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Editor's Note

It is my great honor to introduce *Chapman Law Review's* second issue of Volume Twenty-Five. This issue begins with submissions for our 2022 Symposium: "A Future-Proof Constitution: Exploring the Effects of Modernization on Constitutional Law."

Our first essay, written by Professor Mark S. Kende, overviews several speech and internet speech Supreme Court cases. Professor Kende highlights the lack of caselaw covering the Internet's impact on free speech and suggests the use of a more globally used proportionality approach. Our very own Professor James C. Phillips follows with an essay that examines the meaning of the original public. Professor Phillips summarizes past formulations and linguistic concepts to suggest different original public contenders and concludes by highlighting the need for greater precision when defining the term.

Following these essays is an article written by Professor Lael K. Weis that reexamines originalism and recommends a novel way to reinvigorate this longstanding method of judicial interpretation. Professor Weis has already received much scholarly acclaim for her article and we are privileged to finally present it in print.

To conclude this issue, we present two final student notes. The first note, written by Ms. Kylene Hernandez, analyzes recent California legislation on accessory dwelling units. Ms. Hernandez further contemplates how these structures could provide a solution for the current lack of housing under the backdrop of state and federal fair housing laws. Next, Ms. Jessica Marsella critically examines the Supreme Court's recent interpretation of religious exemptions to the contraceptive mandate. Ms. Marsella highlights the unique challenges that women face in our medical system and argues for the reevaluation and amendment of the Religious Freedom Restoration Act to prevent third-party harm.

Despite the long-awaited return to campus, *Chapman Law Review* faced the challenge of planning a symposium event under constantly changing COVID-19 conditions. With the guidance of our administration, we were able to adjust to the developing state and school safety guidelines and successfully host our second virtual symposium. Needless to say, this effort would not

have been possible without the continued support of our faculty and administration, including: our Executive Vice President and Chief Advancement Officer of Chapman University, Dean Matthew Parlow, for his assistance in soliciting speakers; our Interim Dean of Chapman University Dale E. Fowler School of Law and Professor of Law, Dean Marisa S. Cianciarulo; our beloved faculty advisor, Professor Celestine Richards McConville; and our faculty advisory committee members, Professor Kurt Eggert, Professor Sherry Leysen, Professor Nancy Schultz, and Professor Kenneth Stahl. A special thank you to Professor Eggert who moderated both panels and freely gave his time throughout the planning process. Many thanks to our brilliant symposium event speakers, including: our keynote speaker, Dean of UC Berkeley Law, Erwin Chemerinsky; our panelists Professor Aziza Ahmed, Professor David S. Han, Professor Hugh Hewitt, Professor Mark S. Kende, Professor James C. Phillips, Professor Michael Rappaport, Professor Mark Tushnet, and Professor Rebecca Zietlow. We are also grateful for the team of administrators who championed our vision, including: our Assistant Dean of Student Affairs, Nidhi Vogt; our Assistant Dean for Administration, Kelly Farano; our Digital Media & Marketing Manager, PJ Perez; our Assistant Director of Development and Alumni Affairs, Nicole Bigley; and our Law Events Coordinator, Jonathan Smith.

I would like to recognize our Executive Program Editor, Mr. Sean Gallagher, who proposed the symposium topic and channeled his passion for constitutional interpretation into a successful event.

Additionally, I would like to express my deepest appreciation to the members of our production team: our Executive Managing Editor, Ms. Madeleine Dobson and our Executive Production Editor, Ms. Kylene Hernandez. You both are some of the sharpest, funniest, and kindest people I have met during law school. I am truly humbled and grateful to have worked with you.

Lastly, there are many other people in and out of *Chapman Law Review* who have been integral to the success of this Volume. Although I cannot personally acknowledge each individual, I am reminded of the words of President Theodore Roosevelt, “The credit belongs to the [person] who is actually in the arena.” Thank you to everyone who joined me in the arena, the credit belongs to us.

Ji hea Oh
Editor-in-Chief

The Internet Changes Everything, and Nothing

*Mark S. Kende**

INTRODUCTION

This is not the first essay declaring that the Internet is revolutionary. For scholars, the Internet has enabled unparalleled access to information from all over the globe; it has permitted what were previously impossible collaborations; and it has even led to further evolution of the medium. New developments include social media, artificial intelligence, crypto-currency, and more. The Internet's major "platforms" like Facebook, Google, Apple, Microsoft, and others have even become the robber barons of our age. They are drawing scrutiny from both the U.S. Congress and states regarding how they are changing society, our children, business, and even warfare. The Internet also played an important and innovative role in keeping us linked to each other during a pandemic. Yet things are actually more complicated. This Essay argues that the Internet has had a surprisingly unimportant effect on free speech doctrine. If anything, it has helped lock down the Supreme Court's libertarian categorical approach to the First Amendment, which is rather unique internationally.

Part I of this Essay will initially highlight three questionable Supreme Court speech cases that demonstrate this libertarian tact. Part II will discuss two questionable internet speech cases which follow the formula. Indeed, they may be even more awkward than the brick and mortar cases. The Essay's conclusion is that the Court should become less libertarian in all of these areas, and should follow the approach taken in many Western democracies of proportionality analysis or a type of balancing.

I. THREE QUESTIONABLE SUPREME COURT SPEECH CASES

The essence of the Supreme Court's libertarian approach is an almost perverse aversion to laws that discriminate based on content, no matter how harmful the speech. The Framers would

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not have approved, and society's current polarization is in part due to tolerating such harms. Here are three examples.

A. Hate Speech

In *R.A.V. v. City of St. Paul*, the Supreme Court in 1992 struck down a St. Paul ordinance that criminalized the display of a burning cross, swastika or other symbol that one has reason to know creates "anger, alarm, or resentment" in others.¹ The law could have easily been struck down as overbroad, as advocated by the concurrences.² Instead, Justice Scalia and the majority ruled the law discriminated against content discriminatory fighting words.³ This decision makes little sense since the broader category of fighting words itself is prohibited.⁴ The Court also ignored that the prohibited fighting words were precisely the kind most likely to cause riots and disturbances in urban areas and other places. The case went far beyond where it needed to go; it made the U.S. a tragic outlier given its racist past and present. Even free speech "absolutist" Geoffrey Stone has recently changed his mind and opposes certain types of hate speech.⁵

B. Horrific Cruel Speech

In *Snyder v. Phelps*, the U.S. Supreme Court upheld the right of Westboro Baptist Church members to shout epithets towards the funeral of an American soldier, blaming his death on supposed American corruption such as the tolerance of gay people.⁶ The father of the soldier lost his claim for intentional infliction of emotional distress, despite the obvious lack of any social value in the shouting.⁷ The Court's focus was on how upholding the claim would amount to content discrimination.⁸ The fact that the speech involved was acknowledged to be "outrageous" by the Court adds to the flaws in the case.⁹ The Court simply found that the speech did not fall into a prohibited category, rather than balancing competing interests.¹⁰ Indeed, the speech would be considered hate speech in many countries. The only possible justification would be

¹ 505 U.S. 377, 391–92, 396 (1992).

² *See id.* at 397–415 (White, J., concurring); *see also id.* at 415–16 (Blackmun, J., concurring); *id.* at 416–36 (Stevens, J., concurring).

³ *See R.A.V.*, 505 U.S. at 392.

⁴ *See generally* *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942).

⁵ *See* David Raban, *Racism Thrives at the Law School*, THE CHI. MAROON (Mar. 5, 2019), <http://www.chicagomaroon.com/article/2019/3/5/racism-thrives-law-school/> [<http://perma.cc/3XNW-7XNV>].

⁶ 562 U.S. 443, 454, 460–62 (2011).

⁷ *See id.* at 459.

⁸ *See id.* at 458.

⁹ *See id.*

¹⁰ *See id.*

that allowing the speech averts even worse behavior, like violence. But that is pure speculation.

C. Lying

The next year (in 2012), the Supreme Court in *United States v. Alvarez* struck down the Stolen Valor Act—which made it illegal for a person to falsely state that he was awarded a medal from the U.S. Armed Forces—as unconstitutional.¹¹ There was no doubt that a political candidate violated the law.¹² He lied.¹³ Yet the Court mysteriously said this deceptive speech could not be the basis for prosecution.¹⁴ The Court said that there was no categorical precedent for banning false speech.¹⁵ And the Court said the law disfavored certain false speech over other types.¹⁶ This makes no sense. False speech has essentially no social value, and damages political and other discourse. It contributes to political polarization. Cass Sunstein and others have gradually expressed opposition to this case.¹⁷

II. TWO QUESTIONABLE SUPREME COURT INTERNET SPEECH CASES

With the advent of the Internet, there was much speculation about how the courts would treat its expression. The answer is, surprisingly, in the same libertarian mode as other speech though its greater dangers are apparent. These include its interactivity, its history of predatory activity towards children, its especially graphic portrayals of sexual violence, its easy use for bullying or criminal collaboration, and the evidence that it is causing increasing amounts of depression and suicide, especially for the young. Yet, it is also the rare new technology quickly being protected by the Supreme Court, as opposed to being seen with fear such as film. Here are some examples of internet libertarianism.

A. Indecent Speech

In *Ashcroft v. ACLU*, the Court struck down the Child Online Protection Act which was even modeled on the Court's three-part

¹¹ 567 U.S. 709, 730 (2012).

¹² *See id.* at 713.

¹³ *See id.*

¹⁴ *See id.* at 728.

¹⁵ *See id.* at 723.

¹⁶ *See id.* at 734.

¹⁷ *See generally* CASS SUNSTEIN, LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION (2021).

criteria for regulating obscenity.¹⁸ The Court found the law, however, to be content discriminatory.¹⁹ The law also problematically limited adults to seeing only material suitable for children.²⁰ This is true, but the law created affirmative defenses for adult-focused establishments when they took measures to protect children from access.²¹ But the most bizarre part of the case was Justice Kennedy saying that filters would be better at screening indecent speech than a criminal law, contrary to the opinion of Justice Breyer.²² Indeed, both Justices were using strict scrutiny but reached opposite results.²³ Yet Kennedy admitted parents could not even be required to buy filters.²⁴ This part of Kennedy's reasoning makes no sense. There have been several other laws designed to protect children from the Internet and they have almost all failed because of the Court's categorical approach.²⁵

B. Threats

In 2015, the Supreme Court in *Elonis v. United States* rejected a prosecution for threats based on Facebook postings by an ex-husband against his ex-wife.²⁶ The threats repeatedly indicated that he would do physical harm to her.²⁷ She was terrified.²⁸ But he cautiously put some conditional language in his quotes to create a bit of doubt.²⁹ He prevailed because the Court ruled that there was insufficient proof of his subjective intent.³⁰ Again, the Court acted rigidly and protected speech with no social value.

CONCLUSION

To summarize, the Internet is revolutionary, but its impact on free speech doctrine has been surprisingly small. Indeed, the Supreme Court has become more protective precisely at a time when certain speech is more obviously a clear and present danger. This Essay has touched on a few of these key cases. The Court would do better to follow the proportionality approach used globally, and

¹⁸ 542 U.S. 656, 673 (2004).

¹⁹ *See id.* at 665.

²⁰ *See Ashcroft v. ACLU*, 535 U.S. 564, 571–72 (2004).

²¹ *See id.* at 570.

²² *See Ashcroft*, 542 U.S. at 667; *see also id.* at 683–84 (Breyer, J., dissenting).

²³ *See Ashcroft*, 542 U.S. at 670; *see also id.* at 677 (Breyer, J., dissenting).

²⁴ *See Ashcroft*, 542 U.S. at 669.

²⁵ *See Jennifer A. Rupert, Tangled in the Web: Federal and State Efforts to Protect Children from Internet Pornography*, LOY. CONSUMER L. REV., 130, 132–45 (1999).

²⁶ 575 U.S. 723, 727, 740 (2015).

²⁷ *See id.* at 727–30.

²⁸ *See id.* at 728.

²⁹ *See id.* at 729–30.

³⁰ *See id.* at 740.

advocated by Jamal Greene in his book, *How Rights Went Wrong*.³¹ This would allow the Court to weigh the value of speech, the suitability of the applicable laws, and various other criteria. The Court could even start with an internet case, and add doctrine to its revolutionary impact.

³¹ See generally JAMAL GREENE, *HOW RIGHTS WENT WRONG, WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* (2021).

Which Original Public?

James C. Phillips*

INTRODUCTION

Original public meaning originalism¹ seeks to know what the Constitution would have meant to an ordinary person at the time a specific provision was enacted. So originalist scholars tend to look to see what the Constitution's words would have meant to an ordinary, average, or competent user of American English at the time a specific constitutional provision was adopted. In *District of Columbia v. Heller* ("*Heller*"), however, Justice Scalia's majority opinion took a more specific view of exactly who qualified as the ordinary person of interest. At one point *Heller* declares that the "Constitution was written to be understood by *the voters*."² Yet in the very next sentence, *Heller* notes that "meanings that would not have been known to *ordinary citizens* in the founding generation" are excluded.³ However, these are not the same populations—or, as linguists would say, speech communities⁴—in two ways. First, many citizens could not vote, with voting limited in some states based on requirements such as property ownership, and with few women, able to vote. Second, some voters were not "ordinary," either generally or in their language use. Most, if not all, of the Founders would not fit this description.

This raises an important methodological question for original public meaning originalism. Performing original public meaning originalism requires looking at how the general public used and understood language. But which portion of the public is the correct one for determining the Constitution's meaning? *Heller* proposes two possibilities: voters and "ordinary" citizens.⁵ If we go with the latter group, how would we define "ordinariness?" Yet there are

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¹ This is not the only variant of originalism, but is, in the author's view, the dominant one practiced today.

² *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (emphasis added) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

³ *Id.* (emphasis added).

⁴ See Richard Nordquist, *A Definition of Speech Community in Sociolinguistics*, THOUGHTCO. (July 7, 2019), <http://www.thoughtco.com/speech-community-sociolinguistics-1692120> [http://perma.cc/QY7Q-TA8S].

⁵ See *Heller*, 554 U.S. at 576–77.

other possibilities besides these two populations. What about all citizens, regardless of their “ordinariness?” Alternatively, we could look to the Constitution itself. Its preamble declares that “We the People” ordained and established it.⁶ Who would have been understood to be “We the People” in 1789, and are they the proper public for originalism’s inquiry? One could imagine other publics, such as everyone permanently in the United States, regardless of their ability to vote or citizenship status. Originalism has been theoretically fuzzy as to who qualifies as the original public from which meaning must be sought. This Essay seeks explore the possibilities in hopes of further theoretical refinement to enable more focused originalist methodology.

I. VARIOUS FORMULATIONS OF THE TYPE MEANING AND ORIGINAL PUBLIC

A. Scholarly

Originalist scholars have put forth various formulations of the type of meaning the Constitution contains and the relevant group to look to. For example, Professor Lawrence Solum has referred to “the conventional semantic meaning of the words and phrases” in the Constitution.⁷ Professor Kurt Lash defines “original meaning as the likely original understanding of the text at the time of its adoption by competent speakers of the English language who are aware of the context in which the text was communicated for ratification.”⁸ Thus, Lash has sought to “identify patterns of usage that signal commonly accepted meaning.”⁹ Professor Christopher Green argues that “one should look for what readers of the historically-situated text would have understood the constitutional language to express.”¹⁰ He further observes that “[r]ecovering the historic textually-expressed constitutional sense requires the interpreter to put herself as much as possible in the position of informed people at the time that language was made part of the Constitution.”¹¹ Vasan Kesavan and Professor Michael Stokes Paulsen contend that the appropriate inquiry is to determine “the meaning the language [of the Constitution] would have had . . . to an average, informed speaker and reader of that language at the time of its enactment

⁶ U.S. CONST. pmb.

⁷ Lawrence B. Solum, *Originalist Methodology*, 84 UNIV. CHI. L. REV. 268, 272 (2017).

⁸ KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* 277 (2014).

⁹ *Id.*

¹⁰ Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON UNIV. C.R. L. J. 1, 12 (2008).

¹¹ *Id.* at 44.

into law.”¹² In other words, one must seek to understand both “the meaning the words and phrases of the Constitution would have had, in context, to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted” and the “meaning [words and phrases of the Constitution’s text] would have had at the time they were adopted as law, within the [legal] and linguistic community that adopted the text as law.”¹³ Professor Randy Barnett posits that the Constitution’s meaning is its “objective social meaning,” or its “semantic meaning.”¹⁴

According to these scholars then, the appropriate type of meaning to give the Constitution’s words and phrases is based on conventional semantic meaning, commonly accepted meaning, objective social meaning, and semantic meaning.

It is not clear that these will always be the same. For example, the commonly accepted meaning may not be the conventional semantic meaning or the objective social meaning, but rather a legal meaning.

As for the appropriate population or group whose understanding is the operative one for the Constitution, while scholars agree it must be limited to those at the time of adoption or enactment, scholars don’t quite agree beyond that. The populations in debate include:

- contextually aware, competent speakers of the English language;
- informed people;
- an average, informed speaker and reader of that language;
- ordinary readers, speakers, and writers of the English language, in context; and
- the legal and linguistic community that adopted the text.

Is a competent speaker, reader, and writer the same as an average one or an ordinary one? Average and ordinary might be the same, whereas being competent could mean more or less than being average or ordinary. The average person might not be competent, or the standard for being competent might be below average.

¹² Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 398 (2002).

¹³ Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1118, 1131 (2003).

¹⁴ Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J. L. & PUB. POL’Y 65, 66 (2011).

Also, is this a more subjective or objective standard? When these scholars refer to the average, ordinary, competent person, they could be doing so in an empirical sense. Yet it likely is being used in an objective sense, similar to the reasonable person in tort law. If that is so, it is terribly ironic because one of the reasons that gave rise to originalism—and one of its principal features used to defend its use—is that it cabins judicial discretion. But using an objective standard for the average, ordinary, or competent person at the time a constitutional provision is adopted will mean that a judge's personal views or intuition, consciously or unconsciously, will be doing a lot more work in discerning meaning.

There may be some tension as well between the formulation of the appropriate meaning and the description of the appropriate public or group. The meaning seems to focus more on the ordinary, whereas the group leaves open the door to the ordinary, average, or competent *attorney* (rather than person), considering that when the relevant language in the Constitution is legal language, contextual awareness and an understanding of the type of document being read is paramount.

B. The Supreme Court

In *Heller*, one of the most famous originalist decisions in recent memory, the Supreme Court made two claims about the basic premise of original public meaning originalism.¹⁵ First, quoting a 1931 case, the Court declared that, “In interpreting [the Second Amendment], we are guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.’”¹⁶ Second, in the very next sentence, the Court stated that “[n]ormal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.”¹⁷ These statements put forth two different considerations. One is the type of meaning the Constitution's text carries: normal, ordinary, or idiomatic meaning, but not technical or secret meaning. The other, as identified by the Court, is the group of people whose understanding we are concerned about when interpreting the original Constitution; namely, founding generation voters and

¹⁵ *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008).

¹⁶ *Id.* (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

¹⁷ *Id.* at 576–77.

ordinary citizens. Compared to the scholarly formulation, this appears more subjective rather than objective in nature.

There are problems with both of these *Heller* formulations. The first focuses on meaning types. While it's not entirely clear what the majority means by "technical" language, it could be problematic for interpreting a legal document if it excludes legal meaning. For instance, as Professors John McGinnis and Michael Rappaport have pointed out, the Constitution contains terms that only have a legal meaning and lack an ordinary or normal meaning, such as *writ of habeas corpus*, *bill of attainder*, and *appellate jurisdiction*.¹⁸ Also, some constitutional terms have both a legal and an ordinary meaning, like *treason*, *privileges*, and *necessary and proper*.¹⁹ If legal meaning is technical meaning, then according to *Heller*, some terms would essentially have no meaning while other terms might be given a meaning that makes little sense. It is very unlikely *Heller* meant this, but further theoretical clarification is necessary.

The second formulation is focused on the relevant groups one looks at for determining their understanding of the Constitution. Here the *Heller* Court appears to put forth two groups it sees as interchangeable: voters and ordinary citizens. Only they are not. Not everyone who could vote was an "ordinary" citizen, and not every "ordinary" citizen could vote. Whether or not one could vote in the only federal election open to popular vote at the Founding—the House of Representatives—was entirely dependent on one's state eligibility requirements to vote for the largest branch of the state legislature.²⁰ And states varied, with some allowing women and African Americans to vote and others not.²¹ Likewise, by 1792 about three states had property ownership requirements for voting. One historian estimate that, at that time, in two-thirds of the states about ninety percent of free adult males could vote, whereas in the other on-third of states it was about seventy to seventy-five percent (with the exception of New York, which was likely below seventy percent).²²

Federal citizens were a broader category than voters, as the first federal naturalization law, enacted in 1790, only required two years residency to become a citizen (this would fluctuate

¹⁸ See John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1370 (2018).

¹⁹ *Id.* at 1371.

²⁰ See U.S. CONST. art. I, § 2.

²¹ See THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA 113 (1997).

²² *Id.* at 114.

until settling on five years in 1801).²³ States had similar laws for becoming a state citizen,²⁴ though *Heller* is likely referring to U.S. citizenship. Federal citizenship in that 1790 statute was limited to “free white person[s],” indicating no limitation based on gender but certainly one based on race and color.²⁵ Thus, there were some who could vote but could not have emigrated to the United States and applied for citizenship, and some who were citizens (natural born or naturalized) but could not vote.

What is more, *Heller* adds the further requirement that constitutional interpretation is concerned with “ordinary” citizens. There are two ways to interpret this. One is “ordinary” in the sense of everyday Americans, which is somewhat in harmony with the idea of voters. However, James Madison, Alexander Hamilton, and John Jay, the writers of the *Federalist Papers*, were all citizens (and voters), but they were hardly ordinary. Thus, according to *Heller*, would it be improper to look to their understanding of the Constitution? This may be an instance of at least some members of the Court saying one thing and doing another since those justices who most consistently practice original public meaning originalism also frequently cite to the understanding of elite Americans at the Founding. But if we are to take *Heller*’s words at face value, then we would have to determine what makes someone ordinary and confirm that they are a citizen before we could look to their understanding to interpret the Constitution.

Alternatively, “ordinary” could refer to their language ability, which is consistent with the context of discussing ordinary and normal meaning as opposed to technical meaning. Thus, the relevant group would include those who are both citizens and have ordinary language use ability. This would also be a difficult empirical inquiry and might eliminate many of the more educated folks whom originalists often turn to. Admittedly, there would be a lot of overlap between ordinary citizens in the sense of overall ordinary Americans, and ordinary citizens in the narrow idea of language use. The Court has never clarified what gives one the requisite ordinariness for this inquiry.

Where did *Heller* get the idea that these particular meanings and these particular groups are the relevant ones for constitutional interpretation? It cites to nothing for the proposition that ordinary citizens are the right “public” to

²³ *Id.* at 166.

²⁴ *Id.* at 167.

²⁵ *Id.*

examine.²⁶ For the proper meanings and voters, the Court cites *Gibbons v. Ogden* (“*Gibbons*”)²⁷ and quotes *United States v. Sprague* (“*Sprague*”).²⁸ The quoted language from *Sprague* cites a host of sources,²⁹ all of which seem less than ideal as authorities on how to interpret the Constitution for two reasons. First, originalism is about the meaning of the text of the Constitution rather than the judicial gloss that has been put on the Constitution. Therefore, citing to that judicial gloss (or treatises) seems second best as compared to grounding one’s authority first in the Constitution’s text.³⁰ Even more so, these authorities all seem a bit late, given that the oldest source is dated twenty-seven years after the Constitution was adopted.

Given this, I will just look at the two oldest sources. In *Martin v. Hunter’s Lessee* (“*Martin*”), the Supreme Court declared that the Constitution’s “words are to be taken in their natural and obvious sense.”³¹ Justice Story, writing for the Court, did not cite to any authority for this statement.³² Where does this notion come from? Further, is “natural and obvious” the same as “normal” and “ordinary?” It is not clear that it is the same, though it is possible.

As for *Gibbons*, the Court stated that “the enlightened patriots who framed our constitution, and the people who adopted it, must

²⁶ *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008).

²⁷ *Id.* (citing *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824)).

²⁸ *Id.* at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

²⁹ *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816); *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Brown v. Maryland*, 25 U.S. 419 (1827); *Craig v. Missouri*, 29 U.S. 410 (1830); *Tennessee v. Whitworth*, 117 U.S. 139 (1886); *Lake Cnty. v. Rollins*, 130 U.S. 662 (1889); *Hodges v. United States*, 203 U.S. 1 (1906); *Edwards v. Cuba R. Co.*, 268 U.S. 628 (1925); *The Pocket Veto Case*, 279 U.S. 655 (1929); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 451 (5th ed. 1891); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 61, 70 (2nd ed. 1871).

³⁰ See STORY, *supra* note 29, at 345. Story’s Commentaries, which by its Fifth Edition in 1891 was being written by someone other than Joseph Story, stated that:

[E]very word employed in the Constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are . . . fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common-sense, and cannot be presumed to admit in them any recondite meaning or any extra-ordinary gloss.

Id.; see also THOMAS M. COOLEY, *supra* note 29, at 66. Cooley’s treatise, with the Second Edition published in 1871, declared:

[A]s the [C]onstitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.

Id.

³¹ *Martin*, 14 U.S. at 326.

³² See *id.*

be understood to have employed words in their natural sense.”³³ Here again, the Court cites no authority for this proposition.³⁴ In authoring the majority opinion, Chief Justice Marshall was perhaps writing from personal knowledge: he was from the founding generation, knew many of those who drafted the Constitution, and played a role in the Virginia ratification debates.³⁵ Regarding the *Gibbons* proposition, are the Framers and “the people who adopted it” (perhaps these are the ratifiers) the same as the voters? It is not clear that they are identical; they could be, or they could be a subset. Thus, from *Martin* and *Gibbons* to *Sprague* to *Heller*, the type of meaning the Constitution employs and the group whom we examine for understanding has not necessarily been consistently identified, and its origins are without clear authority.

Setting aside some of this theoretical imprecision, what type of evidence has the Court looked to in order to determine the understanding of voters or ordinary citizens? For instance, the *Heller* majority, in attempting to understand the meaning of “keep arms,” looked to thirteen examples of the term being used, twelve of which were legal sources that included Blackstone’s Commentaries, a 1689 English Statute, and a 1771 legal treatise.³⁶ Similarly, in looking at the use of “bear arms,” *Heller* turned to state constitutions, state court decisions, and collected works of legal scholars from the Founding Era.³⁷ Legal texts seem to be weak evidence regarding how ordinary people would understand language, and instead reflect technical—rather than normal—meaning. Thus, there is tension between what the Court says it is looking for and what it actually does, at least in *Heller*.

II. LINGUISTIC CONCEPTS OF SPEECH COMMUNITIES & REGISTERS

When originalist scholars and jurists seek to identify and examine the relevant group and the appropriate type of meaning, they are tapping into two well-developed linguistic concepts: speech communities and registers.

A. Speech Communities

As Professor Lawrence Solan has pointed out, “When the legal system decides to rely on the ordinary meaning of a word, it must

³³ *Gibbons*, 22 U.S. at 188.

³⁴ *See id.*

³⁵ *See, e.g., John Marshall: Founding Father, Founding Federalist*, HIST. ON THE NET, <http://www.historyonthenet.com/founding-fathers-john-marshall-founding-father-founding-federalist> [<http://perma.cc/3UE5-PDGG>] (last visited Apr. 8, 2022).

³⁶ *District of Columbia v. Heller*, 554 U.S. 570, 582–83, 723 n.7. (2008).

³⁷ *Id.* at 585–86.

also determine which interpretive community's understanding it wishes to adopt."³⁸ Linguists have a name for this: speech community. In essence, "[s]peech communities are groups that share values and attitudes about language use, varieties and practices."³⁹ Put another way, a group of individuals "who share the[] same norms about communication . . . [and] a knowledge of the rules for the conduct and interpretation" of language constitute a speech community.⁴⁰ While there can be some variation within any particular speech community, "[t]he differences in interpretation between members of a speech community are small and they do not interfere much with normal communication."⁴¹

There is debate among linguists (sociolinguists, linguistic anthropologists, and corpus linguists) about determining speech communities in the real world, because there is a certain "fuzziness" over the concept's "precise characteristics," as well as where the "boundaries [are] around some speech community."⁴² For example, a broad view is that all English speakers around the globe belong to one speech community.⁴³ In contrast, a narrower view argues that "people who speak the same language are not always members of the same speech community," and thus, for instance, because "the respective varieties of [South Asian and U.S.] English and the rules for speaking them are sufficiently distinct," these "two populations" should be assigned "to different speech communities."⁴⁴ Likewise, "London is a community in some senses . . . however, with its 300 languages or more it is in no sense a single speech community."⁴⁵

In contending that those interpreting the Constitution should focus on voters, ordinary citizens, or a particular time period, original public-meaning originalism is arguably attempting to define the relative speech community. This matters for originalist methodology: if we are trying to see how a given speech community understands language, we can ignore those *not* in that speech community. So, originalists could ignore documents created

³⁸ Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2059 (2005).

³⁹ MARCYLIENA H. MORGAN, SPEECH COMMUNITIES 1 (2014).

⁴⁰ Kamal K. Sridhar, *Societal Multilingualism*, in SOCIOLINGUISTICS AND LANGUAGE TEACHING 47, 49 (Sandra Lee McKay & Nancy H. Hornberger eds., 1996).

⁴¹ John Sinclair, *Meaning in the Framework of Corpus Linguistics*, 20 LEXICOGRAPHICA 20, 22 (2004).

⁴² See RONALD WARDHAUGH, AN INTRODUCTION TO SOCIOLINGUISTICS 119 (Blackwell Publ'g Ltd., 5th ed. 2010).

⁴³ See Nordquist, *supra* note 4 (citing MURIEL SAVILLE-TROIKE, THE ETHNOGRAPHY OF COMMUNICATION: AN INTRODUCTION 16 (3d ed. 2003)).

⁴⁴ ZDENEK SALZMANN, LANGUAGE, CULTURE, AND SOCIETY: AN INTRODUCTION TO LINGUISTIC ANTHROPOLOGY 226 (3d ed. 2004).

⁴⁵ WARDHAUGH, *supra* note 42, at 126.

by those people who are foreign to the speech community. At a basic level, this is intuitive; no originalist is going to look at documents from 1789 that were created by Spaniards in the Spanish language, because such a document belongs to a different speech community. Additionally, the proper speech community could be a better concept than the groups *Heller* put forth, for example. This is because voters and ordinary citizens are groups defined more by law than by language use. Indeed, there may be little or no difference between the language ability and understanding of voters and non-voters, or ordinary citizens and non-ordinary citizens. Hence, defining the relative speech community by these mere legal groupings could make less sense.

Scholarly attempts to define the appropriate group have been more on point, focusing on the language ability of individuals. That said, a speech community of average, ordinary, or competent users of American English at the time of enactment of the relevant constitutional provision has at least two difficulties. First, how does one define average, ordinary, or competency, particularly when most of the American English language from early time periods that has survived to the present day derives from folks whose language skills were likely above average given they were societal elites who received higher levels of education? To define average, we would need to know what is both below and above average. That reconstruction seems to be a difficult task given the historical record. Second, there may not be any empirical difference between the understanding of average, ordinary American English language users and non-average, non-ordinary users. While that is an empirical question, their range of understanding may be so small that it amounts to a distinction without a meaningful difference. Perhaps ordinary or average is not overly helpful, as someone who is less proficient may be able to understand a text created by someone more proficient in the language; the less proficient person just may not be able to duplicate such proficiency. Take Shakespeare, for instance. He was no doubt an above-average user of the English language, but it appears that both the low-brow and high-brow users of English in his day understood his plays. His audiences consisted of both groups, even if both groups could not write with his skill. Thus, any focus on competency or ordinariness needs to be focused on a level of understanding rather than an ability to create in the language.

B. Registers, Genres, & Styles

Besides speech communities, originalism also appears to refer to what linguists call registers, genres, and styles. As already discussed, originalist jurists and scholars focus not only

on the type of reader, but also the context, the type of document being read, and the historical timeframe.

A register analysis would combine “an analysis of linguistic characteristics that are common in a text variety with analysis of the situation of the use of the variety.”⁴⁶ This is driven by the assumption that “particular features [of language] are commonly used in association with the communicative purposes and situational contexts of texts.”⁴⁷ Communication by a constitution could be quite different than a letter, a newspaper article, or even a statute. Perhaps this is what Chief Justice Marshall was referring to in *McCulloch v. Maryland* when he stated that “we must never forget that it is a *constitution* we are expounding,” and that it lacks “the prolixity of a legal code.”⁴⁸ Professors McGinnis and Rappaport also seem to be hinting at this concept of register in their argument that the Constitution is a legal text and should therefore be interpreted the way legal texts of the time were interpreted.⁴⁹

A genre “perspective is similar to the register perspective in that it includes description of the purposes and situational context of a text variety, but its linguistic analysis contrasts with the register perspective by focusing on the conventional structures used to construct a complete text within the variety.”⁵⁰ So, for instance, the linguistic concept of genre would focus on “the conventional way in which a letter begins and ends.”⁵¹ Perhaps the “conventional structures used to construct” a constitution do not make that much of a difference in determining the meaning of the Constitution, but it is a concept at least worth exploring.

Finally, a “style perspective is [also] similar to the register perspective in its linguistic focus, analyzing the use of core linguistic features that are distributed throughout text samples from a variety.”⁵² But “[t]he key difference” between register and style is that in the latter “the use of these features is not functionally motivated by the situational context; rather, style features reflect aesthetic preferences, associated with particular authors or *historical periods*.”⁵³ Thus, references to “the founding generation,” “at the time of [the Constitution’s] adoption,” “historically-situated text,” “at the time the language was made

⁴⁶ DOUGLAS BIBER & SUSAN CONRAD, REGISTER, GENRE, AND STYLE 2 (2009).

⁴⁷ *Id.*

⁴⁸ 17 U.S. 316, 407 (1819).

⁴⁹ See McGinnis & Rappaport, *supra* note 18, at 1327–28, 1333–34.

⁵⁰ BIBER & CONRAD, *supra* note 46, at 2.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* (emphasis added).

part of the Constitution,” “at the time of its enactment into law,” and “at the time adopted”⁵⁴ arguably tap into the linguistic concept of style—writing that will reflect the historical period in which it is produced (style), just as it will reflect the situation (register) and type of text (genre). Paying closer attention to all three of these linguistic phenomena would not only be consistent with originalist theory, doing so would refine it.

III. WHAT ARE THE POSSIBILITIES?

The above outlines several possibilities for specifying which original public (or speech community) is the appropriate or best one for constitutional interpretation from the perspective of original public meaning originalism. However, there are others besides the ones that can be gleaned from the material above. With all the groups that follow, of course, *who* is in the group will change at different points in time, either through constitutional amendments that expand who is a citizen or a voter, such as the Fourteenth and Nineteenth Amendments, or changes in state or federal law that affect various categories.

A. Voters

One possible original public are the voters at the particular time a constitutional provision at issue was interpreted. For example, 1789 for the original Constitution, 1791 for the Bill of Rights, 1868 for the Fourteenth Amendment, and so on. Of course, not every voter is qualified to vote in every local, state, or federal election because qualifications to vote in these different elections may not be the same. Thus, because originalism is based on the Constitution’s text, it would make the most sense to tie the meaning of original public to the Constitution, and include voters eligible to vote in a federal election (for the House of Representatives⁵⁵ and Senate⁵⁶), as guaranteed by the Fourteenth and Nineteenth Amendments.

There are pros and cons to such an approach. For instance, a pro is that it is voters who have the authority to make changes in our system and, at least indirectly, call the shots. While we often speak of *the people* delegating that authority to their representatives, only *voters* wield any real power. As for cons, one of the largest is how many Americans would be left out of this group. At the Founding, for instance, very few women or African Americans could vote, and not even all white males could vote.

⁵⁴ See discussion *supra* Part I.

⁵⁵ See U.S. CONST. art. I, § 2.

⁵⁶ See *id.* am. XVII, para. 1.

For example, women weren't guaranteed universal suffrage until 1920; up until then less than half of the states granted women that right.⁵⁷ Furthermore, at different times it is contested who could vote. Consider African American males under Jim Crow Laws. Such laws are now understood to be unconstitutional, but they were not at the time. So, would we assess who is a voter under state laws that were deemed unconstitutional when in effect, or under today's standards? And if the former, how exactly would we know who would be eligible under the arbitrary and subjective Jim Crow Laws, such as poll taxes and literacy tests, since these would vary person to person and were often enforced in such a way as to be rigged to find that the applicant failed. Thus, not using voters as the original public avoids such controversial issues. What is more, there is no clear source of authority for the claim that voters are the correct group—the *Sprague* Court appears to just have made that up.⁵⁸

B. Ordinary Citizens

Another possibility put forth by *Heller* is making the time-appropriate original public consist of all ordinary citizens of the United States (as opposed to citizens of a state).⁵⁹ People who qualified as a U.S. citizen changed over the course of our nation's history. One benefit of this formulation, especially as compared to voters, is that it would bring in many who would otherwise be excluded. However, it also has some serious drawbacks. For example, defining ordinary seems difficult, whether ordinary in a general, overall sense or ordinary in a language-use sense. This would likely create endless debates on where to draw the line and whether a particular individual is appropriately placed in the group. Additionally, it would exclude some Americans whom we might otherwise care about in constitutional interpretation because they were too elite to qualify as ordinary, and, in fact, might significantly reduce the data we have since so many of the texts that have survived were written by individuals who are *not* very ordinary in any sense of the word. And like voters, there does not appear to be any clear authoritative sources for the proposition that this is the correct original public.

⁵⁷ See *Women's History*, NAT'L PARK SERV., <http://www.nps.gov/subjects/womenshistory/19th-amendment-by-state.htm> [<http://perma.cc/8DG8-SPAT>] (last updated July 22, 2020).

⁵⁸ See *United States v. Sprague*, 282 U.S. 716, 731 (1931).

⁵⁹ *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008).

C. Ordinary Users of Contemporaneous American English

A broader way to formulate the original public would be to encompass all ordinary (or average or competent) users of contemporaneous American English of the relevant time period. Perhaps its greatest strength is that it avoids some of the potential exclusion problems of the previous two possibilities: states could not prevent someone from being in this category, only their own language ability would.

However, its weaknesses seem at least threefold. First, while it is technically possible to empirically determine who is an ordinary, average, or competent user of contemporaneous American English, like the previously mentioned categories, it would be a difficult enterprise and lead to a lot of additional debate and complexity. We may not have enough confidence to get it right, especially given the problem with only elite documents surviving to present day. For example, since we cannot randomly sample all types of American English language users from, say, 1789, the sample we do have is inevitably biased. Second, this formulation might exclude some voters and citizens whose language abilities are subpar or above average. Third, there is little authority for this proposed original public beyond some early cases talking about natural language (and those cases cited to nothing for support).

D. “We the People of the United States”

A group of people that can be tied to constitutional text is the Preamble’s “We the People of the United States.” This approach avoids many of the aforementioned pitfalls. First, it sources to a legitimate authority that originalism respects: the words of the Constitution. Second, it is more inclusive than voters or ordinary citizens, as it does not require some additional complex inquiry into whether any particular person has the requisite ordinary language ability. Third, it has democratic legitimacy in that it is “the People” who are deemed sovereign in our system. Finally, choosing “We the People” as the relevant original public has the virtue of connecting the Preamble to the Constitution in a way that it has not been, especially in originalist circles where the Preamble has not been seen to have legal effect. While it would not give the Preamble legal effect, *per se*, this move would infuse the words with some constitutional life by making it the basis for determining the original public when interpreting the Constitution.

Who exactly fits into this particular original public is beyond the scope of this Essay, so just a few thoughts will have to suffice. Professor Christopher Green argues that “We the People” refers to those individuals who participated in the state ratifying

conventions.⁶⁰ He bases the argument on the Article VII reference to the state ratifying conventions' authority to establish the Constitution,⁶¹ and the Preamble's language that it was "We the People" who "ordain[ed] and establish[ed]" the Constitution.⁶² He contends both are the same act: establishing the Constitution. Thus, whoever is doing it must be the same group.

While this argument has some persuasive effect, it ultimately fails for reasons based in the Constitution's text. The Preamble observes that "We the People" ordain the Constitution to provide a host of benefits "to ourselves and our Posterity." Under Green's reading, then, the benefits of the Constitution would only flow to those who participated in state ratifying conventions and their posterity. This cramped notion of who "We the People" are and thus who receive "the Blessings" of the Constitution is not one that makes much sense or has much support, either then or now (though for an originalist, only "then" would count). It would basically create two classes of Americans: those protected by the Constitution because they are descendants of state ratifiers, and the rest of us. It is hard to see that as a correct reading.

Further, such reading conflicts with the notion of popular sovereignty that undergirded the debates on the Constitution and was used by those seeking to convince others to adopt it. As Professor Akhil Amar has described, James Iredell contended during the North Carolina ratification debate that "our governments have been clearly created by the people themselves."⁶³ The Virginia ratifying statement declared that "the powers granted under the Constitution [were] derived from the people of the United States."⁶⁴ And in Federalist No. 84, Alexander Hamilton, after quoting the Preamble, stated that "[h]ere is a [better] recognition of popular rights," what Amar characterized as "rights of the people qua sovereign."⁶⁵ Moreover, as Hamilton put it in Federalist No. 22: "The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority."⁶⁶ While there is still some work to be done in

⁶⁰ Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1660–61 (2009).

⁶¹ See U.S. CONST. art. VII, para. 1.

⁶² U.S. CONST. pmbi.

⁶³ AKHIL REED AMAR, AMERICA'S CONSTITUTION 11 (2005).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ THE FEDERALIST NO. 22 (Alexander Hamilton).

clarifying who exactly “We the People” consists of at any given historical time, it is a broad, constitutionally-grounded group.

E. Anyone in the United States Permanently

Another possibility is anyone who is living in the United States on a permanent basis. Perhaps such people are not technically called “Americans,” but are functionally such. This could potentially include anyone regardless of their legal status, which would have the benefit of being very inclusive. However, it has no readily apparent constitutional authority.

F. Anyone in the United States

Finally, one could imagine an original public that includes anyone on American soil at a particular time. This would avoid the problem of having to figure out if they were here permanently or not. And it would include some rather famous folks who played a role in American history, such as Thomas Paine, but who were never here for very long stretches of time. But it would also include those with little ties to the country, such as tourists or ambassadors; and outsourcing the meaning of the Constitution to them may not make sense from the perspectives of legitimacy or linguistics.

CONCLUSION

Refinements in originalism, namely corpus linguistics, have put pressure on this theory of interpretation. So far, original public meaning originalism has been content to somewhat loosely and inconsistently define the public (or group) that is appropriate for inquiry. But now that we can be more precise in originalist methodology, greater precision in originalist theory may be required. Of the various possible original publics examined in this Essay, “We the People of the United States” appears to have the most potential. Even if that is the best original public, additional work is necessary to more accurately define who that includes throughout our history.

Originalism and Constitutional Amendment

Lael K. Weis*

This Article examines a problem that constitutional amendment uniquely poses for originalism, namely: how should changes to a constitution's text that enact a new set of understandings be reconciled with the understandings of the constitution's framers? This issue poses a significant challenge for originalism, and yet it has been overlooked by scholarship to date. This Article is a first effort to tackle this issue. It develops an originalist approach to amendment that identifies which amendments pose the problem and that provides a method for addressing it. In developing this approach, the Article's analysis makes two significant contributions to the evaluation and understanding of originalism. First, it provides a critical missing component of originalist interpretive theory that is needed for its practical application. As this Article's central examples demonstrate, constitutional amendment poses a real challenge for originalism and not a merely hypothetical one—even for old constitutions that have proven difficult to amend. Second, by putting originalism in conversation with current debates about constitutional amendment, this Article's analysis draws attention to implications for issues concerning the scope of the amending power. The originalist approach that it develops places interpretive constraints on the amending power, requiring amenders who wish to override original understanding to do so clearly. This invites comparison with “implicit unamendability” doctrines, a controversial but increasingly common set of practices whereby courts imply strict constraints on the amending power in order to prevent its abuse. This comparison suggests that originalism may provide an attractive—albeit more limited—alternative for those who are concerned about abusive amendment but have reservations

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about implicit unamendability. In making these two contributions, this Article thus helps resituate and reinvigorate interest in originalism, demonstrating that the theory holds broad interest for constitutional theory and practice beyond narrow and technical scholarly debates between originalists and their critics.

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INTRODUCTION

A significant lacuna in the scholarly literature on originalism is how such theories deal with constitutional amendment. By “originalism” I mean theories of constitutional meaning that approach constitutional interpretation much in the same way as ordinary statutory interpretation: namely, as a task that requires courts to give effect to the linguistic meaning of the instrument’s text as understood in light of its drafting context,¹ which includes publicly available information about drafters’ understandings and intentions. This Article addresses that lacuna. It identifies a problem that constitutional amendment uniquely poses for originalism, and it proposes an approach to that problem that is compatible with the theory’s basic commitments. In doing so, however, this Article’s objective is *not* to offer a defense of originalism. Its objective is rather to place the theory in a broader context than the terms in which it is usually debated, where it can be better understood and evaluated, and where it can shed light on contemporary debates about the interpretation and judicial review of constitutional amendments.

The originalist approach to amendment that this Article develops demonstrates why originalism may be attractive to those with concerns about the abuse or excessive use of a constitution’s formal amendment process. More specifically, insofar as an originalist approach to amendment places an *interpretive constraint* on the amending power, it may provide an alternative to so-called “implicit unamendability” approaches,² whereby courts imply *strict constraints* on the amending power. Although this alternative is more limited in scope, it has several advantages to implicit unamendability doctrines because it does not rely upon a normative conception of the framing as an act of the “will of the people” or notions of the “constituent power.” Or so this Article will argue. In this respect, the Article holds broad interest for constitutional theory and practice beyond narrow scholarly debates between originalists and their critics.

¹ By “drafting context,” I have in mind what Lawrence Solum has referred to as the text’s “communicative content” or “linguistic meaning . . . in context” See Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 479 (2013); Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1937–40 (2013).

² See YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 39 (2017) (describing implicit constitutional unamendability); see also *id.* at 141–57 (applying the general theory of the amending power to implicit unamendability).

Stated in its most basic terms, the problem that constitutional amendment poses for originalism is this: how are changes to a constitution's text that enact a new set of understandings ("amenders' understanding") to be reconciled with the understandings of the constitution's framers ("original understanding") that otherwise pervade its text and structure? This problem raises several questions. In particular, how do we identify those changes that leave original understanding intact and those changes that require modifying that understanding in light of the amenders' understanding? Under what circumstances does the amenders' understanding override original understanding as a source of constitutional meaning? And, more broadly, how should originalism view the amenders' understanding of a source of constitutional meaning, given the features of the task of amending a constitution that importantly distinguish it from the task of framing a constitution? This problem presents a significant challenge for originalism. And yet, it has largely been neglected by scholarship to date.³ This Article is a first effort to define the problem and to develop a strategy for addressing it.

The reasons why the problem has been overlooked appear to be due to the somewhat narrow terms in which originalism is typically understood and debated, which concern its merits as a method of judicial restraint, and its application to the U.S. Constitution in particular. The U.S. Constitution is very old, and although it contains many significant amendments, it has proven difficult to amend. Therefore, dealing with amendment has had no real urgency for the scholarly literature on originalism (at least insofar as the American context forms its point of departure). Nevertheless, identifying and addressing the problem that amendment poses for originalism is important for a sound understanding and evaluation of the theory.

This Article adopts a wider perspective: it focuses on originalism as a theory of constitutional meaning (as opposed to a method of judicial restraint) and situates originalism within wider global debates about constitutional amendment. As

³ For example, Lawrence Solum has provided one of the most thorough and detailed accounts of originalism over the span of his career, articulating and addressing major objections and difficulties, with an effort to present the view in its most defensible and plausible light. And yet, as far as I am aware, he has not considered this issue. For instance, it is not considered in his most comprehensive treatment of originalism. See generally Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. L. & Legal Theory, Rsch. Paper No. 07-24, 2008), <http://papers.ssrn.com/abstract=1120244> [<http://perma.cc/CS88-58TA>] ("Semantic Originalism . . . offers an account of the possibility of constitutional communication and explains how a written constitution can provide both fixed semantic content and a general framework that can be adapted to changing circumstances.").

comparative and international constitutional law scholarship has demonstrated, courts in jurisdictions outside of the United States not only use originalism,⁴ but have treated originalism as a more mainstream interpretive approach.⁵ This includes jurisdictions with newer constitutions, where the contemporaneity of the framing gives original meaning greater purchase. However, it also includes Australia where, as I shall describe below, the High Court has had to grapple with how to reconcile amenders' understanding with original understanding in the context of a very old and rarely amended constitution. Moreover, as I shall also consider below, there have even been changes to the U.S. Constitution that present the problem for originalism described here. How originalism deals with amendment is therefore not just an issue that holds interest for abstract or ideal constitutional theory, but an issue that has implications and consequences for constitutional practice.

The issue also has implications for contemporary debates about amendment and the amending power. Courts throughout the world have increasingly developed methods of interpreting and reviewing constitutional amendments that are designed to constrain exercises of the formal amending procedure when it produces changes that are deemed to go beyond what the constitution's framers contemplated.⁶ The most sophisticated account of this development to date has theorized the phenomenon in terms of a "secondary" or "delegated" constituent power.⁷ And yet, despite the evident overlap in concerns, the connection to originalism has not been pursued.⁸ Here, too, the reasons for this oversight appear to be due to the narrow terms of the debate, which make thinking through the problem of how originalism ought to approach amendment seem like an unlikely place for insights. The analysis in this Article will show otherwise, demonstrating how an originalist approach to amendment draws attention to a critical weakness in the defense

⁴ See, e.g., Yvonne Tew, *Comparative Originalism in Constitutional Interpretation in Asia*, 29 SING. ACAD. L.J. (SPECIAL ISSUE) 719, 719–20 (2017); Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT'L L. 780, 780–81 (2014); Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L L. 1239, 1239–40 (2011).

⁵ See Lael K. Weis, *What Comparativism Tells Us About Originalism*, 11 INT'L J. CONST. L. 842, 844–45 (2013).

⁶ See ROZNAI, *supra* note 2, at 115–16, 126.

⁷ See *id.* at 118–26, 205 (providing an account of the nature of constitutional amendment powers).

⁸ Roznai briefly considers the extent to which the objection that originalism privileges "[t]he 'dead hand' of the past" over present majorities similarly applies to unamendability doctrines. *Id.* at 188–90. Beyond this, however, the connection is not examined.

of implicit unamendability approaches and has the potential to provide an alternative—albeit a more modest and limited one.

The discussion proceeds as follows. In Part I, I begin by briefly clarifying the basic commitments of originalism. These commitments are what account for drafters' understanding as a source of constitutional meaning. I then define the interpretive problem presented by constitutional amendment, which for the purposes of this Article refers to actual changes to a constitution's text that are brought about using its formal amendment procedure.⁹ The problem occurs where: (1) discerning constitutional meaning requires consulting drafters' understanding (because the text is not conclusive); and (2) there is a mismatch between original understanding and amenders' understanding (because the relevant understandings are different, and the text does not resolve how they are meant to fit together).

I refer to this as the “incongruity problem,” since it requires the interpreter to decide how to use a set of conflicting and potentially irreconcilable drafters' understandings as a source of constitutional meaning. As I shall explain, the incongruity problem presents a special problem for originalism that it does not present for non-originalism. This is a function of both the priority that originalism assigns to drafters' understanding over other possible extrinsic sources, and the privileged place that constitutional amendment occupies within originalism as the preferred and most legitimate means of changing constitutional meaning.¹⁰

In Parts II and III, I develop an originalist approach to amendment. There are two components to the approach. The first component, considered in Part II, involves identifying the circumstances where the incongruity problem arises, and where it is the most acute. The second component, considered in Part III,

⁹ I therefore follow Roznai, who defines an “amendment” as a constitutional change effected by that constitution's formal amending procedure. *Id.* at 2. The rationale for this thin, descriptive use of the term is that it focuses attention on the issue that matters for originalism: namely, interpreting changes to *the constitution's text*. This does not however rule out further considerations, such as those concerning the object and effect of the amendment that Richard Albert uses to distinguish constitutional amendment proper (i.e., changes that are continuous with an existing constitutional order) from “constitutional dismemberment” (i.e., changes that create a fundamentally different constitutional order). See RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 32, 78–82 (2019).

¹⁰ For some originalists, it is the sole legitimate means. However, others recognize that there are exceptional circumstances where other methods may be permissible (e.g., where a provision is manifestly unjust and the constitution does not provide an adequate procedure for formal amendment). See, e.g., JEFFREY GOLDSWORTHY, *The Case for Originalism*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 42, 59–60, 65–67 (Grant Huscroft & Bradley W. Miller eds., 2011).

involves developing a strategy for addressing the incongruity problem. This consists of an analytical framework for assessing the relative weight of amenders' understanding versus original understanding. The proposed strategy is "originalist" in the sense that it is *consistent* with originalism's basic commitments and concerns. However, it draws upon a set of theoretical resources that are not standardly found within originalism, and in this sense is novel.¹¹ Substantively, I argue that adopting an approach where original understanding always prevails is incompatible with the role that formal amendment occupies within originalism. Nevertheless, I maintain that there is an important sense in which original understanding should be understood as the more basic source of constitutional meaning, which has to do with the nature of "framing" as a constitutional text-producing task, reflected by procedural features that characteristically distinguish framing from amending. The status of original understanding as more basic in this sense establishes a *strong presumption* in favor of original understanding where an amendment intersects with core aspects of the framing and does not clearly convey an intent to override original understanding, but only a *weak presumption* where it does not.

An important consequence of this approach is that there are circumstances where a constitutional amendment should be "read down" to nullify its intended effect: namely, where doing so would be incompatible with the more basic status of original understanding. The potential implications of this for contemporary debates about "amendability," or limitations on the amending power, are considered in Part IV. Here I suggest that the originalist approach to amendment proposed highlights a central weakness with the most prominent defense of implicit unamendability doctrines: namely, its reliance on contestable assumptions about the character of framing as an unfettered expression of the popular will or "constituent power." This leads the view to privilege popular amending processes regardless of amendment type, and informal methods of constitutional change over formal amendment. An originalist approach to amendment places limitations on the amending power but does not require making any such assumptions about the framing. Moreover, it not only creates strong incentives for using formal amendment,

¹¹ In other words, the approach developed in this Article cannot be derived by way of deduction from the tenets of originalism. Thus, although I argue that there are good reasons for an originalist to adopt the proposed approach, it is not necessary (in the strict sense of required for internal logical consistency) that an originalist adopt it. See discussion *infra* Part III.

but for clarity and transparency about the purpose and effect of the proposed constitutional change throughout the amending process—particularly where the proposal alters key features of the constitution as originally enacted—thus reducing the risk of elite or authoritarian manipulation of popular mechanisms. On this basis, I suggest that adopting an originalist approach to interpretation—once supplemented with the theory of amendment proposed here—may provide a more limited but also more attractive alternative to implicit unamendability doctrines, particularly for newer constitutions that are easily amended and vulnerable to abuses of the amending power.

I. WHY ORIGINALISM REQUIRES A THEORY OF AMENDMENT

A. What is Originalism?

“Originalism,” in the sense used in this Article, is a theory of constitutional meaning that is committed to two central theses: *textualism* and *semantic fixation*. “Textualism” refers to the view that a written law is (nothing more than) its text, including presumptions and implications that follow from its text and structure.¹² “Semantic fixation” refers to the view that the language used in a written law continues to mean what it meant at the time of the law’s enactment.¹³ Originalism therefore rejects so-called “living tree” approaches to constitutional interpretation, which accept that a constitution’s meaning changes over time to reflect evolving social needs and values. This means that recent developments such as “living originalism”¹⁴ or “the new textualism”¹⁵ do not count as originalist in the sense used in this Article. Commitment to textualism is a necessary condition for a theory to count as originalist, but it is not sufficient.

There are nevertheless a variety of ways of understanding what semantic fixation requires. This, in turn, produces a variety of different originalist approaches to constitutional interpretation. My analysis will focus on what I take to be the most mainstream and well-developed variety. Sometimes

¹² Solum, *supra* note 3, at 117.

¹³ This terminology stems from Lawrence Solum’s “fixation thesis.” *Id.* at 2–4, 59–67.

¹⁴ See JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

¹⁵ See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012). David Strauss coined the term “[n]ew [t]extualism” to describe Amar’s work. David A. Strauss, *New Textualism in Constitutional Law*, 66 *GEO. WASH. L. REV.* 1153, 1153 (1998). It is unclear, however, whether Amar himself uses that term to describe his approach to constitutional interpretation.

referred to as “textualist originalism” or “public meaning originalism,” this is the view that a written constitution must be interpreted in light of the context-enriched linguistic meaning of its text, including specific terms and phrases, syntax and grammar, and structural features.¹⁶ The relevant “context” is the document’s drafting and ratification, which includes publicly available information about the objectives and intentions of its drafters.¹⁷ Proponents of originalism in the sense used here are therefore not in general concerned with discovering the drafters’ “subjective intentions,” understood as views about how provisions ought to apply in specific circumstances; or, at least, they do not give these kinds of intentions overriding weight.¹⁸ Hereinafter, where I refer to “originalism,” I am referring specifically to this view.

B. The Incongruity Problem

I now turn to the task of defining the challenge that constitutional amendment presents for originalism. That challenge lies in how to reconcile two or more potentially conflicting sets of drafters’ understandings that inform the meaning of the constitutional text. I shall refer to this challenge as the “incongruity problem.” Although this Article focuses primarily on the conflict between original understanding and amenders’ understanding, it bears emphasis that the same potential for conflict arises in the case of subsequent amendments, and even between multiple “framings” in the case of constitutional systems that have arguably had more than one event that counts as a “framing.”¹⁹

In one sense, reconciling potentially conflicting sets of drafters’ understandings is a challenge that *any* approach to constitutional interpretation confronts when dealing with formal amendment. It cannot simply be assumed that original understanding and

¹⁶ Solum, *supra* note 3, at 117.

¹⁷ Prominent defenders of this theory include legal scholars Jeff Goldsworthy and Larry Solum, as well as the late U.S. Supreme Court Justice Antonin Scalia (albeit with a lesser degree of clarity and consistency). *See, e.g.*, Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 *FED. L. REV.* 1 (1997); JUSTICE ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, at vii (Amy Gutmann ed., Princeton 1997); Solum, *supra* note 3, at 1.

¹⁸ *See* Goldsworthy, *supra* note 17, at 15.

¹⁹ For example, this arguably describes both Canada (the first “framing” being the Constitution Act as enacted in 1867, and second “framing” being the 1982 Patriation of the Constitution Act and adoption of the *Canadian Charter of Rights and Freedoms*), and the United States (the first “framing” being the Constitution with the original Bill of Rights as it was adopted in 1789, and the second “framing” being Reconstruction and passage of the Civil War amendments between 1865 and 1870).

amenders' understanding neatly coincide. However, the possibility of conflict presents a special problem for originalism that it does not present for non-originalism. In order to explain why this is so, I first need to set out the incongruity problem in basic terms. The problem is defined in more detail below.

At the most general level, the incongruity problem arises where changes to a constitution's text cannot be easily compartmentalized or contained. The interpreter must consult old provisions alongside new provisions, make sense of remaining provisions in light of the removal of other provisions, or else grapple with old and new components or different versions of the same provision. All of these scenarios create the possibility of divergence between original understanding and amenders' understanding. It is *not* the case that all amendments pose the incongruity problem, however.²⁰ But before considering the parameters of the problem in more detail, it is important to begin by seeing why it presents a special problem for originalism that it does not present for non-originalism.

Understanding why amendment poses a special problem for originalism requires appreciating the place that amendment occupies within the theory. In virtue of originalism's commitment to textualism and semantic fixation, the theory is also committed to the view that the sole legitimate method of changing constitutional meaning is through actual changes to the constitution's text. "Informal amendment," or change to constitutional meaning brought about by methods of judicial interpretation that bypass the constitutionally prescribed amendment procedure, is generally regarded as illegitimate.²¹ This includes interpretive methods that seek to "update" constitutional meaning in light of new understandings, such as changing social needs and values, emerging information and technology, developments in the natural sciences, and the like.²²

For originalists, then, the only way that new understandings can serve as a source of constitutional meaning is through formal amendment, whether by way of alteration, replacement, deletion, or addition of a provision to the constitutional text. To be effective in this regard, however, the new understanding must *clearly* override or displace original understanding through the

²⁰ See *infra* Part II.

²¹ See Goldsworthy, *supra* note 17, at 51.

²² Importantly, originalists distinguish changes in a constitution's meaning from changes in the application or extension of its provisions and deny that changes in the latter entail changes to the former. See Goldsworthy, *supra* note 17, at 61; see also Solum, *supra* note 3, at 2–3.

textual change brought about by the amendment. All constitutional amendments therefore presumptively require the originalist to make an initial determination about whether original understanding survives intact. If not, then the onus is on the originalist to explain how original understanding ought to be reconciled with amenders' understanding in a way that is consistent with the theory's commitment to textualism and semantic fixation.

By contrast, constitutional amendment does not pose a special problem for non-originalism. Non-originalism can accept that constitutional meaning changes over time, quite independently of corresponding textual changes effected via formal amendment. That is because non-originalism can accept that judicial interpretation is a legitimate method of bringing new understandings to bear on constitutional meaning, at least in some circumstances. Accordingly, it is unnecessary to make the same kinds of determinations about the continuing relevance of original understanding: original understanding does not carry any special interpretive weight. Indeed, it is open to non-originalism to adopt an interpretive presumption that amenders' understanding overrides original understanding, even where the actual changes to the constitutional text do not clearly convey this. The same presumption is not open to originalism.

II. IDENTIFYING WHEN THE INCONGRUITY PROBLEM ARISES

So far, I have described the incongruity problem in basic terms in order to show why it presents a special problem for originalism. In this Part, I will define the problem with a bit more precision. The objective is to articulate the scope of the problem that originalism must address by identifying the circumstances in which the challenge of reconciling original understanding with amenders' understanding arises, and the circumstances where the challenge appears to be most acute. Not all amendments pose this problem. Moreover, there are particular kinds of amendments that seem to present the problem in a more challenging way than others. Identifying the circumstances where the incongruity problem arises, and where it is the most acute, is the *first component* of an originalist approach to amendment.

There are a variety of ways that the text of a constitution can be changed, and it will be helpful to begin by sketching these out. Formal amendment presents (at least) the following four possibilities:

1. *Modification*: the deletion, addition, or partial substitution of text within an existing provision;
2. *Replacement*: the substitution of an existing provision for a new provision;
3. *Deletion*: the elimination of an existing provision; and
4. *Addition*: the insertion of a new provision.

All four types of amendment can present challenges for interpretation. At the same time, however, it is evident that not all amendments will pose the specific interpretive problem that we are concerned with here. Bearing in mind the basic commitments of originalism, as described above, some amendments will not require inquiries into drafters' understanding at all because the meaning is clear from the resulting text and structure. Moreover, even where it is necessary to consult drafters' understanding, there may not be any conflict or incompatibility between original understanding and amenders' understanding. I will first outline this set of possibilities before turning to the types of amendments that do appear to present the incongruity problem.

A. Amendments That Do Not Pose the Incongruity Problem:
Clear Overrides, Isolated Insertions, and No-Conflict Cases

To begin with, sometimes it is unnecessary to consider original understanding or, at the very least, it has limited relevance. For example, many (and perhaps most) deletions so clearly override original understanding that no conflict arises. Similarly, additions that insert a new provision that operates independently of and in relative isolation from existing provisions also typically do not pose the incongruity problem. In both of these cases, semantic fixation supplies a clear basis for using amenders' understanding to determine the meaning of the amended text. At the same time, there is no clear basis for relying on original understanding in this way. At best, original understanding has contextual relevance: that is, it may help provide information about the objectives of the amendment, and hence amenders' understanding.

Secondly, even when original understanding is relevant, sometimes there is no conflict with amenders' understanding. There are many examples of modification and replacement that are like this. For example, some modifications or replacements are designed to give effect to original understanding. This includes "corrective" amendments, which make changes to the text in order to resolve ambiguity and clarify original meaning,

and “restorative” amendments, which reverse judicial interpretations of a provision to restore original meaning.²³

Another type of amendment that seems unlikely to pose the incongruity problem is “operational updates.”²⁴ These are modifications or replacements that change the terms of an existing requirement, or additions that create a new requirement, in a manner that is designed to be compatible with original understanding. Possible examples include adding a mandatory retirement age for judges,²⁵ or revising the prescribed election cycle or term-length for elected representatives.²⁶ This type of amendment inserts a new constitutional requirement, and in that respect overrides original understanding. However, they are designed to operate within the existing constitutional framework, and in this respect leave original understanding intact. As a result, there is no real conflict between drafters’ understandings.

In summary, the incongruity problem does not appear to arise: (1) where the amended constitutional text clearly conveys the drafters’ understanding, making further inquiries into compatibility with original understanding unnecessary, as in “clear overrides” and “isolated insertions”; or (2) in “no conflict” cases, where further inquiries reveal that there is no incompatibility between original understanding and amenders’ understanding, as in “corrective,” “restorative,” and “operational update” amendments.

In these circumstances, constitutional meaning can be settled primarily by reference to the text and does not require reconciling different and potentially conflicting sets of drafters’ understandings.

²³ See ALBERT, *supra* note 9, at 81. Many of the examples Albert provides arise in circumstances where a provision has to be applied to a new set of circumstances not anticipated by the framers.

²⁴ This category overlaps, albeit imperfectly, with what Richard Albert describes as “elaborative” and “reformative” amendments. *See id.* at 80–81. Both go beyond original understanding (in some case expressly overriding original understanding), but in a manner that is designed to operate consistently and in harmony with the existing constitutional framework. *See id.*

²⁵ For example, in 1977 the Australian Constitution was amended to change the term of federal judicial appointment from life tenure to mandatory retirement at age seventy. *See Constitution Alteration (Retirement of Judges) Act 1977* (Cth) (Austl.) (altering section 72 of the Australian Constitution to include a maximum retirement age).

²⁶ *See generally* U.S. CONST. Amend. XX, § 1. For example, in 1933 the U.S. Constitution was amended to change the date for the beginning and ending of the terms for President and Vice President, from March 4th to January 20th, in order to limit the “lame duck” after an election where the sitting President and Vice President were not re-elected. *See* John Copeland Nagle, *Lame Duck Logic*, 45 U.C. DAVIS. L. REV. 1177, 1208 (2012).

B. Amendments That Do Pose Incongruity Problem: “Gaps” and “Spill-Overs”

1. “Gaps”

Under what circumstances, then, *does* the incongruity problem *prima facie* arise? One possibility is that an amendment leaves a “gap” in meaning. “Gaps” are interpretive issues internal to a single provision or a set of provisions that operate closely together. They occur when an amendment modifies or replaces some of the text, but either does not fully override original understanding or else does not obviously convey the intention to do so through the relevant textual changes. Gaps thus raise questions about the extent of the continuing relevance of original understanding as a source of constitutional meaning, and how to reconcile original understanding with amenders’ understanding.

The 1967 amendment to the Australian Constitution’s “race power,” section 51(xxvi), provides an example. The amendment modified section 51(xxvi) by deleting a single clause and leaving the rest of the text intact in circumstances where original understanding and amenders’ understanding were clearly in conflict. The provision originally provided that: “The Parliament shall, subject to this Constitution, have power to make laws . . . with respect to: . . . [t]he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.”²⁷ It was clear at the time of the framing that the framers understood the provision to extend to the enactment of racially discriminatory laws.²⁸

The 1967 amendment struck out the phrase “other than the aboriginal race in any State,” so that section 51(xxvi) now provides that: “The Parliament shall, subject to this Constitution, have power to make laws . . . with respect to: . . . the people of any race for whom it is deemed necessary to make special laws.”²⁹ It was equally clear at the time of the amending that the amenders understood the provision, thus modified, to extend only to laws that benefit aboriginal peoples.³⁰

²⁷ *Australian Constitution* s 51(xxvi).

²⁸ See Robert French, *The Race Power: A Constitutional Chimera*, in AUSTRALIAN CONSTITUTIONAL LANDMARKS 180, 182 (H. P. Lee & George Winterton eds., 2003); M. J. Detmold, *Original Intentions and the Race Power*, 8 PUB. L. REV. 244, 244 (1997); Geoffrey Sawer, *The Australian Constitution and the Australian Aborigine*, 2 FED. L. REV. 17, 20 (1966).

²⁹ *Australian Constitution* s 51(xxvi).

³⁰ See *infra* Part III; see also *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 406–09 (Austl.) (Kirby, J., dissenting) (discussing the amenders’ understanding).

Interpreting the amended section 51(xxvi) thus requires determining whether the 1967 amendment displaced the original understanding of the scope of the power, or whether original understanding continues to inform its scope, and if so, how the two ought to be reconciled.

The High Court of Australia considered this question in 1998.³¹ Of the four judges who addressed the issue,³² three held that a “bare deletion” within an existing provision cannot override the original understanding of that provision.³³ Accordingly, in the result, the power was found to extend to laws that discriminate against Aboriginal peoples as well as those that benefit them. But this approach is not obvious. For example, another possibility would have been to hold that original understanding prevails with respect to laws concerning *non-Aboriginal* peoples (the subject matter of the provision as originally drafted), while simultaneously finding that amenders’ understanding prevails with respect to laws concerning *Aboriginal* peoples (the subject matter of the amendment).³⁴ This is not to suggest that this alternative interpretation is to be preferred. It is rather to insist that there is a genuine interpretive problem posed by conflicting drafters’ understandings that the “bare deletion” approach overlooks. Further explanation is required. This shows why an originalist account of amendment is needed.

2. “Spill-Overs”

Another possible scenario that may pose the incongruity problem is where an amendment appears to have implications for the meaning of other, *unamended* provisions. I will refer to this possibility as a “spill-over,” the idea being that amenders’ understanding has flow-on effects for other provisions beyond the amended provision or provisions that contain the actual changes to the constitutional text. Unlike gaps, then, we are imagining cases where the original design of the constitution did not contemplate the provisions at issue as operating closely together

³¹ *Kartinyeri*, 195 CLR 337.

³² Two judges, Chief Justice Brennan and Justice McHugh, declined to address the constitutional question, deciding the matter on the basis of implied repeal and the doctrine of parliamentary supremacy. *See id.* at 337–38. Notably, however, the Chief Justice had previously described the 1967 amendment as “an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial.” *See Commonwealth v Tasmania* (1983) 158 CLR 1, 242 (Austl.) [hereinafter *Tasmanian Dam Case*].

³³ *See Kartinyeri*, 195 CLR 363, 383.

³⁴ *See Tasmanian Dam Case*, 158 CLR at 273. Justice Deane appears to adopt this interpretation in his opinion. *Id.*

(or, indeed, did not contemplate them at all). Thus, all other things being equal, cases where a new provision is added seem more likely to raise the possibility of a spill-over versus a gap.

One example concerns the relationship between the U.S. Constitution's Nineteenth Amendment, guaranteeing women the right to vote, and the Fourteenth Amendment's Equal Protection Clause.³⁵ Although the U.S. Supreme Court has not directly considered the interpretive problem that we are interested in here, Steven Calabresi and Julia Rickert have considered the issue in great depth and detail.³⁶ Their argument merits careful consideration.

Adopting an originalist approach to interpretation, the authors first argue that the Equal Protection Clause, contained in Section 1, should *not* be understood as narrowly confined to race-based discrimination. They point out that the text of Section 1 refers to "persons" and "citizens" and does not expressly refer to race,³⁷ providing that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.³⁸

Moreover, Calabresi and Rickert argue, historical materials from the time of the framing of the Fourteenth Amendment show that the original understanding of Section 1 is that it bans "class-based legislation" or laws that "create a caste."³⁹ However, as the authors also note, it is clear that the Amendment's framers did not think that sex or gender-based discrimination fell within the ambit of its prohibition.

This is evidenced in particular by the text of Section 2 of the Fourteenth Amendment, which concerns the apportionment of representatives. Section 2 expressly refers to "*male* citizens" in prescribing the consequences that the abrogation of voting rights has for apportionment. It relevantly provides that:

³⁵ See U.S. CONST. amend. XIX, § 1.

³⁶ See Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 2 (2011).

³⁷ *Id.* at 5.

³⁸ U.S. CONST. amend. XIV, § 1.

³⁹ See Calabresi & Rickert, *supra* note 36, at 17.

Representatives shall be apportioned among the several states according to their respective numbers . . . But when the right to vote . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.⁴⁰

The text of Section 2 clearly treats sex as a rational basis for discrimination in the conferral of voting rights. Therefore, on the original understanding of Section 1, the guarantee of equal protection does not appear to extend to women. Although Calabresi and Rickert advance an argument for why it does, that argument is difficult to square with originalism's commitment to textualism and semantic fixation.⁴¹

This is not the authors' only argument for why Section 1 extends to women, however. Their other argument relies on the Nineteenth Amendment, which provides that: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any [s]tate on account of sex."⁴²

Here the authors argue that the Nineteenth Amendment "constitutionalized" the principle that sex is *not* a rational basis for the denial of civil and political rights.⁴³ As a result, they argue, the effect of the Nineteenth Amendment is to bring sex within the ambit of the classifications protected by the equality guarantee in Section 1, which extends to the protection of civil and political rights.⁴⁴ In other words, they argue that the amenders' understanding *spills over* to Section 1 and overrides the original understanding of that provision.⁴⁵

From an originalist perspective, the difficulty with this line of argument is that the Nineteenth Amendment leaves the text of

⁴⁰ U.S. CONST. amend. XIV, § 2.

⁴¹ The authors concede as much, noting that the express reference to male citizens "makes it very difficult to read the original 1868 version of the Fourteenth Amendment as a bar to sex discrimination." See Calabresi & Rickert, *supra* note 36, at 66. For criticisms of this aspect of the authors' argument on originalist grounds, see Jack M. Balkin, *Originalism and Sex Discrimination, or, How Thick is Original Public Meaning?*, BALKINIZATION (Dec. 8, 2011, 5:55 PM), <http://balkin.blogspot.com/2011/12/originalism-and-sex-discrimination-or.html> [<http://perma.cc/6XP3-P88N>]; Ed Whelan, *Critique of Calabresi's "Originalism and Sex Discrimination"—Part 2*, NAT'L REV.: BENCH MEMO (Nov. 29, 2011, 8:56 PM), <http://www.nationalreview.com/bench-memos/284381/critique-calabresi-s-originalism-and-sex-discrimination-part-2-ed-whelan> [<http://perma.cc/7R97-DGUW>].

⁴² U.S. CONST. amend. XIX, § 1.

⁴³ Calabresi & Rickert, *supra* note 36, at 2.

⁴⁴ See *id.* at 11.

⁴⁵ See *id.* at 2, 66–67.

the Fourteenth Amendment intact. That is, it does not delete the express reference to “*male* citizens” in Section 2.⁴⁶ Nor does it alter the text of Section 1. It is therefore unclear whether, or how far, the Nineteenth Amendment can go to override the original understanding of those provisions consistently with textualism and semantic fixation.

Drawing on this example, it may therefore be questioned whether spill-overs really fall within the ambit of the incongruity problem. There is a sense in which the very notion of amenders’ understanding *spilling over* to alter the meaning of an unamended provision appears to be at odds with the basic commitments of originalism that give rise to the incongruity problem, thus placing this possibility beyond the scope of an originalist theory of amendment. For, in the case of spill-overs, the text of the provision being interpreted has not changed. So, unlike the case of gaps, it is unclear why amenders’ understanding is relevant. Its relevance cannot be based on semantic fixation in these circumstances, but instead seems to rely upon a wider view of drafters’ understandings as a source of meaning: for example, as evidence of changed background conditions against which unamended provisions now operate and must be interpreted. There is a worry, in other words, that spill-overs rely on amenders’ understanding in an impermissible way: namely, to “update” the meaning of unchanged provisions in light of contemporary social needs and values.⁴⁷

Spill-overs therefore pose a more challenging issue for an originalist theory of amendment than gaps. The proposition that the interpretation of a provision requires reconciling amenders’ understanding and original understanding where the text of the provision remains unchanged is in tension with originalism’s commitment to textualism and semantic fixation. The question is how, consistently with those commitments, textual changes external to the provision or set of provisions being interpreted can cast doubt on original understanding.

This does not mean that the type of argument that Calabresi and Rickert advance cannot be squared with originalism. However, in order to succeed, their argument requires an originalist theory of amendment. An originalist theory of amendment is needed to show why, despite leaving the text of the

⁴⁶ U.S. CONST. amend. XIV, § 2 (emphasis added).

⁴⁷ Josh Blackman, *Response: Originalism at the Right Time?*, 90 TEX. L. REV. 269, 274 (2012) (critiquing Calabresi’s and Rickert’s argument that the adoption of the Nineteenth Amendment in 1920 affected how we should read the Fourteenth Amendment’s equality guarantee).

Fourteenth Amendment intact, the understanding of those who drafted and ratified the Nineteenth Amendment is relevant to its interpretation, and why this is consistent with semantic fixation. I will return to this example in Part III to illustrate how the proposed approach can be used to support the authors' argument.

In summary, formal amendment appears to pose the incongruity problem in two types of circumstances. First, the incongruity problem *prima facie* arises where textual changes leave "gaps" in meaning, requiring the interpreter to decide whether and how original understanding functions as a source of meaning that "fills in" those gaps. Second, the incongruity problem *prima facie* arises where textual changes produce "spill-overs" in meaning, enacting a new set of understandings that put pressure on the original understanding of an unchanged provision.

In both cases, the interpreter must make an initial determination about whether original understanding and amenders' understanding differ, and then explain how they fit together as distinct sources of constitutional meaning. This task will be most challenging in cases where those understandings are contradictory or otherwise incompatible. Moreover, all other things being equal, spill-overs pose a more difficult issue for an originalist approach to amendment than gaps. That is because accepting the type of conflict between drafters' understandings that spill-overs present as a genuine interpretive problem is, or at least appears to be, in tension with originalism's basic commitments.

III. ADDRESSING THE INCONGRUITY PROBLEM

In this Part, I develop an originalist strategy for addressing the incongruity problem. The proposal is not designed to produce definitive answers; rather, the aim is to provide a set of analytical tools that originalists can apply to address the problem. In developing this strategy, it bears emphasis that the incongruity problem occupies a space where the usual theoretical resources found within originalism, and that originalists standardly rely upon to address interpretive issues, run out. As we have seen, addressing the incongruity problem requires saying something about the status of original understanding as a source of constitutional meaning in circumstances where the constitutional text has been altered, thus making the consequences of semantic fixation unclear. We have also seen that it requires saying something about the status of amenders' understanding as a source of constitutional meaning in circumstances where it intersects with unaltered constitutional text, thus going beyond what is strictly required by semantic fixation.

The proposed strategy therefore introduces a novel set of considerations to supplement existing resources within originalism. Although these considerations are not derivable from originalism's basic commitments and concerns, they are nevertheless compatible with those basic commitments and concerns. The starting point is the idea that "framing" and "amending" are distinctive acts of constitutional text-production. The distinction between "framing" and "amending" as *drafting tasks* forms the foundation both for how the approach is structured, and for defining the sets of enquiries that are used to evaluate its key elements.

In outline, the strategy developed here requires examining the *relevance* and *relative weight* of amenders' understanding versus original understanding as a source of constitutional meaning. More specifically, amenders' understanding should override original understanding only in those circumstances where: (1) it is *relevant* to the meaning of the text, and (2) it carries greater *weight* than original understanding as a source of constitutional meaning.

This analytical structure is a consequence of the status of original understanding as a *more basic* source of constitutional meaning, which—I argue—follows from the characteristic features of framing a constitution that importantly distinguish it from amending. The status of original understanding as more basic means that it is always relevant to instances of amendment that pose the incongruity problem, which, by definition, are cases where the textual changes do not clearly override or displace original understanding. By contrast, I argue, there are at least some instances of the incongruity problem—spill-overs, in particular—where the relevance of amenders' understanding cannot be established in the usual way through semantic fixation, and additional considerations are required.

The objective, then, is to identify the considerations that require evaluation within this analytical frame in order to assist the interpreter in: (a) establishing the relevance of amenders' understanding, and (b) assessing its relative weight. Here I argue that there are two key elements that require evaluation. First, *the character of the drafting task presented by the amendment*. This enquiry concerns the subject matter and purpose of the amendment. Its focal point is the extent to which the amendment concerns core elements of the constitution's overall structure and design as originally enacted, or whether it concerns matters that are peripheral to the framing qua drafting task. Second, *the character of the drafting process*. This enquiry concerns specific features of the process used to draft and propose

the amendment, including the identity of the group convened for that task and the manner and form of their engagement. Its focal point is the degree to which the process was well-suited for the drafting task.

Cumulatively, I argue, these two lines of enquiry provide a set of analytical tools that are germane to originalism and that provide originalism with a principled interpretive approach to instances of the incongruity problem that is consistent with the theory's basic concerns and commitments.

The discussion proceeds as follows. I begin by briefly explaining why originalism requires a multi-factorial evaluative framework. In particular, I show why simply adopting an overriding presumption in favor of original understanding in cases of conflict is not available as an originalist solution. I then turn to considerations that differentiate “framing” from “amending” as distinctive acts of constitutional text-production. These considerations are then used to develop the proposed strategy for addressing the incongruity problem, as outlined above. To make that discussion more concrete, I examine how the strategy could be applied to the examples described Part II.

A. Why Originalism Cannot Adopt an Overriding Presumption in Favor of Original Understanding

One might query why a multi-factorial approach is needed. After all, many proponents of originalism—including, perhaps most famously, the late Justice Scalia—favor “bright-line” rules over “balancing tests” that require evaluating and weighing different considerations.⁴⁸ Moreover, as indicated above (and as I will argue below) “founding” and “amending” are importantly distinct constitutional text-producing acts. One consequence of that distinction, to anticipate the discussion that follows, is that there is a sense in which original understanding is the more basic source of constitutional meaning, for reasons that have to do with the exceptional nature of framing a constitution as a drafting task. So, why not simply adopt a rule that where an interpretive issue poses the incongruity problem, original understanding always prevails?

There are two reasons why this solution is not available. The first is that adopting an overriding presumption in favor of original understanding is in tension with the semantic fixation

⁴⁸ Robert M. Bloom & Eliza S. Walker, *Rules and Standards in Justice Scalia's Fourth Amendment*, 55 U. RICH. L. REV. 713–14 (2021).

thesis. Semantic fixation is a general thesis about drafters' understanding as a source of meaning for a written law.⁴⁹ It does not differentiate between *types* of drafters on the basis of who they are or the nature of their drafting task, and there is no reason to think that it ought to apply any differently when the drafters are amenders as opposed to framers. Yet, adopting a rule that original understanding always prevails in cases of conflict implies that this is so.

The second reason why this solution must be rejected has to do with the place that formal amendment occupies within originalism. For the originalist, formal amendment is the most, or even the sole, legitimate means of updating constitutional meaning.⁵⁰

Moreover, and perhaps more importantly, formal amendment is key to a significant line of defense of originalism against its critics.⁵¹ A common criticism is the so-called "dead hand" argument, which complains that originalism is inconsistent with a commonplace view that the constitution's authority as a source of law resides in popular sovereignty.⁵² The fact that a constitution prescribes a method for amendment provides originalism with a response to this criticism. It permits originalists to criticize non-originalist methods of interpretation that permit judges to update constitutional meaning in light of new understandings and values as an "usurpation" of popular sovereignty on the basis that this practice takes the amending power away from the people and places it in the hands of the judiciary.⁵³ Significantly, formal amendment also permits originalists to criticize non-originalism for being overly-focused on justifying these kinds of interpretive methods at the expense of developing better and more effective amendment processes, when even most non-originalists accept that judicial "updating" is only ever a second-best method of constitutional change.⁵⁴

For these reasons, originalism cannot eliminate the incongruity problem by adopting a bright-line rule that original understanding

⁴⁹ See generally Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015).

⁵⁰ See *supra* note 9 and accompanying text.

⁵¹ See Lael K. Weis, *Constitutional Amendment Rules and Interpretive Fidelity to Democracy*, 38 MELB. U. L. REV. 240, 251–56 (2014).

⁵² See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 11–12 (1980).

⁵³ See, e.g., Goldsworthy, *supra* note 17, at 57–60.

⁵⁴ See Weis, *supra* note 51, at 267–68.

always prevails.⁵⁵ Consistency with the basic commitments and concerns of originalism requires developing an approach that examines the relevance and relative weight of *both* sets of drafters' understandings as sources of constitutional meaning. These are issues that require evaluation on a case-by-case basis, having regard to the specific dimensions of particular instances of the incongruity problem, and thus necessarily involve multi-factorial and fact-specific enquiries.

B. Framing and Amending as Distinctive Constitutional Text-Producing Tasks

Having clarified why originalism requires a multi-factorial approach to address the incongruity problem, I now turn to the task of developing that strategy. The objective is to provide a set of analytical tools that can help originalism assess which drafters' understandings are relevant to amended constitutional text, and which have greater weight as a source of constitutional meaning, in circumstances where the standard theoretical resources that originalism relies upon do not provide adequate guidance. My method in pursuing this objective involves interrogating constitutional text-production activities, and proceeds from a foundational distinction between "framing" and "amending" *as tasks of constitutional text-production*. It is worth making a few initial comments about this strategy at the outset.

The first comment concerns the rationale for this strategy. Focusing on the activity of producing constitutional text reflects originalist commitments and concerns. Textualism and semantic fixation are both grounded in assumptions about the production of constitutional text—for example, that the text has drafters, and that the drafters intended to communicate something through producing text—that are key to the privileged status of the constitutional text and its drafting context as sources of constitutional meaning. Focusing on the drafting task is therefore apt to produce evaluative criteria that are consistent with originalism and that reflect its central concerns. Generating criteria based on factors external to the drafting task, by contrast, risks ferrying in assumptions about constitutional meaning that are inconsistent with originalism. But to be clear: the approach developed here cannot be derived originalism's basic commitments. As emphasized at the outset, the incongruity problem exists in a

⁵⁵ This might nevertheless be defended as a method of judicial restraint. That would be a different kind of argument, however. As discussed at the outset, although originalism is sometimes defended as a method of judicial restraint, the focus of this Article is on originalism as a theory of constitutional meaning.

space where the resources derivable from those commitments run out, and in this respect requires a novel approach.

The second comment concerns the distinction between “framing” and “amending” that the analysis relies upon. For the purpose of drawing this distinction, the discussion focuses on central cases. In doing so, I do not deny the reality or possibility of exceptional cases that fall outside of the conceptual core. Indeed, I will ultimately argue that an important feature of the originalist approach to amendment developed here is its power to deal with exceptional cases of amending in a way that does not require relying on contentious normative assumptions about “the founding” as an act of the popular will. I return to this issue in Part IV of the Article, where I consider the extent to which an originalist approach to amendment constrains the amending power.

Bearing these considerations in mind, I begin with the basic proposition that the task of *amending* a constitution is importantly different from the task of *framing* a constitution. Amending involves changing a constitution that already exists, whereas framing involves bringing one into existence.⁵⁶ Thus, by definition and focusing on central cases, amending is narrower both in its scope and in its ambitions than framing. Framing a constitution is the project of creating a fundamental framework for governance and producing a text—typically a master text, “the Constitution”—that is designed to do that. Amending a constitution is a more limited project in both respects. It does not seek to establish a fundamental framework for governance. Nor does it seek to rewrite and replace the entire constitutional text. Indeed, amending presupposes structural features established by a given constitution, and the constitutional text itself, as forming the background legal framework and normative system against which amendments are proposed and debated. This includes the formal amendment procedure, which authorizes changes to the constitutional text. As with other constitutionally prescribed features, the amendment procedure must be understood in terms of the fundamental framework for governance that the constitution establishes.

⁵⁶ This distinction is basic to the definition of amendment in central works in the literature, irrespective of whether the definition focuses on substance or procedure. See, e.g., ALBERT, *supra* note 9, at 76–84 (distinguishing “amendment,” or exercises of the amending power that are continuous with the constitutional order as it currently exist, from “dismemberment,” or exercises of the amending power that aim to create a different constitutional order); ROZNAI, *supra* note 2, at 205 (distinguishing “amending,” qua exercise of secondary or delegated constituent power, from “framing” qua exercise of primary constituent power).

This distinction between “framing” and “amending” as constitutional text-producing tasks is reflected in drafting process. Framing and amending both involve “extraordinary” processes in the sense that they use methods of legal text-production that go beyond what is used in the process of producing ordinary legislation. This reflects the fact that in both cases the text being produced is constitutional text. Nevertheless, there are some significant procedural features that are characteristic of framing, but not of amendment, and that reflect the wider scope and higher stakes of creating versus amending a constitution.⁵⁷

To begin with, the process of drafting a constitution is characteristically time-intensive and deeply deliberative. It involves sustained discussion, debate, and engagement over an extended period of time, often spanning years, as various models are considered and drafts are written, revised, and ultimately consolidated and put forward for ratification. The process of drafting a constitution is also characteristically elite-driven. Although public consultation is common (and, indeed, often critical), the framers—in the sense of those who are directly tasked with constitution-drafting—are typically not general members of the public but individuals with specialized knowledge and expertise about matters related to constitutional settlement and institutional design.⁵⁸ This includes elected legislators or

⁵⁷ The discussion that follows makes a set of generalizations that draws upon the constitution-making resources, research and documentation that are available through the Constitutional Transformation Network (“ConTransNet”) and the International Institute for Democracy and Electoral Assistance (“International IDEA”), two of the leading networks for the global transmission of information about constitution making. See *Constitutional Beginnings*, CONST. TRANSFORMATION NETWORK, http://law.unimelb.edu.au/_data/assets/pdf_file/0005/2903693/MF-Constitutional-INSIGHT-01-Constitutional-beginnings.pdf [<http://perma.cc/Z6Z4-UQV3>]; *Constitution-Building in States with Territorial Based Social Conflict*, CONST. TRANSFORMATION NETWORK, http://law.unimelb.edu.au/_data/assets/pdf_file/0006/2508963/Constitution-Building-in-States-with-Territorially-based-Societal-Conflict.pdf [<http://perma.cc/67R9-FCNQ>]; Dinesha Samararatne, *Direct Public Participation in Constitution-Making*, CONST. TRANSFORMATION NETWORK, http://law.unimelb.edu.au/_data/assets/pdf_file/0006/3037974/Policy-Brief-1-19-PublicParticipation.pdf [<http://perma.cc/8RZM-NA6M>]; *From Big Bang to Incrementalism: Choices and Challenges in Constitution Building*, CONST. TRANSFORMATION NETWORK, <http://law.unimelb.edu.au/constitutional-transformations/MF/melbourne-forum-2017/interim-report> [<http://perma.cc/2RSD-8PEA>]; *Implications of Culture for Constitution Building*, CONST. TRANSFORMATION NETWORK, <http://law.unimelb.edu.au/constitutional-transformations/MF/melbourne-forum-2018/melbourne-forum-2018-final-report> [<http://perma.cc/4QCA-SVZ9>]; *Constitutional Amendment Procedures*, INT’L IDEA, <http://www.idea.int/sites/default/files/publications/constitutional-amendment-procedures-primer.pdf> [<http://perma.cc/WZ6W-2R56>]; *Constitutional Beginnings: Making and Amending Constitutions*, INT’L IDEA, <http://www.idea.int/sites/default/files/publications/constitutional-beginnings-making-amending-constitutions.pdf> [<http://perma.cc/F8HM-DQND>].

⁵⁸ Examples of direct popular involvement in drafting new constitutions or major constitutional reforms are the exception rather than the rule—and arguably an exception that proves the rule. For example, see *infra* note 109 for a discussion of Iceland’s recent

parliamentarians and members of the government; other political and community leaders; experienced lawyers, judges, and other legal experts; and members of the academy or other learned professions. Increasingly, constitution-making also involves participation by international experts with specialized knowledge about constitutions and constitutional design, including international non-governmental organizations (NGOs) with a focus on democracy-building and peace-keeping.⁵⁹ The process of constitution-drafting also commonly includes mechanisms for public input and consultation. However, these are often deployed after substantial drafting has taken place and used for the purpose of educating members of the general public about proposals, getting feedback about proposals, and generating support and buy-in (even where popular ratification is not formally required).

Amendment procedure and practice are far more variable. Formal amendment procedures do not, as a general matter, require the same degree of time-intensive and focused deliberation for drafting proposed changes to the constitutional text. This is not to deny that drafting an amendment can be, and sometimes is, more demanding in these ways—particularly where the subject matter is complicated or contentious. In comparison to drafting a constitution, however, it is fair to say that the level and form of engagement are in general less time and deliberation-intensive in ways that reflect the narrower scope and lower stakes of amendment. Similarly, although amendment is also frequently elite-driven in that amendment processes typically require legislative proposal and rely upon established organs of government and government-convened expert panels, there are important differences in degree. In general, the amendment process is less constrained by demands for the kinds of specialized knowledge and expertise that are characteristically required for framing. Moreover, here too there is great variation. Sometimes substantial efforts are made to engage the public at early stages of proposal and drafting, especially where the subject matter of the amendment concerns

“crowdsourcing” experiment. Following the failure to ratify the amendment proposal produced by the Constitutional Council on that occasion, Iceland is now pursuing a Parliament-driven amendment track to achieve the desired constitutional reforms. See Alexander Hudson, *Will Iceland Get a New Constitution? A New Revision Process Is Taking Shape*, I-CONNECT: BLOG OF THE INT’L J. CONST. L. (Oct. 23, 2018), <http://www.iconnectblog.com/2018/10/will-iceland-get-a-new-constitution-a-new-revision-process-is-taking-shape> [http://perma.cc/EQ5T-2APR].

⁵⁹ See Cheryl Saunders, *International Involvement in Constitution Making*, in *COMPARATIVE CONSTITUTION MAKING* 81 (David Landau & Hanna Lerner eds., 2019).

matters of public consciousness, national identity, or social morality.⁶⁰ However, it is also the case that efforts to engage the public are sometimes very limited, occurring only after drafting has taken place and primarily utilized to inform the public (or to rally support, where popular approval is needed).⁶¹

Stepping back from the discussion so far, we can make two key observations about the import of the distinction between “framing” and “amending” for originalism, in light of the theory’s commitment to textualism and semantic fixation. The first observation is that there is an important sense in which it appears that original understanding ought to be regarded as the *more basic* source of constitutional meaning. This has to do with the distinctive character of framing as an act of constitutional text-production. Framing involves drafting a master text that can serve as a framework for effective and good governance. Accordingly, the understanding of the drafters who in fact undertook that task (the framers) provides a more holistic and more complete picture of the overall constitutional design, and of what textual and structural features were designed to achieve, than the understandings of those who make changes to the constitution from time to time (the amenders). Indeed, original understanding forms the point of departure for proposing and drafting changes to the constitutional text. Original understanding can therefore be said to pervade the constitutional text as a source of meaning in a way that amending understandings do not.

The second observation is that there is a significant *normative dimension* to these distinctive drafting tasks. The different character of each task—both in terms of scale and subject matter—call for a different manner and form of engagement, which is reflected in the different procedures that

⁶⁰ The recent constitutional amendment repealing the prohibition on abortion in Ireland, which utilized a Citizen’s Assembly composed of ninety-nine randomly-selected members of the public, provides such an example. See Erika Arban & Tom Gerald Daly, *Editorial—Debate Symposium: ‘The Citizens’ Assembly in Ireland: A Successful Experiment in Deliberative Democracy?’*, IACL-AIDC BLOG (Nov. 19, 2018), <http://blog-iacl-aidc.org/debate-the-citizens-assembly-in-ireland/2018/11/19/editorial-debate-symposium-the-citizens-assembly-in-ireland-a-successful-experiment-in-deliberative-democracy> [<http://perma.cc/AW7W-YHGG>] (blog symposium describing the process and providing critical commentary).

⁶¹ This describes standard amendment practice in Australia. Although a popular referendum is constitutionally required for ratification, and voting in a referendum is compulsory for all eligible electors, there has been little effort to meaningfully engage the public on the substantive proposal for constitutional reform. See generally GEORGE WILLIAMS & DAVID HUME, *PEOPLE POWER: THE HISTORY AND FUTURE OF THE REFERENDUM IN AUSTRALIA* (2010). *But see* discussion *infra* Section III.B.2.b. (discussing the 1967 amendment as a notable exception).

they utilize. They have different timelines, involve different degrees of deliberation and engagement, and draw upon different forms of knowledge and expertise. The characteristic procedural features of drafting a constitution reflect the gravity of the drafting task. Framing demands a higher-degree of focused deliberation and debate, and more technical and lawyerly forms of expertise, and as a consequence, framing has a longer timeline and is more heavily elite-driven. By contrast, while generally less demanding in these ways, the procedural features of proposing and drafting amendments are otherwise highly variable. Importantly, at least *some* of that variation—particularly in degree of deliberation and engagement, and in forms of knowledge and expertise—appears to reflect the variable character of amendment topics and types. Although amending is in general narrower in scope and lower in stakes than framing, there is a wide array of issues that might be addressed and objectives that might be sought in amending a constitution.⁶²

These two observations—the first about *the more basic status of original understanding*, and the second about *the normative dimensions of drafting tasks*—have important consequences for an originalist approach to amendment; or so I now want to suggest. In particular, I want to suggest that they ought to bear on the assessment of the relevance and relative weight of competing drafters' understandings in cases of amendment that present the incongruity problem. Taken together, they provide an analytical structure for assessing relevance and relative weight, and they help identify factors closely related to the drafting task that require evaluation in making those assessments. I consider these issues in turn in the remainder of this section.

Before proceeding, it is important to recall that the method of analysis developed below applies only in those circumstances, identified in Part II, where the incongruity problem arises. That is, it applies only where: (i) there is a conflict or mismatch between drafters' understandings, and (ii) the amended text does not clearly convey how amenders' understanding is meant to "fit" with original understanding. As we have seen, in many cases of amendment the incongruity problem simply does not arise: either because the amendment clearly overrides original understanding,

⁶² Indeed, many constitutions differentiate "higher" versus "lower" stakes issues by prescribing different procedural requirements for amending different aspects of the constitution, and in some cases forbidding amendment altogether—or else making amendment so difficult that it is practically impossible. See ALBERT, *supra* note 9, at 175–94 (discussing constitutions that prescribe different amendment procedures for different topics); *id.* at 140–49, 158–68 (discussing "codified" and "constructive" unamendability).

or because it is consistent with original understanding. The other essential component of the overall originalist approach to amendment offered in this Article therefore consists of a threshold determination about whether an interpretive issue poses the incongruity problem at all.

1. Analytical Structure: Establishing the Relevance of Drafters' Understandings

The analytical structure of the proposed originalist strategy for addressing the incongruity problem is derived from the more basic status of original understanding as a source of constitutional meaning. As suggested above, there is a sense in which original understanding pervades the constitutional text. Another way to think of this is in terms of “constitutional identity.” For originalism, the relevant conception of constitutional identity lies in constitutional text and structure and is bounded by considerations drawn from drafting context.⁶³ It excludes broader considerations, such as evolving popular understandings of constitutional language and extra-legal functions of the constitution in social culture, that are incompatible with originalism as a theory of constitutional meaning. In this respect, it is a relatively “thin” conception of constitutional identity.⁶⁴ The framing creates that identity through its constitutional text-production activity, which establishes the overall design, structure, and features of a constitution that make it that particular constitution. As such, where the incongruity problem arises, *original understanding* will always be relevant to interpretation. This follows from semantic fixation: by definition, the incongruity problem only concerns cases of amendment where textual changes do not obviously override original understanding.

By contrast, in at least some possible instances of the incongruity problem, the relevance of *amenders' understanding* must be independently established. Although this does not in general appear to be an issue for “gaps,” a point I return to below,⁶⁵ it is a central challenge presented by “spill-overs.” As

⁶³ See Diarmuid F. O'Scannlain, *The Role of the Federal Judge in the Constitutional Structure: An Originalist Perspective*, 50 SAN DIEGO L. REV. 517, 518 (2013) (“[O]riginalism speaks not just of the meaning of the Constitution’s textual provisions. It speaks also of the structure established by the Constitution . . .”).

⁶⁴ This can be contrasted, for instance, with the conception of constitutional identity developed by Gary Jacobsohn, who argues that constitutional identity is a function of the social and cultural role that a constitution acquires over time through practice and experience. GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY*, at xii–xvi (2010).

⁶⁵ See *infra* p. 380.

discussed above, spill-overs occur where amenders' understanding is said to be relevant to the meaning of *unamended* constitutional text: a proposition that is *prima facie* difficult to square with semantic fixation, and in any event, clearly does not follow from it. At the same time, however, it is not obvious that spill-overs can simply be dismissed as beyond the scope of the set of interpretive problems that an originalist approach to amendment must address. For, it is not difficult to imagine amendments that result in textual changes that stand in direct conflict—or at least in serious tension—with unamended text.

In such cases, it is true that semantic fixation cannot establish the relevance of amenders' understanding to the unamended text. But it cannot *rule out* its relevance either. To do so, I want to suggest, would be inconsistent with originalism's commitment to textualism, which requires a holistic approach to constitutional interpretation. Here, too, we might helpfully draw on the idea of constitutional identity. Some amendments alter basic assumptions that underlie aspects of the design, structure, and features of a constitution that make it that particular constitution. Changes to these aspects of a constitution will often inform the interpretation of many other provisions, even where the text of a given provision is unchanged by the amendment. In such circumstances, originalism therefore must at least consider amenders' understanding as a possible source of constitutional meaning. It cannot simply be dismissed.

To illustrate why this is so, recall the example of the Nineteenth Amendment to the U.S. Constitution, discussed above. The Nineteenth Amendment did not delete the reference to "male citizens" in Section 2 of the Fourteenth Amendment. Nevertheless, it is in direct conflict with the underlying assumption of Section 2, namely, that it is constitutionally permissible to exclude women from the electoral franchise. That is by design: on any plausible view of the Nineteenth Amendment, the object of the amendment was to make this constitutionally impermissible. Viewed in this way, amenders' understanding is clearly relevant. Indeed, if this were a case of ordinary statutory interpretation, we would say that it presents an example of an implied repeal, meaning that, despite the absence of textual changes to Section 2 of the Fourteenth Amendment, the provision must be read as if the Nineteenth Amendment deleted the reference to "male."

Here, one might interject to suggest that originalism adopt the same approach to constitutional amendment. This must be resisted, however. For one thing, implied repeal only provides clear answers when there is an obvious contradiction (as in the

example) and is thus likely to be of limited assistance. But, there is a more important reason why this move is unavailable. The doctrine of implied repeal is governed by the principle of legislative supremacy, which prohibits a sitting legislature from binding subsequent legislatures.⁶⁶ Legislative supremacy is a normative principle that governs the activity of producing ordinary legislation and is based on the proposition that differently composed legislatures elected and convened at different times are equal in status.⁶⁷ As we have seen, however, another set of normative considerations governs the activity of producing constitutional text. One consequence of those considerations is that original understanding is a more basic source of constitutional meaning than amenders' understanding. In this respect, they are *not* equal in status. The doctrine of implied repeal therefore cannot simply be imported into the constitutional context to assist originalism with the incongruity problem.

Even so, the analogy to implied repeal is useful for present purposes because it helps demonstrate why semantic fixation cannot rule out amenders' understanding in the kinds of cases we are imagining. Originalism is not only committed to semantic fixation but also to textualism, and it is an imperative of textualism that constitutions, like statutes, are to be read as a "whole."⁶⁸ Textualism is not "literalism" in that textualism requires "reasonable," rather than "strict" construction, meaning that structural and contextual features of the legal text being interpreted must be given due weight.⁶⁹ Provisions must not be interpreted in isolation from each other, and later provisions that come into conflict with earlier provisions must be given full effect, meaning that they must be confronted head-on.

It follows from the textualist imperative for interpretive holism that amenders' understanding ought to be regarded as *a possible source* of constitutional meaning for a provision, even where its original text is unchanged, when it is evident from the amendment's text and drafting context that changing the

⁶⁶ See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283 (1989); JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES 226–28 (2010).

⁶⁷ See *id.*

⁶⁸ Importantly, however, this is a modest constitutional holism that is tempered by semantic fixation, and thus, should not be confused with the more ambitious constitutional holism associated with Akhil Reed Amar. See *Originalism and the Unwritten Constitution*, *supra* note 1, at 1962–65; Solum, *supra* note 3, at 107–08 (distinguishing modest holism from "organic-unity holism" and arguing that the latter is implausible as a theory of a constitutional text's communicative content).

⁶⁹ See, e.g., SCALIA, *supra* note 17, at 23–24.

provision's operation was among its objects. To be clear, discerning the object of an amendment is not a "holistic" evaluation of the kind associated with the "new textualism"—a set of interpretive approaches that treat the constitution as an "organic unity" or "living document." For originalism, the meaning of the constitutional text is always tied to the factual circumstances of its production: interpretive holism is therefore constrained by drafting context.⁷⁰

The same imperative for interpretive holism applies even where the conflict is less straightforward and more indirect than in the Section 2 example. This describes the other, and more controversial, spill-over involving the Nineteenth Amendment, which has to do with the Amendment's implications for the Section 1 guarantee of equal protection. At the very least, there is a conflict where equal protection concerns voting-related matters. However, as Calabresi and Rickert point out, it is difficult to isolate voting-related matters from other matters involving civil and political rights, which suggests that the conflict may in fact be broader.⁷¹ Here too, then, semantic fixation cannot rule out amenders' understanding as a possible source of constitutional meaning. At the same time, however, textualism does not automatically rule it in. Instead, discerning the object of amendment requires further attention to the drafting context. For, it is not obvious from the text of the Nineteenth Amendment alone that dealing more broadly with the equality of women was among its objects. If it was not, then bringing amenders' understanding to bear on the interpretation of the equal protection clause would be inconsistent with an originalist approach.

What about gaps? The discussion so far has focused on the special problem of establishing the relevance of amenders' understanding that arises in the case of spill-overs. As noted at the outset, this issue does not in general appear to arise for gaps because they are instances of the incongruity problem where the text being interpreted has been changed by amendment. Accordingly, the relevance of amenders' understanding can be established in the usual way via semantic fixation.

Even so, one might query whether there are examples involving minor textual changes that raise a possible issue of

⁷⁰ It is on this basis that Larry Solum argues that the kind of "organic holism" associated with Akhil Reed Amar is inconsistent with originalism. See *Originalism and the Unwritten Constitution*, *supra* note 1, at 1971–72.

⁷¹ See Calabresi & Rickert, *supra* note 36, at 11–12, 66–67.

relevance. For instance, this is one way of understanding the High Court of Australia's approach in the *Kartinyeri* case, discussed above, where the amendment to Section 51(xxvi) was characterized as a "bare deletion."⁷² Qua bare deletion, one might argue—as several High Court judges and prominent originalist commentators did⁷³—that amenders' understanding is irrelevant because the amendment produced no text at all. This reasoning is dubious, however. For, it is equally plausible to characterize the amendment as producing a new version of Section 51(xxvi) by re-drafting and enacting a revised version of the original text. On this view, the amendment produced a full replacement, not a bare deletion. Deciding between these two views cannot be neatly resolved by drawing on semantic fixation or by considering the text in isolation from drafting context. Here, too, it is necessary to discern the object of amendment.

In summary, then, where the relevance of amenders' understanding to the interpretive problem cannot be established in the usual way through semantic fixation—either because there is no change to the text being interpreted, or because the textual changes are relatively minor, making semantic fixation alone a controversial basis for establishing its relevance—then it is necessary to make a judgment about the object of amendment. Was the Nineteenth Amendment to the U.S. Constitution designed solely for the purpose of making it constitutionally impermissible to exclude women from the electoral franchise, or was it designed to go further, requiring the equal protection of women in relation to other matters? Was the 1967 amendment to the Australian Constitution designed to expand Commonwealth power to enact racially discriminatory laws to a different category of people, or was it designed for the more limited purpose of conferring power to enact legislation for the benefit and advancement of Aboriginal people?

As we shall see, these lines of enquiry concerning the object of amendment are also needed to evaluate the relative weight of drafters' understanding and are taken up again below. It should be emphasized, however, that the purpose of this Article is not to reach a firm position on what substantive conclusions an originalist would be likely to reach in relation to either example. The aim is to identify the concrete issues that an originalist would need to examine in order to address the conflict between

⁷² *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 363 (Austl.).

⁷³ See *id.* at 363, 383; Jeffrey Goldsworthy, *Interpreting the Constitution in Its Second Century*, 24 MELB. U. L. REV. 677, 701–04 (2000).

drafters' understandings in instances of the incongruity problem. Analysis of the examples and any conclusions reached are included to illustrate how to apply the proposed approach.

Answering these questions evidently requires careful attention to the drafting context, which is to say, a historically embedded investigation linking the text produced with the activity of text production. For present purposes, the important thing to see is that this relies on the same kinds of extrinsic sources that originalists currently use to discern framers' understanding. This includes materials that provide evidence about the campaign for constitutional change leading to the formal proposal, records of the debates during the proposal and drafting stages, and documents containing information produced and circulated to inform and persuade the public during the ratification stage. In this respect, the kinds of enquiries required to discern the object of amendment are part and parcel of standard originalist approaches to constitutional interpretation: here, brought to bear on the distinctive task of amending (as opposed to framing) as a constitutional-text production activity.

2. Addressing the Conflict: Evaluating the Relative Weight of Amenders' Understanding

As developed so far, we have seen that the originalist approach to amendment being proposed is structured by a presumption that original understanding prevails, unless it is overridden by amenders' understanding. This presumption places an *interpretive constraint* on what an amendment can achieve in the absence of a clear and express intention to override original understanding that is manifest in the resulting constitutional text. Where the resulting text is unclear, and where there is a conflict between drafters' understandings, the incongruity problem arises. The analysis then proceeds by examining the *relevance* and *relative weight* of amenders' understanding as a source of constitutional meaning. As discussed, original understanding is always relevant given its status as a more basic source of meaning, and in many (and perhaps most) instances of the incongruity problem, the relevance of amenders' understanding is straightforward. In at least some cases, however, it will be controversial. Here, establishing the relevance of amenders' understanding requires discerning the object of the amendment.

This section provides the final component of the proposed approach, which is a method of evaluating which set of drafters' understandings ought to prevail. The proposed method is a method of "weighing." The factors used to assign "weight" to drafters' understandings involve considerations that are germane

to originalism and its emphasis on the constitution as a legal text. However, while consistent with originalism, the proposed factors go beyond the usual theoretical resources found within the theory and are neither reducible to, nor derivable from, originalism's basic commitments. They involve a wider set of concerns that attend the activity of constitutional text production and are drawn from the observation—which emerged from the discussion in Part III, Section B—that there are *normative dimensions* of the drafting process that is characteristically used to frame a constitution and that importantly distinguish that task from amending one.

The key normative consideration in play is “suitability,” used here in the normatively-loaded sense of “propriety” or “fitness,” rather than a mere “means-end” connection. The question is whether the *drafting process*—that is, the procedure used to produce the text—is well-suited to the *drafting task*—that is, the nature of the constitutional text-producing activity—having regard to both the subject matter and the object of amendment. There are two central propositions which are derived from the exceptional character of framing as a drafting task. Stated in their most basic terms, they are: (1) the more closely that the drafting task presented by the amendment falls *within* the core drafting tasks involved in framing the constitution (“the core”), the stronger the presumption in favor of original understanding; and (2) as a corollary, the greater the degree to which the drafting task involved in amending falls *outside* the core drafting tasks that were involved in framing (“the periphery”), the weaker the presumption in favor of original understanding.

When the presumption in favor of original understanding is strong, it can be overridden only where the process of amending approximates those features characteristically associated with framing and that speak to the status of original understanding as the more basic source of constitutional meaning. By contrast, when this presumption is weak, amenders' understanding will override original understanding so long as the process used to amend the constitution was suitable for the specific drafting task.

As a matter of constitutional interpretation then, determining which set of drafters' understandings prevails in cases of amendment that pose the incongruity problem requires two sets of enquiries into the amendment's drafting context: one corresponding to the drafting task, and the other corresponding to the drafting process. However, as we have seen, amending is highly variable in its scope, subject matter, and procedure. Accordingly, the analysis will always be case-specific, meaning that it must be conducted in light of the specific amendment, the

constitution being interpreted, and the particularities of the activities that were in fact involved in the specific act of constitutional text production. As such, it is not possible—nor indeed wise—to attempt to canvas all of the possibilities. The discussion that follows will therefore focus on identifying key factors that fall within each set of enquiries, while indicating some possible permutations by way of illustration. The discussion will also draw on the “gap” and “spill-over” examples that we have been considering to make this analysis more concrete.

a. Drafting Task: “the core” vs “the periphery”

The first set of enquiries concerns the nature of the drafting task. The emphasis here is on the object of the amendment in relation to the design and structure of the relevant constitution as it was originally enacted. In other words, what were the textual changes brought about by the amendment *designed to do*? In this respect, the enquiries required here overlap with the enquiries needed to establish the relevance of amenders’ understanding in cases where it is controversial. As such, both sets of enquiries require discerning the object of the amendment. However, the focal point here differs: the concern is with the extent to which the amendment falls within the set of concerns at the core of the framing as a drafting task (“the core”). In other words, it is not simply the object of the amendment that matters but *the relationship* between the object and the core.

The concept of “the core” is closely connected to the idea of constitutional identity discussed above.⁷⁴ It includes only those elements that are essential to constitutional design and structure, and without which, a given constitution would fail to be that particular constitution. Consistent with originalism’s basic commitments and concerns, those elements must be discernible from the constitution’s text and structure and must also be supported by its drafting history. Determining which aspects of a constitution fall within the core will therefore depend upon the specific constitution being interpreted. At the same time, the core ought to be defined at a relatively high level of abstraction, which is to say, it should not generally be thought to concern details such as the practical operation or application of provisions, unless there is evidence that these were crucial aspects of the framing project or otherwise essential to constitutional settlement.

⁷⁴ See discussion *supra* Section III.B.1.

By way of illustration, the core ought to encompass basic features such as:

1. *The horizontal separation of powers*: for example, the degree to which a constitution subscribes to a strict separation of legislative and executive power, and how a constitution conceives of judicial power, including the scope of judicial power to review legislative and executive power.
2. *The vertical distribution of powers*: for example, the degree to which a constitution subscribes to federalism or other forms of subsidiarity versus a unified or centralized distribution of powers.
3. *Limitations or constraints on powers*: for example, specific topic or subject matter requirements needed to enliven legislative power, as well as requirements for the legislative supervision of executive power, rights and other guarantees.

Each of these broad categories of general features is evidently referable to various specific aspects of constitutional text and structure that can be described at different levels of abstraction. Determining which of these aspects ought to be regarded as within the core of a given constitution, and at what level of description, will require situating them within the context of the framing. Thus, although the identification of a constitution's core is a novel enquiry in the sense that it is not found within the standard originalist repertoire, it nevertheless relies upon well-established originalist methods.

For instance, drawing on the examples that we have been using, it is uncontroversial that federalism is a fundamental aspect of both the U.S. Constitution and the Australian Constitution. A prominent textual and structural feature of both constitutions is the distribution of legislative power between a national government and constituent states through the enumeration of specific topics that fall within the (mainly) non-exclusive competency of the former. Moreover, the creation of a federal system in order to better coordinate activities among existing states, constituted as self-governing entities, that pre-dated the founding was the central drafting task involved in the framing of both constitutions. It thus seems uncontroversial to say that federalism and the federal distribution of legislative power, achieved in the manner just described, fall within the core of both constitutions. Notice, however, that whether the specific enumerated topics of federal legislative power have a similar status is an open question. For example,

ensuring federal legislative power to regulate interstate trade and commerce was critical to both framing projects.⁷⁵ But the inclusion or exclusion of other topics may be debatable; a point that is discussed further below in relation to the specifics of our “gap” example.

Bearing these general considerations in mind, the task for the interpreter is to determine whether or not the amendment falls within the core. Although constitutional amendment is necessarily narrower in scope than framing, it may nevertheless fall within the core. For instance, it is uncontroversial that the object of the Fourteenth Amendment to the U.S. Constitution was to alter the distribution of powers between the national government and the states.⁷⁶ In this respect, it is exemplary of an amendment that falls within the core: indeed, it is for this reason that its drafting and ratification are often referred to in terms of “framing.” Notice, however, that while the Fourteenth Amendment poses an array of questions about how the new distribution of powers it was designed to bring about ought to be understood, these are questions about how to interpret the Fourteenth Amendment in light of amenders’ understanding. They are not questions about which set of drafters’ understandings ought to prevail because the amendment clearly overrides original understanding. The example thus serves as an important reminder that not all instances of amendment—even those that fall within the core—give rise to the incongruity problem.

Amending also commonly concerns topics that are peripheral to the framing, in the sense that they do not fall within the set of concerns that defined the framing as a drafting task (“the periphery”). There are a variety of reasons why this may be so. For instance, perhaps the framers simply did not consider (or could not have considered) the issue. Or, perhaps it was left to be dealt with in other ways (e.g., through ordinary legislation). Or perhaps it was deferred to future generations. It bears emphasis that, in making this determination, whether or not a constitution addresses a topic is not conclusive. A constitution’s silence on a topic may indicate that it falls within the periphery, but not necessarily so: it matters *why* the constitution is silent about the topic. Similarly, the fact that a constitution addresses a topic does not necessarily mean that it falls within the core: it matters *how* the constitution addresses the topic. In general, then, unless the topic of amendment concerns a prominent structural feature that is linked to constitutional identity, it will typically be

⁷⁵ See U.S. CONST. art. I, §8, cl. 3; *Australian Constitution* s 51(i).

⁷⁶ See U.S. CONST. amend. XIV.

necessary to consult the body of evidentiary materials available to provide a contextual picture of the framing as a drafting task.

This leads to an important point of clarification. The foregoing discussion may give the impression that the distinction between the core and the periphery lends itself to a binary, “either-or” classification. Although some amendments may be classifiable in this way, this straightforward kind of classification is clearly not possible in all cases. The object of many amendments is more nuanced in relation to the framing project. Accordingly, while it is helpful to present the distinction in a binary way for exegetical purposes, it is more accurate to think of constitutional amendments as posing an array of drafting tasks that fall along a continuum. At one end of the continuum, there are amendments that would result in a different constitution altogether, as compared to the one produced by the framing. At the other end, there are amendments that have no relation to the central topics of the framing project at all. The nature of the determination required at this stage is therefore better regarded as one of *relative proximity* to the core versus the periphery.

To make this more concrete, it will be helpful once again to draw on our two examples. I will begin with the 1967 amendment to section 51(xxvi) of the Australian Constitution, which is more straightforward.⁷⁷ Recall that this amendment modified an existing topic of federal legislative power, extending the power to legislate with respect to “the people of any race” to Aboriginal peoples. As discussed in Part II, Section B, the object of the amendment is uncontroversial if consideration is given to its drafting context: it was clearly designed to ensure that the Commonwealth Parliament could enact legislative measures for the advancement of Aboriginal peoples.⁷⁸

Evidentiary materials from all stages of the amendment process support this view.⁷⁹ This includes Hansard and other materials from Parliamentary discussion and debate of the proposal, informational materials circulated to members of the public ahead of ratification (which in Australia involves a referendum where voting is compulsory for all eligible electors),⁸⁰

⁷⁷ *Australian Constitution* s 51(xxvi).

⁷⁸ See discussion *supra* Section II.B.1.

⁷⁹ See WILLIAMS & HUME, *supra* note 61, at 140–45; see also *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 404–09 (Austl.).

⁸⁰ See *Australian Constitution* s 128 (“The proposed law [for the alteration of the Constitution] shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.”); *Referendum (Machinery Provisions) Act 1984* (Cth) s 45(1) (Austl.) (“It is the duty of every elector to

and materials documenting the referendum campaign itself. This view is also supported by the text and structure of the amendment proposal, having regard to the proposal as a whole. In addition to expanding Commonwealth legislative power, the 1967 amendment removed section 127.⁸¹ Section 127 had stated that “aboriginal natives shall not be counted” for a variety of purposes for which the Constitution uses population numbers⁸²—including, significantly, the number of representatives that a State is entitled to in the lower house—and was widely perceived to be racist. The referendum campaign, which had unanimous support from the government and opposition, was run on the basis that *both amendments* were required to advance the cause of Aboriginal Australians.⁸³

At the same time, however, we have seen that the resulting textual change to section 51(xxvi) does not expressly prohibit discriminatory legislation.⁸⁴ This is precisely what gives rise to the incongruity problem: there is a “gap” between the amenders’ understanding and the original understanding that the text does not resolve. This interpretive puzzle concerns the scope of the power to legislate with respect to Aboriginal peoples, and, in particular, whether the original understanding of the power’s scope (which would extend it to discriminatory laws) or the amenders’ understanding (which would limit it to beneficial laws) ought to prevail. How should *this* particular issue be regarded in relation to the core?

As discussed above, federalism and the enumeration of topics of federal legislative power are clearly part of the core. It is unclear, however, whether the enumeration of *this* particular subject matter is properly regarded as more proximate to the core than to the periphery. Supporting such a conclusion on an originalist approach would require demonstrating that the issue was a significant aspect of the federal distribution of legislative power contemplated by the framing project in the same way—as noted above—that the power to regulate interstate trade and commerce was so regarded.

Existing scholarship examining historical materials from the time of the framing casts doubt on this proposition. Although there was some discussion in the Convention Debates concerning

vote at a referendum.”).

⁸¹ See WILLIAMS & HUME, *supra* note 61, at 141.

⁸² See Sawer, *supra* note 28, at 25–26.

⁸³ See WILLIAMS & HUME, *supra* note 61, at 140–41.

⁸⁴ See *Australian Constitution* s 51(xxvi).

whether the race power ought to be exclusive to the Commonwealth or concurrent with the States, there was no discussion of the reservation of Aboriginal matters exclusively to the States.⁸⁵ This suggests that the topic was neither critical to federation in terms of its place within the overall design, nor a matter of contention that was needed to secure constitutional settlement.⁸⁶ Moreover, commentators have observed that the power of the Commonwealth to enact laws discriminating against racial groups *other than* Aboriginal peoples was overdetermined by design, as several other enumerated topics of federal legislative power could be used for this purpose.⁸⁷ This observation suggests that section 51(xxvi) was designed to supplement related subjects of federal legislative power—such as the power to regulate migration and foreign nationals—rather than to effect a vertical distribution of legislative power that was critical to the federation project.⁸⁸

Drawing on the foregoing considerations, the drafting task involved in the 1967 amendment to section 51(xxvi) thus appears to be better regarded as more proximate to the periphery than to the core. This means that the presumption in favor of original understanding is weak: it will be overridden by amenders' understanding so long as the drafting process involved in amending was well-suited to the drafting task, which is the second step in the analysis and taken up below.

⁸⁵ See French, *supra* note 28, at 182–83; Sawyer, *supra* note 28, at 18. Geoffrey Sawyer suggests that the lack of consideration of the issue may have to do with the fact that the only the States had mainland territory at the time of the framing; as a result, the framers may have simply regarded matters concerning Aboriginal peoples as within the range of other matters, such as land settlement, that were generally thought to fall within their general competency. *Id.* at 17.

⁸⁶ As former High Court Chief Justice Robert French observed, indigenous peoples appear to be “irrelevan[t]” to the original understanding of the race power. French, *supra* note 28, at 185. Geoffrey Sawyer takes a similar position, suggesting that the reservation from the original grant of power would not have prevented the Commonwealth from regulating Aboriginal affairs indirectly, through other grants of legislative power. See Sawyer, *supra* note 28, at 24. In this respect, section 51(xxvi) can be contrasted with reservations in other grants of legislative power that are said to prevent the Commonwealth from legislating on that topic indirectly on the basis that they were expressly reserved to the States. Reservations of this kind are treated as essential terms of the federal compact and were the subject of discussion during the Convention Debates. See, e.g., NICHOLAS ARONEY, *THE CONSTITUTION OF A FEDERAL COMMONWEALTH: THE MAKING AND MEANING OF THE AUSTRALIAN CONSTITUTION* 279–80 (2009) (discussing the granting to the Commonwealth Parliament the power to legislate “with respect to banking *other than state banking*”).

⁸⁷ This includes: section 51(xix) naturalization and aliens; section 51(xxvii) immigration and emigration; section 51(xxviii) the influx of criminals; section 51(xxix) external affairs. Notably, the latter three topics of federal legislative power are listed immediately following the race power in section 51. *Australian Constitution* s 51.

⁸⁸ See French, *supra* note 28, at 181–86; Sawyer, *supra* note 28, at 19–23.

Turning to our second example, how should the drafting task involved in producing the Nineteenth Amendment to the U.S. Constitution be viewed in relation to the core? Recall that the interpretive issue that we are interested in concerns the possible intersection of the Nineteenth Amendment with the Fourteenth Amendment's Equal Protection Clause (i.e., not with the Constitution as originally enacted). As discussed above, this issue only arises if the object of the amendment is plausibly viewed as guaranteeing the equal status of women as citizens. This view is not uncontested, however. On another view, its object is more narrowly confined to women's voting rights.

The narrow view is consistent with the text of the amendment, which only addresses the right to vote. However, discerning the object of an amendment is a contextual enquiry: it is not confined to its text, but requires careful examination of the available evidentiary materials that supply information about the drafting context. Existing scholarship on the Nineteenth Amendment that engages in depth with these materials, and perhaps most notably the work of Reva B. Siegel, supports the broader view.⁸⁹ As documented by Siegel, historical materials indicate that the failure of the Fourteenth Amendment to adequately deal with the "woman question" was a driving force in the campaign for the Nineteenth Amendment.⁹⁰ Moreover, historical materials show that proponents and opponents of the amendment alike understood voting as an issue about the status of women as citizens: voting was then regarded as a privilege (and not a right) of citizenship that required independence of thought and political judgment, qualities that opponents of the amendment thought that women lacked, thus making them unequal in status to adult male citizens.⁹¹

For the purpose of illustrating how the proposed approach would apply, we will accept the wider view. Thus understood, does the drafting task fall within the core? For the purposes of identifying "the core," the relevant framing that we are interested in here concerns Reconstruction.⁹² The central project

⁸⁹ See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 949 (2002).

⁹⁰ See *id.* at 974–75.

⁹¹ See *id.* at 979–80.

⁹² In *Leser v. Garnett*, the U.S. Supreme Court considered and rejected a challenge to the Nineteenth Amendment that was brought on the basis that it exceeded the Article V amending power. 258 U.S. 130, 136 (1922). Specifically, the Nineteenth Amendment was alleged to be inconsistent with the Article V guarantee that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." See *id.*; U.S. CONST. art. V. The essence of the argument was that prohibiting states from excluding women from the

of Reconstruction, understood as a “framing,” concerned the abolition of slavery, racial equality, and a corresponding reallocation of legislative power between the federal government and the States.⁹³ The conventional and widely-accepted view of Reconstruction is that dealing with sexual inequality and the political rights of women were not among its objects.⁹⁴ Although there does not appear to have been consensus among the framers as to whether the equal protection clause did or could be extended to sex discrimination,⁹⁵ historical evidence supports the view that the framers of the Reconstruction amendments rejected suffragists’ calls to address women’s political rights, and women’s suffrage in particular, either because they thought women were unfit for such rights (and therefore would not support the amendment on that basis), or else due to strategic concerns that broadening the scope of the amendments in this way defeat the proposal.⁹⁶ As a result, the amendments did not explicitly address sexual inequality beyond the implication, from reference to “male” in Section 2 of the Fourteenth Amendment, that excluding adult women from the electoral franchise remained permissible. Ensuring that the States could continue to treat women as unequal in status as citizens in this way was not important for the project of Reconstruction, however: use of the term “male” to qualify “citizens” reflected widely shared assumptions at the time, but the issue of women’s status as citizens did not fall within Reconstruction’s central concerns.⁹⁷

electoral franchise would result in newly constituted and therefore differently “represented” states in contravention of the Article V guarantee. *See Garnett*, 258 U.S. at 136. Although there is a sense in which the issue presented goes to the intersection of the Nineteenth Amendment with the “core,” it does not present the kind of interpretive problem we are interested in here: it is an issue about how to interpret an express limitation on the amending power, and not about a possible conflict between drafters’ understandings. An originalist would approach the interpretation and application of express limitations on the scope of amendment in usual way.

⁹³ *See* Franita Tolson, “*In Whom Is the Right of Suffrage?*”: *The Reconstruction Acts as Sources of Constitutional Meaning*, 169 U. PA. L. REV. 2041, 2042, 2046 (2021).

⁹⁴ *See* Siegel, *supra* note 89, at 954 n.14.

⁹⁵ *See* Nina Morais, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 YALE L. J. 1153, 1153 (1988).

⁹⁶ *See* Calabresi & Rickert, *supra* note 36, at 51 (discussing Congressional “application intentions” in relation to sex); W. William Hodes, *Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment*, 25 RUTGERS L. REV. 26, 36–38 (1970) (discussing the view ultimately taken by the amendment’s framers that Reconstruction was “the ‘Negro’s hour’”); Morais, *supra* note 95, at 1156–58 (discussing how women’s suffrage was a key point of contention for the framers of the 14th Amendment); Siegel, *supra* note 89, at 969 n.58, 970 n.60 (discussing historical works examining debates about drafting the 14th Amendment to address the “woman question”).

⁹⁷ *See, e.g.*, Catherine A. Jones, *Women, Gender, and the Boundaries of Reconstruction*, 8 J. CIV. WAR ERA 111, 119 (2018).

The foregoing supports the conclusion that guaranteeing the equal status of women as citizens—which we have accepted *arguendo* as the historically more accurate view of the object of the Nineteenth Amendment—falls within the periphery. As a result, the presumption in favor of the original understanding of the equal protection clause, while strong in relation to race, would be weak in relation to sex.

Notice that this approach would not only strengthen Calabresi and Rickert's originalist argument, but it would also avoid the need to provide a novel account of Reconstruction as concerned with eliminating all forms of caste-based discrimination, which is the aspect of their argument that has attracted the most criticism.⁹⁸ Indeed the authors' preferred characterization of Reconstruction gives the Fourteenth Amendment's drafters' understanding *greater* presumptive weight, meaning that it would be less easily overridden by the Nineteenth Amendment's drafters' understanding. Thus, while Calabresi and Rickert's novel account of Reconstruction may be an important scholarly contribution in its own right, one might query their argumentative strategy. Insofar as a central aim of their work is to demonstrate why originalists should hold that the equal protection clause extends to sex, the approach developed here suggests that making their argument about the Nineteenth Amendment the leading argument rather than a back-up argument is the better strategy. The originalist approach to amendment proposed in this Article provides the analytical tools needed to do that.

In making this point, it again bears emphasis that it is not this Article's objective to defend particular conclusions about either example, but to develop an originalist approach to amendment. Both examples illustrate that classifying an amendment along the continuum between a constitution's core and its periphery is a matter of degree and may prove contestable in some cases, particularly where there is room for debate about the object of the amendment.⁹⁹ An originalist approach to amendment cannot resolve these kinds of disputes. It can only

⁹⁸ See, e.g., Balkin, *supra* note 41; Whelan, *supra* note 41.

⁹⁹ It is worth noting that the two examples we have been considering concern very old constitutions, which pose special evidentiary challenges for discerning the core simply in virtue of the passage of time since the framing. An originalist approach to amendment may prove easier to apply to newer constitutions where less time has passed since the framing, at least insofar as the relevant evidentiary materials from the constitutional drafting context are more readily available and less equivocal. I return to this point in Part IV, where I discuss the implications of an originalist approach to amendment for debates about "amendability." See discussion *infra* Part IV.

provide a framework that will allow originalists to identify the incongruity problem with greater precision, and to address the problem with greater clarity. These are analytical tools that the theory currently lacks. The proposed distinction between the core and the periphery is germane to originalism's commitments and concerns and provides a needed focal point for establishing the strength of the presumption in favor of original understanding.

b. Drafting Process: Suitability to the Drafting Task

Once the presumptive weight of original understanding has been established, the final step in the analysis is to determine the relative weight of amenders' understanding. This requires attending to the normative dimensions of the drafting process used to produce the amendment, as a matter of its suitability to the particular task of constitutional text production. As we have seen, not all drafting tasks are equal: it is on this basis that we have distinguished framing from amending. But the same is true *within* the category of amending. Different amendments have different objectives and, as such, place different normative demands on the activity of constitutional text production. This is reflected, for instance, in the fact that many constitutions prescribe different amendment procedures for different kinds of amendments.¹⁰⁰ The aim of this section is to outline the considerations that would be relevant to an originalist's assessment of suitability. Here, too, the proposed method of evaluation goes beyond existing resources in originalist theory. At the same time, it is contended that the kinds of enquiries required are compatible with the theory's central commitments and concerns.

As a threshold matter, an originalist approach to amendment requires making an initial determination that the drafting process used to produce the amendment is consistent with the constitutionally prescribed amendment procedure and other formal constitutional requirements. This includes express substantive limitations on the amending power, or "unamendability" provisions.¹⁰¹ Importantly, however, the evaluation of suitability cannot be confined to formal requirements but must also examine how the procedure is conducted in practice. This includes both *the persons* who are convened for the task of amending, and *their manner and form of engagement* with the

¹⁰⁰ Canada's extremely complicated amending formula is exemplar in this regard. See Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.); see also Kate Glover, *Hard Amendment Cases in Canada*, in THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT 273, 273–76 (Albert et al. eds., 2017).

¹⁰¹ See ALBERT, *supra* note 9, at 140–49; ROZNAI, *supra* note 2, at 15.

drafting task. The evaluation of suitability extends to all stages of amending: proposing, drafting, and ratifying.

Once the threshold issue has been settled, the starting point in assessing suitability picks up from where we left off in evaluating the presumptive weight of original understanding: namely, with the relative proximity of the amendment to the core versus the periphery. All other things being equal, the greater the proximity to the core, the greater the demand for a drafting process that approximates the framing. The guiding principle here is that amendments that fall within the core are higher stakes because they go to constitutional identity: a constitution's defining features, and aspects of constitutional design that were basic to the framing project. Because they are higher stakes, they demand a higher degree of focused deliberation and debate—and more technical and lawyerly forms of expertise—than amendments that fall within the periphery.

In the absence of a clear expression of intent to override original understanding, as manifest in the text produced by the amendment and supported by its drafting context, it is therefore unlikely that amenders' understanding will prevail in these circumstances. For, as discussed in Part III, Section B, the drafting procedures used in amending—although highly variable—typically do not approximate those that are characteristically associated with framing.¹⁰² There are, however, exceptional cases where the amendment process is conducted in such a manner, often precisely *because* the subject and object of amending fall with a constitution's core. One example is the Reconstruction amendments to the U.S. Constitution, which have been variously described as an episode of constitutional law-making analogous to that of the framing.¹⁰³ Another example is the 1982 Patriation of the Canadian Constitution and adoption of the *Canadian Charter of Rights and Freedoms*, which was a major episode of constitutional law-making involving an extended period of deliberation, debate, and negotiation between the provincial and federal governments.¹⁰⁴

¹⁰² See discussion *supra* Section III.B.

¹⁰³ See generally 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998). The overarching ambition of Ackerman's work is to justify major constitutional changes that fall *outside* of Article V: in the case of Reconstruction, by denying Confederate states readmission to the Union until they ratified the Fourteenth Amendment. Nevertheless, Ackerman's account highlights exceptional aspects of the processes involved in drafting, proposing, and ratifying the amendments that more closely align Reconstruction with "framing" than with "amending" as an episode of constitutional law-making. *Id.*; see also DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 389–487 (2d ed. 2005) (describing Congressional debates in the drafting, proposal, and ratification of the Reconstruction amendments).

¹⁰⁴ Significantly, the Patriation package included a new set of amending rules, set out in Part V of the Constitution Act 1982. It bears emphasis that the characterization of

In these kinds of cases, it is possible to overcome the strong interpretive presumption in favor of original understanding. In practice, however, there is reason to think that the incongruity problem will not often arise in these circumstances. All other things being equal, one would expect the gravity of the drafting task associated with amendments of this kind, and the correspondingly more demanding drafting procedures used to bring about constitutional change, to result in greater clarity of the amendment's intended operation in relation to existing constitutional provisions than less demanding drafting procedures. The Reconstruction amendments in the United States and the Repatriation amendments in Canada are examples of this: in both cases, the amendments were clearly designed to override and displace original understanding with respect to the matters that they addressed.¹⁰⁵ From an originalist perspective, the interpretive problems that they have subsequently presented in relation to existing constitutional arrangements—although often challenging—have been of the ordinary variety and not instances of the incongruity problem. Which is to say, they present interpretive problems that require discerning the meaning of the text in light of drafting context but not one of the special interpretive problems posed by conflicting sets of drafters' understandings that we have been considering.

Amendments that fall within the periphery require a different starting point because they generally do not demand the kinds of procedures that are characteristically associated with framing. Moreover, given the highly variable nature of amendment, there is far greater diversity in the kinds of procedural features that could meet the requirement of suitability. Thus, the analysis here requires attending to the specific drafting task presented by the particular amendment under consideration, which is a function of its objective. If the drafting process is well-suited to the drafting task, then amenders' understanding ought to outweigh original understanding in instances of the incongruity problem.

In conducting this analysis in periphery cases, the suitability criterion should not be given an overly strict application in terms of the required "fit" between drafting task and drafting process.

these events as a "framing" is not due to *popular* engagement in the drafting or ratification process. See JEREMY WEBBER, *THE CONSTITUTION OF CANADA: A CONTEXTUAL ANALYSIS* 42–47 (Peter Leyland et al. eds., 2015). As Richard Albert observes, "Patriation was an agreement among elites with no direct involvement from voters." ALBERT, *supra* note 9, at 167. Moreover, it should be noted that it is a characterization that has some difficulties due to Québec's rejection of the Patriation package.

¹⁰⁵ See, e.g., James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 685–86 (2016); WEBBER, *supra* note 104, at 45.

To do so would be incompatible with the role of formal amendment in originalist theory as the most (or even sole) legitimate means of updating constitutional meaning, and as foundational to the commitment to democratic values that is claimed by most originalists. Moreover, it is a feature of the proposed approach that the requirement of suitability—as with the strength of the presumption in favor of original understanding—can be calibrated to reflect the relative degree of proximity of the amendment to the core versus the periphery.¹⁰⁶ The proposal defended here does not take a position on how this should be worked out in practice: any such calibration would need to have regard to the specific interpretive problem and the constitutional context in which the approach is applied.

There is a wide array of variables in amendment procedure and practice that are potentially relevant to the assessment of suitability. Although it is not possible to comprehensively define these, we can nevertheless identify some key factors and possible permutations. One important factor concerns the forms of expertise and information needed to develop and evaluate an amendment proposal. This factor is predominantly concerned with the question of *who* the amenders are. Another important factor concerns the forms of engagement used in the amendment process. This factor is predominantly concerned with the question of *how* the amenders are involved. I will begin by outlining these factors, and then briefly consider how they could be applied to the examples that we have been considering.

Starting with the first factor, the types of expertise and information required for the drafting task will vary according to the subject and object of amendment. Although public support is important for the success of any major constitutional change, some amendments impose greater demands on the need for public consultation than others. For example, some amendments concern subjects that go to social understandings and values, and are designed to make changes to a constitution

¹⁰⁶ This is analogous to the different requirements for means-end “fit” found in standards of review that courts use to analyze the constitutional validity of rights-impairing legislation, including the system of tiered classification-based review found in the American context, as well as the forms of proportionality testing found elsewhere. Importantly, the criterion of suitability described here should not be confused with the weaker means-end connection requirement of “suitability” found in proportionality reasoning, which only requires a rational connection between means and end. Nor, however, should it be conflated with the stricter requirement of “necessity,” which performs different analytical work.

so that it better reflects the people it governs.¹⁰⁷ Here, one would ordinarily expect substantial public consultation at the early stages of proposing and preparing the amendment, and not just at the ratification stage. An amendment process that limited public engagement to informing the public about the proposed change, without soliciting opinions or addressing concerns, would not be well-suited to the drafting task for an amendment of this kind.

Similarly, although specialized expertise is generally required to develop workable proposals for constitutional change, some amendments impose greater demands on the need for specialized expertise. For example, some amendments are designed to make technical changes or address topics that require information or knowledge not generally held by lay-people.¹⁰⁸ Here, substantial public consultation may be unnecessary (or even inappropriate) during the initial stages of the drafting process where various proposals are considered and prepared. An amendment process that involved direct proposals by lay-persons, without any expert analysis of the likely effects or operation of different proposals,¹⁰⁹ would not be well-suited to the drafting task for an amendment of this kind.

Turning to the second factor, the forms of engagement used in the amending process will predominantly be a function of the quality and quantity of deliberation and debate. For example:

¹⁰⁷ The recent example from Ireland described earlier, which involved the repeal of a constitutional prohibition on abortion, again provides an illustration of an amendment of this kind. See Arban & Daly, *supra* note 60, at 1.

¹⁰⁸ For example, the Australian Constitution was amended in 1910 and 1928 to vary federal fiscal arrangements in relation to State debt. See Australian Constitution section 105; see also ALBERT, *supra* note 9, at 4–6 (providing examples of “routine” and “technical” amendments).

¹⁰⁹ It should be noted that procedures of this kind are highly unusual, even for amendments that concern non-technical topics. For instance, even Iceland’s recent experiment in “crowdsourcing” constitutional change had mechanisms for expert input on the technical dimensions of the Constitutional Council’s proposals before putting them forward for ratification. After delivery of the Bill containing the amendment proposals to Parliament, advice was sought from Icelandic lawyers and political scientists, the Council of Europe, the Venice Commission, and local and international constitutional law experts, including leading scholars Jon Elster and Tom Ginsburg. See Thorvaldur Gylfason, *Democracy on Ice: A Post-Mortem of the Icelandic Constitution*, OPENDEMOCRACY (June 19, 2013), <http://www.opendemocracy.net/en/can-europe-make-it/democracy-on-ice-post-mortem-of-icelandic-constitution/> [<http://perma.cc/85V8-YSCY>]; see also Ragnhildur Helgadóttir, *Which Citizens?—Participation in the Drafting of the Icelandic Constitutional Draft of 2011*, BLOG OF THE INT’L J. OF CONST. L. (Oct. 7, 2014), <http://www.iconnectblog.com/2014/10/which-citizens-participation-in-the-drafting-of-the-icelandic-constitutional-draft-of-2011/> [<http://perma.cc/ZSF5-XD2R>].

- How much consultation occurred and over what time period?
- Were all the relevant stakeholders consulted, and how were the different stakeholders' views accommodated?
- What information about the proposed amendment was made available, in what forms, and who had access?

It would also include variables such as the degree of consensus or strength of opinion, as these too may reveal important details about the amenders' engagement with the drafting task. For example:

- What was the nature of the campaigns for and against the amendment?
- Were the purpose of the proposed amendment and the consequences of constitutional change clearly conveyed, and fairly and accurately represented?
- What was the turnout for the referendum or other ratification procedure, and by what margin did the proposal succeed?

All other things being equal, the higher the levels of informed and deliberative engagement and the greater the agreement among the amenders, the stronger the case for overriding original understanding.

Turning to the examples that we have been considering, there is a plausible case to be made that both the Nineteenth Amendment to the U.S. Constitution and the 1967 amendment to the Australian Constitution utilized processes that were well-suited to the drafting task involved in amendment. Both amendments involved changes to constitutional powers concerning the status of groups of historically marginalized persons: indigenous peoples in the case of the 1967 amendment to section 51(xxvi) of the Australian Constitution, and women in the case of the Nineteenth Amendment to the U.S. Constitution.¹¹⁰ Both amendments sought to revise existing constitutional powers, liberties and responsibilities in order to better reflect contemporary social understandings and values, and to rectify outdated assumptions about the status of those groups within the body politic.¹¹¹ The nature of the drafting task in both cases of amendment is therefore such that public engagement seems both appropriate and necessary. Neither is a technical amendment, nor does either present complexities in its intended

¹¹⁰ See *Australian Constitution* s 51(xxvi); see also U.S. CONST. amend. XIX.

¹¹¹ See WILLIAMS & HUME, *supra* note 61, at 142; see generally Siegel, *supra* note 89.

operation or effect, for which it would be appropriate or necessary to rely primarily on specialized expertise.

Without attempting to comprehensively survey the relevant considerations in play in either case, leading scholarly accounts suggest that the amendment process in both cases was conducted with relatively high levels of public engagement at all stages. To begin with, whilst neither constitution formally requires public engagement at the proposal or drafting stages, it is notable that both amendments were put forward as a result of decades of campaigning at the grass-roots level: spanning from the formation of Aboriginal advocacy organizations in the 1920s to 1966 in the case of the 1967 amendment to section 51(xxvi),¹¹² and from the Seneca Falls Convention in 1848 to 1919 in the case of the Nineteenth Amendment.¹¹³ Both amendment proposals were developed in response to the concerns raised by those campaigns.

The 1967 amendment to section 51(xxvi) had broad-based community support and bipartisan support in Parliament,¹¹⁴ and the referendum passed with the highest levels of support of any referendum in Australian history (with 90.77% in favor).¹¹⁵ Many Australians erroneously believed (and continue to believe) that the amendment granted citizenship to Aboriginal people. However, this misunderstanding is consistent with the campaign for constitutional change, which was often pitched as a campaign for the full and equal *status* of Aboriginal Australians *as citizens*.¹¹⁶ Moreover, despite disagreement about the concrete policies needed to advance the cause of Aboriginal peoples, there is evidence of a widespread consensus that race should not be used as a criterion for imposing burdens or detriments.¹¹⁷ This is consistent with the amenders' understanding that Commonwealth power to legislate with respect to Aboriginal peoples was limited to the enactment of beneficial laws.

¹¹² Larissa Behrendt, *The 1967 Referendum: 40 Years On*, 11 AUSTL. INDIGENOUS L. REV. 12, 12 (2007); JOHN SUMMERS, THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA AND INDIGENOUS PEOPLES 1901–1967 29–30 (Vision in Hindsight: Research Paper No. 10/2000-01, Parliament of Australia, Oct. 31, 2000), <http://www.aph.gov.au/binaries/library/pubs/rp/2000-01/01rp10.pdf> [<http://perma.cc/6LAV-8BGU>].

¹¹³ See generally I–VI ELIZABETH CADY STANTON ET AL., HISTORY OF WOMAN SUFFRAGE (Susan B. Anthony et al. eds., 2009).

¹¹⁴ Behrendt, *supra* note 112, at 12. Notably, Parliament did not produce a No case in this regard—as is the standard practice for referendums. HUME & WILLIAMS, *supra* note 61, at 144–45.

¹¹⁵ *Referendum Dates and Results*, AUSTL. ELECTORAL COMM'N, http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm [<http://perma.cc/3HCY-4WVW>] (updated Oct. 24, 2012).

¹¹⁶ See, e.g., Summers, *supra* note 112, at 30 (discussing the 1938 Day of Mourning protest).

¹¹⁷ See *id.* at 29–31.

The Nineteenth Amendment, proposed in 1919 and ratified in 1920, was far more contested at the time.¹¹⁸ Moreover, because the Article V amendment procedure does not require a referendum for ratification, public support is somewhat more difficult to ascertain. Although the amendment had no difficulty gaining the needed two-thirds approval in the House of Representatives, gaining a two-thirds majority in the Senate and of the states proved more difficult.¹¹⁹ Nevertheless, looking beyond the formal amendment procedure, the level of public engagement and deliberation on the issue of inclusion of women in the electoral franchise was in many respects exceptional; particularly in respect of the citizen-led grass-roots nature of the campaign, and the duration of time (forty-one years) over which the proposed constitutional change was debated.¹²⁰ Moreover, as alluded to in the previous section, the public debate about extending the electoral franchise to women reflected broader views about the status of women as equal citizens. It was not a debate cast in narrow or technical terms.

To conclude, to the extent that both examples present instances of the incongruity problem—an issue which, we have seen, is constable in the case of our spill-over example involving the U.S. Constitution—it appears that there is a good case to be made that amenders' understanding ought to prevail. For, in both cases the presumption in favor of original understanding appears to be relatively weak, and the drafting process appears to be suitable to the drafting task. Therefore, on the originalist approach to amendment proposed here, it is possible for an originalist to hold the view that the Fourteenth Amendment's Equal Protection Clause extends to the protection of women's civil and political rights, while simultaneously accepting the standard account of the original meaning of the Fourteenth Amendment. Similarly, it is possible for an originalist to hold the view that the Commonwealth Parliament of Australia's power to legislate in respect of Aboriginal peoples pursuant to section 51(xxvi) must be used for purposes that are consistent with the advancement of Aboriginal peoples—or, at the very least, that it

¹¹⁸ See, e.g., W. William Hodes, *Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment*, 25 RUTGERS L. REV. 26, 46–47 (1971).

¹¹⁹ The proposal failed several times in the Senate before it was ultimately approved, and many States did not ratify the Amendment until much later (Mississippi was the final state in 1984). See *Woman Suffrage Centennial, Timeline: The Senate and the 19th Amendment*, U.S. SENATE, http://www.senate.gov/artandhistory/history/People/Women/Nineteenth_Amendment_Vertical_Timeline.htm [<http://perma.cc/BUK9-5L7Z>] (last visited Nov. 18, 2019).

¹²⁰ See ELEANOR FLEXNER, *CENTURY OF STRUGGLE 164–70* (1959); see generally STANTON ET AL., *supra* note 113.

cannot be used to single out Aboriginal peoples for the purpose of subjecting them to detrimental treatment—while simultaneously accepting the standard account of the original meaning of the power granted by section 51(xxvi).

These conclusions are tentative and provided for the purposes of illustration only. The important thing to see is that the approach to amendment developed in this Article provides originalism with the analytical resources that are needed both to identify the interpretive problem posed by amendment in cases like these, and to address that problem in a way that is consistent with the commitments and concerns of originalist theory. Fully defending any substantive conclusion in either case would of course require additional argument—including a more detailed examination of the relevant evidentiary materials—and is beyond the scope of this Article.

IV. IMPLICATIONS FOR AMENDABILITY

The approach to constitutional amendment developed in this Article provides a missing component of originalist interpretive theory, which is an important contribution to contribution to scholarly enquiry in its own right. However, the approach also has important implications for contemporary debates about limitations on the amending power, or “amendability.” In this respect, it holds much broader interest for constitutional theory. In this final Part, I briefly consider these implications and indicate possible lines of enquiry for future research.

As we have seen, one consequence of the originalist approach to constitutional amendment developed in this Article is that there are circumstances where an originalist will find that an amendment is ineffective to bring about its intended constitutional change as a matter of constitutional interpretation. This will occur where: (1) there is a conflict between original understanding and amenders’ understanding, (2) the text produced by the amendment is insufficiently clear about the intention to override or displace original understanding, (3) the interpretive presumption in favor of original understanding is strong, owing to the amendment’s proximity to the core, *and* (4) the interpretive weight of amenders’ understanding is weak, owing to the drafting process being unsuitable to the drafting task.

In practice, then, certain amendments are susceptible of being “read down” in a manner that nullifies their intended effect. The approach therefore places *substantive constraints* on the amending power, albeit overridable ones. More specifically, it imposes an interpretive presumption in favor of original understanding in cases of conflicting drafters’ understanding, the strength of which

is determined by the type of amendment. In this respect, there is an important and yet unappreciated sense in which originalism intersects with the development of so-called “implicit unamendability” approaches to constitutional amendment.

The term “implicit unamendability” refers to a set of doctrines that constrain the use of the amending power to make constitutional change. Unlike “express unamendability,” these constraints are not found in a constitution’s text: they are constraints implied by courts. As with the originalist approach to amendment, then, implicit unamendability doctrines impose *substantive constraints* on the amending power. This invites comparison.

Implicit unamendability is most commonly applied where an amendment is thought to alter “basic” or “fundamental” features of a constitution.¹²¹ This is similar to the idea of “the core” utilized in the originalist approach to amendment proposed above, in that it relies on a conception of constitutional identity to generate constraints on formal amendment. However, it is potentially far more robust. For, unlike originalism, the considerations used to generate the content of substantive constraints on implicit unamendability approaches are not limited to text, structure, and drafting context. Rather, considerations used on such approaches extend to assumptions about the nature of the amending power, the constitution being interpreted, and, more broadly, constitutionalism itself (although these are not always explicitly articulated). This is one way in which implicit unamendability has a wider scope than originalism as a limitation on the amending power.

Moreover, unlike the originalist approach to amendment, these constraints always override the intended effect of the amendment, which is to say, even where the intended effect is clear. In this respect, implicit unamendability doctrines impose *strict* substantive constraints on the amending power and not merely presumptive ones. This is a second way in which implicit unamendability has a wider scope than originalism as a limitation on the amending power.

Implicit unamendability is a practice that has become increasingly important in recent years, in light of growing concerns about “abusive” uses of the amending power.¹²² As

¹²¹ See ALBERT, *supra* note 9, at 149–58 (discussing “interpretive unamendability”); ROZNAI, *supra* note 2, at 42–47, 69–70, 141–56 (describing the “basic structure doctrine” and discussing the scope of implicit unamendability).

¹²² See David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 231–39 (2013); Kim Lane Scheppele, *Autocratic Legalism*, 85 UNIV. CHI. L. REV. 545, 563–64, 582 (2018).

recent scholarship has demonstrated, formal amendment can and has been used to bring about substantial structural changes that threaten to undermine liberal, democratic constitutional orders. This is often done by autocratic or authoritarian leaders, who claim to act in the name of “the people.”¹²³ Because these changes occur incrementally and through legal means, and because they do not obviously (or at least do not *prima facie*) appear to have the aim of dismantling the constitutional regime,¹²⁴ they often do not attract sufficient attention at the time that they occur, and may even occur undetected. Thus, by the time the changes have taken effect and their consequences have been felt, it may be too late to reverse course.¹²⁵ Implicit unamendability doctrines can therefore provide an important check on the amending power.

At the same time, however, there are many critics of implicit unamendability who argue that the practice cannot be justified, or else that it should only be used as a last resort. A key concern lies in the very idea of judicially-implied constraints on amendment: for many, this practice is the ultimate act of judicial activism, denying the power of the people to determine the fundamental legal framework for governance.¹²⁶ Critically, the application of implicit unamendability doctrines cut off the sole means of changing a constitution in response to binding judicial decisions about its meaning and application.

Another key concern lies in operationalizing implicit unamendability doctrines in practice: even if their use can be justified as a matter of principle, deciding which features of a constitution ought to count as “basic” or “fundamental” for the purpose of implying constraints on the amending power is highly contestable.¹²⁷ In light of these concerns, and allowing for the possibility of highly exceptional cases, some critics of implicit unamendability have argued that the only substantive

¹²³ See Landau, *supra* note 122, at 195–216; Scheppele, *supra* note 122, at 549–56.

¹²⁴ As Scheppele observes, “many of the changes . . . are highly technical and therefore hard for the ordinary citizen to understand.” Scheppele, *supra* note 122, at 582.

¹²⁵ See *id.* at 571, 581–83. Hence, as Scheppele emphasizes, the importance of scholarship describing recognizable patterns and steps taken in eroding democratic constitutionalism through incremental, legalistic means.

¹²⁶ See, e.g., Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1069–70 (2010); see also Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT’L J. CONST. L. 460, 487 (2006); see also RAJU RAMACHANDRAN, *The Supreme Court and the Basic Structure Doctrine*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 107, 107 (B. N. Kirpal et al., eds., 2000).

¹²⁷ See Landau, *supra* note 122, at 237–38 (acknowledging this criticism, although ultimately defending the practice).

constraints on the amending power should be those that are explicit in the constitutional text.

In an important recent work, Yaniv Roznai defends implicit unamendability as a matter of constitutional theory, offering one of the most comprehensive and sophisticated accounts of the practice to date.¹²⁸ Conceptually, Roznai situates the amending power in between ordinary law-making or “constituted” power, which is legally constrained by the established constitutional order, and original constitutional law-making or “constituent” power, which is legally unconstrained, arising outside of (and giving rise to) the established constitutional order.¹²⁹ Roznai argues that the amending power is best understood as a *secondary constituent power*: “secondary” in the sense that it is delegated by “the people” to “the amenders” via a constitution’s formal amendment procedure.¹³⁰ This delegation occurs at the time of the constitution’s framing, understood as an act of *primary constituent power*. Formal amendment is therefore limited, on Roznai’s approach, to those constitutional law-making purposes for which it is delegated, even where those limitations are not expressly stated in the constitutional text. The judicial power to review and invalidate amendments on this basis, Roznai argues, is necessary and legitimate as “a safeguard of ‘the people’s’ primary constituent power.”¹³¹

On Roznai’s account, then, the key to both justifying implied constraints on amendment and generating the content of those constraints lies in a basic distinction between “framing” (qua exercise of primary constituent power) and “amending” (qua exercise of delegated or secondary constituent power). As such, there is a notable parallel to the originalist approach to amendment developed in this Article, which similarly rests on a distinction between framing and amending. However, as we have seen with the originalist approach, that distinction is based on the nature of framing as a *drafting task*, and not upon any assumptions about the framing as a constituent act—at least not

¹²⁸ See ROZNAI, *supra* note 2, at 39.

¹²⁹ See *id.* at 113–22. In drawing this distinction, Roznai draws heavily on Carl Schmitt’s well-known theory of popular sovereignty. See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL*, 49–53 (George Schwab trans., Univ. of Chi. Press 1996); see also CARL SCHMITT, *CONSTITUTIONAL THEORY*, 269–73, 278 (Jeffrey Seitzer trans., Duke Univ. Press 2008); see also CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY*, 25–31 (Ellen Kennedy trans., MIT Press 1985).

¹³⁰ See ROZNAI, *supra* note 2, at 117–20. Roznai also describes this as an “agency” relationship, where the amenders are the agents of “the people” (the principals), or a “fiduciary” relationship, where the amenders are “trustees” of the constituent power. *Id.* at 118–19.

¹³¹ *Id.* at 196.

in the normatively-loaded sense associated with the idea of constituent power—which appeals to notions of popular sovereignty and an unfettered popular will. In this respect, I will now argue, the originalist approach draws attention to a critical weakness of implicit unamendability: namely, its reliance on the “democratic” or “popular” credentials of the drafting process.

There are two main concerns with this move. First, purely as a matter of providing sound theoretical foundations, one concern with this aspect of implicit unamendability—at least as theorized by Roznai—is that it relies upon a contentious characterization of “framing.” Although Roznai’s argument purports to be conceptual (i.e., about constitutionalism as such) rather than descriptive (i.e., about particular constitutions), a critical premise needed to sustain the argument is that a constitution’s framing is properly understood as an act of popular will *par excellence*. This premise is necessary both to distinguish framing (qua act of primary constituent power) from amending (qua exercise of secondary or delegated constituent power) *and* to justify the constraints that the former exerts over the latter. Yet, as commentators have noted¹³²—and as Roznai himself acknowledges¹³³—this is descriptively inaccurate as a generalization about constitutions, even if it is a widely-accepted normative ideal in constitutional theory.¹³⁴

The second concern has to do with the application of implicit unamendability doctrines in practice. The most basic difficulty lies in deciding which constitutional features enliven implicit unamendability (i.e., which features count as “basic” or “fundamental”). As Roznai correctly observes, once it has been accepted that there ought to be *some* limitations on the amending power, it isn’t possible to fully resolve this matter: there will always be room for debate. The question is, therefore, how to provide courts with adequate guidance. The concern here lies in the criterion that Roznai proposes for dealing with this issue and, in particular, its implications for constitutional resilience.

¹³² See, e.g., Joel I. Colón-Ríos, *Enforcing the Decisions of “the People,”* 33 CONST. COMMENT. 1, 3–4, 6 (2018) (book review); see also Jairo Lima, *Unconstitutional Constitutional Amendments: The Limits of Amending Powers*, 10 JURIS. 114, 116 (2019) (book review); see also Adrienne Stone, *Unconstitutional Constitutional Amendments: Between Contradiction and Necessity*, 12 ICL J. 357, 365–67 (2018) (noting that the case for implicit unamendability “waxes and wanes according to the nature of the exercise of constituent power” in the act of framing).

¹³³ See ROZNAI, *supra* note 2, at 121–22.

¹³⁴ As Roznai observes, “[i]n the modern era, the nation’s constitution receives its normative status from the political will of the ‘people’ to act as a constitutional authority. The ‘people’ are the subject and the holder of the constituent power.” *Id.* at 105–06.

Roznai's proposal involves using procedural considerations to calibrate the degree of judicial scrutiny used to review an amendment, thus avoiding the need to determine with a high degree of precision whether it alters "basic" or "fundamental" constitutional features.¹³⁵ The capacity of formal amendment to bring about changes of this kind—whatever these are determined to be—turns on the extent to which the amending procedure can plausibly be characterized as the manifestation of an unfettered "popular will," approximating the primary constituent power. Crucially, here, Roznai distinguishes amending processes that are "governmental," which rely on the ordinary organs of government such as the legislature, from those that are "popular,"¹³⁶ arguing that "the *more popular* the amendment power, the *less limited* it is."¹³⁷

As developed by Roznai, then, implicit unamendability approaches privilege amendment processes that engage the public, regardless of the type of amendment. Moreover, and significantly, they also privilege constitutional change that occurs outside of formal amendment: because most amendment procedures are governmental in Roznai's sense, and not maximally popular, changes to basic or fundamental constitutional features will be easier to achieve through informal, revolutionary channels.¹³⁸

In evaluating this proposal, it is important to bear in mind that growing concerns about constitutional resilience are what have made constraints on the amending power seem attractive in the first place. From this perspective, I suggest, both of these features of implicit unamendability are highly undesirable. There are two related points.

The first is that the "popular will" is highly manipulable, and perhaps especially so when invoked for the purpose of law-making on highly technical matters, which may be less well-understood by laypersons and, therefore, more vulnerable to misinformation. Although extraordinary recent events such as Brexit have drawn attention to this issue, it is not a new idea. Research in the social sciences has consistently demonstrated that procedural mechanisms for direct popular input into both ordinary and constitutional law-making are susceptible to manipulation and

¹³⁵ Roznai refers to this way of calibrating review as a "spectrum" of amending powers. *Id.* at 158.

¹³⁶ *Id.* at 162–64, 169.

¹³⁷ *Id.* at 170 (emphasis added). Roznai refers to this proposition as the "legitimation elevator." *Id.*

¹³⁸ Roznai acknowledges this concern. *Id.* at 129–30. However, the issue is ultimately left unresolved as an issue to be dealt with in future work. *Id.* at 131.

obfuscation, and thus can be effective instruments for consolidating power and influence, whether by partisan interests, or by autocratic or authoritarian leaders.¹³⁹

Concerns about maximally democratic procedures as vehicles for advancing partisan interests have long been raised about the citizen-driven law-making mechanisms used in many U.S. states, including popular referendums (which are relatively common in U.S. states) and popular ballot initiatives (which are less common).¹⁴⁰ Similar concerns have emerged in the context of popular constitutional conventions, which may only represent partisan interests while claiming the authority to speak as “the people” qua exercise of constituent power.¹⁴¹ Moreover, area studies research on emerging democracies demonstrates how autocrats and authoritarians have used notions of “constituent power” and “popular will” to consolidate their power.¹⁴²

The second and related point is that creating incentives to bring about constitutional changes outside of formal amendment compounds these concerns. Unlike formal amendment, they may not be visible *as* constitutional changes and thus may occur largely undetected.¹⁴³ But even where they are visible—as for example in the case of popular social movements or campaigns—they are less likely to be reviewable by courts on Roznai’s proposed approach than a formal

¹³⁹ See Hanna Lerner & David Landau, *Introduction to Comparative Constitution Making: The State of the Field*, in *COMPARATIVE CONSTITUTION MAKING* 1, 6 (David Landau & Hanna Lerner eds., 2019). For a general critique of the quality of law-making through citizen-driven mechanisms as opposed to legislatures, see Philip Pettit, *Deliberative Democracy, the Discursive Dilemma, and Republican Theory*, in *DEBATING DELIBERATIVE DEMOCRACY* 138, 138 (James S. Fishkin & Peter Laslett, eds., 2003).

¹⁴⁰ See, e.g., DAVID BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2001); Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 *UNIV. CHI. L. SCH. ROUNDTABLE* 17 (1997); William B. Fisch, *Constitutional Referendum in the United States of America*, 54 *AM. J. COMPAR. L.* 485, 494–97 (2006).

¹⁴¹ See, e.g., Gabriel L. Negretto, *Democratic Constitution-Making Bodies: The Perils of a Partisan Convention*, 16 *INT’L J. CONST. L.* 254, 255 (2018). This possibility is consistent with earlier research demonstrating a tendency for deliberative and other direct democracy mechanisms to reproduce patterns of hierarchy and privilege. See Lynn M. Sanders, *Against Deliberation*, 25 *POL. THEORY* 347, 347–48 (1997).

¹⁴² See, e.g., David Landau, *Constitution-Making Gone Wrong*, 64 *ALA. L. REV.* 923, 925–26 (2013); see also William Partlett, *The Dangers of Popular Constitution-Making*, 38 *BROOK. J. INT’L L.* 193, 196 (2012).

¹⁴³ See, e.g., Maciej Bernatt & Michal Ziolkowski, *Statutory Anti-Constitutionalism*, 28 *WASH. INT’L L.J.* 487, 488, 491–92 (2019) (demonstrating how statutes have been used as tools of constitutional erosion in Poland); Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 14 *L. & ETHICS HUM. RTS.* 49, 51 (2020) (demonstrating how changes to executive accountability mechanisms have been used as tools of constitutional erosion in India).

amendment with the same objective.¹⁴⁴ As a result, an important check on possible efforts to dismantle the constitutional order is thereby weakened.

These risks are not insignificant, particularly for newer and less stable democracies, and especially those with constitutions that are easily amended. In recent years, even as these developments in have been underway, there have been increasing demands for more direct forms of public input in constitutional law-making processes.¹⁴⁵ These developments, although highly varied, are driven by a widely shared premise that constitutional law's claim to authority and legitimacy is grounded in its claim to embody the principle of popular sovereignty. However, even if this premise is accepted as a matter of constitutional theory, it is suggested that there are good reasons for questioning whether the implications of this premise for *framing* a constitution are the same as those for *amending* a constitution—or, indeed, even for all instances of amending. Not all drafting tasks are the same.

Originalism does not contain these risks for constitutional resilience because it does not privilege the popular will in this way. As we have seen, broader considerations that go to the “democratic” character of the drafting process do not necessarily give greater weight to amenders’ understanding. Although there may be other good reasons for building forms of popular engagement into the drafting process, what matters for the purpose of evaluating the weight of amenders’ understanding as a source of constitutional meaning is not the degree to which the drafting process is describable as a manifestation of an unfettered “popular will.” What matters is the extent to which the forms of popular engagement that are used are *suitable* for the particular drafting task posed by the amendment in question. Moreover, originalism clearly does not favor informal methods of constitutional change: indeed, an originalist approach to constitutional interpretation creates strong incentives for using formal amendment, as informal methods are almost always regarded as illegitimate.¹⁴⁶

¹⁴⁴ This is the type of example that Roznai appears to have in mind in discussing Bruce Ackerman's “constitutional moments,” suggesting that at least some of these episodes ought to be understood as the emergence of the primary constituent power. ROZNAI, *supra* note 2, at 127–28. The implication is that courts are justified in consolidating these via constitutional interpretation, and perhaps ought to do so.

¹⁴⁵ See, e.g., Zachary Elkins et al., *The Citizens as Founder: Public Participation in Constitutional Approval*, 81 TEMP. L. REV. 361 (2008).

¹⁴⁶ See discussion *supra* Section I.B.

These points of difference suggest that an originalist approach to constitutional interpretation, once supplemented by the approach to amendment developed in this Article, could provide an alternative to implicit unamendability doctrines. Although this possibility cannot be fully examined here, I want to conclude with the suggestion that it is a topic that ought to be pursued in the scholarly literature on these issues.

In making this suggestion, however, it should be acknowledged that there is a sense in which originalism is not a *true* alternative: it is first and foremost a method of constitutional interpretation, and not a method of constraining the amending power through judicial review. The substantive constraints on the amending power that originalism can generate are therefore much more limited both in content and in operation. The content of those constraints is limited to a conception of constitutional identity that consists solely in considerations of constitutional text, structure, and drafting context. Moreover, the operation of those constraints is that of an interpretive presumption, or “clear statement rule,” applied in a manner that is analogous to the principle of legality. As such, there is nothing that prevents the amenders from overriding original understanding, so long as they do so clearly and openly, meaning that the intended effect of the amendment must be clear from its text, read in light of its drafting context.

On this basis, one might object that originalism is simply too limited in scope to provide an effective constraint on the kinds of abuses of the amending power that have generated the rise of and interest in implicit unamendability doctrines. It is true that an originalist approach to amendment is more limited in these ways. Nevertheless, in response to this objection, it can be observed that these limitations in scope may also contain advantages over implicit unamendability: addressing the two key concerns noted above that critics often cite against adopting this set of doctrines, while simultaneously providing a real constraint on abuse of the amending power.

Starting with the content of its constraints on amendment, originalism’s more limited conception of constitutional identity is arguably less likely to generate intractable debates than implicit unamendability doctrines. As discussed, a key difficulty with the application of implicit unamendability doctrines is how courts determine which elements of a constitution count as “fundamental” or “basic” for the purpose of enlivening judicial

review.¹⁴⁷ This determination turns on views about the nature of the amending power, the character of the constitution being interpreted, and constitutionalism itself. These issues are contestable and not easily resolved as they reflect different normative understandings. As such, they are apt to produce irreconcilable disagreement.

An originalist approach to amendment avoids some of these difficulties. The central determination used to address conflicts between drafters' understandings, which functions as the source of constraints on amendment, is what falls within the constitution's "core." This determination turns on views about the best account of constitutional text and structure in light of drafting context. The focal point is thus on the framing as an actual historical event, and not as a conceptual construct. It is a determination that requires examining empirical materials that provide evidence about the framing as a drafting task.

This is not to deny the possibility of disagreement. However, the disagreement purports to be predominantly empirical and historical rather than normative and philosophical, and thus at least potentially resolvable through relying on publicly available records, reports, and other documentation. Moreover, the set of enquiries is confined to a relatively narrow range of issues concerning drafting context and relies on familiar extrinsic sources, as both of the examples considered in this Article illustrate. As such, in addition to being less apt to produce intractable disagreement, originalism may also be easier for courts to apply and produce greater clarity than implicit unamendability doctrines. This may be especially true in countries with newer constitutions, where the framing is relatively recent and where evidentiary materials providing information about the drafting context may thus be more readily available and more reliable. This is significant when it has more commonly been countries with newer constitutions that have needed to limit the amending power to prevent abuse.

Turning to the operation of originalism's constraints on amendment, by functioning as a "clear statement rule" for successful formal amendment, originalism thereby produces constraints on the amending power that are less likely to raise concerns about judicial activism or a democracy-deficit of the kind that attend implicit unamendability. At the same time, although originalism's interpretive presumptions are more

¹⁴⁷ See *supra* notes 128–139 and accompanying text.

limited in scope than implicit unamendability's strict constraints, they are nevertheless capable of curbing abusive amendment by making it more difficult for autocrats and authoritarians to pursue stealth tactics. Studies showing how amendment has and can be used to dismantle a constitutional order suggest that abusive uses of the amending power often occur undetected, either due to deliberate obfuscation and misinformation, or else due to pursuing constitutional changes that are "highly technical and therefore hard for the ordinary citizen to understand."¹⁴⁸ In these circumstances, the intended effect of the amendment is unlikely to be expressed with the degree of clarity—either in the text produced, or in the information that is made publicly available, or both—that is needed to overcome the interpretive presumption in favor of original understanding. This is particularly so in instances of amendment that go to the "core," where that presumption is at its strongest.

By contrast, it is not obvious that implicit unamendability has the resources to "smoke out" stealth tactics because it permits changes to "basic" or "fundamental" constitutional elements to have their intended effect so long as they utilize maximally popular procedures (in the case of formal amendment) or, alternatively, where courts deem external developments that change the operation of the constitutional system to have credentials as an expression of the "popular will" (in the case of informal amendment). It may be the case that stealth tactics or highly technical and difficult to understand amendments are unlikely to meet this criterion. As discussed above, however, the "popular will" is highly manipulable, particularly by motivated populists.

Although admittedly much more limited in scope as a method of constraining formal amendment *ex post*, originalism has the resources to prevent this from occurring at all. If populists wish to alter features that go to a constitution's core, then they cannot rely on informal tactics: they must use the formal amendment procedure. Moreover, they must do so clearly: by producing text that conveys the amendment's intended effect and, where the text leaves room for interpretive disagreement, by making information about the objective and aims of the proposed constitutional changes publicly available. Insofar as an originalist approach to amendment requires transparency about the impact of an amendment on existing constitutional arrangements and avoiding public misinformation or obfuscation, it may well prevent stealth

¹⁴⁸ Scheppele, *supra* note 122, at 582.

tactics from successfully producing constitutional change in the first place. At the very least, originalism does not allow them to succeed on the basis of efforts to characterize constitutional change as an expression of the popular will.

CONCLUSION

This Article has identified a problem that formal amendment uniquely presents for originalism that has been overlooked by scholarship to date, and it has developed an originalist approach to that problem. In doing so, the analysis set forth above not only provides an important missing component of originalist interpretive theory, but helps resituate the place of originalism in contemporary constitutional law and theory. Despite the great volume and depth of scholarship on originalism, the grounds of enquiry have been framed rather narrowly, with a focus on refining technical aspects of the theory that may have little import beyond scholarly debates. For many, this frame has made originalism appear to be of predominantly academic interest, particularly among American law professors¹⁴⁹—with perhaps a fleeting curiosity for the American public—where the view holds sway in debates about U.S. Supreme Court.¹⁵⁰

This Article's analysis suggests otherwise. By adopting a broader perspective that brings originalism into conversation with contemporary debates in constitutional law about the amending power, it has demonstrated why originalism holds interest beyond these narrow scholarly debates. The two central examples, drawn from the United States and Australia, show that constitutional amendment presents real interpretive challenges even in countries with very old constitutions that have proven difficult to amend. Originalism holds sway with courts and jurists in both jurisdictions as a prominent, albeit often dissenting view in the United States, and as a fairly mainstream though less vigorously defended view in Australia.¹⁵¹ As such, this Article provides an important set of analytical tools that are

¹⁴⁹ Mark Tushnet, *Academic Constitutional Theory and Judicial Constitutional Practice*, BALKINIZATION (Oct. 31, 2019, 9:34 AM), <http://balkin.blogspot.com/2019/10/academic-constitutional-theory-and.html> [<http://perma.cc/C22W-CANA>] (noting a tendency to focus on technical distinctions and other refinements, and observing that “communicating to outsiders their importance in making originalist theory coherent is, for all practical purposes, impossible”). Although Tushnet is making a general point about scholarly debates in constitutional theory, he singles out originalism in particular as an area of inquiry with limited relevance beyond the debate's interlocutors. *Id.*

¹⁵⁰ See Jamal Greene et al., *Profiling Originalism*, 111 COLUM. L. REV. 356, 357 (2011); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659 (2009).

¹⁵¹ See Weis, *supra* note 5, at 849.

needed for the application of originalism to be defensible, coherent, and effective, and which the theory currently lacks.

Perhaps more significantly, the originalist approach to amendment developed here suggests several reasons why originalism may be attractive to those who have concerns about the use of formal amendment to erode core aspects of constitutional structure that are designed to secure governance under the rule of law, but who are simultaneously dissatisfied with implicit unamendability doctrines as a tool for preventing and addressing such abuses. This Article's analysis draws attention to a critical weakness of implicit unamendability in this regard: namely, its reliance on a criterion of popular sovereignty to prescribe the scope of constraints on amendment, which makes such doctrines vulnerable to exploitation by populist autocrats and authoritarians. Although originalism provides a more modest and limited set of constraints on the amending power, it is less vulnerable to this and other criticisms of implicit unamendability approaches because the constraints that it places on amendment are generated using a criterion that is based on textual considerations.

This has material implications for constitutional practice throughout the world, as a variety of constitutional systems, especially newer democracies, are increasingly facing such internal threats. Insofar as an originalist approach to amendment is an aspect of an integrated theory of constitutional meaning and approach to constitutional interpretation, then, this Article's analysis may assist in invigorating and broadening interest in what may otherwise appear to be a set of well-worn academic debates that are mainly of parochial concern.

The Fair Housing Problem with Accessory Dwelling Units in California

*Kylene B. Hernandez**

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“History shows that settled compromises endure.”¹

INTRODUCTION

California and unaffordability are effectively synonymous. *Living* in California is a misnomer for most people, and to say one is *surviving* in California is even a stretch. With an exceptionally high cost of living and not enough housing to meet the needs of the state’s total population,² it is no wonder that “even California’s least expensive housing markets are more expensive than [the national] average.”³ As California’s housing crisis continues to worsen,⁴ housing advocates continue to push forward innovative strategies to create “new housing units for all income levels” throughout the state.⁵ One recent strategy is the building of accessory dwelling units (“ADUs”).⁶

While there is great potential for ADUs to increase the housing supply, and this potential is only heightened due to the

¹ Robin Fretwell Wilson, *Bargaining for Civil Rights: Lessons from Mrs. Murphy for Same-Sex Marriage and LGBT Rights*, 95 B.U. L. REV. 951, 973 (2015).

² See *Addressing a Variety of Housing Challenges*, CAL. DEPT OF HOUS. & CMTY. DEV., <http://www.hcd.ca.gov/policy-research/housing-challenges.shtml> [http://perma.cc/8P74-PZEN] (last visited Feb. 7, 2022) (revealing that California needs to produce 180,000 additional homes annually to meet the state’s housing needs); Noah Buhayar & Christopher Cannon, *How California Became America’s Housing Market Nightmare*, BLOOMBERG (Nov. 6, 2019), <http://www.bloomberg.com/graphics/2019-california-housing-crisis/> [http://perma.cc/6EH8-V4CR] (suggesting that California needs millions of new homes to solve its housing crisis, a feat which likely will not be accomplished until 2050).

³ See MAC TAYLOR, CALIFORNIA’S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES 3, 7 (2015), <http://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf> [http://perma.cc/66QX-YJ9Q] (“Today, an average California home costs \$440,000, about two-and-a-half times the average national home price (\$180,000). Also, California’s average monthly rent is about \$1,240, 50 percent higher than the rest of the country (\$840 per month).”).

⁴ See SARAH MAWHORTER & CAROLINA REID, LOCAL HOUSING POLICIES ACROSS CALIFORNIA: PRESENTING THE RESULTS OF A NEW STATEWIDE SURVEY 5–6 (2018), http://californialanduse.org/download/Terner_California_Residential_Land_Use_Survey_Report.pdf [http://perma.cc/7WEG-76FE].

In August 2018, a two bedroom, 1,100-square-foot townhome in San Jose listed for \$1.1 million. A one bedroom, 650-square-foot apartment in Oakland rents for \$3,090 per month. Increasing housing prices have touched jurisdictions across California: over the past two years, rents have increased by 26 percent in Sacramento, 23 percent in Long Beach, and 28 percent in Stockton. The need for more housing is visible in nearly all communities in the state. One obvious solution to this problem is to encourage more housing construction, but this is often harder than it sounds.

Id.

⁵ See DAVID GARCIA, ADU UPDATE: EARLY LESSONS AND IMPACTS OF CALIFORNIA’S STATE AND LOCAL POLICY CHANGES (2017), http://ternercenter.berkeley.edu/wp-content/uploads/pdfs/ADU_Update_Brief_December_2017_.pdf [http://perma.cc/N8AR-WMGV].

⁶ See *id.* (“Since 2015, there has been significant progress in clearing the way for more ADUs in California in the state legislature.”).

many incentives offered to private homeowners in doing so,⁷ crucial first steps must take place. Specifically, homeowners must want to build an ADU, have the financial means to do so,⁸ take steps to begin construction, and then *choose what kinds of people will be living in their own backyard*.⁹ Unfortunately, most of the literature on ADUs neglects this final piece of the puzzle. This Note sets out to fill that gap by considering ADUs in the context of both state and federal fair housing laws.

According to one scholar, the Fair Housing Act of 1968¹⁰ is “the least successful of the civil rights acts.”¹¹ While hoping that “[o]vercoming discrimination that denied protected classes residency in high-opportunity areas would produce integrated communities of more equal opportunity. The problem has been that discrimination has matured in less recognizable ways and segregation has calcified, leading to more concentrated poverty, re-segregation and widening economic inequality.”¹²

As this Note will argue, current fair housing laws are inadequate and ineffective when considering modern housing relationships, primarily as a result of carefully carved out exemptions within those fair housing laws which were designed to address housing discrimination in the traditional real estate market.¹³ ADUs drastically change the contextual landscape of fair housing laws: private homeowners will be the landlords of a sectioned-off portion of land zoned for single-family use, while simultaneously maintaining permanent residence on the same parcel of land. Therefore, current fair housing laws might render the purpose of ADUs moot if homeowners will discriminate based on race. In the alternative, people may discriminate based on

⁷ See, e.g., CITY OF SANTA CRUZ ECON. DEV. HOUS. & CMTY. DEV. DIV., 2019 ACCESSORY DWELLING UNITS: FEE WAIVER INFORMATION AND APPLICATION 1 (2019), <http://www.cityofsantacruz.com/home/showpublisheddocument?id=80873> [<http://perma.cc/V9ZU-YQKK>].

⁸ See KAREN CHAPPLE ET AL., ADUS IN CA: A REVOLUTION IN PROGRESS 15 (2020), <http://www.aducalifornia.org/wp-content/uploads/2020/10/ADU-Progress-in-California-Report-October-Version.pdf> [<http://perma.cc/R4VT-XV57>].

In Los Angeles, the average cost estimate is \$148,000 while in the San Francisco Bay Area it is \$237,000 In fact, ADU construction costs in the Bay Area can exceed \$800 per square foot, equaling \$400,000 for a 500 square foot ADU. The lower cost of construction could make ADU construction in Los Angeles more accessible for lower-income homeowners

Id.

⁹ See *id.* at 18.

¹⁰ See Fair Housing Act of 1968, Pub. L. No. 90-284, § 801, 82 Stat. 73, 81 (codified as amended in 42 U.S.C. §§ 3601–3619).

¹¹ David D. Troutt, *Inclusion Imagined: Fair Housing as Metropolitan Equity* 1 (Rutgers Sch. of L. Newark Rsch. Paper No. 152, 2016), <http://ssrn.com/abstract=2777563> [<http://perma.cc/FZU4-BU7W>].

¹² *Id.*

¹³ See discussion *infra* Part III.

socioeconomic status (“SES”), which will undoubtedly have a racial impact.¹⁴ To provide an adequate opportunity for ADUs to fulfill their intended purpose, the questions presented by this Note must first be answered.

Part I defines ADUs and places them in the context of the housing crisis by summarizing recent housing legislation and providing preliminary data on ADUs in California. Part II offers a necessary history of California’s housing crisis as it currently exists. I first touch on the current state of affairs in California, providing elemental data so as to understand the urgency of the crisis. Then I consider California’s problematic obsession with exclusionary zoning practices and how they intersect with America’s long history of residential racial segregation. Historically marginalized groups, particularly black Americans, are among the most vulnerable in California’s critical housing market. Thus, housing discrimination becomes a necessary point for discussion. Part III dissects both state and federal fair housing laws in order to identify how ADUs will fit into the legal framework. The defects in federal law coupled with the uncertainty of California state law leads to a probable finding that private homeowners will be able to engage in both overt and subtle modes of racial discrimination in the rental of ADUs. In recognizing the need for change, Part IV demands that housing reform continue within California, and that the outdated exemptions in both state and federal fair housing law need to seriously be reconsidered in light of 21st century housing relationships.

I. ADUS: A GENERAL BACKGROUND

ADUs, colloquially known as “granny flats” or “in-law units,” are located on the property of a single-family home but cannot be sold separately from the main house. Typically located in converted garages, backyards, or basements, ADUs provide a “low-cost means of increasing local housing supply” simply by utilizing an existing attached or standalone building.¹⁵ The cost of the ADU, and the subsequent rental price, will predominantly depend on the design, options, and size.¹⁶ For example, converting a garage into an ADU in Orange County, California will cost anywhere from \$70,000 to

¹⁴ See generally Jesus Hernandez, *Race, Market Constraints, and the Housing Crisis: A Problem of Embeddedness*, 1 KALFOU: J. COMPAR. & RELATIONAL ETHNIC STUD. 29, 52–53 (2014) (arguing that “economic relations are clearly fused with social content,” whereby exclusionary market practices have created a hierarchy in which economics and race are highly correlated).

¹⁵ CHAPPLE ET AL., *supra* note 8, at 7.

¹⁶ See *The New 2022 Orange County Granny Flat and Garage Conversions Guide*, GREATBUILDZ, <http://www.greatbuildz.com/blog/orange-county-granny-flat-adu-guide/> [<http://perma.cc/G26X-C2PW>] (last visited Mar. 26, 2022).

\$120,000.¹⁷ In the alternative, total ground-up construction in the same area will more likely be in the \$100,000 to \$400,000 range.¹⁸ While ADUs were once very prevalent throughout the country,¹⁹ support for ADUs and their implementation throughout California has only recently begun.²⁰ This is partially due to the state legislature's commitment back in 2016 to lay a strong "foundation for a proliferation of ADUs statewide."²¹ Unfortunately, notwithstanding awareness of the immediacy of the housing crisis,²² change was slow. But in the latter half of 2019, the California Legislature took a crucial step by adopting some of the most significant housing legislation ever passed.

In an effort to address the "issue of affordability . . . head on[.]"²³ Governor Newsom, in August and October of 2019, signed into law a series of bills to lift local restrictions on the building of ADUs.²⁴ For a long time, "cities hostile to the Californian dream of affordable housing . . . have found ways to ban [ADUs]."²⁵ Now, if local ordinances make it difficult to fit an ADU on property zoned for single-family use, these new state laws all but "guarantee each home one backyard detached ADU, and potentially a small Junior ADU ["JADU"] converted from existing space like a garage."²⁶ The following is a brief, superficial discussion of each of the four critical bills.

The general purpose of each bill is the same: to remove many of the barriers to developing ADUs, for they are a crucial form of housing production that can be part of the solution to California's

¹⁷ *See id.*

¹⁸ *See id.*; KAREN CHAPPLE ET AL., IMPLEMENTING THE BACKYARD REVOLUTION: PERSPECTIVES OF CALIFORNIA'S ADU OWNERS 3 (Apr. 22, 2021), <http://www.aducalifornia.org/wp-content/uploads/2021/04/Implementing-the-Backyard-Revolution.pdf> [<http://perma.cc/7TKN-SWNT>] ("The median statewide construction cost of an ADU is \$150,000.")

¹⁹ *See* John Infranca, *Housing Changing Households: Regulatory Challenges for Micro-Units and Accessory Dwelling Units*, 25 STAN. L. & POL'Y REV. 53, 54 (2014).

²⁰ *See* CHAPPLE ET AL., *supra* note 8, at 5.

²¹ GARCIA, *supra* note 5.

²² *See infra* Table 1.

²³ Sophia Bollag, *Governor Signs California Housing Laws on Granny Flats, Zoning*, SACRAMENTO BEE, Oct. 10, 2019, at 9A.

²⁴ *See Governor Newsom Signs Legislation 8.30.19*, OFF. OF GOVERNOR GAVIN NEWSOM (Aug. 30, 2019), <http://www.gov.ca.gov/2019/08/30/governor-newsom-signs-legislation-8-30-19/> [<http://perma.cc/9QUD-X5HU>]; *Governor Gavin Newsom Signs 18 Bills to Boost Housing Production*, OFF. OF GOVERNOR GAVIN NEWSOM (Oct. 9, 2019), <http://www.gov.ca.gov/2019/10/09/governor-gavin-newsom-signs-18-bills-to-boost-housing-production/> [<http://perma.cc/2Q8U-AD3J>].

²⁵ *Let's Triplexize California*, CAL. RENTERS LEGAL ADVOC. & EDUC. FUND [hereinafter *Triplexize*], <http://carlaef.org/adus/> [<http://perma.cc/GS7Z-YB2Y>] (last visited Mar. 1, 2022); *see also* discussion *infra* Section II.B.

²⁶ *Triplexize*, *supra* note 25.

housing crisis.²⁷ AB 68 and AB 881 have significant overlap, and because of this, they were consolidated into one bill.²⁸ Generally speaking, these two bills remove many of the barriers and restrictions that local governments have placed on the building of ADUs.²⁹ Additionally, SB 13 prohibits owner-occupancy requirements and reduces the financial and related costs for homeowners who choose to build ADUs.³⁰ Finally, AB 670, signed into law by Governor Newsom on August 30, 2019, prevents homeowners' associations from "banning or unreasonably restricting on single-family lots on the construction of [ADUs]."³¹ Together AB 68, AB 881, and SB 13 amend section 65852.2 of the Government Code,³² which will go into effect on January 1, 2025.³³

As a preliminary matter, it is important to recognize why ADUs are so appealing to the California Legislature. In a state crippled by such grave opposition to denser housing options (i.e., apartment complexes and other forms of multi-family housing), ADUs can neutralize homeowner opposition by allowing them to profit from new development in their very own backyard. ADUs are a potential solution to the statewide fear of high-rise complexes by adding only gentle density rather than completely dismantling California's strict adherence and preference for single-family zoning.³⁴ Indeed, 92% of all ADUs are built on land zoned for single-family residential housing.³⁵ By removing some of the barriers to ADU development and permitting one ADU and one

²⁷ See Assemb. 68, 2019–2020 Reg. Sess. (Cal. 2019); Assemb. 881, 2019–2020 Reg. Sess. (Cal. 2019); S. 13, 2019–2020 Reg. Sess. (Cal. 2019); Assemb. 670, 2019–2020 Reg. Sess. (Cal. 2019); *Accessory Dwelling Unit Handbook*, CAL. DEPT OF HOUS. & CMTY. DEV. 8 (Dec. 2020), http://www.hcd.ca.gov/policy-research/docs/adu_december_2020_handbook.pdf [<http://perma.cc/4RKC-W9BV>].

[T]he California Legislature found and declared that, among other things, California is facing a severe housing crisis and ADUs are a valuable form of housing that meets the needs of family members, students, the elderly, in-home health care providers, people with disabilities and others. Therefore, ADUs are an essential component of California's housing supply.

Id.

²⁸ See Benjamin Donel, *California's New Accessory Dwelling Units Laws: What You Should Know*, FORBES (Mar. 12, 2020, 8:30 AM), <http://www.forbes.com/sites/forbesfinancecouncil/2020/03/12/californias-new-accessory-dwelling-units-laws-what-you-should-know/?sh=51f27d317a30> [<http://perma.cc/8FZY-4THV>].

²⁹ See *id.* (pointing out that approval time and size requirements were some of the critical barriers to building ADUs prior to the passage of these bills).

³⁰ See *id.*

³¹ *Id.* ("Presently, many HOAs have CCRs ('conditions, covenants and restrictions') that prevent people from building ADUs Regardless, HOAs now need to have a way for people to construct ADUs if they so choose.")

³² See Assemb. 68, 2019–2020 Reg. Sess. (Cal. 2019); Assemb. 881, 2019–2021 Reg. Sess. (Cal. 2019); Assemb. 13, 2019–2020 Reg. Sess. (Cal. 2019).

³³ See CAL. GOV. CODE § 65852.2.

³⁴ See generally discussion *infra* Section II.B.

³⁵ See CHAPPLE ET AL., *supra* note 8, at 15.

JADU on single-family parcels, this legislation has basically tripled the zoning capacity in California areas zoned as single-family. Thus, the *potential* of ADUs in fulfilling their intended purpose is extraordinary, especially considering that two-thirds of California cities and counties “perceive a strong appetite among homeowners to add ADUs to their properties.”³⁶

Despite the recency of the bills, initial studies and literature give us an initial sense of where ADUs are taking us within the context of the housing crisis. First, the number of ADU permits issued in California increased by over 150% between 2018 and 2019,³⁷ and actual ADU completions more than tripled over the same time period.³⁸ According to a 2020 study, 87% of surveyed California jurisdictions indicated they had adopted an ADU ordinance.³⁹ And the majority of these jurisdictions did so between 2017 and 2020.⁴⁰ Furthermore, between 2018 and 2019, the counties with the highest rates of actual ADU production were Los Angeles, Santa Clara, and San Diego (some of the cities most in need of additional housing supply).⁴¹ In fact, the overall trend in California is that ADU production is occurring in “diverse, transit-accessible neighborhoods where a greater share of homeowners have recently purchased their homes and still have a mortgage.”⁴² Nevertheless, those homeowners with high home values are far more likely to be the ones constructing ADUs.⁴³ Finally, lack of space is not a primary motivator in

³⁶ See Andrew Hall, *Much Ado About ADUs: New Legislation and Emerging Legal Issues from California’s Attempt to Create Affordable Housing*, 39 CAL. REAL PROP. J. 25, 33 (2021) (internal citation omitted).

³⁷ See CHAPPLE ET AL., *supra* note 8, at 5; see also HALL, *supra* note 36, at 30 (“ADU permits and, more importantly, completions have skyrocketed over the past few years. While there were 5,911 ADU permits issued in 2018, a whopping 15,571 were issued in 2019. Moreover, ADU *completions* jumped from 1,984 in 2018 to 6,668 in 2019.”) (internal citations omitted); Haisten Willis, *Accessory Dwellings Offer One Solution to the Affordable Housing Problem*, WASH. POST (Jan. 7, 2021), http://www.washingtonpost.com/realestate/accessory-dwellings-offer-one-solution-to-the-affordable-housing-problem/2021/01/07/b7e48918-0417-11eb-897d-3a6201d6643f_story.html [<http://perma.cc/9MNT-6HF2>] (“In California, legislative changes helped pave the way for an 11-fold increase in ADU permits between 2016 and 2019 Los Angeles alone issued 15 ADU permits in 2013, 80 in 2016, then 2,342 in 2017 and 6,747 in 2019.”). It is important to note that this data pre-dated the new legislation, meaning these numbers are only going to keep rising.

³⁸ CHAPPLE ET AL., *supra* note 8, at 13.

³⁹ *Id.* at 12.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 15; see also Kristen Kopko & Andrew Warfield, *ADU Case Study—Pre-Approved ADUs: A Tool for Revitalizing California’s Affordable Housing Struggle*, UC RIVERSIDE, <http://icsd.ucr.edu/case-study-adu> [<http://perma.cc/5G8P-43ND>] (last visited Mar. 13, 2022) (analyzing a pre-approved ADU program in Encinitas, California as well as presenting policy recommendations for other counties throughout California).

⁴³ See CHAPPLE ET AL., *supra* note 8, at 16.

choosing to build an ADU, for almost 70% of ADUs are built on parcels where the main house has at least three bedrooms.⁴⁴

With all this data in mind, the California Legislature maintains that ADUs will play a vital role in alleviating the state housing crisis. These are not massive, multi-family buildings that will disrupt the residential character of neighborhoods. And the laws are not intended do so either. Instead, the new legislation is supposed to alleviate the burden on homeowners and make it easier to increase the supply of ADUs by reducing the ability of local governments to say no as they have historically done in the past.⁴⁵ California, like other states, is “increasingly willing to preempt local government[]”⁴⁶ in the face of its deepening housing crisis. Not only have researchers estimated that ADU units across the state “could account for approximately 40% of the state’s housing need,”⁴⁷ adding an ADU will generate monthly income and increase the resale value of property.⁴⁸ Thus, there is a mutual benefit in utilizing ADUs that makes them far more desirable than alternative housing policies.

At the same time, there is still significant and warranted uncertainty: will ADUs *actually* provide fair and affordable housing? For example, it may be that cities are simply going to rely on ADUs to meet their regional housing needs. In 1969, the California Legislature enacted a law requiring “all local governments (cities and counties)” to “adequately plan to meet the housing needs of everyone in the community.”⁴⁹ Despite the Housing and Community Development (“HCD”) utilizing a specialized formula to arrive at each local government’s regional

⁴⁴ See *id.* at 15.

⁴⁵ See Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1068 (2017) (“Although [land use] is often considered a ‘traditional’ local concern, the record of local governments using their authority therein to exclude ‘undesirable’ uses, like low-income housing, is legion.”).

⁴⁶ John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 829 (2019).

⁴⁷ See CHAPPLE ET AL., *supra* note 8, at 7; see also *New Poll Finds that 25% of Homeowners Would Add an In-Law Unit, Creating 400,000 New Affordable Housing Units*, BAY AREA COUNCIL (Apr. 12, 2017), <http://www.bayareacouncil.org/community-engagement/new-poll-finds-that-25-of-homeowners-would-add-an-in-law-unit-creating-400000-new-and-affordable-housing-units/> [<http://perma.cc/E954-JD2L>] (finding that an ADU added to just 10% of the 1.5 million single-family properties in the Bay Area would add 150,000 new units).

⁴⁸ See *How Much Value Does an ADU Add?*, ARCHITECTS LA (Jan. 27, 2021), <http://architectsla.com/how-much-value-does-adu-add/> [<http://perma.cc/7KBC-QBC4>] (“[D]etached ADUs, in particular, have the potential to increase your property value by a whopping 20–30%.”).

⁴⁹ See *Regional Housing Needs Allocation*, CAL. DEP’T OF HOUS. AND COMTY. DEV., <http://www.hcd.ca.gov/community-development/rhna/index.shtml> [<http://perma.cc/86Y9-J8SD>] (last visited Feb. 8, 2022); see also CAL. GOV. CODE § 65584.

housing needs assessment (“RHNA”), even the HCD notes that this is a “general plan” that is to serve as a mere “blueprint.”⁵⁰ Thus, the RHNA calculations is simply theoretical: the local governments do not have to build the housing, they must simply have the theoretical capability to accommodate the housing needs. Indeed, studies have shown that there is often “no measurable relationship between compliance [with RHNA requirements] and overall housing production.”⁵¹ Thus, even if California is becoming a lot more serious about requiring cities to make plans to accommodate thousands of new housing units by relying on ADUs,⁵² the fact remains that compliance with RHNA includes identifying sites for new housing that may have little to no chance of ever being developed.⁵³

There are other barriers to the actual implementation of ADUs⁵⁴ and their subsequent use as affordable housing. According to a survey provided to Los Angeles County residents, 50% of respondents said they were either unlikely or highly unlikely to add an ADU to their property.⁵⁵ Indeed, only “half of California’s new ADUs serve as income-generating rental units,” whereas 18% serve as no-cost housing to friends or relatives of the homeowner.⁵⁶ Not to mention the fact that the average square footage of ADUs recently built in California is *just 615 square feet*.⁵⁷ This uncertainty as to the efficacy of constructing ADUs in a manner to actually increase the affordable housing supply is only exacerbated by unanswered questions regarding legal framework of ADUs. For purposes of this Note, the most relevant issue deals with who will be occupying these ADUs,

⁵⁰ See *Regional Housing Needs Allocation*, *supra* note 49.

⁵¹ See PAUL G. LEWIS, CALIFORNIA’S HOUSING ELEMENT LAW: THE ISSUE OF LOCAL NONCOMPLIANCE 69 (2003).

⁵² See *generally* SCAG REGIONAL ACCESSORY DWELLING UNIT AFFORDABILITY ANALYSIS, SCAG 1 (2020), http://scag.ca.gov/sites/main/files/file-attachments/adu_affordability_analysis_120120v2.pdf?1606868527 [<http://perma.cc/AM7G-LEZW>] (“Government Code section 65583.1 details how jurisdictions may consider alternative means of meeting RHNA beyond vacancy and underutilized sites. The potential for [ADUs] or [JADUs] is one of these available alternative means.”).

⁵³ *But see id.* (“A jurisdiction must include an analysis of the anticipated *affordability* of ADUs in order to determine which RHNA income categories they should be counted toward.”) (emphasis added).

⁵⁴ See CHAPPLE ET AL., *supra* note 8, at 18 (recognizing financial barriers, lack of desire and awareness, and total disinterest in becoming a landlord as primary concerns).

⁵⁵ See YAMILLET BRIZUELA, ASSESSING THE UNTAPPED HOUSING CAPACITY IN LA COUNTY RESIDENTIAL NEIGHBORHOODS, 31–34 (2020) (revealing responses such as: “I don’t want to deal with living with other people on the same property. This is why I moved out of apartments,” “I would rather find other avenues to help with housing. I don’t want strangers on my property,” and “there is a level of discomfort in having a stranger live in your backyard”).

⁵⁶ See *About Accessory Dwelling Units*, ADU CAL., [http://www.aducalifornia.org/#:~:text=\(APR\)%20data-,ADU%20production,to%20the%20state's%20housing%20supply](http://www.aducalifornia.org/#:~:text=(APR)%20data-,ADU%20production,to%20the%20state's%20housing%20supply) [<http://perma.cc/WU2K-6Y7N>] (last updated Aug. 16, 2021).

⁵⁷ See CHAPPLE ET AL., *supra* note 8, at 15.

rather than who will have the means to build them. But before diving into the legal problem that this Note sets out to unveil, an overview of California's current housing environment is necessary.

II. CALIFORNIA'S HOUSING CRISIS AS IT EXISTS TODAY

The housing crisis and lack of affordability are not issues limited to California. However, the unparalleled cost of living in the state, coupled with judicially sanctioned local housing restrictions and legislative deadlock make California unique in the crippling lack of affordable housing. Moreover, because of the many state and federally accepted forms of racial residential segregation, black Californians are uniquely and disproportionately impacted by the wealth disparity and lack of affordable housing in California. The following discussion looks at each of these details in order to demonstrate who is most likely to build ADUS, who is mostly likely to need to rent them out, and the likelihood that these are racially distinct groups.

A. Defining the Housing Crisis

One particular article redefined California's "housing crisis" so as to prevent the further "sapping [of] its urgency."⁵⁸ More specifically, the article noted that there are actually three separate housing crises in California, each affecting a different segment of California's population:

The first and most urgent crisis is the 150,000 homeless Californians sleeping in shelters or on the streets It's the most shameful symptom of how things have gone so wrong here, and is trending in the wrong direction. The second housing crisis involves the 7.1 million Californians living in poverty when housing costs are taken into account. While not homeless, 56% of these low-income Californians see more than half of their paychecks devoured by rising rents. Skewing black and brown, these are the renters who face intense displacement and gentrification pressures, live in overcrowded and unsafe housing conditions, and have fled urban cores for cheaper exurbs over the past two decades. California's third housing crisis afflicts a younger generation of middle-class and higher-income Californians While lower-income Californians have struggled to afford the state for decades, the term "housing crisis" and its attendant publicity really only came into vogue once richer Californians started seriously considering moving [out of California].⁵⁹

⁵⁸ See Matt Levin, *Commentary: Five Things I've Learned Covering California's Housing Crisis that You Should Know*, CAL MATTERS (Jan. 6, 2021), <http://calmatters.org/housing/2021/01/california-housing-crisis-lessons/> [<http://perma.cc/XB3J-VK3T>].

⁵⁹ *Id.*

In necessarily recharacterizing California's housing crisis, this three-pronged approach acknowledges that it is now a problem for everyone. Even those individuals who never thought that they would be forced to "spend half their income on housing" must now "choose between extra space or extra miles for a commute, or decide which landlord to trust in a market with just about everything in their favor."⁶⁰ Indeed, residents in Los Angeles must earn "nearly \$50 an hour" just to afford the *average* monthly rent in the City of Angels.⁶¹ Assuming that this wage earner works a fifty-two-week year at forty hours per week, this means that an annual salary of \$104,000 is the minimum necessary to afford *rent* in this part of southern California. Furthermore, at the end of 2019, the median cost to *buy* a house in California exceeded \$600,000, more than double the national median.⁶²

It seems that the booming economy, gorgeous coastline, unbeatable weather, and excellent food can no longer compete with the extraordinary costs associated with living in California.⁶³ According to a 2019 survey, 53% of all California residents were considering leaving the state due to the high cost of living, with 63% of California's millennials sharing the same sentiment.⁶⁴ The same report noted that California's housing crisis is a greater threat to its economy than any costs associated with healthcare, crime, or higher education combined.⁶⁵ More simply put: there are economic benefits which derive from adequate affordable housing that go beyond putting a roof over someone's head.⁶⁶ So how did we get here? How did we get to a place where, as one scholar puts

⁶⁰ See Liam Dillon, *I've Covered California's Housing Crisis for Years. Living it is a Different Story*, L.A. TIMES (Nov. 4, 2019), <http://www.latimes.com/california/story/2019-11-04/california-housing-crisis-reporter-rent-double-move-sacramento-los-angeles> [<http://perma.cc/85F9-JF8P>].

⁶¹ See Jamie Yuccas, "There's no way out of this": Lack of Affordable Housing Contributes to Los Angeles Homeless Crisis, CBS NEWS (July 5, 2019), <http://www.cbsnews.com/news/homeless-population-los-angeles-county-california-rises-2019-07-05/> [<http://perma.cc/Q5S5-HUUJ>].

⁶² See Buhayar & Cannon, *supra* note 2.

⁶³ See *Addressing a Variety of Housing Challenges*, CAL. DEP'T OF HOUS. & CMTY. DEV., <http://www.hcd.ca.gov/policy-research/housing-challenges.shtml> [<http://perma.cc/UZA4-6NNP>] (last visited Feb. 7, 2022) (finding that "the majority of Californian renters—more than 3 million households—pay more than 30 percent of their income toward rent, and nearly one-third—more than 1.5 million households—pay more than 50 percent of their income toward rent").

⁶⁴ See *2019 Edelman Trust Barometer: Special Report California*, EDELMAN 1, 7 (Jan. 2019), http://www.edelman.com/sites/g/files/aatuss191/files/2019-02/2019_Edelman_Trust_Barometer_Special_Report_California_0.pdf [<http://perma.cc/555A-8BPN>].

⁶⁵ See *id.* at 8.

⁶⁶ See Jeff Montejano, *The Economic Consequences of California's Housing Crisis*, THE ORANGE CNTY. REG. (June 20, 2019) <http://www.oregister.com/2019/06/20/the-economic-consequences-of-californias-housing-crisis/> [<http://perma.cc/54JF-FFXE>] (referencing a study that reported a state economic loss of over \$140 billion per year due to California's housing shortage).

it, California must shamefully boast that it has “the nation’s highest poverty rates in one of the world’s most successful economies[?]”⁶⁷ Over the years, the answer has become quite clear: local barriers to new housing development not only limiting housing supply, but they continue to “threaten to exacerbate income inequality and stifle GDP growth.”⁶⁸

B. The Real California Nuisance: Unreasonable Obsession with Single-Family Zoning

“Zoning is the quintessential [local] government power.”⁶⁹

When considering local barriers to new housing development, the best place to start is at the Supreme Court. In *Village of Euclid v. Ambler Realty Co.*, the Court held that a zoning ordinance was constitutional because it was supported by a rational basis: separating incompatible uses.⁷⁰ In analogizing with the common-law doctrine of nuisance, the Court stated that governments have the authority to protect the public from undesirable structures and industries.⁷¹ Ambler, a property owner holding land on the west side of the village, sued the municipality after it adopted a comprehensive zoning plan to regulate and restrict the location and size of trade, industries, and apartment homes, as well as the more desirable single-family houses.⁷² Because the zones in which Ambler’s property fell into prohibited him from selling land to a developer, Ambler argued that the zoning ordinance violated constitutional due process rights under the Fourteenth Amendment.⁷³ But the Court disagreed,⁷⁴ and *Euclid’s* acquiescence to unmitigated zoning plans, so long as the locality’s “public interest” is somehow arbitrarily served, has yet to be overturned. Subsequently, California’s own courts followed the

⁶⁷ See Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California’s Housing Crisis*, 24 HASTINGS ENV’T L.J. 21, 23 (2018).

⁶⁸ See Infranca, *supra* note 46, at 826 (citing The White House, Housing Development Toolkit 1, 2 (2016), http://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf) [<http://perma.cc/7H2B-Z2ES>].

Local policies acting as barriers to housing supply include land use restrictions that make developable land much more costly than it is inherently, zoning restrictions, off-street parking requirements, arbitrary or antiquated preservation regulations, residential conversion restrictions, and unnecessarily slow permitting processes. The accumulation of these barriers has reduced the ability of many housing markets to respond to growing demand.

Id.

⁶⁹ Infranca, *supra* note 46, at 825.

⁷⁰ See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926).

⁷¹ See *id.* at 387–88.

⁷² See *id.* at 379–80.

⁷³ See *id.* at 384.

⁷⁴ See *id.* at 390.

Supreme Court's guidance,⁷⁵ and the electorate in the state's largest cities continue to benefit.⁷⁶

The decision in *Euclid* created an unintended but lasting impact: “[t]he entitlements associated with a property right in land [after *Euclid*] became mostly concerned with assuring the homeowner’s security—protecting her from intrusions and changes in the residential environment.”⁷⁷ The Supreme Court was willing to “damage[] the values of certain properties” in order to “promote the values of other properties.”⁷⁸ Thus, California homeowners have a vested property interest, but *only* if they reside in zones designated as single-family residential, and there is little incentive to support new development that might decrease the value of that property right. Instead, maintaining the status quo ensures that these early homeowners will reap the benefits of their long-term investment in real property.⁷⁹ However, other scholars maintain that the exclusionary attitudes of homeowners are far simpler: they want racial and economic uniformity.⁸⁰

⁷⁵ See, e.g., *Miller v. Bd. of Pub. Works*, 234 P. 381, 386 (Cal. 1925) (“[W]e think it may be safely and sensibly said that justification for residential zoning may . . . be rested upon the protection of the civic and social values of the American home.”); *Magruder v. Redwood City*, 265 P. 806, 808 (Cal. 1928) (“The right of municipalities of this state to enact zoning ordinances is now settled beyond any doubt, and has received the sanction of both the [L]egislature and the courts.”); *Lockard v. Los Angeles*, 202 P.2d 38, 42 (Cal. 1949) (assuming that zoning ordinances are “adopted to promote the public health, safety, morals, and general welfare.”); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Porterville*, 203 P.2d 823, 825 (Cal. Ct. App. 1949) (justifying a single-family restrictive zoning ordinance because it “tends to promote and perpetuate the American home and protect its civic and social values.”); *Los Angeles v. Gage*, 274 P.2d 34, 45 (Cal. Ct. App. 1954) (upholding the constitutionality zoning provisions that required nonconforming existing uses to be discontinued within five years because it was a valid exercise of police power).

⁷⁶ See Vivian Ho, *California Housing Bill’s Failure Comes Amid Fierce Debate on How to Solve Crisis*, THE GUARDIAN (Jan. 31, 2020), <http://www.theguardian.com/us-news/2020/jan/31/california-housing-crisis-bill-failure-debate>; Mawhorter & Reid, *supra* note 4, at 13; CHAPPLE ET AL., *supra* note 8, at 27 (finding that 71% of local jurisdictions in California have yet to seriously consider zoning law changes).

⁷⁷ Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 YALE J. ON REGUL. 91 (2011). This protection from intrusion in the zoning sense mirrors the protection of the right to associate under the First Amendment which will be discussed in Part III of this Note.

⁷⁸ See *id.* at 137.

⁷⁹ See generally Kenneth A. Stahl, *Reliance in Land Use Law*, 2013 BYU L. REV. 949, 951–53 (2013) (explaining that homeowners are hostile to new development for fear that their property values will decline with the incorporation of undesirable nuisances).

⁸⁰ See Cecile Murray & Jenny Schuetz, *Is California’s Apartment Market Broken? The Relationship Between Zoning, Rents, and Multifamily Development*, TERNER CTR. FOR HOUS. INNOVATION 4 (July 2019), http://www.brookings.edu/wp-content/uploads/2019/07/20190711_metro_Is-California-Apartment-Market-Broken-Schuetz-Murray.pdf [https://perma.cc/Y2RW-PCGZ]; see also Timothy J. Choppin, *Breaking the Exclusionary Land Use Regulation Barrier: Policies to Promote Affordable Housing in the Suburbs*, 82 GEO. L.J. 2039, 2049 (1994); Hernandez, *supra* note 67, at 22 (finding that more often than not, lawsuits under the California Environmental Quality

In addition to being judicially backed by both the Supreme Court and its own state courts, California's local governments are equally culpable and are often the very tool that homeowners use to perpetuate the maintenance of single-family zoning. Municipalities (contrary to popular belief that the state government needs to just step in to solve the problem)⁸¹ have "considerable control over its land use regulation[.]"⁸² According to a study by Berkeley's Turner Center, most of California's local jurisdictions provide considerably less land for multifamily housing as compared to both single-family *and* nonresidential uses.⁸³ Between 2013 and 2017, "[c]ities with some of the state's highest rents" failed to issue a single multifamily construction permit.⁸⁴ Even cities that do zone for multifamily housing find alternative ways to regulate and limit the "nuisance" that such buildings create, such as restricting apartment buildings to less than four stories.⁸⁵ When challenged, courts have given these local government strategies considerable deference and support.⁸⁶ And when SB 50—one of the most ambitious proposals introduced in the Senate to combat restrictive zoning plans and allow for small apartment buildings in single-family zoned neighborhoods—was up for approval in January of 2020, only two cities supported the measure, whereas fifty-seven cities were fervently opposed.⁸⁷

Notwithstanding a desire to do so, the California Legislature has historically failed to provide an adequate remedy to address the worsening problem, until now. Table 1 identifies results from a very simple search conducted on California's Legislative Information website: it lists the number of Senate and Assembly bills introduced during each identified session year that included the keyword "affordable housing."⁸⁸

Act are "aimed at promoting . . . the discriminatory 'Not In My Backyard' (NIMBY) agendas of those seeking to exclude housing, park, and school projects that would diversify communities by serving members of other races and economic classes" rather than actually protecting the environment).

⁸¹ See Liam Dillon, *Gov. Gavin Newsom Threatens to Cut State Funding from Cities that Don't Approve Enough Housing*, L.A. TIMES (Mar. 11, 2019, 5:20 PM), <http://www.latimes.com/politics/la-pol-ca-gavin-newsom-housing-plan-201903011-story.html> (discussing Newsom's proposal to withhold state tax dollars from communities who fail to approve developments for new housing).

⁸² See Kenneth A. Stahl, *The Challenge of Inclusion*, 89 TEMP. L. REV. 487, 526 (2017).

⁸³ See Murray & Schuetz, *supra* note 80, at 5.

⁸⁴ See Jill Cowan, *How Fixing California's Housing Crisis is Like Playing Whac-a-Mole*, N.Y. TIMES (Sept. 17, 2021), <http://www.nytimes.com/2019/08/21/us/california-housing-crisis-local-regulations.html> [<http://perma.cc/3TQE-VRLW>].

⁸⁵ See Murray & Schuetz, *supra* note 80, at 6.

⁸⁶ See Stahl, *supra* note 79, at 982.

⁸⁷ See S.B. 50, Cal. S. Rules Comm. 14–19 (2020).

⁸⁸ See *generally* Bill Search, CAL. LEGIS. INFO, <http://leginfo.ca.gov/faces/billSearchClient.html> [<http://perma.cc/2Z62-WLST>].

Table 1. California Legislative Bills with “Affordable Housing”

	2005– 2006	2007– 2008	2009– 2010	2011– 2012	2013– 2014	2015– 2016	2017– 2018	2019– 2020
Senate	26	37	33	27	26	48	48	84
Assembly	52	82	54	42	59	94	105	159
TOTAL	78	119	87	69	85	142	153	243

If nothing else, the consistent increase in legislative bills discussing affordable housing over the last few years is circumstantial evidence of both the magnitude of the crisis and the unfortunate conclusion that most bills will be unsuccessful. The legislation, at least its potential to affect change, is not the issue. Rather, there is a disconnect between what must be done, and what politicians are willing to do. While single-family zoning may have been the catalyst that most heavily contributed to California’s inadequate housing supply, it is the failure to remedy its long-lasting impacts that has sent California on this downward trajectory. With the 2019 ADU bills, it looks like we are moving in the right direction. Unlike SB 50, which sought to drastically transform and effectively eliminate exclusive single-family zoning,⁸⁹ ADUs are far more politically acceptable given historic local resistance to zoning changes. But as this Note will show, ADUs are not the Holy Grail, for ADUs necessarily intersect with another crucial aspect of the housing crisis as it exists in California: the long-lasting consequences of racial residential segregation.⁹⁰

⁸⁹ See Liam Dillon & Taryn Luna, *California Bill to Dramatically Increase Home Building Fails for Third Year in a Row*, L.A. TIMES (Jan. 30, 2020), <http://www.latimes.com/california/story/2020-01-29/high-profile-california-housing-bill-to-allow-mid-rise-apartments-near-transit-falls-short> [<http://perma.cc/LUU6-EW34>]

(“The legislation would have allowed for the construction of mid-rise apartment complexes near transit and job centers and fourplexes in most single-family neighborhoods.”).

⁹⁰ See PHILOMENA ESSED, UNDERSTANDING EVERYDAY RACISM: AN INTERDISCIPLINARY THEORY 29 (1991) (“To summarize: Anti-Black racism in the United States is still characterized by overall segregation, in particular in residential areas.”); see also Rachel F. Moran, *Whatever Happened to Racism?*, 79 ST. JOHN’S L. REV. 899, 900 (2005) (citing MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 36–37 (2003)).

C. Who is Impacted? Race as a Proxy for Income

Preference for the single-family, despite its massive impact and contribution to California's housing crisis, is not the whole of the story. In fact, it barely scratches the surface when it comes to housing Californians most vulnerable residents:

By restricting the construction of these multi-family, high-density units, suburban officials are effectively shutting the door on the types of new residents who might otherwise not be able to afford homes in their city. In this way, a facially neutral zoning restriction, such as limiting lot sizes, has the second-order effect of preserving a community's racial or economic homogeneity.⁹¹

For many legal and social scholars, racial discrimination is “one of the causes of the affordable housing crisis, or at the very least” significantly contributes to it.⁹² Others make note of the fact that “exclusionary zoning laws that discriminate by income . . . [arrived] shortly after explicit zoning by race was struck down by the Supreme Court.”⁹³ Thus, the lack of affordable housing resulting from “income disparities” is simply a means of circumventing 20th century prohibitions against racial discrimination. Others indicate that *both* racial and economic discrimination continue to persist as a way to oppose affordable housing despite federal and state mechanisms that seek to eradicate racial discrimination.⁹⁴ While this Note is neither a comprehensive history of racial zoning nor the first to discuss the policies which perpetuated it, a brief discussion is crucial to understand the role, if any, that ADUs will play in alleviating California's housing crisis.

One major feature of residential racial segregation is the role that both state and federal governments have played in its development. For example, in *The Color of Law*, Richard Rothstein provides a remarkable history of de jure racial segregation in America as a whole: “[s]egregation by intentional government action” through laws and public policy.⁹⁵ In fact, one legal scholar maintains that reinforcing racial segregation and “preventing ‘the coming of colored people into a district’” was the

⁹¹ Bradley Pough, *Neighborhood Upzoning and Racial Displacement: A Potential Target for Disparate Impact Litigation?*, 21 U. PA. J. L. & SOC. CHANGE 267, 272 (2018).

⁹² Paulette J. Williams, *The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 FORDHAM URB. L.J. 413, 422 (2004).

⁹³ Richard D. Kahlenberg, *Taking on Class and Racial Discrimination in Housing*, THE AM. PROSPECT (Aug. 2, 2018), <http://prospect.org/civil-rights/taking-class-racial-discrimination-housing/> [<http://perma.cc/FXV9-Z7J7>].

⁹⁴ See Choppin, *supra* note 80, at 2054.

⁹⁵ See RICHARD ROTHSTEIN, THE COLOR OF LAW, at viii (2017); *but see* Tex. Dep't Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc., 576 U.S. 519, 528–29 (2015) (claiming that “[d]e jure residential segregation by race was declared unconstitutional” in 1917, but then going on to note all the private and governmental policies instituted throughout the 20th century to maintain such segregation).

real reason that zoning ordinances took off in the 20th century.⁹⁶ Single-family homeownership in the Bay Area was reserved for white families due to both financing and land use regulations tailored or aimed at maintaining racial segregation.⁹⁷

Moreover, in cities like Los Angeles, governments purposely allowed toxic waste facilities and other dangerous entities into predominantly black areas so as to avoid any sort of “deterioration of white neighborhoods.”⁹⁸ And well into the second half of the twentieth century, California, like all states, incorporated a racially-motivated method of assessing risk known as redlining, whereby the racial and socioeconomic composition of residents were used to determine home values.⁹⁹

The most relevant consequence of redlining and racially motivated zoning, at least for purposes of this Note, is that families of color (particularly black families) were denied the opportunity to take a necessary first step into “middle class stability and wealth accumulation” through homeownership.¹⁰⁰ Indeed, in 2019 throughout the country, “homeownership was lowest among Black Americans.”¹⁰¹ For most U.S. families, the home is the greatest asset.¹⁰² And on average, white families in the U.S. have twenty times more wealth than families of color, a disparity that has only increased over time.¹⁰³ During the first quarter of 2020, only 44% of black families owned their home in the U.S., which is far lower than the 73.7% of white homeowners.¹⁰⁴ Unsurprisingly, these national

⁹⁶ See ROTHSTEIN, *supra* note 95, at 52 (positing that nuisance law and favoring single-family zoning was simply a front to ensure that there was no racial mixing in housing).

⁹⁷ See Hernandez, *supra* note 67, at 37; see also ROTHSTEIN, *supra* note 94, at 65 (highlighting the FHA’s policy of discouraging banks from loaning to older, urban neighborhoods because of its tendency to primarily house only “lower class occupancy”). As home ownership directly correlates with *who* will build ADUs, this historic practice and its long-lasting effects ought to be considered when proclaiming that ADUs will provide more housing.

⁹⁸ See ROTHSTEIN, *supra* note 95, at 55.

⁹⁹ See *id.* at 64 (describing the creation of color-coded maps identifying risk, whereby “[a] neighborhood earned a red color if African Americans lived in it” regardless of whether it was a middle-class area).

¹⁰⁰ See Hernandez, *supra* note 67, at 38.

¹⁰¹ *Homeownership Rates Show that Black Americans Are Currently the Least Likely Group to Own Homes*, USA FACTS (Oct. 16, 2020, 2:27 PM), <http://usafacts.org/articles/homeownership-rates-by-race/> [<http://perma.cc/45YV-JWGM>].

¹⁰² Junia Howell & Elizabeth Korver-Glenn, *Homes in Black and Latino Neighborhoods Still Undervalued 50 Years After U.S. Banned Using Race in Real Estate Appraisals*, U.S. NEWS (Sept. 24, 2020, 11:54 AM), <http://www.usnews.com/news/cities/articles/2020-09-24/homes-in-black-and-latino-neighborhoods-still-undervalued-50-years-after-us-banned-using-race-in-real-estate-appraisals> [<http://perma.cc/4YX6-N3TR>].

¹⁰³ See *id.*

¹⁰⁴ Michele Lerner, *One Home, a Lifetime of Impact*, WASH. POST (July 23, 2020), <http://www.washingtonpost.com/business/2020/07/23/black-homeownership-gap/?arc404=true> [<http://perma.cc/KA2R-VGRG>].

numbers are higher than those in California, where only 63.4% of white Californians own their home, which is nearly double the 34.8% of black Californians who own their home.¹⁰⁵ Of those families that do own homes, black families are five times as likely to own a home in a formerly redlined neighborhood than they are to own a home in a formerly greenlined (predominantly white) neighborhood.¹⁰⁶

Throughout the country, housing contributes to 27% of the wealth gap between white and black Americans.¹⁰⁷ This resulting wealth disparity is starkly visible in California, due to the skyrocketing home values and California's 2.2 million black residents who disproportionately struggle to find affordable housing.¹⁰⁸ It is the most urbanized counties, such as Los Angeles and those in the Bay Area, which yield the highest disparities.¹⁰⁹ While over 40% of California households fall within the federal definition of "housing cost burdened," a recent study found that almost 25% of black Californians were forced to expend well over half of their income towards housing costs.¹¹⁰ And while much of the discussion thus far has focused on disparities between white and black *homeownership*, the gap between the wealth of homeowners and the wealth of renters has also only increased over time.¹¹¹ Within this group, 60.6% of black renters in California are cost-burdened compared to 48% of white renters in California.¹¹² Finally, despite the fact that black Californians make up just over 5% of the state's total population, nearly 30% of the 150,000 Californians experiencing homelessness are black.¹¹³

The aforementioned facts and statistics highlight the following: Any discussion of the lack of affordable housing in California is necessarily and inextricably linked to the wealth disparities resulting from the century-long effects of racial and

¹⁰⁵ See *Housing, RACE COUNTS* [hereinafter RACE COUNTS], <http://www.racecounts.org/issue/housing/> [<http://perma.cc/9WBH-7XXM>] (providing racially-based housing statistics by state, county, and city in California).

¹⁰⁶ Lerner, *supra* note 104.

¹⁰⁷ Dean Starkman, *The \$236,500 Hole in the American Dream: The Wealth Gap Between Black and White Families is Greater than Ever. Here's How to Close It*, THE NEW REPUBLIC (June 30, 2014), <http://newrepublic.com/article/118425/closing-racial-wealth-gap> [<http://perma.cc/M3SX-HFHZ>].

¹⁰⁸ Matt Levin, *Black Californians' Housing Crisis, by the Numbers*, CAL MATTERS (June 19, 2020), <http://calmatters.org/housing/2020/06/black-californians-housing-crisis-by-the-numbers/> [<http://perma.cc/CX8S-76DJ>].

¹⁰⁹ See RACE COUNTS, *supra* note 105.

¹¹⁰ Levin, *supra* note 108.

¹¹¹ See Hernandez, *supra* note 67, at 38; see also Howell & Korver-Glenn, *supra* note 102 (noting how the increase of high housing costs coupled with stagnant wages further perpetuates racial and socioeconomic disparities).

¹¹² See RACE COUNTS, *supra* note 105. Cost burdened means spending more than 30% of income on housing.

¹¹³ Levin, *supra* note 108 ("No major California ethnic group is as over-represented in the state's homeless count as Black people.").

residential segregation. These strategies, many of which still exist today,¹¹⁴ have led to patterns of racial residential segregation that impact property values in California and throughout the country. As mentioned earlier in this Note, homeowners with historically high home values are the ones most likely to build an ADU,¹¹⁵ implying that black Californians are less likely to own a home renting out an ADU¹¹⁶ and more likely to be living in the ADU. Indeed, one of the first ever surveys of ADU owners reveals that the disparity in the racial composition of homeowners that recently constructed an ADU is strikingly similar to the racial composition of California homeowners generally.¹¹⁷ Therefore, as this Note analyzes California ADU legislation and how it might serve its intended purpose, an appropriate question is whether ADUs fall within the purview of both state and federal fair housing laws, such that ownership disparities due to historic racial residential segregation do not obviate the ability of ADUs to create a new housing supply.

III. FAIR HOUSING LAWS: WHERE DO ADUS FIT IN?

Thus far, this Note has clarified two fundamental truths regarding California's housing crisis that guide the following discussion on fair housing laws. First, the housing crisis and lack of affordable housing has only gotten worse over time. Hoping to maintain the desirable American family, preference for single-family zoning at the local level eliminated the possibility for denser housing, thereby limiting the housing supply while demand exponentially increased. Second, the individuals who have been most targeted by discrimination in housing and, therefore, suffered the most due to the lack of affordable housing are minorities, especially black Americans. Despite the new wave of middle-class Californians who are also struggling to find housing in California, this is not a twenty-first century phenomenon for black Californians. As California legislators hope to use ADUs to increase the availability of affordable housing, it is critical to point out the inevitable: Private homeowners will have the discretion to choose who rents out the ADU on their private

¹¹⁴ See, e.g., KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT 7–8, 13, 17–18 (2019) (arguing that black Americans never had a chance to acquire affordable housing, as they simply went from being redlined to becoming the prime target of high-risk mortgage investments); Infranca, *supra* note 46, at 831–32 n.38.

¹¹⁵ See *supra* notes 37–44 and accompanying text.

¹¹⁶ See Chapple et al., *supra* note 18, at 3–5, 7 (“[T]he ADU revolution has been slow to reach low-income homeowners of color.”).

¹¹⁷ *Id.* at 7. Unsurprisingly, 71% of all California homeowners who constructed an ADU identify white, whereas only 2% identify as black or African American. *Id.*

property. Therefore, any analysis of the potential of ADUs to alleviate the housing crisis is incomplete without understanding both state and federal fair housing laws.

While there are relevant distinctions between certain provisions in the federal Fair Housing Act of 1968 (“FHA”)¹¹⁸ and California’s Fair Employment and Housing Act of 1959 (“FEHA”),¹¹⁹ state fair housing laws were intended to mirror those that were passed by Congress. Unfortunately, as we will see, fair housing laws were designed to address discrimination in the traditional housing market rather than to regulate arrangements with private homeowners.¹²⁰ Specifically, the anti-discrimination laws were created to fight the strategies discussed earlier in the Note: Commercial property owners and lenders engaging in, encouraging, and benefitting from overt discrimination.¹²¹ Thus, the purpose of the fair housing laws was not to force people to live together. Moreover, fair housing laws are improperly designed to deal with the lack of affordable housing as it exists today.

The [FHA] prohibited future discrimination, but it was not primarily discrimination (although this still contributed) that kept African Americans out of most white suburbs after the law was passed. It was primarily unaffordability. The right that was unconstitutionally denied to African Americans in the late 1940s cannot be restored by passing a Fair Housing law that tells their descendants they can now buy homes in the suburbs, if only they can afford it. The advantage [given to the] white lower-middle class in the 1940s and ‘50s has become permanent.¹²²

A. The FHA: Incomplete in Both Intent and Effect

Congress passed the FHA amid decades of redlining, widespread racial discrimination in the sale and rental of housing, and perhaps the failure of the Supreme Court’s decision in *Shelley v. Kraemer*¹²³ to successfully deter practices aimed at racial residential segregation.¹²⁴ The FHA, originally part of the

¹¹⁸ See Fair Housing Act of 1968, Pub. L. No. 90-284, § 801, 82 Stat. 73, 81 (codified as amended at 42 U.S.C. §§ 3601–3619).

¹¹⁹ See CAL. GOV’T CODE §§ 12900–96.

¹²⁰ Allison K. Bethel, *A New Home for Haters—Online Home Sharing Platforms: A Look at the Applicability of the Fair Housing Act to Home Shares*, 53 U. RICH. L. REV. 903, 916 (2019).

¹²¹ See *id.*

¹²² ROTHSTEIN, *supra* note 95, at 183.

¹²³ See *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) (holding that state judicial enforcement of restrictive covenants based on race violates the equal protection of the law under the Fourteenth Amendment).

¹²⁴ See Brenna R. McLaughlin, *#AirbnbWhileBlack: Repealing the Fair Housing Act’s Mrs. Murphy Exemption to Combat Racism on Airbnb*, 2018 WIS. L. REV. 149, 156 (2018); see also Diane J. Klein & Charles Doskow, *Housingdiscrimination.com?: The Ninth Circuit (Mostly) Puts Out the Welcome Mat for Fair Housing Acts Suits Against*

Civil Rights Act of 1968, declares that “[i]t is the policy of the United States to provide . . . for fair housing throughout the United States” for all.¹²⁵ The historical context surrounding the Civil Rights Act of 1968 necessarily implies that race was the predominant, if not the key, factor in passing this monumental legislation.¹²⁶ The relevant provision of the FHA makes it unlawful to “refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”¹²⁷ To make out a claim under the FHA, courts must determine if a “dwelling” is involved,¹²⁸ if a protected class is involved,¹²⁹ if a “discriminatory housing practice” has occurred,¹³⁰ and *whether an exception applies*.

The breadth of the exceptions makes the coverage of the FHA incomplete. While the FHA sought to provide new remedies for discriminatory practices in the sale and rental in housing,¹³¹ the FHA also allows for exceptions, one of which is colloquially known as the “Mrs. Murphy” exemption.¹³² In its simplest terms, Mrs. Murphy *exempts* the following from the scope of section 3604 (the FHA’s general statute prohibiting discrimination):

Roommate-Matching Websites, 38 GOLDEN GATE U. L. REV. 329, 339–40 (2008).

¹²⁵ See Fair Housing Act of 1968, Pub. L. No. 90-284, § 801, 82 Stat. 73, 81 (codified as amended at 42 U.S.C. §§ 3601–19).

¹²⁶ See McLaughlin, *supra* note 124, at 156–58 (providing contextual history of the passage of the FHA, including the social and political leaders at the forefront during the Civil Rights Movement).

¹²⁷ 42 U.S.C. § 3604(a). For purposes of the FHA, the term dwelling “means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.” 42 U.S.C. § 3602(b).

¹²⁸ Since the passage of the FHA, the definition of dwelling has been broadly interpreted, thereby expanding the breadth of the Act’s coverage so that it is not just limited to traditional housing. See Bethel, *supra* note 120, at 909 n.43, 910 n.48 (providing comprehensive caselaw interpreting the scope and requirements of housing so as to constitute a “dwelling” for purposes of the FHA). So long as the dwelling is intended to be used as a residence, despite the duration of the stay or the physical makeup of the dwelling, it generally falls within the scope of the FHA and its protections. See *id.* But that does not mean all is fine and well, because this broad interpretation of dwelling is also employed in the FHA’s exemption.

¹²⁹ This Note’s discussion is limited to racial discrimination and will not address the Mrs. Murphy exemption in the context of other protected classes. The intent of this Note is not to discredit other protected classes, but simply as a means to focus in on the historical background of residential racial segregation.

¹³⁰ See 42 U.S.C. § 3602(f).

¹³¹ See 42 U.S.C. § 3604 (prohibiting discrimination on any basis in the sale, rental, or negotiation of housing).

¹³² See James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 605 n.3 (1999) (providing contextual history of the Mrs. Murphy exemption).

“rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.”¹³³ In other words, so long as the homeowner lives in the house or in one of the units in the apartment complex that she rents out, and the apartment complex contains four or fewer units, the FHA does not apply to her: she is free to racially discriminate without facing liability under the FHA. As one scholar pointed out, “[t]he existence of an exemption for owner-occupied dwellings announces that our nation still tolerates discrimination.”¹³⁴ Interpreted in the context of the rental of ADUs, Mrs. Murphy may have disastrous consequences for those most in need of affordable housing in California, as demonstrated in Part II, Section C of this Note.

As Congress pointed out, homeowners have “the right to choose who is pattering around in [their] living room.”¹³⁵ That may be true, but that argument is woefully misleading when interpreting the statutory language. Perhaps most problematic to the exception is that it is overinclusive with respect to its intended purpose: to “protect the associational and privacy rights of people who share intimate living space.”¹³⁶ Why is that overinclusive? Because this broad exception also protects those individuals that own small apartment buildings and *live in separate units*,¹³⁷ as would be the case for those living in ADUs. Despite the argument that the Mrs. Murphy exemption was to protect the First Amendment right to association, the exemption was in actuality “necessary to make the FHA more palatable to white Americans opposed to open housing.”¹³⁸ At the end of the day, a Mrs. Murphy renting out an ADU will have an entirely separate entrance and living space. In fact, the homeowner might be able to avoid contact with the family renting out the ADU altogether. The intimate settings sought to be protected no longer exist in the ADU context. So why should the exemption? Unfortunately, based on prior statutory interpretation, owners

¹³³ 42 U.S.C. § 3603(b)(2). For purposes of the FHA, “family” also includes a single individual. See 42 U.S.C. § 3602(c).

¹³⁴ Walsh, *supra* note 132, at 607.

¹³⁵ See Adam Liptak, *Fair Housing, Free Speech and Choosy Roommates*, N.Y. TIMES (Jan. 22, 2007), <http://www.nytimes.com/2007/01/22/us/22bar.html> [<http://perma.cc/5UH6-6UN3>].

¹³⁶ Rigel C. Oliveri, *Discriminatory Housing Advertisements On-Line: Lessons from Craigslist*, 43 IND. L. REV. 1125, 1154 (2010); see also *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619–20 (1984) (explaining that the purpose of the constitutional right to intimate association is to protect the intimacy of individuals that resemble that of a family).

¹³⁷ See 42 U.S.C. § 3603(b).

¹³⁸ See Walsh, *supra* note 132, at 610.

who rent out their ADUs will likely be able to employ the exemption, and victims of discrimination will not have a cognizable action under federal law.

In fact, some legal scholars have already touched on modern housing arrangements and whether they fall within the purview of the FHA. Airbnb, an online marketplace for short-term lodging that has taken off over the last decade, allows hosts to offer public accommodations to an unlimited cohort of potential renters. Because Airbnb hosts provide housing, affirmative findings in which Airbnb facilitates racial discrimination, and further reducing racial integration, may provide a cause of action under the FHA.¹³⁹ This tends to be the case: minority users are “systematically denied lodging by Airbnb hosts.”¹⁴⁰ While one would hope that Airbnb guests would have a prima facie case against Airbnb for discrimination in violation of the FHA, courts have actually held that the Mrs. Murphy exemption applies to these shared-living arrangements in which spare bedrooms or units are rented out.¹⁴¹ In this regard, as a mode of shared living, ADUs appear to be facially similar to Airbnbs. Moreover, if associational rights are protected under the kind of temporary housing that Airbnbs provide,¹⁴² it logically follows that long-term living arrangements (i.e., ADUs), in which the association is more frequent and pervasive, will have the same protection.

Regardless of the legislative intent behind the passage of California’s ADU laws, it appears that homeowners who build and subsequently rent ADUs will have the freedom under federal law to discriminate in any manner and on the basis of any protected characteristic. As the Eighth Circuit pointed out, the FHA “prohibit[s] all forms of [housing] discrimination, sophisticated as well as simpleminded, and thus disparity of treatment between whites and blacks, burdensome application procedures, and tactics of delay, hindrance, and special treatment must receive short shrift from the courts.”¹⁴³ Of course, that is assuming there is no exemption, which it looks like there will be. This is in part because Senator Walter Mondale’s outdated and problematic rationale for the Mrs. Murphy

¹³⁹ See Dayne Lee, *How Airbnb Short-Term Rentals Exacerbate Los Angeles’s Affordable Housing Crisis: Analysis and Policy Recommendations*, 10 HARV. L. & POL’Y REV. 229, 244 (2016).

¹⁴⁰ *Id.* Unsurprisingly, on the flip side, studies show that black American Airbnb hosts tend to earn 12% less than white American hosts for similar listings. *Id.*

¹⁴¹ See McLaughlin, *supra* note 124, at 153–54.

¹⁴² See Jaleesa Bustamante, *Airbnb Statistics*, IPROPERTYMANAGEMENT (Feb. 2, 2022), <http://ipropertymanagement.com/research/airbnb-statistics> [<http://perma.cc/DHL6-AEQ3>] (finding that the average Airbnb stay is just 4.3 nights).

¹⁴³ *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir. 1974).

exemption in the FHA utterly disregards the goal of ADUs amid the current state of affairs in California: “Where the loss in [FHA] coverage represents a very small fraction of the total housing supply—now and in the future—then I think we can give one slice of the loaf in order to save the remainder of the loaf.”¹⁴⁴

Should ADUs, one of the only success stories of the California Legislature in fighting the housing crisis, be considered a “slice of the loaf?” Should overt discrimination, or discrimination in which homeowners are likely to use race as a proxy for income,¹⁴⁵ be excluded from the purview of the FHA because of a rationale that was intended to allow white homeowners the right to discriminate in “limited” circumstances in order to gain approval of the FHA? Unfortunately, whether such discrimination *should* occur is irrelevant as the FHA and its Mrs. Murphy currently read. When there is a Mrs. Murphy within the broad statutory language, the FHA allows and turns a blind eye to such enumerated modes of discrimination.

B. The Deafening Silence of the FEHA

Like many states, California adopted its own fair housing laws through the passage of the FEHA and the Unruh Civil Rights Act.¹⁴⁶ The general provision in the FEHA prohibiting housing discrimination in California provides the following:

It shall be unlawful: [f]or the owner of any housing accommodation to discriminate against or harass any person because of the race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information of that person.¹⁴⁷

Notably, the FEHA has expanded its reach by including more protectable characteristics in its general prohibition statute as compared to the FHA. This indicates that the California Legislature likely intended to provide broader protections and fewer exceptions in the context of housing discrimination.

¹⁴⁴ 114 CONG. REC. 2495 (1968).

¹⁴⁵ See Lu-in Wang, *Race as a Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013, 1017 (2004).

¹⁴⁶ CAL. CIV. CODE § 51 (West, Westlaw through Ch. 10 of 2022 Reg. Sess.). Because the Unruh Act prohibits *business* establishments from engaging in housing discrimination, it will not be discussed further in this Note, which is singularly concerned with non-business homeowners. See *Legal Records and Reports*, CAL. DEP'T OF FAIR EMP. AND HOUS., <http://www.dfeh.ca.gov/legalrecords/> [<http://perma.cc/M59J-GNWU>] (last visited Mar. 10, 2022).

¹⁴⁷ CAL. GOV. CODE § 12955(a) (West, Westlaw through Ch. 10 of 2022 Reg. Sess.). For purposes of the FEHA, “housing accommodation” is broadly construed to incorporate a seemingly limitless variety of housing, including the FHA’s own definition of dwelling. See *id.*; see also CAL. CODE REGS. tit. 2, § 12005(o) (2022).

Even still, like the FHA's Mrs. Murphy exemption, California expressly limits the applicability of its general prohibition. Discrimination for relevant purposes of the FEHA does *not* include the "[r]efusal to rent or lease a portion of an owner-occupied single-family house to a person as a roomer or boarder living within the household, provided that no more than one roomer or boarder is to live within the household."¹⁴⁸ Generally, the Supremacy Clause in the U.S. Constitution declares that federal law is the supreme law of the land.¹⁴⁹ However, when state law provides for *more* protections compared to those afforded by federal law, the former will prevail.¹⁵⁰ This appears to be the case for California's state fair housing law: the FEHA exemption provides broader protections for tenants, rather than homeowners, because its version of Mrs. Murphy is limited to a single-family home if and only if the homeowner rents to only one individual. But this simplistic assumption is misguided, as this Note will point out in the discussion below.

1. What is a Household?

Unfortunately, there is little guidance from California courts¹⁵¹ and agencies interpreting its Mrs. Murphy exemption. For example, does "household" mean that the tenant has to live in the same *physical* unit? Must the tenant share customary living spaces, such as a kitchen or living room, with the homeowner for the FEHA exemption to apply? ADUs can be either attached or detached to the main housing unit; does it matter for purposes of the FEHA exemption? Because ADUs are meant to be incorporated in areas zoned for traditional single-family housing, is this enough to satisfy the "single-family" requirement?

While the California Supreme Court has not provided an answer in the context of the FEHA, an en banc decision from 1980 provides some useful discussion. In *City of Santa Barbara v. Adamson*, the California Supreme Court held that the city ordinance's definition of family as either (1) related persons living together as a single household unit in a dwelling unit or (2) a group of not to exceed five persons, excluding servants, living together as a single housekeeping unit in a dwelling unit violated

¹⁴⁸ CAL. GOV. CODE § 12927(c)(2)(A).

¹⁴⁹ See U.S. CONST. art. VI, cl. 2.

¹⁵⁰ See, e.g., 42 U.S.C. §§ 3610(g)(2)(C), 3612(a); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986).

¹⁵¹ A simple search of section "12927(c)(2)" on both Westlaw and LexisNexis yields just three cases in which California state courts have addressed and interpreted this seemingly limited exemption.

the State Constitution.¹⁵² Despite invalidating this particular provision, the Court's analysis is crucial for purposes of this Note for two reasons: first, despite an invalid and unconstitutional provision, the Court upheld a strict local zoning ordinance;¹⁵³ second, the Court provided guidance on how to interpret "household" in the FEHA's Mrs. Murphy context.

First, it is clear that California interprets the terms "household unit" and "dwelling unit" as distinct from each other. Thus, despite the FEHA's reliance on federal law in construing its own definitions,¹⁵⁴ it seems that the term "household" was specifically employed in California's own Mrs. Murphy to be much narrower than the traditional, broad definition of "dwelling" utilized by the FHA.¹⁵⁵ Second, the analysis employed by the California Supreme Court provides further guidance on how to properly construe the meaning of a "household":

Appellants' *household* illustrates the kind of living arrangements prohibited by the ordinance's rule-of-five. They chose to reside with each other when Adamson made it known she was looking for congenial people with whom to *share her house*. Since then, they explain, they have become a *close group* with social, economic, and psychological *commitments* to each other. They *share* expenses, rotate chores, and eat evening meals *together* . . . Emotional support and stability are provided by the members to each other; . . . they have chosen to *live together* mainly because of their compatibility.¹⁵⁶

Again, the language implies that there is some intimate and familial nature to the living arrangement. While sharing a house might include even detached parts of the house (i.e., ADUs), sharing meals as a "close group" and deciding to "live together" suggests both emotion *and* physical togetherness. Thus, a household likely requires the sharing of those customary living spaces such that residents are actually *living together*.

Despite this seemingly narrow interpretation of "household" given that particular passage, the *Adamson* court later used conflicting language, which is particularly relevant within the context of ADUs. When proposing alternatives for the City of Santa Barbara in their quest to "establish, maintain and protect the essential characteristics of the [residential] district," the court stated the following: "Traffic and parking can be handled by limitations on the number of cars (applied evenly to all

¹⁵² See *City of Santa Barbara v. Adamson*, 610 P.2d 436, 442 (Cal. 1980).

¹⁵³ See discussion *supra* Section II.B.

¹⁵⁴ See generally CAL. CODE REGS. tit. 2, § 12005(o) (2022).

¹⁵⁵ See *Adamson*, 610 P.2d at 442.

¹⁵⁶ *Id.* at 438 (emphasis added) (citation omitted).

households) and by off-street parking requirements.”¹⁵⁷ Does that mean that the main house and the ADU (or junior ADU) are separate households for purposes of parking requirements? It is unlikely: the narrow interpretation of household is at odds with the amended language of section 65852.2 of the California Government Code, which provides for five circumstances prohibiting a city from changing the parking standards on one’s *parcel* of land upon the adoption of an ADU.¹⁵⁸ In other words, a city is unlikely to deal separately with the main house and the ADU when determining applicable parking standards.

Thus, the confusion surrounding the term “household” still persists because it is used in an array of different contexts. Despite the initial reading of the FEHA and its narrow exceptions, a narrow interpretation of household logically follows. But, according to the Ninth Circuit, the same constitutional concerns regarding the right to intimate association, which were used to justify the need for the Mrs. Murphy exemption in the federal FHA, are also applicable to the FEHA.¹⁵⁹ Despite the argument that California’s exemption to FEHA is far more limited than FHA’s Mrs. Murphy,¹⁶⁰ this Ninth Circuit interpretation might lead federal and state courts to broaden its application of the exemption, especially due to the lack of data, literature, and legal recognition of both the FEHA and its exceptions.

2. Idleness of the FEHA

Adding to the uncertainty with FEHA in the housing context, the law is used to combat discrimination in the employment context far more often than it is implicated to fight housing discrimination. Of the 22,584 complaints filed in 2019 with the Department of Fair Employment and Housing (“DFEH”)—California’s government agency responsible for receiving, investigating, and prosecuting violations of FEHA—only 934 (just over 4%) dealt with housing.¹⁶¹

¹⁵⁷ *Id.* at 440–42 (emphasis added).

¹⁵⁸ CAL. GOV’T CODE § 65852.2(d) (West, Westlaw through Ch. 12 of 2022 Reg. Sess). The circumstances are: (1) the accessory dwelling unit is located within one-half mile walking distance of public transit; (2) the accessory dwelling unit is located within an architecturally and historically significant historic district; (3) the accessory dwelling unit is part of the proposed or existing primary residence or an accessory structure; (4) when on-street parking permits are required but not offered to the occupant of the accessory dwelling unit; and (5) when there is a car share vehicle located within one block of the accessory dwelling unit. *Id.*

¹⁵⁹ See Fair Hous. Council v. Roommate.com, LLC, 666 F.3d 1216, 1222 (9th Cir. 2012).

¹⁶⁰ See Scott M. Badami, *United States: The FHA’s “Mrs. Murphy” Exemption—A 50 State Guide*, MONDAQ (Apr. 23, 2013), <http://www.mondaq.com/unitedstates/real-estate/235406/the-fhas-mrs-murphy-exemption--a-50-state-guide> [<http://perma.cc/5H7L-6NSX>].

¹⁶¹ See Kevin Kish, *2019 Annual Report*, CAL. DEP’T OF FAIR EMP. AND HOUS. 8 (2019), http://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/10/DFEH_2019AnnualReport.pdf [<http://perma.cc/W9NC-7N3Z>].

In fact, there were only four civil complaints filed by the DFEH in 2019, none of which were based in the housing context.¹⁶²

Even more problematic is the fact that, up until 2019, the DFEH had never provided any sort of guidance or set of regulations interpreting the anti-discrimination laws in the FEHA's housing context.¹⁶³ But according to Kevin Kish, the Director of the DFEH, the "Council's biggest accomplishment in 2019 was the completion of the first ever housing regulations interpreting the fair housing provisions of the [FEHA]."¹⁶⁴ Yet, there is no guidance whatsoever regarding California's Mrs. Murphy: there is no separate definition for "household" as used in the section 12927(c)(2)(A), nor is there any actual reference to the provision itself, further exacerbating the lack of clarity with respect to FEHA and its Mrs. Murphy exemption.¹⁶⁵ According to *Brown v. Smith*, California courts of appeal will look to the FHA when interpreting the FEHA if and when they need guidance.¹⁶⁶ At this moment in time, state courts are in crucial need of guidance. Unfortunately, relying on the interpretation of federal law and the breadth of its Mrs. Murphy is not what California tenants need.

California's FEHA, and the application of its Mrs. Murphy exemption to ADUs, is far less clear than one would hope. Why are there so few lawsuits? A possible rationale is synonymous with one of Justice Ruth Bader Ginsburg's (many) iconic dissents: "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."¹⁶⁷ In other words, there are no lawsuits under the FEHA because its anti-discrimination provisions within the housing context are working. On the other hand, the limited number of housing lawsuits filed under the FEHA could in large part be due to the multi-step "Complaint Flowchart" that guides

¹⁶² See *id.* at 17.

¹⁶³ See *id.* at 4. This is critical, particularly because the FEHA dates back to 1963.

¹⁶⁴ See *id.*

¹⁶⁵ See CAL. CODE REGS. tit. 2, § 12005(o) (2022).

¹⁶⁶ See 64 Cal.Rptr.2d 301, 305 (1997). An interesting alternative comes from *Chun v. Del Cid*, where the court was tasked with interpreting whether the Rent Stabilization Ordinance of the City of Los Angeles exempted a property from its purview because the property was a single-family dwelling. See 246 Cal.Rptr.3d 488, 489 (2019). Although this case is only persuasive at best, for it did not interpret the FEHA, the court found that the exemption *did not* apply because there were separate living and communal areas. See *id.* at 494–95. The purpose of the exemption was to protect the intimacy of the family, whether related or not, who had to live and coexist together. See *id.* at 495. Reemphasizing that this case is not on point, it does provide an alternative, and perhaps more accurate, interpretation of the intent behind California's Mrs. Murphy exemption to the FEHA: to *narrowly* limit the protections to the intimate relationships of *roommates* rather than families in separate units on a single property.

¹⁶⁷ *Shelby Cnty. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

the trajectory of any complaint filed with the DFEH.¹⁶⁸ There are several steps that must be taken prior to prosecuting a claim, and if the DFEH finds that the initial complaint is without merit, it will simply be dismissed.¹⁶⁹

Despite these preliminary musings, an answer was provided through my own personal contact with the DFEH. The initial response from the DFEH proved inconclusive, as I was informed it was unlikely that anyone could provide an accurate reason for a specific quantity (or lack thereof) of lawsuits.¹⁷⁰ The only data readily accessible was simply the number of lawsuits, but no adequate reason as to why the number is so low.¹⁷¹ But shortly thereafter, a far more useful, albeit anticlimactic answer was provided: fair housing litigators prefer federal court.

Even though a unanimous jury verdict is necessary in federal court,¹⁷² the simple truth is that Federal Rules of Civil Procedure are preferable for the fair housing plaintiff. Specifically, California state courts are incredibly busy and, consequently, some issues may not receive the review they require. Indeed, fair housing claims can be very intense. On the other hand, federal courts have the following: stricter timelines; procedures on how parties will meet and confer in a way that is preferential for plaintiffs, including a Magistrate judge that will work closely with the parties; specific persons to handle discovery motions, negotiations, and settlements; and far more efficiency regarding court appearances and paperwork.¹⁷³ But most importantly, the FEHA, like so many other state fair housing regulations, largely tracks federal law and existing regulations from U.S. Department of Housing and Urban Development (“HUD”).¹⁷⁴ The bottom line is that federal courts have handled most of the precedent, meaning that federal law is more pronounced simply due to a larger body of law and a longer tradition of bringing forth fair housing claims. Indeed, even though state law is more pronounced today, California courts presented with fair housing claims must turn to Ninth Circuit precedent. Essentially then, the FEHA is moribund simply because federal law is more likely to yield a favorable

¹⁶⁸ See *Complaint Flowchart (Non-Employment)*, CAL. DEP’T OF FAIR EMP. & HOUS. (2018), <http://dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-A03P-Eng-ComplaintFlowchart-General.pdf> [<http://perma.cc/GN27-AEZE>].

¹⁶⁹ See *id.*

¹⁷⁰ See e-mail from DFEH Contact Center, to author (Apr. 22, 2021, 16:04 PST) (on file with author).

¹⁷¹ See *id.*

¹⁷² See FED. R. CIV. P. 48(b).

¹⁷³ See generally William R. Slomanson, *California-Federal Procedure Contrast: A Proposal*, 327 FED. RULES DECISIONS 1301, 1311–40 (2018).

¹⁷⁴ See *Sisemore v. Master Fin. Inc.*, 60 Cal. Rptr. 3d 719, 746 (Ct. App. 2007).

outcome because that is where the precedent is. But this conclusion is incredibly problematic because it merely reinforces the need for more interpretation of the FEHA: how can the FEHA yield more favorable results if it is never interpreted?

An initial read of the FEHA hints at broader protections to those bringing fair housing claims, and the likelihood of success in federal courts balances out these disparities. If federal and state courts evaluate claims under the FHA and the FEHA similarly, whereby available remedies are the only distinction,¹⁷⁵ claims under both federal and state law will likely be unsuccessful due to the applicable Mrs. Murphy exemption and the inadequate interpretation of “household.” But *even if* Mrs. Murphy is repealed or amended in the future (as this Note later suggests), ADU renters who feel they have been subjected to unlawful housing discrimination are not in the clear just yet. What housing discrimination currently looks like, and the burden of proof that claimants must satisfy, are issues completely distinct from a problematic Mrs. Murphy.

C. Disparate Impact: An Impossible Evidentiary Question

In 1991, the Civil Rights Division of the United States Department of Justice (“DOJ”) established the Fair Housing Testing Program (the “Program”).¹⁷⁶ Its purpose: to “identify unlawful housing discrimination based on race, national origin, disability, or familial status in violation of the [FHA]” using testers.¹⁷⁷ These testers are individuals who pose as potential renters “without any bona fide intent to rent or purchase housing.”¹⁷⁸ But even before the adoption of the Program, the Supreme Court held that a tester has standing to sue under the FHA, despite having no intent to buy or rent a home, because the injury suffered was of the kind the FHA was designed to guard

¹⁷⁵ See Olivia Solon, *Airbnb Host Who Canceled Reservation Using Racist Comment Must Pay \$5,000*, THE GUARDIAN, <http://www.theguardian.com/technology/2017/jul/13/airbnb-california-racist-comment-penalty-asian-american> [<http://perma.cc/89Z9-SPHA>] (July 14, 2017, 12:44 PM) (highlighting that both federal and state remedies provide for damages and injunctive relief in housing discrimination claims, but state remedies might also incorporate public policy remedies, such as mandating anti-discrimination training).

¹⁷⁶ See *Fair Housing Testing Program*, U.S. DEPT OF JUST., <http://www.justice.gov/crt/fair-housing-testing-program-1> [<http://perma.cc/T4XL-9959>] (last updated Dec. 3, 2021). The Program was spearheaded after a 1989 survey found that “[twenty-five] metropolitan areas revealed widespread discrimination in the sale and rental of housing.” See Andrea Panjwani, *Beyond the Beltway: Testers, Fair-Housing Organizations Fight Bias Under the Fair Housing Act*, 4 J. AFFORDABLE HOUS. & CMTY. DEV. L. 15, 15 (1994) (finding that 60% of black Americans suffered racial discrimination when trying to rent in the cities with the highest cases of widespread discrimination).

¹⁷⁷ *Fair Housing Testing Program*, *supra* note 176.

¹⁷⁸ *Id.*

against.¹⁷⁹ In the federal system alone, the Program has resolved more than 109 unlawful practices and recovered more than \$14.3 million in damages.¹⁸⁰ The primary piece of evidence in finding violations of the FHA involve “misrepresenting the availability of rental units or offering different terms and conditions” based on protected characteristics such as race.¹⁸¹ Recognizing the need to detect housing discrimination at the state level, local California governments have adopted their own testing practices.¹⁸² Moreover, in a recent budget proposal for the 2021-22 fiscal year, the DFEH requested \$3.9 million over the next two years, in addition to eight new full-time positions, to aid the DFEH in “build[ing] a fair housing testing program and attendant enforcement capability.”¹⁸³ This current budget push only further evidences California’s awareness of its housing crisis and the racial disparity thereof.

In the ADU context, the applicability of the disparate impact standard arises because homeowners may not explicitly discriminate based on race. Nevertheless, based on the statistics referenced to above,¹⁸⁴ homeowners renting out ADUs may implicitly favor people from their own SES, resulting in an enormous racial disparity.

Assuming that a fair housing plaintiff is not barred by Mrs. Murphy (in state or federal court) in the future, or that the term “household” narrows the FEHA’s Mrs. Murphy which might reinvigorate its use, there is still the difficult burden in making out a successful claim under federal and state fair housing law. Scholars have pointed out that America is “[i]n an era . . . characterized by . . . egalitarian ideals,” where unconscious biases drive our behavior more so than “overt racial

¹⁷⁹ See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982) (“Whereas Congress, in prohibiting discriminatory refusals to sell or rent . . . required that there be a ‘bona fide offer’ to rent or purchase, Congress plainly omitted any such requirement insofar as it banned discriminatory representations . . .”).

¹⁸⁰ See *Fair Housing Testing Program*, *supra* note 176.

¹⁸¹ See *id.*

¹⁸² See, e.g., *Fair Housing Testers Needed*, FAIR HOUS. FOUND., <http://fhfca.org/testers/> [<http://perma.cc/5Z3F-V7NX>] (last visited Feb. 13, 2022) (posting an advertisement for testers in both Los Angeles and Orange County); *Become a Fair Housing Investigator*, FAIR HOUS. ADVOC. OF N. CAL., <http://www.fairhousingnorcal.org/become-an-investigator.html> [<http://perma.cc/9T7K-QFP5>] (last visited Feb. 13, 2022) (explaining the importance of housing discrimination testers and the need for volunteers).

¹⁸³ See HOUSING EQUITY OUTREACH & ENFORCEMENT, BUDGET CHANGE PROPOSAL, 1700-001-BCP-2021-GB, STATE OF CAL. DEP’T OF FAIR EMP. & HOUS (Feb. 2020), http://esd.dof.ca.gov/Documents/bcp/2122/FY2122_ORG1700_BCP4444.pdf [<http://perma.cc/BM26-V6CQ>] (noting that, prior to fiscal year 2019-20, there were no fair housing testing programs).

¹⁸⁴ See discussion, *supra* Section II.C.

bigotry.”¹⁸⁵ Because of this, limiting actionable claims to intentional discrimination is inadequate in modern times: “[S]ituations in which discrimination is easy to see are not the ones in which it is most likely to be found.”¹⁸⁶ As a result, the last decade has seen a massive increase in the legal discussion surrounding disparate impact claims, including formal recognition by the courts.

Current fair housing laws recognize two types of discrimination: intentional discrimination and disparate impact. However, the latter was not always recognized.¹⁸⁷ Today, this alternative “allow[s] claimants to avoid the onerous burden of proving intent.”¹⁸⁸ By 2013, twelve federal circuit courts recognized disparate impact claims under the FHA, albeit with differing application and burden of proof standards.¹⁸⁹ To alleviate this disconnect across federal circuit courts, the Secretary of HUD issued a regulation to establish a burden-shifting framework for adjudicating claims of disparate impact under the FHA in 2013.¹⁹⁰ In its most general terms, the framework provides that courts ought to assess discriminatory effect of a challenged practice, whether the discrimination is justified or necessary to achieve a “substantial, legitimate, nondiscriminatory interest,” and whether less discriminatory alternatives exist for the challenged practice.¹⁹¹ But less than two years later, when the Supreme Court was first presented with a claim of disparate impact

¹⁸⁵ See Wang, *supra* note 145, at 1017; see also Eduard Bonilla-Silva, *The Linguistics of Color Blind Racism: How to Talk Nasty about Blacks without Sounding “Racist,”* 28 CRITICAL SOCIO. 41, 46 (2002) (“[P]ost-civil rights racial norms disallow the open expression of *direct* racial views and positions”); ESSED, *supra* note 90, at 26–27; Moran, *supra* note 90, at 900 (“Race-conscious remedies have been used for decades, and the evil of racism that they addressed seems to be in decline. Yet, racial inequality remains a robust feature of American life by nearly any commonly accepted measure of well-being.”); Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141, 1161 (2013) (“Although overt racism has been forced underground, the inequality of the system remains.”); Lincoln Quillian, *Does Unconscious Racism Exist?*, 71 SOC. PSYCH. Q. 6 (2008). *But see, e.g.*, Solon, *supra* note 175 (discussing an Airbnb host who canceled a reservation, just minutes before the guest arrived, via text message declaring she would not rent to an Asian guest).

¹⁸⁶ See Wang, *supra* note 145, at 1020; see also Margery Austin Turner et al., *Executive Summary: Housing Discrimination Against Racial and Ethnic Minorities 2012*, U.S. DEPT. OF HOUS. & URB. DEV. 9, June 2013 (“The most blatant forms of discrimination have declined since the passage of the 1968 Fair Housing Act.”).

¹⁸⁷ See Quinn Marker, *Zoning for All! Disparate Impact Liability Amidst the Affordable Housing Crisis*, 88 U. CIN. L. REV. 1105, 1110 (2020).

¹⁸⁸ Conor Arpey, *The Multifaceted Manifestations of the Poor Door: Examining Forms of Separation in Inclusionary Housing*, 6 AM. U. BUS. L. REV. 627, 634 (2017).

¹⁸⁹ See Marker, *supra* note 187, at 1111.

¹⁹⁰ See 24 C.F.R. § 100 (2013).

¹⁹¹ See *Tex. Dep’t Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 527 (2015); see also Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After Inclusive Communities*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 685, 692–97 (2016) (providing analysis on the general progression of a housing-related disparate impact claim).

following HUD's regulations, the Court "limited its bite"¹⁹² by instituting a "robust causality requirement" to ensure that racial imbalance, alone, will not stand on its own to make out a disparate impact claim.¹⁹³ Properly understood, "disparate impact claims concentrate on discriminatory *results* of practices and policies" as an alternative to a showing of discriminatory intent.¹⁹⁴ Unfortunately, the Court's interpretation of the disparate impact standard effectively blurred the distinction between intentional discrimination and disparate impact when Justice Kennedy stressed that disparate impact liability could not be "imposed based solely on a showing of a statistical disparity."¹⁹⁵ In effect, a claim arising out of disparate impact theory must *prove* intent rather than *infer* intent.

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, petitioner argued that the Texas Department of Housing & Community Affairs violated the FHA when it disproportionately allocated housing tax credits to predominantly low-income, black inner-city neighborhoods compared to tax credits given in predominantly white suburban neighborhoods.¹⁹⁶ The resulting effect was the perpetuation of segregated housing patterns.¹⁹⁷ But by narrowing its application of the disparate impact standard, the Supreme Court chose to protect "housing authorities and private developers" from "being held liable for racial disparities"¹⁹⁸ rather than utilize the FHA to its fullest extent. Moreover, the Court feared that claims of disparate impact under the FHA would "cause race to be used and considered in a pervasive way," thereby raising "serious constitutional questions."¹⁹⁹ Consequently, the Supreme Court undermined HUD's desire to make disparate impact claims more cognizable under the FHA, and lower federal courts have subsequently followed the

¹⁹² See Marker, *supra* note 187, at 1112.

¹⁹³ See 576 U.S. at 542.

¹⁹⁴ See Arpey, *supra* note 188, at 634 (emphasis added).

¹⁹⁵ See 576 U.S. at 540.

¹⁹⁶ *Id.* at 526.

¹⁹⁷ *Id.*

¹⁹⁸ See *id.* at 541–42.

¹⁹⁹ *Id.* at 542–43 ("Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision."); see also Lindsey E. Sacher, *Through the Looking Glass and Beyond: The Future of Disparate Impact Doctrine under Title VIII*, 61 CASE W. RESV. L. REV. 603, 604, 616 (2010) (positing that the disparate impact doctrine may directly conflict with the Fourteenth Amendment's guarantee of equal protection because it mandates "race-conscious decision making"); Adam Weiss, Grutter, *Community, and Democracy: The Case for Race-Conscious Remedies in Residential Segregation Units*, 107 COLUM. L. REV. 1195, 1197 (2007) (discussing the fact that changes in the Supreme Court's equal protection jurisprudence have made lower courts "hesitant to use race" in the context of awarding race-conscious remedies to promote housing desegregation).

Court's guidance.²⁰⁰ Additionally, despite California's express regulatory language aimed at combating disparate impact in housing practices,²⁰¹ its state courts similarly defer to the hesitancy of the *Inclusive Communities* Court.

For example, in the summer of 2020, a California state appellate court interpreted the FEHA's disparate impact claim in a similar light. Despite a series of projects in the Los Angeles area that would create a barrier to fair housing by displacing lower-income Latino and black residents, the court acknowledged the "robust causality requirement" identified in *Inclusive Communities* by noting that neither the FHA nor the FEHA requires housing authorities to "reorder their priorities" by creating affordable housing.²⁰² As a result, proving disparate impact is no small feat: both federal and state courts require a strong showing of causality, despite the disparate impact standard being tailored at challenging practices that have a "disproportionately adverse effect on minorities."²⁰³

Absent a showing of intentional discrimination, the FHA and the FEHA claim to offer an alternative in disparate impact claims. However, courts have historically precluded this as a viable option. And when it comes to disparate impact claims in the context of ADUs, another challenge for complainants will likely arise: how does a private homeowner fit within a contextual analysis that predominantly deals with landlords existing in a more commercial setting? General examples of disparate impact claims include, but are not limited to, the following examples:²⁰⁴

1. Rather than using income as a standard, apartment complexes require potential tenants to have a full-time job, thereby having a disparate impact on disabled individuals (i.e., veterans) who might otherwise be able to afford the apartment despite not having the ability to work full-time;

²⁰⁰ See Marker, *supra* note 187, at 1114–18 (offering a general account of recent circuit court decisions, which continue to provide inconsistent application of a standard in proving a disparate impact claim under the FHA).

²⁰¹ See CAL. CODE REGS. tit. 2, § 12060 (2021) ("A practice that is proven under Section 12061 to create, increase, reinforce, or perpetuate segregated housing patterns is a violation of the [FEHA] independently of the extent to which it produces a disparate effect on protected classes.").

²⁰² AIDS Healthcare Found. v. City of L.A., 264 Cal. Rptr. 3d 128, 139–40 (Ct. App. 2020).

²⁰³ See 576 U.S. 519, 559 (emphasis added).

²⁰⁴ See NFHA *Disparate Impact is Illegal Discrimination: A Guide to Understanding Disparate Impact Under the Fair Housing Act*, NFHA (2019), <http://nationalfairhousing.org/wp-content/uploads/2019/03/Disparate-Impact-Info-Pack-2019-Updated.pdf> [<http://perma.cc/MC53-3YN9>].

2. Absent a legitimate reason for the policy, a local government prevents denser, more affordable housing from being developed, thereby excluding people of color in that area;²⁰⁵ and
3. Lending practices in which officers can use their own discretion in determining loan policies, which has led to higher prices for women who have similar credit profiles to male counterparts.

So where do ADUs fit into this analysis? As the Supreme Court noted in *Inclusive Communities*, there must first exist a causal connection with statistical evidence.²⁰⁶ However, a homeowner renting out an ADU is a private individual. And unlike the examples enumerated above, which demonstrate an entity's consistent practices over time, a private homeowner is simply renting out a unit on private property, most likely zoned for single-family use.²⁰⁷

If Homeowner A chooses to require a tenant to work full-time²⁰⁸ (either as a student or member of the workforce) or prefers people with "local ties" as opposed to "outsiders,"²⁰⁹ is that enough to make out a disparate impact claim under fair housing laws? Based on the Supreme Court's analysis and interpretation, the answer is no.²¹⁰ A disparate impact claim, which alleges that a single homeowner acted in a way to negatively impact racial minorities in these isolated contexts, is unlikely to survive the dismissal stage. Research testing under the Program is based on "covering many different housing providers, rather than multiple

²⁰⁵ See *Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 17 (1988).

²⁰⁶ See 576 U.S. at 543.

²⁰⁷ CHAPPLE ET AL., *supra* note 8, at 15 (revealing that 92% of California ADUs are built on parcels zoned for single-family residential use).

²⁰⁸ Effective on January 1, 2020, California's state fair housing laws prohibit source of income discrimination. Therefore, landlords "cannot refuse to rent to someone, or otherwise discriminate against them, because they have a housing subsidy, such as a Section 8 Housing Choice Voucher, that helps them to afford their rent." *Source of Income FAQ*, DFEH (Feb. 2020), http://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/02/SourceofIncomeFAQ_ENG.pdf [<http://perma.cc/UGV5-F9P7>].

²⁰⁹ See Schwemm & Bradford, *supra* note 191, at 694.

²¹⁰ See 576 U.S. at 543.

A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact. For instance, a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all.

Id.

tests to clearly establish discrimination by a single provider.”²¹¹ Indeed, the requirements for offering substantial and actionable data to meet this initial burden of proof are tenuous: *significant* discriminatory effects are crucial.²¹² In fact, the Court noted that “private policies are not contrary to the disparate-impact requirement unless they are ‘artificial, arbitrary, and unnecessary barriers.’”²¹³

A potential alternative for claimants might be to bring suit under a theory of vicarious liability, which the Supreme Court recognizes under the FHA (so it is likely the FEHA will track).²¹⁴ A handful of local governments and coalitions in California are considering building ADUs and subsidizing them for homeowners who are willing to rent to lower-income families.²¹⁵ Rather than sue individual homeowners, some might try to go after the companies to demonstrate the requisite policy has a significant discriminatory effect. Though it is likely that remedies will be limited to arbitration.²¹⁶

Even if the claim were to survive the initial dismissal stage, defendant homeowners will still have an opportunity to rebut the presumption by providing a legitimate interest. And courts have broadly construed this “case-specific, fact-based inquiry”²¹⁷ to provide discretionary and considerable leeway.²¹⁸ In fact, courts may even further broaden the scope of “legitimate interest” so as to continue encouraging folks to construct ADUs. If defendants are successful, claimants must yet again provide sufficient evidence to affirmatively demonstrate that there are alternative policies with *less* discriminatory effect than the one adopted by defendant.²¹⁹ This presents yet another evidentiary issue for claimants seeking to enforce fair housing rights in the context of ADUs: claimants

²¹¹ See Turner et al., *supra* note 186, at 14 (noting the “nuanced narratives” required by enforcement protocols to determine “exactly what happened in an individual test” that may or may not yield evidence of discrimination).

²¹² See Schwemm & Bradford, *supra* note 191, at 698–700.

²¹³ See 576 U.S. at 543 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

²¹⁴ See Meyer v. Holley, 537 U.S. 280, 285 (2003).

²¹⁵ See *ADU Aid Programs Across the U.S.*, VILLA, <http://villahomes.com/blog/adu-aid-programs> [<http://perma.cc/2MHD-MJXN>] (last visited Feb. 8, 2022) (identifying financing programs in Los Angeles, Marin County, Newport Beach, Pasadena, and Santa Cruz that incentivize homeowners who agree to rent out their ADUs to low-income tenants).

²¹⁶ See McLaughlin, *supra* note 124, at 164, 173.

²¹⁷ See Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 32,11460, 32,11470 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

²¹⁸ See Schwemm & Bradford, *supra* note 191, at 696 nn.47–48 (referencing caselaw that has yielded different results in ascertaining if defendants can meet this burden).

²¹⁹ See *id.* at 697; see also Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 32,11460, 32,11473 (Feb. 15, 2013) (“HUD agrees that a less discriminatory alternative must serve the respondent’s or defendant’s substantial, legitimate nondiscriminatory interests, must be supported by evidence, and may not be hypothetical or speculative.”).

must prove that a readily identifiable alternative would impact a *lower proportion* of members of a protected class (i.e., racial minorities) than the original proportion impacted by the *individual* homeowner's facially neutral practice.²²⁰ And more likely than not, such evidence will be unavailable in the context of ADUs to make the necessary comparison.²²¹

Why is this burden so difficult to meet? As the Supreme Court pointed out, these limitations are necessary because without them, private entities (i.e., homeowners) may no longer wish to construct affordable housing units for low-income families and individuals, thereby upsetting the very purpose of the state and federal fair housing laws—and ADUs—if defendants were to be subjected to “abusive disparate-impact claims.”²²² This takes us back to the balancing of “rights” that the Supreme Court engaged in in *Euclid*:²²³ it is the abuse suffered by homeowners with ADUs that will be the underlying concern rather than the individuals who are still unable to maintain affordable housing.

In the years since the 1926 Supreme Court ruling [which upheld the constitutionality of local zoning practices], numerous white suburbs in towns across the country . . . prevent[ed] low-income families from residing in their midst. Frequently, class snobbishness and racial prejudice were so intertwined that when suburbs adopted such ordinances, it was *impossible* to disentangle their motives and to prove that the zoning rules violated constitutional prohibitions of racial discrimination.²²⁴

Almost one hundred years later—as we cling to the promise of egalitarian ideals—and after decades of social unrest, extensive findings of significant residential segregation, and unequal housing for racial minorities, discriminatory practices are still permissible so long as they are facially “unintentional.”²²⁵ More likely than not, claimants will not have access to the necessary data when they are discriminated against in the process of renting out an ADU.

²²⁰ See Schwemm & Bradford, *supra* note 191, at 747; see also Hila Keren, *Law and Economic Exploitation in an Anti-Classification Age*, 42 FLA. ST. U. L. REV. 313, 317–18 (2015) (noting that the current judicial approach of anti-classification within the racial context makes it incredibly difficult for claimants to satisfy a burden which requires the comparison of groups).

²²¹ See Schwemm & Bradford, *supra* note 191, at 747.

²²² See *Tex. Dep't Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 544 (2015) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

²²³ See *supra* notes 77–78 and accompanying text.

²²⁴ ROTHSTEIN, *supra* note 95, at 53 (emphasis added).

²²⁵ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 269–70 (1977) (reasoning that conformity to general practices, despite the fact that the policy rationale “[bore] more heavily on racial minorities,” was enough to defeat “an inference of invidious purpose”).

IV. MOVING FORWARD

To be clear, the purpose of this Note is *not* to argue that ADUs are wholly irrelevant and should not be utilized. Instead, the purpose is to address how the legislative intent with the passage of the four bills may be moot given the current structure of both state and federal fair housing laws. Fair housing laws were designed to remedy a segregated housing market, yet legal scholars are quick to recognize that the FHA, and by extension its state counterparts, have been the least effective of any of the civil rights laws.²²⁶ Victims of discrimination in search of affordable housing should not have the burden of additional time and cost required by filing suit. Moreover, because state fair housing laws are rarely used, and federal fair housing laws do not provide a remedy absent litigation,²²⁷ housing plaintiffs in the ADU market may not have an adequate remedy. So, while ADUs might be a piece of the puzzle in alleviating the housing crisis, they will only be a small piece given the practical effect of fair housing laws. To address these issues, this Part provides additional solutions that might help California in the way it needs.

A. An Obvious First Step: The Repeal of Article 34

Rather than rely exclusively on the discretion of private homeowners or alternative civil rights law,²²⁸ the California Legislature should work closely with local governments—the very entities that generally oppose bills that change or disrupt the housing landscape in California.²²⁹ One necessary call-to-action is for the repeal of article 34 in California’s State Constitution.²³⁰ While a lofty goal, the change is long overdue. section 1 of article 34 states the following:

No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which

²²⁶ See John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 UNIV. MIAMI L. REV. 1067, 1071 (1998).

²²⁷ See Theresa Keeley, *An Implied Warranty of Freedom from Sexual Harassment: The Solution for Harassed Tenants Where the Fair Housing Act Has Failed*, 38 U. MICH. J. L. REFORM 397, 444 (2005).

²²⁸ See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. §§ 1981–82); see also Joseph Tobener, *Housing Discrimination in California: What Is It and What Can Tenants Do About It*, TOBENER RAVENSCROFT (June 10, 2021), <http://www.tobenerlaw.com/housing-discrimination-in-california-what-is-it-and-what-can-tenants-do-about-it/> [http://perma.cc/G72W-WATF] (“In addition, it is important to point out that regardless of the federal FHA and state FEHA exemptions, the 1866 Civil Rights Act permits no exemptions with respect to race. It is illegal to discriminate on the basis of race for any and all housing transactions.”).

²²⁹ See discussion *supra* Section II.B–C.

²³⁰ See S. 2, 2021–22 Leg., Reg. Sess. (Cal. 2020).

it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.²³¹

Even though a three-judge federal district court in California determined that article 34 inferentially denies housing to poor people, and therefore racial minorities,²³² the Supreme Court reversed and upheld article 34.²³³ The majority refused to acknowledge a “clear purpose to disadvantage blacks or other racial or ethnic minorities” in the California housing market.²³⁴ In this challenge under the Equal Protection Clause under the Fourteenth Amendment, a feigned preference for democracy guided the majority’s willful blindness regarding the inherent “bias, discrimination, [and] prejudice” that is found in article 34.²³⁵ As Professor Kenneth Stahl points out, article 34 creates an assumption that land use control is a legal right conferred to California’s local governments, and there has been little success in changing that problematic narrative.²³⁶

The California Legislature, despite its commitment to provide more affordable housing, retains the provision referenced above which prevents low-rent housing projects absent electoral approval. This provision was approved prior to both state and federal fair housing laws,²³⁷ which mandates an inference that it failed to seriously consider resulting residential racial segregation. Moreover, it resulted in preference for a wide variety of real estate construction that did not include affordable housing.²³⁸ Notwithstanding three previous failed attempts to

²³¹ CAL. CONST. art. 34, § 1. For purposes of Article 34, the term “low rent housing project” means “any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise.” *Id.* For purposes of Article 34, the term “persons of low income” means “persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.” *Id.*

²³² See *Valtierra v. Hous. Auth. of City of San Jose*, 313 F. Supp. 1, 4 (N.D. Cal. 1970).

²³³ See *James v. Valtierra*, 402 U.S. 137, 142–43 (1971).

²³⁴ See George Lefcoe, *The Public Housing Referendum Case, Zoning, and the Supreme Court*, 59 CAL. L. REV. 1384, 1385 (1971).

²³⁵ See 402 U.S. at 141.

²³⁶ See Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1209 (2008).

²³⁷ See CAL. CONST. art. XXXIV, § 1 (1950) (adopted eighteen years prior to the FHA).

²³⁸ See, e.g., Liam Dillon, *A Dark Side to the California Dream: How the State Constitution Makes Affordable Housing Hard to Build*, L.A. TIMES (Feb. 3, 2019, 8:30 AM), <http://www.latimes.com/politics/la-pol-ca-affordable-housing-constitution-20190203-story.html> [<http://perma.cc/KBW4-SZGK>] (referencing the decision, following the passage of Article 34, to build Chavez Ravine as the Dodgers’ new stadium in lieu of more affordable housing).

repeal article 34,²³⁹ the fight for repeal must continue. Because even if local governments have the financial capability to create lower-income housing, the law will prevent them from doing so. This obsession with local control is unique to California, no other state has a similar provision in their constitution which requires voter approval for public housing.²⁴⁰ The provision may facially prioritize the democratic ideal of voter approval, but it is undoubtedly discriminatory in purpose and effect. While repealing this “stain” on the California Constitution will not solve everything, it is a crucial step.

B. Much Ado About Zoning

As mentioned previously in this Note, ADUs are likely going to play a crucial role in providing new housing supply. However, as the law currently stands, particularly in the context of state and federal fair housing laws, ADUs are not the Holy Grail. State and local governments, in addition to the electorate as a whole, must look at other things to work in tandem with ADUs. In spite of the historic failure of legislation aimed at eliminating *Euclidian* zoning in California,²⁴¹ both local and state governments must continue to push it forward.

In February of 2021, Berkeley’s city council “unanimously approved a resolution calling for the end of exclusionary zoning by 2022.”²⁴² The decision is quite symbolic, as one of its neighborhoods was among the first parts of the nation to adopt single-family zoning in 1916.²⁴³ Indeed, because almost 82% of the Bay Area is currently zoned for residential use, this is a crucial step for the northern part of California.²⁴⁴ Ironically, anti-density zoning (i.e., continued preference for single-family zoning) actually leads to higher housing costs,²⁴⁵ and furthermore, studies show that single-family zoning leads to more racially segregated populations well into the 21st century.²⁴⁶ Holding onto the “property right” promised by exclusionary zoning perpetuates racial residential segregation. Thus, cities throughout the state

²³⁹ *See id.*

²⁴⁰ *See id.*

²⁴¹ *See supra* Table 1.

²⁴² Laura Bliss, *The Upzoning Wave Finally Catches up to California*, BLOOMBERG (Mar. 1, 2021, 5:00 AM), <http://www.bloomberg.com/news/articles/2021-03-01/california-turns-a-corner-on-single-family-zoning> [<http://perma.cc/8MVG-ZHTD>].

²⁴³ *See id.*

²⁴⁴ *See id.*

²⁴⁵ *See* Jonathan Rothwell, *Land Use Politics, Housing Costs, and Segregation in California Cities*, TERNER CTR. FOR HOUS. INNOVATION (Sept. 5, 2019), <http://turnercenter.berkeley.edu/research-and-policy/land-use-politics-housing-costs-and-segregation-in-california-cities/> [<http://perma.cc/3A9B-WYAS>].

²⁴⁶ *See id.*

ought to follow Berkeley and seriously consider adopting resolutions to allow for more density, which includes the same kind of gentle density offered by ADUs.

Notably, SB 9, colloquially referred to as the California Housing Opportunity and More Efficiency (“HOME”) Act,²⁴⁷ went into effect across California on January 1, 2022.²⁴⁸ This recent state bill effectively allows homeowners up to four residential units on their property.²⁴⁹ For example, a homeowner with land currently zoned single-family can *first* split their parcel into two and sell one-half of it and *second* build an ADU on each half of the parcel. Now, up to four families can live on a lot originally zoned single-family. The potential for the HOME Act in alleviating the housing crisis in California mirrors the potential for ADUs as pointed out in this Note. But the issue remains: the housing must be *fair* and *affordable*. If the HOME Act simply allows homeowners to replicate current segregation, the bill will simply add to the pile of ineffective housing legislation.²⁵⁰

C. Using RHNA as Intended

The effects of *Euclidian* zoning extend far beyond a preference for single-family zoning in California. Rather, the consequences of the nearly 100-year-old Supreme Court case allow local governments to evade the call to produce more affordable housing.²⁵¹ Indeed, despite more than fifty years having passed since the California Legislature established local RHNA requirements, local failure to produce sufficient low-income housing is nevertheless “compliant” with the law. This is a significant problem, especially if ADUs are to help alleviate the housing crisis. Theorizing about how ADUs can contribute without actually enforcing their production should not be sufficient compliance. Thus, another affirmative action from the state

²⁴⁷ *Senate Bill 9 is the Product of a Multi-Year Effort to Develop Solutions to Address California’s Housing Crisis*, SB 9 THE CAL. H.O.M.E. ACT, <https://focus.senate.ca.gov/sb9> [<https://perma.cc/8HHG-29PL>] (last visited Apr. 15, 2022).

²⁴⁸ Liam Dillon, *Some California Cities Try to Blunt New Duplex Law with Restrictions on New Developments*, L.A. TIMES (Nov. 30, 2021, 8:31 AM), <http://www.latimes.com/homeless-housing/story/2021-11-30/some-california-cities-aim-to-blunt-new-duplex-law> [<http://perma.cc/H25Y-Q8F8>].

²⁴⁹ *See id.*

²⁵⁰ *See* Christian Horvath et al., *The Absolute Wrong Way to Solve California’s Affordable Housing Crisis*, L.A. TIMES (July 9, 2021), <http://www.latimes.com/opinion/story/2021-07-09/california-affordable-housing-sb9> [<http://perma.cc/RE2K-ZN5W>] (“Upzoning of the sort proposed [by SB 9] does not produce more affordable housing. Rather, it increases the underlying land’s value, making new construction unnecessarily more expensive and, over time, raising values and rents throughout neighborhoods.”).

²⁵¹ *See supra* notes 80–86 and accompanying text.

government ought to be amending RHNA to hold local governments truly accountable in meeting their housing needs.

D. Away with Mrs. Murphy

As state and federal fair housing laws currently stand, ADUs might not increase the housing supply for Californians who are in the greatest need. As discussed in Parts III.B and IV of this Note, the “rights” of traditionally white homeowners necessarily eliminate the development of new housing. Mrs. Murphy continues to perpetuate the racial residential discrimination that has been historically tied to *Euclidian* zoning and government regulation: “Initially controversial, the bargain represented by Mrs. Murphy remains long after norms would judge the beneficiaries to be bigots.”²⁵² Contrary to what its major proponents have argued, “Mrs. Murphy does not seek to protect her family home from outside intrusion.”²⁵³ In the ADU context, she has already welcomed the intrusion. Instead, the “claimed right not to associate is really a claim of a right to discriminate.”²⁵⁴

While problematic from its birth,²⁵⁵ Mrs. Murphy raises additional issues in the context of ADUs. It is improper to view what each individual Mrs. Murphy is doing with her own backyard for two crucial reasons. First, the purpose of ADUs is quite clear: increase the housing supply statewide.²⁵⁶ If ADUs are going to meet this lofty goal, they cannot be viewed as something separate from the traditional real estate market. At the end of the day, “[t]he overriding fact remains that Mrs. Murphy makes her units or rooms available to the public *in return for money*.”²⁵⁷ Whether or not profit is the underlying motivation in renting out an ADU, all Mrs. Murphys are inherently engaged in a business.²⁵⁸ So, because each ADU is aggregated over the entire state for purposes of increasing the housing supply, it must therefore follow that each Mrs. Murphy is aggregated over the state. Even without further elaboration, the issue is clear: advocates of Mrs. Murphy want to protect intimate associational rights by *explicitly allowing over discrimination in the sale and rental in housing*. But it is impracticable to protect *individual*

²⁵² Wilson, *supra* note 1, at 973.

²⁵³ Walsh, *supra* note 132, at 631.

²⁵⁴ *See id.*

²⁵⁵ Compare 42 U.S.C. §§ 3603(b), 3604 (offering broad exceptions to the prohibition on housing discrimination), and 42 U.S.C. § 1982 (codifying a certain provision of the Civil Rights Act of 1866 which bans all forms of racial discrimination in the sale or rental of housing without any exceptions).

²⁵⁶ *See supra* notes 28–31 and accompanying text.

²⁵⁷ Walsh, *supra* note 132, at 631 (emphasis added).

²⁵⁸ *See id.*

associational rights while simultaneously creating new housing supply in the *aggregate*. Mrs. Murphy can have no place in the ADU rental market. And although Mrs. Murphy ought to be seriously reconsidered to take account for modern living arrangements and housing needs, amending federal law is a lofty endeavor. Nevertheless, the immediate goal is clear: to continue making changes.

E. Reinvigorating the FEHA in State Court

Historically, testers in the Program have been used to demonstrate a frequent *pattern* or *practice* of housing discrimination.²⁵⁹ According to the DOJ, a pattern or practice occurs “when the evidence establishes that the discriminatory actions were the defendant’s *regular* practice, rather than an *isolated* instance.”²⁶⁰ Thus, in the context of ADUs, an individual occurrence of housing discrimination might not be enough despite the aggregation of Mrs. Murphys discriminating throughout California. Thus, current testing procedures promulgated at both the state and federal level are insufficient in providing the requisite statistical analysis when dealing with individual homeowners renting out ADUs. For the FHA and the FEHA to successfully prohibit housing discrimination, the use of testers and the definitions of “pattern” and “practice” need to adjust to be viable in light of modern housing arrangements. Assuming the budget proposal referenced to in Part III, Section C is approved, those additional funds and full-time employees should afford due care in restructuring testing protocols and standards as they apply in California.

Additionally, for the ADU bills to accomplish their intended goal, actual interpretation of California’s own moribund fair housing laws is crucial. Federal court might be preferable to plaintiffs at this moment in time, but the literature is still missing. Interpreting California’s Mrs. Murphy provision, particularly the meaning of the word “household,”²⁶¹ may be the

²⁵⁹ For a comprehensive list of cases developed through the testing program dealing with consistent patterns of discrimination by apartment complexes, developers, nation-wide architectural firms, and hotels, see generally C.R. Div., *Housing and Civil Enforcement Section Cases: Cases Developed Through Testing Program*, U.S. DEP’T OF JUST., http://www.justice.gov/crt/housing-and-civil-enforcement-cases?search_api_views_fulltext=pattern+or+practice+of+discrimination&items_per_page=10 [<http://perma.cc/LXU6-3KU8>]. *But see* United States v. Flanagan, No. 1:09-cv-07338, 2009 WL 4239522 (N.D. Ill. Jan. 19, 2011) (alleging that, on just one instance, a homeowner admitted to making racially discriminatory statements to a tester).

²⁶⁰ C.R. Div., *A Pattern or Practice of Discrimination*, U.S. DEP’T OF JUST., <http://www.justice.gov/crt/pattern-or-practice-discrimination> [<http://perma.cc/7N5J-YFF9>] (emphasis added).

²⁶¹ See discussion *supra* Section III.B.

best place to start. Indeed, because a state can choose *not* to exempt Mrs. Murphy from its fair housing laws,²⁶² California must take this affirmative action to provide more context for homeowners and potential tenants. Moreover, unlike federal law, FEHA expressly recognizes disparate impact as a basis in bringing forth a cause of action for housing discrimination.²⁶³ Thus, the guard rails established by the Supreme Court in *Inclusive Communities* may have little impact on the reach of California's FEHA except to confine the claims to state court. While the 2019 Guidance²⁶⁴ is a step in the right direction, its recency is more than indicative that housing discrimination still needs adequate attention in the context of the FEHA, especially considering the urgency of California's housing crisis and the many legislative attempts to remedy it.

CONCLUSION

Fair housing laws, which mandate fairness, and ADUs, which seek to increase the housing supply, necessarily coexist. The historic inequities in the housing market that negatively affect marginalized groups, particularly black Americans, means that the effects of California's housing crisis are disproportionate. As ADUs continue to gain support to create more affordable housing, their intersection with fair housing laws could render them unsuccessful in their intended purpose. Discrimination by Mrs. Murphy, particularly in the ADU context, is inexcusable and unjustifiable. ADUs are a necessary first start, but they are by no means the end-all-be-all for solving California's housing crisis. And without careful critique of fair housing laws and their exemptions to maintain the effectiveness of ADUs, the California Legislature is going to have to turn elsewhere.

²⁶² See 42 U.S.C. § 3615; see also Walsh, *supra* note 132, at 633–34 (providing a sample of state fair housing laws which limit the coverage of Mrs. Murphy to ensure that “only the most intimate of Mrs. Murphy settings” are protected by the exemption).

²⁶³ See CAL. GOV'T CODE § 12955.8(b). *But see supra* notes 182–190 and accompanying text (explaining that disparate impact liability is not statutorily mandated, but is an alternative doctrine judicially created and promulgated by HUD).

²⁶⁴ See generally CAL. CODE REGS. tit. 2, § 12005(o) (2022).

Reframing RFRA: Why Considering Third-Party Harm is Essential to Determine Whether Religious Exemptions to the Affordable Care Act's Contraceptive Mandate Impose a Substantial Burden on Religion

*Jessica Marsella**

Despite the well-documented benefits of widespread access to contraceptives, there are a number of religious exemptions and religious accommodations to the Affordable Care Act's (ACA) contraceptive mandate, which make accessing contraceptives more difficult or may prevent such access altogether. The validity of such exceptions and accommodations have reached the Supreme Court numerous times. A common theme in all of these challenges, however, is the lack of consideration that granting the exemptions or accommodation has on others. This Note primarily focuses on the religious exemptions to the contraceptive mandate and will explore how the Supreme Court's treatment of such exemptions and accommodations are flawed due to the Supreme Court's failure to consider how third parties are adversely affected, as required by the Religious Freedom Restoration Act (RFRA). This failure has wide ranging effects: it indirectly inhibits social growth and encourages inherent sexism.

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INTRODUCTION

Millions of individuals lost their jobs as a result of the COVID-19 pandemic.¹ Now imagine some of them finally obtain a job with health insurance, only to find that contraceptives are excluded under their particular healthcare plan. When they inquire as to why contraceptives are not included, the newly employed individual learns it is because of their secular employers' religious beliefs.² This failure to provide such coverage constitutes a form of gender discrimination.

Gender discrimination in healthcare settings was widespread and legally permissible prior to the Patient Protection and Affordable Care Act's (the "ACA")³ implementation on March 23, 2010.⁴ One method of gender discrimination is gender bias. Gender bias is a term used to describe "prejudice in action or treatment against a person on the basis of their sex."⁵ In healthcare settings, gender bias "refers to situations where patients are assessed, diagnosed and treated differently and at a lower quality level because of their gender . . . [as compared to] others with the same complaints."⁶

¹ *E.g.*, Paul Fronstin & Stephen A. Woodbury, *How Many Americans Have Lost Jobs with Employer Health Coverage During the Pandemic?*, COMMONWEALTH FUND (Oct. 7, 2020), <http://www.commonwealthfund.org/publications/issue-briefs/2020/oct/how-many-lost-jobs-employer-coverage-pandemic> [<http://perma.cc/4GCX-XP2>].

² The most egregious extrapolation, as discussed below in Section III.D, is where an employer states that even filling out the paperwork noting they have a religious objection, violates their religious beliefs, the assertion of which could prevent an employee from obtaining contraceptive coverage.

³ The ACA is also colloquially referred to as "Obamacare."

⁴ *See, e.g.*, *Turning to Fairness: Insurance Discrimination Against Women Today and the Affordable Care Act*, NAT'L WOMEN'S L. CTR. 1, 5 (Mar. 2012), http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf [<http://perma.cc/39HU-K4TK>]; Jenny Deam, *Could You Be Denied Health Insurance Just Because You're a Woman?*, PREVENTION (Nov. 29, 2011), <http://www.prevention.com/life/a20430126/health-insurance-and-gender-discrimination/> [<http://perma.cc/FBY4-49LX>].

⁵ Thomas Jefferson Univ. Online, *Exploring Gender Bias in Healthcare*, MEDCITY NEWS (Sept. 4, 2019, 5:00 AM), http://medcitynews.com/?sponsored_content=exploring-gender-bias-in-healthcare [<http://perma.cc/VUV7-NYWW>].

⁶ *Id.*

In healthcare, it refers to situations where patients are assessed, diagnosed and treated differently and at a lower quality level because of their gender than others with the same complaints. Gender bias in healthcare can also manifest as the assumption that males and females are the same when the sexes have differences that need to be addressed.

Id. A recent and visible example of gender bias occurred when a female African American doctor died of COVID-19 in Indiana after posting a video on social media alleging subpar treatment due to her gender and race. *See* Bill Hutchinson, *Black Doctor Dies of COVID after Alleging Hospital Mistreatment: This is How Black People Get Killed*, ABC NEWS (Dec. 24, 2020, 1:50 PM), <http://abcnews.go.com/US/black-doctor-dies-covid-alleging-hospital-mistreatment-black/story?id=74878119> [<http://perma.cc/7HYC-YQTT>].

Discrimination in healthcare settings, however, encompasses more than unfair and prejudicial treatment from medical professionals; it also encompasses systemic, institutionalized barriers to healthcare, both in difficulty obtaining insurance policies and, once obtained, the inability to attain desired services under those insurance policies.⁷ Before the ACA's implementation, insurance carriers were not only able to charge women higher premiums than men⁸ for individual plans,⁹ but were also able to perfunctorily deny women coverage because of pre-existing conditions, such as pregnancy, domestic violence, or rape.¹⁰

The ACA was passed, *inter alia*, to make health insurance more affordable and accessible to vulnerable populations, including those facing gender discrimination.¹¹ Specifically to

⁷ See Thomas Jefferson Univ. Online, *supra* note 5; Fay Schopen, *The Healthcare Gender Bias: Do Men Get Better Medical Treatment?*, THE GUARDIAN (Nov. 20, 2017, 11:35 AM), <http://www.theguardian.com/lifeandstyle/2017/nov/20/healthcare-gender-bias-women-pain> [<http://perma.cc/JC5U-M7L9>].

⁸ This practice of charging women higher premiums than men is called gender rating. Only a few states (including California) banned the practice before the ACA was implemented. In states that did not ban gender rating, 92% of insurance companies charged women more than men, solely on the basis of their gender. See NAT'L WOMEN'S L. CTR., *supra* note 4, at 3.

Women continue to face unfair and discriminatory practices when obtaining health insurance in the individual market—as well as in the group health insurance market. Women are charged more for health coverage simply because they are women, and individual market health plans often exclude coverage for services that only women need, like maternity care. Furthermore, insurance companies—despite being aware of these discriminatory practices—have not voluntarily taken steps to eliminate the inequities. While some states have outlawed or limited these practices, only when the Affordable Care Act is fully implemented in 2014 will they end nationally.

Id.

⁹ An individual plan is a health insurance policy that is purchased directly for an individual or family by an insurance company. See Davalon, *What's the Difference Between Group and Individual Health Insurance?*, EHEALTH (Jan. 11, 2021), <http://www.ehealthinsurance.com/resources/small-business/whats-difference-group-individual-health-insurance> [<http://perma.cc/QP7Q-F4AP>].

¹⁰ See Deam, *supra* note 4 (“In most states, a man and a woman of the same age and health status will be charged different rates for exactly the same individual health insurance policy, a practice called ‘gender rating.’”); see generally Terry Fromson & Nancy Durborow, *Insurance Discrimination Against Victims of Domestic Violence*, NAT'L HEALTH RES. CTR. ON DOMESTIC VIOLENCE (2019), <http://womenslawproject.org/wp-content/uploads/2019/09/Insurance-Discrimination-2019-Final.pdf> [<http://perma.cc/K7QR-MYK5>] (describing discriminatory insurance policies which deny women coverage due to being a domestic violence victim).

¹¹ The ACA was also passed to address the rapidly rising cost of healthcare in America. Kimberly Amadeo, *What is Obamacare?*, THE BALANCE (Dec. 7, 2021), <http://www.thebalance.com/what-is-obamacare-the-aca-and-what-you-need-to-know-3306065> [<http://perma.cc/C2PG-MJ2V>].

The aim with this plan was to make health care more affordable for everyone by lowering costs for those who can't afford them [B]efore the ACA, insurance companies could exclude people with pre-existing conditions. As a result, the people with the greatest health expenses sometimes had to go without insurance

address this concern, section 1557 of the ACA “make[s] sure [that] there are no loopholes: [The ACA] prohibits insurance companies from denying coverage, charging people higher premiums based on their health or gender, limiting benefits tied to preexisting conditions and capping insurance payouts for people who are very sick. . . .”¹²

Since its passage and implementation over ten years ago, the ACA has had an immediate and beneficial impact on women, namely by providing affordable, accessible preventative care.¹³ Contraceptive coverage is a crucial component of preventative care. Almost half of all pregnancies in the United States are unintended.¹⁴ For multiple reasons, unintended pregnancies have a profound impact on women.¹⁵ Physically, women who have carried unintended pregnancies to term are at higher risk of having cesarean sections and are more likely to gain excessive weight.¹⁶ Each of these complications may negatively impact the health of both mother and child.¹⁷ Psychologically, unintended pregnancies

or settle for a policy that did not cover [a pre-existing] condition. Because they couldn’t afford regular doctor visits, they often ended up in hospital emergency rooms, unable to contribute to the expense of their treatments.

Id.; see also Larry Levitt, *Want to Protect People with Preexisting Conditions? You Need the Full Affordable Care Act*, WASH. POST (Oct. 22, 2020), <http://www.washingtonpost.com/outlook/2020/10/22/preexisting-conditions-aca-debate-trump-biden/> [<http://perma.cc/X9HQ-5CCY>].

¹² Levitt, *supra* note 11; see also Abbe R. Gluck, Mark Regan & Erica Turret, *The Affordable Care Act’s Litigation Decade*, 108 GEO. L.J. 1471, 1500 (2020).

Two provisions of the ACA, sections 1557 and 2713, broaden protection for civil rights and preventative services respectively. These sections have received particular scrutiny, and have become the subject of intense litigation because they have been applied to extend protection to contraception, to women who have terminated pregnancies, and to transgender individuals.

Id.

¹³ See Gluck, Regan & Turret, *supra* note 12, at 1493, 1500.

¹⁴ *Unintended Pregnancy in the United States*, GUTTMACHER INST. (Jan. 2019), <http://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us.pdf> [<http://perma.cc/38VB-VSA4>] (“In 2011, nearly half (45%, or 2.8 million) of the 6.1 million pregnancies in the United States were unintended.”).

¹⁵ See, e.g., Lois K. Lee et al., *Women’s Coverage, Utilization, Affordability, and Health After the ACA: A Review of the Literature*, 39 HEALTH AFFS. 387, 391 (2020).

¹⁶ Reza Omani-Samani et al., *Impact of Unintended Pregnancy on Maternal and Neonatal Outcomes*, 69 J. OBSTETRICS & GYNECOLOGY INDIA 136, 137 (2019) (“Pregnancy outcomes might be affected by unintended pregnancy such as preeclampsia, preterm birth, cesarean section and low birth weight We found higher risk of cesarean section and inappropriate weight gain during pregnancy as adverse outcomes of unintended pregnancy. . . .”).

¹⁷ Babies born via cesarean section are more likely to develop transient tachypnea, a breathing disorder, and although rare, may even be injured during the surgery itself. Mothers may develop infections or other surgical complications. *C-Section*, MAYO CLINIC, <http://www.mayoclinic.org/tests-procedures/c-section/about/pac-20393655> [<http://perma.cc/GN6D-6JN4>] (last visited Jan. 1, 2022).

may contribute to an increased risk of maternal depression.¹⁸ All of the foregoing consequences of an unintended pregnancy may result in long term ramifications, with a watershed effect.

That said, contraceptives do far more than simply prevent pregnancy.¹⁹ Numerous health benefits can be derived from their use. For instance, oral contraceptives can prevent or lessen acne, cysts, bone thinning, iron deficiency, and some endometrial and ovarian cancers.²⁰ But even beyond these health benefits, national use of contraceptives can be linked to women's social mobility.²¹ A study conducted by the Guttmacher Institute in 2012 revealed that "[w]omen use contraception because it allows them to better care for themselves and their families, complete their education and achieve economic security"²² Subsequent to the 2013 Guttmacher Institute study, Planned Parenthood issued a report in which sixty-five percent of women stated that their primary motivation for using contraceptives was for economic reasons: they simply could not afford to raise a child.²³

¹⁸ See Jinwook Bahk et al., *Impact of Unintended Pregnancy on Maternal Mental Health: A Casual Analysis Using Follow up Data of the Panel Study on Korean Children (PSKC)*, BMC PREGNANCY & CHILDBIRTH, Apr. 3, 2015, at 8.

The results of this study showed that an absence of intention for a pregnancy had an adverse effect on maternal depression and parenting stress, and that the relation between pregnancy intention and maternal mental health was partly mediated by marital conflict, fathers' participation in child care, and mothers' knowledge of infant development.

Id.

¹⁹ *What Are the Benefits of the Birth Control Pill?*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/learn/birth-control/birth-control-pill/what-are-the-benefits-of-the-birth-control-pill> [<http://perma.cc/2483-8PKM>] (last visited Jan. 1, 2022) ("The birth control pill is a safe, simple, and convenient way to prevent pregnancy. It also has other benefits like reducing acne, making . . . periods lighter and more regular, and easing menstrual cramps.").

²⁰ *Id.*

²¹ See *Griswold v. Connecticut*, PLANNED PARENTHOOD, <http://www.plannedparenthoodaction.org/issues/birth-control/griswold-v-connecticut> [<http://perma.cc/Z9YP-YCQQ>] (last visited Dec. 20, 2021) (explaining that in 1965, the Supreme Court held in *Griswold v. Connecticut* that there is "a constitutional right to privacy regarding reproductive decisions"). As a result of widespread access to contraceptives, maternal and infant mortality rate significantly dropped. *Id.* ("From 1960 to 2011, the percentage of women who completed four or more years of college multiplied by six.").

²² Rebecca Wind, *New Study Confirms What Many Have Long Believed to be True: Women Use Contraceptives to Better Achieve their Life Goals*, GUTTMACHER INST. (Sept. 25, 2012), <http://www.guttmacher.org/news-release/2012/new-study-confirms-what-many-have-long-believed-be-true-women-use-contraception#> [<http://perma.cc/FNG4-HZF7>] ("New evidence confirms what most people already believe: Women use contraception because it allows them to better care for themselves and their families, complete their education and achieve economic security").

²³ See *Taking Control: The Ongoing Battle to Preserve the Birth Control Benefit in the Affordable Care Act*, PLANNED PARENTHOOD 6 [hereinafter *Taking Control*], http://www.plannedparenthoodaction.org/uploads/filer_public/27/d6/27d67baf-44ad-44e5-b762-8522f17c20d4/bc_report_062713_vf.pdf [<http://perma.cc/45D7-K2RH>].

After the passage of the ACA, “the rate of uninsured working women (ages 18–64) decreased by 39 percent”²⁴ and women consistently reported that they are less “worried about paying for health care”²⁵ Further, as a direct result of the passage and implementation of the ACA, 20.4 million women were able to obtain access to preventative services, including contraceptives, without cost sharing.²⁶ Cost sharing is when the cost of medical services is divided between a patient and their insurance company.²⁷ This practice is a substantial barrier to effective contraceptive use and “is associated with less use of highly effective methods . . . and greater contraceptive nonadherence and discontinuation.”²⁸ Access to contraceptives without cost sharing resulted in a financial benefit as well: “one study estimates that women saved \$1.4 billion in out-of-pocket costs in 2013” as a result of the contraceptive mandate and “[o]n average, each woman saves \$255 every year.”²⁹

Despite the well-documented benefits of widespread access to contraceptives, there are a number of religious exemptions and religious accommodations to the contraceptive mandate, which make accessing contraceptives more difficult or may prevent such access altogether.³⁰ The validity of such exceptions and accommodations have reached the Supreme Court numerous times.³¹ A common theme in all of these challenges, however, is the lack of consideration that granting the exemptions or accommodation has on others. This Note primarily focuses on the religious exemptions to the contraceptive mandate and will explore how the Supreme Court’s treatment of such exemptions and accommodations are flawed due to the Supreme Court’s

²⁴ Lee et al., *supra* note 15, at 388.

²⁵ *Id.* at 390.

²⁶ *Id.*; see also Gluck, Regan & Turret, *supra* note 12, at 1500 (“Section 2713 of the ACA requires coverage of certain preventative healthcare services without cost sharing—i.e., without paying anything at the point of service.”).

²⁷ *What is Cost Sharing?*, BLUE CROSS N.C., <http://www.bluecrossnc.com/understanding-health-insurance/cost-sharing#:~:text=Cost%20sharing%20means%20...or%20a%20deductible%20and%20coinsurance> [<http://perma.cc/SU4U-R4Z3>] (last visited Mar. 11, 2021).

²⁸ Lee et al., *supra* note 15, at 391.

²⁹ See Jamila Taylor & Nikita Mhatre, *Contraceptive Coverage under the Affordable Care Act*, CAP (Oct. 6, 2017), <http://www.americanprogress.org/issues/women/news/2017/10/06/440492/contraceptive-coverage-affordable-care-act/> [<http://perma.cc/MHT4-VSWT>].

³⁰ As used throughout this Note, I differentiate between the terms “religious accommodation” and “religious exemption” to demonstrate the practical applications these terms have on third parties. A *religious accommodation* to the contraceptive mandate means that, even though the employer has a religious objection, employees are still able to receive contraceptive coverage via their employer’s health insurance plan. In contrast, the term *religious exemption* is used to mean that the employer is not required to include any contraceptive coverage and employees are *not* able to access contraceptives through the employer’s health insurance plan.

³¹ See *infra* Part III.

failure to consider how third parties are adversely affected, as required by the Religious Freedom Restoration Act (“RFRA”). This failure has wide ranging effects: it indirectly inhibits social growth and encourages inherent sexism.

Part I of this Note will explain how the ACA requires preventative services with respect to women, a requirement colloquially known as the contraceptive mandate.³² Part II will provide an overview of RFRA, which is being used by employers to challenge the validity of the exemptions to the contraceptive mandate. Overall, RFRA requires that the government must show a compelling interest and demonstrate it is using the least restrictive means of achieving that interest to substantially burden someone’s religion.³³ Essentially, the argument made herein is that the government need only show they are using the least restrictive means to achieve a compelling interest only *after* concluding that the government’s actions impose a substantial burden on religion. In determining if government actions substantially burden religion, RFRA—contrary to the approach taken by the Supreme Court—requires that courts weigh the claimant’s sincerity and the adverse consequences to the claimant against the adverse consequences to third parties.³⁴ Part III of this Note will address the history of the religious accommodations and exemptions and the significant litigation regarding the contraceptive mandate, including *Burwell v. Hobby Lobby Stores, Inc.* (“*Hobby Lobby*”),³⁵ *Zubik v. Burwell* (“*Zubik*”),³⁶ and *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania* (“*Little Sisters*”)³⁷.

On its own, the presence of third-party harm does not necessarily mean the government’s actions substantially burden religion, *per se*.³⁸ Part IV will demonstrate how the RFRA balancing test, including the consideration of third-party harm, should have led the Supreme Court to reject Little Sister’s claims. This Note will show that while the religious claimant’s beliefs may be sincere and there are adverse practical consequences in complying with the contraceptive mandate, the contraceptive mandate *does not* substantially burden religion because granting such broad religious exemptions will cause *significant* third-party harm. Part V will demonstrate how the trend of granting more and more religious

³² See 42 U.S.C. § 300gg-13(a)(4).

³³ See *id.* § 2000bb.

³⁴ See *id.*

³⁵ 573 U.S. 682 (2014).

³⁶ 136 S. Ct. 1557 (2016).

³⁷ 140 S. Ct. 2367 (2020).

³⁸ See Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 934 (2019).

accommodations and exemptions are actually undermining the purpose of the ACA by sending the message that access to contraceptives is not a priority. Finally, this Note illustrates how RFRA may be amended to specifically address third-party harm.

I. THE CONTRACEPTIVE MANDATE

Under the ACA, insurance plans must provide essential services, including prescriptions, preventative care, and maternity care.³⁹ One of the key provisions of the ACA was 42 U.S.C. § 300gg-13, the so-called contraceptive mandate, which provides that employers are required to obtain insurance plans which include preventative care with respect to women.⁴⁰ Congress did not define what constitutes preventative care with respect to women, and instead delegated the definition to the Health Resources Services Administration (the “HRSA”)—a department within the Department of Health and Human Services (the “HHS”)—who then delegated the definition to the Institute of Medicine⁴¹ (the “IOM”).⁴² “The IOM convened a group of independent experts, including ‘specialists in disease prevention [and] women’s health.’”⁴³ Ultimately, the IOM “defined women’s preventative services to include all contraceptives approved by the Food and Drug Administration (FDA), including oral contraceptives, intrauterine devices, emergency contraceptives, and sterilization procedures. The mandate does not cover abortion-inducing drugs”⁴⁴

The HHS fully accepted this definition of what constitutes preventative services with respect to women and adopted it in full, issuing a rule that required employers to provide employees with health insurance plans which include all FDA-approved

³⁹ See *10 Essential Health Benefits Insurance Plans Must Cover Under the Affordable Care Act*, FAMS. USA (Feb. 9, 2018) <http://familiesusa.org/resources/10-essential-health-benefits-insurance-plans-must-cover-under-the-affordable-care-act/> [<http://perma.cc/59QC-HYGR>].

⁴⁰ See 42 U.S.C. § 300gg-13(a)(4).

⁴¹ See generally *About the National Academy of Medicine*, NAT’L ACAD. OF MED. <http://nam.edu/about-the-nam/> [<http://perma.cc/34XR-DQRM>] (last visited Apr. 26, 2021) (noting that the Institute of Medicine subsequently changed its name to the National Academy of Medicine).

⁴² See Swapna Reddy, Nina Patel & Priya Radhakrishnan, *ACA’s Birth Control Mandate at the US Supreme Court: What’s at Stake?*, HEALTH AFFS. (May 4, 2020) <http://www.healthaffairs.org/doi/10.1377/hblog20200430.180292/full/> [<http://perma.cc/DNG9-JWMC>]; *Taking Control*, *supra* note 23, at 17.

⁴³ *Burwell v. Hobby Lobby Stores, Inc.*, 573 US 682, 742 (2014) (Ginsburg, J., dissenting) (alteration in original).

⁴⁴ Reddy, Patel & Radhakrishnan, *supra* note 42; see also *Birth Control*, FDA (last visited Apr. 8, 2021) <http://www.fda.gov/consumers/free-publications-women/birth-control> [<http://perma.cc/ME2X-BV85>] (listing FDA-approved contraceptives).

contraceptive devices without cost-sharing.⁴⁵ The rule, however, contained an accommodation for religious employers, which was defined as an employer that:

(1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a nonprofit organization described in section 6033(a)(1) and 6033(a)(3)(A)(i) or (iii) of the Code. Section 6033(a)(3)(A)(i) and (iii) of the Code refers to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order.⁴⁶

Essentially, this accommodation allows for religious organizations to opt out of providing contraceptives coverage to their employees if doing so would violate their religious beliefs.⁴⁷ Simply stated, when an employer opted out for religious purposes, the insurance companies were required to cover contraceptives at no cost to the employees.⁴⁸ In 2013, the government issued a revised accommodation that created a system which allowed employers to shift the cost of contraceptives to insurers or third-party administrators⁴⁹ so long as employers notified the government of their religious objection.⁵⁰ The government would subsequently notify the religious organization's insurers, who were authorized to pay for contraceptives for the employer's beneficiaries.⁵¹ Failing to abide by these rules resulted in employers being fined up to 100 dollars per day, per employee.⁵² These accommodations had no practical consequences to employees; they would still be able to receive contraceptives without cost sharing.

Not long after this rule was issued, the Supreme Court expanded this accommodation to secular businesses in *Hobby*

⁴⁵ See Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,873–74 (July 2, 2013).

⁴⁶ *Id.*

⁴⁷ See *id.* at 39,874; see also Reddy, Patel & Radhakrishnan, *supra* note 42 (“The final preventive services rule issued in 2012 required insurers and group health plans to cover all such contraceptive services. It also included accommodations for houses of worship and other religious organizations that object to contraceptive coverage for faith-based reasons.”).

⁴⁸ See Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. at 39,874; see also *Taking Control*, *supra* note 23, at 18.

⁴⁹ Third-party administrators are businesses that “deliver[] various administrative services on behalf of an insurance plan, such as a health plan. . . [and] help with the design, launch, and ongoing management of a health plan.” Kev Coleman, *What is a Third-Party Administrator (TPA)?*, ASSOCIATED HEALTH PLANS (Nov. 18, 2020) <http://www.associationhealthplans.com/group-health/what-is-tpa/> [<http://perma.cc/GTK6-EQZD>].

⁵⁰ 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B); see also *Massachusetts v. U.S. HHS*, 513 F. Supp. 3d 215, 225 (D. Mass. 2021).

⁵¹ 45 C.F.R. § 147.131(c)(4)(i), (c)(4)(ii).

⁵² 26 U.S.C.S. § 4980D(b)(1) (2012).

Lobby, stating that RFRA required “similar accommodations for secular employers that object to contraceptive coverage on religious grounds.”⁵³ This expansion to secular businesses commenced the erosion of the accommodation and set the stage for things to come.

II. A BRIEF INTRODUCTION TO RFRA AND THIRD-PARTY HARM

The passage of the ACA was controversial: it resulted in a considerable amount of litigation, much of which focused on the religious accommodations and exemptions to the contraceptive mandate.⁵⁴ The scope of this Note primarily focuses on how courts treat these religious exemptions under RFRA.⁵⁵

RFRA was passed in 1993 as a direct result of the Supreme Court’s holding in *Employment Division v. Smith*, which held that a neutral law of general applicability (i.e., a law that applies to everyone regardless of their religion) did not violate the First Amendment’s Free Exercise Clause.⁵⁶ RFRA restored the heightened scrutiny courts applied pre-*Smith*: it requires that a law which substantially burdens the exercise of religion serve a compelling governmental interest and that it be the least restrictive means of furthering that interest.⁵⁷ Ultimately, if a

⁵³ Reddy, Patel & Radhakrishnan, *supra* note 42.

⁵⁴ Some of the litigation surrounding the ACA focused on the constitutionality of the individual mandate, which, simply put, required that all Americans have health insurance or be fined. In *National Federation of Independent Business v. Sebelius*, the Supreme Court determined that the individual mandate can be considered a tax, which Congress was authorized to collect under the Tax Clause of Article I, Section 8 of the U.S. Constitution. See *Obamacare Individual Mandate*, OBAMACARE.NET (Nov. 2017) <http://obamacare.net/obamacare-individual-mandate/> [<http://perma.cc/RU8Q-2VLE>].

⁵⁵ There has been some debate about whether the exemptions would be permissible under the Establishment Clause. Traditionally, courts have applied the *Lemon* test to determine whether a law runs afoul of the Establishment Clause. Under *Lemon*, it is necessary to determine whether the law has a secular purpose, which neither advances nor inhibits religion and does not foster excessive governmental entanglement with religion. Scholars have argued that “by shifting the material costs of accommodating anticontraception beliefs from the employers who hold them to their employees who do not, RFRA exceptions from the [contraceptive] Mandate violate an Establishment Clause constraint on permissive accommodation.” Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 349 (2014).

⁵⁶ In *Smith*, members of the Native American church brought suit after they were denied unemployment benefits because they smoked peyote. The Supreme Court held that someone’s religious belief was not sufficient to excuse him from neutral and generally applicable laws. *Emp. Div. v. Smith*, 494 U.S. 872, 890 (1990).

⁵⁷ The relevant portion of RFRA is as follows:

(3) [G]overnments should not substantially burden religious exercise without compelling justification; (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests. B. Purposes. The

law substantially burdens religion, RFRA requires that courts balance the competing interests of religious adherents with the government's compelling interest as set forth in *Sherbert v. Verner*⁵⁸ and *Wisconsin v. Yoder*.⁵⁹

In *Sherbert*, the Supreme Court determined that the government's interest in denying unemployment benefits to a religious individual who refused to work on Sunday did not outweigh the individual's right to exercise their religion.⁶⁰ The Supreme Court found that the disqualification of benefits imposed a substantial burden on the appellant's religion because "[t]he ruling [of the Employment Security Commission] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."⁶¹ The Court also noted "this is not a case in which an employee's religious convictions serve to make h[er] a nonproductive member of society."⁶² Consequently, the Court determined that there was no substantial competing governmental interest to deny the appellant unemployment benefits.⁶³

In *Yoder*, the Supreme Court held that although the State of Wisconsin had a substantial interest in educating its citizens, that interest must be balanced against the countervailing interests of the parents who wished to remove their children from public education to prepare them life in the Amish community.⁶⁴ The

purposes of this Act are— (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened

42 U.S.C § 2000bb *et seq.*

⁵⁸ 374 U.S. 398, 410 (1963).

⁵⁹ 406 U.S. 205, 215 (1972).

⁶⁰ 374 U.S. at 410.

⁶¹ *Id.* at 404.

⁶² *Id.* at 410.

⁶³ The government attempted to argue that if the Supreme Court were to find in favor of the employee/claimant, there would be a slew of fraudulent claims to follow (i.e., the floodgates would open). *Id.* at 407. The Supreme Court responded by stating that the mere possibility of fraudulent claims being filed was not sufficient to defeat the employee/claimant's interest. *Id.* In fact, the Supreme Court refused to even consider this argument because it was not presented before the South Carolina Supreme Court and the Supreme Court was reluctant to "assess the importance of an asserted state interest without the views of the state court." *Id.*

⁶⁴ *Yoder*, 406 U.S. at 215.

The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.

Id.

case arose after Amish parents were fined five dollars after removing two children, aged fourteen and fifteen, from public school after they completed the eighth grade.⁶⁵ The parents objected to Wisconsin's requirement that children attend school until the age of sixteen, asserting that public secondary-school education promoted values contrary to the Amish way of life, and, therefore, imposes a substantial burden on religion.⁶⁶ The State, however, argued that it had a compelling interest in ensuring that children received a comprehensive education.⁶⁷ Ultimately, the Supreme Court determined that the right of the Amish parents to remove their children from school to better prepare them for life in the Amish community outweighed the State's interest in providing an additional year or two of education.⁶⁸

Not only did the Supreme Court in *Sherbert* and *Yoder* utilize a balancing test, but both decisions also implicitly considered how granting the religious exceptions would impact society. *Sherbert* explicitly states that "this is not a case in which an employee's religious convictions serve to make him a nonproductive member of society."⁶⁹ Additionally in *Yoder*, a substantial factor in granting the exception was the fact that the parents sought to remove the children from school to be a productive member of the Amish community. The Court stated:

There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society. Absent some contrary evidence supporting the State's position, we are unwilling to assume that persons possessing such valuable vocational skills and habits are doomed to become burdens on society should they determine to leave the Amish faith, nor is there any basis in the record to warrant a

⁶⁵ *Id.* at 207–08; *see also id.* at 218 ("The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenants of their religious beliefs.").

⁶⁶ *Id.* at 207, 209.

⁶⁷ *Id.* at 221.

⁶⁸ *Id.* at 222.

It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in the modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.

Id.

⁶⁹ 374 U.S. 398, 410 (1963); *see also Yoder*, 406 U.S. at 222.

Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional "mainstream." Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms.

Id.

finding that an additional one or two years of formal school education beyond the eighth grade would serve to eliminate any such problem that might exist.⁷⁰

Thus, by restoring the compelling interest test set forth in *Sherbert* and *Yoder*, a proper analysis under RFRA should require courts to inquire about the impact religious exemptions will have on society at large in an analysis of third-party harm.⁷¹ The Supreme Court, however, has largely ignored this consideration in deciding the contraceptive mandate cases.

A. RFRA, RLUIPA, and Third-Party Harm

Consideration of third-party harm is not unique to RFRA; it appears elsewhere in First Amendment jurisprudence,⁷² notably in *United States v. Lee*,⁷³ *Cutter v. Wilkinson*,⁷⁴ and *Estate of Thornton v. Caldor*.⁷⁵

In *Lee*, the Supreme Court declined to grant an employer an exemption from paying social security taxes based on the third-party harm principle, explaining that: “Granting an exemption from social security taxes to an employer operates to impose the employer’s religious faith on the employees.”⁷⁶ *Lee* was decided

⁷⁰ *Id.* at 224–25. The State of Wisconsin tried to argue that compulsory education was necessary in the event that some Amish children would wish to leave the community and they would be ill prepared for life in the modern world without an additional year or two of formal education. *See id.* at 224.

⁷¹ *Sherbert* and *Yoder* are “cases that were themselves illustrative of the third-party harm principle and were decided in a period in which the generally applicable third-party harm principle reigned supreme.” *Developments in the Law—Intersections in Healthcare and Legal Rights, Chapter Two: Reframing the Harm: Religious Exemptions and Third-party Harm After Little Sisters*, 134 HARV. L. REV. 2186, 2200 (2021) [hereinafter *Developments in the Law*].

⁷² In addition to appearing in First Amendment jurisprudence, the third-party harm principle was also fundamental in civil rights discrimination suits “in which religious adherents sought exemptions from laws geared toward eliminating racial discrimination.” *Developments in the Law, supra* note 71, at 2189; *see also* *Newman v. Piggie Park Enter., Inc.* 390 U.S. 400, 402 n.5 (1968); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (“[G]overnmental interest [in eradicating racial discrimination] substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.”).

⁷³ 455 U.S. 252 (1982).

⁷⁴ 544 U.S. 709, 722 (2005) (“[A]n accommodation must be measured so that it does not override other significant interests.”).

⁷⁵ 472 U.S. 703, 709–10 (1985).

The State thus commands that Sabbath religious concerns automatically control over all secular interests in the workplace; the statute takes no account of the convenience or interest of the employer or those of other employees who do not observe a Sabbath. . . . This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses[:] . . . “the First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.”

Id.

⁷⁶ *Lee*, 455 U.S. at 261.

before RFRA's passage and demonstrates how the Court applied the third-party harm principle in the *pre-Smith* era.

Additionally, *Cutter* and *Caldor* both found that courts should consider the burdens imposed on third parties when granting accommodations.⁷⁷ *Cutter* explicitly states that in “properly applying [the Religious Land Use and Institutionalized Persons Act], courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.”⁷⁸ The Religious Land Use and Institutionalized Persons Act (“RLUIPA”) protects “individuals, houses of worship, and other religious institutions from discrimination in zoning and landmarking laws” as well as protects the rights of institutionalized or incarcerated individuals.⁷⁹ RLUIPA and RFRA are sister statutes, requiring an analysis of third-party harm under the RLUIPA necessitates that a similar analysis be required under RFRA.⁸⁰

Background information regarding the connection between the two statutes is necessary to fully explain how RFRA and RLUIPA are connected. As noted above, RFRA was passed as an immediate response to the holding in *Employment Division v. Smith*, and initially, RFRA also applied to the states as well as to the federal government.⁸¹ The Supreme Court, however, held in *City of Boerne v. Flores* that RFRA could not extend to the states or local government.⁸² “*City of Boerne* involved a land-use dispute between a Catholic Archdiocese that wanted to expand a church in a historic district and local zoning officials who had denied it the necessary permit.”⁸³ The Supreme Court held that in extending RFRA to the states, Congress had exceeded its legislative power because “Congress had not established a widespread pattern of religious discrimination, [so] RFRA could not be justified as a remedial measure designed to prevent

⁷⁷ *Cutter*, 544 U.S. at 721; *Caldor, Inc.*, 472 U.S. at 708–10.

⁷⁸ *Cutter*, 544 U.S. at 720.

⁷⁹ *Places to Worship Initiative—What is RLUIPA?*, U.S. DEPT OF JUST. (Nov. 7, 2018), <http://www.justice.gov/crt/place-worship-initiative-what-rluipa> [<http://perma.cc/5XB2-LNSM>].

⁸⁰ *See, e.g.*, *Fowler v. Crawford*, 534 F.3d 931, 937 (8th Cir. 2008) (holding that the RLUIPA standard was “identical to the RFRA standard”); *see also*, *Storslee, supra* note 38, at 875 (“Under statutes like RFRA and RLUIPA, courts are required to deny an accommodation when doing so is the least restrictive means of furthering a compelling interest . . . [and] that inquiry necessarily requires courts to consider whether an accommodation ‘unduly restrict[s] other persons . . . in protecting their own interests.’”).

⁸¹ *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997).

⁸² *Id.* at 516–18.

⁸³ U.S. DEPT OF JUST., REPORT ON THE TWENTIETH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 3 (2020) <http://www.justice.gov/opa/press-release/file/1319031/download> [<http://perma.cc/8QMP-L2ZQ>].

unconstitutional conduct.”⁸⁴ In direct response to this holding, Congress passed RLUIPA in 2000.⁸⁵

Essentially, “RLUIPA institutes a compelling interest test that mirror[ed] the RFRA test for specific types of state actions.”⁸⁶ Given that the language and legislative history of both statutes note their similarities, the application of precedent discussing one statute to the other is appropriate. In fact, several courts have applied RFRA precedent to RLUIPA cases, and vice versa. For instance, in *Cutter*, the Supreme Court stated that “Congress carried over from RFRA the ‘compelling governmental interest’/‘least restrictive means’ standard [to RLUIPA].”⁸⁷ And, in *Fowler v. Crawford*, the 8th Circuit determined that “the RLUIPA standard . . . was identical to the RFRA standard.”⁸⁸

Cutter states that courts are required to consider the harm that granting religious exemptions may cause to third parties under RLUIPA, RFRA’s sister statute.⁸⁹ Additionally, both *Sherbert* and *Yoder* likewise consider broader social harms.⁹⁰ Thus, the Supreme Court should also consider third-party harm in the current line of cases debating the validity of the exemptions to the contraceptive mandate under RFRA.

B. An Analysis of Third-Party Harm Should be Under RFRA’s Substantial Burden Prong

Neither a consensus nor a straightforward definition or application of the third-party harm doctrine exists in regard to the contraceptive mandate.⁹¹ Its overarching concept may be best demonstrated by a quote from late law professor Zechariah Chafee, Jr., who stated: “Your right to swing your arms ends just where the other man’s nose begins.”⁹²

⁸⁴ Whitney K. Novak, *The Religious Freedom Restoration Act: A Primer*, CONG. RSCH. SERV. 1–2 (2020), <http://crsreports.congress.gov/product/pdf/IF/IF11490> [<http://perma.cc/F9JT-67B4>].

⁸⁵ *Id.* at 2.

⁸⁶ *Id.*

⁸⁷ 544 U.S. 709, 717 (2005).

⁸⁸ 534 F.3d 931, 937 (8th Cir. 2008).

⁸⁹ *Cutter*, 544 U.S. at 720.

⁹⁰ See *Sherbert v. Verner*, 374 U.S. 398, 410 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); see also *supra* notes 58–72 and accompanying text.

⁹¹ In fact, this particular topic is the subject of several law review articles. See generally Elyssa Sternberg, *Who Moved My Harm Principle? How the Relationship Between Complicity Claims and the Contraception Mandate Shows that Considerations of Third-Party Harms in Religious Exemption Cases Are Not Where We Think They Are*, 28 S. CAL. REV. L. & SOC. JUST. 165 (2019).

⁹² Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919).

How this concept applies to the ACA's contraceptive mandate, however, is heavily debated. One view, proffered by Mark Storslsee, the former Executive Director of the Stanford Constitutional Law Center, states that First Amendment jurisprudence prevents the government from providing religious accommodations when doing so generates any burden to third parties.⁹³ In contrast, others argue that the impact of religious exemptions should be considered as a part of the RFRA balancing test, although where it should be placed is also debated.⁹⁴

It makes the most logical sense to analyze third-party harm under the substantial burden prong of RFRA.⁹⁵ The Supreme Court in *Hobby Lobby* rejected the argument that providing contraceptives to the general public satisfies the compelling interest test.⁹⁶ Additionally, according to RFRA and RLUIPA, the government's "compelling interest test [must be] satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."⁹⁷ Here, because the contraceptive mandate burdens an employer's religion, the compelling interest analysis must be applied to the employer, not third parties.

However, the Supreme Court, despite considering third-party harm in *Sherbert, Yoder, Lee, Caldor*, and *Cutter*,⁹⁸ largely ignores the effect the accommodations to the contraceptive mandate may have on third parties.

⁹³ See Storslee, *supra* note 38, at 883 ("[A]lthough religious believers (the 'first party') may sometimes receive exemptions from government (the 'second' party), the Establishment Clause forbids accommodations that generate costs or burdens for 'third parties,' meaning 'persons who derive no benefit from an exemption because they do not believe or engage in the exempted religious practices.'").

⁹⁴ Compare Sternberg, *supra* note 91, at 165, 170–71 ("While the compelling interest prong of RFRA is an insufficient basis for contemplating the harm principle, the substantial burden prong of the *Sherbert* test can allow courts to find certain forms of religious exercise to be unprotectable due to their harmful effects on third parties."), with *Developments in the Law*, *supra* note 71, at 2187 (explaining that the third-party harm principle is "couched in a compelling interest analysis"); see also *Yoder*, 406 U.S. at 224 (considering third-party harm under the government's compelling interest prong of RFRA).

⁹⁵ While *Hobby Lobby* states—when considering the burden religious accommodations have on nonbeneficiaries—"that consideration will often inform the analysis of the Government's compelling interest" the use of the word "often" indicates that a third-party harm analysis is not part of the compelling interest test per se. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730 n.37 (2014) (emphasis added).

⁹⁶ See discussion *infra* Section III.A.

⁹⁷ *Hobby Lobby*, 573 U.S. at 726 (quoting *Gonzales v. O Centro*, 546 U.S. 418, 430–31 (2006)).

⁹⁸ The third-party harm principle also appears in antidiscrimination lawsuits, including racial and sexual orientation discrimination. See *infra* notes 192–193 and accompanying text.

III. SIGNIFICANT MILESTONES REGARDING THE CONTRACEPTIVE MANDATE

A. *Hobby Lobby*

After creating an exception for nonprofit organizations, for-profit organizations claimed they should also receive exemptions to the contraceptive mandate. Notably, the Supreme Court first addressed this issue in *Hobby Lobby*. In that case, Hobby Lobby Stores, Inc., a for-profit corporation, challenged the contraceptive mandate's requirement to provide FDA-approved drugs and devices that may act to destroy an embryo, as opposed to preventing conception.⁹⁹ The Supreme Court ultimately held that a closely held corporation is entitled to receive religious accommodations to the contraceptive mandate and shift the cost of contraceptives to health insurance companies so long as the corporation filled out the necessary forms notifying the government.¹⁰⁰

In reaching this decision, the Supreme Court found that the contraceptive mandate imposes a substantial burden on religion, but rejected the argument that the government had a compelling interest in promoting "public health" and "gender equality."¹⁰¹ The Court quoted *Gonzales v. O Centro*: "[RLUIPA, like RFRA,] contemplates a 'more focused' inquiry [and] 'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened."¹⁰²

Thus, the Supreme Court considered "the marginal interest in enforcing the contraceptive mandate in these cases"¹⁰³ but decided not to address the issue of whether the government had a compelling interest and simply assumed that it did.¹⁰⁴

⁹⁹ 573 U.S. at 720.

¹⁰⁰ *Id.* at 688–92.

¹⁰¹ *Id.* at 726–27. Justice Ginsburg critiques the majority for conflating the sincerity of the religious beliefs with the substantiality of the burden. *Id.* at 760 (Ginsburg, J., dissenting). She states:

I would conclude that the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The requirement carries no command that Hobby Lobby . . . purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans.

Id.

¹⁰² *Id.* at 726 (citing *Gonzales*, 546 U.S. at 430–31).

¹⁰³ *Id.* at 727.

¹⁰⁴ *Id.* at 727–28 ("We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA . . .").

The Supreme Court likely deferred the issue of whether the government had a compelling interest because the final prong of RFRA analysis, that the government use the least restrictive means to achieve their compelling interest, was not satisfied.¹⁰⁵ The majority notes that not only was it possible for the government to assume the cost of providing contraceptives free of charge to women but that the HHS could also expand the current accommodation to secular businesses as well.¹⁰⁶ This accommodation would require employers to self-certify that they oppose the inclusion of certain contraceptives in their healthcare plan.¹⁰⁷ The majority briefly considered the harm that granting the accommodation may cause to third parties: “The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.”¹⁰⁸ However, the proposition that there is no third-party harm as a result of the accommodations is no longer correct. After the *Hobby Lobby* decision, the government crafted additional rules granting moral and religious exemptions to the contraceptive mandate, which provide no alternate mechanism for employees to obtain contraceptives without cost sharing.¹⁰⁹

In her dissent, Justice Ginsburg heavily criticized the majority’s approach.¹¹⁰ She explained:

In the Court’s view, RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners’ religious faith—in these cases, thousands of women employed by Hobby Lobby . . . or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve

¹⁰⁵ *Id.* at 728 (“The least-restrictive-means standard is exceptionally demanding . . . and it is not satisfied here.”).

¹⁰⁶ *See id.* at 729–31.

¹⁰⁷ *Id.* at 731.

¹⁰⁸ *Id.* at 693. The Supreme Court appears to “tie accommodation to the fact that the government has other ways of providing for the statute’s intended beneficiaries so that no third-party harm would result from the accommodation.” Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516, 2532 (2015).

¹⁰⁹ *See* discussion *infra* Section III.C.

¹¹⁰ *See Hobby Lobby*, 573 U.S. at 739–40 (Ginsburg, J., dissenting). Others have also criticized the *Hobby Lobby* decision. For instance, Alexis Florczak argues: “Because the [Supreme] Court provided little guidance to lower courts for evaluating a corporation’s sincerely held religious beliefs, the possibility for a corporation to succeed in asserting insincere beliefs to discriminate and deny medically necessary services . . . is a dangerous consequence inconsistent with RFRA’s original purpose.” Alexis M. Florczak, *Make America Discriminate Again? Why Hobby Lobby’s Expansion of RFRA is Bad Medicine for Transgender Health Care*, 28 *HEALTH MATRIX* 431, 435 (2018).

a far less radical purpose, and mindful of the havoc the Court's judgment can introduce, I dissent.¹¹¹

Not only does Justice Ginsburg condemn the majority for ignoring the societal harm their decision will have, but she also critiques the majority's application of RFRA itself.¹¹² According to Justice Ginsburg, the majority's decision, "elides entirely the distinction between the sincerity of a challenger's religious belief and the substantiality of the burden placed on the challenger."¹¹³

Shortly after this decision was rendered, several organizations asserted objections to the accommodation, claiming that even filling out the forms and noting a religious objection violated RFRA.¹¹⁴

B. *Zubik*

In 2016, the second ACA contraceptive mandate and religious accommodation case reached the Supreme Court.¹¹⁵ Petitioners, most of whom were nonprofit organizations that provided health insurance to their employees, sought an exemption from the contraceptive mandate and argued that the self-certification process, whereby organizations assert they have a religious objection to providing some or all contraceptives required under the ACA, "substantially burdens the exercise of their religion," in violation of RFRA.¹¹⁶ After oral arguments, the Court remanded the case without deciding the issue.¹¹⁷ In an unsigned opinion, the Supreme Court instructed the parties to create an approach to the self-certification requirement that "accommodates petitioners'

¹¹¹ *Hobby Lobby Stores, Inc.*, 573 U.S. at 740 (Ginsburg, J., dissenting).

¹¹² *See id.* at 740, 757–59.

[Religious] beliefs, [no matter how] deeply held, do not suffice to sustain a RFRA claim. RFRA properly understood, distinguishes between "factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature," which a court must accept as true, and the "legal conclusion . . . that [plaintiffs'] religious exercise is substantially burdened," an inquiry the court must undertake.

Id. at 758–59 (alteration in original) (quoting *Kaemmerling v. Lappin*, 533 F.3d 669, 679 (D.C. Cir. 2008)).

¹¹³ *Id.* at 760.

¹¹⁴ *See NeJaime & Siegal, supra* note 108, at 2531–32 ("Mere days after issuing its *Hobby Lobby* decision, the Court provisionally recognized another complicity-based conscience claim in its interim order in *Wheaton College v. Burwell* . . . [The claimants alleged] that the self-certification form . . . would 'make it *complicit* in the provision of contraceptives by triggering the obligation for someone else to provide the services to which it objects.'").

¹¹⁵ *Zubik v. Burwell*, 578 U.S. 403 (2016). *Zubik* was a series of consolidated cases. *See E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015); *Geneva Coll. v. Sec'y U.S. Dep't of Health & Hum. Servs.*, 778 F.3d 422 (3d Cir. 2015); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015); *Priests for Life v. U.S. Dep't of Health & Hum. Servs.*, 772 F.3d 229 (D.C. Cir. 2014).

¹¹⁶ 578 U.S. 403, 405–07 (2016).

¹¹⁷ *Id.* at 408–10.

religious exercise while at the same time ensur[es] that women covered by petitioners' health plans 'receive full and equal coverage, including contraceptive coverage.'"¹¹⁸

C. The Interim Final Rules and the Final Rules

On remand, in an attempt to follow the *Zubik* directive, the HHS reviewed more than 50,000 comments¹¹⁹ but announced that the HHS was unable to determine or devise a method by which it could accommodate the petitioners' views while ensuring the seamless contraceptive coverage to women.¹²⁰ As a result, the HHS issued Interim Final Rules (IFRs) in October 2017, creating a religious (Religious Exemption IFR)¹²¹ and moral (Moral Exemption IFR)¹²² exemption to the contraceptive mandate.¹²³ These exemptions required employers to self-certify that they had religious or moral objections to the contraceptive mandate, and as a result, the employees would no longer have access to contraceptives via their employer's health insurance plans.¹²⁴

The Religious Exemption IFR expanded the definition of objecting entities to include any nongovernmental plan sponsor that objects, based on its sincerely held religious beliefs, to its "establishing, maintaining, providing, offering, or arranging (as applicable): (i) [c]overage or payments for some or all contraceptive

¹¹⁸ *Id.* at 408 (internal citation omitted).

¹¹⁹ *Massachusetts v. U.S. Dep't of Health & Hum. Servs.*, 513 F. Supp. 3d 215, 220 (D. Mass. 2021). Generally, before an administrative agency can promulgate rules, the agency must publicly announce that they intend to do so. The public then has the opportunity to submit comments about the proposal. *Learn About the Regulatory Process*, REGULATIONS.GOV, <http://www.regulations.gov/learn> [<http://perma.cc/8GW8-EYYX>] (last visited Jan. 2, 2022).

¹²⁰ *Massachusetts*, 513 F. Supp. 3d at 220.

¹²¹ Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,793 (Oct. 13, 2017).

¹²² Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838, 47,839 (Oct. 13, 2017).

¹²³ See Reddy, Patel & Radhakrishnan *supra* note 42 ("The Trump administration rules at issue . . . broaden the exceptions to the contraceptive coverage mandate [even] further, notably including employers that object on moral, not just religious, grounds and offering objecting parties outright exemptions from the mandate, rather than just accommodations."). This is also not the first time that the government considered adding a conscience-based objection to the contraceptive mandate. After passing the ACA,

Republican leaders attempted to pass legislation providing conscience exemptions from the law's requirement that employer-provided healthcare insurance cover particular items and services. In 2012, the Respect of Rights of Conscience Act, commonly referred to as the Blunt Amendment, sought to amend the ACA to exempt any employer from "providing coverage" and any plan from "paying for coverage" of any "items or services . . . contrary to the religious beliefs or moral convictions of the sponsor, issuer, or other entity offering the plan." . . . The Blunt Amendment was narrowly defeated in the Senate . . .

NeJaime & Siegal, *supra* note 108, at 2550–51.

¹²⁴ *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2377–78 (2020).

services; or (ii) [a] plan, issuer, or third party administrator that provides or arranges such coverage or payments.”¹²⁵

The Moral Exemption IFR expanded the exemption even further; it allows nonprofit organizations and for-profit entities with no publicly traded ownership interests to opt out of, based on its sincerely held moral conviction, “establishing, maintaining, providing, offering, or arranging for (as applicable): (i) [c]overage or payments for some or all contraceptive services.”¹²⁶

Significantly, however, these exemptions, while allowing employers to opt out of the ACA’s contraceptive mandate, do not contain any alternative mechanisms to ensure that women are able to access contraceptives.¹²⁷ If an employer certifies that they have a religious or moral objection to providing contraceptives to their employees, their employees will be left with two options: (1) find contraceptive care from existing governmental programs or (2) pay for contraceptives out of their own pocket.¹²⁸ Existing governmental programs that provide medical services to low-income individuals, such as Medicaid, are not equipped to deal with a sudden “influx of tens of thousands of previously insured women.”¹²⁹ Additionally, suddenly compelling women to navigate the requirements for these programs not only imposes additional barriers, but it also creates a “continuity of care problem, ‘forc[ing those] who lose coverage away from trusted providers who know their medical histories.’”¹³⁰ While women could alternatively, pay for contraceptives out of their own pocket, this may impose a substantial financial hardship.¹³¹ For instance, one of the most effective types of contraception is an intrauterine device (IUD),

¹²⁵ 45 C.F.R. § 147.132(a)(iv)(2) (2021).

¹²⁶ 45 C.F.R. § 147.133(a)(2) (2021); *Massachusetts v. U.S. Dep’t of Health & Hum. Servs.*, 513 F. Supp. 3d 215, 221 (D. Mass. 2021).

¹²⁷ *Little Sisters*, 140 S. Ct. at 2403 (Ginsburg, J., dissenting).

¹²⁸ *Id.* at 2408–09.

The first option . . . is for women to seek contraceptive care from existing government-funded programs. Such programs, serving primarily low-income individuals, are not designed to handle an influx of tens of thousands previously insured women. . . . The second option for women losing insurance coverage for contraceptives is to pay from contraceptives counseling and devices out of their own pockets.

Id.

¹²⁹ *Id.* at 2408.

¹³⁰ *Id.* at 2409 (quoting Brief for Nat’l Women’s L. Center et al. as Amici Curiae Supporting Respondents at 18, *Little Sisters*, 140 S. Ct. 2367 (2020) (Nos. 19-431, 19-454)); *see also* Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,888 (July 2, 2013).

¹³¹ *See Little Sisters*, 140 S. Ct. at 2409 (Ginsburg, J., dissenting).

the cost of which “is nearly equivalent to a month’s full-time pay for workers earning the minimum wage.”¹³²

The IFRs were superseded by the Final Rules issued in November 2018, which became effective in January 2019.¹³³ The Final Rules formally codify the expanded exemptions and are substantively similar as the IFRs.¹³⁴

In summary, with the promulgation of these rules, opting out of the contraceptive mandate became easier for secular employers, and the Supreme Court’s directive in *Zubik* that women be provided with full and equal coverage, including contraceptive coverage, was not met.

¹³² *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 762 (2014) (Ginsburg, J., dissenting).

¹³³ Religious Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018); Moral Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018).

¹³⁴ Also, interestingly, the Final Rules are being challenged in court. Massachusetts is currently involved in litigation against HHS claiming that the Final Rules: (1) are arbitrary and capricious under the Administrative Procedures Act; (2) violate the Establishment Clause; and (3) violate the equal protection guarantee implicit in the Fifth Amendment. *Massachusetts v. U.S. Dep’t of Health & Hum. Servs.*, 513 F. Supp. 3d 215, 223–29 (D. Mass. 2021). The district court determined that the (1) Final Rules did not violate the APA; (2) Massachusetts did not show that the Final Rules violated the Establishment Clause; and (3) the Final Rules did not violate the 5th amendment’s equal protection guarantee. *Id.* The fact that the IFRs (and later the Final Rules) included religious and moral exceptions is particularly interesting. Often times the terms (religious and moral) are grouped together, but there are numerous theories exploring the connection between the two. Linda J. Skitka et al., *Moral and Religious Convictions: Are They the Same or Different Things?*, PLOS ONE, June 2018, at 1, 2–4. The four theories are as follows: (1) the equivalence hypothesis provides that religion and morality are inseparable; (2) the secularization hypothesis states that “morality and religion have become increasingly separate overtime[;]” (3) the political asymmetry hypothesis states that “religious Americans are more likely to have conservative than liberal positions on most issues”; and (4) the distinct constructs hypothesis states that morality and religion are fundamentally different. *Id.* According to the distinct construct hypothesis, a key distinction between religion and morality is the degree of authority independence. *Id.* at 4. For instance,

[r]eligious beliefs are more intimately tied to authorities and rules than are moral beliefs. In other words, religious authorities and institutions teach their members what is acceptable or unacceptable, such as whether to eat pork or to go outside without covering one’s head. . . . In contrast, people define moral beliefs in more absolutist terms that transcend what institutions or authorities dictate. If, for example, someone has a moral commitment to the idea that eating meat is morally wrong, it would not matter what authorities or the law had to say about the practice: The perceiver would still see meat consumption as wrong.

Id. (footnote omitted). A study conducted by researchers at the University of Illinois at Chicago revealed that the evidence suggests that “moral and religious convictions are largely independent constructs.” *Id.* at 12. This research indicates that there is a distinction between moral and religious beliefs. *Id.* Religious beliefs are protected by RFRA; moral beliefs are not. See Novak, *supra* note 84.

D. *Little Sisters*

1. The Majority Opinion

Little Sisters of the Poor Home for the Aged are an order of Roman Catholic Nuns that operate several nursing homes and objected to the contraceptive mandate's self-certification requirement because "notice to the government implicates them in contraception use."¹³⁵ The government responded by asserting that both the Religious Exemption IFR and Moral Exemption IFR were substantively and procedurally invalid.¹³⁶ The case made its way to the Supreme Court, and in ruling on the matter, the Court determined that the HHS had the authority to issue the IFRs and that there were no procedural defects.¹³⁷ The Supreme Court in *Little Sisters* did not decide whether the self-certification requirement violated RFRA, nor did the Supreme Court consider whether the expansion to the exemptions contained in the IFRs violated the Administrative Procedures Act or the First Amendment's religion clauses.¹³⁸

2. Alito's Concurrence

Justice Alito agreed with the majority that the HHS had the authority to promulgate the IFRs but wrote a separate concurrence stating that he would have also decided whether the IFRs violated RFRA.¹³⁹ He believes they do not.¹⁴⁰

Under Justice Alito's RFRA analysis, it is necessary to consider two questions in determining the substantiality of the burden: "would noncompliance have substantial adverse practical consequences" and "would compliance cause the objecting party to violate its religious beliefs, *as it sincerely understands them*?"¹⁴¹ In essence, Justice Alito's analysis examines the sincerity of the claim and the practical adverse consequences to

¹³⁵ Frederick Mark Gedicks, "Substantial" Burdens: How the Courts May (and Why They Must) Judge Burdens on Religion Under RFRA, 85 GEO. WASH. L. REV. 94, 99 (2017); see also *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1178 n.25 (10th Cir. 2015).

¹³⁶ See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2378–79 (2020). Respondents could not argue that the Religious Exemption IFR or Moral Exemption IFR were permissible under RFRA because the text of the Religious Exemption IFR states that the government does not have a compelling interest in providing contraceptives under the ACA. See *id.* at 2392 (Alito, J., concurring).

¹³⁷ *Id.* at 2386 (majority opinion).

¹³⁸ See *id.* at 2367.

¹³⁹ See *id.* at 2387 (Alito, J., concurring).

¹⁴⁰ See *id.*

¹⁴¹ *Id.* at 2389.

the religious claimants.¹⁴² Though notably, he does not consider the adverse practical consequences to third parties.¹⁴³

Justice Alito begins his analysis with an acceptance that the petitioner's claims were sincere, explaining that "federal courts have no business addressing . . . whether the religious belief asserted in a RFRA case is reasonable."¹⁴⁴ Justice Alito further opines that fining the petitioners 100 dollars per day, per employee is a substantial adverse effect.¹⁴⁵ The sincerity of the petitioners' claims coupled with the fine led Justice Alito to conclude that the IFRs substantially burdened religion.¹⁴⁶

Justice Alito then proceeds to analyze whether the government had a compelling interest and whether the government used the least restrictive means.¹⁴⁷ Pursuant to Justice Alito, the government did not have a compelling interest in providing widespread access to cost-free contraceptives because preventative services with respect to women were not included in the text of the ACA itself.¹⁴⁸ Rather, outside agencies defined what constituted preventative care and included contraceptives in that definition.¹⁴⁹ Additionally, he notes that there are a broad number of exceptions to the contraceptive mandate.¹⁵⁰ Moreover, the Supreme Court has previously determined that if there are a large swathe of exceptions to a generally applicable rule, the government does not have a compelling interest.¹⁵¹

Finally, Justice Alito determined that, assuming the government did have a compelling interest in providing contraceptives, the government did not institute the least restrictive means of achieving that interest.¹⁵² An alternative would be for the government to absorb the cost of providing contraceptives to women who could not afford them.¹⁵³

¹⁴² *See id.*

¹⁴³ *See id.* at 2387–2400.

¹⁴⁴ *Id.* at 2390.

¹⁴⁵ *Id.* at 2389–90.

¹⁴⁶ *See id.* at 2391.

¹⁴⁷ *See id.* at 2392.

¹⁴⁸ *See id.* at 2392, 2394 ("[I]t is undoubtedly true that the contraceptive mandate provides a benefit that many women may find highly desirable, but Congress's enactments show that it has not regarded the provision of free contraceptives or the furnishing of 'seamless' coverage as 'compelling.'").

¹⁴⁹ *Id.* at 2387.

¹⁵⁰ *See id.* at 2392–93.

¹⁵¹ *See Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993); *see also Rader v. Johnston*, 924 F. Supp 1540, 1552 n.23 (D. Neb. 1996) (holding that the large number of exceptions were not being enforced in a neutral manner and that providing such a large number of exceptions "undercuts" the purpose of the regulation).

¹⁵² *Little Sisters*, 140 S. Ct. at 2394 (Alito, J., concurring).

¹⁵³ *Id.* at 2394 ("[T]he Government has 'other means' of providing cost-free contraceptives to women 'without imposing a substantial burden on the exercise of religion by the objecting parties. . . . The most straightforward way,' we noted [in *Hobby Lobby*] 'would be

3. Ginsburg's Dissent

Justice Ginsburg, however, approached the issue from a different perspective and wrote a scathing dissent. She began by saying:

In accommodating claims of religious freedom, this Court has taken a balanced approach, one that does not allow the religious beliefs of some to overwhelm the rights and interest of others who do not share those beliefs. . . . Today, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the nth degree.¹⁵⁴

Justice Ginsburg's approach, in contrast to Justice Alito's, considers the third-party harm the accommodations may have as part of a balancing test. A crucial point made by Justice Ginsburg is that if the Supreme Court finds that the self-certification requirement violates RFRA, between approximately "70,500 and 126,400 women would immediately lose access to no-cost contraceptive services."¹⁵⁵ Justice Ginsburg also highlights the ramifications these accommodations would have on the tens of thousands of women who would lose contraceptive coverage: many women will forgo contraception when faced with the high out-of-pocket costs they would need to pay to obtain effective contraceptives.¹⁵⁶

IV. THE SUPREME COURT MISAPPLIES RFRA: THERE IS NO SUBSTANTIAL BURDEN TO LITTLE SISTERS BECAUSE THIRD-PARTY HARM OUTWEIGHS LITTLE SISTER'S SINCERITY AND ANY ADVERSE PRACTICAL CONSEQUENCES

Instances where third-party harm triumphs over religious claimants highlight the need for courts to consistently consider the impact religious exemptions may have on others.¹⁵⁷ However, such a determination can only be made *after* judicial inquiry. Although often overlooked in the context of the contraceptive mandate, the Supreme Court has considered limiting religious exemptions to protect third parties elsewhere, including in the context of LGBTQ+ discrimination. In *Masterpiece Cakeshop*, the Supreme Court, in dicta, explained the importance of confining religious exemptions to protect other liberties:

for the Government to assume the cost of providing the . . . contraceptives.") (internal citations omitted) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014)).

¹⁵⁴ *Id.* at 2400 (Ginsburg, J., dissenting) (internal citations omitted).

¹⁵⁵ *Id.* at 2401.

¹⁵⁶ *Id.* at 2409 ("[T]he religious exemption reintroduce[s] the very health inequities and barriers to care that Congress intended to eliminate when it enacted the women's preventive services provision of the ACA.") (internal citations omitted).

¹⁵⁷ For brevity's sake, I only discuss one example of third-party harm triumphing over religious claimants.

[If religious exceptions] were not confined, then a long list of persons who provide goods and services . . . might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.¹⁵⁸

In that instance, the Supreme Court found that third-party harm warrants the denial of religious exemptions as the societal harm outweighed any adverse effect to the religious claimants.¹⁵⁹

In the context of the contraceptive mandate, the Supreme Court has not consistently analyzed how religious exemptions will impact third parties. Cumulatively, *Hobby Lobby*, *Zubik*, the IFRs/FRs, and *Little Sisters* demonstrate that the Court largely accepted a claimant's assertion that the exemptions substantially burden the exercise of religion without independently considering third-party harm or whether the assertions are sincere (as opposed to merely accepting the assertion that the claim is sincere). In determining whether the IFRs and FRs violate RFRA, the Court should utilize the balancing test created in *Sherbert/Yoder* and weigh the competing interests of the religious claimants and third parties. Employing this test would require the Supreme Court to analyze the substantiality of the burden, including religious sincerity and third-party harm, and weigh that burden against the government's compelling interest.

The Supreme Court in *Little Sisters* did not consider the adverse practical consequences to third parties. In his concurrence to the majority opinion, Justice Alito only considered two factors in

¹⁵⁸ *Masterpiece Cake Shop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1727 (2018). Although the religious claimants in *Masterpiece Cake Shop* relied on the First Amendment's Free Exercise Clause, not RFRA, the legal standards are similar. See *infra* Section II.A. For further discussion about *Masterpiece Cake Shop* and third-party harm, see also *Developments in the Law, supra* note 71, at 2192 (2021) (“[I]n *Masterpiece Cakeshop*, the Court granted an exemption to a state non-discrimination statute, but was also careful to reaffirm the third-party harm principle, this time framed in terms of the need to protect the ‘dignity and worth’ of same-sex couples.”); Douglas NeJaime & Reva Siegal, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 *YALE L.J.F.* 201, 210 (2018).

In *Masterpiece Cakeshop*, the Court emphasizes the importance of antidiscrimination protections in public accommodations and reaffirms precedent limiting religious exemptions from such laws. It stresses that exemptions must be limited in order to vindicate the government's interest in securing equal opportunity, to afford protected classes equal access to goods and services, and to shield them from stigma.

Id.

¹⁵⁹ The Supreme Court spoke in dicta while considering the hypothetical situation that unrestrained religious-based exceptions could pose severe risks towards the goals of the civil rights movements for members of the LGBTQ+ community. However, their reasoning still proves instructive as they upheld the religious freedom of the baker who declined to make a wedding cake for a gay couple in *Masterpiece Cakeshop*. See *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

deciding whether or not the claimants in *Little Sisters* were substantially burdened: “would noncompliance have substantial adverse practical consequences?” and “would compliance cause the objecting party to violate its religious beliefs, *as it sincerely understands them?*”¹⁶⁰ However, he neglected to consider in the foregoing analysis, the substantial adverse practical consequences to *third parties*. As described above, third-party harm is a factor to consider when evaluating whether or not a law constitutes a substantial burden to religion.¹⁶¹

Moving forward, if this issue returns to the Supreme Court—which must decide whether the claimants face a substantial burden in certifying that they have a religious objection to providing their employees with access to contraceptives—it is necessary to consider more than just the sincerity of their argument. It is also necessary to consider the adverse practical consequences to both religious claimants *and* third parties.

A. Sincerity

Petitioners in *Little Sisters* objected to the contraceptive mandate’s self-certification requirement, arguing that the self-certification requirement would still render them complicit in their employees having access to contraceptives.¹⁶² Although courts are generally hesitant to examine the sincerity of religious beliefs, it is particularly important to consider it along with third-party harm in complicity cases “because under a complicity claim, specifically identified persons or groups who do not share the claimant’s belief can be forced to bear the burden of claimant’s exercise, instead of society in general.”¹⁶³

Notwithstanding courts’ hesitancy in scrutinizing sincerity, the employer’s argument in *Little Sisters*—that complying with the self-certification requirement would render them complicit in the sin of using contraceptives—while sincere, is logistically flawed: *Little Sisters* is an employer operating in the United States and is thus required to pay their employees. If an employee uses their paycheck to purchase contraceptives, are the employers not “complicit”

¹⁶⁰ *Little Sisters*, 140 S. Ct. at 2389 (Alito, J., concurring).

¹⁶¹ See *supra* Section II.A.

¹⁶² *Little Sisters*, 140 S. Ct. at 2390–91 (Alito, J., concurring).

¹⁶³ Sternberg, *supra* note 91, at 173; see also *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972) (“Although a determination of what is a ‘religious’ belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.”).

then according to Little Sisters' reasoning?¹⁶⁴ However, since courts do not consider the reasonableness of a religious belief in RFRA cases (even when they should),¹⁶⁵ for the purposes of this Note, it is conceded that their belief is sincere.

B. Adverse Practical Consequences

Notwithstanding a concession pertaining to the reasonableness of Little Sisters' sincerity, their sincerity still must be weighed against the adverse practical consequences to the claimants *and* third parties. In his concurrence, Justice Alito found that fining Little Sisters 100 dollars per day, per employee is a substantial adverse effect.¹⁶⁶ Comparatively, the *Yoder* Court determined that a five-dollar fine was a substantial adverse effect.¹⁶⁷ In making the comparison, it is important to note that in *Yoder*, removing children a year or two early from public school did not impact third parties.¹⁶⁸ Thus, while there was an adverse effect to the claimants, there was no practical consequences to others. Accordingly, the *Yoder* Court properly found that the requirement that Amish children attend school past a certain age imposed a substantial burden on religion.¹⁶⁹

Similarly in *Sherbert*, the Supreme Court determined that the disqualification of benefits imposed a substantial burden on the appellant's religion because "[t]he ruling [of the Employment Security Commission] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work on the other hand."¹⁷⁰ Moreover, the Court briefly considered how the disqualification of benefits may impact society at large: "this is not a

¹⁶⁴ Moreover, "the Little Sisters are employers that do not insulate themselves from those who think and live differently in a pluralistic society. They operate institutions that they hold open to persons of all faith and of no faith—both with respect to employees and clients." M. Cathleen Kaveny, *Law, Religion, and Conscience in a Pluralistic Society: The Case of Little Sisters of the Poor*, in LEGAL STUDIES RESEARCH PAPER SERIES at 1, 6 (Mar. 29, 2016) (B.C. L. Sch., Rsch. Paper No. 394) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2756148 [<http://perma.cc/C8XE-DN2C>].

¹⁶⁵ See Gregory M. Lipper, *The Contraceptive-Coverage Cases and Politicized Free-Exercise Lawsuits*, 2016 U. ILL. L. REV. 1331, 1332 (2016) ("The government has largely taken the plaintiffs' sincerity for granted, failing to invoke (or even investigate) significant evidence that many of the asserted claims are insincere.").

¹⁶⁶ *Little Sisters*, 140 S. Ct. at 2389 (Alito, J., concurring).

¹⁶⁷ See *Yoder*, 406 U.S. at 208, 236. "Adjusted for inflation, \$5 in 1972 is worth \$31.69 in 2021." *Calculate the Value of \$5.00 in 1972*, DOLLAR TIMES, <http://www.dollartimes.com/inflation/inflation.php?amount=5&year=1972> [<http://perma.cc/HW4J-J98R>] (last visited Apr. 28, 2021).

¹⁶⁸ 406 U.S. at 224–25.

¹⁶⁹ *Id.* at 207.

¹⁷⁰ 374 U.S. 398, 404 (1963).

case in which an employee's religious convictions serve to make h[er] a nonproductive member of society."¹⁷¹

Although briefly mentioned in each decision, widespread adverse practical consequences were not a significant factor in either *Sherbert* or *Yoder*.¹⁷² In those cases, there were no countervailing interests to prevent the Supreme Court from concluding that the law imposed a substantial burden on religion.

The line of cases involving the contraceptive mandate, however, are functionally different, as any decision to grant religious exemptions necessarily impacts women who have insurance under which they receive the benefits of contraceptives. In contrast to the absence of third-party harm in *Sherbert* and *Yoder*, if the Supreme Court determines that the religious exemptions to the contraceptive mandate violate RFRA, a substantial impact to third parties would exist. The government estimates that "between 70,500 and 126,400 women would immediately lose access to no-cost contraceptive services."¹⁷³

If "between 70,500 and 126,400 women . . . immediately lose access to no-cost contraceptive services[.]"¹⁷⁴ they may face financial hardship in trying to obtain contraceptives elsewhere. They may incur psychological harm due to the elimination of benefits as a result of their employer's religious beliefs that women may not necessarily share.¹⁷⁵ Their alternative would be to obtain contraceptives from existing governmental programs,

¹⁷¹ *Id.* at 410.

¹⁷² *See supra* Part III; *see also* Sternberg, *supra* note 91, at 169 ("This 'complicity claim' is a very different claim from those brought in *Sherbert* and *Smith* because a complicity claim necessarily controls the conduct of a third party.").

¹⁷³ *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2401 (2020) (Ginsburg, J., dissenting).

¹⁷⁴ *Id.*

¹⁷⁵ One of the most effective types of contraception is an intrauterine device (IUD), the cost of which "is nearly equivalent to a month's full-time pay for workers earning minimum wage." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 762 (2014) (Ginsburg, J., dissenting). Additionally, medical bills and expenses are the most cited reasons for individuals filing bankruptcy. One study estimates that a little over 60% of people who file for bankruptcy do so, at least in part, because of medical bills. Unfortunately, the ACA has done little to help reduce this number. Even with health insurance, individuals may be thousands of dollars in debt. By further increasing the costs of healthcare, indigent populations will be disproportionately impacted by a sudden, large increase in fees by having to purchase contraceptives from their own pocket. *See* Michael Sainato, *I Live on the Streets Now: How Americans Fall into Medical Bankruptcy*, THE GUARDIAN (Nov. 14 2019, 2:00 AM), <http://www.theguardian.com/us-news/2019/nov/14/health-insurance-medical-bankruptcy-debt> [<http://perma.cc/4GJF-DBUE>]; David U. Himmelstein et al., *Medical Bankruptcy: Still Common Despite the Affordable Care Act*, 109 AM. J. PUB. HEALTH 431, 431–33 (2019); *see also* NeJaime & Siegal, *supra* note 108, at 2528 ("In adjudicated religious liberties law, when accommodation has threatened to impose significant burdens on other citizens, courts have repeatedly rejected the exemption claims. The underlying intuition seems to be that one citizen should not be singled out to bear significant costs of another person's religious exercise.").

but these programs are not designed to handle a sudden influx of tens of thousands of women.¹⁷⁶ Additionally, the potential for social stigmatization exists:

Accommodating such religious beliefs may stigmatize women who use contraception, either by entrenching old norms that condemn women for seeking sex while avoiding motherhood or by labelling contraception as an ‘abortifacient.’ In these ways, sanctioning the employer’s refusal to pay can create meanings that deter women from using contraception, compromising both the individual and societal interests that the [ACA] furthers.¹⁷⁷

Overall, the contraceptive mandate not only provides financial benefits (via the elimination of cost-sharing), but it also has a broader social impact: access to affordable contraceptives is linked to the financial, physical, and emotional health of women, children, and families.¹⁷⁸ Ultimately, removing access to contraceptives for women at the behest of an employers’ religious convictions, has significant adverse consequences.¹⁷⁹

¹⁷⁶ *Little Sisters*, 140 S. Ct. at 2408.

¹⁷⁷ NeJaime & Siegel, *supra* note 108, at 2581–83.

¹⁷⁸ Of course, women’s social mobility is not solely linked to access to contraceptives. A broad range of factors has likely contributed to such movement. Contraceptives, however, do play a central role. Jacoba Urist, *Social and Economic Benefits of Reliable Contraception*, THE ATLANTIC (July 2, 2014) <http://www.theatlantic.com/health/archive/2014/07/the-broader-benefits-of-contraception/373856/> [<http://perma.cc/M4E6-7NRS>].

According to a 2013 Guttmacher Institute review of more than 66 studies, spanning three decades, reliable contraception allows women to be better parents. Among the findings: couples who experience unintended pregnancy and unplanned childbirth are more likely to have depression and anxiety—while adults who plan their children tend to be happier. Relationships are more likely to dissolve after an unplanned birth than a planned one. And those who are unprepared to be parents are more likely to develop a poor relationship with their child.

. . . Last year, the Guttmacher Institute concluded that access to birth control significantly increases a woman’s earning power and narrows the gender pay gap.

. . .

Embedded in the conversation about birth control access is a cycle of poverty. As income inequality grows families without access to reliable contraception are potentially at a greater disadvantage. Poorer children experience more health problems, live in more dangerous neighborhoods and have higher rates of delayed academic development. Those from poorer households in the long run, have lower test scores, are less likely to complete high school or college, limiting their earning potential as adults.

Id.

¹⁷⁹ There is also a substantial impact to public health.

The public health benefit of providing contraception is clearly supported by multiple studies. . . . The US Maternal Mortality Ratio (MMR) is comparable to countries with few healthcare resources: The US MMR was 16 per 100,000 live births from 2006 to 2010 and has risen to 23.8 in 2014. More than 700 women a year die of complications related to pregnancy each year in the United States, and two-thirds of those deaths are preventable. Reducing unintended pregnancy is an important element of addressing the unacceptably high MMR in the United States.

While Little Sisters' claim that the self-certification requirement noting they have a religious objection to providing their employees contraceptives would render them complicit in sinful activity is sincere and being fined 100 dollars per day, per employee does have adverse practical consequences, it does not override the substantial harm these exemptions would do to third-parties. In this instance, employees (who may not necessarily share the religious beliefs of their employers) should not be forced to bear the consequences of their employer's beliefs. By applying the aforementioned test and balancing the claimant's sincerity and adverse practical consequences against the harm imposed by the exemptions to third parties, it is evident that the self-certification requirement does *not* impose a substantial burden on religion as defined under RFRA.

V. SIGNIFICANCE AND SOLUTION

Finding that there is no substantial burden is significant because the government is not able to demonstrate that there is a compelling interest in providing contraceptives to women.¹⁸⁰ To demonstrate a compelling interest, "the Government would have to show that it would commit one of the 'gravest abuses' of its responsibilities if it did not furnish free contraceptive[s] to all women."¹⁸¹ In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court stated that "a law cannot be regarded as protecting an interest of 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."¹⁸² Simply stated, the more exemptions there are to a law, the less likely the government will be able to demonstrate that they have a compelling interest. There are several exceptions to the contraceptive mandate, even beyond the Religious Exemption IFR and Moral Exemption IFR, including exceptions for grandfathered plans, nonprofit institutions, and employers

Reddy, Patel & Radhakrishnan, *supra* note 42; *see also* Roosa Tikkanen et al., *Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries*, THE COMMONWEALTH FUND (Nov. 18, 2020), <http://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries> [<http://perma.cc/794T-HYWA>].

¹⁸⁰ Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47792, 47800 (Oct. 13, 2017) ("Upon further examination of the relevant provisions of the Affordable Care Act and the administrative record on which the [contraceptive] Mandate was based, the [government] ha[s] concluded that the application of the Mandate to entities with sincerely held religious objections to it does not serve a compelling governmental interest.").

¹⁸¹ *Little Sisters*, 140 S. Ct. at 2392 (Alito, J., concurring).

¹⁸² 508 U.S. 520, 547 (1993).

with less than fifty employees.¹⁸³ Such a large number of exemptions dilutes the government's argument that providing contraceptives is a compelling interest. Indeed, even the text of the IFRs concede that the government does not have a compelling interest in providing widespread access to contraceptives.¹⁸⁴ Accordingly, the only way for the IFRs/FRs to survive a RFRA challenge is to reframe the substantial burden requirement and weigh sincerity and adverse practical consequences to the claimants, against the adverse practical consequences to third parties.

Regarding the contraceptive mandate, Justice Ginsburg, in her dissent to *Little Sisters*, is the only Supreme Court Justice to consider how granting the religious exemptions may harm third parties. Her analysis properly considers the adverse practical consequences to those who do not share the claimant's religious beliefs.¹⁸⁵ Even beyond the fact that a third-party harm inquiry is required under RFRA, such an analysis is important because third-party harm and the underlying purpose of the ACA are intertwined. As stated above, the ACA was passed, *inter alia*, to reduce discriminatory practices in healthcare.¹⁸⁶ By failing to consider how the exemptions will impact third parties, the ACA cannot function as intended (i.e., to increase access to healthcare and reduce discriminatory practices women experience in healthcare settings).

The Supreme Court's decisions regarding the contraceptive mandate coupled with the current trend of administrative agencies instituting broader exemptions to the contraceptive mandate undermines the purpose of the ACA. Originally, at the outset of the ACA, there were a limited number of exemptions to the contraceptive mandate: only nonprofit organizations who

¹⁸³ See Katie Keith, *Supreme Court Upholds Broad Exemptions to Contraceptive Mandate—for Now*, HEALTH AFFAIRS (July 9, 2020), <http://www.healthaffairs.org/doi/10.1377/hblog20200708.110645/full#:~:text=In%20implementing%20regulations%20in%202011,that%20object%20to%20providing%20contraceptives> [<http://perma.cc/A3WG-R8S8>]; *Understanding Who Is Exempted from the Mandate*, LITTLE SISTERS OF THE POOR, <http://thelittlesistersofthepoor.com/who-is-exempt-from> [<http://perma.cc/3UAJ-ENGM>]; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 699 (2014).

¹⁸⁴ See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47792, 47800 (Oct. 13, 2017). For more information about the economic and societal benefits of preventing unintended pregnancies, see *Sherbert v. Verner*, 374 U.S. 398, 410 (1963).

¹⁸⁵ See *Little Sisters*, 140 S. Ct. at 2367 (Ginsburg, J., dissenting).

¹⁸⁶ The ACA was also passed to address the rapidly rising cost of healthcare in America. See Kimberly Amadeo, *What is Obamacare?*, THE BALANCE, <http://www.thebalance.com/what-is-obamacare-the-aca-and-what-you-need-to-know-3306065> [<http://perma.cc/VT9M-XVEN>] (last updated Sept. 29, 2021); see also *Little Sisters*, 140 S. Ct. at 2406 (Ginsburg, J., dissenting) ("First and foremost, [the contraceptive mandate] is directed at eradicating gender-based disparities in access to preventative care.").

satisfied the criteria,¹⁸⁷ employers with less than fifty employees, and grandfathered plans¹⁸⁸ were eligible. Religious accommodations soon followed.¹⁸⁹ *Hobby Lobby* then expanded the religious accommodations to closely held secular businesses.¹⁹⁰ Subsequently, further challenges to the accommodations resulted in the Supreme Court remanding the issue in *Zubik*, whereby the government responded by crafting a flat-out religious and moral exemption to the contraceptive mandate.¹⁹¹

Cumulatively, these decisions implicitly perpetuate the practice of gender bias in health care. By not considering third-party harm or the purpose of the contraceptive mandate when given the opportunity to address it, the Supreme Court is complicit in enabling the concept that providing preventative care with respect to women is not of national importance.¹⁹² Such a position directly conflicts with *why* the ACA was initially passed: to reduce discriminatory practices in healthcare settings.¹⁹³ As stated in Part I, access to affordable contraceptives is linked to the financial, physical, and emotional health of women, children, and families.¹⁹⁴ Further, widespread access to contraceptives can be linked to women's upward social

¹⁸⁷ See Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871, 39,873–74 (July 2, 2013).

¹⁸⁸ Grandfathered health plans are those that were in existence on March 23, 2010, and have not made significant changes in coverage. See *Grandfathered Health Plan*, HEALTHCARE.GOV, <http://www.healthcare.gov/glossary/grandfathered-health-plan/> [<http://perma.cc/S63M-WK5D>].

¹⁸⁹ See Rules and Regulations for Group Health Plans, 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B) (July 1, 2020).

¹⁹⁰ 573 U.S. 682, 683 (2014).

¹⁹¹ 578 U.S. 403, 408–10 (2016); Religious Exemption Interim Final Rule, 82 Fed. Reg. 47,792 (Oct. 13, 2017); Moral Exemption Interim Final Rule, 82 Fed. Reg. 47,838 (Oct. 13, 2017).

¹⁹² Other inactions further demonstrate the Supreme Court majority's indifference towards women's rights. The Supreme Court denied an emergency hearing regarding the constitutionality of a recent Texas law, which went into effect on September 1, 2021. That law imposes civil liability for anyone "facilitating" an abortion after a fetal heartbeat is detected, which can be as early as six weeks into a pregnancy, contrary to the holding of *Roe v. Wade*. See Kate Sullivan, *Biden Blasts Texas' 6-week Abortion Ban as 'Extreme' and Violation of a Constitutional Right*, CNN, <http://www.cnn.com/2021/09/01/politics/biden-texas-abortion-ban/index.html> [<http://perma.cc/6PRF-LJGY>] (last updated Sept. 1, 2021); see also "Stunning": Read the Dissents on the Supreme Court Texas Abortion Ban Ruling, AXIOS (Sept. 2, 2021), http://www.axios.com/texas-abortion-ban-supreme-court-roberts-sotomayor-29e6b7ee-a947-4ef9-a790-35236b474b38.html?utm_medium=partner&utm_source=verizon&utm_content=edit&utm_campaign=subs-partner-vmg [<http://perma.cc/J64X-TQ8U>] (quoting Justice Sotomayor's dissent: "Presented with an application to enjoin a flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny, a majority of Justices have opted to bury their heads in the sand.").

¹⁹³ See *supra* INTRODUCTION.

¹⁹⁴ Urist, *supra* note 178.

mobility.¹⁹⁵ There is a significant societal interest in remedying gender discrimination, and the Supreme Court's failure to consider the effect these accommodations have on third parties is problematic, to say the least.¹⁹⁶

In fact, scholars have cautioned the Supreme Court that rejecting the third-party harm principle in its entirety would generate severe and long reaching ramifications far beyond the contraceptive mandate: “based on its total dismissal of the issue of third-party harm, the [*Little Sisters*] decision could be read to imply that *all* antidiscrimination laws are at risk of being undermined through religious exemptions.”¹⁹⁷ The third-party harm principle is fundamental to antidiscrimination laws and appears in racial discrimination cases¹⁹⁸ and LGBTQ+ discrimination cases.¹⁹⁹ The line of cases regarding the contraceptive mandate are not substantially different from these antidiscrimination claimants who are seeking to be excluded from generally applicable laws which are designed to eliminate the disparate treatment marginalized communities face.²⁰⁰

In recent years, the Supreme Court has largely found in favor of religious claimants.²⁰¹ This trend is unlikely to change

¹⁹⁵ Wind, *supra* note 22 (“New evidence confirms what most people already believe: Women use contraception because it allows them to better care for themselves and their families, complete their education and achieve economic security . . .”).

¹⁹⁶ See *Developments in the Law*, *supra* note 71, at 2187.

But even if the conservative majority on the Court is increasingly dismissive of third party harms, rejecting the principle entirely would threaten longstanding precedents that held racially discriminatory exemptions to be impermissible on that basis—a change even the most avid conservatives on the Court have indicated a reluctance to undertake.

Id.

¹⁹⁷ *Id.* at 2187, 2196.

¹⁹⁸ See *e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

¹⁹⁹ *E.g.*, *Masterpiece Cake Shop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1727 (2018).

[If religious exceptions] were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

Id.

²⁰⁰ It is important to note, in the context of the contraceptive mandate and third-party harm, I am limiting my arguments to secular businesses claiming religious exemptions (as opposed to religious institutions). How religious institutions address discrimination and third-party harm is beyond the scope of this Note.

²⁰¹ Adam Liptak, *An Extraordinary Winning Streak for Religion at the Supreme Court*, N.Y. TIMES (Apr. 5, 2021) <http://www.nytimes.com/2021/04/05/us/politics/supreme-court-religion.html> [<http://perma.cc/B8PA-UJ5F>].

Justice Samuel A. Alito Jr. told the Federalist Society[.] . . . “It pains me to say this, but, in certain quarters, religious liberty is fast becoming a disfavored right.” Those quarters do not include the Supreme court, which has become far more likely to rule in favor of religious rights in recent years

Id.

given the current composition of the Supreme Court.²⁰² A recent study found that:

The Roberts Court has ruled in favor of religious organizations far more frequently than its predecessors—over 81% of the time, compared to about 50% for all previous eras since 1953. . . . A statistical analysis suggests that this transformation is largely the result of changes in the Court's personnel: a majority of Roberts Court justices are ideologically conservative and religiously devout—a significant break from the past.²⁰³

This study did not include the newest Justice, Amy Coney Barrett, who is religiously devout and one of the most conservative judges from the Seventh Circuit Court of Appeals.²⁰⁴

Thus, one solution would be for Congress to amend RFRA, such that an analysis of third-party harm is required when determining

²⁰² On April 15, 2021, Democrats introduced a bill that would expand the Supreme Court from nine justices to thirteen justices. By expanding the number of justices on the Supreme Court, Democrats hope the appointment of more liberal justices will counteract the current conservative majority. Many top Democrats, however, do not support the proposal. Sahil Kapur & Rebecca Shabad, *Democrats to Introduce Legislation to Expand Supreme Court from 9 to 13 Justices*, YAHOO! (Apr. 14, 2021) <http://www.yahoo.com/news/democrats-introduce-legislation-expand-supreme-010000976.html> [<http://perma.cc/X24E-K9RU>].

²⁰³ Lee Epstein & Eric Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait* (Apr. 3, 2021) (accepted for publication in the *Supreme Court Review*), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3825759; see also *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) (“Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic systems of government, but political division along religious lines was one of the principle evils against which the First Amendment was intended to protect.”); Kaveny, *supra* note 164, at 3 (stating that the Little Sisters’ “lawsuit is managed by the Beckett Fund, an activist legal organization theoretically dedicated to advancing the general cause of religious liberty under American law. In practice, however, the Beckett fund has been particularly solicitous of the religious liberty of social conservatives protesting the intrusion of progressive law and policy developments.”).

²⁰⁴ Amy Coney Barrett, BALLOTPEDIA, http://ballotpedia.org/Amy_Coney_Barrett [<http://perma.cc/P6UV-VZMR>]; see also Ruth Graham & Sharon LaFraniere, *Inside the People of Praise, the Tight-Knit Faith Community of Amy Coney Barrett*, N.Y. TIMES (Oct. 8, 2020), <http://www.nytimes.com/2020/10/08/us/people-of-praise-amy-coney-barrett.html> [<http://perma.cc/TX4L-34WQ>]. To be clear, I am not implying Justice Barrett will favor religious claimants *solely* because she herself is religious. Rather, religion is one factor that may influence a judicial decision. See, e.g., Brian H. Bornstein & Monica K. Miller, *Does a Judge's Religion Influence Decision Making?*, DIGITALCOMMONS@UNIVERSITY OF NEBRASKA - LINCOLN (2009), <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1302&context=ajacourtreview> [<http://perma.cc/3PQP-CVHR>] (“[T]he U.S. Supreme Court, ‘decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices.’”); Rachel Gross, *Do the Religious Beliefs of Supreme Court Justices Influence Their Decisions?*, MOMENT (Jan. 1, 2015), <http://momentmag.com/symposium-religion-supreme-court/> [<http://perma.cc/8CH2-UPCF>].

The abortion question is now driven in a considerable part by the Roman Catholic Church’s perspective on that issue. In his rulings on partial birth abortion, Justice Kennedy has especially been acting out his personal Catholic faith. While much of his jurisprudence is driven by liberty interests, when it comes to women’s liberty interests, he is tone deaf.

Id.

the substantiality to the burden on religion.²⁰⁵ Specifically, RFRA could be amended as follows, adding subsection (3)(i):

(a) Findings. The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws “neutral” toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(i) to determine if a law substantially burdens religion, governments must weigh the sincerity of the claim and the adverse practical consequences to the claimants against the adverse practical consequences to third parties.

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes. The purposes of this [Act] are—

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.²⁰⁶

It is especially important to amend RFRA given the rise of complicity-based claims—claims whereby religious claimants object to a government regulation because it would make them “complicit in the assuredly sinful conduct of others”—because such claims, by definition, impact third parties.²⁰⁷ RFRA was designed to restore the compelling interest test articulated in

²⁰⁵ In light of the Supreme Court’s failure to consistently inquire into third-party harm, as required by *Sherbert* and *Yoder*, an explicit legislative amendment to RFRA, as discussed above, should be enacted.

²⁰⁶ 42 U.S.C. § 2000bb.

²⁰⁷ Sternberg, *supra* note 91, at 169. *Little Sisters* relies on complicity-based claims.

Sherbert and *Yoder*.²⁰⁸ While societal harm is a theme present in both of those cases, Justice Ginsburg was the only Justice willing to entertain the consideration of third-party harm in regard to the contraceptive mandate. Clearly, this issue must be addressed explicitly to adequately consider the ramifications religious exemptions will have on nonbeneficiaries.²⁰⁹

CONCLUSION

“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”²¹⁰

Women face unique challenges in the medical system. Prior to the implementation of the ACA, women paid higher insurance premiums²¹¹ and may have been denied coverage because of prior pregnancies, domestic abuse, or sexual assault²¹². The ACA sought to remedy gender bias in healthcare. And the contraceptive mandate serves as an integral part in achieving this goal. Reproductive rights are not something which can be viewed in a vacuum; they are inherently connected to the social welfare of society.

While RFRA provides significant protection to religious claimants, it is crucial to examine how such protections impact third parties. The exemptions to the contraceptive mandate impose a substantial burden on employees who may not share the same religious beliefs as their employers, so much so that it is evident such exemptions do not impose a substantial burden on the employer's religion. The Supreme Court's decisions in *Hobby Lobby*, *Zubik*, and *Little Sisters* have cumulatively eroded the ACA's protections against gender bias and healthcare discrimination, which is not only inconsistent with the purpose of the ACA, but also with prior precedent established by *Lee*, *Cutter*, *Caldor*, *Sherbert*, and *Yoder*. By failing to engage in a substantive analysis of third-party harm, the Court has implicitly enabled the continuation of gender bias and healthcare discrimination—the exact tenets which the ACA sought to abolish. The Supreme Court should either engage in an analysis of third-party harm

²⁰⁸ 42 U.S.C. § 2000bb(b)(1).

²⁰⁹ The suggested amendment to RFRA is intended to ensure courts adequately consider how granting religious accommodations and exemptions will impact third parties. Ultimately, whether or not religious claimants prevail in their challenge is irrelevant.

²¹⁰ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992).

²¹¹ Danielle Garrett, *Turning to Fairness: Insurance Discrimination Against Women Today and the Affordable Care Act*, NAT'L WOMEN'S L. CTR. (Mar. 2012), http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf [<http://perma.cc/M84E-NC9Z>].

²¹² See Deam, *supra* note 4.

(consistent with its own prior precedent) or Congress should amend RFRA to explicitly consider the harm granting religious exemptions will have on others. The failure of either the Supreme Court or Congress to act as described above, may result in the further erosion of women's reproductive rights as well as extend into other emotionally and politically charged areas.

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