by amendability-conscious approaches to other federal powers and to the constitutional doctrines that limit federal or state power. For convenience, these brief speculations build on or depart from the more-detailed analyses of legislative power or individual rights above.

a. Executive Power

As described in Table 1, under the theory, executive power should be interpreted as strictly as congressional power in times of higher amendability only to the extent the interests of the executive and Congress are sufficiently aligned. Similarly, the precedential weight of a denial of executive power in an era of higher amendability is higher only to the extent of interest alignment between the executive and Congress. One of the strongest examples of an expansive interpretation facially at odds with the theory came in an assertion of executive power that never reached the Supreme Court—the assertion of authority to negotiate and conclude the Louisiana Purchase by Jefferson in 1803.¹⁶⁵ Because this was during an era of higher amendability, and because the interest of the executive was

161. *Fletcher*, 10 U.S. 87.

162. *See id.* at 135-43; *see also Lochner*, 198 U.S. 45; *Adkins*, 261 U.S. 525.

163. In retirement at Monticello, Jefferson denounced the decision as a “twistification[],” Letter from Thomas Jefferson to James Madison (May 25, 1810), *cited in*, Lindsay G. Robertson, “A Mere Feigned Case”: *Rethinking the Fletcher v. Peck Conspiracy and Early Republican Legal Culture*, 2000 UTAH L. REV. 249, 254 n.29 (citing 11 THOMAS JEFFERSON, THE WORKS OF THOMAS JEFFERSON 141 (Paul Leicester Ford ed., 1905)) (brackets in original).

164. *See, e.g.*, Wallace Mendelson, *New Light on Fletcher v. Peck and Gibbons v. Ogden*, 58 YALE L.J. 567, 572 (1949) (“In *Fletcher v. Peck* the public interest got rough treatment and little lip service.”)

165. Louisiana Purchase Treaty (1803), WWW.OURDOCUMENTS.GOV, <http://www.ourdocuments.gov/doc.php?flash=true&doc=18> (last visited April 4, 2012).

aligned with Congress, the theory facially indicates the interpretation of the power to make the purchase should be strict; yet the Act by which the geographic size of the country was so dramatically increased had only remote connection to any express constitutional power of the federal government, a fact that deeply troubled Jefferson¹⁶⁶ (but not so much as to sacrifice the acquisition).¹⁶⁷

The Louisiana Purchase might be reconciled in two ways. First, inherent power claims might be regarded as a distinct class to which the concept of flexibility I have used for the rest of the constitutional questions does not apply. Second, this may present an emergency exception or special case for amendability itself. That is, even in eras where amendability is higher in general, it is very low or impossible for questions for which the formal amendment process would take too long and which could not reasonably be anticipated.

b. Judicial Power

The effect of amendability consciousness on judicial power interpretation should look similar to the other non-congressional power—executive power—with one exception. For some over-assertions of judicial power, Congress has a ready non-constitutional remedy: it may legislatively limit the jurisdiction of the courts in various ways.¹⁶⁸ Thus, if the interpreter considers amendability to be low, interpretation of the scope of power in areas subject to legislative jurisdiction limitations should be even more flexible.

c. Federalism Limits on Federal Power

In one sense, the Rehnquist Court’s tripartite “new federalism”—enhanced state sovereign immunity, the anti-commandeering principle, and the dual federalism limits imposed on the scope of federal legislative and executive power¹⁶⁹—might evoke merely the converse of analysis of the positive scope of federal power described extensively above. On the other

166. See Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 723 (2009). See generally ROBERT W. TUCKER & DAVID C. HENDRICKSON, *EMPIRE OF LIBERTY: THE STATECRAFT OF THOMAS JEFFERSON* (1990).

167. See Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), reprinted in 9 THE WRITINGS OF THOMAS JEFFERSON 279, 281 (P. Ford ed., 1898) (concluding in regard to the Louisiana Purchase that “[a] strict observance of written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation.”).

168. See U.S. CONST. art. III, §§ 1, 2, cl. 1.

169. See generally Ann Althouse, *On Dignity and Deference: The Supreme Court’s New Federalism*, 68 U. CIN. L. REV. 245 (2000).

hand, rather than merely framing outer-bounds on the scope of federal power, the new federalism doctrines may invoke a states-rights ethos that undermines the self-dealing calculus Congress would undertake when considering proposing an amendment that expands its powers.

d. Dormant Power Doctrine and Article IV Privileges and Immunities

Both the dormant power and Article IV privileges and immunities doctrines are significantly comprised of individual rights against states acting to favor residents over non-residents.¹⁷⁰ Thus, often thought of as the general character of rights classified as insider—e.g., economic interests—because they invoke strong state-sovereignty interests, in the amendability calculus they may be more like outsider rights, their denial not likely to be remedied by constitutional legislation coming from Congress, since Congress is made up of individuals who represent state interests.¹⁷¹

IV. RECOGNIZING AMENDABILITY-CONTINGENCY: BASELINE AND CONTINUING CONSIDERATIONS FOR INTERPRETERS

Amendability-contingency (A) adds complexity to one's overall interpretive analysis in several dimensions, the effects on one's methodology likely being felt in two stages: first with the need for (B) a baseline empirical and theoretical assessment of present and historical amendability applicable to all present and future interpretations and then with (C) the more narrowly-focused applications of those baseline assessments to each type of constitutional question as it is faced.

A. Overview: Amendability-Contingent Interpretation is Empirically Informed, Subject-Matter Dependent, and Historically Sensitive

Making one's interpretive approach amendability-contingent adds several components to the constitutional analysis process: (1) an empirical and theoretical assessment of contemporary and historical amendment difficulty in general; (2) identification of the effects of the current level of amendability on interpretation of text and, if precedent is relevant to one's interpretive theory, on precedent for each particular type of constitutional question encountered; (3) application of those interpretive effects to interpretation of constitutional text and relevant modern precedent and

170. See U.S. CONST. art. IV, § 2, cl. 1; see also *Gibbons v. Ogden*, 22 U.S. 1 (1824) (recognizing the dormant commerce clause).

171. See U.S. CONST. art. 1, § 2, cl. 1; see also *id.* § 3, cl. 1.

precedent from same-amendability-level historical eras; (4) if amendability has varied historically, precedent is relevant in one's theory, and historical precedent from an era with differing amendability exists for the issue, identification of the effects of the differing level of amendability on the interpretation of text and precedential weight for the type question at issue; and (5) if necessary, application of the effects determined for differing levels of amendability to any relevant historical precedent.

Much of the analytical work associated with adding those components to one's process likely would be considered in-depth in the first instances of amendability-conscious interpretation, producing general understandings that would provide the basis for abbreviated process in future cases. For instance, the interpreter may soon come to operate under a standing assumption that present amendability is relatively "low," as applied to the amendability-sensitive components of his or her interpretative theory, but that it was higher in some earlier areas, which may affect the weight given precedents from those eras. The interpreter might also accumulate a stock of prior analysis of the effect of determined levels of amendability on specific constitutional questions—such as on questions of congressional power in general or on a category of individual-rights infringement questions—as well as the effect on the facial weight given to any relevant precedent of the level of amendability existing at the precedent's date of origin for those questions.

For example, facing a question of congressional power today, a judge might assess the current degree of amendability to be low, leading to a flexible interpretation of the claimed power; but that interpretative flexibility might be tempered by an earlier decision that rejected the particular power claimed if rendered during a period of high amendability (the failure of the decision to be overturned during which lends extra strength to that precedent). Alternatively, if the interpreter adopts a more optimistic view of amendability than I have argued, the analysis differs.

Note, however, though the amendability-contingency theory speaks to the relative weight of precedent, the amendability-conscious aspects of the theory do not determine the role of precedent in general in the interpretive process. Thus, for an interpretive theory that gives zero weight to precedent, the precedent's relative weight is meaningless.¹⁷²

172. While it is hard to find a judge or scholar who articulates and applies consistently a theory of absolute zero stare decisis in constitutional adjudication across the board, to all constitutional questions, some argue the inherent limitations of precedent in the constitutional context and press its particular inapplicability in certain types of cases. See, e.g., Earl M. Maltz, *Abortion, Precedent, & the Constitution: A Comment on Planned Parenthood of Southeast Pennsylvania v. Casey*, 68 NOTRE DAME L. REV.

After the interpretive lens has been focused or filtered by those amendability considerations, the interpreter would then complete the interpretation using non-amendability-contingent aspects of the interpreter's methodology.

B. The Generally Applicable, Threshold Empirical Assessment

As described in the preceding section, at the threshold an amendability-contingent interpretive approach must posit a degree of amendability and should distinguish between the present time and relevant historical eras. My 2005 article articulated a tentative rationale for concluding amendability currently to be relatively low, but to have varied historically.¹⁷³ But all my conclusions were tentative, meant primarily to frame the problematic and inform further debate.¹⁷⁴ Hence, other amendability-conscious interpreters might reach different empirical starting points for their interpretive process.

In particular, my 2005 tentative conclusions were self-consciously under-theorized and under-analyzed. First, I only raised the question of and did not argue a method for operationalizing "amendment need," a necessary component for assessing how low or high practical amendability actually is.¹⁷⁵ Nor did the speculations on the degree of congressional response to amendment need an examination of all the factors potentially contributing to it in detail; instead I identified patterns in aggregate rates of amendment proposing and general legislative activity and I drew tentative conclusions based on speculations about congressional motivations over time, based in part on changes in legislative process rules and sparse evidence of attitudes of individual members of Congress towards legislation and constitutional amendments.¹⁷⁶ Thus, the potential exists for different assessments of amendability based on either new theoretical or new empirical work.

C. The Subject-Matter Dependent and Historically-Sensitive Phase of the Interpretive Process

Assuming a judge would assess current amendability to be low¹⁷⁷ and the degree of amendability to have varied historically according to the seven eras described in my prior article, incorporating an amendability factor into

11 (1992) (focusing on precedent's inapplicability on such "politically charged" questions as abortion and capital punishment).

173. See Latham, *supra* note 3.

174. See *id.*

175. See *id.* at 154-56, 256-61.

176. See *id.* at 253-56.

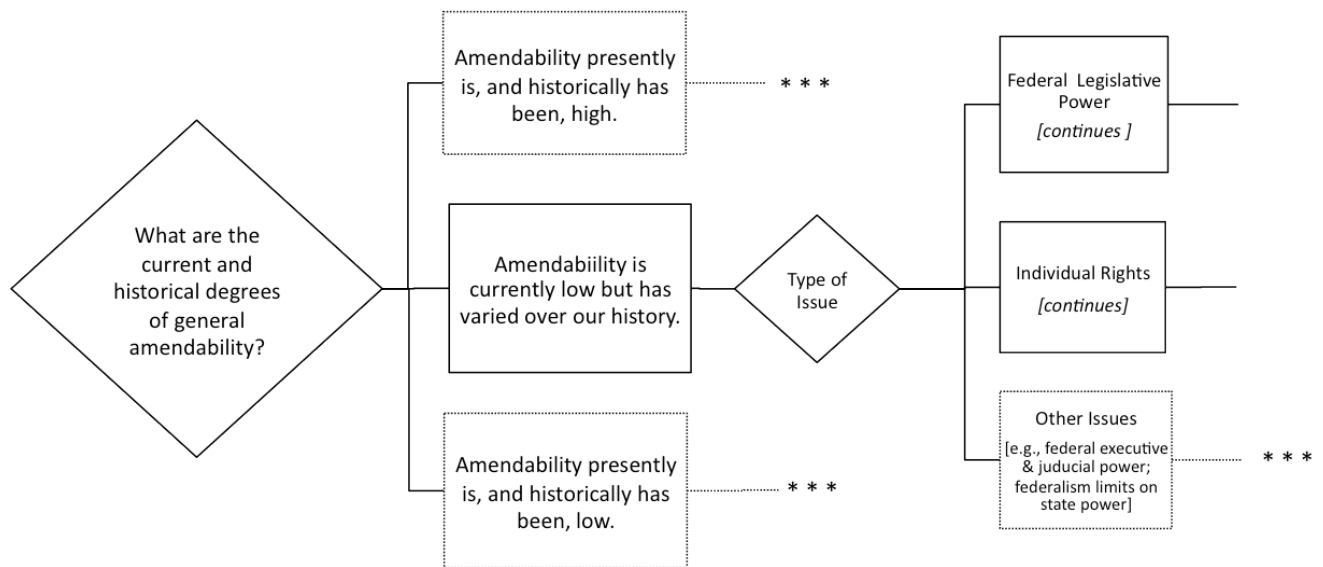
177. See, e.g., Rosalind Dixon, *Updating Constitutional Rules*, 2009 SUP. CT. REV. 319, 319 (2010) (noting the "virtual impossibility of formal amendment to the Constitution under Article V . . .").

constitutional interpretation would divide the universe of constitutional claims into a variety of subject-matter categories, each demanding a distinct analysis that, for any historical precedent relevant to the interpretation, may vary with the degree of amendability existing at the date of the precedent.

The following chart, Figure 2, maps out a potential series of steps in such an analysis:

Figure 2: The Amendability-Conscious Interpretive Process

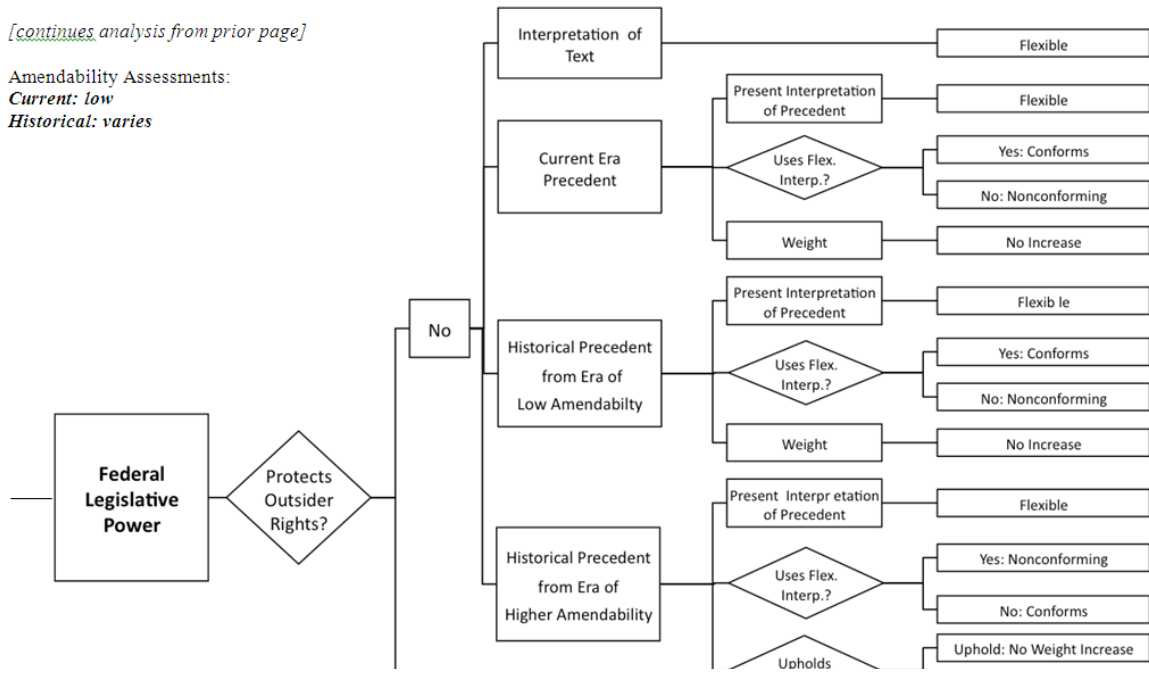
The amendability-conscious interpreter likely would approach each new interpretive task with stock assessments of amendability and its implications.



***This illustration continues only for the interpreter who assesses the current level of amendability to be low, but to have varied over history. And even in that case, it considers the interpretive process only for federal legislative power and individual rights.

[continues analysis from prior page]

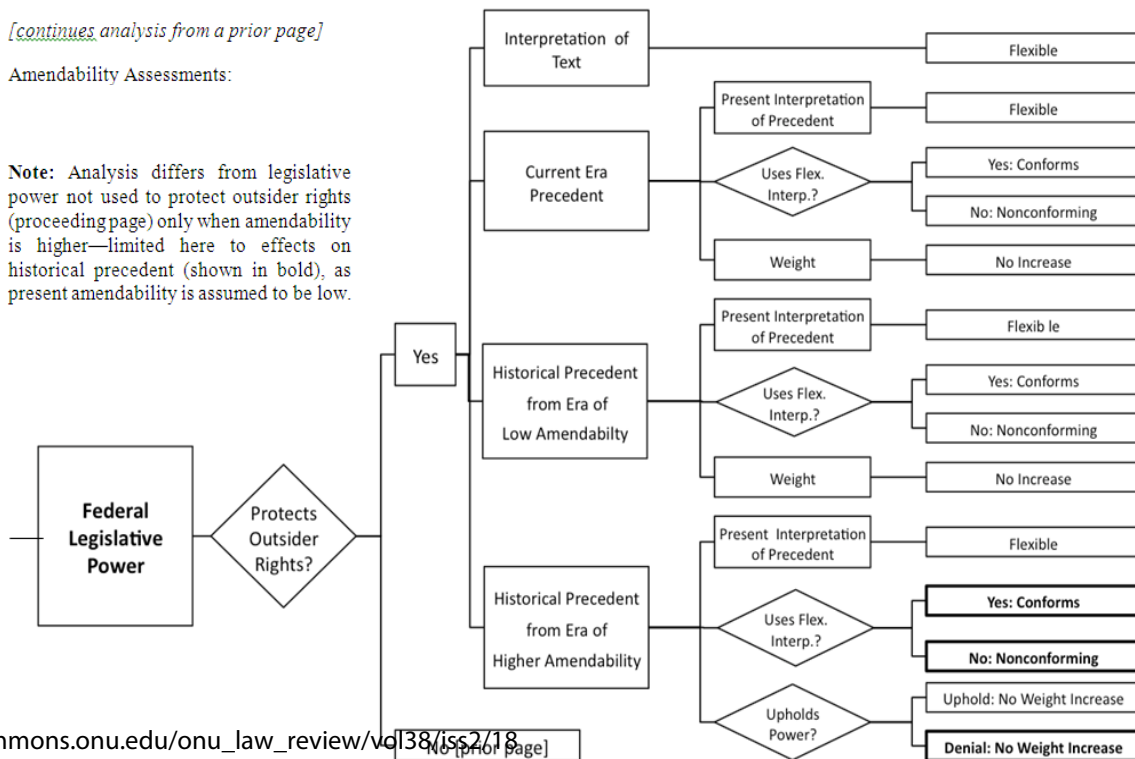
Amendability Assessments:
Current: low
Historical: varies



[continues analysis from a prior page]

Amendability Assessments:

Note: Analysis differs from legislative power not used to protect outsider rights (proceeding page) only when amendability is higher—limited here to effects on historical precedent (shown in bold), as present amendability is assumed to be low.

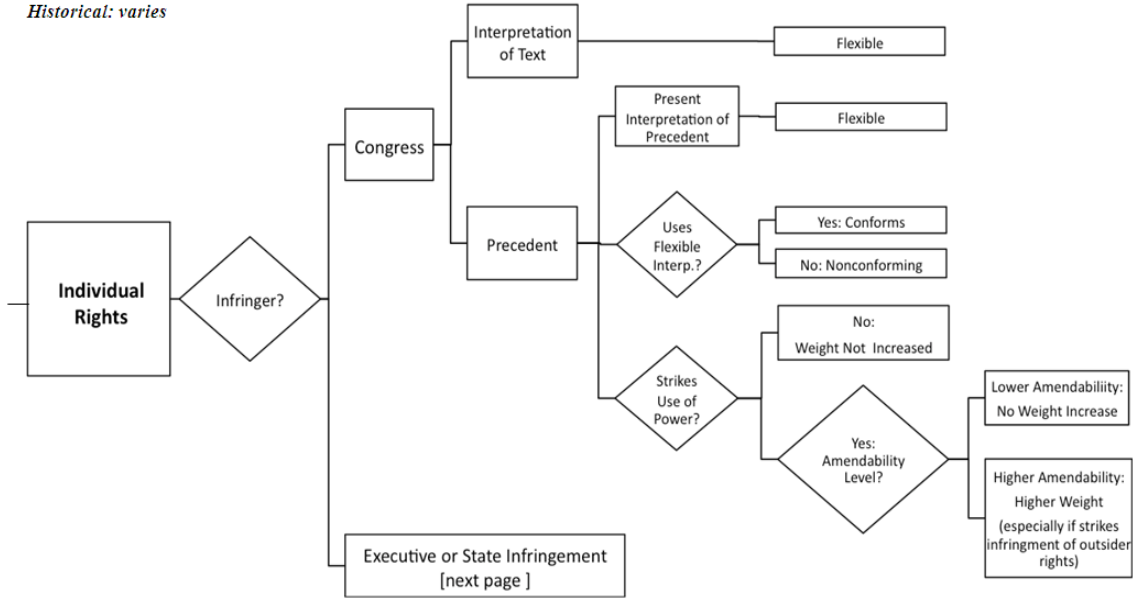


[continues analysis from a prior page]

Amendability Assessments:

Current: low

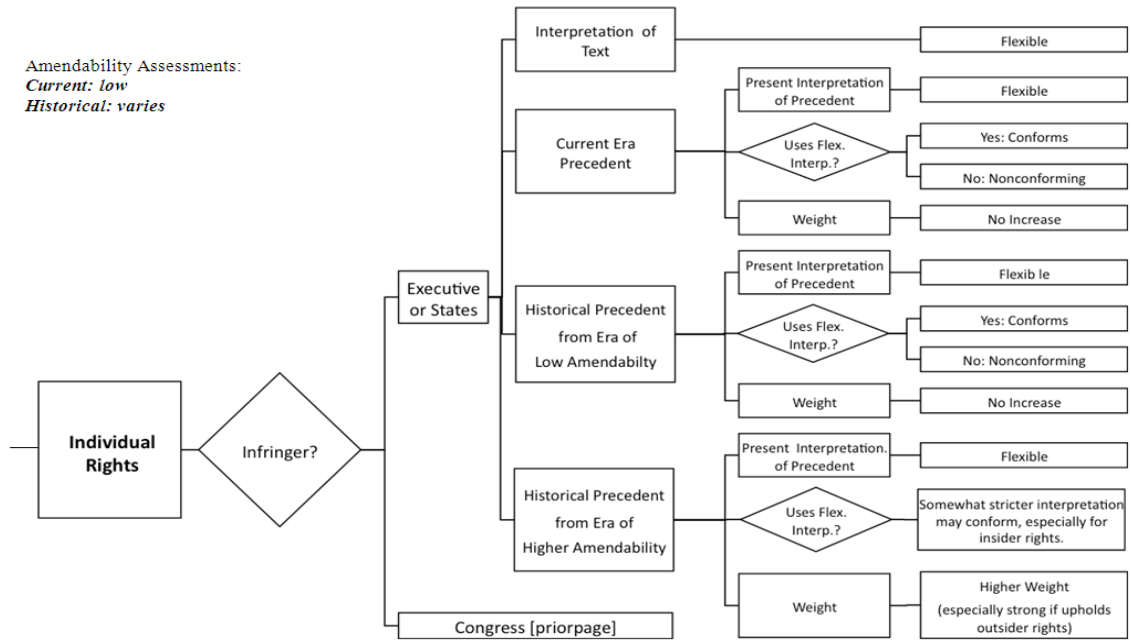
Historical: varies



Amendability Assessments:

Current: low

Historical: varies



Again, Figure 2 illustrates the interpretive process for only one set of empirical assessments of amendability—that amendability presently is low and has varied historically. Were an assumption that amendability has, instead, always been relatively high traced throughout the illustration, it would show many more instances where stricter interpretation would be indicated by the theory, particularly for congressional power.¹⁷⁸

Figure 2 is meant to suggest the nature of, not prescribe an exact, amendability-conscious process. And the results of the process outlined—assessments of the appropriate level of flexibility of interpretation of constitutional text or precedents, the facial correctness of precedents, and the degree to which a precedent’s weight should be increased by the failure for it to be corrected by formal constitutional amendment—again, do not signify the final step in the interpretive process. Rather, they provide material for use in the non-amendability-contingent aspects of interpretation. For instance, for one—again—whose general interpretive theory holds precedent irrelevant, the precedential-weight assessment process I have described would be irrelevant.

V. THE CONSERVATIVE ORIENTATION OF AMENDABILITY-CONTINGENT INTERPRETATION

One area of doctrine that seems at least facially suspect under an amendability-contingent approach is the Rehnquist Court’s new federalism.¹⁷⁹ The Modern Era of low amendability seems to dictate a more-flexible interpretation of the scope of federal power than embodied in the new federalism trilogy—the Court’s retrenchment of commerce power generally, its anti-commandeering cases, and its sovereign immunity decisions.¹⁸⁰ The following responds to two threshold arguments against amendability-contingent interpretation itself I would expect to be made by defenders of the new federalism: (A) the notion of an “amendability” that goes beyond recognition of the static, formal terms of Article V and varies historically is rank nonsense, and (B) an amendability-conscious interpretive theory is normatively at odds with important conservative values.

A. Amendability-Contingency in Interpretation Is Formally Inescapable

A mechanistically-formal view of Article V falters, first, at the recognition that there are no pure textualists on the Court or in the

178. See *supra* Table 1.

179. See, e.g., Althouse, *supra* note 169.

180. See *supra* note -169.

academy.¹⁸¹ Even the most formalism-inclined thinkers all accept some type and degree of intentionalism—that is, formalist approaches to interpretation recognize that the authority of the constitutional text alone under-determines constitutional interpretation, which must at least sometimes be contingent on context.¹⁸²

Moreover, that context analysis should recognize that three original assumptions about the process of formal constitutional change likely do not hold today: (1) the present degree of practical amendability is far lower than the framers and adopters expected;¹⁸³ (2) the number of states has multiplied, our political economy has increased in complexity, and norms of legislative bodies as political institutions have matured to the point where Congress can no longer play anything like the creative, deliberative, and generative role that originally may have been envisioned for it as gatekeeper to the amendment process under Article V;¹⁸⁴ and (3) despite recent popular and scholarly speculation to the contrary,¹⁸⁵ there has been general, longstanding scholarly agreement that the convention method of amendment proposing has turned out not to be the expected viable alternative to the congressionally-driven method we have always used.¹⁸⁶

For those reasons, even a formalist approach should recognize that at least some degree of constitutional change through non-Article V judicial

181. See, e.g., Stephen Durden, *Partial Textualism*, 41 U. MEM. L. REV. 1 (2010).

182. See *id.*

183. See, e.g., FEDERALIST NO. 85 (Alexander Hamilton) (“whenever . . . ten States [i.e., three-fourths of the original thirteen] were united in the desire of a particular amendment, that amendment **must** infallibly take place.”). Similarly, a delegate to the Connecticut convention assuaged concerns **about** particular problems in the Constitution by noting that Article V “provides a remedy for whatever defects it may have This is an easy and peaceable way of amending any parts of the Constitution which may be found inconvenient in practice.” DEBATES OF THE CONNECTICUT CONVENTION (Jan. 9, 1788) (statement of Delegate Richard Law), in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 200 (Jonathan Elliot ed., 2d ed. 1836-1845). Moreover, just on voting arithmetic alone, the congressional threshold is now higher in the sense that senators from states comprising just 7.5% of the population can block any proposed amendment, whereas it required nearly double that constituent base (14.79%) to block a proposal at the founding. See *supra* note 11.

184. See Latham, *supra* note 3, at 257-58 (expressing doubt that the “hyper-creative, proactive, opinion-leading [Philadelphia Convention of 1787] really bequeath[ed] a national deliberative assembly utterly devoid of a role in constitutional leadership.”).

185. See, e.g., Gerard N. Magliocca, *State Calls for an Article Five Convention: Mobilization and Interpretation*, 2009 CARDOZO L. REV. DE NOVO 74 (2009).

186. See *supra* note 10; see also Walter E. Dellinger, *The Recurring Question of the “Limited” Constitutional Convention*, 88 YALE L.J. 1623, 1624 (1979) [hereinafter Dellinger, *Recurring Question*] (arguing that a constitutional convention would be undesirably unwieldy because it must have authority to consider and propose to the states whatever amendments it deems fit); Walter E. Dellinger, *Who Controls a Constitutional Convention?—A Response*, 28 DUKE L.J. 999, 999 (1979) [hereinafter Dellinger, *Who Controls*] (dispelling the notion that state legislatures control the text of proposed amendments at constitutional conventions).

interpretation is necessary; and that necessity is caused by, and thus contingent upon, the low degree of practical amendability.

B. The Flexibility of Interpretation Dictated by Amendability-Contingency Theory Invokes a Fundamentally-Conservative Philosophy

David Strauss has argued the ways in which the Supreme Court's modern practice of constitutional interpretation is a "common law" method.¹⁸⁷ Regardless of the legitimacy of a common-law-style interpretive theory,¹⁸⁸ Strauss's description evokes the conservative, incremental nature of the Court's practice.¹⁸⁹ By contrast, though conservative in the extreme rarity with which it is implemented, constitutional change by formal amendment in our system invokes a process and can produce effects diametrically opposed to conservative political theory and values.

What makes the jarring, nearly-irreversible change of a formal amendment particularly anti-conservative is the complexity of modern societies and the inability to predict the effects of attempts to change them—a point emphasized by Austrian-born, Nobel-laureate economist Friedrich Hayek beginning in the first half of the 20th century.¹⁹⁰ In his seminal 1944 work, *The Road to Serfdom*, Hayek lamented that the fundamental problem of those who attempt central planning is that no one can ever know everything about a given situation and hence has no certain way of predicting the actual outcome of a policy or reform.¹⁹¹ Admired by many stripes of modern conservative thinkers (in law and other fields today¹⁹²) Hayek's subsequent work over several decades continued to

187. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996). See also Cass Sunstein's work on "judicial minimalism." CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005).

188. For critique of Strauss and the common law constitutionalism project, see, e.g., Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482 (2007).

189. The conservative value of incremental change is frequently referenced in the non-constitutional legal context. See, e.g., Thomas F. Cotter, *A Burkean Perspective on Patent Eligibility*, 22 BERKELEY TECH. L.J. 855 (2007).

Burkean conservatives . . . clearly prefer gradual, incremental change to radical change, anticipating that radical change can give rise to unforeseeable negative consequences and erode the unappreciated benefits embodied in tradition. For Burkeans, changes to laws and social practices should be based whenever possible on experience, as opposed to abstract ideas, and should be proportionate to the perceived change in circumstances.

Id. at 857 (citations omitted).

190. See FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 3, 4 (1944).

191. See *id.* at 56-87 (1944).

192. See, e.g., *Quotes on Hayek*, TAKING HAYEK SERIOUSLY, http://hayekcenter.org/?page_id=5 (last visited January 15, 2012) (compiling contemporary and historical praise of Hayek from a variety of disciplines and perspectives, including recent U.S. Treasury Secretary and Harvard president Lawrence

expound the themes of the limits of human knowledge and the value of spontaneous order in social institutions.¹⁹³

While modern legal scholars following those aspects of Hayek focus on the defects of rule generation in non-constitutional contexts,¹⁹⁴ the limitation of human knowledge relevant to predicting future legal developments and the corresponding value of spontaneous ordering translate directly to the constitutionalism context; those Hayekian insights point to the value of incremental interpretation as compared to textual entrenchment.¹⁹⁵ It is hard to imagine a philosophy more anti-Hayekian—more trusting in humans’ ability to know the future direction of society and to plan centrally, as well as more stifling of spontaneous development in social institutions—than one that requires all constitutional change to occur by crafting a new scheme based on predicted long-term effects that must be formally and rigidly entrenched as constitutional text.

Summers, philosopher Karl Popper, Margaret Thatcher, Ronald Reagan, living and deceased Nobel economics laureates, Peter Drucker, and, from the legal academy, Richard Epstein).

193. See, e.g., FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960).

194. See, e.g., Andrew P. Morriss, *Hayek & Cowboys: Customary Law in the American West*, 1 N.Y.U. J. L. & LIBERTY 35, 37-38 (2005). Morriss describes a Hayekian philosophy of rule generation:

[L]egal institution rules are (mostly) grown, not made. They are not generated by reason, but arise from experience, the resolution of disputes, and observations of what is successful. As Hayek notes . . . “Learning from experience[.]” among men no less than among animals, is a process not primarily of reasoning but of the observance, spreading, transmission and development of practices which have prevailed because they were successful - often not because they conferred any recognizable benefit on the acting individual but because they increased the chances of survival of the group to which he be-longed.” Trial and error teaches individuals which sets of rules are productive and which are not. . . .

Hayek explicitly rejects the idea that planning has any role in rule generation, arguing that individual rules need not be “rationally demonstrated or ‘made clear and demonstrative to every individual’” He criticizes the belief that “man has achieved mastery of his surroundings mainly through his capacity for logical deduction from explicit premises,” as “factually false,” and contends that “any attempt to confine [man’s] actions to what could thus be justified would deprive him of many of the most effective means to success that have been available to him.”

Id. at 37-38 (citations omitted).

195. To be clear, I am not claiming Hayek did embrace or would have embraced my conclusion that his knowledge-skepticism and anti-central-planning ideas militate for non-formal constitutional change. While Hayek did expound on desirable substantive constitutional principles, see, e.g., Donald J. Boudreaux, *Hayek’s Relevance: A Comment on Richard A. Posner’s Hayek, Law, and Cognition*, 2 N.Y.U. J. L. & LIBERTY 157, 163 (2006) (asserting that “[w]hat Hayek admired about the U.S. Constitution was that it instituted a national government of limited, enumerated powers . . .”), he does not seem to have considered the synthesis of general principles with an amendability analysis in general or one applied to American constitutionalism, as I am suggesting.

That Hayekian insight prefigures more recent scholarship applying “complexity theory” in physics to law.¹⁹⁶ Tying the unpredictability of formal change to law’s status as a sensitive, complex system, the argument holds “it is the *system* that counts as much as the *rules*, and . . . we cannot effectively change only one variable of that equation and expect the others to remain static.”¹⁹⁷ In cataloguing virtues of non-Article V change, Brannon Denning has observed that proposals to weaken the formal requirements of Article V, as well as substantive formal amendments themselves, invite the reductionist errors threatened by law’s complexity.¹⁹⁸ Denning cites the potential unintended consequences of two categories of proposed amendments popular at the time of his 1997 article—term limits and a balanced budget amendment—and references an analysis of the unintended consequences that likely did result from the direct election of Senators.¹⁹⁹

VI. CONCLUSION

This Article outlines how acknowledging an extreme practical difficulty in formal adoption of amendments to the Constitution of 1788 should affect the process of constitutional interpretation to produce results that, in at least some cases, differ from outcomes were the interpreter to consider amendment to be much easier;²⁰⁰ how the impact of such amendability-contingency differs according to the type of constitutional questions at issue;²⁰¹ and how the amendability-conscious interpretive process is rendered more complex and variable to the extent our Constitution’s formal amendability has varied over history.²⁰²

Among the most robust implications of an amendability-contingent approach—impervious to any likely variance in the empirical or theoretical underpinnings of my other speculations here—are the interpretative effects for truly-outsider rights.²⁰³ A rigorous amendability-conscious analysis

196. See, e.g., J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849 (1996).

197. *Id.* at 916.

198. Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 15, 226-27 (1997).

199. *Id.* at 227, 227 n.450 (referring to Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1401-05 (1996)).

200. See *supra* Parts II.A & III.

201. See *supra* Parts II.A & III.

202. See *supra* Part IV.

203. See *supra* Part II.B. As discussed in Part II.B, though I have not fully theorized or analyzed the outsider-rights concept I use here and do not attempt a definitive list, I assume that at least some rights claims will meet a detailed description of lack of political viability, regardless of its nuances.

inevitably exposes certain inherent limitations of narrow construction: (1) the validity of a narrow, originalist interpretive approach varies across categories of constitutional issues and with the empirical assessment of the level of amendability; because (2) narrow theories presume, at least implicitly, that there is a formal amendment alternative should the relevant polity reject some narrow interpretation;²⁰⁴ but (3) the correctness of that presumption varies with category of issue and level of amendability;²⁰⁵ and (4) at least for rights of clear outsiders, and if one accepts that at least some rights are inalienable, that presumption underlying the legitimacy of narrow interpretation proves false²⁰⁶—especially so if one accepts that the present practical amendability of the U.S. Constitution is low.²⁰⁷ Thus, using the narrow approach for outsider-rights claims cannot be supported on an argument from the authority of the existing constitutional text—that is, not on its language, provenance, or formal-amendment scheme.

True, certain other non-originalist interpretive arguments supporting a minimalist approach to judicial interpretation²⁰⁸ still may validly limit interpretation of outsider rights, undiminished by my amendability-contingency theory. But those methods invoke a less-polarized type of discourse than that which comprises part of the theoretical divide on the Court and much popular political rhetoric. That is because—for the limited category of outsider rights—liberal alternative methods should not seem so comparatively illegitimate to conservatives for their lack of originalist pedigree once it is acknowledged that original intent, unreachable by the amendment process, lacks controlling force in this category. And such a move from a formalist to a prudential stance by conservative interpreters logically should narrow the scope of the debate.

For example, present judges and scholars, as well political actors associated with judicial selection, that oppose recognition of constitutional protection of gay rights often believe the general concept of unenumerated fundamental rights, or of heightened equal-protection scrutiny for groups beyond the scope of specific original intent, to be illegitimate or legitimate only in an extremely narrowly-cabined form.²⁰⁹ A deeper contemplation of

204. See Latham, *supra* note 43, at 183-185.

205. See *supra* Parts II.A & III.

206. See *supra* Parts II.A-B, III.A, & III.B.2.

207. See *id.*

208. See generally SUNSTEIN, *supra* note 187.

209. Justice Thomas most represents that perspective on the current Supreme Court. See, e.g., *Lawrence v. Texas*, 539 U.S. 653, 605-06 (2003) (Thomas, J., dissenting) (“I am not empowered to help petitioners [challenging a statute criminalizing homosexual sodomy] and others similarly situated. My duty, rather, is to ‘decide cases “agreeably to the Constitution and laws of the United States.” “I ‘can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy.””

the amendability factor, however, may move some in that group (intellectually) away from that invalidity or narrow-validity of rights thesis to a stance that, for reasons grounded in only prudential or precedential concerns rather than in an absence of originalist legitimacy, the Court should not engage certain interpretive principles that lead to gay rights. That move, in turn, portends legal and political progress. While perhaps not changing an ultimate ruling in particular gay rights litigation, the shift could foment a substantially more focused debate on the appropriate principles for recognition of unenumerated rights and undercut a basis for illegitimacy rhetoric against interpretive liberals in judicial confirmation processes.

quoting *Griswold v. Conn.*, 381 U.S. 479, 530 (1965) (Stewart, J., dissenting), “or as the Court terms it today, the ‘liberty of the person both in its spatial and more transcendent dimensions.’”). And that view inheres in the general extra-textual-rights skepticism of scholars, *see, e.g.*, Kurt T. Lash, *A Textual-History Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 927, 932-33 (2008) (arguing that the Ninth Amendment protects collective individual rights and that “the text of the Ninth Amendment seems to prohibit an unenumerated rights interpretation of the Fourteenth Amendment.”); a recent U.S. President, *see, e.g.*, Comm’n on Pres. Debates, Unofficial Debate Transcript: The First Gore-Bush Presidential Debate (Oct. 3, 2000), <http://www.debates.org> (follow “Debate History” hyperlink) (George W. Bush stating, “I’ll put . . . judges on the bench, . . . who will strictly interpret the Constitution”); Senators in recent Supreme Court confirmation hearings, *see* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 592 n. 21 (2009) (“[T]he question whether a judge will ‘strictly interpret the Constitution’ is now common fare at all Supreme Court confirmation hearings.”); and, most recently, the commentary of several Republican Senators in the confirmation process for Justice Kagan, *see* The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 28–30 (2010) (available at <http://www.judiciary.senate.gov/resources/transcripts/111transcripts.cfm>) (statement of Senator John Cornyn) (arguing that “[I]n the traditional vision, the courts enforce a written Constitution” and that “[n]o court of law under this view has . . . authority to invent new rights” because constitutional change is permitted only through Article V); *id.* at 9–11 (statement of Senator Orrin Hatch) (arguing a nominee to be unfit if “she believe[s] that the words of the Constitution . . . can be separated from their meaning so that the people . . . put words on the page but judges may determine what those words actually mean”); *id.* at 18–20 (statement of Senator Jon Kyl) (arguing Kagan endorsed an improper judicial philosophy when she wrote in praise of Justice Thurgood Marshall, for whom she had clerked, that, “in his view, it was the role of the courts in interpreting the Constitution to protect the people who went unprotected by every other organ of government, to safeguard the interests of people who had no other champion”); *id.* at 4–6 (statement of Senator Jeff Sessions) (arguing proper judicial role to be “merely a neutral umpire”).

VII. APPENDIX: CRITIQUED PRECEDENTS REFERENCED IN TABLE 2
 (by Category, then Amendability Era, then Disposition)

Congressional Power Cases

Founding (1791-1812)

*Hamilton's Opinion in Favor of Power to Create First Bank (1791)*²¹⁰

Argued for power to establish bank from very broad conceptions of both inherent and implied federal legislative power.

*Marbury v. Madison (1803)*²¹¹

On issue of congressional power, held Congress could not expand Court's original jurisdiction beyond express limits of Article III.

Antebellum (1813-1858)

*McCulloch v. Maryland (1819)*²¹²

Upheld power to create Second Bank under various enumerated powers and broad readings of implied powers and Necessary and Proper Clause.

*"The Goliah" (1858)*²¹³

Commerce power did not permit Congress to extend Admiralty jurisdiction to claims ("libels") for goods lost in internal trade of one state.

Latter Reconstruction- Guided Age (1869-1886)

*Legal Tender Cases (1870 – 1871)*²¹⁴

After first striking retroactive force of Legal Tender Act, *Hepburn v. Griswold*,²¹⁵ Court upheld as applied to obligations incurred before and after passage, in *Knox v. Lee*²¹⁶ and *Parker v. Davis*,²¹⁷ finding an implied federal power to compel creditors to receive paper money in payment of debt, contrary to the intentions of the founding generation.

210. Alexander Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank* (1791), reprinted in 8 PAPERS OF ALEXANDER HAMILTON 97 (Harold C. Syrett & Jacob E. Cooke eds., 1965).

211. 5 U.S. 137 (1803).

212. 17 U.S. 316 (1819).

213. 62 U.S. 248 (1858).

214. Collectively, *Hepburn v. Griswold*, 75 U.S. 603 (1870); *Knox v. Lee*, 79 U.S. 457 (1871); *Parker v. Davis*, 79 U.S. 457 (1871). *Juilliard v. Greenman*, 110 U.S. 421 (1884) (also upholds paper money).

215. 75 U.S. 603 (1870).

216. 79 U.S. 457 (1871).

217. 79 U.S. 457 (1871).

*Trade-mark Cases (1879)*²¹⁸

Invalidated federal law establishing system for registering trademarks.

Populist-Progressive (1887-1916)

*Shreveport Rate Cases (1914)*²¹⁹

Upheld federal railway rate regulation under commerce power.

*United States v. E.C. Knight Co. (1895)*²²⁰

Struck federal anti-trust regulation as beyond federal legislative power.

Suffrage-Prohibition (1917-1930)

*Stafford v. Wallace (1922)*²²¹

Upheld federal regulation of stockyards under commerce power.

*Hammer v. Dagenhart (1918)*²²²

Struck regulation of child labor as beyond federal legislative power.

Modern (1931-present)

*Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp. (1937)*²²³

Upheld federal labor regulations.

*Gonzalez v. Raich (2005)*²²⁴

Upheld federal regulation of medical marijuana under commerce power.

*United States v. Butler (1936)*²²⁵

Struck federal tax on crop production beyond certain limits as beyond federal legislative power.

*United States v. Lopez (1995)*²²⁶

Struck federal regulation of gun possession near schools as beyond federal legislative power.

218. 100 U.S. 82 (1879).

219. 234 U.S. 342 (1914).

220. 156 U.S. 1 (1895).

221. 258 U.S. 495 (1922).

222. 247 U.S. 251 (1918).

223. 301 U.S. 1 (1937).

224. 545 U.S. 1 (2005).

225. 297 U.S. 1 (1936).

226. 514 U.S. 549 (1995).

Insider Rights Cases**Founding (1791-1812)***Fletcher v. Peck (1810)*²²⁷

Invalidated Georgia law rescinding (even against subsequent purchasers) state land sale obtained by bribery of prior legislature. Marshall's opinion relied on Contracts Clause and on natural-law doctrine of "vested rights."

*Sedition Act of 1798*²²⁸

Executive enforcement by Federalists against supporters of Jefferson's Republicans²²⁹ (to extend dissenters can be regarded as insiders).

Antebellum (1813-1858)*Scott v. Sandford (1857)*²³⁰

Dicta: Sandford had constitutional right (substantive due process) to Scott as a slave.

*Barron v Baltimore (1833)*²³¹

Rejected Baltimore wharf owner's takings claim against the city, holding that the first ten amendments restrained only the federal government.

Latter Reconstruction- Guided Age (1869-1886)*Loan Ass'n v. Topeka (1874)*²³²

Struck tax for funds to attract private businesses to city, as both "beyond the legislative power" and "an unauthorized invasion of a private right."

*Slaughter-house Cases (1873)*²³³

Upheld state licensing of slaughterhouses against a variety of Fourteenth Amendment challenges.

227. 10 U.S. 87 (1810).

228. 1 Stat 596 (1798) (expired 1801).

229. See generally LUCAS A. POWE JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA (1991).

230. 60 U.S. 393 (1857).

231. 32 U.S. 243 (1833).

232. 87 U.S. 655 (1875).

233. 83 U.S. 36 (1873).

Populist- Progressive (1887-1916)*Lochner v. New York (1905)*²³⁴

Struck state regulation of hours for bakers as violation of substantive due process (liberty to contract).

*Muller v. Oregon (1908)*²³⁵

Upheld state law capping hours for women against substantive due process challenge, relying on social-science data of first “Brandeis Brief.”

Suffrage- Prohibition (1917-1930)*Adkins v. Children’s Hospital (1923)*²³⁶

Struck minimum wages for women as violation of substantive due process.

*Bunting v. Oregon (1917)*²³⁷

Upheld state law cap on hours for men and women in manufacturing jobs.

Modern (1931-present)*Morehead v. Tiplado (1936)*²³⁸

Struck minimum wage law for women under substantive due process.

*New York Times v. Sullivan (1964)*²³⁹

Struck tort liability for defamation that limited press defense to proving truth of publication as violation of (incorporated) First Amendment.

*Roe v. Wade (1973)*²⁴⁰

Struck state-law ban on abortion as violation of women’s fundamental right to make procreative decisions, including terminating pregnancy.

*Adarand Constructors, Inc. v. Pena (1995)*²⁴¹

Struck federal construction contract set-aside for minority-owned businesses as violation of equal protection doctrine.

234. 198 U.S. 45 (1905).

235. 208 U.S. 412 (1908).

236. 261 U.S. 525 (1923).

237. 243 U.S. 426 (1917).

238. 298 U.S. 587 (1936).

239. 376 U.S. 254 (1964).

240. 410 U.S. 113 (1973).

241. 515 U.S. 200 (1995).

*United States v. Virginia (1996)*²⁴²

Struck exclusion of women from military institute under equal protection.

*West Coast Hotel v. Parrish (1937)*²⁴³

Upheld state minimum wage law for women and minors against substantive due process challenge (overruling *Adkins* and *Morehead*).

*Grutter v. Bollinger (2003)*²⁴⁴

Upheld consideration of race as factor in admissions policy at the University of Michigan's law schools against equal protection challenge.

*Kelo v. City of New London (2005)*²⁴⁵

Rejected claim that inverse condemnation violated public-use of Takings Clause by transferring land to private company for economic development.

Outsider Rights Cases

Founding (1791-1812)

*Kentucky & Virginia Resolutions Against Sedition Act (1798 – 1799)*²⁴⁶

Sedition Act of 1798 was vehemently opposed by legislative resolutions in Kentucky and Virginia, written by Jefferson and Madison, respectively.

*Sedition Act of 1798*²⁴⁷

Enforcement by Federalists against supporters of Jefferson's Republicans (to extend dissenters can be regarded as outsiders).

Antebellum (1813-1858)

*Worcester v. Georgia (1832)*²⁴⁸

Held Georgia's anti-Cherokee laws violated federal jurisdiction over tribes. Rather than enforce, President continued tribe-relocation policy.²⁴⁹

242. 518 U.S. 515 (1996).

243. 300 U.S. 379 (1937).

244. 539 U.S. 306 (2003).

245. 545 U.S. 469 (2005).

246. See THE VIRGINIA REPORT 27, 28, 162-67 (J.W. Randolph ed., 1850).

247. 1 Stat 596 (1798) (expired 1801).

248. 31 U.S. 515 (1832).

249. See, e.g., JOHN EHLE, TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION (1988) (describing relocation of Cherokees from Georgia lands to Oklahoma).

Scott v. Sandford (1857)²⁵⁰

Holding Scott lacked citizenship because African descendants were not racially qualified for citizenship under original constitutional intent.

Latter Reconstruction- Guided Age (1869-1886)

Strauder v. West Virginia (1880)²⁵¹

Struck state law that limited jury service to whites only as violation of equal protection clause.

Pace v. Alabama (1883)²⁵²

Upheld state law imposing higher penalties for adultery and fornication when the participants in the act are of two different races.

Populist- Progressive (1887-1916)

United States v. Reynolds (1914)²⁵³

Struck statute criminalizing breach of contract to work to repay a debt as involuntary servitude in violation of Thirteenth Amendment.

Plessy v. Ferguson (1896)²⁵⁴

Upheld state law segregating races on passenger rail cars against equal protection challenge.

Suffrage- Prohibition (1917-1930)

Meyer v. Nebraska (1923)²⁵⁵

Struck state prohibition against teaching other than in English as violation of parents' fundamental liberty to control education of their children.

Pierce v. Society of Sisters (1925)²⁵⁶

Struck state requirement that children be sent to public schools as violation of fundamental right to control upbringing of children.

250. 60 U.S. 393 (1857).

251. 100 U.S. 303 (1880).

252. 106 U.S. 583 (1883).

253. 235 U.S. 133 (1914).

254. 163 U.S. 537 (1896).

255. 262 U.S. 390 (1923).

256. 268 U.S. 510 (1925).

Schenck v. United States (1919)²⁵⁷

Upheld conviction for conspiracy to circulate to men, accepted for military service, a document calculated to cause insubordination and obstruction.

Modern (1931 —2006)

Brown v. Board of Education (Brown I) (1954)²⁵⁸

Held racial segregation in public schools violated equal protection.

Brandenburg v. Ohio (1969)²⁵⁹

On conviction of organizer of rally, advocating “revengeance” and sending blacks to Africa, and Jews to Israel, Court struck statute purporting to punish mere advocacy under new test requiring intent in incitement cases.

Lawrence v. Texas (2003)²⁶⁰

Struck homosexual sodomy statute (overruling *Bowers*) as violation of fundamental right of intimate association.

Korematsu v. United States (1944)²⁶¹

Upheld forced internment of Japanese Americans without individualized screening, despite applying “the most rigorous scrutiny.”

Dennis v. United States. (1951)²⁶²

Upheld convictions under Smith Act for conspiracy to overthrow U.S. government by Communist Party organizing and teaching related doctrine, against First Amendment challenge, adopting “risk-formula” analysis.

Bowers v. Hardwick (1986)²⁶³

Upheld homosexual sodomy statute against challenge that violated fundamental rights of intimate association.

257. 249 U.S. 47 (1919).

258. 347 U.S. 483 (1954).

259. 395 U.S. 444 (1969).

260. 539 U.S. 558 (2003).

261. 323 U.S. 214 (1944).

262. 341 U.S. 494 (1951).

263. 478 U.S. 186 (1986).