Washington University Law Review

Volume 80 | Issue 1

January 2002

Popular Sovereign Generated Versus Government Institution Generated Constitutional Norms: When Does a Constitutional Amendment Not Amend the Constitution?

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POPULAR SOVEREIGN GENERATED VERSUS GOVERNMENT INSTITUTION GENERATED CONSTITUTIONAL NORMS: WHEN DOES A CONSTITUTIONAL AMENDMENT NOT AMEND THE CONSTITUTION?

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I. INTRODUCTION

An elementary principle of constitutional law is that a constitutional amendment nullifies, or at least alters, preexisting and conflicting constitutional provisions. Yet should all constitutional amendments have this effect? Can we imagine a scenario in which ratification of a new constitutional amendment would leave preexisting conflicting constitutional provisions fully intact, unaltered, and undisturbed? This Article argues that the best understanding of fundamental adjudicatory principles compels us to recognize just such a possibility.

Consider, as an example, an amendment seeking to alter the contours of the First Amendment's Free Exercise Clause.[1] The contours of the Free Exercise Clause are quite broad, and may plausibly be read as providing anything from maximum to minimum protection from government action that burdens the exercise of religious practices.[2] Currently, the Supreme Court maintains that the Free Exercise Clause prohibits only state action that is non-neutral with regard to religious practices.[3] In contrast, facially neutral and generally applicable state action that substantially burdens the free exercise of religion is permitted, so long as the state action is rationally related to a legitimate government interest.[4] Previously, however, the Court had read the Free Exercise Clause as prohibiting state action substantially burdening the free exercise of religion unless the government action satisfied

1. U.S. CONST. amend. I.

2. *See infra* notes 3-5 and accompanying text.

3. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (striking down city ordinance as unconstitutional because it non-neutrally sanctioned the practices of a particular religious sect).

4. *See id.*; Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872 (1990) (upholding neutral and generally applicable state statute even though it substantially impinged the religious practices of a religious group); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1021 (1997) (construing Employment Div. v. Smith, 497 U.S. 872) ("The [*Smith*] Court held that the free exercise clause cannot be used to challenge a neutral law of general applicability."). In other words, neutral and generally applicable statutes that have the effect of burdening religious practices comport with the Free Exercise Clause, even when they are not supported by a compelling government interest. City of Boerne v. Flores, 521 U.S. 507, 514 (1997) (citing Employment Div. v. Smith, 494 U.S. 872), and stating that "*Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling government interest."

a strict scrutiny test.[5] Both the current rational basis and former strict scrutiny analyses constitute plausible readings of the Free Exercise Clause. Congress, fearing that the more recent rational basis test was insufficient to protect the free exercise of religion, passed the Religious Freedom Restoration Act (RFRA), which sought to impose the strict scrutiny test onto the Free Exercise Clause.[6] The Supreme Court, however, struck down RFRA as an unconstitutional effort to define the scope of Free Exercise Clause protections via passage of an ordinary statute, an action beyond the limits of Congress's enumerated legislative powers.[7]

If RFRA had been ratified pursuant to Article V[8] as an amendment to the Constitution, would it have reshaped and narrowed the contours of the Free Exercise Clause?[9] Would such an amendment, to be more precise, have truncated the otherwise broad range of plausible Free Exercise Clause meanings and eliminated the current rational basis reading as a permissible reading of the Free Exercise Clause? The conventional answer is that a

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5. Sherbert v. Verner, 374 U.S. 398 (1963) (applying a strict scrutiny test to strike down facially neutral state law that denied unemployment benefits to a woman fired for refusing to work on the Sabbath); CHEMERINSKY, *supra* note 3, at 1021 (observing that the Supreme Court applied a strict scrutiny analysis to Free Exercise Clause cases for twenty-seven years following its decision in *Sherbert*).

6. 42 U.S.C. §2000bb (1994). Under the terms of RFRA, the "government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest." *Id*. § 2000bb-1(b).

7. *Boerne*, 521 U.S. at 516-19, 529-36 (holding that Congress's power to enforce the Fourteenth Amendment does not include the power to alter the meaning of constitutional provisions such as the Free Exercise Clause, and that RFRA sought to expand Free Exercise Clause protections, rather than merely enforce Fourteenth Amendment protections).

8. U.S. CONST. art. V. Article V states:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Id.

9. Such an amendment is quite possible. The same eclectic political interest group that pushed RFRA through Congress could engineer the passage of such a constitutional amendment. *See* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 13 & n.49 (1994). There may exist sufficient support in the state legislative bodies to ratify such an amendment. Alabama has ratified a similar amendment to its constitution. ALA. CONST. amend. 622, § V; Thomas C. Berg & Frank Myers, *The Alabama Religious Freedom Amendment: An Interpretive Guide*, 31 CUMB. L. REV. 47 (2000). In addition, several states have passed statutes similar to RFRA. *Id*. at 47 n.2 (citations omitted).

constitutional amendment resembling RFRA would have had just that effect. In other words, a RFRA-like constitutional amendment would narrow the scope of constitutionally permissible government action substantially burdening religious practices to the few instances where government action is narrowly tailored to advance compelling government interests. This Article, however, argues that a RFRA-like amendment might *not* have such an effect. Instead, this Article argues that the contours of the Free Exercise Clause might remain completely undisturbed despite passage pursuant to Article V of a RFRA-like constitutional amendment.

How could the contours of an existing constitutional provision remain undisturbed in the face of a conflicting constitutional amendment? The answer lies in (1) an understanding of the meta-norms that govern adjudication of cases in which legal norms conflict, and (2) the recognition that constitutional provisions emanate from two distinct sources, and therefore are of two distinct classes, with one class hierarchically superior to the other. Upon these twin pillars I trace an argument supporting the following thesis: Constitutional provisions emanating from "We the People," the hierarchically superior source, should always and unconditionally trump irreconcilably conflicting constitutional provisions created by government institutions, the hierarchically inferior source. Thus, only a constitutional amendment emanating from We the People (but not a constitutional amendment produced by ordinary government institutions) ought to trump an irreconcilably conflicting popular sovereign-generated constitutional provision.

In practical terms, whether the above hypothesized RFRA-like constitutional amendment would alter the contours of the Free Exercise Clause should depend upon whether the amendment in fact emanates from We the People, or instead from ordinary government institutions—ratifying state legislatures acting pursuant to Article V. Begin with the orthodox assumption that the Bill of Rights emanates from We the People.[10] If the hypothetical constitutional amendment also emanates from We the People,

10. I do not necessarily adopt the position that the Bill of Rights emanates from We the People, but instead assume that it does for rhetorical purposes. Ultimately, whether the Bill of Rights or any constitutional provision emanates from the popular sovereign or instead from government institutions depends upon the criteria employed for distinguishing the two. The identification of such criteria is beyond the scope of this Article. Instead, in this Article I will argue (contrary to the extant orthodox view) that under any reasonable criteria, only some constitutional provisions can be honestly and accurately catalogued as emanating from the popular sovereign, while others must be described as emanating from ordinary government institutions. I leave for a later date the task of sifting through the universe of reasonable criteria that might be used to separate popular sovereign-generated norms from government-institution generated constitutional norms.

then the amendment, being of more recent vintage, should reshape the contours of the Free Exercise Clause. If emanating from ordinary government institutions, however, despite its more recent vintage, the amendment ought not alter in any way the popular sovereign-generated Free Exercise Clause.[11] Such a government institution-generated amendment would be hierarchically inferior to the popular sovereign-generated Free Exercise Clause. In short, the paramount factor in resolving conflicts between constitutional provisions should be the *sources* of constitutional provisions and their corresponding positions in our extant hierarchy of legal norms, rather than the *chronologic order* of ratification.

The steps leading to such an iconoclastic conclusion will take quite a bit of work to clarify.[12] Perhaps the most crucial step in the argument will be to clarify what I mean by popular sovereign-ratified versus government institution-ratified constitutional provisions. Currently, the courts make no distinction between constitutional provisions generated by the popular sovereign and those generated by ordinary government institutions. Under the extant constitutional orthodoxy, all constitutional provisions emanate from a single source—We the People—either via Article VII,[13] the Constitution's ratification provision, or Article V,[14] the Constitution's amendment provision.[15] Regarding amendments, any constitutional provision proposed by Congress and ratified by the requisite number of state legislative bodies satisfies Article V requirements and *ipso facto* counts as a constitutional provision emanating from, and ratified by, We the People. Stated differently, according to the orthodox view, Article V provides a complete and self-contained answer to the epistemic question of how we know that the popular sovereign has created a new constitutional textual norm.

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11. Although a government institution-created constitutional amendment ought not alter the contours of a preexisting popular sovereign-created constitutional provision, I leave open the possibility that such a constitutional amendment may overrule a Supreme Court interpretation of a popular sovereign-created constitutional provision. Thus, although a RFRA-styled constitutional amendment not sourced in We the People should not trump or alter the contours of the Free Exercise Clause itself, such an amendment may trump or nullify the Supreme Court's narrow doctrinal interpretation of the Free Exercise Clause expounded in *Boerne*, 521 U.S. 507, and *Smith*, 494 U.S. 872. *See infra* text at notes 355-59.

12. Along the way, therefore, it will be necessary to make some simplifying assumptions and to narrow the scope of inquiry. Here, my purpose is to trace the outlines of an argument. In future work I will return to some of the knottier issues piece by piece and offer more comprehensive treatment.

13. U.S. CONST. art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.").

14. *See supra* note 8 for the text of Article V.

15. *See infra* text at notes 108-34.

A major portion of this Article is dedicated to debunking the orthodox view that all constitutional provisions, particularly those ratified by state legislatures pursuant to Article V, emanate from We the People. On the contrary, an accurate description must admit that constitutional provisions emanate from two separate and distinct sources—We the People *and* ordinary government norm-generating institutions. I will refer to this crucial idea as the "dual-source thesis."

The seeds of the dual-source thesis lie in Article V's amendment mechanism. Rather than directly consulting the popular sovereign, Article V bypasses We the People and instead employs ordinary government law making institutions—state legislative bodies—as agents through which We the People purportedly act to ratify new constitutional provisions. When Article V's principal-agent mechanism operates well, Congress and state legislatures ratify amendments reflecting and embodying the popular sovereign's deliberated consensus sanctioning the creation of new higher law principles. In such cases, passage via Article V signals and formalizes We the People's act of constitutional textual norm generation. When Article V's principal-agent mechanism breaks down, however, the state legislatures ratify amendments over which the popular sovereign has not reached a deliberated consensus, or even ratifies amendments contrary to a deliberated popular consensus. In such cases, the formal satisfaction of Article V requirements signals not an act of We the People, but instead the creation of a new constitutional provision by ordinary government norm-generating institutions, state legislatures, which malfunction as conduits through which We the People act. In short, not every constitutional amendment that overcomes Article V's formal hurdles can honestly and accurately be characterized as ratified by We the People. In principal-agent relationships such false positive agency problems are bound to arise. Where agency problems arise, a new constitutional provision is created, but without a legitimate popular sovereignty pedigree.[16]

16. Article V also gives rise to false negative agency problems—instances where a state legislature fails to ratify a formal constitutional amendment even though We the People have reached a deliberated consensus sanctioning ratification. The failed Equal Rights Amendment may be one such false negative. *See* Sanford Levinson, *Why It's Smart to Think About Constitutional Stupidities*, 17 GA. ST. U. L. REV. 359, 373 (2000) ("[T]he Equal Rights Amendment, which was indeed proposed by Congress, received the assent of a majority of the states composed of a majority of the American population, and, of course, was not added to the text because it did not receive the approval of the constitutionally required thirty-eight states."). In some cases the judicial and executive branches may bring about the changes called for by the failed amendment via revisions of statutory and common law rules. *See* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1475-78 (2001) (arguing that changes in the failed Child Labor and Equal Rights Amendments were effectuated by legislative and executive branch action).

Once we accept the dual-source thesis, the conclusion I advance follows programmatically from the regular and consistent application of a set of axiomatic meta-norms that lawyers and judges, often unconsciously, take as immutable givens in everyday legal arguments. This set of meta-norms constitutes a majoritarian democracy-reinforcing framework that governs adjudication of cases involving irreconcilably conflicting legal norms.[17] Courts never intentionally and openly veer from these meta-norms. By unreflectively treating all constitutional provisions as emanating from We the People, however, courts unwittingly violate the meta-norms.[18] Once courts candidly acknowledge that constitutional provisions spring from two separate and distinct sources, consistent application of the meta-norms leads to three related conclusions. Popular sovereign-generated and government institution-generated constitutional provisions (1) are different in kind, (2) are hierarchically ordered, and (3) when in irreconcilable conflict, the former must always and unconditionally trump the latter.

With regard to the first meta-norm, which I call the "source axiom," legal norms generated by different norm-generating institutions or entities belong to what I call different "legal categories and subcategories." Conversely, legal norms generated by the same norm generating institutions or entities belong to the same "legal categories and subcategories." For example, all legal norms generated by Congress (with the approval of the Chief Executive) are similar in kind and are members of the legal category "statutory norms." Similarly, all norms generated by administrative agencies are similar in kind and are members of the legal category "administrative norms."

The source axiom applies to constitutional norms as well. The extant constitutional orthodoxy characterizes all of the Constitution's provisions, including amendments, as originating in We the People, and as forming a single category of legal norms. To the extent that courts have been operating

17. I have previously developed and discussed in detail two of these meta-norms and their role in the adjudication of cases involving irreconcilably conflicting legal norms. Carlos E. González, *The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-Formalism in Adjudication of Conflicting Legal Norms*, 80 OR. L. REV. 447 (2001). This Article elaborates on two additional meta-norms underlying the framework and also explains the framework's majoritarian democracy-reinforcing tendencies. *See also infra* text accompanying notes 74-92.

18. Courts purport to adhere to the meta-norms when adjudicating cases involving irreconcilable constitutional provisions. The seemingly consistent application of these meta-norms in constitutional cases, however, is an illusion fostered by the orthodox notion that all constitutional provisions are sourced in the popular sovereign and are therefore similar in kind. If one accepts the dual-source thesis—the idea that some constitutional provisions locate their source in the popular sovereign, while others locate their source in ordinary legislative bodies—it becomes apparent that courts have in fact failed to consistently apply the democracy-reinforcing meta-norms at the constitutional level. *See infra* text accompanying notes 100-06.

under the orthodoxy, they have remained true to the source axiom. Passive acceptance of the orthodoxy, however, is problematic. As this Article argues, any realistic descriptive account of the origins of constitutional norms must admit that they derive from two distinct sources—We the People and ordinary government institutions. Given the dual sources of constitutional provisions, consistent application of and adherence to the source axiom meta-norm demands that the legal system treat constitutional textual norms sourced in the popular sovereign as categorically different from those sourced in ordinary legislative bodies. Just as the legal system treats statutes and administrative regulations as different in kind, it should treat constitutional provisions emanating from We the People as categorically different from constitutional provisions emanating from mere government institutions. Thus, the Free Exercise Clause, which emanates from We the People, is categorically different in kind from the hypothetical RFRA-like amendment, which lacks a valid popular sovereignty pedigree and emanates from ordinary state legislatures.

Where consistency with the source axiom requires separating popular sovereign-generated and government institution-generated constitutional provisions into separate categories, a second meta-norm requires that the legal system treat the former as hierarchically superior to the latter. Under what I call the "hierarchic axiom," legal categories populated by legal norms sourced in institutions or entities of relatively greater democratic legitimacy are hierarchically superior to those populated by legal norms sourced in institutions or entities of relatively lesser democratic legitimacy. Thus, for example, statutory norms are sourced in Congress, while administrative norms are sourced in administrative agencies. Because the former *source* enjoys greater democratic legitimacy than the latter *source*, the legal system treats statutes as hierarchically superior to administrative regulations. Based on consistent application of the hierarchic axiom meta-norm, constitutional provisions sourced in We the People—the norm generating entity of highest democratic legitimacy—should be treated as hierarchically superior to constitutional provisions sourced in agent legislative bodies—a norm generating institution of comparatively lesser democratic legitimacy. Thus, the Free Exercise Clause, which emanates from We the People, is hierarchically superior to the hypothetical RFRA-like amendment, which emanates from ordinary state legislatures.

A third meta-norm supplies the final piece of the puzzle. Under this third meta-norm, which elsewhere I have labeled the "categoric axiom,"[19] legal

19. *See supra* note 17.

norms belonging to legal categories of superordinate hierarchic status always and unconditionally trump irreconcilably conflicting legal norms belonging to legal categories of subordinate hierarchic status. Thus, for example, when a statute and administrative regulation irreconcilably conflict, the hierarchically superior statute will always and unconditionally trump the hierarchically inferior administrative norm. Based on consistent application of the categoric axiom meta-norm, a hierarchically superior popular sovereign-sourced constitutional provision should always and unconditionally trump an irreconcilably conflicting hierarchically inferior government institution-sourced constitutional provision. Thus, the Free Exercise Clause, belonging to a superordinate legal category, trumps the hypothetical RFRA-like amendment, which belongs to a subordinate legal category.

The basic strategy, in sum, is to offer a more honest and accurate description of the sources of constitutional textual norms—the dual-source thesis—and then apply three existing fundamental, axiomatic, democracy-reinforcing meta-norms—the source, hierarchic, and categoric axioms—to that new descriptive account. Once we accept the dual-source thesis, consistency with the three axiomatic meta-norms leads directly to the conclusion that constitutional provisions sourced in the popular sovereign should always and unconditionally trump irreconcilably conflicting constitutional provisions sourced in government institutions.

The Article is organized as follows: First, Part II summarizes the basic framework governing adjudication of cases in which a court has determined that two legal norms stand in a posture of irreconcilable conflict. Briefly, a hierarchy of legal categories and subcategories, along with the categoric axiom and chronologic axiom meta-norms, govern almost all cases in which legal norms irreconcilably conflict. Next, Part II elaborates on the framework by explaining the two additional axiomatic meta-norms—the source and hierarchic axioms—which account for the ordering of legal categories and sub-categories. Finally, Part II outlines how the four axiomatic meta-norms promote majoritarian democracy-reinforcing ends. Part III returns the discussion to the central proposition of the Article—the idea that constitutional textual norms generated by We the People should trump conflicting constitutional textual norms created by ordinary government institutions—and briefly summarizes the argument in support of that proposition. The core of the argument calls for the consistent application of the four axiomatic meta-norms in the constitutional arena. Part IV turns to the lynchpin of the argument, the above-mentioned dual-source idea that some constitutional textual norms originate from We the People, while others originate from mere legislative bodies. Part IV traces the reasons why the

dual-source thesis offers a more honest and accurate description of the sources of constitutional textual norms than does the extant orthodoxy. Part V explains how, given the dual-source thesis, failure to treat popular sovereign-sourced constitutional textual norms as categorically distinct from, and hierarchically superior to, government institution-sourced constitutional textual norms, is inconsistent with the democracy-reinforcing meta-norms discussed in Part II. Part V also offers some thoughts on the practical implications of the dual-source thesis and explains why pragmatic concerns for stability, continuity, and tradition ought not deter us from embracing the dual-source thesis with all of its consequences. Among the most important reasons why we ought not be deterred from embracing the dual-source thesis is the following: Though inferior to popular sovereign generated constitutional textual norms, government institution-generated constitutional textual norms count as constitutional norms. As such, they may nullify both conflicting state and federal statutes, and judicial interpretations of constitutional provisions. Part VI summarizes some of the issues touched upon throughout the Article that deserve more in-depth treatment in future work.

II. FIRST STEPS: REVIEWING THE META-NORMS GOVERNING IRRECONCILABLY CONFLICTING LEGAL NORMS

Why ought constitutional provisions generated by the popular sovereign always and unconditionally trump irreconcilably conflicting constitutional provisions created by government institutions? Stated most simply, allowing the latter to trump the former is inconsistent with the axiomatic, majoritarian democracy-reinforcing meta-norms governing adjudication of cases where legal norms irreconcilably conflict.[20] This Part briefly reviews the axiomatic meta-norms and their majoritarian democracy-reinforcing tendencies.

I begin with two preliminary issues. First, let me carefully define what I mean by cases in which legal norms stand in a posture of irreconcilable conflict, or what I elsewhere have referred to as "true legal conflict."[21] A true legal conflict occurs when a court determines that legal norms demand mutually exclusive outcomes. I have in mind, to give one possible iteration, cases where one legal norm prohibits X (or is interpreted to prohibit X),

20. Briefly, although no legal system can hope to achieve perfect consistency, the incongruent application of fundamental, democracy-reinforcing meta-norms—basic presuppositions undergirding the legal system—is particularly problematic and in need of reform, especially once those incongruities have been exposed. *See infra* notes 361-64.

21. *See* González, *supra* note 17, at 457-73.

while another legal norm allows X (or is interpreted to allow X). For example, where one statute prohibits vehicles—including bicycles—from entering into the park, while another statute specifically authorizes bicycle racing in the park on Sundays, the two norms stand in a posture of irreconcilable conflict. The two norms stand in what I call a posture of "true legal conflict" because the statutes demand irreconcilably incompatible outcomes—the simultaneous prohibition and allowance of bicycles in the park.[22]

At the outset it is important to note that whether two legal norms stand in a posture of true conflict is very often determined by an exercise of judicial discretion in the interpretation of legal norms. Returning to the hypothetical, if the initial statute prohibits vehicles, but does not explicitly include bicycles in the definition of the term "vehicles," a court must exercise its interpretive discretion to decide whether that term includes bicycles. Only where a court determines that the statutory term "vehicles" encompasses bicycles does a true conflict between the permissive and prohibitory statutes arise.[23] Though judicial discretion plays a key role in whether legal norms truly conflict, it is not the main focus of this Article. Instead, the Article focuses on factors driving substantive outcomes once a court, using its interpretive discretion, has determined that legal norms stand in a posture of true legal conflict.[24]

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22. *See* H.L.A. HART, THE CONCEPT OF LAW 127-29 (2d ed. 1994) (setting forth Hart's famous "no vehicles in the park" hypothetical); González, *supra* note 17, at 10-11 (using "no vehicles in the park" hypothetical). Cases of true legal conflict include cases in which norms demand *partially* mutually exclusive outcomes. For example, if norm 1 allows *X*, *Y*, and *Z*, but norm 2 prohibits *V*, *W*, and *X*, norm 1 and norm 2 are in true legal conflict because of the inconsistent rules governing *X*.

23. González, *supra* note 17, at 464.

24. Courts rely on a complex array of interpretive rules, presumptions, and principles, which vary from context to context, and even from case to case, to determine whether legal norms stand in true conflict. *Id.* at 22 n.39. Briefly consider the complex array of rules, presumptions, and principles. In the above mentioned no-vehicles-in-the-park hypothetical, both of the norms involved are statutory norms. In order to determine whether the two statutes truly conflict, courts would focus on (1) the meaning of the norms, (2) the rules regulating the implied repeal of preexisting statutes by newly created statutes, (3) canons of statutory interpretation, and (4) uses of the word "vehicle" in other statutes, and the like. Courts would use these rules and canons to determine whether the statute allowing Sunday bicycle races expresses a legislative intent to partially or fully repeal the earlier created statutory norm prohibiting vehicles, including bicycles, from the park, or whether the prohibitory statute even prohibited bicycles in the first place. Note that in this example a court would not address whether the statute prohibiting vehicles could be reconciled with the statute allowing Sunday bicycle races. More specifically, a court would not try to eliminate the true conflict between the two statutes by interpreting the word "vehicle" in the first statute as not including bicycles. Any slight variation in the hypothetical will alter the rules and canons relevant to determining whether the norms in question truly conflict. If the norm allowing bicycle racing were an administrative regulation, rather than a statute, courts would turn to the rules according deference to agency interpretations of statutory norms in order to determine whether the norms are reconcilable or irreconcilable. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984). Likewise, if the norm prohibiting vehicles in the park were a constitutional norm, a court would turn to

As a second preliminary issue, let me differentiate between what I refer to as "meta-norms" versus ordinary "legal norms." So far I have used these terms without defining them, but in a way that suggests that they are distinguishable. Both "legal norms" and "meta-norms" are positive prescriptive legal rules that can influence actors, outcomes, or both. Ordinary legal norms are foremost in the minds of lawyers and judges in everyday legal practice. Legal norms are in some manner codified in an authoritative legal text, be it a constitution, a statute, a regulation, or a case authority. They are the grist of everyday practical legal discourse and are cited by lawyers and judges on a daily basis.

In contrast, meta-norm, as I use the term, refers to those deeply internalized and ingrained, uncodified, immutable, fundamental building-block principles of positive law that constitute the presupposed framework within which everyday practical legal discourse takes place.[25] Lawyers and judges treat meta-norms as indisputable givens, and for that reason, rarely explicitly state them in making practical legal arguments. Indeed, in many instances meta-norms become so deeply internalized as presuppositions that lawyers and judges are not even cognizant of their existence, operation, or influence in everyday legal practice. Legal discourse nonetheless reflects their omnipresent effect on the content of legal discourse.

As an example of an easily recognizable meta-norm, consider the principle that, all other things being equal, like cases should be treated alike. I will refer to this as the "consistency principle." Lawyers and judges, often quite unconsciously, take this principle as an indisputable given when engaging in everyday, practical legal discourse.[26] Though the consistency

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the principles applicable to conflicts between statutory and constitutional norms. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to … save the act."); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) ("When the validity of an act of Congress is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). Under any variation, however, courts essentially focus their reasoning (or at least their stated reasons) on the meaning of the two norms in question and whether those meanings irreconcilably conflict. González, *supra* note 17, at 540-47. The issue of whether legal norms truly conflict involves interpretation or construction of a norm, while the issue of resolving this conflict involves the mediation of a true conflict between norms once interpreted. Where principles of norm interpretation dominate the former issue, the axiomatic meta-norms discussed in this Part govern adjudication of the latter issue.

25. Meta-norms may find particular expression in regular legal norms. Unlike ordinary legal norms, their existence does not depend on their expression in some authoritative codified form.

26. Lawyers and judges may argue about whether in a given instance all other things are equal or that some other meta-norm contradicts and overrides the dictate to treat like cases the same. Lawyers and judges, however, cannot dispute the notion that treating like cases the same way constitutes a

principle may find expression in certain inscribed, codified legal norms, its existence is entirely independent of any such codification.[27] To see how this meta-norm functions as an incontestable positive law presupposition, consider the following prototypical legal argument:

Proposition 1: The previously decided *Fulano* case established *X* rule, and arrived at *Y* outcome.

Proposition 2: The yet to be decided *Mengano* case is factually indistinguishable from the *Fulano* case.

Conclusion: The *Mengano* case should follow *X* rule established in *Fulano*, and arrive at *Y* outcome.

The conclusion does not necessarily follow from the two stated propositions. To complete the syllogism, the consistency principle must be inserted as a third proposition: all other things being equal, like cases should be treated alike.[28] Though lawyers rarely, if ever, explicitly state the consistency principle proposition in oral arguments or legal briefs, judges gladly accept this incomplete syllogistic form of argument every day.[29] They accept it because the omitted consistency principle proposition is not really omitted, but merely unstated. It literally goes without saying that, all other things being equal, like cases should be treated alike. The proposition is assumed because the consistency principle is a meta-norm.[30]

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fundamental, immutable, and presupposed statement of positive legal force that is wholly independent of any particular inscribed codification.

27. For example, the rule of stare decisis, which directs courts to decide present cases in the same way as factually similar previously decided cases, reflects the consistency principle. Stare decisis is a particular example of the principle in application.

28. In addition, it may be necessary to assert that all other things in fact *are* equal.

29. *See, e.g.*, Wigglesworth v. Teamsters Local Union No. 592, 68 F.R.D. 609 (E.D. Va. 1975) (holding based on and consistent with previous case presenting nearly identical facts).

30. The consistency principle is not merely a common law approach to deciding cases. *See, e.g.*, Jim Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) (J. Souter) (rejecting the prospective application of a newly announced constitutional doctrinal rule, coupled with retroactive application of the new rule on grounds that the practice "breaches the principle that litigants in similar situations should be treated the same, a fundamental component of stare decisis, and the rule of law generally"). As a meta-norm, the consistency principle has broad application. In the statutory interpretation context, for example, the consistency principle results in the courts interpreting the same word or words found in two different statutes the same way, all other things being equal. *See, e.g.*, Flowers v. S. Reg'l Physician's Servs., 247 F.3d 229, 233 (5th Cir. 2001) (reading language in ADA as having same meaning as identical language in Title VII); Jeldness v. Pearce, 30 F.3d 1220, 1227 (9th Cir. 1994) ("Because Title IX and Title VI use the same language, they should, as a matter of statutory interpretation be read to require the same levels of protection and equality."). Thus, in the context of statutory interpretation, the consistency principle is the unstated third proposition that completes the following syllogism:

This Part lays out the four meta-norms central to adjudication of cases involving true legal conflict. Unlike the consistency principle, some of the four meta-norms may not be immediately recognizable to lawyers and judges. Though not immediately recognizable, they are in fact embedded in legal practice. I deduce them by using a methodology similar to that used in rational choice social science modelling. In this type of modelling, one assumes that relevant actors or entities operate as rational maximizers of a particular variable. One constructs a model based on that assumption and then tests the model's predictive ability. If the model has high predictive value, one can, with a high degree of confidence, conclude that in fact the actors do operate as rational maximizers of the particular variable.[31] A model offered below reflects the meta-norm axioms that I uncover and discuss. Because the model reflecting the meta-norms ultimately predicts the outcomes of almost all cases in which two legal norms stand in a posture of true legal conflict, we can be confident that the meta-norms in fact operate

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Proposition 1: The word "reasonable" in statute *A* means *X*.

Proposition 2: Statutes *A* and *B* are alike.

Conclusion: The word "reasonable" in statute *B* should be interpreted to mean *X*.

Indeed, to the extent that a legal system strives towards rationality, the consistency principle is a requisite meta-norm. Consistency, often expressed in the form of the transitivity principle in the literature on rational choice, constitutes a necessary ingredient to rationality. *See* SHAUN HARGEAVES HEAP ET AL., THE THEORY OF CHOICE: A CRITICAL GUIDE 5-6 (1992) (identifying transitivity as a prerequisite axiom to rational choice); JON ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY 1-15 (1985) (discussing consistency as a key element of the "thin" theory of rationality and stating that "consistency, in fact, is what rationality in the thin sense is all about"). Under the transitivity principle, if $a \geq b$, and $b \geq c$, then $a \geq c$. *See* SHAUN MARTIN HOLLIS, *supra*, at 5-6. Though perhaps broader than the transitivity principle, *see* ELSTER, *supra*, at 6 (stating that consistency at least involves compliance with transitivity), the consistency principle permeates legal discourse. Consider for example, the following common form of legal argument:

Premise 1: If *N* condition, then *X* outcome;

Premise 2: *A* is an instance of *N* condition;

$\therefore$ if *A*, then *X* outcome

Premise 3: $A = B$;

$\therefore$ if *B*, then *X* outcome.

This form of legal argument is found in *California v. Carney*, 471 U.S. 386 (1985). *Carney* held that a warrantless search of a motor home did not violate the Fourth Amendment's prohibition against unreasonable search and seizures. *Id.* at 395. As explained in *Carney*, the Court had previously held that where there is a diminished expectation of privacy (*N* condition), a warrantless search does not violate the Fourth Amendment (*X* outcome). *Id*. at 391-92. Moreover, the Court had previously held that individuals have a diminished expectation of privacy in an automobile (*A* is an instance of *N* condition), and that therefore, a warrantless search of an automobile does not violate the Fourth Amendment ($\therefore$ if *A*, then *X* outcome). *Id.* In *Carney*, the Court reasoned that the expectation of privacy in a motor home (*B*) is essentially similar to the expectation of privacy in automobiles ($A = B$), and that therefore a warrantless search of a motor home does not violate the Fourth Amendment ($\therefore$ if *B*, then *X* outcome). *Id.* at 393.

31. *See generally* MELVIN J. HINICH & MICHAEL C. MUNGER, ANALYTICAL POLITICS (1997) (using various models to test voter predictability).

on, and exert prescriptive influence within, the legal system.[32]

With these preliminary issues in mind, I turn to the meta-norms governing adjudication of cases in which legal norms stand in a posture of irreconcilable or true legal conflict. The meta-norms center on the following key elements: first, the grouping of legal norms into different legal categories and subcategories; second, the arrangement of those legal categories and subcategories into a hierarchy; third, the privileging of norms belonging to hierarchically superordinate legal categories and subcategories over truly conflicting legal norms belonging to subordinate legal categories and subcategories; and fourth, the privileging of newer norms over older truly conflicting norms belonging to the same legal category and subcategory.[33] The first two elements result in a hierarchy of types of legal norms. The second two elements are twin axiomatic meta-norms that grant trumps to certain kinds of norms over other kinds of norms. The ordering and the twin axiomatic meta-norms are all that are necessary to predict the outcomes of cases in which courts find legal norms in a posture of true legal conflict. In essence, the ordering and twin axioms govern the adjudication of such cases.

A. An Ordering of Different Kinds of Legal Norms

Begin with the first two factors—the separation of legal norms into different categories and subcategories, and the ordering of those legal categories and subcategories into a hierarchy. No one will dispute that our legal system treats constitutional, statutory, administrative, and common law

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32. Moreover, the four meta-norms that I have identified have both descriptive and prescriptive value. That is to say, they both describe fundamental features of the legal system and also indicate the way courts ought to adjudicate cases. Consider an analogy to the norms of baseball. In baseball, when a batter hits the ball over the outfield fence, that batter's team is credited with a run. This phenomenon describes something that is a normal occurrence in the game of baseball. It also, however, results from a prescriptive rule in the game of baseball. Under the prescriptive rules of the game of baseball, when a batter hits the ball over the outfield fence, the official scorer must credit that batter's team with a run. THE OFFICIAL RULES OF MAJOR LEAGUE BASEBALL, 10.04(1) (2000), *available at* http://www.mlb.com/NASApp/mlb/mlb/baseball_basics/mlb_basics_official_scorer.jsp. The rules define a run as "the score made by an offensive player who advances from batter to runner and touches first, second, third and home bases in that order." *Id*. at 2.00. Furthermore, "the batter becomes a runner when . . . [a] fair ball passes over a fence or into the stands at a distance from home base of 250 feet or more. Such hit entitles the batter to a home run when he shall have touched all bases legally." *Id.* at 6.09(d). An official scorer who fails to credit the run not only does something out of the ordinary, but also transgresses a prescriptive rule of baseball commanding the official scorer to credit a run under particular circumstances. Such an official scorer would violate what the scorers do as a rule, and transgresses what scorers are supposed to do because of a rule. Like the rule of baseball commanding that a team be credited with a run when one of its batters hits the ball over the outfield fence, the four meta-norms governing the adjudication of true legal conflicts both describe what courts do *as a rule* and command courts to adjudicate cases to particular outcomes *because of a rule or set of rules*.

33. González, *supra* note 17, at 455.

norms as different in kind. I will speak of the practice of treating constitutional, statutory, administrative, and common law norms as different in kind as the assignment of legal norms into separate "legal categories."[34] Further, legal practice treats these four basic legal categories as though they were arranged in a particular hierarchy. Constitutional norms occupy the highest strata, while statutory, administrative, and common law norms each occupy, in descending order, the remaining strata. I will refer to this hierarchy as our "ordering" of legal categories.[35]

The ordering, however, incorporates a layer of complexity beyond the four basic categories. Lawyers and judges treat inscribed, codified words that constitute legal norms as different in kind and hierarchically superior to judicially sanctioned interpretations of those inscribed words. For example, lawyers and judges treat the words "[N]or shall any State deprive any person of life, liberty, or property, without due process of law"[36] as one kind of legal norm—a textual norm—and treat judicial interpretations of that textual norm as an entirely distinct kind of legal norm—a doctrinal norm. I will refer to the cleavage between textual and doctrinal norms as the assignment of legal norms to what I call "legal subcategories."[37] When I speak of textual norms, I am speaking of the actual inscribed words of constitutional, statutory, and administrative texts of normative force created by the norm-generating entities and institutions charged with creating such norms. Lawyers and judges find textual norms in written constitutions, code books, and compilations of administrative textual regulations. When I speak of doctrinal norms, I am speaking of the sanctioned interpretations or constructions of textual norms generated by judicial institutions. Doctrinal norms are evidenced in written opinions, which are compiled in case reporters.

Not only do lawyers and judges treat textual and doctrinal norms as different in kind, but they also treat textual norms as hierarchically superior to corresponding doctrinal norms. Within the constitutional norm category, for example, the legal system recognizes constitutional textual norms—the textually inscribed passages of the Constitution—as separate from and hierarchically superior to constitutional doctrinal norms—the interpretations of constitutional textual norms by the federal courts.[38] Similarly, within the statutory norm category, our legal system treats statutory textual norms—the textually inscribed sections of the United States Code—as different in kind

34. *See id.*
35. *Id.*
36. U.S. CONST. amend. XIV.
37. González, *supra* note 17, at 495.
38. *Id.* at 482, 488-503.

and as hierarchically superior to statutory doctrinal norms—the statutory constructions given to passages of the United States Code by the federal courts.[39] Even administrative law makes a distinction between textual norms and doctrinal norms.[40] What I label administrative textual norms are the binding, inscribed textual regulations of general application, which are promulgated by administrative agencies—agency legislative rules.[41] What I call administrative doctrinal norms, in contrast, are agency interpretations of agency legislative rules found in agency adjudications, which enjoy stare decisis value.[42] Administrative law practice treats the former as different in kind from and hierarchically superior to the latter.[43] Together, the legal categories and subcategories give us a framework for classifying legal norms into different types. Figure No. 1, below, models the legal categories and subcategories. The left hand side of the model represents the four principal legal categories and the hierarchical ordering in which they are arranged. The right hand side of the model represents the legal subcategories. Within three of the four principal legal categories there are two legal subcategories, which correspond to the division between textual and doctrinal norms. Again, textual norms are the actual inscribed words of constitutional, statutory, and

39. *Id.* at 503-11.

40. *Id.* at 511-15.

41. *See* 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 6.3, 6.5 (3d ed. 1994) (discussing agency legislative rules and their binding effect).

42. Agency interpretations of their own legislative rules found in quasi-judicial formal adjudications enjoy the force of law because they enjoy the precedential value of stare decisis and therefore operate as rules of general application. *See id.* § 8.1 (discussing agency adjudications); Atchison, Topeka & Santa Fe Co. Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 807-08 (1973) (stating that agency adjudicatory decisions "may serve as precedent[s] . . . [that there is] a presumption that the policies [announced in adjudications] will be carried out best if the settled rule is adhered to . . . [and the agency's] duty to explain its departure from prior norms" flows from that presumption); Kelley v. FERC, 96 F.3d 1482, 1489 (D.C. Cir. 1996) ("It is, of course, axiomatic that an agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent."); M.M.& P. Mar. Advancement v. Dep't of Comm., 729 F.2d 748, 755 (Fed. Cir. 1984) ("An agency is obligated to follow precedent, and if it chooses to change, it must explain why."); NLRB v. Int'l Union of Operating Eng'rs, Local 925, AFL-CIO 460 F.2d 589, 604-05 (5th Cir. 1972) (holding that an agency cannot depart from its own precedents unless it sufficiently articulates a reason for so doing); 2 DAVIS & PIERCE, *supra* note 41, § 11.5, at 204-07; 3 DAVIS & PIERCE, *supra* note 41, § 17.2, at 104 (discussing the precedential effect of agency adjudications and stating that "if an agency resolves adjudication *A* in one way by applying a policy or set of decisional criteria, and then resolves adjudication *B* in a different way by applying a different policy or set of decisional criteria, the second action must be reversed and remanded as arbitrary, capricious and an abuse of discretion unless the agency explicitly acknowledges and explains the reasons for its change in policy.").

43. *See* González, *supra* note 17, at 511-14. *See also* Iran Air v. Kugleman, 996 F.2d 1253, 1260 (D.C. Cir. 1993) (citing Joseph Zwerdling, *Reflections on the Role of an Administrative Law Judge*, 25 ADMIN. L. REV. 9, 12-13 (1973) (An Administrative Law Judge "is governed, as in the case of any trial court, by the applicable and controlling precedents. These precedents include the applicable statutes and agency regulations, the agency's policies as laid down in its *published* decisions, and applicable court decisions.")).

administrative texts of normative force. Doctrinal norms are the sanctioned interpretations of normative force given to those inscribed texts by judicial institutions. Within the statutory norm category, for example, the model represents statutory textual norms and statutory doctrinal norms. The hierarchical ordering of legal categories and subcategories represented in Figure No. 1 constitutes the first of three key elements governing adjudication of cases in which legal norms irreconcilably conflict.

Legal Categories	Legal Subcategories
Constitutional Norms	Constitutional Textual Norms
	Constitutional Doctrinal Norms
Statutory Norms	Statutory Textual Norms
	Statutory Doctrinal Norms
Administrative Norms	Administrative Textual Norms
	Administrative Doctrinal Norms
Common Law Norms	

Figure No. 1

B. The Categoric and Chronologic Axioms

A pair of immutable, axiomatic meta-norms make up the remaining two elements governing the adjudication of cases involving true legal conflict. Both meta-norms mediate conflicts between irreconcilably conflicting legal norms by granting absolute trumps to one norm over another depending on

the category and subcategory memberships of the conflicting norms. As the first axiomatic meta-norm, *legal norms belonging to legal categories of superordinate hierarchic status always and unconditionally trump irreconcilably conflicting legal norms belonging to legal categories of subordinate hierarchic status.* I call this phenomenon the "categoric axiom."[44] Thus, for example, constitutional norms always trump truly conflicting statutory norms, and statutory norms always and unconditionally trump truly conflicting administrative norms.[45] Similarly, norms belonging to the constitutional textual norms subcategory always and unconditionally trump truly conflicting norms belonging to the constitutional doctrinal norms subcategory.[46]

The idea that legal norms belonging to superordinate legal categories trump (and nullify) truly conflicting norms belonging to subordinate legal categories lies beyond controversy. Further, once properly understood, the idea that textual norms always and unconditionally trump doctrinal norms of the same kind also proves uncontroversial. A bit of clarification, however, will be necessary. The key is understanding textual norms, doctrinal norms, and true conflicts between them.

The inscribed words of a given textual norm—a constitutional provision, statute, or agency regulation—quite often lend themselves to a range of plausible meanings.[47] Returning to Hart's no-vehicles-in-the-park hypothetical,[48] a textual norm prohibiting vehicles in the park prohibits mechanized things used in transport and conveyance, possibly including anything from cars, to tractors, to bicycles, to skateboards, to wheel barrels.[49] The exact confines of the prohibition on vehicles in the park found in the textual norm, however, is imprecise. In other words, reasonable minds can disagree over which mechanical means of transport and conveyance the norm prohibits from the park.[50] This range of imprecise meaning constitutes the scope of the textual norm, or in other words, the range of plausible meanings attributable to the textual norm.

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44. *See* González, *supra* note 17, at 479.
45. *Id.* at 480.
46. *Id.* at 483.
47. *See id.* at 484-88.
48. HART, *supra* note 22, at 127-29.
49. RANDOM HOUSE UNABRIDGED DICTIONARY 2109 (2d ed. 1997) (defining "vehicle" to include "a conveyance moving on wheels, runners, tracks, or the like, as a cart, sled, automobile, or tractor").
50. *See, e.g.*, Fowles v. Dakin, 205 A.2d 169, 173 (Me. 1964) (finding that a bicycle is not included within the statutory meaning of vehicle); Richards v. Goff, 338 A.2d 80, 86 (Md. Ct. Spec. App. 1975) (finding that a bicycle is included within the statutory meaning of vehicle).

A doctrinal norm is a judicial institution-generated norm of precedential value that adopts and endorses a particular meaning of a given textual norm. For example, a court could generate a doctrinal norm by construing the textual norm prohibition of vehicles in the park as prohibiting cars and tractors, but not bicycles, skateboards, and wheelbarrels. This sort of doctrinal reading of the textual norm is permissible because it is entirely plausible that the term "vehicle" in the textual norm refers to cars and tractors, but not to bicycles, skateboards, and wheelbarrels. If a court chooses this particular doctrinal construction of the textual norm, the doctrinal norm it has generated is within the scope of, and therefore not in true conflict with, the range of meanings plausibly attributable to the textual norm prohibition on vehicles in the park.[51]

However, when a judicial institution adopts a meaning that is outside the range of meanings plausibly attributable to the textual norm it interprets, that judicial institution creates a doctrinal norm that is in true conflict with the textual norm it interprets. Under such circumstances, the categoric axiom requires that the hierarchically superordinate textual norm always and unconditionally trump and nullify the truly conflicting subordinate doctrinal norm.[52] For example, a doctrinal norm that interprets the term "vehicle" in the textual norm as covering human beings who carry bacterial infections would probably fall outside the range of plausible meanings attributable to the textual norm in question. Although a person carrying a bacterial infection does, under a particular definition, constitute a vehicle,[53] this does not appear to be the kind of vehicle or meaning of the term "vehicle" embraced by the textual norm prohibition on vehicles in the park.[54] Though textual norms may not have precise meanings, they do not have boundless meanings.

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51. Similarly, depending on the wording of the textual norm, the intent or purpose of the statute, and principles of statutory construction, a court could also interpret vehicle to include bicycles and skateboards within its meaning. Although bicycles and skateboards may be at the fringes of the range of meanings attributable to the textual norm, they still fit plausibly within that range.

52. Stated as a command, the categoric axiom instructs judicial institutions not to generate doctrinal norms adopting meanings outside, beyond, or different from the range of meanings plausibly attributable to the textual norms they interpret.

53. *See* RANDOM HOUSE, *supra* note 49, at 2109 (defining "vehicle" to include "a carrier, as of infection").

54. Though one could certainly imagine a prohibitory textual norm using the word vehicle in the sense of a carrier of a bacterial infection, the hypothesized textual norm prohibition on vehicles in the park does not appear to embrace this meaning.

Now that I have clarified what I mean by textual norms, doctrinal norms, and conflict between them, we can better understand how the categoric axiom works. Stated simply, where a court adopts a doctrinal interpretation of a textual norm falling outside the range of plausible meanings attributable to the textual norm, the categoric axiom calls for nullification of the doctrinal norm. Where, for example, a court interprets a statute prohibiting vehicles in the park as prohibiting people carrying bacterial infections from entering the park, the categoric axiom calls for nullification of the interpretation (by an appellate court, or in a later litigation revisiting the meaning of the statute).

Moving to the second axiomatic meta-norm, *whenever two truly conflicting legal norms belong to the same legal category and subcategory, the more recently created norm always and unconditionally trumps the preexisting norm.* I call this phenomenon the "chronologic axiom."[55] For example, a constitutional amendment—or in other words a newly created constitutional textual norm—trumps or amends a truly conflicting preexisting constitutional text.[56] Likewise, a new interpretation of a statute—or in other words a new statutory doctrinal norm—will always trump and replace an older interpretation of that same statute—an old statutory doctrinal norm.[57] Simply stated, when dealing with truly conflicting legal norms of the same kind—both belonging to the same legal category *and* subcategory—the norm of more recent vintage trumps and nullifies the norm of older vintage.[58]

Figure No. 2, below, adds representation of the categoric and chronologic axioms to the ordering of legal categories and subcategories illustrated in Figure No. 1, above. The vertical arrows on the right and left sides of the graph represent the categoric axiom, while the horizontal arrow at the top of the graph depicts the chronologic axiom.

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55. González, *supra* note 17, at 475-78.
56. *Id.* at 476.
57. *Id.* at 475.
58. When the conflicting norms do not belong to the same legal subcategory, the categoric axiom resolves the conflict. A statutory textual norm, for example, trumps and nullifies a truly conflicting statutory doctrinal norm, regardless of the chronologic order in which the textual and doctrinal norms come into being. *Id.* at 504.

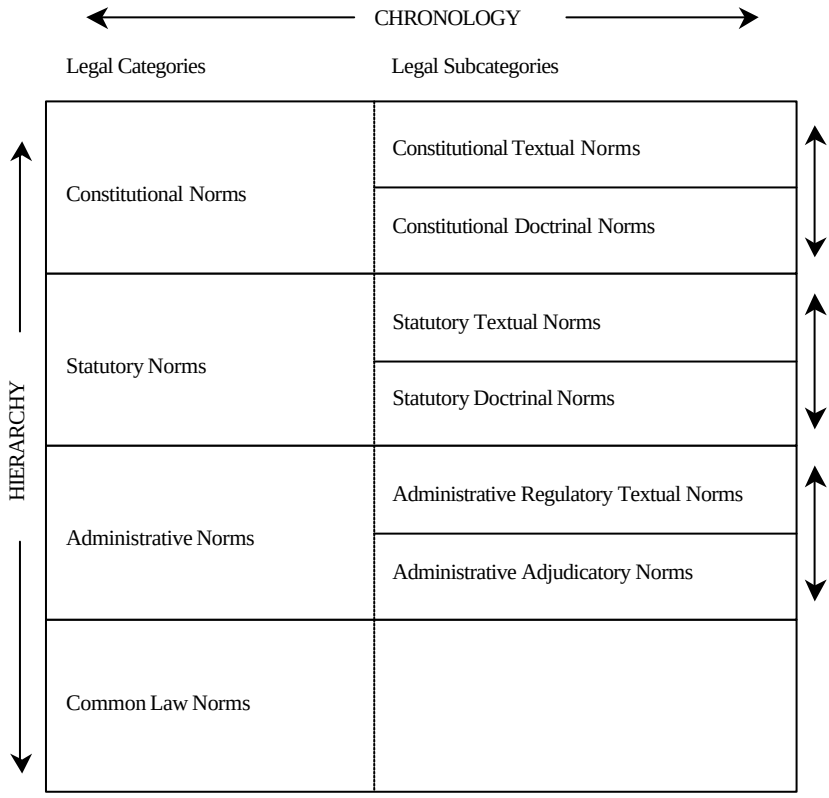

Figure No. 2

The ordering and twin axioms represented in Figure No. 2 fully account for the outcomes of cases in which a court has found two legal norms standing in a posture of true legal conflict. The model works as follows: Reflecting the categoric axiom, norms belonging to a given superordinate legal category and/or subcategory will always and unconditionally trump truly conflicting norms belonging to a given subordinate legal category or subcategory. Statutory norms, for example, always and unconditionally trump truly conflicting common law norms.[59] Likewise, statutory textual norms always and unconditionally trump truly conflicting statutory doctrinal norms.[60] Reflecting the chronologic axiom, in cases where two truly conflicting norms belong to the same legal category and subcategory, the

59. *Id.* at 479-80.
60. *Id.* at 504-11.

newer norm always and unconditionally trumps the older norm. Thus, for example, a newly passed statute trumps a truly conflicting preexisting statute,[61] and a newly created administrative regulation nullifies a truly conflicting preexisting regulation.[62] Graphically, norms located in the upper right hand corner of the box—recent constitutional textual norms—will always and unconditionally trump any other truly conflicting norm. Those norms located in the lower left hand corner of the box—old common law norms—will always and unconditionally be trumped by any other truly conflicting norm.

In sum, the model illustrates the simplest set of principles—the grouping of legal norms into different categories and subcategories, the arrangement of those categories and subcategories into a hierarchical ordering, a preference for higher order norms over truly conflicting lower order norms, and a preference for newer norms over truly conflicting older norms—accounting for and predicting the result in cases where legal norms demand mutually exclusive outcomes.[63]

C. The Presupposed Yet Invisible Nature of the Ordering and Twin Axioms

We can be confident that the ordering and twin axioms exist as positive law, even though rarely referred to in practical legal discourse, because taken together they robustly predict the outcomes of cases in which legal norms of all kinds stand in a posture of true legal conflict.[64] In any case where a legal norm belonging to a superordinate category irreconcilably conflicts with a norm belonging to a subordinate legal category, we can be sure that the former norm will trump the latter norm.

We can also be confident that the axioms are meta-norms. When litigating cases where legal norms may be found to stand in a posture of true legal conflict, lawyers and judges, perhaps quite unconsciously, treat these features as unmoveable presuppositions around which they must argue.[65] Return again to the no-vehicles-in-the-park hypothetical[66] and assume that the norm prohibiting vehicles in the park is a constitutional norm, and that the norm allowing Sunday bicycle races is a statutory norm. In litigating such a case,

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61. *Id.* at 475-76.
62. *Id*. at 476 n.49.
63. The only class of true legal conflicts the model does not account for are those between two legal norms of the same category and subcategory created at the same point in time. *Id.* at n.203.
64. *Id.* at 535-37.
65. *Id.* at 538, 540-48.
66. HART, *supra* note 22, at 127-29.

we certainly would not expect the discourse to center on whether or not constitutional norms are different in kind or hierarchically superior to statutory norms, or whether constitutional norms trump irreconcilably conflicting statutory norms. Lawyers and judges would not focus on such issues because it is incontestable that constitutional and statutory norms are different in kind, and that constitutional norms always trump truly conflicting statutory norms.[67] The ordering and twin axioms are assumed prior to the point when lawyers and judges begin the process of adjudicating a case of true legal conflict.

Given the immutable nature of the legal categories and subcategories, the hierarchical order into which they are arranged, and the categoric and chronologic axioms, lawyers and judges focus their arguments on whether norms in fact stand in a posture of true legal conflict.[68] The meaning of legal norms, in contrast to the rigidly immutable ordering and twin axioms, is open, textured, mutable, and flexible. The lawyer arguing in favor of allowing bicycles in the park on Sundays could not successfully argue against the principle that norms belonging to a superordinate legal category (constitutional norms) trump truly conflicting norms belonging to a subordinate legal category (statutory norms). Instead, that lawyer must argue that the norms in question do not irreconcilably conflict, or, more precisely, that the term "vehicle" in the constitutional norm that prohibits vehicles does not include bicycles.[69]

Another reason we should be confident in the existence of the axioms as positive law meta-norms is that lawyers and judges are comfortable talking about ideas incorporated in the ordering and axioms. Where the ordering and axioms are stated at the highest possible level of generality that retains predictive and explanatory power, lawyers and judges speak with a more context specific vocabulary. All lawyers and judges recognize as obvious, for example, that courts will nullify statutes that are incompatible with the Constitution, and invalidate administrative regulations incompatible with statutory mandates.[70] Similarly, all lawyers and judges know that Supreme Court-developed constitutional doctrine that cannot be squared with any plausible meaning attributable to the text of the Constitution, or judicial statutory interpretations irreconcilable with any plausible meaning attributable to statutory text, are illegitimate.[71] The categoric axiom

67. *See* González, *supra* note 17, at 537-39.
68. *Id.*
69. *See id.* at 544.
70. *Id.* at 481, 537-39.
71. *Id.* at 537-39.

summarizes these kinds of context-dependent ways of speaking and thinking into a highly generalized, simple, context-independent rule: Norms belonging to superordinate legal categories or subcategories always trump truly conflicting norms belonging to subordinate legal categories or subcategories. In short, although lawyers may not be aware of such a legal rule, lawyers *are* quite aware of the more context-specific ways of expressing this general meta-norm principle.

The same holds true for the chronologic axiom. All lawyers and judges regard as obvious that a new constitutional amendment, statute, or administrative regulation will nullify a corresponding old conflicting constitutional clause, statute, or administrative regulation.[72] Likewise, all recognize that when the Supreme Court offers a new doctrinal interpretation of a constitutional passage or statutory text, the old doctrinal interpretation of that constitutional passage or statutory text loses its normative force and ceases to operate as a valid legal norm.[73] The chronologic axiom generalizes or abstracts these context-specific notions into a simple meta-norm that is applicable in all contexts: More recent norms always trump truly conflicting preexisting norms belonging to the same legal category and subcategory.

In short, the descriptive explication of the ordering of legal categories and subcategories, and the categoric and chronologic axioms, constitute a generalized, simple, and context-independent way of stating rules that lawyers and judges already consciously and/or unconsciously apply everyday, though at a more complex, and context-specific level. The value of this kind of descriptive exercise is twofold. First, it distills the essence of what appears at first glance to be a relatively complex and contextually varying part of our legal practice. Boiling legal practice down to its bare elements allows us to understand the essential mechanisms behind an area of legal practice. Second, distillation to the bare elements allows one to quickly and easily see the essential forces driving a set of practices, the threads that tie (or fail to tie) a given set of practices together, the underlying structure and patterns characterizing a given practice, and as we will see in Parts III and V, the incongruities riddling a practice that would otherwise remain camouflaged.

D. The Two Additional Axiomatic Meta-Norms Behind the Ordering

The ordering and twin axioms are all that are necessary to predict the outcomes of cases in which courts find legal norms in true conflict. In order

72. *Id.* at 542-43.
73. *Id.* at 488-93, 542-43.

to see how judicial treatment of conflicting constitutional provisions is inconsistent with the meta-norms, however, we will need to know a bit more about the meta-norms. The categoric and chronologic axioms are prescriptive norms. Beyond merely describing how courts adjudicate cases involving true legal conflict, they indicate how courts ought to adjudicate such cases. The ordering of legal categories and subcategories illustrated in the previous Parts, in contrast, merely describes the different classes of legal norms and hierarchical arrangements that judges and lawyers use everyday. It does not tell courts how they ought to adjudicate cases or how they ought to separate legal norms into different hierarchically-arranged categories and subcategories. The ordering merely represents a background set of assumptions that courts treat as immutable truths when dealing with instances of true legal conflict.

Two additional axiomatic meta-norms, which are prescriptive in nature, lie beneath the ordering. Only by understanding these two additional meta-norms will we be able to understand how judicial treatment of conflicting constitutional provisions is inconsistent with the meta-norms governing adjudication of true legal conflicts. These two additional axiomatic meta-norms are less familiar than the categoric and chronologic axioms. Nonetheless, because they account for the particular architecture and characteristics of the ordering, we can be confident that the two additional meta-norms operate as positive law and are prescriptive in nature. One of these additional axiomatic meta-norms explains the particular legal categories and subcategories that the ordering utilizes. The other additional axiomatic meta-norm accounts for the hierarchical ordering in which those legal categories and subcategories are arranged.

1. The Source Axiom

What accounts for the particular categories that the legal system uses, as opposed to some other categoric arrangement? Why does the legal system differentiate constitutional norms from statutory norms, or statutory norms from common law norms, rather than drawing some entirely different lines of distinction between different kinds of norms? We are so familiar with the divisions between constitutional, statutory, administrative, and common law norms, and between textual versus doctrinal norms, that these divisions may, at first glance, appear as though they are the only way to divide legal norms into different kinds. Their familiarity, however, ought not be mistaken for an iron-clad mandate dictating the use of the extant legal categories. Conceivably, the legal system could discard the extant categories and divide up the universe of legal norms on different axes.

Our system, for example, could recognize categoric distinctions between norms corresponding to their time of creation (old versus new norms), their level of support (high, medium, and low support), their subject area (public versus private), the nature of their commands (prohibitory versus permissive), or their function (power-granting, rights-creating, and institution-creating and regulating). All of these constitute different descriptive labels that lawyers and judges commonly apply to different legal norms. None, however, constitute different legal categories, or at least none are legal categories relevant to the resolution of conflicts between legal norms that irreconcilably conflict. Whether a norm may be labeled prohibitory or permissive, power-granting or rights-establishing, or public versus private is immaterial to the adjudication of such conflicts.[74]

Whether by dint of historical accident or conscious design, our legal system has come to use a particular categoric system that separates the universe of legal norms into constitutional, statutory, administrative, and common law categories, and textual versus doctrinal subcategories. Even if emerging by fortuity, as opposed to conscious design, a phenomenon so foundational and deeply rooted as our extant set of legal categories and subcategories necessarily reflects an underlying prescriptive rudiment.

An axiomatic meta-norm, which I will refer to as the "source axiom," constitutes that prescriptive element. According to the source axiom, *legal norms emanating from different norm-generating institutions or entities belong to different legal categories and subcategories; legal norms emanating from the same norm generating institutions or entities belong to the same legal categories and subcategories*. Differences between the sources from which legal norms originate, in other words, determine the lines of demarcation separating one legal category or subcategory from another legal category or subcategory. Legal norms sourced in a particular law-creating entity or institution constitute a particular legal category or subcategory; legal norms sourced in some other law-creating entity or institution constitute and are members of a separate legal category or subcategory.

Let me clarify. The sources of legal norms to which I refer are the four basic kinds of institutions or entities empowered to create legal norms: We the People (the popular sovereign), legislative bodies, executive branch agencies, and the courts. All legal norms are sourced in a given lawmaking entity or institution, or combination of entities or institutions. The source axiom perfectly explains or accounts for the particular architecture of the four

74. *Id.* at 517-20.

different legal categories. Norms created by a given entity or institution comprise and belong to a particular legal category. For example, legal norms sourced in We the People belong to the constitutional norm category, whereas legal norms sourced in legislative bodies (with Chief Executive approval) belong to the statutory norm category. Norms created by executive branch agencies comprise the administrative norm category, while norms formulated by courts are common law norms. Our extant categoric and subcategoric distinctions between norms, in other words, tightly correspond with our four principle lawmaking entities and institutions: the popular sovereign, legislative bodies, administrative agencies, and the courts.

The source axiom also accounts for the subcategoric distinctions between textual and doctrinal norms. The legal system, for example, treats constitutional textual norms as categorically different from constitutional doctrinal norms.[75] The fact that the former are thought of as the product of the popular sovereign, while the latter locates its immediate source in courts interpreting the former, explains this phenomenon. The same holds true at the statutory level. The legal system treats statutory texts as different in kind from case authorities interpreting statutory texts. Again, the different sources of statutory textual and doctrinal norms—legislative bodies versus courts—explains the difference in treatment. Even at the level of administrative law, the distinction between textual and doctrinal norms is attributable to differences in the sources of those norms. Administrative agencies perform both quasi-legislative and quasi-judicial functions.[76] In the former capacity, agencies create legislative rules, or what I have labeled administrative textual norms, via quasi-legislative informal notice and comment rulemaking procedures.[77] In the latter capacity, agencies use quasi-judicial formal agency adjudications to apply earlier created legislative rules.[78] In short, paralleling the statutory textual versus doctrinal norms dichotomy and corresponding legislative versus judicial law creation processes, agencies routinely use

75. *See* Akhil Reed Amar, *The Supreme Court, 1999 Term–Forward: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000) [hereinafter Amar, *The Supreme Court*] (generally focusing on the difference between constitutional doctrine and constitutional text); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (calling attention to constitutional doctrinal and textual norms).

76. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 164 (3d ed. 1991) ("Administrative action under the Federal Administrative Procedure Act is either rulemaking or adjudication. The APA is thus based on the fundamental rulemaking-adjudication dichotomy that governs administrative law itself.") (footnotes omitted).

77. RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 276 (3d ed. 1999) ("Informal rulemaking closely resembles the process of enacting legislation.").

78. *Id.* ("Formal adjudication looks very much like a judicial trial . . . . [and] is designed to serve functions analogous to those of a judicial trial . . . .").

different administrative norm-creating processes—informal notice and comment rulemaking versus formal adjudications—when creating administrative textual norms versus administrative doctrinal norms.[79]

In sum, norms sourced in a particular law-creating entity or institution are grouped together and considered members of a single legal category or subcategory. Legal norms sourced in some different law-creating entity or institution are grouped together and treated as members of a distinct legal category or subcategory. Stated more briefly, the dividing lines between legal categories, as well as the criteria for membership in a legal category, both correspond with the different law-making entities or institutions from which legal norms spring.[80]

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79. One might argue that both administrative textual and doctrinal norms are the product of singular law-creating institutions—administrative agencies. Statutory textual and doctrinal norms, in contrast, are the product of different law-creating institutions—legislative bodies and the courts. This difference, however, is trivial. Though formally housed within a given agency, notice and comment rulemaking and formal administrative adjudications constitute lawmaking processes as different as the legislative and judicial process. *See supra* notes 77-78 and accompanying text. Agency textual norms derive from the quasi-legislative notice and comment rulemaking, while agency doctrinal norms derive from the quasi-judicial formal agency adjudications. In a second way, however, the correlation between different derivations and different legal subcategories is weaker in the administrative area than in the statutory realm. Most agency legislative rules (i.e., administrative textual norms) are the product of notice and comment rulemaking, but some result from formal rulemaking processes which closely resemble the formal adjudications-producing agency doctrinal norms. PIERCE ET AL., *supra* note 77, at 315-16 (explaining that agencies make legislative rules via both informal notice and comment rulemaking and formal adjudication rulemaking.). The similarity between formal agency adjudicatory rulemaking and formal agency adjudications that establish agency norms of precedential value degrades somewhat the tight correlation between different legal subcategories and different law-creating processes or entities. Relatively few agency textual norms, however, are the product of formal rulemaking. *See* SCHWARTZ, *supra* note 76, at 164, 192 (stating that agency rulemaking is "largely informal in character, although provision is also made for the comparatively rare case of formal rulemaking" and that "only a few federal statutes provide expressly for 'trial-type' hearings in rulemaking."). Further, despite procedural similarities, formal adjudications and formal rulemaking are distinct forms of agency action. PIERCE ET AL., *supra* note 77, at 275 ("The APA sets forth four types of procedures potentially available to agencies—formal adjudication, informal adjudication, formal rulemaking and informal rulemaking."). Therefore, one should not over-emphasize any degradation of the correlation between different derivations of textual and doctrinal norms and different legal subcategories.

80. The difference between the four principle legal categories and the textual versus doctrinal norm subcategories is that the former's categoric boundaries are defined by the perception of what is the *ultimate* source, whereas the latter is defined by *immediate* sources of legal norms. For example, the broad legal category "statutory norms" includes as members both the inscribed texts of statutes found in code books as well as the judicial interpretations of the inscribed texts of statutes found in the reporters. Both kinds of statutory norms—inscribed texts in code books and judicial interpretations in reported cases—ultimately derive from Congress (with approval by the Chief Executive). Thus, when dealing with the four legal categories, the source axiom works as follows: Whenever legal norms derive from different norm-generating institutions or entities, they belong to different legal categories. It follows, then, that legal norms ultimately sourced in Congress (with approval of the Chief Executive) belong to the legal category "statutory norms." Once the broad membership of a legal norm has been determined (according to its ultimate source), the question of legal subcategory membership

As with the categoric and chronologic axioms, my claim is that the source axiom is a prescriptive meta-norm. It is a meta-norm because it operates as a presupposed, and therefore usually unstated principle of positive law that judges and lawyers utilize in everyday legal discourse and thinking. It is prescriptive, rather than merely descriptive, because its violation would not only be aberrant, but would also be subject to condemnation as mistaken or erroneous.[81] If, for example, a court ruling were to treat a legal norm created by an administrative agency as a statute rather than an administrative regulatory norm, lawyers and judges would instantly recognize the ruling as erroneous for having transgressed a principle that governs the way that courts ought to decide cases. An appellate court reviewing such a ruling would reverse the ruling, not necessarily because the ruling deviates from the way courts usually rule on such matters, but rather because such a ruling would violate a fundamental and incontrovertible norm to which courts ought to adhere when adjudicating cases. The source axiom, in other words, commands that lawyers and judges should not lump a legal norm sourced in one norm-generating institution in a legal category populated by legal norms generated by another norm-generating institution. To do so would go against

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arises. Here the source axiom works as follows: Whenever a legal norm belonging to a given legal category derives from the norm-generating source charged with creating legal norms belonging to that legal category, the legal norm in question belongs to the textual subcategory. For example, statutory norms, with an immediate source in Congress, belong to the legal subcategory "statutory textual norms." In contrast, whenever a legal norm that belongs to a given legal category locates its *immediate* source in the norm-generating source *not* charged with creating legal norms for that legal category, the legal norm in question belongs to the doctrinal subcategory. For example, statutory norms with an immediate source in the courts belong to the legal subcategory "statutory doctrinal norms."

81. The line between description (what normally happens) and prescription (what happens because of a norm) is sometimes not acknowledged. Where, for example, one observes that drivers halt their vehicles when they reach a stop sign, one may ask whether this phenomenon is something that drivers do as a rule (what normally happens), or instead something that drivers do because of a prescriptive rule (what happens because of a norm), or both. As with the norm commanding drivers to halt their vehicles at a stop sign, the meta-norms discussed herein, including the source axiom, are prescriptive in nature. They not only describe what is ordinarily done in the legal system, but they also delineate principles that dictate what ought to be done or the way cases ought to be adjudicated.

The recent dispute over the status of the *Miranda* rule illustrates the concept of the source axiom as a prescriptive meta-norm. *See* Dickerson v. United States, 530 U.S. 428 (2000). Justice Scalia's dissenting opinion in *Dickerson* essentially accuses the majority of violating the source axiom. *Id.* at 444-65 (faulting majority for failing to clarify whether *Miranda* rule is a requirement of the Self-Incrimination Clause or merely a Supreme Court-created common law rule that is not required by the Self-Incrimination Clause). At least one scholar has joined Justice Scalia in using source axiom principles to criticize the majority opinion in *Dickerson*. *See* Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1071-78 (2001) (criticizing the majority opinion in *Dickerson* for failing to clarify whether *Miranda* lays down a rule required by the Fifth Amendment, and is therefore ultimately sourced in the popular sovereign, or whether it is merely a prophylactic—a judicially-created common law norm based on the right against compelled self-incrimination).

not only what judges and lawyers *usually do*, but what judges and lawyers are *supposed to do.*

2. The Hierarchic Axiom

The source axiom explains only one phenomenon—that the legal system treats legal norms created by different norm-generating institutions as different in kind, or in other words, as members of different legal categories and subcategories. Why, however, does the legal system hierarchically arrange the legal categories and subcategories with constitutional norms at the top, common law norms at the bottom, and statutory and administrative norms sandwiched in between? Similarly, why are textual norms of a given species considered superior to doctrinal interpretations of those textual norms? The legal system need not organize categories of norms in a hierarchic ordering, or in this particular hierarchical ordering. In light of the hierarchy of textual norms over doctrinal norms, some commentators have advanced theories of statutory interpretation that would privilege statutory doctrinal norms over statutory textual norms.[82] Looking at the principle legal categories, several commentators have questioned the impenetrable superiority of constitutional norms over statutory norms, and in so doing have hinted at a reversal of that hierarchy.[83]

A legal system need not base adjudication of true legal conflicts on a hierarchically-arranged ordering of legal categories and subcategories defined by the sources from which legal norms originate. That our legal system is organized in this fashion represents a choice, though perhaps an unconscious one. Such fundamental organizational features of a legal system cannot be dismissed as arbitrary or as without an underlying foundation. What then explains and justifies the extant hierarchical ordering that the legal system utilizes in adjudicating instances of true legal conflict?

The answer lies with a second axiomatic meta-norm, which I will refer to as the "hierarchic axiom." According to the hierarchic axiom, *legal*

82. *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163-66 (1982) (arguing that courts should be able to treat statutes in much the same way as they treat established common law rules—as subject to judicial revision if outdated and no longer in synch with the legal landscape); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21 (1988) (using metaphors to describe statutory interpretation; the archeological metaphor means that the "meaning of a statute is set in stone on the date of its enactment," while the nautical metaphor implies that "a statute [i]s an on-going process (a voyage)"). Both Calabresi's and Aleinikoff's theories of statutory interpretation permit courts to create statutory doctrine that is irreconcilable with the range of plausible meanings attributable to statutory textual norms at the time of their creation.

83. *See* Amar, *The Supreme Court*, *supra* note 75, at 27 (discussing the "doctrinalist" school of thought under which doctrinal precedent "displaces" constitutional text).

categories populated by legal norms emanating from institutions or entities of relatively greater democratic legitimacy are always and unconditionally hierarchically superior to those legal categories populated by legal norms emanating from institutions or entities of relatively lesser democratic legitimacy. This simple axiomatic rule explains the entire hierarchy of the ordering of legal categories and subcategories.

What explains, for example, the phenomenon of the first-order legal category, statutory norms, occupying a higher position in our ordering of legal categories than the first-order legal category, common law norms? Legislative bodies, the source of norms belonging to the former category, have greater majoritarian democratic legitimacy than courts, the origin of norms belonging to the latter category. Why do we place constitutional norms in a superordinate position over statutory norms? The answer is similar: constitutional norms, which are derived from the popular sovereign, claim greater democratic legitimacy than the source of statutory norms—legislative bodies.

In short, as we ascend the hierarchy of legal categories, the entity or institution giving rise to the norms populating each of the four legal categories makes an increasingingly strong claim to majoritarian democratic legitimacy. At the bottom of the hierarchy, unelected courts and the common law norms they create claim very weak democratic legitimacy.[84] The democratic legitimacy of administrative agencies and their regulations are also suspect.[85] Agencies possess an advantage over the courts, however, in

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84. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 384 (2001). In that case, the Court stated:

> Unlike courts, Congress directly reflects public attitudes and beliefs, enabling Congress better to understand where, and to what extent, refusals to accommodate a disability amount to behavior that is callous or unreasonable to the point of lacking constitutional justification. Unlike judges, Members of Congress can directly obtain information from constituents who have firsthand experience with discrimination and related issues.
>
> Moreover, unlike judges, Members of Congress are elected. When the Court has applied the majority's burden of proof rule, it has explained that we, *i.e.*, the courts, do not "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations."

Id. (citation omitted).

85. Jody Freeman, *Symposium, The Contracting State*, 28 FLA. ST. U. L. REV. 155, 198 (2000) ("In a democratic system, we expect our elected representatives to be accountable for state-sponsored coercion. Although Congress might delegate the bulk of the regulatory task to administrative agencies, agency discretion is constrained by numerous formal and informal accountability mechanisms, including legislative and executive oversight, judicial review, procedural rules, and media scrutiny."). *See also* Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 232-33 (1986) (finding that if Congress has directly and precisely addressed an issue, the Agency may not act contrary to Congress's will); Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 125 (1985) ("[I]f Congress has clearly expressed an intent contrary to that of the Agency, our duty is to enforce the will of Congress.").

that they are more directly checked by the electorally accountable executive and legislative branches than are Article III courts. Next, legislative bodies, which are subject to direct electoral checks, and the statutes they produce, make a stronger claim to majoritarian democratic legitimacy.[86] Ascending to the top rung in the hierarchy, the popular sovereign, considered the ultimate source of constitutional norms, makes the strongest claim to democratic legitimacy. In a political system that allocates ultimate sovereignty to the people no entity or institution may make a stronger claim to democratic legitimacy than the People themselves.[87]

The perceived different levels of legitimacy account not only for the superordinate and subordinate majoritarian democratic legitimacy of each of the four basic legal categories, but also for the positions of the various textual and doctrinal legal subcategories. Beginning at the constitutional level, the legal subcategory, "constitutional textual norms," for example, occupies a superordinate position over the legal subcategory, "constitutional doctrinal norms." Constitutional textual norms are spoken of as products of the popular sovereign.[88] Constitutional doctrinal norms derive from judicial interpretation and application of constitutional textual norms. Manifestly, the majoritarian democratic pedigree of the popular sovereign is purer than that of unelected courts.

Similarly, at the statutory level, statutory textual norms originate from legislative bodies, while courts produce the case authorities establishing doctrinal precedents that interpret statutory texts. The electorally accountable former claims greater majoritarian democratic legitimacy than the unelected latter.[89] This difference in degrees of democratic legitimacy accounts for the hierarchy of the statutory textual norm over statutory doctrinal norm. Even in the administrative realm the hierarchy of textual norms over doctrinal norms corresponds with differing degrees of democratic legitimacy. As mentioned above, administrative textual norms are largely the product of quasi-legislative informal notice and comment rulemaking, whereas administrative doctrinal norms spring from quasi-judicial formal agency adjudications.[90] As the quasi-legislative and quasi-judicial descriptive labels imply, the former administrative law-creating process can claim greater democratic legitimacy

86. *See supra* note 84.

87. THE FEDERALIST NO. 22, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("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."). *See also* Corwin, *infra* note 132.

88. *See infra* text accompanying notes 108-34.

89. *See supra* note 84.

90. *See supra* text accompanying notes 76-79.

than the latter. Agencies promulgating legislative rules via informal notice and comment rulemaking "have sought to democratize the rulemaking process" via broad participation, consultation, and legislative committee style hearing procedures.[91] Agency formal adjudications, in contrast, employ trial-like procedures that are not designed to enhance the scope of participation, but rather, to establish a trial-like record that forms the basis for an administrative order.[92]

In sum, the hierarchic axiom fully accounts for the particular hierarchical ordering of legal categories and subcategories. In other words, the axiom explains why any given legal category or subcategory occupies a superordinate or subordinate position in the ordering of legal categories and subcategories.

E. The Majoritarian Democracy Reinforcing Justification Underlying the Four Axioms

The four axiomatic meta-norms can be stated as follows:

1. The source axiom: Legal norms emanating from different norm-generating institutions or entities belong to different legal categories and subcategories; legal norms emanating from the same norm-generating institutions or entities belong to the same legal categories and subcategories.

2. The hierarchic axiom: Legal categories populated by legal norms emanating from norm-generating institutions or entities of relatively greater democratic legitimacy are hierarchically superior to those legal categories populated by legal norms emanating from institutions or entities of relatively lesser democratic legitimacy.

3. The categoric axiom: Legal norms belonging to legal categories of superordinate hierarchic status always and unconditionally trump irreconcilably conflicting legal norms belonging to legal categories of subordinate hierarchic status.

4. The chronologic axiom: Whenever two truly conflicting legal norms belong to the same legal category and subcategory, the more recently created norm always and unconditionally trumps the preexisting norm.

Taken together, the four axiomatic meta-norms account for the outcomes of almost all cases in which courts find that legal norms stand in a posture of true legal conflict. Without the meta-norms, or some substitute set of meta-norms performing the same function, the legal system would have no way of

91. *See* SCHWARTZ, *supra* note 76, at 189-92.
92. *See id.* at 192-93.

predictably resolving cases of true legal conflict. Why, however, have we chosen to use these particular meta-norms to resolve true legal conflicts? The meta-norms need justification because the meta-norms play such an important and fundamental role, and because we could easily imagine alternative systems for mediating true legal conflict.

As it turns out, the outcomes produced by the four meta-norms justify their role in mediating true legal conflicts. Stated most simply, *when the four meta-norms work in conjunction, they always privilege the legal norm produced by the institution or entity of greatest majoritarian democratic legitimacy over the legal norm produced by the institution or entity of lesser democratic legitimacy*. In this way, the four meta-norms promote majoritarian democracy-reinforcing outcomes. The meta-norms achieve these outcomes by (1) hierarchically ordering the legal categories and subcategories according to the democratic legitimacy of the various norm-generating sources, and (2) granting norms that emanate from sources of higher majoritarian democratic legitimacy an absolute trump over norms that emanate from sources of lesser majoritarian democratic legitimacy.

Figure No. 3 engrafts the source and hierarchic axioms accounting for the legal categories and subcategories onto the model represented in Figures No. 1 and 2. The left-most part of the graph illustrates the one-to-one positive correspondence between the degree of democratic legitimacy that the source of norms populating a given legal category or subcategory may claim, with the position in the ordering that the legal category or subcategory occupies. The greater the degree of majoritarian democratic legitimacy that a source may claim, the higher the position of the legal category or subcategory populated by norms rooted in that source. The top-most part of the graph illustrates the nexus between the recency of a norm's creation and its democratic legitimacy. All other things being equal, norms of more recent vintage enjoy greater democratic legitimacy than norms of older vintage.

Figure No. 3 also identifies the sources of legal norms. I do not claim that the listed sources represent the exclusive, or even the actual, sources of legal norms.[93] Instead, at least regarding the four legal categories, they represent

93. At least one scholar, for example, claims that the various forms of administrative "guidance" constitute a species of legal norms. *See* PETER L. STRAUSS, PUBLICATION RULES IN THE RULEMAKING SPECTRUM: ASSURING PROPER RESPECT FOR AN ESSENTIAL ELEMENT 2 (Columbia Law School Center for Law and Economic Studies, Working Paper No. 189 (2001)).

the ultimate sources that our legal culture normally associates with the various kinds of legal norms. Our constitutional folklore maintains that the Constitution emanates from the popular sovereign.[94] As I will argue in Part IV, no one could reasonably claim that *all* constitutional norms originate from We the People.[95] Nonetheless, under extant constitutional orthodoxy, We the People are thought to be, and are spoken of as, the font of constitutional norms.[96] Similarly, lawyers and judges commonly think of statutory norms as the product of legislative bodies. To be certain, the Chief Executive, courts, and administrative agencies play important roles in the elaboration of statutory norms.[97] Nonetheless, our legal culture associates statutes with legislative bodies and purports to limit the role of the Chief Executive, courts, and agencies in the elaboration of statutory norms to carrying out the sometimes ambiguous legislative will or commands embedded in statutes.[98]

At the subcategoric level, the identified sources represent not just the ultimate and normally associated sources of legal norms, but rather, the actual and immediate sources. Statutory textual norms, for example, are primarily the product of legislative bodies, while the doctrinal norms interpreting them are creations of the courts. To give a second example, administrative textual norms are most immediately the creation of quasi-legislative administrative processes, which promulgate regulations of general application. Administrative doctrinal norms, in contrast, are creations of administrative quasi-judicial procedures, which interpret administrative regulations.

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94. *See infra* text accompanying notes 108-34.

95. *See infra* text accompanying notes 135-323.

96. *See infra* text accompanying notes 108-34.

97. *See* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992) (setting forth a formal rational choice model that articulates the strategic and dynamic influence of different actors in a statutory policy-elaboration game).

98. *See* Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 624-33 (1996) (reviewing the honest agent conception, which maintains that when interpreting statutes courts must faithfully execute the directive and intent of the enacting legislative body).

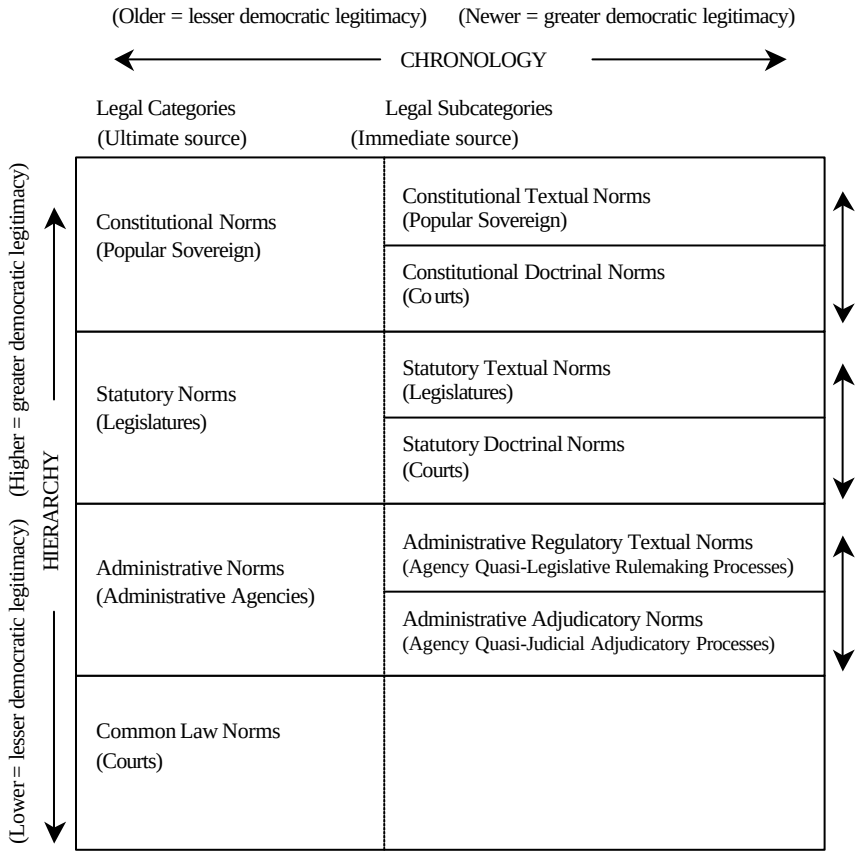

Figure No. 3

The four axioms represented in Figure No. 3 encapsulate the narrow majoritarian democracy-reinforcing narratives that lawyers and judges commonly use to justify small pieces of the hierarchical arrangement. Lawyers and judges have used a democracy reinforcing narrative to justify the nullification of statutory norms and other sub-constitutional norms by truly conflicting constitutional norms since *Marbury v. Madison*.[99] Likewise, a democracy reinforcing narrative justifies the hierarchy of statutory norms over both administrative and common law norms. The same is true for the justification, at the subcategoric level, of the hierarchy of statutory textual norms over statutory doctrinal norms. Courts ought not create statutory

99. 5 U.S. (1 Cranch) 137 (1803). *See infra* note 115.

doctrinal norms that irreconcilably conflict with the range of meanings reasonably attributable to statutory textual norms. Allowing courts to create doctrinal norms incompatible with textual norms would empower a lawmaking institution of lesser democratic legitimacy—the courts—to nullify or modify a norm created by a law-creating institution of greater democratic legitimacy—a legislative body. The four axioms aggregate these and other similar justificatory narratives into a generalized and simplified justificatory narrative that is applicable regardless of the particular kinds of norms involved.

III. CONSISTENCY WITH THE META-NORMS DEMANDS THAT POPULAR SOVEREIGN-GENERATED CONSTITUTIONAL NORMS TRUMP TRULY CONFLICTING GOVERNMENT INSTITUTION-GENERATED CONSTITUTIONAL NORMS

Thus far I have defined the concepts of true legal conflict and of meta-norms; identified both the hierarchical ordering of legal categories and subcategories, and the categoric, chronologic, source, and hierarchic meta-norm axioms; argued that the four meta-norms govern the adjudication of true legal conflicts; and explained how the meta-norms advance majoritarian democratic outcomes.

Having laid the groundwork, I now return the discussion to the central normative proposition of the Article—consistency with the axiomatic meta-norms requires that constitutional norms sourced in We the People always and unconditionally trump truly conflicting constitutional norms sourced in ordinary government institutions. As a corollary, consistency with the axiomatic meta-norms requires that constitutional norms sourced in We the People be immune from repeal by later-in-time created truly conflicting constitutional norms sourced in ordinary government institutions. This proposition presupposes a categoric distinction between popular sovereign-generated and government institution-generated constitutional norms, a distinction not currently acknowledged by the courts.[100]

On the orthodox view, reflected in Figure No. 3, all constitutional provisions (constitutional textual norms) emanate from a single source—We the People.[101] Unlike some constitutional systems, American courts have

100. At this juncture, I refrain from defining the line between constitutional norms originating from the popular sovereign and those originating from ordinary government institutions. The important point, at least for now, is recognizing that there is a clear distinction between the two sources.

101. *See infra* text accompanying notes 108-34.

never recognized a subset of super-constitutional norms.[102] Instead, all constitutional provisions are treated as similar in kind and enjoy an equal hierarchical status.[103]

As long as we accept the orthodox view, the way that courts have adjudicated true conflicts between constitutional provisions fully conforms to, and is consistent with, all four axiomatic meta-norms.[104] My claim, however, is that the orthodox view is more myth than reality, more fable than fact. The dual-source thesis more accurately and honestly describes the origins of constitutional norms than the extant orthodoxy. Only some constitutional textual norms may rightfully claim a popular sovereignty pedigree. Others can in no way be characterized as emanating from We the People, but rather are more honestly characterized as creations of ordinary legislatures that fail to embody the popular sovereign's norm-creating acts. Contrary to the orthodoxy, an accurate descriptive account of the origins of constitutional textual norms must acknowledge that constitutional provisions in fact originate from two different sources—the popular sovereign and ordinary legislative bodies.

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102. *See infra* text accompanying notes 330-37. The Slave Trade Clause and the Equal Suffrage in the Senate Clause are notable exceptions. *See* U.S. CONST., art. V. The former was purportedly unamendable until 1808, while the latter makes equal suffrage of the states in the Senate unamendable without the consent of each state.

103. Though lawyers and judges may, for example, descriptively differentiate rights-granting constitutional provisions from power-granting constitutional provisions, such a distinction has no relevance in adjudicating cases of true conflict between constitutional provisions. Further, though some constitutional provisions may have more influence, be the subject of a greater volume of judicial attention, or reflect principles closer to the core of the Constitution, at least for purposes of adjudicating conflicts between constitutional norms, all constitutional provisions are treated with equal hierarchical status. *See* González, *supra* note 17, at 516.

104. In conformity with the source axiom, under the supposition that all constitutional provisions originate from We the People, the courts treat all constitutional provisions as similar in kind. Similarly, in conformity with the hierarchic axiom, courts treat constitutional norms—supposedly originating from the popular sovereign—as hierarchically superior to statutory, administrative, and common law norms, which originate from norm-generating institutions of lesser majoritarian democratic legitimacy than We the People. Moreover, given that all constitutional provisions are supposedly derived from the same entity, for purposes of adjudicating true conflicts between constitutional norms, no constitutional provision or subcategory of constitutional provisions is treated as different in kind from, or hierarchically superior to, other constitutional provisions. Finally, because all provisions of the Constitution belong to a single indivisible legal category (and therefore enjoy an equal hierarchic status) the courts never use the hierarchic axiom to resolve true conflicts between constitutional norms. Instead, the chronologic axiom alone determines which of two truly conflicting constitutional norms will prevail. In short, in light of the extant constitutional orthodoxy positing that all constitutional provisions are derived from We the People, the courts' adjudication of truly conflicting constitutional norms has perfectly mirrored the four axiomatic meta-norms that govern the adjudication of true legal conflicts.

Once we accept the dual-source thesis, consistency with the source, hierarchic, and categoric axioms requires: (1) that popular sovereign and government institution-generated constitutional provisions be treated as different in kind, (2) that the former be treated as hierarchically superior to the latter, and (3) that in cases of true conflict the former always and unconditionally trumps the latter.

Figure No. 4 below incorporates the dual-source thesis into the model developed in Figures No. 1-3. The model presented in Figure No. 4 illustrates five, rather than four, principle legal categories. In contrast to our current ordering of legal categories and subcategories, constitutional norms under the structure I advance constitute two separate legal categories, "popular constitutional norms" and "government constitutional norms," with the former hierarchically superior to the latter. The division of constitutional norms into distinct categories follows from the source axiom. Because constitutional provisions emanate from two different sources—the popular sovereign or government institutions—the legal system must treat those sourced in the former as categorically distinct from those sourced in the latter.

Other than the division of the previously undivided legal category "constitutional norms" into two separate legal categories, the model works exactly as before. In accordance with the categoric axiom, legal norms belonging to superordinate legal categories or subcategories always and unconditionally trump truly conflicting norms belonging to subordinate legal categories or subcategories. As applied to the new ordering, any norm belonging to the legal category "popular constitutional norms" trumps any irreconcilably conflicting norm belonging to the category "government constitutional norms," and only a newly created popular constitutional amendment can trump an existing popular constitutional textual norm.

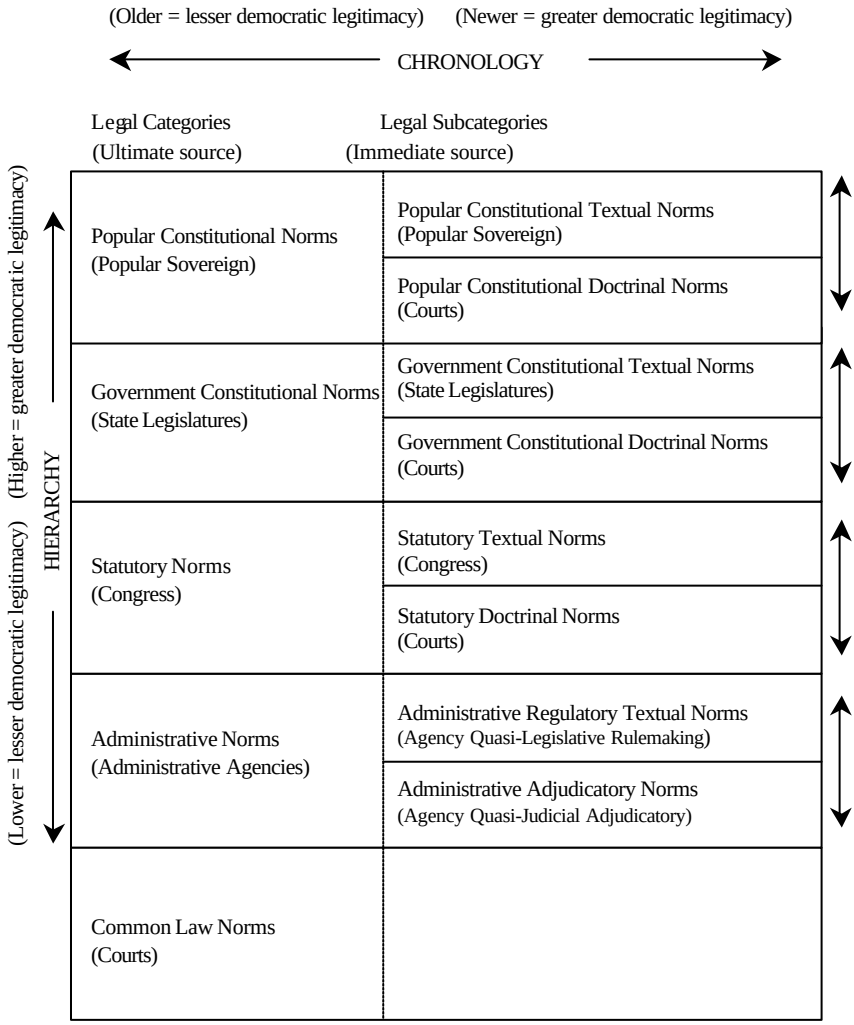

Figure No. 4

If the dual-source thesis is accurate, then courts inadvertently have been violating the source, hierarchic, and categoric axioms when dealing with true conflicts between constitutional provisions. By uncritically adhering to the orthodox view that all constitutional norms emanate from a single source, the courts have wrongly treated all constitutional provisions as similar in kind (a violation of the source axiom) and as hierarchically indistinguishable (a violation of the hierarchic axiom), thereby allowing constitutional provisions that emanate solely from legislative bodies to trump constitutional provisions that emanate from We the People (a violation of the categoric axiom).

To see how judicial treatment of truly conflicting constitutional provisions can transgress the meta-norms, return to the hypothesized RFRA-like constitutional amendment discussed in Part I.[105] Again, assume that the Supreme Court would find that such an amendment is in true legal conflict with the Free Exercise Clause. Assume further, under given criteria for separating popular sovereign-generated constitutional provisions from ordinary government institution-generated constitutional provisions, that the Free Exercise Clause belongs to the former category, while the hypothesized RFRA-like amendment falls into the latter category. How would we expect the Supreme Court to adjudicate the conflict? As suggested above, the Court would hold that the RFRA-like amendment expands and alters the contours of Free Exercise Clause protections.[106] The court would do so because, operating under the extant orthodoxy, it would consider the RFRA-like amendment to emanate from the same source as the Free Exercise Clause, and would therefore treat them both as constitutional norms of equal hierarchical status. Because they would be treated as members of the same legal category and subcategory, the chronologic axiom would govern and the more recently created norm would trump or alter the preexisting norm.

Yet, if the RFRA-like amendment emanates from ordinary government institutions, while the Free Exercise Clause emanates from We the People, allowing the former to trump the latter violates the source, hierarchic, and categoric axioms. It violates the source and hierarchic axioms by treating norms sourced in two distinct norm-generating entities of different democratic legitimacy as categorically and hierarchically indistinguishable. It violates the categoric axiom by privileging the RFRA-like amendment—a norm that should be treated as a member of a hierarchically inferior legal category—over the Free Exercise Clause—a norm that should be treated as a member of a hierarchically superior legal category.

All of these conclusions, of course, rely heavily on the dual-source thesis. Without the dual-source thesis, judicial treatment of truly conflicting constitutional norms fully complies with the meta-norms. Once we accept the dual-source thesis as a more accurate descriptive account of the origins of constitutional norms, however, consistency with the source, hierarchic and categoric meta-norms requires that popular sovereign-generated constitutional provisions trump truly conflicting government institution-generated constitutional norms. Why ought we embrace the dual-source thesis and reject the extant orthodoxy? The next Part addresses this question.

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105. *See supra* text accompanying notes 6-9.
106. *See supra* text accompanying notes 8-10.

IV. EMBRACING THE DUAL-SOURCE THESIS

The lynchpin of the argument lies in supplanting the orthodoxy (all constitutional textual norms, including the amendments, are sourced in We the People) with the dual-source thesis (constitutional textual norms emanate from two separate and distinct kinds of law creating sources—We the People and ordinary state legislatures, which ratify amendments pursuant to Article V). I harbor no false hope that my argument will cause the legal community to instantly jettison the orthodoxy and replace it with the dual-source thesis. Persuading lawyers to discard long held presuppositions in favor of novel interpretations is a process rather than an event. Instead of aiming to convince that the extant orthodoxy is "wrong" and that the dual-source thesis is "correct," I will advance the more palatable argument: The orthodoxy rests on questionable foundations, and the dual-source thesis offers a plausible, and perhaps superior, alternative understanding of the sources of constitutional textual norms.

Keeping in mind my limited objectives, I will merely outline the arguments against the orthodoxy and in favor of the dual-source thesis. In forthcoming articles, and with the eventual intent to persuade lawyers and judges to fully embrace the dual-source thesis, I will take up a more comprehensive consideration of the argument's most controversial and crucial components. For now, in order to narrow the scope of my task, I will assume that both the body of the Constitution and the Bill of Rights emanate from the popular sovereign,[107] and I will focus only on the Constitution's post-Bill of Rights amendments. I will advance the following proposition: Contrary to the orthodox view of sources of constitutional amendments, we must take seriously the notion that at least some amendments created pursuant to Article V cannot accurately be described as emanating from, or created by, We the People. Instead, these amendments are more honestly described as creations of the ratifying legislative bodies alone. If at least some constitutional amendments are sourced in ordinary government, rather than in We the People, the orthodoxy cannot stand.

A. The Orthodoxy and Article V

Before countering the orthodoxy, let me first survey its manifestations. That constitutional norms emanate from We the People is part and parcel of the theory of popular sovereignty, a constitutional cornerstone that found

107. Of course I reserve the right to examine the validity of this assumption at some future date.

early expression during the American Revolution, and later in the Founding Era. In both periods, the legitimacy of constitutions rested on their status as legal norms sourced in the sovereign People.[108] Most prominently, during the Founding period, Federalists used the idea that constitutional norms are sourced in the sovereign People to rebut a key Anti-Federalist critique of the then-proposed Constitution. Anti-Federalists argued that Article VII of the proposed Constitution, proclaiming the Constitution ratified upon the approval of popular constituent conventions in only nine of the thirteen states,[109] violated both the Articles of Confederation Amendment Clause[110] and provisions of the then-in-force state constitutions.[111] Federalists, however, responded that under Article VII, the sovereign People, assembled in popular constituent conventions, would be the ratifiers of the proposed Constitution.[112] If the sovereign People chose to adopt the Constitution, any conflict with the Amendment Clause of the Articles of Confederation or with extant state constitutions would be moot. As law sourced in We the People, the Constitution would trump the conflicting Articles of Confederation and state constitutions.[113]

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108. *See* U.S. CONST. pmbl. ("We the People of the United States . . . do ordain and establish this Constitution . . ."); WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA (Rita Kimber & Robert Kimber trans., 1980) (discussing Revolutionary era state constitutions, which lodge sovereignty in the People); STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM 12 (1996) (describing how the authorship of constitutions evolved to require special popular constituent conventions and how Americans adopted the idea that the People are the creators of constitutions); Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 386 (1983) ("That the American system of government traces its authority to a Constitution originally consented to by conventions elected by (a portion of) the people is one significant legitimating feature of the regime."); Martin S. Flaherty, *History in Constitutional Argumentation*, *in* 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1290, 1291 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000) (explaining the idea that popular sovereign's ratification of the Constitution legitimizes its authority unless and until the popular sovereign amends the Constitution); Abner S. Greene, *The Irreducible Constitution*, 7 J. CONTEMP. LEGAL ISSUES 293, 295-96 (1996) (discussing democratic foundationalism).

109. *See* U.S. CONST. art. VII.

110. Article of Confederation art. XIII. The Amendment Clause provides:

> And the Articles of this Confederation shall be inviolably observed by every state, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of United States, and be afterwards confirmed by the legislatures of every state.

Id.

111. *See* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 464-75 (1997) [hereinafter Amar, *The Consent of the Governed*] (explaining the Anti-Federalist arguments relating to the conflict between the proposed Constitution, the Articles of Confederation, and state constitutions, including the Federalists' popular sovereignty-based rebuttal).

112. *See id.*

113. *See id*. *See also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 476 (Max

During the nation's early years, a nationalist Supreme Court voiced the orthodox view that the Constitution emanates from the popular sovereign. In *McCulloch v. Maryland*,[114] Justice Marshall clearly articulated the orthodoxy with the following statement:

> [W]hen, "in order to form a more perfect union," it was deemed necessary to change this alliance [the Articles of Confederation] into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.
>
> *The government of the Union, then . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.*"[115]

Justice Story offered another early assertion of the orthodoxy in *Martin v. Hunter's Lessee*[116] with the following statement: "The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States.'"[117]

The period leading up to the Civil War featured a Southern challenge to the orthodox view.[118] Most prominently, John C. Calhoun argued that the

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Farrand ed., 1937) [hereinafter 2 FEDERAL CONVENTION] (James Madison speaking of the People as the "fountain of all [political] power" and as ratifiers of the proposed constitution).

114. 17 U.S. (4 Wheat.) 316 (1819).

115. *Id*. at 404-05 (emphasis added). For another opinion in which Justice Marshall expressed the orthodox view, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). In *Marbury*, Marshall justified judicial review as the Court enforcing "the original and supreme will" of the popular sovereign expressed in the Constitution, over the will of the legislature, expressed in ordinary legislation. *Id*. at 176. Marshall's *Marbury* opinion closely tracks Hamilton's justification for judicial review. *See* THE FEDERALIST NO. 78, at 464-72 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing in favor of judicial review on the grounds that the courts' enforcement of constitutional norms over statutory norms amounts to courts' enforcement of norms emanating from People over norms emanating from a legislative body). The position Marshall advances is not one of the Court trumping Congress, but rather of the People's Constitutional norms trumping Congress. *See* William Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 16-17 (1969); Thomas E. Baker, *Exercising the Amendment Power to Disapprove of Supreme Court Decisions: A Proposal for a "Republican Veto,"* 22 HASTINGS CONST. L.Q. 325, 326-27 (1995).

116. 14 U.S. (1 Wheat.) 304 (1816).

117. *Id*. *See also* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 236 (1796) ("There can be no limitation on the power of *the people* of the *United States*. By their authority . . . the Constitution of the *United States* was established . . . ."); Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 470-71 (1793) ("[T]he people, in their collective and national capacity, established the present Constitution . . . .").

118. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1451-67 (1987) [hereinafter Amar, *Of Sovereignty and Federalism*] (succinct yet inclusive summary of the Southern

states or the people of the states, rather than the national people, had created the Constitution, and therefore the states retained a right to secede from the union.[119] Other Civil War era actors, as exemplified by Abraham Lincoln, followed to the Marshallian orthodox line and spoke of the Constitution and its amendments as emanating from the national popular sovereign. Lincoln articulated the orthodoxy in his 1861 inaugural address as follows:

> This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing Government, they can exercise their *constitutional* right of amending it or their *revolutionary* right to dismember or overthrow it . . . . I fully recognize the rightful authority of the people over the whole subject, to be exercised in either of the modes prescribed in [Article V] . . . ."[120]

Whatever controversy may have existed prior to the Civil War, the war and the ensuing amendments resolved the debate in favor of the idea that the Constitution derives from the national We the People, and not, as the South had insisted, from the states or the peoples of the states.[121]

Modern courts and scholars have continued to speak of the Constitution as emanating from We the People. Most notably for present purposes, modern authorities have unwaveringly spoken of constitutional *amendments* that are ratified pursuant to Article V as emanating from We the People. In

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challenge to the orthodox view).

119. *See* JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT, 80-88 (1992). *See also* Amar, *Of Sovereignty and Federalism*, *supra* note 118, at 1451-66 (recounting the debate on whether sovereignty resides with a national We the People or with the peoples of individual states in the period leading up to the Civil War). Indeed, the Southern Civil War idea that sovereignty resided in the states grew out of uncertainty as to the location of sovereignty, dating at least as far back as the Virginia and Kentucky Resolutions that were spurred by the Alien and Sedition Acts. *See* ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 136-41 (6th ed. 1983).

120. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 1789-1989, at 140 (bicentennial ed. 1989). Curiously, in the next breath Lincoln may have differentiated the popular constituent convention from the state legislature ratification models, favoring the former as the only ratification method that "allows amendments to originate with the people themselves." *Id.* It is not entirely clear, however, whether Lincoln was speaking of a national constitutional convention for proposing amendments, or of popular constituent conventions organized for ratification of proposed amendments.

121. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 81-82 (1991) [hereinafter ACKERMAN, FOUNDATIONS] (reviewing how the pre-Civil War debates regarding the primacy of the national people versus the states—so hotly debated up to and during the Civil War was decided in favor of the former by the outcome of the Civil War and the Civil War Amendments); 1 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTION LAW OF THE UNITED STATES 600 (2d ed. 1929) (stating that the idea that the Constitution was an agreement between the states, rather than higher law emanating from the popular sovereign, is a "theory which, since the Civil War, has been so decisively rejected by the American people and by the courts").

Hawke v. Smith,[122] a case focusing on challenges to the legitimacy of the Ohio legislature's approval of the Prohibition Amendment,[123] the Court stated that "both methods of ratification [of amendments under Article V], by legislatures or conventions, call for action by deliberative assemblages representative of the people, *which it was assumed would voice the will of the people*."[124] The Court was even more forceful in *Dillon v. Gloss*,[125] stating that

> the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several States and be ratified in three-fourths of them. The plain meaning of this is (a) that *all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the States shall be taken as a decisive expression of the people's will and be binding on all.*"[126]

Hawke and *Dillon* are momentous in that they extend the orthodox rationale, which was traced early in the Court's history by nationalist Justices Marshall and Story. Marshall and Story adopted the orthodoxy in cases that challenged clauses in the Constitution's main body.[127] By holding that the Constitution emanates from We the People, Justice Marshall and Story simply echoed the Preamble and Founding Era understandings. In contrast, *Hawke* and *Dillon* extended the orthodoxy to amendments, holding that the amendments too emanate from the popular sovereign, regardless of which Article V mode of ratification had been employed. As I argue below, although Marshall and Story's adherance to the orthodoxy may find strength in the text and original understanding of the Constitution, the case for extending the orthodoxy to amendments finds little such support.[128]

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122. 253 U.S. 221 (1920).
123. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XX, § 1.
124. 253 U.S. at 226-27 (emphasis added).
125. 256 U.S. 368 (1921).
126. *Id*. at 374 (emphasis added). *See also* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 452-53 (1934) (speaking of the people—rather than the Supreme Court—as responsible for amending the Constitution); United States v. Sprague, 282 U.S. 716 (1931) (rejecting argument differentiating ratification by convention from ratification by state legislatures, only the former was empowered to ratify amendments that granted federal government new powers).
127. *See supra* notes 115-17 and accompanying text.
128. *See infra* text accompanying notes 135-94.

More recently, a concurring opinion in *Frontiero v. Richardson*[129] reaffirmed the orthodox view of the source of constitutional amendments established in *Hawke* and *Dillon*.[130] In *Frontiero*, Justice Powell, speaking of the proposed Equal Rights Amendment then under consideration by the state legislatures, stated, "If this Amendment is duly adopted, *it will represent the will of the people* accomplished in the manner prescribed by [Article V of] the Constitution."[131] Recent academic commentary has also espoused the orthodoxy and, in particular, has embraced the orthodox view that all constitutional amendments ratified pursuant to Article V emanate from We the People.[132]

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129. 411 U.S. 677 (1973).
130. *Id*. at 692.
131. *Id*. (emphasis added).
132. Professor Corwin early on articulated the orthodoxy as follows:

> It is customary nowadays to ascribe the *legality* as well as the *supremacy* of the Constitution . . . exclusively to the fact that, in its own phraseology, it was "ordained" by "the people of the United States." Two ideas are thus brought into play. One is the so-called "positive" conception of law as a general expression merely for the particular commands of a human lawgiver, as a series of acts of human will; the other is that the highest possible source of such commands, because the highest possible embodiment of human will, is "the people." . . . [T]he Constitution of the United States . . . is assumed to have proceeded immediately from the people . . . . [I]n the American *written constitution*, higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the validity of a *statute emanating from the sovereign people*.

Edwin S. Corwin, *The 'Higher Law' Background of American Constitutional Law*, 42 HARV. L. REV. 149, 151-52, 409 (1928-29). More recent scholarly work echos the orthodoxy and applies it to the amendments. *See, e.g.*, WAYNE D. MOORE, CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE 4-5, 58-59, 77-84 (1996) (discussing the idea that We the People are the authors of the Constitution and how We the People act "through" legislative bodies to amend the Constitution under Article V); JOHN R. VILE, CONTEMPORARY QUESTIONS SURROUNDING THE CONSTITUTIONAL AMENDING PROCESS 114-15 (1993) ("Previous commentators on the amending process understood that, when it came to amending the Constitution, sovereignty would not be exercised by any fifty-one percent or more of the voters but only be the people acting through the requisite majorities established in Article V."); Amar, *The Supreme Court*, *supra* note 75, at 29, 36, 38, 43, 49, 84-85 (referring to amendments as well as the main body of the Constitution as emanating from We the People); Brendon Troy Ishikawa, *Everything You Always Wanted to Know About How Amendments Are Made, but Were Afraid to Ask*, 24 HASTINGS CONST. L.Q. 545, 555 (1997) ("Both the Preamble and Article V articulate a form of government that derives its authority from the people through the actions of state constitutional conventions or legislatures."); Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893, 900 (1990) (discussing the widely held notion that the Constitution "enjoys the pedigree of enactment by persons who reasonably can be expected to have represented the public will in lending their formal assent to its ratification"). Even Bruce Ackerman has alluded to the Article V "classical" system of constitutional amendment as providing one of two higher lawmaking systems by which the popular sovereign can create new constitutional amendments. *See* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 15 (1998) [hereinafter ACKERMAN, TRANSFORMATIONS] (Article V authorizes constitutional amendment in the name of the People); ACKERMAN, FOUNDATIONS, *supra* note 121, at 69, 267. Ackerman, however, is honest enough to admit that ratification via Article V may not always coincide with the kind of deliberated and decisive popular consensus needed to constitute an act of constitutional norm creation on the part of We the People. *See* ACKERMAN, FOUNDATIONS, *supra* note 121, at 291 (stating that "a constitutional amendment may be approved by three-quarters of

The orthodox view of the sources of constitutional norms, and in particular of the sources of amendments, is firmly established. A handful of lawyers and scholars, however, contested the orthodox view of the source of amendments in challenging the Prohibition Amendment. Most notably, Professor Selden Bacon called attention to Article V's two ratification methods—approval by state legislatures or approval by popular constituent conventions—and suggested that new constitutional textual norms ratified by the former have not necessarily been ratified by We the People.[133] The Supreme Court, however, rebuffed these theories in the aforementioned *Hawke* and *Dillon* cases,[134] thus relegating Bacon and the few others who challenged the orthodoxy to a status as isolated voices against the entrenched view that any amendment overcoming Article V ratification hurdles *ipso facto* emanates from We the People.

B. Article V and the Dual-Source Thesis

Can the orthodox view, particularly the part that speaks of the Constitution's amendments as emanating from the popular sovereign, successfully withstand critical analysis? Close examination will, at the very least, cast a long shadow of doubt on the orthodoxy, and establish the dual-

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the state assemblies without the transformative initiative gaining the requisite kind of support of the mobilized People").

133. *See* Selden Bacon, *How the Tenth Amendment Affected the Fifth Article of the Constitution*, 16 VA. L. REV. 771, 791 (1930). Bacon argues that the Tenth Amendment requires that only the popular sovereign, assembled in popular constituent conventions, and not state legislatures, may ratify amendments that grant new powers to the national government and that therefore the Eighteenth Amendment is unconstitutional because it was ratified by state legislatures and grants new powers to the national government. *Id*. at 780-82. Specifically, Bacon wrote that

> the Fifth Article does not say, it does not pretend to say, that the legislatures in so voting are agents of the people . . . .
>
> . . . The ratification by legislatures was thus *an alternative method*, provided by the Fifth Article, for adopting an amendment by action of the state legislatures, *without going back to the people as the source of power.*
>
> The [convention] method of ratification and adoption provided by the Fifth Article was a method of going back *to the people themselves* as the source of the power sought and securing their adoption of the amendment . . . .

Id. at 780-81 (italics in original). Elihu Root advanced arguments similar to Bacon's. In arguing the *National Prohibition Cases*, Root stated that "ratification by state legislatures does not as a matter of fact provide an opportunity for the people to express their will . . . as the calling of conventions might have done." Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional* Entrenchment, 29 COLUM. J.L. & SOC. PROBS. 251, 280 (1996). *See also* DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION 1776-1995, at 247 (1996) [hereinafter KYVIG, EXPLICIT AND AUTHENTIC ACTS] (same); DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 17-18 (2000) [hereinafter KYVIG, PROHIBITION] (discussing Elihu Root's arguments on anti-prohibition litigation).

134. *See* cases cited *supra* notes 122 and 125.

source thesis as a credible alternative account of the sources of constitutional amendments. Analysis begins with the text of Article V:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .[135]

According to the extant orthodoxy, any norm ratified pursuant to Article V is a constitutional textual norm created by We the People, no different and of no less weight than the provisions within the main body of the Constitution.

From where does the orthodox view on the source of constitutional amendments spring? Not from the text of Article V. Simply stated, Article V's text *does not address* the issue of whether amendments ratified under its terms emanate from We the People or from some other source. Article V merely outlines the procedural rules that regulate the addition of new textual norms to the Constitution. The text indicates that proposed amendments "shall be valid to all [i]ntents and [p]urposes" when ratified by the requisite ratio of state legislatures or popular constituent conventions. Nothing in the text of Article V indicates that norms ratified pursuant to its terms, whether by state legislatures or conventions, are sourced in We the People. Because Article V fails to address this issue, we will ultimately have to look beyond its confines to determine the source or sources of constitutional amendments.

To the extent that Article V's text could be construed as revealing something meaningful about the source or sources of constitutional amendments, it tends to support the dual-source thesis over the orthodox view that all amendments emanate from We the People. Article V candidly bypasses direct consultation with We the People. Instead, Article V straight forwardly lodges the immediate source of amendments in ordinary legislative bodies. Article V charges Congress with proposing amendments and the state legislatures with ratifying proposed amendments. Although Article V also allows a national constitutional convention to propose amendments and permits popular constituent conventions organized in the states to ratify amendments, these clauses have little practical import. None of the twenty-

135. U.S. CONST. art. V.

seven amendments has been proposed by a constitutional convention, and popular constituent conventions have ratified only one of the twenty-seven formal amendments.[136] For all intents and purposes, amendments are proposed by Congress and ratified by state legislatures.[137] It follows then, that constitutional amendments (or at least twenty-six of the twenty-seven amendments) emanate not from We the People as the orthodoxy maintains, but instead from ordinary legislative bodies.

Moreover, once we factor in the popular constituent convention route to amendment ratification, the orthodoxy appears even less connected to Article V's text. The founding generation considered popular constituent conventions to be the only kind of representative bodies capable of embodying and speaking as We the People for purposes of ratifying the main body of the Constitution.[138] As mentioned above, the Federalist reading of Article VII is that it provided a way for We the People to ratify the body of the proposed constitution through popular constituent conventions organized in each state.[139] Consequently, it is completely natural to read Article V's reference to ratification of amendments with similar constituent conventions as providing a way for We the People to ratify new constitutional textual norms. Although Article V does not incorporate direct approval by We the People, it enables We the People to indirectly ratify proposed amendments through popular constituent conventions specially elected for the sole purpose of considering amendments.[140]

If there is language in Article V supporting the orthodox view that amendments emanate from We the People, the clause providing for ratification by popular constituent conventions *is* that language. Yet this language ultimately damages, rather than assists, the orthodoxy. If, in accordance with original understandings, we read the convention route to ratification as a mode by which We the People ratify new constitutional textual norms, then what are we to do with the other mode of ratification,

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136. EDWIN S. CORWIN THE CONSTITUTION AND WHAT IT MEANS TODAY 268-71 (Harold W. Chase & Craig R. Ducat eds., 14th ed. 1978) (only the repeal of the Prohibition Amendment was submitted for ratification to conventions); Gerald Benjamin & Tom Gais, *Constitutional Conventionphobia*, 1 HOFSTRA L. & POL'Y SYMP. 53, 54-57 (1996) (commenting on the absence of federal constitutional conventions).

137. *See* EDWIN S. CORWIN, *supra* note 136, at 268-71.

138. *See infra* text accompanying notes 146-61.

139. *See supra* text accompanying notes 111-12.

140. Professor Amar offers a compact and instructive discussion of the Founding Era concept of popular constituent conventions as a virtual embodiment of the People and of the superior status of such conventions over legislative bodies. *See* Amar, *Of Sovereignty and Federalism*, *supra* note 118, at 1459-61 & n.147 (reviewing the Founding Era notion that only conventions and not legislative bodies could embody the People for purposes of ratifying constitutional norms).

approval by state legislatures? The orthodoxy insists that all amendments emanate from a *single* source. Article V, however, plainly lays out *two* separate and distinct methods of ratification. The orthodoxy insists that We the People are the sole source of constitutional amendments. Yet if We the People ratify amendments through the device of popular constituent conventions, the state legislature ratification route would appear to provide the method by which organs of ordinary government may ratify amendments. This reading, at least, follows from the original understanding of state legislative and popular constituent convention ratification of new constitutional textual norms. Rather than conforming with the orthodoxy, Article V's binary ratification modalities favor an interpretation more in line with the dual-source thesis.[141]

Not so fast, I hear the defender of the orthodoxy jumping forward to rebut. The notion that amendments emanate from two separate and distinct sources simply because Article V sets forth both state legislature and convention tracks for amendment ratification is too facile. The orthodox reading of Article V is not so ham-handed. We are interpreting a Constitution, not some local parking ordinance. Such simple-mindedness will not wash in this arena. We need a more subtle and urbane understanding of Article V's language. All constitutional amendments *do* emanate from a single source—We the People—because Article V contemplates (or should be read as contemplating) that both conventions and state legislatures are representational structures that embody and personify the popular sovereign, and operate as conduits through which We the People act to create higher law norms. Article V attempts to set forth two ways—state legislatures and popular constituent conventions—for one source—We the People—to indirectly ratify new constitutional textual norms.

Indeed, this is the orthodox reasoning sanctioned by the Supreme Court. Though all but one of the twenty-seven amendments have been ratified by

141. Moreover, the issue of whether amendments created by the popular constituent route convention are superior to those created via the state legislature route is not explicitly addressed by Article V. The closest the text of Article V comes to addressing this issue is the phrase stating that proposed amendments "shall be valid to all Intents and Purposes, as Part of this Constitution" upon ratification via either method of ratification. U.S. CONST. art. V. One could possibly construe this language as suggesting that constitutional amendments, no matter how ratified, are of equal weight and hierarchical status as any other constitutional provision. This represents the orthodox interpretation. A more plausible reading, however, is that this phrase does not, in any way, address the relative weight or hierarchical status of constitutional amendments. Instead, as its language simply states, the proposed constitutional amendments become part of the constitution when ratified by either the requisite number of state legislatures or the requisite number of popular constituent conventions. The phrase, in other words, clearly defines the circumstances under which a proposed amendment becomes part of the constitution—by ratification by state legislatures or by constitutional conventions. The weight or hierarchical status of amendments, however, remains an entirely open question.

state legislatures, the Court steadfastly maintains that amendments ratified by state legislatures emanate from We the People.[142] Tempting. It sounds eminently plausible and gloriously convenient. If we buy into the subtle notion that state legislatures, as well as popular constituent conventions, embody We the People, we can all pat ourselves on the back and go home feeling good about the popular sovereignty pedigree and democratic legitimacy of our constitutional amendments. All's well that ends well.

Unfortunately, a happy ending is not so easily attained. Nothing in the text of Article V binds us to the idea that state legislatures embody We the People for purposes of ratifying new constitutional textual norms. More importantly, we have serious reason to doubt that state legislatures personifying the popular sovereign constitutes a reasonable reading of Article V. The orthodox rejoinder cuts against basic principles of constitutional interpretation. To read Article V's binary amendment ratification language as providing two ways for the popular sovereign to ratify new constitutional textual norms renders one of the two constitutional amendment ratification methods superfluous. If, as the orthodox reading suggests, ordinary legislative bodies operate as agents through which We the People create new constitutional textual norms, why include in Article V the second popular constituent convention route to ratification? Stated differently, if state legislatures embody We the People for the purpose of creating new constitutional textual norms, why add the popular constituent convention method as a second means of embodying We the People? Equating ratification via the state legislature method with ratification by the popular sovereign renders the popular constituent convention amendment method unnecessary excess baggage, and vice versa. The Constitution normally will not be read in ways that render parts of it superfluous, but instead should be read so that all of its clauses have substance and import.[143] Therefore, in order to give meaning to the binary ratification language of Article V, the language must be read as permitting the People to ratify new constitutional

142. *See* cases cited *supra* notes 114-17, 122-26, 129.

143. Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570-71 (1840). In explaining the principle of constitutional interpretation, Chief Justice Taney stated:

> [E]very word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.

Id. See also Griswold v. Connecticut, 381 U.S. 479, 490-91 (1965) (Goldberg, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("[I]t cannot be presumed that any clause in the constitution is intended to be without effect.").

textual norms via the popular constituent convention route, and as permitting legislative bodies to create new constitutional textual norms via the state legislature route.

Case closed? Hardly. The orthodoxy did not get to be the orthodoxy by walking away from a challenge. A defender of the orthodoxy might try a slightly more refined tactic, arguing that the popular constituent convention method is not superfluous, but rather just a second option by which We the People can create new constitutional norms *when the state legislature route is at an impasse*. Every proposed constitutional amendment approved by three-fourths of state legislatures has indeed gained the constructive consent of We the People. Because legislative bodies do not perfectly personify the People, however, not every proposed constitutional amendment that is capable of gaining the consent of the popular sovereign can also obtain the approval of three-fourths of state legislatures. The popular constituent convention path offers a second method of amendment ratification that is useful when a proposed amendment enjoys strong popular acceptance, but due to agency problems, would not likely obtain approval via the state legislature route.[144] In other words, the popular constituent convention method operates not as the sole method by which We the People approve new constitutional textual norms, but rather as a safety valve available whenever a proposed amendment that We the People favor could not gain approval from three-fourths of the state legislatures. Because all amendments that gain the approval of three-fourths of state legislatures reflect the approval of We the People, Article V truly does set up two meaningful and nonsuperfluous methods by which one law-creating entity—We the People—may create new constitutional textual norms.

Clever. Has the orthodoxy found a way to coexist with basic principles of constitutional interpretation? Admittedly, this twist would give significance and substance to both the popular constituent convention method and the state legislature amendment ratification method. The argument, however, suffers from two fatal flaws, both of which strike at the core defect in the orthodox reading of Article V. The first flaw stems from the orthodoxy's insistence that *all* constitutional amendments ratified via the state legislature

144. One might buttress this orthodox reading of Article V with the following idea: Article V had to include the constitutional convention method in order to provide a way for We the People to adopt amendments that limit the power of the state governments. Even if strongly favored by the electorate, state legislatures might reject a proposed amendment that would limit the power of state governments. The convention method allows We the People to ratify such proposed amendments. This argument, however, is ultimately detrimental to the orthodoxy, for it admits that state legislatures will (at least under certain circumstances) fail to embody and reflect the will of We the People when considering proposed amendments.

route have been ratified by We the People. Again, the orthodoxy justifies the existence of the convention method of ratification as a safety valve available for cases where state legislatures might fail to ratify a proposed amendment that We the People want ratified. This justification concedes the possibility of an Article V *false negative*—the failure of state legislatures to ratify what We the People want ratified. Yet, in arguing that each and every amendment ratified by state legislatures *ipso facto* constitutes ratification by We the People, the orthodoxy insists that the opposite agency problem—*the false positive*—will never occur.[145]

The proposition that false negatives occur, but that false positives are an impossibility, lacks credibility. I defer full consideration of this issue until Part IV.C. For now, it will suffice to foreshadow the argument. Suppose that ordinary legislatures usually *can* embody the popular sovereign, and that We the People usually *can* act through ordinary standing state legislatures to ratify constitutional amendments. Assume, in short, that in most instances, ratification by state legislatures *is* tantamount to ratification by We the People. Nonetheless, there will be some cases in which state legislatures fail to embody the popular sovereign and malfunction as conduits through which We the People act to ratify new constitutional textual norms. In these cases, ordinary state legislatures will ratify amendments over which We the People have not engaged, deliberated, or arrived at a decisive consensus sanctioning the creation of new higher law norms. Nonetheless, in these cases, an amendment may formally come into being (by virtue of satisfying Article V's formal requirements). It strains the bounds of the credible, however, to describe an amendment that was not the subject of a meaningful popular deliberative process, much less a decisive popular consensus, as emanating from or sourced in We the People. On the contrary, such an amendment can only be described as a creation of ordinary legislative bodies that have malfunctioned as conduits through which We the People might act to ratify new constitutional textual norms. Thus, even if the orthodoxy is correct in reading Article V as contemplating both conventions and state legislatures as conduits through which We the People can ratify constitutional amendments, because of the false positive problem we will still have constitutional amendments emanating from two sources. One source is We the People. Those amendments ratified by conventions and state legislatures that properly embody and personify the popular sovereign's deliberated consensus can honestly be described as emanating from, and created or

145. As Bruce Ackerman points out, efforts to eliminate the false positive make the false negative more probable. ACKERMAN, TRANSFORMATIONS, *supra* note 132, at 29.

ratified by, We the People. Ordinary legislatures constitute a second source. Where state legislatures fail to embody the popular sovereign and ratify an amendment over which We the People have not fully deliberated or reached a discernable consensus, the amendment only emanates from ordinary legislatures.

I will have more to say on these issues in Part IV.C. For now, however, let me turn to the second flaw in the orthodox argument that Article V's popular constituent convention ratification route is not superfluous. The first flaw suggests that, under some circumstances, amendments passed via the state legislature route may not in any meaningful sense emanate from We the People. In short, even if we can honestly describe *some* amendments that are passed via the state legislature route as a product of We the People, *not all* amendments ratified by that method can honestly be described in that manner. The second flaw, in contrast, goes to whether under *any* circumstances amendments that are created via the state legislature route can honestly and accurately be deemed to emanate from, or be ratified by, the popular sovereign.

If the original understandings I have touched on have anything to say about the issue, amendments created via the state legislative route never should be thought of as emanating from the popular sovereign. In simplest terms, the orthodox idea that We the People exercise the sovereign right to create new constitutional textual norms through representatives in ordinary state legislative bodies does not square with well-known and unequivocal Founding Era understandings. As previously indicated, under the original understanding, popular constituent conventions, *but not state legislatures*, were thought of as capable of operating as a conduit through which We the People might ratify new constitutional textual norms.[146] Thus, from the perspective of original understandings, not only might the false positive agency problem mean that *some* amendments ratified by state legislatures cannot honestly be considered to be ratified by We the People, but ratification of constitutional textual norms by state legislatures in and of itself can *never* equate with ratification by We the People.

The original understandings on this point deserve attention. Since the Founding Era, American constitutional theory has conceived of both the popular sovereign and legislative bodies as creators of legal norms. The kinds of norms they are permitted to generate, however, are completely separate and distinct. Legislative bodies, but not We the People, are thought of as competent to generate statutory norms. Indeed, a major premise of Federalist

146. *See supra* text accompanying notes 108-13.

thinking was the notion that We the People ought not have any direct involvement in the creation of sub-constitutional norms (i.e., statutes).[147] In contrast, with respect to the creation of constitutional norms, the opposite assumption reigns. We the People are presumed to be the source of constitutional norms (operating through popular constituent conventions, and if the orthodoxy would have its way, through state legislatures). Ordinary state legislative bodies, on the other hand, have been thought incompetent to ratify or alter constitutions on behalf of the popular sovereign.[148] The clearly demarcated institutional roles of We the People and legislative bodies emerged in the period between the Revolutionary and the Founding Eras.[149]

During the American Revolution, legislative bodies were thought to be capable of fairly and accurately reflecting popular preferences. Legislatures, as highly responsive and populist institutions, were thought to embody the People in government.[150] Given this assumption, legislative bodies were considered to be fully competent to ratify constitutional norms on behalf of the sovereign people.[151] In short, during the optimistic Revolutionary period, Americans sought to build governments not only emanating from the People, but also governed by the People, through legislatures embodying the People. By the time of the Founding Era, however, the republican notion of a unity of interests within society,[152] and the idea that legislative bodies would fairly

147. *See, e.g.*, THE FEDERALIST NO. 63, at 387 (James Madison) (Clinton Rossiter ed., 1961) (stating that one feature of government under the proposed Constitution is that it "lies *in the total exclusion of the people in their collective capacity*" from government). Although the Federalist constitutional theory affords We the People an ample role in creating and amending the Constitution, it offers no such role to the People in everyday government, for example, in the generation of statutory norms. *See, e.g.*, ACKERMAN, FOUNDATIONS, *supra* note 121, at 179-86 (arguing that under Federalist constitutional theory, the People are not present in government). This model of government stands in sharp contrast to the Revolutionary Era aspiration that the people would not only create constitutions, but also govern through highly responsive and populist state legislatures. For a discussion of the Revolutionary Era idea that state legislatures embody the People in government, see ADAMS, *supra* note 108, at 230-36; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 162-73 (1969).

148. *See* sources cited *supra* note 147.

149. *See id.*

150. ADAMS, *supra* note 108, at 235 (discussing the 1778 Whig statement that legislature should be a "miniature replica of society"); Gordon S. Wood, *American Revolution and Constitutional Theory*, *in* 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 83-86 (Leonard W. Levy & Kenneth L. Karst eds., 2000); WOOD, *supra* note 147, at 162-65 (discussing the Revolutionary Era idea that the legislature embodies the People in government).

151. ADAMS, *supra* note 108, at 63-64 (discussing how popular sovereignty theory was effectuated via state legislatures—the "full and free representation of the people" ratifying state constitutions); WOOD, *supra* note 147, at 306 (stating that legislatures had been thought "competent" to ratify constitutions); González, *supra* note 98, at 656 ("At the time of the Declaration of Independence, legislatures were thought competent to act as the voice of the people in making and ratifying state constitutions.").

152. THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961) (warning of the

and accurately embody the People, had vanished.[153] Experience with populist state legislatures engendered distrust of legislative bodies among American constitution builders.[154] Practical experience brought about a subtle but profound shift in the postulates of popular sovereignty theory.[155] Once disabused of naive assumptions, American constitutional theorists began to conceive of legislatures as a regular part of government just as likely to abuse the rights of the People as powerful executives.[156] Legislative bodies, in short, came to be seen not as the People in government, but as separate and distinct from the People and as a threat to the rights of the People.

With this new and less naive conceptualization of the relationship between the sovereign People and their agent legislative bodies, American constitutional theory at the time of the Founding Period roundly rejected the notion that legislative bodies could legitimately function as a conduit through which the People could ratify constitutional textual norms.[157] The prevailing practice by the time of the Founding Period was to give the sovereign people a role in creating constitutions, either via direct popular ratification or via popular constituent conventions.[158] Founding Era thinking was quite clear, however, in the idea that legislative bodies do not embody We the People,

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dangers of factions and describing an institutional frame of government aimed at limiting the evils of factions).

153. WOOD, *supra* note 147, at 403-09 (surveying the abuses committed by state legislative bodies in the Revolutionary Era).

154. *Id.* at 409-13 (surveying the growing popular distrust of legislatures); González, *supra* note 98, at 647-52 (discussing the shift in attitude towards legislative bodies in the years following the Declaration of Independence).

155. *See* EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 255 (1988) (arguing that "the misuse by representatives of powers," as seen in the state legislatures following the Revolution, caused a reappraisal of the theory of popular sovereignty, rather than its repudiation).

156. WOOD, *supra* note 147, at 447-48 (explaining that legislatures came to be seen not as the embodiment of the People, but as agents of the People—not superior to the other branches of government).

157. ROBERT E. SHALHOPE, THE ROOTS OF DEMOCRACY: AMERICAN THOUGHT AND CULTURE, 1760-1800, at 90 (1990) ("It became apparent that if constitutions were to be made genuinely impervious to legislative tampering, they must be created by a power greater than the legislatures themselves."); WOOD, *supra* note 147, at 328 (connecting distrust of legislative assemblies with the subsequent emergence of conventions as a mechanism for ratifying constitutions); González, *supra* note 98, at 657-58 (explaining that the idea that legislatures could ratify constitutions had died by the time of the Constitution's creation); Leslie Friedman Goldstein, *Popular Sovereignty, the Origins of Judicial Review and the Revival of Unwritten Law*, 48 J. POL. 51, 61-62 (1986) (same).

158. DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL 71 (1980) ("Initially, since the legislatures wrote the constitutions, the people gave consent indirectly through their representatives. However, beginning with the 1780 Massachusetts Constitution (the first one framed by a constitutional convention and ratified by the people), the people at large gave consent directly."); WOOD, *supra* note 147, at 342 (stating that by the 1780s, the convention method of constitutional creation had become "firmly established").

and therefore are incompetent to ratify constitutions.[159] Conventions embody the popular sovereign.[160] Legislatures, like any other branch of government, are agents, rather than embodiments, of We the People. Legislatures make ordinary law, but not higher law. The popular sovereign makes higher law, but not ordinary law. For this reason, Article VII explicitly avoids ratification of the Constitution by state legislatures and instead insists upon ratification by popular constituent conventions, which were thought to be the appropriate mechanism by which the popular sovereign could sanction constitutional norms.[161]

In short, the orthodox reading of Article V collides with the Founding Era distinction between the proper roles of legislative bodies and popular constituent conventions. Given the widely espoused notion that only popular constituent conventions, and not legislative bodies, were capable of embodying We the People, reading Article V's state legislature ratification method as ratification by We the People is hard to countenance. If state legislatures are incompetent as a conduit through which the popular sovereign acts in ratifying the main body of the Constitution under Article VII,[162] how could state legislatures be competent to serve as a conduit through which the popular sovereign acts in ratifying amendments to the Constitution under Article V? Given Founding Era understandings, the most plausible reading of Article V runs not on orthodox lines, but instead more along the lines of the dual-source thesis. The state legislature ratification

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159. LUTZ, *supra* note 158, at 72-74, 204, 207 (There was a transition from the Revolutionary Era practice of state legislatures drafting and ratifying constitutions to drafting by a special popular constituent convention and ratification by direct popular vote or by popular constituent convention. This shift was largely due to distrust in the ability of legislative bodies to reflect majoritarian preferences, changing concepts regarding the relationship between legislative bodies and the people, and a shift from Whig to Federalist political underpinnings.); WOOD, *supra* note 147, at 306, 328-43 (discussing the distrust of legislative bodies and the shift from legislative ratification of constitutions to ratification by popular constituent conventions).

160. WOOD, *supra* note 147, at 337-38 ("[A] convention was 'in a special manner the epitome of the People.' . . . [and] an act of the people . . . ."). *See* Amar, *Of Sovereignty and Federalism*, *supra* note 118, at 1459-61 & n.147 (reviewing the Founding Era notion that only conventions—not legislative bodies—could embody the People for purposes of ratifying constitutional norms).

161. James Madison and others at the Philadelphia Convention thought legislatures were incompetent to ratify the Constitution. They instead sought to submit the document to the People through the Article VII mechanism of popular constituent conventions. Madison repeatedly expressed that conventions, not legislatures, were the appropriate mechanism through which the People should ratify the Constitution. *See* RECORDS OF THE FEDERAL CONVENTION, *reprinted in* 4 THE FOUNDERS' CONSTITUTION 648, 650, 652, 654 (Philip B. Kurland & Ralph Lerner eds., 1987). Furthermore, Madison stated, among other things, that the provision recommending ratification by conventions rather than legislatures was "essential" because the "Constitution should be ratified in the most unexceptional form, and by the supreme authority of the people themselves." *Id*. at 648. Other delegates espoused similar views. *Id.* at 648, 650-51 (comments of Wilson, Mason, and Ghorum).

162. *See* U.S. CONST. art. VII. For the text of Article VII, see *supra* note 13.

route is not an alternative method to the popular constituent convention method by which the People create new constitutional norms. Instead, it is a way for normal law-making institutions to amend the Constitution. Without some extra-Article V indicia of a deliberated popular consensus, we ought not view constitutional amendments ratified by the state legislature as constitutional norms emanating from We the People. Only those constitutional norms created via popular constituent conventions ought to enjoy the presumption of a popular sovereignty pedigree. In contrast, the legal system should treat constitutional amendments ratified by three-fourths of the state legislatures presumptively as creations of normal law-creating institutions.[163]

Not so fast, the champion of the orthodoxy will again cry in protest. Granted, Article V's text may be interpreted as setting up two methods of ratification by which either the popular sovereign or ordinary legislative bodies ratify new constitutional textual amendments. And perhaps the Founding Era understanding of the role of popular constituent conventions and state legislative bodies relating to Article VII did in fact dictate that only the former could operate as a conduit through which We the People ratified

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163. Akhil Amar has advanced a somewhat similar interpretation of Article V. *See* Amar, *The Consent of the Governed*, *supra* note 111, at 459. Amar argues that Article V offers a method by which "ordinary *Government*—Congress and the state legislatures—can change the Constitution .. . . It merely specifies how ordinary Government can amend the Constitution without recurring to the People themselves . . . ." *Id.* We the People, however, retain a popular sovereign-derived legal right to alter or abolish government outside the confines of Article V mechanisms. *Id*. *See also* Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 89 (Sanford Levinson ed., 1995) [hereinafter Amar, *Popular Sovereignty*]; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988) [hereinafter Amar, *Philadelphia Revisited*]. There are two key differences between Amar's reading of Article V, and my own reading. First, my dual-source reading is offered merely for rhetorical purposes, and is inteneded only to show that the orthodox interpretation is not the only plausible reading of Article V. Amar, on the other hand, advances his interpretation as the best possible reading of Article V. Second, the dual-source reading of Article V contemplates that We the People may ratify constitutional amendments through Article V when popular constituent conventions (not state legislatures) ratify a proposed amendment. The Amarian reading of Article V, in contrast, apparently views Article V only as a way for government institutions to ratify amendments. Amar does not seem to acknowledge the possibility that the popular sovereign might act through popular constituent conventions organized in the states. *See* Amar, *The Consent of the Governed*, *supra* note 111, at 460 ("Article V is Government-driven: if exclusive, it gives ordinary Government officials—Congress and the state legislatures—a monopoly on initiating the process of constitutional change."). Despite this difference, I thoroughly agree with the idea central to Amar's reading of Article V—that popular sovereignty means We the People can always alter, abolish, or replace constitutional norms, and can do so in ways not specified in the Constitution. In any political system constructed upon popular sovereignty foundations, the People always enjoy an inalienable right to alter constitutional norms. Moreover, Amar presumably never squarely considered whether ratifying amendments via the convention method is tantamount to ratification by We the People. He was most likely too immersed in developing his novel extra-Article V constitutional amendment theory to have focused on what, for his purposes, would have been a side issue.

the Constitution's main body. But surely the original intent behind Article V itself—the debates centering specifically on the meaning of Article V—will make it abundantly clear that its words should be read as providing two methods by which one entity—We the People—can create new constitutional textual norms. Curiously, however, Article V's original intent fails to provide a definitive answer on the issue. In the first instance, the framers dedicated relatively little time to Article V during the Philadelphia Drafting Convention. Any inferences that one may draw from this omission must be tempered by the fact that "consideration of amending procedures was one of the least adequate of the Convention debates."[164] What little evidence of Article V's original intent that we have, however, does not aid the orthodox view of ratification.

The delegates at the Philadelphia Convention never clarified whether ratification of amendments by state legislatures is tantamount to ratification by We the People. Early on at the Philadelphia Convention, the delegates agreed, without much controversy, on the need for an amendment provision, but postponed consideration of its content.[165] In early August, 1787, the Committee of Detail submitted the following amendment clause to the Convention: "On the application of the Legislature of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose."[166]

Up to this point, and for much of the Convention, the amendment provision made no reference to state legislative bodies or state popular constituent conventions as ratifiers of proposed constitutional amendments. Not until seven days before the Convention adjourned did the amendment provision receive significant attention. On September 10, 1787, the Convention agreed to reconsider the amendment clause.[167] On that date, James Madison proposed the following language as a substitute for the language submitted by the Committee on Detail in August:

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164. THORNTON ANDERSON, CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS 161 (1993).

165. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22, 121-22, 202-03 (Max Farrand ed., rev. 1937) [hereinafter FEDERAL CONVENTION] (resolution favoring amendment provision approved on May 29, 1787; issue of whether amendment should require assent of national legislature postponed on June 5, 1787, and again postponed on June 11, 1787). The Philadelphia Convention convened on May 25, 1787, and adjourned on September 17, 1787. 1 1787 DRAFTING THE U.S. CONSTITUTION 3 (Wilbourn E. Benton ed., 1986).

166. 2 FEDERAL CONVENTION, *supra* note 113, at 188. Text of Article XIX was introduced for consideration by the Committee on Detail on August 6, 1787. *Id.* On August 30, 1787, the Convention agreed to Article XIX without dissent. *Id.* at 467-68.

167. *Id.* at 557-58.

> The Legislature of the U– S– whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, *when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof*, as one or the other mode of ratification may be proposed by the Legislature of the U.S.[168]

The Convention tentatively approved Madison's language, and agreed to reconsider the amendment clause at a later time.[169] On September 12, 1787, the Committee of Style reported a draft of the Constitution, which included Article V language nearly identical to Madison's proposal.[170] As such, on September 10, 1787, only one week before the Convention would adjourn, the binary amendment ratification language emerged.[171] Madison left no contemporaneous explanation for his choice of both state legislatures and conventions as ratifiers of proposed amendments. More to the point, he said nothing that suggests whether he considered both state legislative bodies and popular constituent conventions capable of embodying We the People for purposes of amending the Constitution.[172]

Article V's amendment provisions received one last treatment by the delegates on September 15, 1787, just two days before adjournment.[173]

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168. *Id*. at 559 (emphasis added). It was also on this date that an entrenchment clause ensuring that no amendment to the Slave Trade Clause of Article I, prior to 1808, would be added to what would become Article V. *Id*.

169. *Id.*

170. *See id.* at 602 & nn.25-29.

171. *Id*. at 557-59.

172. Madison expressed concern with the vagueness of the initial amendment provision. That provision allowed a convention to consider amendments. *Id.* at 558. Madison asked, "How was a convention to be formed? by what rule decide? what the force of its acts?" *Id.* at 558. Perhaps Madison's proposal to allow three-fourths of either state legislatures or state-organized popular constituent conventions to ratify proposed amendments was aimed at nothing more than providing more clarity and certainty than the previously proposed amendment provision. Another possibility is that Madison had federalism concerns in mind when proposing his binary ratification modality language. The previously proposed amendment provision gave the states a role in proposing amendments, but appeared to give ratification power to a national constitutional convention to be convened by Congress. *See* 2 FEDERAL CONVENTION, *supra* note 110, at 188. Madison's version, in contrast, gave the states a definite role not only in the proposal of amendments, but also in their ratification. Madison's language could have been primarily aimed at placating delegates who were concerned that the amendment process could be used to weaken the states. It is even conceivable that in offering language aimed at placating such delegates, Madison himself did not think of consequences beyond the federalism implications of granting both state legislatures and conventions the power to ratify proposed amendments.

173. *Id*. at 629.

Various objections and proposed changes were advanced.[174] None, however, touched on the meaning of Article V's dual amendment ratification mechanisms, or whether We the People could use both mechanisms to create new constitutional textual norms.[175] George Mason of Virginia, an advocate of state power, unconvincingly argued that Article V made the amendment process too difficult and relied too heavily on Congress.[176] Roger Sherman of Connecticut sought to add two entrenchment clauses, one prohibiting any amendment that might affect the internal police of the states, and the other prohibiting amendments that would deprive the states of equal representation in the Senate.[177] Only the second entrenchment clause ultimately became part of Article V.[178] Governeur Morris of Pennsylvania and Elbridge Gerry of Massachusetts moved successfully to add a clause requiring Congress to call a constitutional convention at the request of two-thirds of the state legislatures.[179] A handful of additional unsuccessful motions were made by Sherman, Gerry, and others. No such motions, however, touched on the meaning of Article V's binary amendment mechanism.[180]

Close scrutiny of the entire Convention record relating to the amendment provision offers nothing that would indicate that the Framers considered the dual amendment mechanism. Instead, the Convention debates on the amendment clause, as sparse as they were, concentrated on the federalism issues of whether the states, as opposed to Congress, played a sufficient role in the amendment process, whether the states would be protected from amendments aimed at weakening them, and whether the various proposed amendment provisions made the process too difficult. For example, on the state protection issue, Elbridge Gerry expressed concern regarding the August Committee on Detail amendment provision, claiming that a national constitutional convention with the sole power to ratify amendments could adopt "innovations that might subvert the State Constitutions altogether."[181] Similarly, Roger Sherman suggested that equal state suffrage in the Senate Clause was aimed at protecting the states (or at least the small states) from future amendments that might degrade their power.[182] Finally, George Mason

174. *See id.*
175. *See id.*
176. *Id.*
177. *Id.*
178. *See* U.S. CONST. art. V; 2 FEDERAL CONVENTION, *supra* note 113, at 631 (Equal suffrage of States in the Senate language, suggested earlier by Roger Sherman, was approved without a formal vote on a motion by Governeur Morris.).
179. 2 FEDERAL CONVENTION, *supra* note 113, at 629-30.
180. *Id.* at 630.
181. *Id.* at 557-58.
182. *See supra* note 172.

expressed the common federalism concern with the balance of power between the national and state governments and of granting exclusive power to Congress to propose amendments.[183]

Following adjournment of the Philadelphia Convention, both public discourse on the proposed Constitution and debates in the state ratifying conventions repeated the amendment provision controversies present at the Philadelphia Convention, but failed to address whether ratification of amendments by state legislatures would be tantamount to ratification by We the People. As in Philadelphia, Article V was not a central issue in the state ratifying conventions.[184] Unlike the Philadephia Convention, however, the state ratification convention records contain a few explicit references to Article V as a way for We the People to alter higher law.[185] Yet even here, such expressions failed to specify exactly how the People act through Article V mechanisms. For example, in the Massachusetts Convention, delegate Rufus King spoke of Article V as a mechanism by which "the people had . . . an opportunity to correct any abuse."[186] King, however, failed to specify exactly how We the People may act through Article V mechanisms. Did King believe that the state legislatures, as well as state conventions (similar to the ratifying convention in which he was taking part) could embody We the People? Or when he spoke of Article V as a method by which We the People might "correct any abuse," was he thinking only of the convention method of amendment ratification? Or is it that none of these subtleties even occurred to King? Because King never clarified his thoughts, we will never know. King's comment is too uncertain and ambiguous to advance the orthodox reading of Article V.

Federalist commentaries leading up to ratification are equally unavailing. Discussion of Article V in the Federalist Papers is just as hazy on the intended meaning of Article V's binary ratification mechanisms as were King's comments during the Massachusetts Convention. For example, in *Federalist No. 49* Madison wrote of Article V as a means by which We the People might resolve interbranch constitutional disputes. Expressing caution

183. 1 FEDERAL CONVENTION, *supra* note 165, at 202-03.

184. Kurt T. Lash, *Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V*, 38 AM. J. LEGAL HIST. 197, 211 (1994) ("Article V aroused little controversy in the state ratification conventions."). Professor Lash notes that "there is no record of discussions regarding Article V in the state ratification conventions of Delaware, New Jersey, Georgia, Maryland, or New Hampshire." *Id.* at 211 n.86.

185. *Id.* at 211 n.87 (citing statements in the Pennsylvania, North Carolina, and Connecticut ratification conventions that spoke of Article V as a way for the People to amend the constitution).

186. 2 ELLIOT'S DEBATES ON FEDERAL CONSTITUTION 116 (Jonathan Elliot ed., 1836); Lash, *supra* note 184, at 211; Henry Paul Monaghan, *We The People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 155 (1996).

regarding future use of Article V, Madison argued that "a constitutional road to the decision of the people [via Article V] ought to be marked out and kept open, for certain great and extraordinary occasions."[187] Clearly Madison believed that We the People may act through Article V's legalistic mechanism. But how? Madison's reference to Article V as a "road to the decision of the People" is certainly consistent with the idea that both ratification mechanisms, approval by state legislatures and by conventions, embody We the People. But consistency does not justify the orthodox reading of Article V. Nowhere does Madison specify whether ratification by state legislatures, as opposed to ratification via popular constituent conventions, constitutes a "road to the decision of the People." Madison may very well have believed that only conventions, not state legislative bodies, constitute the Article V "road . . . to the people." But Madison may have held the opposite belief, or he may have failed to consider the issue. At any rate, his allusion to Article V as a "road . . . to the People" is consistent with both the orthodox and dual-source readings of Article V. The problem we face today is that his comments do not address and decide the precise issue of whether state legislatures embody We the People for purposes of ratifying constitutional amendments, or in the alternative, operate as ordinary government institutions.

The writings of the Anti-Federalists also fail to illuminate the issue.[188] In public debate, the Anti-Federalists focused on the weaknesses in Article V that they had seized upon during the Philadelphia Convention.[189] First, they vociferously argued that Article V made an amendment too remote a possibility. "An Old Whig," for example, lamented, "I would full as soon sit down and take my chance of winning an important privilege to the people, by the casting the dice 'till I could throw sixes an hundred times in succession" before securing amendment under Article V.[190] Similarly, another Anti-Federalist, qualified Article V as "a cunning way of saying that no alteration

187. THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

188. *See* Lash, *supra* note 184, at 216-19 (summarizing Anti-Federalist public opposition to Article V).

189. Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155 (1997) (critics of Article V raised the same issues in press debates and state ratifying conventions).

190. *An Old Whig* (VIII), PHILADELPHIA INDEPENDENT GAZETTEER, Feb. 6, 1788, *reprinted in* XVI THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE 56 (John P. Kaminski & Gaspare J. Saladino eds., 1986). *See also* JACKSON TURNER MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788, at 161 (1961) (Anti-Federalists feared that the amendment under Article V would be too difficult); Lash, *supra* note 184, at 218-19 (discussing comments of the Anti-Federalists that suggested that Article V made amendment too difficult).

shall ever be made."[191] Second, the Anti-Federalists emphasized their belief that the national government would dominate the amendment process under Article V. As one scholar recounts, the Anti-Federalist "Centinal" argued at least twice that Article V gave Congress too much control over the amendment process.[192]

In short, the record on the intended meaning of the words "ratified by the Legislatures of three fourths of the several states, or by Conventions in three fourths thereof" is scant and therefore entirely indeterminate. The record of the Philadelphia Convention, the state ratifying conventions, and the public debates leading up to ratification show no signs that the meaning of Article V's binary amendment ratification methods were considered, or subjected to protracted deliberation. Much like the text of Article V as a whole, the drafters, ratifiers, and commentators of the Founding Era simply did not directly confront the meaning of Article V's two amendment ratification methods.[193] As such, the orthodox reading of Article V cannot easily be confirmed by reference to the original intent behind Article V.

Granted, the record of Article V's original understanding is hardly a smoking gun in support of the dual-source interpretation. Nowhere, in other words, will we find a leading participant in the Founding Era debates over Article V who suggests that Article V provides for ratification by state legislatures, thus allowing ordinary government institutions to alter the Constitution. Nor will we find any participants in Founding Era debates who suggest that Article V provides for ratification by conventions, so that We the People might create new constitutional textual norms. The Founding generation's failure to address the issue, at the very least, leaves the orthodoxy and the alternative dual-source reading of Article V on equal footing. Neither interpretation can find direct, decisive support from evidence of Article V's original intent.

If anything, a dual-source reading of Article V appears more plausible than the orthodox interpretation. The orthodoxy depends on the possibility of state legislatures embodying the popular sovereign and operating as a conduit through which We the People ratify constitutional textual norms. Original

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191. Denning, *supra* note 189, at 166 (citing *An Old Whig* [*George Bryan et al.*] I, PHILADELPHIA INDEPENDENT GAZETTEER, Oct. 12, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 122-23 (Bernard Bailyn ed., 1993)).

192. Denning, *supra* note 189, at 166-67 (discussing two different occasions on which Samuel Bryan objected to Article V) (citations omitted).

193. ANDERSON, *supra* note 164, at 161 ("No evidence appears in the records that the delegates evaluated the alternatives in terms of their implications for the locus of sovereignty; the word was never used.").

understandings developed in connection with Article VII, however, rejected the idea that the legislative bodies are the People in government or that legislatures can embody We the People for purposes of ratifying constitutional textual norms. The lack of specific evidence to support the orthodoxy regarding the original understanding of Article V tilts the balance, and makes it difficult to conceive that state legislative bodies embodying We the People for purposes of creating constitutional amendments was the intent behind Article V.[194]

This analysis brings us back to the orthodoxy's inescapable dilemma: The orthodox insistence that *all* amendments ratified pursuant to Article V, whether ratified by state legislatures or popular constituent conventions, have been ratified by We the People, renders one (or both) of the ratification methods superfluous. If legislatures embody the popular sovereign and if We the People can operate through legislatures to ratify amendments, why include the second popular constituent convention method of ratification? We must read the Constitution to give each of its phrases and words meaning.[195] The most natural reading of Article V, therefore, is the dual-source reading, which suggests that Article V sets out two separate and distinct ratification methods by which two separate and distinct entities may ratify new constitutional textual norms: (1) We the People ratify amendments though popular constituent conventions organized in the states. (2) The government ratifies amendments through state legislative bodies.

Of course this argument is a bit of a ruse. My survey of Article V and Article VII original understandings is just that—a survey. The arguments and evidence enumerated above will not suffice to convince even myself that my alternative reading of Article V offers the "correct" interpretation and that the orthodoxy is "wrong." Article V's inscribed words are open-ended, and subject to multiple plausible interpretations. My proposed alternative reading is just one among several plausible interpretations of Article V. The dual-source thesis, therefore, is neither "right" nor "wrong." The dual-source theory, however, *is* a plausible way to read Article V. In the final analysis, my quick survey of the original intent of Article V and VII is too cursory to decide the issue one way or the other. I will have to dig deeper and look at the issue from more angles in order to confidently conclude that the orthodox reading of Article V is wrong, and that the dual-source reading is correct.

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194. This point, however, ought not be pushed too far. It is entirely possible that the Constitution's drafters, ratifiers, and commentators simply did not devote much thought to, or fully comprehend, the subtle issue of whether or not Article V offers two ways for We the People to ratify constitutional amendments.

195. *See* cases cited *supra* note 143 and accompanying text.

I am confident that a fuller analysis will show that the orthodoxy finds no support in the original understanding of Article V. That fuller analysis, however, deserves its own separate treatment, which I will supply in due course. Here, however, my aims are limited to tracing a broader line of argument. I will be content at this stage of the game to have piqued your interest, to have persuaded you that the orthodoxy rests on controvertible foundations, and to have convinced you that my alternative reading of Article V is in fact quite credible. Hopefully I have convinced you that neither Article V's text nor original intent decisively addresses or answers the issue of the source or sources of constitutional amendments, but that the dual-source interpretation is, at least, healthy competition for the orthodox reading of Article V.

Ultimately, if we want to understand the true sources of amendments, we will have to look *outside* the confines of Article V's text and original understandings. Yet, as we shall see, in looking outside of Article V, we must not make the mistake of looking past Article V, for embedded therein lies a peculiar principal-agent norm-generating mechanism that proves to be the key to the orthodoxy's ultimate unraveling.

C. Article V's Principal-Agent Mechanism and the False Positive Problem

From where do constitutional amendments originate? Why must we ask this strange question? After all, do we not usually have a pretty solid grasp of the sources of legal norms? As we saw in Part II, legal norms emanate from four basic norm-generating entities: the popular sovereign, legislatures, administrative agencies, and courts. Statutes emanate from legislatures (with Chief Executive approval), regulations emanate from administrative agencies, and common law norms emanate from courts. The orthodoxy tells us that constitutional norms, in general, and constitutional amendments, in particular, originate in We the People. Yet in Part IV.B we saw that the orthodoxy finds little support in Article V. Perhaps our grasp on the sources of constitutional amendments is less solid than we have presumed.

Or is it? So far I have done little to actually refute the orthodox idea that all constitutional amendments derive from We the People. Just because Article V does not provide definitive support for the orthodoxy does not necessarily mean that the orthodoxy is wrong. Even though Article V does not address the issue, it nonetheless may be the case that constitutional amendments actually *do* emanate from We the People. Ultimately, the issue is not the meaning of Article V, but rather the concrete truths of practice. Both the orthodoxy and the dual-source thesis are descriptive claims. They make assertions about the sources of constitutional amendments in practice.

Thus, in the final analysis, they will stand or fall on whether they capture the reality of constitutional law in practice. The meaning and intent behind Article V cannot really get us very far towards understanding that reality, or more specifically towards understanding the true sources of constitutional amendments. Even if Article V spoke directly and unambiguously on the issue, we still would have to look beyond Article V to understand the true sources of constitutional amendments. Declarations etched into constitutions cannot transform fictions into truths. Does anyone believe that the proclamation of a "People's Democratic Republic" engraved in a document called a constitution can turn a dictatorship into a democracy? Likewise, even if Article V began with the words "All constitutional amendments emanate from We the People," we nonetheless would have to examine the real world processes by which amendments come into being in order to determine their true sources.[196]

The ultimate inquiry, therefore, does not center on the meaning of Article V, but instead on the practical reality of the creation of constitutional amendments. Either the presumption underlying the orthodox justification for judicial review and orthodox reading of Article V—all constitutional textual norms, including amendments, are sourced in the popular sovereign—or the dual-source thesis—some constitutional textual norms are the creation of the popular sovereign while others are creations of state legislatures alone—more closely describes and captures how constitutional textual norms realistically come into being.

My fundamental claim is the following: Any serious analysis can only conclude that at least some constitutional amendments cannot be fairly and honestly characterized as sourced in We the People. At least some constitutional amendments quite clearly can only be described as created by legislative bodies that in no way embody an act of constitutional norm creation by the popular sovereign. These amendments satisfy the formal requirements of Article V's state legislature ratification method, but do not bear a legitimate popular sovereignty pedigree. For this reason, the dual-source thesis better describes the sources of constitutional amendments than does the orthodoxy.

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196. I recognize, however, that inscribed words in a constitution can, by establishing a particular process, help bring about their own truth. By establishing a regular and legalistic process for amending the Constitution, Article V may prompt political entrepreneurs to channel popular reform efforts through its mechanisms. It is a deliberative popular consensus that sanctions constitutional reform, however, rather than formal satisfaction of Article V's requirements, which signals a constitutional amendment emanating from We the People.

How do I arrive at such an unconventional conclusion? First, let me color the orthodoxy in the most favorable light. In Part IV.B we saw that the most sympathetic case for the orthodox approach to the origins of constitutional amendments runs as follows: Both state legislatures and popular constituent conventions can embody We the People. As such, ratification via both state legislatures and popular constituent conventions is tantamount to ratification by We the People. Article V's dual amendment ratification methods are not redundant or superfluous. Article V's convention route operates as a safety valve available when the state legislatures might fail to ratify an amendment that We the People have embraced and sanctioned after meaningful deliberation. This version of the orthodoxy offers a plausible Article V interpretation that does not violate fundamental principles of constitutional interpretation. Yet, even this most sympathetic version of the orthodoxy runs up against the original understanding of the proper roles of state legislatures and constituent conventions in ratifying constitutional textual norms. No matter. Again, the issue here centers not on the meaning of Article V, but instead on practical truths. Therefore, despite the original understandings, let us assume, as does this most sympathetic version of the orthodoxy, that state legislatures *can* embody We the People, and that ratification of a constitutional amendment by state legislative bodies *can* be tantamount to ratification by We the People.

Even conceding this much, however, it is still impossible to conclude, as does the orthodoxy, that *all* constitutional amendments created pursuant to Article V's mechanisms *ipso facto* emanate from, or are generated or ratified by, We the People. Why is this so?

Consider the processes by which constitutional and sub-constitutional norms come into being. Generally, the entity identified as the source of a particular kind of legal norm is the same entity charged with undertaking and completing a series of formal steps culminating in the creation of that kind of legal norm. For example, Congress (with Chief Executive approval) is identified as the source of statutes, and Congress is the entity that undertakes the formal procedural steps which culminate in the passage of statutes. Congress passes a statute through majority approval of both houses and with the consent of the Chief Executive. Likewise, regulatory agencies are identified as the sources of regulations and are the entities responsible for moving a potential regulation through the obstacle course of informal notice and comment rulemaking procedures. An agency regulation is created when an agency undertakes and satisfies the required steps of notice and comment rulemaking, which culminates with the agency announcing a new regulation

in the Code of Federal Regulations.[197] In a like manner, the courts are identified as the source of common law rules and the institution responsible for their elaboration through the litigation process. Common law rules come into being when a court decides a novel issue and publishes its holding in an authorized case reporter. The creation of statutes, regulations, and common law rules share a common theme—the entity commonly identified as the source of the norm is inexorably responsible for executing the formal steps required to create the norm.

The method for creating constitutional textual norms, however, is fundamentally different. In the constitutional context, the popular sovereign is the purported source of constitutional textual norms. However, other entities, such as popular constituent conventions or state legislatures, are charged with executing the formal steps required to establish a constitutional textual norm. We the People never directly generate norms, as do legislatures, administrative agencies, and courts, which respectively generate statutes, regulations, and common law rules. This principal-agent[198] system of norm generation is codified into Articles V and VII of the Constitution. Under Article VII, popular constituent conventions ratified the main body of the Constitution on behalf of We the People.[199] Under Article V, either popular constituent conventions or state legislatures ratify constitutional amendments on behalf of We the People.[200] Principal-agency relationships are not unknown in the generation of legal norms. In fact, they are quite common. The principal-agent mechanism employed in the creation of constitutional textual norms, however, exhibits unique features. Only in the constitutional context do we find the creation of a norm by one entity—state legislatures or conventions—characterized as tantamount to creation of that norm by another entity—We the People.

Compare the principal-agent mechanisms used in the creation of constitutional amendments with those used in the creation of administrative regulations. In the constitutional arena, Article V allows state legislatures to ratify norms in the name of We the People. On the orthodox view, when a state legislature approves a proposed constitutional amendment, it speaks not for itself, but as the embodiment or personification of We the People. Administrative norm creation also employs a principal-agent relationship.

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197. 1 DAVIS & PIERCE, JR., *supra* note 41, § 7.1.

198. For a brief overview of principal-agent relationships, see THRÁINN EGGERTSSON, ECONOMIC BEHAVIOR AND INSTITUTIONS 40-45 (1990). For a seminal article on principal-agent relationships, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Capital Structure*, 3 J. FIN. ECON. 305 (1976).

199. *See* U.S. CONST. art. VII.

200. *See* U.S. CONST. art. V.

Congress, which creates statutes, plays the role of the principal, and agencies, which create regulations that implement statutes, assume the role of agents. Administrative agencies however, are only empowered to create regulations. They cannot generate statutes in Congress's stead. Were the principal-agent mechanism used in administrative norm generation parallel to the principal-agent mechanism used in constitutional amendment generation, agencies would create statutes in the name of Congress. The nondelegation doctrine, however, clearly prohibits this sort of agency mechanism.[201] The principal-agent relationship between Congress and administrative agencies is characterized by the delegation of proscribed authority, the confines of which are set by a congressionally-generated statutory scheme, and which creates norms of an inferior hierarchical status. The principal-agent relationship employed in the creation of constitutional amendments, however, is entirely distinct and unique. Only in this situation does the agent, which is purportedly empowered to create norms of the very highest order, act in the name of the principal. Again, at least if the orthodoxy has its way, because state legislatures embody We the People, ratification of a constitutional amendment by state legislative bodies is tantamount to ratification of a constitutional amendment by We the People. In contrast, administrative agencies are not thought to embody Congress, and creation of an administrative regulation by an agency is never considered tantamount to the creation of a statute by Congress.[202]

By utilizing a principal-agent mechanism to ratify constitutional amendments, Article V opens the door to the ubiquitous agency problem.[203] Principal-agent relationships cannot avoid situations where the agent fails to do that which the principal wants done, acts before the principal is prepared

201. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935) ("The Congress is not permitted to abdicate or to transfer to others the essential legislative function with which it is thus vested.").

202. The principal-agent relationship found in the creation of administrative norms is similar in structure to other common principal-agent relationships found in the generation of other kinds of norms. The conventional view of statutory norm creation, for example, holds that Congress is the principal that creates the statutory textual norm, while the courts operate as Congress's agents in elaborating statutory doctrinal norms. *See* González, *supra* note 98, at 624-33 (describing major normative theories of statutory interpretation as all-conceiving of the relationship between Congress and the courts as a principal-agent relationship). Similar to the way that administrative agencies elaborate congressional mandates, courts elaborate the statutory commands of Congress. In so doing, the courts do not claim that judicial interpretation of a statute is tantamount to Congress interpreting the statute. Instead, the courts merely claim to interpret a statute according to the statutory command created by the principal legislature.

203. *See* Jensen & Meckling, *supra* note 198, at 309 (describing the "generality of the agency problem [as] the problem of inducing an 'agent' to behave as if he were maximizing the 'principal's welfare'").

to act, or even engages in self-dealing behavior against the interests or desires of the principal. The agency problem appears in other norm-generating contexts that employ principal-agent mechanisms. Returning to the creation of administrative regulations, in some instances the agent administrative agencies create regulations which cannot be squared with delegated authority that is codified in the legislative principal's statutory scheme.[204] In other situations an administrative agency will create a regulation prematurely, prior to actual Congressional deliberation and a decision to delegate authority.[205] Such errors are the inevitable price of the principal-agent mechanism. Just as they occur in the creation of administrative norms, they also occur in the creation of constitutional amendments.

There is, however, a crucial difference between the consequences of the agency problem in the administrative law context and the constitutional amendment context. That difference stems from the aforementioned distinct roles that the agents play in different contexts when they create new norms. The agent in the constitutional amendment ratification game claims to be doing something quite extraordinary. Again, in ratifying constitutional amendments the agent state legislatures (at least on the orthodox view) purports to embody or personify the principal People—and to create a legal norm in the name of the principal people. When state legislatures ratify a constitutional amendment, the claim is that We the People (indirectly) have ratified that constitutional amendment. An administrative agency never makes so bold a claim. In the administrative context, the agent merely claims to have generated a hierarchically lower order norm that falls within the scope of the principal's legislative delegation. An agency never claims to embody the legislative principal, or to have created a statutory norm in the name of the legislative principal.

The unique and extraordinary claim of agent state legislatures gives rise to an equally unique agency problem. In the typical principal-agent relationship, agency problems involve the agent going beyond or against the interests or directives of the principal. Thus, when an administrative agency creating a regulation arguably acts *ultra vires*, the following question arises: Does the regulation go beyond the scope of the statutory authority delegated by the principal? If it does, the regulation may be nullified upon judicial

204. *See, e.g.*, ETSI Pipeline Project v. Missouri, 484 U.S. 495, 517 (1988) (agencies may not exercise authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law").

205. *See, e.g.*, Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (striking down FDA tobacco regulation for exceeding the scope of the regulatory authority delegated by Congress).

review.[206] In the constitutional amendment context, however, the unique claims of the agent state legislatures give rise to an entirely different kind of uncertainty. Here, the agency problem is not of some act beyond the scope of authority delegated by the principal, but rather the agent failing to act in the name of the principal. A breakdown of the principal-agent mechanism in this context means that the agent fails to embody or personify the principal. The following kinds of uncertainties loom: Did the agent in fact embody the principal and thereby fail to ratify a constitutional amendment in the name of the principal? In other words, have We the People *actually* spoken through our agent state legislatures? Or, have the agent state legislatures spoken before We the People have arrived at a deliberated consensus sanctioning the creation of new higher law, or spoken in a way which differs from We the People's deliberated consensus? In short, an agency problem in the constitutional amendment ratification context raises the possibility that an amendment ratified by three-fourths of the state legislatures has *not* been (indirectly) ratified by We the People. A breakdown here could take the form of state legislatures ratifying constitutional amendments over which We the People have failed to engage and deliberate. Or it could take the form of state legislatures ratifying constitutional amendments over which popular deliberation has occurred, but not yet ripened into a discernable popular consensus sanctioning the creation of new higher law principles in the name of We the People. Or it could take the form of state legislatures ratifying constitutional amendments at variance from (or diametrically opposed to) a discernable and fully deliberated popular consensus.

This kind of agency problem is fatal to the orthodox view that each and every amendment that achieves the approval of three-fourths of the state legislatures *ipso facto* constitutes ratification by We the People. The best version of the orthodox view insists that state legislatures *can* embody the popular sovereign. But do they *always* embody the popular sovereign? At least in some cases, the agency problems inherent within Article V's principal-agent mechanism will undeniably result in the malfunctioning of the agent state legislatures as an embodiment of We the People and, consequently, in the ratification of amendments that cannot be described as emanating from We the People.

The orthodoxy concedes the existence of agency problems inherent in Article V. Again, in order to avoid redundancy of Article V's two amendment ratification methods, the orthodoxy must admit the possibility of

206. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984) (holding that a court may nullify an agency regulation where the regulation is an unreasonable interpretation of the statute).

cases where the agent state legislatures fail to ratify amendments that the principal popular sovereign has, after arriving at a deliberated consensus, embraced. Thus, even the most sympathetic version of the orthodoxy cannot escape the agency problem inherent in Article V's principal-agent amendment ratification mechanism.

Technically, the orthodoxy has not conceded the existence of the agency problem that would produce constitutional amendments, which, although ratified by state legislatures, lack any meaningful popular sovereignty pedigree. By admitting the possibility that the agent state legislatures may *fail* to ratify an amendment that We the People have embraced, the orthodoxy has merely acknowledged the presence of the "false negative" agency problem. Nowhere, however, has the orthodoxy explicitly admitted the "false positive" agency problem—cases where the agent state legislatures actually ratify an amendment that is either at odds with the deliberated conviction of We the People or lacks a deliberated conviction of We the People.

The false positive agency problem in the amendment process is nonetheless impossible to deny. Many commentators have spoken of the false negative agency problem that is produced by Article V's principal-agent mechanism.[207] Thousands of constitutional amendments have been proposed in the halls of Congress,[208] yet only twenty-seven have run the guantlet to become formal constitutional amendments. That at least some among the thousands of failed proposed amendments would have been sanctioned by a deliberated consensus of We the People, but for Article V's principal-agent impediment, lies beyond doubt.[209] Is it imaginable that the agent state legislatures fail to embody We the People when they mistakenly reject an amendment, but always perfectly embody We the People when they

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207. *See, e.g.*, Stephen M. Griffin, *The Nominee Is . . . Article V*, *in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 51-53 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (discussing how Article V makes a formal constitutional amendment "exceedingly difficult").

208. JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-1995, at 362 (1996) (chart indicating that thousands of amendments have been proposed since the 1780s).

209. *See* Allison L. Held et al., *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113, 115-16 (1997) (noting that, despite the ERA's broad popular support and passage by "an overwhelming majority" of Congress, the ERA failed to engender support from enough states to overcome the Article V requirement); Ishikawa, *supra* note 132, at 587-88 & n.170 (discussing the Balanced Budget Amendment's failure to overcome Article V's proposal mechanism, despite the amendment's great popularity); Dick Morris, *Direct Democracy and the Internet*, 34 LOY. L.A. L. REV. 1033, 1048 (2001) (noting that Congress has failed to propose constitutional amendments to ban flag burning and allow school prayer even though they "command a clear majority of the voters in virtually every poll").

approve an amendment? Can we imagine a world in which false negatives abound, but false positives are impossible? Even if we could imagine such a world, this is not the world in which we live. As Bruce Ackerman has recognized, "The only way to eliminate all false positives is to make the Constitution completely unamendable."[210] Again, agency problems are an inevitable cost of principal-agent mechanisms.[211]

We need not reinvent the study of legislatures to conclude that they often fail to accurately reflect the preferences of the electorate. If anything, our modern understanding of legislative bodies can only serve to corroborate the Founding Era understanding that legislative bodies cannot embody We the People. Agency problems are the norm rather than the exception when it comes to the ability of legislatures to mirror the preferences of the electorate.[212] No doubt, Article V's supermajority requirement minimizes the possibility that the state legislatures will ratify new constitutional textual norms that lack discernable and deliberated popular sanction.[213] Even the supermajority requirement, however, cannot reduce the probability of false positives to zero.[214]

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210. ACKERMAN, FOUNDATIONS, *supra* note 121, at 279. Ackerman acknowledges the possibility of an Article V false positive when he admits that "a constitutional amendment may be approved by three-quarters of the state assemblies . . . without the transformative initiative gaining the requisite kind of support of the mobilized People." *Id.* at 291. Curiously, however, Ackerman leaves the Article V false positive problem unresolved. Other than this fleeting reference, he has not expanded further on the issue.

211. *See* EGGERTSSON, *supra* note 198, at 44 ("Some opportunistic behavior by agents is presumably present in equilibrium contracts of most hierarchical relationships, a residual that remains after the principal has taken advantage of all profitable opportunities to limit shirking.").

212. Political scientists, whether using the pluralist model or the more recent rational choice model, have amply documented the inherent inability of legislative bodies to reflect the electorate's preferences. For seminal works in this area, see KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION (1991); DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974); E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA (1960). For useful overviews of the political science literature on the topic, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L. REV. 31, 35-44 (1991); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

213. Those espousing the orthodoxy have relied on Article V's supermajority of state legislatures requirement as the answer to the false positive agency problem.

214. At least two commentators agree. Working from the perspective of rational choice social science and speaking the language of principal-agent insitutional economics, Professors Boudreaux and Pritchard have concluded the following:

> [N]otwithstanding Article V's protection of the status quo, its procedures cannot guarantee that a majority of the *people* support a constitutional amendment. Because the Constitution can be amended solely by the actions of political representatives, the opportunity exists for shirking by the people's elected representatives. This shirking can take two forms: enacting an amendment that a majority (or substantial minority) of the people oppose, or failing to enact an amendment

While Article V requires ratification by three-fourths of the state legislatures, only a simple majority is required in each state legislature. It is entirely possible that an amendment could gain a simple majority in three-fourths of the state legislatures in the absence of, or contrary to, a discernable deliberated popular consensus sanctioning the creation of new higher law norms. No one doubts that at least on some issues narrowly-focused interest groups exercise disproportionate influence within legislative chambers and have proven successful in securing the passage of legislation contrary to popular majoritarian preferences.[215] Admittedly, the costs of disproportionate influences are higher when dealing with three-fourths of the state legislatures than when dealing with just one state legislature. In many cases, however, the same asymmetries that lend themselves to the disproportionate influence of a narrowly focused interest in one legislative body will replicate themselves across many or most of the state legislatures, thereby significantly reducing the cost of securing passage of special interest constitutional amendments. If a narrowly-focused special interest group can get one state legislature to approve an amendment despite the lack of a deliberated and discernable popular consensus, or contrary to the deliberated and discernable popular consensus, it probably can convince many state legislatures to do the same.[216]

Those espousing the orthodoxy have been too quick to rely on Article V's supermajority-of-state-legislatures requirement as a panacea for the false positive agency problem. For example, two commentators have recently

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that a supermajority of the people favor.

> The first possibility, enacting an amendment contrary to the will of the majority, can take place only under specific conditions. Although Article V's requirement of a supermajority in Congress seems to ensure that at least a majority of the citizenry supports an amendment, agency costs make a congressional majority no guarantee of a popular majority.

Donald J. Boudreaux & A.C. Pritchard, *Rewriting The Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 130 (1993).

215. *See* Macey, *supra* note 212, at 230-31 (discussing the methods by which well organized interest groups exert influence on the policy formation process, achieving wealth transfers at the expense of society at large).

216. State-by-state lobbying is common in the amendment ratification process. Ratification of the Seventeenth Amendment (popular election of senators), for example, was brought about via a state-by-state lobbying strategy. *See* Kris W. Kobach, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 YALE L.J. 1971, 1976-80 (1994). Kobach's analysis is enlightening. Though the Seventeenth Amendment ultimately was the product of meaningful popular deliberation and enjoyed popular support, it could not have been ratified without supporters of the Amendment waging a state-by-state battle to secure support in the state legislatures. *See id.* Congress initially opposed the Amendment, and therefore refused to propose it. *Id*. at 1977. The proponents of the Seventeenth Amendment, however, lobbied in the states to bring about the reforms called for by the amendment at the state level. *Id*. at 1977-78. By winning reforms in many states, the backers of the Seventeenth Amendment succeeded in building an irresistible pressure, eventually forcing Congress to propose the amendment. *Id*. at 1978-79. Having already built support in the states, ratification by state legislatures quickly followed. *Id*. at 1980.

stated that "although Article V . . . interposes deliberative institutional agents to express the popular will, namely, the state legislatures, there is no reason to believe that these agents would approve any change contrary to the desires of their principals."[217] The statement is both mistaken and under-inclusive. We should not expect that three-fourths of the state legislatures will approve an amendment that is contrary to the desires of their principals very often. As we will see below, however, this kind of false positive is far from impossible.[218] The false positive agency problem, however, involves much more than the agent state legislatures acting in diametric opposition to the deliberated popular consensus of the principal We the People. More likely, false positives will take the form of the agent state legislatures ratifying an amendment without a fully deliberated popular consensus, or even absent any meaningful popular deliberation at all. Will simple majorities in three-fourths the state legislatures approve *X* if We the People have, after meaningful deliberation, reached a discernable consensus opposing *X*? Only in the rarest of cases. But will simple majorities in three-fourths of the state legislatures approve *X* if We the People have not yet reached a discernable deliberated consensus on the issue, but are still in the midst of the deliberative process? At least sometimes, yes. Will simple majorities in three-fourths of the state legislatures approve *X* if We the People have simply failed to engage in a deliberative process over the issue? At least sometimes, yes. In each of these situations, the false positive agency problem results in the ratification of constitutional amendments that cannot honestly and accurately be described as emanating from, or sourced in, We the People.

At the end of the day, any rule that uses one phenomenon—ratification by state legislatures—to identify a second phenomenon—ratification by We the People—encounters the unavoidable risk of falsely indicating the second phenomenon where it is not in fact present. State legislatures do not *always* embody We the People. Even if state legislatures sometimes perfectly represent and embody We the People, other times they will not. Despite Article V's supermajority requirement, in some instances state legislatures will act contrary to a discernable, deliberated popular consensus, prior to the formation of a discernable, deliberated popular consensus, or in the absence of any meaningful popular deliberation at all. Although Article V's supermajority requirement means that the false positive may not be nearly as common as the false negative, it is still a very real phenomenon.

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217. Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501, 509 n.59 (1994).

218. *See infra* text accompanying notes 219-92.

Consider the Twenty-seventh Amendment, the stealthy Congressional Pay Amendment.[219] Can anyone seriously maintain that the Twenty-seventh Amendment, which was ratified via Article V's state legislature route, in any way represents constitutional norm creation by We the People acting though the state legislatures? The Twenty-seventh Amendment was proposed in 1789 as part of the original Bill of Rights.[220] It initially gained approval in only six of the original thirteen state legislatures.[221] The Amendment languished for over eighty years, until the Ohio legislature, enraged over the 1873 federal "salary-grab" statute, gave its approval to the proposed amendment.[222] Not until 1978 did the next state, Wyoming, ratify the proposed amendment.[223] Several years later, two more states, Maine and Colorado, ratified the proposed amendment.[224] From 1984 to 1992, numerous other state legislatures ratified the proposed amendment.[225] It took until 1992, when Michigan joined the ratifying states, to finally achieve the requisite three-fourths of the state legislatures, thus formally ratifying the Congressional Pay Amendment.[226] Even more surprising than the nearly two centuries it took to ratify the Twenty-seventh Amendment is the fact that in the final push from 1978 to 1992 to achieve the approval of three-fourths of the state legislatures, most Americans had *no idea* that the amendment was even being considered.[227] Even legal scholars, who presumably stay abreast of such issues, were caught off guard.[228] Though the Amendment's extended ratification period at first raised questions of its constitutional legitimacy,[229]

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219. U.S. CONST. amend. XXVII ("No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until election of Representatives shall have intervened.").

220. Christopher M. Kennedy, *Is There a Twenty-Seventh Amendment?: The Unconstitutionality of a "New" 203-Year-Old Amendment*, 26 J. MARSHALL. L. REV. 977, 980-82 (1993).

221. *Id.* at 982.

222. *Id.* at 984.

223. *Id.* at 985.

224. *Id.* at 985-86.

225. *Id.* at 986.

226. *See* Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 679 (1993) (citing Michigan as the 38th state to ratify the proposed amendment).

227. KYVIG, EXPLICIT AND AUTHENTIC ACTS, *supra* note 133, at 461 ("Ironically, this extraordinary Twenty-Seventh Amendment drew less notice at the moment of its ratification than perhaps any other constitutional reform . . . . Not surprisingly, few Americans even realized in spring 1992 that their nation's fundamental law had been altered. Those who did notice might well have wondered whether constitutional amending bore any importance.").

228. *See* Paulsen, *supra* note 226, at 679 (stating that ratification of the Twenty-seventh Amendment caught "a number of respected legal commentators, completely by surprise").

229. *Id.* at 679-80 (discussing contradictory opinions on the validity of the Twenty-seventh Amendment).

the consensus now acknowledges that the Twenty-seventh Amendment is part of the Constitution.[230]

The Twenty-seventh Amendment is the prime example of an amendment over which We the People never deliberated. Given the nearly two century time-span from the Amendment's proposal to its ultimate ratification, the Twenty-seventh Amendment cannot honestly and accurately be characterized as an amendment reflecting an act of constitutional law creation by the popular sovereign. A contemporaneous popular consensus is a necessary condition to the ratification of an amendment by We the People.[231] No such contemporaneous popular consensus existed for the ideas expressed in the Twenty-seventh Amendment. Indeed, what is more telling is that there was not even broad public *awareness* of the Twenty-seventh Amendment. For this reason, the state legislatures, even those that ratified the Amendment between 1978 and 1992, could not possibly have embodied a deliberated and discernable popular consensus. Consequently, the Twenty-seventh cannot honestly be described as an amendment emanating from, sourced in, or created by We the People. The Twenty-seventh Amendment is, plain and simple, a constitutional textual norm created exclusively by ordinary legislative bodies that in no way, shape, or form personified a discernable, deliberated popular consensus sanctioning the ratification of new higher law norms.

Ratification of the Twenty-seventh Amendment may be an anomaly that will never again be repeated. However, the ratifications of several other amendments also cast doubt on the orthodox claim that ratification by the state legislatures is *ipso facto* tantamount to ratification by We the People. Consider the Twenty-second Amendment, the Presidential Term Limits amendment.[232] Ratified by the state legislatures in 1951, the Twenty-second Amendment demonstrates how party politics can distort the ability of legislative bodies to embody We the People. The issue of presidential term limits had been on the national radar screen at various points in American history.[233] In the 1940s, President Franklin Roosevelt's four consecutive

230. *Id.* at 680 ("There quickly came to be general agreement that the Twenty-seventh Amendment had become law.").

231. A contemporaneous popular consensus, however, does not appear to be a necessary condition of the ratification of an amendment by the state legislatures (as opposed to ratification by We the People). Against the tide of academic commentary and Supreme Court dicta, the Amendment was certified as part of the Constitution once Article V's formal requirements had been satisfied. *See id.* at 680, 684-88 (discussing the National Archivists certification of the Amendment and contrary academic commentary concurring with Supreme Court dicta that suggests a contemporaneous consensus is required by Article V).

232. U.S. CONST. amend. XXII.

233. Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional*

terms revived the term limit issue.[234] Indeed, Gallup polls in the first half of the 1940s showed that a majority of those polled favored presidential term limits of some sort.[235] However, public support for the term limit initiative faded as quickly as it had appeared. By 1944, "the popular appeal of the issue was gone."[236] At a minimum, however, unlike the congressional pay issues in the Twenty-seventh Amendment, the issue of presidential term limits had at least penetrated the public consciousness.[237]

The Twenty-second Amendment, nevertheless, can hardly be described as emanating from a public consensus sanctioning a presidential term limit amendment. To the contrary, the Twenty-second Amendment was the result of strong party politics and a coalition between Republicans and conservative Southern Democrats reflecting their mutual frustration over the liberal policies of the four consecutive Roosevelt terms.[238] Upon gaining control of Congress in the 1946 elections, Republicans made a presidential term limit amendment a legislative priority.[239] The House hearings on the Amendment were brief, in the hopes of drawing little public attention.[240] Despite lukewarm public support for a presidential term limit, the House voted 285 to 121 to propose the Amendment.[241] The extreme degree of partisanship displayed in the vote is especially damaging to the orthodox view that legislative bodies will personify We the People when operating under Article V. Not one of the 238 House Republicans voted against the measure.[242] Moreover, thirty-seven of the forty-seven House Democrats who voted in favor of the measure were Southern Democrats who had long been aligned with Republicans against the Roosevelt Administration's policies.[243] The

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Interstices and the Twenty-Second Amendment, 83 MINN. L. REV. 565, 589-93 (1999) (recounting efforts by Congress to limit presidential terms at various points throughout American history).

234. *See* Stephen W. Stathis, *The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver?*, 7 CONST. COMMENT. 61, 64-65 (1990) (explaining how Roosevelt's election to a third presidential term began the movement towards presidential terms limits, which culminated in the Twenty-second Amendment).

235. *Id.* at 65.

236. *Id*.

237. The Republican Party platform included planks in both 1940 and 1944 supporting a constitutional presidential term limit amendment. *Id.* at 62.

238. *Id*. *See also* James Randolph Peck, *Restoring the Balance of Power: Impeachment and the Twenty-Second Amendment*, 8 WM. & MARY BILL RTS. J. 759, 787 (2000) ("Historians have argued that the Republican Party forced this Amendment through Congress and the state ratification process in a frustrated response to the four terms to which President Franklin D. Roosevelt was elected.").

239. *Id*.

240. *Id.* at 66-67.

241. *Id.* at 67.

242. *Id*.

243. *Id*.

same partisan-driven pattern repeated itself in the Senate.[244] All forty-eight Senate Republicans supported the Amendment. Thirteen Democratic Senators, nine of whom were from Southern states, joined the Republicans.[245] Party politics, rather than a popular consensus favoring presidential term limits, was the major impetus for proposing the Twenty-second Amendment.[246]

The ratification process in the state legislatures was equally driven by partisan politics.[247] Of the 3,272 Republican state legislators in states that considered the Amendment, only twenty-five Republican senators and fifty-eight Republican representatives opposed the Amendment.[248] Because amendment approval requires only a simple majority of a state legislature, the unwavering Republican Party made passage of the Amendment by three-fourths of the state legislatures highly probable. Beyond party politics, a slightly different kind of politics also influenced passage in the southern state legislatures. Initially, no Southern state legislature approved the Twenty-second Amendment. However, once it became clear that the Truman Administration would continue strong support for civil rights initiatives, Southern Democrats used approval of the Twenty-second Amendment to register their disapproval of the Administration's policies.[249]

Where were We the People while these political machinations played themselves out in the halls of Congress and the state legislatures? Were the state legislatures, despite the political machinations, accurately registering a deliberated public consensus on the issue? Stephen Stathis's analysis gives an unequivocal answer:

> The twenty-second amendment, according to the *Nation*, 'glided through legislatures in a fog of silence—passed by men whose election in no way involved their stand on the question—without hearings, without publicity, without any of that popular participation that should have accompanied a change in the organic law of the country.' The press and public were equally lax. There was only spotty coverage in the local press, virtually none in national periodicals, and little public participation. Even interest groups most

244. *Id.* at 68.
245. *Id.*
246. *Id.* at 69.
247. *See* Paul G. Willis & George L. Willis, *The Politics of the Twenty-Second Amendment*, 5 W. POL. Q. 469, 481 (1952) (describing the ratification of the Twenty-second Amendment in the state legislatures as exhibiting "strong political overtones").
248. Stathis, *supra* note 234, at 70.
249. *Id.* at 71-72.

> directly affected by the change in presidential tenure paid little attention to the ratification process.[250]

In short, though the issue penetrated the public consciousness, We the People were largely missing from the process. Rather than an expression of a deliberated and discernable popular consensus, the Twenty-second Amendment was the result of partisan politics.[251] Can we honestly describe such an amendment as emanating from and sourced in We the People?

The Eighteenth Amendment (Prohibition)[252] may also represent a false positive. The Eighteenth Amendment appears to have been the combined product of disproportionate interest group influence and a systematic skew in the representational structures in state legislatures. In the end, forty-six of the forty-eight state legislatures eventually approved the Eighteenth Amendment.[253] One would think that in order to secure passage in all but two state legislatures, prohibition would have been favored by a decisive majority after extensive and meaningful public debate.[254] Unlike both the Twenty-seventh and Twenty-second Amendments, no one can claim that the Eighteenth Amendment was not the subject of a meaningful and extended process of public deliberation.[255] However, it is not at all clear that the process of public deliberation ever culminated in a discernable popular consensus sanctioning the state legislatures' ratification of the Prohibition Amendment.[256] Although I have not found scholarly analysis focusing directly and exclusively on the issue, there is evidence to suggest that, despite its ratification by all but two state legislatures, the Eighteenth Amendment lacked majoritarian popular support.[257] Even if when ratified prohibition

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250. *Id.* at 71 (citations omitted).

251. *See supra* text accompanying note 238.

252. U.S. CONST. amend. XVIII.

253. *See* SEAN DENNIS CASHMAN, PROHIBITION: THE LIE OF THE LAND 1 (1981).

254. KYVIG, PROHIBITION, *supra* note 133, at 12 (lopsided victory of Eighteenth Amendment indicates wide acceptance of prohibition).

255. Temperance had been an issue of waxing and waning importance on the national agenda since the earliest days of the Republic. *See* RICHARD F. HAMM, SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE, REFORM, LEGAL CULTURE, AND THE POLITY 1880-1920, at 20-21 (1995). Hamm's book offers a comprehensive and detailed look at the temperance movement from its earliest days through ratification of the Eighteenth Amendment.

256. KYVIG, PROHIBITION, *supra* note 133, at 12 ("The absence of a direct national referendum or reliable public opinion survey [on prohibition] makes it impossible to judge precisely the degree of [its] popular support.").

257. *See* CASHMAN, *supra* note 253, at 6-8 (reviewing the number of states that had some form of prohibition prior to the enactment of the Eighteenth Amendment and concluding that even though many states had enacted some form of prohibition, "it does not signify that prohibition had reached such epidemic proportions that it already had national support"); KYVIG, EXPLICIT AND AUTHENTIC ACTS, *supra* note 133, at 241 (those who disagreed with prohibition "concluded that a skillful, manipulative minority had overridden the preferences of most citizens"); William L. Marbury, *The*

enjoyed slight majoritarian support, a discernable national consensus favoring prohibition never congealed. The issue was, at best, a close one.[258]

How then did the Eighteenth Amendment gain the approval of forty-six of the forty-eight state legislatures? To begin, formidable and focused lobbyists pressured the state houses for passage of the Amendment.[259] In contrast, opponents of prohibition were diffuse and ineffective.[260] More importantly, and more problematic for the orthodox view, was a systematic skew in the representational structure of the state legislatures of the era. Support for prohibition did not have an even geographic distribution. Urban areas opposed prohibition, while rural areas strongly favored prohibition. Unfortunately for the urban opponents of prohibition, however, malapportioned state legislatures greatly under-represented urban voters and their preferences.[261] The Eighteenth Amendment won by landslide margins in the state senates, which especially over-represented rural areas. In the less skewed state houses, the votes were very close. Nevertheless, the prohibition lobbyists effectively used the large margins of victory in the heavily skewed state senates to influence the less skewed state houses in their favor.[262] Moreover, the politically shrewd prohibition lobbyists, with knowledge that they could win their greatest victories in state legislatures that over-represented rural America, lobbied successfully to have the proposed Amendment submitted for ratification in the state legislatures rather than popular constituent conventions that might not be malapportioned.[263]

Limitations upon the Amending Power, 33 HARV. L. REV. 223, 223-24 (1919) (Stating that the Eighteenth Amendment was ratified by state legislatures "contrary to the well-known sentiments and wishes of a vast majority of the people of those states").

258. *See* CASHMAN, *supra* note 253, at 9 (concluding that "[t]he evidence hardly suggests a solid bloc in favor of prohibition even in the rural states").

259. *See id.* at 20, 25 (describing the Anti-Saloon League as "masters at lobbying the state legislatures" and stating that "[t]he success of the prohibition movement at the turn of the century belongs to the Anti-Saloon League").

260. HAMM, *supra* note 255, at 241 (describing the anti-prohibition lobby as "hopelessly and bitterly divided . . . leaderless and lost").

261. *See* CASHMAN, *supra* note 253, at 19-20 (recounting that in state senates, rural areas had as much as seven times the number of representatives as urban areas and explaining that the pro-prohibition lobby feared state referenda on prohibition for fear of losing at the hands of anti-prohibition urban votes); KYVIG, EXPLICIT AND AUTHENTIC ACTS, *supra* note 133, at 242 (referring to disproportionate representation of rural pro-prohibition interests in the Ohio legislature); KYVIG, PROHIBITION, *supra* note 133, at 140, 171 (referring to over-representation of rural pro-prohibition areas in the state legislatures both at the time the Eighteenth Amendment was ratified and at the time of its repeal).

262. Cashman, *supra* note 253, at 20.

263. *Id.* at 19.

The history behind *Hawke v. Smith*[264] further reinforces the point that the Eighteenth Amendment was ratified by state legislatures that overly represented rural pro-prohibition areas.[265] *Hawke* challenged a provision of the Ohio constitution that was adopted by a statewide referendum and which required that proposed federal constitutional amendments be submitted to the People of Ohio via a referendum, and not the Ohio legislature.[266] The Ohio legislature, however, disregarding the Ohio Constitution, approved the Eighteenth Amendment. The vote was not close—twenty to twelve in the Ohio Senate, and eighty-five to twenty-nine in the Ohio House, in favor of adoption.[267] Shortly thereafter, however, in a state-wide referendum, the People of Ohio rejected the Eighteenth Amendment.[268] Ultimately, the Supreme Court invalidated the Ohio Constitution's provision requiring that proposed amendments be submitted to the People via referendum as inconsistent with Article V.[269] The episode, however, raises the question of whether the Ohio legislature in fact embodied the People of Ohio. If the People of Ohio rejected the Eighteenth Amendment in a referendum vote, how could the Ohio legislature have approved the Eighteenth Amendment by such a wide margin? Did the Ohio legislature malfunction as a conduit through which the People might act to pass judgment on a proposed constitutional amendment? Suspicion about the democratic legitimacy of the ratification of the Eighteenth Amendment by the state legislatures eventually factored into its repeal and resulted in the submission of the Twenty-first Amendment to conventions, rather than state legislatures.[270]

Nor is the Eighteenth Amendment the most extreme case of breakdown in Article V's principal-agent amendment ratification mechanism. The Twenty-sixth Amendment,[271] which lowered the voting age to eighteen, may be the most extreme false positive. Like prohibition, lowering the age of suffrage had been on the national agenda at various times throughout American

264. 253 U.S. 221 (1920).

265. *Id.*

266. *Id.* at 224-25.

267. KYVIG, EXPLICIT AND AUTHENTIC ACTS, *supra* note 133, at 242; KYVIG, PROHIBITION, *supra* note 133, at 14.

268. KYVIG, EXPLICIT AND AUTHENTIC ACTS, *supra* note 133, at 242; KYVIG, PROHIBITION, *supra* note 133, at 14. Kris W. Kobach, *May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. DAVIS L. REV. 1, 20-21 (1999) (recounting the history behind *Hawke v. Smith*, 253 U.S. 221 (1920)).

269. Hawke v. Smith, 253 U.S. 221, 231 (1920).

270. KYVIG, PROHIBITION, *supra* note 133, at 140, 171 (questionable democratic legitimacy of the Ohio legislature's approval of Prohibition from *Hawke v. Smith* and over-representation of rural pro-prohibition areas in state legislatures prompted advocates of the Prohibition Repeal Amendment to insist on ratification via the convention method).

271. U.S. CONST. amend. XVI.

history, particularly in times of war, when young, disenfranchised Americans were sent into battle.[272] The issue surfaced again during the Vietnam War.[273] In 1969 and 1970, prior to consideration of a federal constitutional amendment to lower the voting age, sixteen states submitted voting age reduction proposals to statewide referenda.[274] At the federal level, the Twenty-sixth Amendment met rapid and overwhelming success.[275] The Amendment found overwhelming bipartisan support in Congress and the state legislatures; the Senate voted ninety-four to zero and the House voted 401 to 19 to propose the Amendment.[276] It only took 101 days, the fastest ratification period ever, for three-fourths of the state legislatures to approve the Twenty-sixth Amendment.[277] From the orthodox perspective, based on the Amendment's rapid success in Congress and the state legislatures, the Amendment must have enjoyed widespread popular support.

In fact, the Twenty-sixth Amendment was ratified by the state legislatures "despite clear evidence of considerable public opposition."[278] Several states had proposed to lower the voting age by state-wide referenda in the years leading up to the Twenty-sixth Amendment. By wide margins, the voters in ten of the sixteen state referenda in 1969 and 1970 rejected proposals for lowering the age of suffrage.[279] In addition, the voters in seven other state referenda between 1966 and 1968 had rejected proposals to lower the voting age from twenty-one.[280] In short, "voting age reduction appeared to lack majority support, much less a broad consensus."[281] As such, the Twenty-sixth Amendment appears to be a false positive ratification that is directly contrary to a deliberated popular consensus against lowering the minimum voting age.

If at odds with the deliberated popular consensus, how did the Twenty-sixth Amendment achieve such rapid and overwhelming success in both Congress and the state legislatures? The answer lies in time pressure and a desire to avoid an election-day nightmare. In 1970, Congress amended the

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272. *See* KYVIG, EXPLICIT AND AUTHENTIC ACTS, *supra* note 133, at 364 ("Lowering the voting age from twenty-one . . . had been discussed during every war in which the United States asked younger men to fight.").

273. *Id*.

274. *Id.* at 363.

275. The proposed voting age reduction was first taken up by a congressional committee in February of 1970. *Id*. at 365. By the summer of 1971, the voting age was successfully lowered to age eighteen through enactment of the Twenty-sixth Amendment. *Id*. at 368.

276. *Id.* at 367.

277. *Id.* at 368.

278. *Id.* at 363.

279. *Id*.

280. *Id.* at 364 (rejected referenda in Michigan, New York, Hawaii, Maryland, Nebraska, North Dakota, and Tennessee).

281. *Id.* at 365.

Voting Rights Act to lower the age of suffrage to eighteen years of age.[282] The statutory amendments purportedly applied to elections for federal as well as state-level offices.[283] In *Oregon v. Mitchell*, however, the Supreme Court partially invalidated the 1970 statutory amendments, holding that Congress lacked the legislative authority under Section Five of the Fourteenth Amendment to mandate the voting age in state, as opposed to federal, elections.[284] The combined effect of the 1970 amendments to the Voting Rights Act and the holding in *Oregon v. Mitchell* was that the approaching 1972 elections would have to be conducted with separate suffrage requirements. The amended Voting Rights Act made the voting age eighteen for federal offices while *Oregon v. Mitchell* left the voting age for most state officials at twenty-one.[285] Faced with the expense and complication of running the elections with separate suffrage requirements, both Congress and the state legislatures rushed to ratify the Twenty-sixth Amendment, despite widespread popular disapproval.[286]

My review of the Twenty-seventh,[287] Twenty-sixth,[288] Twenty-second,[289] and Eighteenth Amendments[290] has been less than comprehensive. As with the original understanding of the original intent of Article V, a fuller analysis will have to wait until another day. Here, I merely seek to trace the outline of an argument casting doubt on the orthodoxy. Even a tentative analysis, however, raises deep skepticism about the orthodoxy's unforgiving nature. The uncompromising claim that each and every constitutional amendment gaining the approval of three-fourths of the state legislatures is *ipso facto* tantamount to ratification by We the People is hard to square with the history of ratification of at least four of our amendments.

In the case of the Eighteenth Amendment, we see that systematic distortions in the structure of representation may have caused the state legislatures to malfunction as a conduit through which We the People act to ratify constitutional amendments. Would the Eighteenth Amendment have been ratified by state legislatures more balanced in their representation of town and country? We will need a deeper study than what I have provided to

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282. *Id.* at 366.

283. *Id*. (The amendment to the 1965 Voting Rights Act was thought to "invade the realm of state authority.").

284. Oregon v. Mitchell, 400 U.S. 112, 134-35 (1970).

285. KYVIG, EXPLICIT AND AUTHENTIC ACTS, *supra* note 133, at 367.

286. *Id.* ("Catalyzed as well by the specter of electoral confusion, [state] legislators rushed to ratify [the Twenty-sixth Amendment].").

287. U.S. CONST. amend. XXVII.

288. U.S. CONST. amend. XXVI.

289. U.S. CONST. amend. XXII.

290. U.S. CONST. amend. XVIII.

answer that question. From what we do know, however, we can no longer unquestioningly accept the platitude that any amendment able to gain the assent of three-fourths of the state legislatures enjoys the considered consensus and sanction of We the People. Structural distortions in state legislatures may in some (perhaps isolated) cases undermine the proposition that ordinary legislative bodies serve as true barometers of We the People's deliberated consensus. Moreover, when those structural distortions replicate themselves throughout the state legislatures, amendments can be ratified by three-fourths of the state legislatures even when We the People are quite evenly or closely divided on an issue.

The point is not that ratification of the Eighteenth Amendment necessarily went *against* a decisive popular consensus. Article V's supermajority provisions minimize the risk of this sort of false positive agency problem. Popular opinion on prohibition may or may not have favored passage of the Eighteenth Amendment in 1919. That forty-six of forty-eight state legislatures ratified prohibition, does, however, represent a serious disconnect with closely contested public opinion on the Eighteenth Amendment.

As suspicious as the Eighteenth Amendemnt is, the Twenty-sixth paints an even more troubling picture for the orthodoxy. Here it appears that passage of the Twenty-sixth Amendment by the state legislatures was contrary to a clear, deliberated, popular consensus. Like the Eighteenth Amendment, the Twenty-sixth Amendment had both penetrated the popular consciousness and been the subject of real popular discourse—through state referenda and as part of the nation's ongoing internal debate over the Vietnam War. Unlike prohibition, however, lowering the voting age from twenty-one was not a closely divided issue. We the People, for better or for worse, had voiced strong opposition. Nonetheless, the Twenty-sixth Amendment sailed through the state legislatures with little resistance and achieved ratification faster than any other amendment in history.[291]

Our look at the Twenty-seventh and Twenty-second Amendments raises a different, and perhaps more damaging, kind of false positive agency problem for the orthodoxy. The Eighteenth and Twenty-sixth Amendments erode confidence in the belief that state legislatures act as accurate barometers of We the People's deliberated consensus sanctioning ratification of new constitutional norms. In both cases the problem lies with the agent state legislatures that malfunctioned as conduits through which We the People act. The Twenty-seventh and Twenty-second Amendments, in contrast, demonstrate that the false positive agency problem, inherent in Article V,

291. KYVIG, EXPLICIT & AUTHENTIC ACTS, *supra* note 133, at 368.

may sometimes stem from the principal, and not the agent. In both cases, We the People never even formed a deliberated consensus. How can we even begin to describe, as does the orthodoxy, the state legislatures as a personification and embodiment of We the People's deliberated consensus when no deliberated consensus ever existed? How do legislatures embody a nonexistent popular consensus? How can We the People act through agent state legislatures to ratify an amendment codifying issues that We the People have not even considered? It would be far more accurate to describe the principal-agent relationship employed in the ratification of these amendments along more traditional lines. In the usual principal-agent relationship, the principal appoints an agent to act *on behalf* of the principal, not to *be* the principal. Remember, on the orthodox view, the agent state legislatures do not make the ordinary claim that they act *for* We the People. They instead make the extraordinary claim that state legislatures act *as an embodiment of* We the People.

The truth of the matter is that We the People only infrequently form a deliberated and decisive consensus sanctioning the creation of higher law norms. The public ignorance and lack of attention to the issues involved in the ratification of the Twenty-seventh and Twenty-second Amendments is the rule rather than the exception.[292] Political scientists and legal scholars have long noted that American politics vacillates between long periods of uninformed and apathetic disengagement, and relatively brief periods of popular ferment and participation.[293] The bulk of the scholarship on this phenomenon focuses on the brief periods of popular ferment.[294] Bruce Ackerman's work in this area, however, is particularly useful for present purposes because he devotes significant attention to periods of popular

292. *Id.* at 363 (stating that few amendments or proposed amendments "even achieve[] widespread public visibility").

293. Professor Pope concisely summarizes the legal and political science scholarship that focuses on the variance of public interest in politics. *See* James Gray Pope, *Republican Moments: The Role of Direct Popular Power in The American Constitutional Order*, 139 U. PA. L. REV. 287, 304-13 (1990) (reviewing Bruce Ackerman's dualist theory of ordinary politics and constitutional moments, the political science on critical elections, Samuel Huntington's description of American politics as vascillating between interest group and creedal politics, and Pope's own theory of republican moments).

294. Political scientists have extensively analyzed critical elections and their effects on the normal pattern of political stasis. *See* DAVID W. BRADY, CRITICAL ELECTIONS AND CONGRESSIONAL POLICY MAKING (1988); WALTER DEAN BURNHAM, CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS (1970); JEROME M. CLUBB ET AL., PARTISAN REALIGNMENT: VOTERS, PARTIES, AND GOVERNMENT IN AMERICAN HISTORY (1990); Thomas P. Jahnige, *Critical Elections & Social Change: Towards a Dynamic Explanation of National Party Competition in the United States*, 3 POLITY 465, 467-71 (1971); V.O. Key, Jr., *A Theory of Critical Elections*, 17 J. POL. 3 (1955). Among legal scholars, James Pope's work focuses more on the relatively rare "republican moments" than the more common periods of interest group politics. *See* Pope, *supra* note 293.

political disengagement, which he aptly labels "normal politics."[295] Ackerman properly uses terms like "apathy," "ignorance," "limited engagement," and "selfishness" to describe the characteristics of the private citizen in times of normal politics.[296] Ackerman explains that in times of normal politics "the People themselves have retired from public life."[297] To the extent that the People might form opinions on political issues, they are not the product of considered judgment. The private citizen is too preoccupied with private life to devote sufficient time to considered judgment on the political themes of the day.[298]

The character of the public citizen in times of normal politics generates insurmountable difficulties for the Article V orthodoxy's view of legislative representation. Contrary to the orthodox vision of state legislatures embodying We the People when ratifying constitutional amendments, "[d]uring normal politics, *nobody* represents the People . . . . [T]he People do not exist; they can only be represented by 'stand-ins.'"[299]

If "the absence of mobilized and politically self-conscious majority sentiment" characterizes periods of normal politics,[300] how can constitutional amendments ratified via Article V during such times constitute creations of We the People? We the People cannot engage in acts of constitutional norm creation when disengaged, immobilized, and lacking any discernable deliberated consensus on political issues. Indeed, as Ackerman explains, the normal, versus constitutional politics periodization, helps "distinguish

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295. Ackerman's dualist theory of constitutional change posits that American politics vacillates between periods of constitutional politics and normal politics. During periods of normal politics, the sovereign People pay scant attention to political issues. Instead, they defer to the political choices adopted by their agent government. In contrast, during periods of special constitutional politics or "constitutional moments," the sovereign people become highly attuned to political issues and assume an active participatory role in shaping the basic rules that define constitutional rights and responsibilities. Ackerman identifies the Founding Era, the Civil War Era, and the New Deal Era as periods of constitutional politics. *See generally* ACKERMAN, FOUNDATIONS, *supra* note 121; ACKERMAN, TRANSFORMATIONS, *supra* note 132; Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279 (1999); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

296. ACKERMAN, FOUNDATIONS, *supra* note 121, at 234-35.

297. *Id.* at 255 (emphasis omitted).

298. *Id.* at 240-42 (discussing the concept of the soft vote).

299. *Id.* at 263. *See also id.* at 260. Addressing "the problematic character of the effort to speak for We the People during normal politics," Ackerman writes:

> Who then *really does* speak for We the People? None of [the organs of government]. They are just stand-ins, that's all. The mass of the *private* citizens are too busy right now to engage in the kind of sustained and mobilized debate and decision that would justify any of their stand-ins declaring that they have a decisive mandate for fundamental change . . . none of [the organs of government] should be allowed to pretend they stand for *the People themselves*.

ACKERMAN, FOUNDATIONS, *supra* note 121, at 263.

300. *See* ACKERMAN, TRANSFORMATIONS, *supra* note 132, at 5.

between ordinary decisions made by government and considered judgments made by the People."[301] While the People may make law in periods of constitutional politics, government makes law in periods of normal politics. Ackerman's entirely appropriate description of normal politics seems to eliminate the possibility that constitutional textual norms ratified via Article V during those periods could be sourced in We the People.[302]

Herein lies the most intractable problem for the orthodoxy: In the orthodox view, the agent state legislatures embody We the People's deliberated consensus. Yet most of the time, We the People have not formed a deliberated consensus, or even engaged in a process of public deliberation. Under such conditions, it is logically impossible for the agent state legislatures to embody We the People when ratifying amendments under Article V. To the contrary, when We the People are, for all intents and purposes, absent from the scene, state legislatures ratifying constitutional amendments are more accurately described as traditional agents—acting *on behalf of* the principal, rather than *as* the principal. This action on behalf of the principal is exactly what we see in the ratification of the Twenty-seventh and Twenty-second Amendments. We the People never formed a discernable, deliberated consensus sanctioning ratification of either amendment. Rather than embodying a nonexistent popular consensus, the state legislatures acted as ordinary government organs.

The orthodoxy's possible response that opinion polls show majoritarian support for the policies codified in the Twenty-seventh and Twenty-second

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301. *Id.*

302. Ackerman's definitions of constitutional and normal politics strongly imply that constitutional amendments created during times of normal politics in fact are not products of the popular sovereign, despite having overcome Article V hurdles. Ackerman states that "the normal lawmaking track is designed for countless decisions made in the absence of mobilized and politically self-conscious majority sentiment. The higher lawmaking system imposes specially rigorous tests upon political movements that hope to earn the heightened sense of democratic legitimacy awarded to spokesmen for We the People." *Id.*

Generally speaking, Ackerman's theory of dualist democracy is consistent with the notion that mere ratification by three-fourths of the state legislatures under Article V does not *ipso facto* constitute ratification by We the People. To begin, Ackerman argues that no formal rule can always correctly identify constitutional textual norms originating from the popular sovereign. *Id.* at 28-29. The orthodox view of Article V maintains that ratification under Article V signifies, in Ackerman's words, "the existence of a mobilized and considered popular judgment." *Id.* at 28. Ackerman, however, rightly recognizes that formal rules, by their nature, will produce false positives. *Id.* at 29. If Article V is treated as a formal rule for identifying constitutional textual norms sourced in the popular sovereign, in at least some instances, it will erroneously identify some constitutional textual norms as having secured the consent of the People. *See id.* at 29.

Moreover, Ackerman's discussion of normal politics seems to commit him to much more. If we take Ackerman's conception of normal politics seriously, then he, like Amar, must agree that ratification of a new constitutional textual norm via Article V does not signal the creation of a constitutional textual norm by We the People.

Amendments is insufficient. Mere majoritarian support expressed in snapshot opinion polls is not the equivalent of a discernable, deliberated popular consensus sanctioning agent state legislatures to ratify new constitutional textual norms in the name of We the People. Opinion polls are of little importance when, for whatever reason, an issue fails to generate meaningful and sustained public deliberation.

A vast difference separates an agent doing what the principal *would do* if the principal *had gone through* the process of deep consideration of all the options and had reached a discernable judgment sanctioning an agent to act, as opposed to an agent doing what the principal has sanctioned the agent *to do after actually having gone through* the process of deeply considering all of the options and reaching a judgment. The orthodoxy claims that state legislatures do the latter. In reality, however, as we see from the Twenty-seventh and Twenty-second Amendments, state legislatures sometimes only do the former. The mere fact that the principal People may express an undeliberated majoritarian preference favoring the amendment ratified by agent state legislatures does not mean that the agent is doing what the principal People sanctioned after *actually having meaningfully deliberated*, and reached a decisive judgment.

None of this should surprise us. That amendments can overcome Article V's hurdles despite a lack of a popular deliberated consensus, or even contrary to a popular deliberated consensus, is an artifact of Article V's principal-agent mechanism for creating new constitutional textual norms. False positives exist in any principal-agent relationship.[303] Sometimes state legislatures will ratify amendments when We the People have not engaged, deliberated, or arrived at a discernable consensus favoring the creation of new higher law norms. They sometimes will ratify amendments contrary to a deliberated popular consensus. Such amendments cannot with any level of honesty be described as emanating from We the People. Instead, they must

303. I am not suggesting that all constitutional norms ratified by state legislatures are necessarily creations of ordinary government institutions, or that all constitutional norms ratified by popular constituent conventions necessarily emanate from, and are ratified by, We the People. Given the clear distinction between the proper roles of legislatures and conventions in ratifying constitutional textual norms, I concede that this is a plausible construction of Article V. I need not resort to such a mechanical and extreme reading of Article V, however, to make my point. Instead, I only need to persuade you of a negative thesis—contrary to the orthodox reading, approval by three-fourths of the state legislative bodies is not necessarily the equivalent of ratification by We the People. Approval by the state legislatures, in other words, is insufficient to create a new constitutional textual norm emanating from We the People. Indeed, depending on the criteria, some, several, or even most amendments ratified via the state legislature route can honestly be described as products of We the People acting through agent state legislatures to ratify new constitutional textual norms. However, even under the most generous set of assumptions possible, there will remain some constitutional amendments that cannot reasonably be characterized as creations of We the People.

be characterized as creations of ordinary legislative bodies acting as agents on behalf of, rather than as, We the People.

Reasonable minds may disagree over which constitutional amendments emanate from the popular sovereign and creations of state legislatures. Upon serious analysis, however, reasonable minds cannot differ on the following points: First, we cannot honestly and accurately describe *all* constitutional amendments as sourced in the popular sovereign; some constitutional amendments can be described as creations of We the People, while others must be described as creations of ordinary, standing, legislative bodies. Second, the presupposition that all amendments ratified by three-fourths of the state legislatures have *ipso facto* secured the consent of the sovereign people lies beyond the credible.[304] In short, the dual-source thesis more closely approximates the reality of the origins of constitutional amendments than the orthodoxy.

D. The Impossibility of the Popular Sovereignty Skeptic's Retort

The dual-source thesis offers a novel description of the sources of constitutional textual norms. Although novel, the dual-source theory presents a middle ground between two polar opposites: At one end of the spectrum, the orthodoxy claims that all constitutional textual norms, including all amendments, emanate from We the People. At the other end of the spectrum, the popular sovereignty skeptic doubts the validity of claims that We the People can or do engage in anything resembling acts of constitutional norm-creation, and argues that *no* constitutional textual norms can honestly and fairly be characterized as creations of the popular sovereign.[305] The popular

304. With this reality in mind, the question becomes the following: Which constitutional textual norms may we fairly and honestly classify as creations of We the People, and which must be reclassified as creations of government norm-generating institutions that fail to capture or embody a popular norm-generating act? I have identified the Twenty-seventh, Twenty-sixth, Twenty-second, and Eighteenth Amendments as the most obvious examples of Article V false positives. In so doing, however, I have not articulated a clear rule or set of rules for distinguishing the constitutional textual norms that emanate from We the People from those emanating from ordinary legislative bodies. For present purposes, however, I need not identify such a set of rules. It is sufficient at this stage to understand what could not, under any reasonable approach, constitute a constitutional textual norm emanating from We the People. Identification of at least some amendments that cannot honestly be described as emanating from We the People is sufficient to debunk the orthodoxy, which holds that all constitutional textual norms originate from the popular sovereign. Articulating the line between constitutional textual norms that originate from We the People and those that originate from ordinary legislatures is a project for another day.

305. For literature that either subscribes to or reports expressions of popular sovereignty skepticism, see ANDERSON, *supra* note 164, at xiv (claiming that the Constitution's drafters "rejected the notion of popular sovereignty—as anything more than political rhetoric"); GRIFFIN, *supra* note 108, at 24-26 (claiming that popular sovereignty receded as an important constitutional idea after

sovereignty skeptic raises difficult questions. Who constitutes We the People? By what procedures do they (or it) generate norms? How can the Constitution qualify as a creation of We the People if only white, male, property owners were allowed to select delegates to the state ratifying conventions, and only white males were elected to those ratifying conventions? How do we know when the People have engaged in an act of constitutional norm-creation?[306] The path of least resistance would be to avoid these and other difficult questions and simply treat the theory of popular sovereignty as a quaint fiction advanced by the Federalists in the pre-ratification period for purposes of placating populist opposition to the proposed Constitution and, thus, as effectively null and void as an operational component of American constitutional theory.

While the popular sovereignty skeptic admittedly raises serious and difficult questions, the easy path of reading popular sovereignty theory out of the American Constitution is utterly unavailable. The Constitution embodies a constellation of fundamental or core principles. Without a doubt, popular sovereignty belongs to that constellation of principles.[307] Both Federalists and Anti-Federalists publicly claimed to embrace popular sovereignty theory and argued in favor of popular sovereignty principles.[308] The Federalists

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ratification, and that the People have no practical institutional arrangement by which they might exercise sovereignty); PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 62-64 (1992) [hereinafter KAHN, LEGITIMACY AND HISTORY] (discussing the "myth of popular sovereignty"); PAUL W. KAHN, THE REIGN OF LAW: *MARBURY V. MADISON* AND THE CONSTRUCTION OF AMERICA 228, 230 (1997) [hereinafter KAHN, REIGN OF LAW] (speaking of popular sovereignty as an illusion essential to maintaining the appearance of the rule of law); MORGAN, *supra* note 155, at 13-14 (referring to popular sovereignty as a necessary fiction); JULIE MOSTOV, POWER, PROCESS, AND POPULAR SOVEREIGNTY 6 (1992) (discussing democratic theorists who view popular sovereignty as a "fiction" or a "noble lie"); J. ALLEN SMITH, THE SPIRIT OF AMERICAN GOVERNMENT (Cushing Strout ed., 1965); Bernard Crick, *Sovereignty*, *in* THE INTERNATIONAL ENCYCLOPEDIA OF SOCIAL SCIENCES 80 (1968) (referring to "the almost meaningless rhetoric of popular sovereignty"); David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 13, 35 (1990) (claiming that popular sovereignty is only important to academicians and "is an esoteric notion that is irrelevant to constitutional interpretation"); Monaghan, *supra* note 186, at 167-73 (useful overview of popular sovereignty skepticism from historians and legal scholars).

306. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 230 (1980) (questioning the moral authority of the Constitution-amending process given that the Civil War Amendments only embodied the interests of "white property-holders and not the population as a whole").

307. GRIFFIN, *supra* note 108, at 19 ("The sovereignty of the people is a key element of American constitutionalism."); MORGAN, *supra* note 155, at 143 ("By the eighteenth century, the sovereignty of the people was taken for granted."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 2 (2d ed. 1988) ("That all lawful power derives from the people ... is the oldest and most central tenet of American constitutionalism.").

308. *See, e.g.*, ELBRIDGE GERRY, OBSERVATIONS ON THE NEW CONSTITUTION, AND ON THE FEDERAL AND STATE CONVENTIONS, *reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED

were particularly vociferous in claiming that the proposed Constitution was built on popular sovereignty foundations.[309] The proposed Constitution was advertised as permeated with popular sovereignty theory.[310] Moreover, the state ratifying conventions approved the Constitution under the expectation that popular sovereignty represented an integral component in the constitution's morphology.[311]

Even if one were to accept the Beardian thesis that popular sovereignty theory was an artifice aimed at assuaging agrarian Anti-Federalist opposition to the less democratically responsive and more centralized government under the proposed Constitution,[312] popular sovereignty nonetheless stands amongst the Constitution's core principles. That certain Federalist Founders privately may not have been enamored with popular sovereignty, or may have utilized it as a rhetorical device, is irrelevant to whether popular sovereignty theory belongs to the Constitution's constellation of core values. In the first instance, the Beardian thesis has rightly fallen out of favor.[313] Even if the Federalists had been privately indifferent or even hostile to popular sovereignty (a hard to sustain claim), "what counts as text is the document as understood by the American People who ratified and amended it, and what counts as history is accessible public meaning, not secret private intent."[314] Moreover, the argument that private Federalist indifference or

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STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 6 (Paul Leicester Ford ed., 1888) (At the Massachusetts Ratifying Convention, Anti-Federalist Elbridge Gerry stated that "the origin of all power is in the people, and they have an incontestable right to check the creatures of their creation."); JAMES WILSON, PENNSYLVANIA RATIFYING CONVENTION, 4 December 1787, *reprinted in* 1 THE FOUNDERS' CONSTITUTION 62 (Philip B. Kurland & Ralph Lerner eds., 1987) (At the Pennsylvania Ratifying Convention, Federalist James Wilson stated that "[t]he truth is, that the supreme, absolute and uncontrollable authority, *remains* with the people . . . . [S]upreme power . . . *resides* in the PEOPLE, as the fountain of government.").

309. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 18 (1996) (speaking of popular sovereignty as "one of the great rallying points of Federalist argument").

310. *The Federalist* is littered with references to popular sovereignty legitimizing the Constitution. *See, e.g.*, THE FEDERALIST NO. 22, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("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."); THE FEDERALIST NO. 49, at 313-14 (James Madison) (Clinton Rossiter ed., 1961) ("[t]he people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived . . . . ").

311. *See supra* text accompanying note 113.

312. *See* CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION (1913).

313. *See* ACKERMAN, FOUNDATIONS, *supra* note 121, at 201-02, 212-18 (explaining that the reappraisal and ultimate rejection of Beard's thesis began in the 1950s and culminated with Gordon Wood, *The Creation of the American Republic, 1776-1787*); KELLY, *supra* note 119, at 115 ("Beard's thesis in its original formulation has long since been disproved.").

314. Amar, *The Supreme Court*, *supra* note 75, at 29. *See also* ACKERMAN, FOUNDATIONS, *supra* note 121, at 88 ("[I]t is the intentions of the People that count, not those of a small number of

hostility excludes popular sovereignty from the Constitution's core principles proves too much. Even if certain Federalist Founders' private motivations for advancing the popular sovereignty component of the Constitution may be suspect, the private motivations of certain Federalist Founders in emphasizing the Constitution's democratic or federalist components are equally suspect. No one could argue that democracy and federalism do not have their respective places among the Constitution's constellation of core principles.

Nor can one argue that popular sovereignty is degraded as a core constitutional principle because, in retrospect, the Constitution does not appear to have been ratified in accordance with popular sovereignty ideals. It is certainly true that many people were excluded from participating in the election of delegates to state ratifying conventions, which, from the modern perspective, contradicts popular sovereignty theory.[315] That modern standards for popular sovereignty may not have been broadly practiced in ratifying the Constitution, however, does not mean that the Constitution does not embrace popular sovereignty theory as one of its core values.[316] Again, no one would argue that democratic elements fall outside the Constitution's constellation of core values. However, in practice the Constitution has not always effectuated the minimum requirements of democratic elections—open and widespread citizen participation in the process of electoral checks. Female citizens did not gain suffrage until 1919,[317] and African Americans were denied equal voting rights until the 1960s.[318] Did this lack of universal suffrage mean that the Constitution did not or does not embrace democracy as one of its core principles? Of course not. It merely means that for much of United States history, practice failed to conform to core constitutional values.

'Framers' who proposed the Constitution or its early amendments.").

315. Beard concludes that less than one-fifth of the population enjoyed the right of suffrage. *See* BEARD, *supra* note 312, at 239-52. On the other hand, Akhil Amar counters that the electorates who chose the delegates to the state ratifying conventions were the broadest and most inclusive in history, and that ratification of the Constitution can accurately be characterized as the largest scale democratic event in the history of the world. Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 FORDHAM L. REV. 1657, 1657 (1997); Amar, *The Supreme Court*, *supra* note 75, at 35-36. Moreover, the evidence suggests that the representatives at the state-ratifying conventions who voted in favor of ratification represented a decisive majority of the electorate.

316. The theory and practice of popular sovereignty are separate phenomena. One may fully embrace popular sovereignty theory even if one's practices do not live up to popular sovereignty ideals. As David Dow has written, "[w]e can say . . . that the framers held an impoverished notion of 'people' without saying, necessarily, that their parochial notion of people belied their commitment to the idea of popular sovereignty." Dow, *supra* note 305, at 11.

317. U.S. CONST. amend. XIX.

318. The Fourteenth Amendment was not enforced to protect the voting rights of blacks until the Civil Rights movement. *See* U.S. CONST. amend. XXIV.

Rather than conclude that anti-democratic practices deleted democracy as a core constitutional value, Americans have sought to bring practices in line with core values. Seven of the Constitution's twenty-seven formal amendments aim to fulfill the Constitution's original promise of democratic values by broadening electoral participation rights.[319] The same reasoning applies to popular sovereignty. Because at the time of ratification only white male property owners participated in the state ratifying conventions and in the selection of delegates to those conventions, the practice of constitutional ratification failed to conform to the ideals of popular sovereignty theory. This stain on the nation's history, however, does not expunge popular sovereignty from the Constitution's constellation of core values.[320]

For better or for worse, popular sovereignty is part of our constitutional system. Partially because many scholars have overlooked popular sovereignty theory as one of the Constitution's core values, however, we do not have readily available answers to the difficult questions posed by the popular sovereignty skeptic. It is admittedly difficult to pinpoint exactly what popular sovereignty entails in practice. At the very least, however, popular sovereignty theory posits We the People (1) as an entity, (2) superior to government, (3) which ratifies constitutional norms. Inescapably, the idea that the People are the font of constitutional norms is deeply rooted in our constitutional tradition.

Yet as unavailable as the popular sovereignty skeptic's route may be, the orthodox view of We the People as the source of *all* constitutional textual norms is equally unrealistic. Unless we are willing to concede the fable that successful navigation of the Article V maze constitutes *ipso facto* ratification by We the People, we are forced to acknowledge that not all constitutional textual norms can honestly and accurately be characterized as creations of We the People. An honest and accurate descriptive characterization of constitutional textual norms requires a proper balance of two realities. On one side, because popular sovereignty belongs among the Constitution's core values, it must make room for the creation of constitutional textual norms by We the People. On the other side, it must also acknowledge the reality that not every constitutional provision and not every constitutional amendment can rightfully claim a legitimate popular sovereignty pedigree. Some

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319. *See* U.S. CONST. amends. XXVI, XXIV, XXIII, XIX, XV, XIV, V; 2 CHESTER JAMES ANTIEAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 29.01 (2d ed. 1997).

320. It may, however, impact our view regarding which constitutional provisions emanate from the popular sovereign and which do not. Thus, it is not unreasonable to argue that recent amendments, ratified by state legislatures, which were elected by broad and inclusive electorates, more legitimately reflect the popular sovereign than the body of the Constitution itself, which was ratified by conventions that did not include women, minorities, and the landless poor.

constitutional textual norms may be characterized as sourced in the popular sovereign. Others are more accurately described as creations of normal government law-making institutions acting pursuant to Article V. In spite of the false positive problems inherent in the Twenty-seventh, Twenty-sixth, Twenty-second, and Eighteenth Amendments, we must not forget the Progressive Era and Civil War Era Amendments. The amendments emerging from these periods probably *can* credibly claim an untarnished popular sovereignty pedigree.[321] Exactly what separates constitutional textual norms sourced in the People from constitutional norms sourced in normal government institutions is a complicated issue not subject to a simple formula. That the two extremes exist, however, is rather evident.

Part of the task of legal scholarship is to develop narratives that legitimize legal norms and the operation of legal systems.[322] In creating legitimizing theories, a few loose ends must be ignored, some outlier data disregarded, and some rough edges smoothed out. The complexities of reality never exactly comport with a reductionist model. Simplification is part and parcel of theory construction.[323] Yet the construction of reductionist legitimizing theories ought not perpetuate reality-defying mythologies. Legal scholars should seek to develop *credible* legitimizing theories, not improbable fables. Popular sovereignty theory serves the important function of legitimizing the constitutional system. The orthodox view that *all* constitutional norms emanate from We the People, however, crosses the line from reductionist legitimizing narrative to fantastic mythology. While the idea that We the People are the font of higher law norms can fit most of the data, the notion that each and every jot of the Constitution emanates from We the People is too absolute and unconditional to be credible.

The dual-source thesis is a credible alternative to the extreme and overwrought orthodoxy. Popular sovereignty theory posits that We the

321. In citing the Civil War and Progressive Era Amendments, I am not endorsing them as necessarily emanating from We the People. Instead, I more narrowly assert that these amendments can make credible claims to a popular sovereignty pedigree. Bruce Ackerman's theory of constitutional moments seeks to ground the Civil War Amendments in a creative process that culminates in popular consent. *See* ACKERMAN, TRANSFORMATIONS, *supra* note 132, at 99-252. James Pope's theory of republican moments seeks to do the same for the Progressive Era Amendments. *See* Pope, *supra* note 293, at 325-29. More generally, at this point I do not take a position on precisely which constitutional amendments were generated by We the People. Instead, I argue that we can identify at least four amendments that are very hard to describe as emanating from We the People under any reasonable set of criteria that might be employed for distinguishing popular sovereign from government institution-generated constitutional norms.

322. Of course, this is not to deny that another equally important role for legal scholarship is, when deserved, to criticize the law.

323. HINICH & MUNGER, *supra* note 31, at 4 ("*[S]implifying assumptions* make[] analysis manageable and help[] us focus on the key components of a phenomenon.").

People are authors of constitutional textual norms. The legitimacy of the Constitution depends upon the idea that it emanates from We the People. Its legitimacy, however, does not require that each and every provision emanate from We the People. A constitutional system based on the idea that some constitutional textual norms are generated by the popular sovereign, while others are generated by ordinary government institutions, is perfectly sustainable, especially if the provisions emanating from the popular sovereign are treated as higher order constitutional norms that trump lower order constitutional norms created by ordinary government.

The best description, or more accurately, the only description consistent with both practical reality and foundational constitutional premises, maintains that We the People create some constitutional textual norms, while ordinary government norm-generating institutions create other constitutional textual norms. Although this description may contradict the orthodox mythology, it is hardly polemic. At the very least, it is less problematic and controvertible than its competing alternatives, the orthodoxy's mythology and the popular sovereignty skeptic's harangue.

V. TREATING POPULAR SOVEREIGN AND GOVERNMENT GENERATED CONSTITUTIONAL NORMS AS DIFFERENT IN KIND

What exactly would embracing the dual-source thesis and rejecting the extant orthodoxy mean for the adjudication of cases involving conflicts between constitutional provisions? As with many of the issues raised in this Article, this question deserves a separate and more complete treatment. At this juncture, however, I submit that embracing the dual-source thesis need not necessarily portend radical change in the constitutional landscape, and I suggest some tentative ideas for implementing the dual-source thesis where constitutional norms irreconcilably conflict.

Return to the RFRA-like amendment example raised in the Introduction.[324] Imagine that, like either the Eighteenth or Twenty-sixth Amendments, the hypothesized RFRA-like constitutional amendment overcomes Article V's hurdles and becomes the Twenty-eighth Amendment to the Constitution, despite the lack of a discernable, deliberated popular consensus sanctioning its ratification by the state legislatures. Embracing the dual-source thesis clearly would *not* mean that such a Twenty-eighth Amendment would be a nullity. Article V unambiguously states that any amendment overcoming its supermajoritarian hurdles "shall be valid to all

324. *See supra* text accompanying notes 4-7.

Intents and Purposes, as Part of this Constitution."[325] The fact that the Twenty-eighth Amendment might emanate from ordinary state legislatures, rather than from We the People, would not affect its status as a legitimate constitutional norm. As a formal matter, Article V manifestly empowers Congress to propose, and the state legislatures to ratify, new constitutional textual norms, with or without a discernable, deliberated popular consensus. The Twenty-eighth Amendment, therefore, would undeniably count as part of the Constitution. Moreover, all other things being equal, whenever some lower order norm—a statute, administrative regulation, or common law rule—would come into conflict with the Twenty-eighth Amendment, the latter would trump the former. Constitutional norms axiomatically trump sub-constitutional norms. Because it has overcome Article V's supermajoritarian hurdles, it deserves to be treated as different in kind and hierarchically superior to ordinary statutes. Yet, because it does not bear the marks of a true popular sovereignty pedigree, it ought not be categorized as the highest form of law. We could call such an amendment a constitutional superstatute.[326]

The real question, however, is the effect of the Twenty-eighth Amendment on other parts of the Constitution. Under the extant orthodoxy, the Twenty-eighth Amendment would trump the conflicting Free Exercise Clause. Acceptance of the dual-source thesis implies a different outcome. Return to the source, hierarchic, categoric, and chronologic meta-norms discussed in Part II. Under the source axiom, legal norms sourced in the same kinds of norm-generating institutions or entities belong to the same legal category, while legal norms sourced in different kinds of norm-generating institutions or entities belong to separate legal categories.[327] Because the orthodoxy supposes that We the People have ratified both the Twenty-eighth Amendment and the Free Exercise Clause, both belong to the category "constitutional textual norms." From the perspective of the dual-source thesis, however, if we assume that the Bill of Rights emanates from We the People, the source axiom demands that the Free Exercise Clause be treated as categorically distinct from the government institution-generated Twenty-

325. U.S. CONST. art. V.

326. Others have used the term superstatute differently. Most recently, William Eskridge and John Ferejohn used the term superstatute to refer to statutes that "successfully penetrate public normative and institutional culture in a deep way." William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215 (2001). Bruce Ackerman has used the term superstatute to refer to amendments that "do not try to revise any of the deeper principles organizing our higher law." ACKERMAN, FOUNDATIONS, *supra* note 121, at 91. My use of the term, in contrast, refers to any amendment that has overcome Article V hurdles, but which nonetheless lacks a popular sovereignty pedigree.

327. *See supra* text accompanying notes 75-81.

eighth Amendment. The former belongs to the legal category "government constitutional norms," while the latter belongs to the legal category "popular constitutional norms." Under the hierarchic axiom, legal categories populated by norms sourced in institutions and entities of comparatively superior democratic legitimacy are hierarchically superior to the legal categories populated by norms sourced in institutions and entities of comparatively inferior democratic legitimacy.[328] A political system built on popular sovereignty, by definition, considers We the People to be the norm-generating entity of highest democratic legitimacy. Legislative bodies, in contrast, are mere agents or "stand-ins" for We the People. If we embrace the dual-source thesis, consistency with the hierarchic axiom, therefore, demands that the legal system treat the popular sovereign-generated Free Exercise Clause as hierarchically superior to the government institution-generated Twenty-eighth Amendment. Finally, under the categoric axiom, whenever a norm belonging to a superordiante legal category irreconcilably conflicts with a norm belonging to a subordinate legal category, the former always unconditionally trumps the latter.[329] Thus, the superordinate Free Exercise Clause would trump the newly minted subordinate Twenty-eighth Amendment.

In short, acceptance of the dual-source thesis means that ratification of our hypothetical Twenty-eighth Amendment would *not* result in a complete or even partial repeal of the Free Exercise Clause. To the contrary, despite the newly minted Twenty-eighth Amendment, the Free Exercise Clause would remain fully intact and unaltered. Under the orthodox approach, because all constitutional textual norms, including all amendments, emanate from We the People, the chronologic axiom would govern any conflict between hierarchically equal constitutional provisions. The Twenty-eighth Amendment, being of more recent vintage, would trump the Free Exercise Clause. In contrast, if we accept the dual-source thesis as more accurately describing the sources of constitutional amendments, the opposite result is reached. Because the Twenty-eighth Amendment and Free Exercsie Clause emanate from different sources, the categoric axiom will govern the conflict. Assuming that the Bill of Rights emanates from We the People, consistency with the categoric axiom requires that the Free Exercise Clause remain completely untouched and unaltered by ratification of the Twenty-eighth Amendment, which lacks a legitimate popular sovereignty pedigree. The categoric axiom, rather than the chronologic axiom, will govern, and the Free

328. *See supra* text accompanying notes 82-85.
329. *See supra* text accompanying note 58.

Exercise Clause will trump a subordinate constitutional provision.[330]

This is a considerable departure from existing practices. For several reasons, however, it is in fact less radical than it might appear at first glance.[331] First, recognizing that constitutional textual norms emanate from

330. At this juncture some may raise the objection that even if some constitutional amendments cannot accurately be described as emanating from We the People, all constitutional amendments nonetheless have the same hierarchical status as the provisions of the Constitution's main body. The objection runs as follows: Some amendments cannot be described as emanating directly from We the People. Article V itself, however, *does* emanate from We the People. By ratifying Article V, We the People delegated to ordinary government institutions the power to create constitutional *amendments*. An amendment, by definition, must work a *change*. An amendment that effects no change is nonsensical. Thus, the RFRA-like amendment, whether or not it reflects a popular consensus, must, as do all constitutional amendments, *change* the Constitution.

The objection, however, is fatally flawed. Even if an amendment must necessarily change the Constitution, Article V does not address the *way* in which amendments change the Constitution. Using my dual-source thesis based approach, the RFRA-like amendment *would* change the Constitution by becoming a new legitimate constitutional textual norm. *See infra* text accompanying notes 354-60. Nothing, however, compels us to find that a new amendment must change the Constitution by altering the contours of some preexisting constitutional provision. In short, even if the word "amendment" in the language of Article V means *change*, it is not necessarily limited to change that overrules, nullifies, reshapes, or in other words, partially or fully destroys some other preexisting constitutional provision. One may amend, change, alter, or modify without destroying. Think of a house. One may change a house by fully or partially tearing down a screened porch and replacing it with a new enclosed wing. This kind of change involves destruction. Some amendments may effect this kind of change. In the alternative, one may change a home by adding rain gutters. The rain gutters do not in anyway destroy a preexisting part of the home. They merely add a new feature. Other amendments, such as the RFRA-like amendment, which lack a popular sovereignty pedigree, will effect this kind of change. In short, there is nothing in the meaning of the word "amendment" that necessarily means destructive nullification or reshaping. An amendment can also be the simple addition of some previously nonexistent element. Moreover, even if the word amendment often means change that involves the destruction of a previously existing feature, to read that meaning into Article V would be a mistake. As discussed above, Article V received very little attention in the ratification process. *See supra* text accompanying note 164. To presume that the drafters or ratifiers debated and decided the particular meaning of the word "amendment," or even that they considered the meaning of the word in such detail, presumes too much. In the end, the meaning of "amendment" in Article V is open to interpretation. Article V simply does not tell us whether the word "amendment" is limited to changes that partially or fully destroy preexisting elements of the Constitution.

331. What about existing amendments? What would acceptance of the dual-source thesis mean for the Twenty-seventh, Twenty-sixth, Twenty-second, and Eighteenth Amendments, all of which apparently lack a solid popular sovereignty pedigree? First, the Eighteenth Amendment has been repealed. *See* U.S. CONST. amend. XXI. Second, the Twenty-seventh, Twenty-sixth, and Twenty-second Amendments add something new to the Constitution. None of them contradict preexisting constitutional provisions. Therefore, acceptance of the dual-source thesis and finding that these amendments emanate not from We the People, but instead from ordinary state legislatures, would have no effect on their validity.

I must candidly admit, however, that amendments such as the Thirteenth (slavery unconstitutional), Fourteenth (equal protection), and Sixteenth (direct taxation without apportionment) present harder questions. *See* U.S. CONST. amends. XIII, XIV, XVI. At this juncture, the reader may rightly wonder whether my thesis will ultimately eviscerate these amendments. More to the point, do these amendments lack a popular sovereignty pedigree, and if so, are they trumped by the preexisting popular sovereign-generated constitutional provisions that they were supposed to nullify? The short answer is no. I believe that ultimately, we can devise a rational and attractive set of principles for

two different sources, and that we therefore have two different kinds of constitutional textual norms, is not all that novel. The effect of embracing the dual-source thesis would be to make the constitutional provisions emanating from We the People harder to amend than those emanating from ordinary government. The former could only be amended by We the People. The latter, in contrast, could be amended either by We the People or by ordinary government via Article V. Though not currently a part of federal constitutional practice in the United States, many nations follow variations on this strategy. The French and German Constitutions, for example, create two tiers of constitutional norms by explicitly making certain provisions unamendable.[332] The Indian constitutional system creates two tiers of constitutional norms by utilizing two separate tracks for the amendment process. Most provisions may be amended by a two-thirds vote of the Parliament, plus the consent of the President.[333] However, for amendments seeking to alter constitutional provisions reflecting fundamental rights, "not less than one-half of the state legislatures must ratify [the amendment]."[334] The Spanish Constitution creates two classes of constitutional provisions, one more firmly entrenched than the other. Most provisions may be amended by the legislatures or, if requested by one-tenth of the legislature, by popular referendum.[335] Certain core provisions regarding democratic principles and certain rights, however, may be amended only by supermajorities of both houses of two consecutive national legislatures.[336] Closer to home, some states have effectively adopted two levels of constitutional norms. California, for example, has effectively created two tiers of constitutional provisions by placing changes in provisions that would amount to a "far-reaching change in [the] governmental framework" beyond the reach of the voter initiative

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distinguishing popular sovereign from government institution-generated amendments. Bruce Ackerman's theory of constitutional moments and James Pope's theory of republican moments, to give two examples, offer ways of categorizing the Civil War Amendments as emanating from the popular sovereign. *See* Ackerman, *supra* note 121, at 99-252. Pope, *supra* note 293, at 305-06. While I take no position on either approach, Ackerman's and Pope's attempts to develop theories for the nonformal popular sanction of constitutional change show that my dual-source thesis does not necessarily spell constitutional chaos. The Thirteenth and Fourteenth Amendments *can* be categorized as emanating from We the People. The challenge going forward will be to devise a set of principles that more honestly and accurately categorizes constitutional provisions than the one-size-fits-all approach of the extant orthodoxy and that will not disrupt well-settled constitutional law. I will take up this challenge in future work.

332. Katz, *supra* note 132, at 265-67.
333. *Id*. at 270.
334. *Id.*
335. *Id*. at 284.
336. *Id.* at 284-85.

amendment process.[337] Embracing the dual-source thesis would simply make the American Constitution one of the many constitutions that create two tiers of constitutional norms by making some provisions harder to amend than others.

Moreover, embracing the idea that not all constitutional textual norms can honestly and accurately be described as emanating from We the People would not be the first time that a myth regarding the sources of constitutional norms has been dismantled. The dual-source thesis merely builds on past learning on the sources of constitutional norms. Post-World War II legal scholars jettisoned the then-orthodox mythology that all constitutional norms, including constitutional doctrine, are sourced in We the People. The orthodox view, as expounded by Alexander Hamilton in *Federalist No. 78*[338] and adopted by Justice Marshall in *Marbury v. Madison*,[339] maintained that constitutional doctrine merely declares We the People's constitutional textual norms. Based on the Hamiltonian-Marshallian view, therefore, judicial review is the popular sovereign speaking though the Supreme Court (rather than the Court speaking with its own voice), which trumps the acts of legislatures and executive branch officials.[340] Nonetheless, post-World War II Supreme Court practice rendered the Hamiltonian-Marshallian view untenable. The Warren Court's increased appetite for judicial review and the Court's propensity to find novel and amplified constitutional rights underscored a theretofore underappreciated reality: While constitutional texts may be sourced in the popular sovereign, doctrinal elaborations are more accurately portrayed as creations of the Supreme Court. Though cognizable even in early stages of American constitutional development, from the 1950s forward the distinction between constitutional textual norms and constitutional doctrinal norms stands front and center in the minds of

337. *Id*. at 281-84 (quoting Raven v. Deukmejian, 801 P.2d 1077, 1080 (Cal. 1990), *reh'g denied* (Feb. 14, 1991)).

338. THE FEDERALIST NO. 78 (Alexander Hamilton).

339. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176, 177 (1803) (stating that "the people have an original right to establish, for their future government, [fundamental] principles," which, when "attached to a written constitution" defeat legislative acts repugnant to it).

340. The Hamiltonian-Marshallian orthodoxy deftly shifted the focus from the democratic legitimacy of the institution responsible for determining constitutionality (electorally legitimized legislatures versus electorally unaccountable courts) to the democratic legitimacy of entities that create the conflicting norms (the People's constitutional norms versus the statutes created by legislatures). It is not so much the unelected third branch's constitutional doctrine that trumps the electorally accountable first branch's statute, but rather the constitutional norms that originate from We the People that trump the statutory norms created by the People's legislative agents. The Supreme Court just happens to be the institution which, by virtue of its adjudicatory function, referees conflicts between the People's constitutional norms and their legislative agents' statutory norms.

constitutional scholars.[341] Against this landscape, embracing the dual-source thesis represents not a break from the past, but rather a continuation of past learning. Whereas post-World War II counter-majoritarian difficulty scholars rejected the idea that *constitutional doctrinal norms* emanate from the popular sovereign, the dual-source thesis furthers the analysis by asserting that not all *constitutional textual norms* emanate from the popular sovereign.

The dual-source thesis also extends recent learning on the sources of constitutional norms. The work of the counter-majoritarian difficulty theorists focused on constitutional doctrine. Recent scholarship, in contrast, has begun to focus on the sources of constitutional amendments and the nature of constitutional change in general.[342] Rather than a bolt from the blue, the dual-source thesis merely pushes ideas developed in this newer body of work in a new direction. Consider Akhil Amar's popular sovereignty-informed reading of Article V. The conventional wisdom views Article V as the exclusive means for creating new constitutional textual norms. Amar, however, argues that Article V merely sets forth the methods by which ordinary government institutions may create new constitutional norms.[343] We

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341. By the 1950s, constitutional scholars, no longer able to swallow the Hamiltonian-Marshallain view that all constitutional norms are creations of the popular sovereign, began to frame judicial review in an anti-democratic light. Under the Hamiltonian-Marshallian orthodoxy, judicial review is We the People (constitutional norms) versus their legislative agents (statutes). That the People should trump their agents is altogether uncontroversial and perfectly compatible with democratic values. Once scholars proclaim that the Supreme Court acts as an author of constitutional doctrinal norms, however, judicial review becomes a question not of the People versus their legislative agents, but rather of the unelected Supreme Court versus the electorally accountable Congress and Chief Executive. Framed in these terms, constitutional scholars began to wonder how a democratic system can countenance such an institutional arrangement. Judge Learned Hand, Herbert Wechsler, Alexander Bickel, and John Ely each struggled to resolve or dissolve what had come to be characterized as the counter-majoritarian difficulty in their own unique way. *See* KAHN, Legitimacy and History, *supra* note 305, at 134-51 (providing an overview of the counter-majoritarian theorists' ideas regarding the legitimacy of judicial review). All, however, explicitly or implicitly recognized that the Supreme Court (as opposed to the popular sovereign alone) operates as a creator of constitutional norms, and that the court's function as a norm-generating institution gives rise to the counter-majoritarian difficulty. *See id.* Scholars today openly confess that although the Constitution's passages may have been ratified by the People, at least where open-textured constitutional passages are involved (e.g., equal protection, substantive due process, and privacy rights), the Supreme Court functions as the immediate author of constitutional doctrinal norms. *See, e.g.*, Strauss, *supra* note 75, at 883, 887 (arguing that Supreme Court precedent is of greater import than constitutional text when deciding cases and that a common law model better describes Supreme Court elaboration of constitutional doctrine than does the idea that constitutional doctrine must be connected to the Framers or popular sovereign). *See also* Amar, *The Supreme* Court, *supra* note 75, at 27 (identifying scholars associated with the "doctrinalist" school of thought, under which Supreme Court-developed constitutional doctrine "displaces" constitutional text).

342. For an overview of this body of scholarship, see RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995).

343. Amar explicitly regards Article V as a process by which government alone can amend the Constitution. *See* Amar, *The Consent of the Governed*, *supra* note 111, at 459 ("[Article V] merely specifies how ordinary Government can amend the Constitution without recurring to the People

the People, in contrast, may amend the Constitution through a national referendum on a proposed constitutional amendment.[344] Amar's Article V interpretation quite openly accepts dual-source-oriented thinking by arguing that constitutional amendments emanate from normal government norm-creating institutions operating through Article V on the one hand, and We the People operating through national referenda on the other hand.[345]

As we have already seen, Bruce Ackerman's much discussed theory of dualist democracy and extra-Article V constitutional amendment also seems to presuppose the dual-source thesis thinking, though in a less explicit way. Ackerman rightly recognizes that formal rules will, by nature, produce false positives.[346] If Article V is considered a formal rule for identifying constitutional textual norms sourced in the popular sovereign (as mentioned previously), in at least some instances, it will erroneously identify some constitutional amendments ratified by the state legislatures as having secured We the People's deliberated sanction. As previously argued, these false positives can only be honestly and accurately described as constitutional textual norms emanating from ordinary government institutions that have malfunctioned as an embodiment of We the People.[347]

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themselves, the true and sovereign source of all lawful power."). *See also* Amar, *Philadelphia Revisited*, *supra* note 163, at 1054 ("Article V makes constitutional amendment by ordinary governmental entities possible and thus eliminates the *necessity* of future appeals to the People themselves."). Recently, however, Amar has implied that We the People, as well as ordinary government, may amend the Constitution via Article V mechanisms. *See* Amar, *The Supreme Court*, *supra* note 75, at 29, 36, 38, 43, 49, 84-85 (referring to several amendments ratified via Article V and referring to the main body of the Constitution as emanating from We the People). Either way, the Amarian interpretation of Article V clearly comprehends that constitutional amendments may emanate from both We the People and ordinary government.

344. *See* Amar, *The Consent of the Governed*, *supra* note 111, at 457 ("We the People of the United States have a legal right to alter our Government—to change our Constitution—via a majoritarian and populist mechanism akin to a national referendum, even though that mechanism is not explicitly specified in Article V.").

345. The Amarian interpretation of Article V resembles the dual-source interpretation of Article V that I advanced for rhetorical purposes in Part IV.B. *See* Amar, *Popular Sovereignty*, *supra* note 163. Amar's reading of Article V has come under serious attack. *See, e.g.*, Dow, *supra* note 305 (arguing the plain meaning of Article V and Constitution's commitment to majority rule); Monaghan, *supra* note 186 (arguing that the Amarian reading of Article V is "historically groundless" and ignores the federalism aspect of Article V and the desire of the Framers to eliminate unmediated direct popular lawmaking); John R. Vile, *Legally Amending the United States Constitution: The Exclusivity of Article V's Mechanisms*, 21 CUMB. L. REV. 271 (1991). The critics, however, seem to assume that there is only one correct reading of Article V—the orthodoxy's reading. In reality, there are several plausible readings of Article V's text and original understandings, and Amar has provided an interpretation of Article V at least as plausible as the orthodox reading. Reasonable minds, however, may conclude that the weight of the evidence does not support the Amarian reading of Article V. Nonetheless, Amar has undeniably gathered a substantial body of evidence to support his unorthodox Article V interpretation.

346. ACKERMAN, FOUNDATIONS, *supra* note 121, at 278-80; ACKERMAN, TRANSFORMATIONS, *supra* note 132, at 28-29.

347. *See supra* text accompanying notes 210, 303-04.

We have also seen how some of Ackerman's most basic premises imply (though probably unintentionally) dual-source-oriented thinking. In constructing his theory of extra-Article V constitutional amendment, Ackerman uses the oscillation of the American body politic between periods of normal and constitutional politics to great effect. He clearly posits that We the People are ratifiers of constitutional textual norms.[348] During periods of constitutional politics, Ackerman claims that We the People ratify amendments via a special four phase extra-Article V process developed during the Founding, Civil War, and New Deal Eras.[349] He also suggests that We the People may ratify new constitutional textual norms through the "classical" Article V system.[350] Ackerman's characterization of We the People in periods of normal politics as apathetic, ignorant, and of limited attention span, however, seems to suggest that during such times, We the People are incapable of ratifying constitutional amendments, not only via the four-phase process, but also via the classical Article V mechanism. As argued earlier, We the People cannot generate a deliberated popular consensus sanctioning new constitutional norms if, for all intents and purposes, We the People are absent from the political stage.[351] Ackerman all but explicitly asserts this argument with his Federalist-inspired notion that in periods of normal politics, government institutions (legislatures) stand in place of, rather than stand for, We the People.[352] As stand-ins state legislatures ratify constitutional amendments in their own name, and on

348. Ackerman describes American politics as alternating between periods of "normal" and "constitutional" politics. ACKERMAN, FOUNDATIONS, *supra* note 121, at 266-94. *See also supra* note 295. During periods of normal politics, the sovereign people pay scant attention to political issues and instead defer to the political choices adopted by their agent government. *See id.* During periods of special "constitutional politics" or "constitutional moments," in contrast, the sovereign people become highly attuned to political issues and take up an active participatory role in shaping the basic rules that define constitutional rights and responsibilities. *See id.* Constitutional norms, however, may be amended during periods of both normal and constitutional politics. *See id.* In periods of normal politics, the Constitution has been amended via formal Article V methodologies. *See id.* In periods of special constitutional politics, however, the People have "ratified" transformative constitutional alterations via creative extra-Article V methods. *Id.* Ackerman identifies the Founding Era, the Civil War Amendments, and the New Deal Era reconceptualization of the Commerce Clause as special constitutional moments resulting in transformative constitutional change. *Id.* at 206-12. In each of these periods, transformative constitutional change followed from a set four-stage pattern, which ultimately culminated in what amounts to informal non-Article V popular ratification of transformative constitutional modification. *Id.* at 266-90.

349. *Id.* at 266-90 (breaking down the extra-Article V amendment process into signaling, proposal, deliberation, and codification phases).

350. ACKERMAN, TRANSFORMATIONS, *supra* note 132, at 15 (stating that under Article V, a proposal by two-thirds of Congress and three-fourths of the state legislatures authorizes constitutional reform in the name of We the People).

351. *See supra* text accompanying notes 295-99.

352. *See supra* text accompanying note 299.

behalf of, rather than as an embodiment of, We the People. In short, crucial Ackermaniacal premises leave little room to conclude that constitutional amendments emanate from We the People in times of ordinary politics. To the contrary, Ackerman's premises suggest that in times of ordinary politics, constitutional amendments are creations of ordinary government.

In short, the dual-source thesis neatly complements the current literature on Article V and the sources of constitutional amendments. The Amarian reading of Article V explicitly embraces the idea that some constitutional amendments are ratified by ordinary government institutions (amendments ratified by Article V), while others are ratified by We the People (via majoritarian referenda). Though less explicit than Amar, Ackerman's premises also seem to imply that both We the People and ordinary government may ratify constitutional amendments. In fairness to Amar and Ackerman, neither has focused directly on the dual-source thesis. Both argue that Article V is not a *necessary* condition to We the People amending the Constitution. The dual-source thesis, in contrast, argues that Article V is not a *sufficient* condition to We the People amending the Constitution. Thus, the dual-source thesis pushes the line traced by Amar and Ackerman in a new direction.

Another important reason that the dual-source thesis ought not be thought too radical is that embracing it need not necessitate a wholesale reconfiguration of the constitutional landscape. One might imagine that treating popular sovereign and government-sourced constitutional textual norms as different in kind and hierarchically ordered would require the federal courts to revisit and revise vast bodies of constitutional law. The degree of change in the constitutional landscape, however, would depend upon exactly which constitutional provisions count as sourced in We the People and which count as sourced in ordinary government institutions. At this point it is unclear exactly where that line should be drawn.

In the first instance, prudential interpretive doctrines could conceivably minimize alterations in the constitutional landscape. For example, the federal courts could apply a rebuttable presumption favoring the categorization of all constitutional clauses ratified pursuant to Article VII or Article V as emanating from We the People.[353] Only compelling evidence that a particular

353. I am assuming that such issues would be justiciable. Current Supreme Court doctrine places questions on the meaning of Article V in the hands of the electorally accountable branches of government. *See* Coleman v. Miller, 307 U.S. 433 (1939). *See also* Dellinger, *supra* note 108, at 386 (criticizing non-justiciability of the meaning of Article V). Even if not justiciable, the political branches could, at least in theory, implement the dual-source thesis. I say in theory, because Congress, which by a two-thirds vote has proposed an amendment, may often have little incentive to later find that the amendment, once ratified, lacks a pure popular sovereignty pedigree.

constitutional textual norm was ratified absent substantial popular deliberation (like the Twenty-seventh Amendment) or contrary to a deliberated popular consensus (like the Twenty-sixth Amendment) would rebut the presumption of a pure popular sovereignty pedigree. By admitting that not all constitutional textual norms can rightfully claim a popular sovereignty pedigree, this approach avoids the Achilles heel of the orthodox mythology—that *all* constitutional amendments emanate from We the People. Moreover, at the practical level, a rebuttable presumption minimizes disruptions in the constitutional landscape by reducing the number of current and future amendments classified as subordinate government-generated constitutional textual norms. I do not necessarily mean to endorse this kind of interpretive presumption for differentiating between popular sovereign and government institution-sourced constitutional textual norms. My point is simply that strategies are available for minimizing the practical impact of embracing the dual-source thesis, and avoiding the reevaluation of vast bodies of settled constitutional case law decided under orthodox assumptions.

Consider yet another reason why embracing the dual-source thesis and its resulting consequences need not necessarily work a wholesale reconfiguration of the extant constitutional landscape. So far I have argued that under a dual-source oriented paradigm, ratification of a RFRA-like Twenty-eighth Amendment lacking a popular sovereignty pedigree would leave the contours of the popular sovereign-generated Free Exercise Clause completely unaltered. The implications of the dual-source thesis for constitutional doctrinal norms, however, are less clear. Recall that a constitutional textual norm, such as the Free Exercise Clause, usually embraces a range of plausible meanings. A valid constitutional doctrinal norm, in contrast, is a particular judicially chosen meaning from within that range.[354] The dual-source thesis implies that a government institution-generated constitutional amendment ought not trump a constitutional provision bearing a valid popular sovereignty pedigree. It is entirely plausible, however, that a government institution-generated constitutional amendment would trump judicially created constitutional doctrine.

In concrete terms, our hypothetical Twenty-eighth Amendment should not trump the Free Exercise Clause textual norm. It may, however, trump the Free Exercise Clause-based doctrinal rule of *Employment Division, Department of Human Resources of Oregon v. Smith*.[355] One reasonable

354. *See supra* text accompanying notes 47-54.

355. 494 U.S. 872 (1990). The Supreme Court uses a rational basis test to articulate Free Exercise Clause-based constitutional doctrine. *See supra* note 4 and accompanying text.

interpretation of the Free Exercise Clause textual norm is that the clause prohibits government action impinging on facially neutral religious practices only when government fails to provide a rational reason for impinging on particular religious practice.[356] This is the doctrinal interpretation adopted in *Smith*. An alternative plausible reading of the Free Exercise Clause is that it prohibits government action impinging on religious practices unless the government provides a compelling reason. This was the doctrinal interpretation maintained prior to *Smith*.[357] Our hypothetical Twenty-eighth Amendment seeks to impose the latter strict scrutiny standard. Because the Amendment lacks a popular sovereignty pedigree, it should neither repeal nor alter the contours of the popular sovereign-sourced Free Exercise Clause textual norm. More precisely, it should not narrow the range of plausible meanings attributable to the Free Exercise Clause and eliminate the rational basis test as one of multiple plausible meanings. On the other hand, the Twenty-eighth Amendment *could* alter the contours of the Court-created constitutional doctrinal interpretation of the Free Exercise Clause. In the same way that Supreme Court-developed doctrine does not alter the range of plausible meanings attributable to a constitutional provision, a government-generated constitutional amendment would not alter the contours of a constitutional provision. Such an amendment would merely select one particular meaning attributable to a preexisting constitutional textual norm, much as the Supreme Court selects one plausible interpretation from a range of plausible meanings attributable to a constitutional textual norm when the Court develops constitutional doctrinal norms.

Constitutional doctrine may be based on a constitutional provision emanating from We the People. Constitutional doctrine itself, however, emanates from the Supreme Court. Constitutional doctrinal norms, in other words, like the hypothetical Twenty-eighth Amendment, lack a valid popular sovereignty pedigree. It is therefore entirely reasonable that a RFRA-like Twenty-eighth Amendment should trump and nullify the Supreme Court-created constitutional doctrinal rule articulated in *Smith*. Though lacking the sanction of a discernable, deliberated popular consensus—a valid popular sovereignty pedigree—our hypothetical Twenty-eighth Amendment *has* gained the assent of two-thirds of Congress and three-fourths of the states.[358]

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356. *See id.* at 876-82.

357. For nearly three decades prior to *Smith*, the Supreme Court used a strict scrutiny analysis of the Free Exercise Clause. *See* Sherbert v. Verner, 374 U.S. 398 (1963); CHEMERINSKY, *supra* note 4, at 1021 ("For the next 27 years [after *Sherbert*], the Court usually purported to apply strict scrutiny to religion clause claims . . . .").

358. However, our hypothetical Twenty-eighth Amendment could neither entirely repeal the Free Exercise Clause nor impose some interpretation falling outside the range of plausible meanings of the

Congress cannot, by passing a statute, overrule a Supreme Court doctrinal interpretation of a constitutional provision.[359] On the other hand, a constitutional superstatute (lacking the sanction of a deliberated popular consensus, but gaining the assent of two-thirds of Congress and three-fourths of the state legislatures) should, perhaps, overrule conflicting Supreme Court-created constitutional doctrine.[360]

As with the interpretive presumption of a popular sovereignty pedigree, I do not necessarily endorse the above-mentioned argument. A separate and thorough exploration of the dual-source thesis's implications on constitutional doctrine will be needed before endorsing such an idea. I raise the issue here, however, merely to reinforce the point that embracing the dual-source thesis does not necessarily imply a far-reaching reconfiguration of the Constitution. It is entirely possible that allowing a constitutional superstatute amendment to trump Supreme Court-created doctrine—but not popular sovereign-generated constitutional textual norms—would minimize any necessary reconfiguration.

Despite the foregoing analysis, many commentators will still object on pragmatic grounds. Many will argue that it is simply too late in our jurisprudential and constitutional history to so abruptly change course. Since the founding of the republic, the federal courts have treated all constitutional provisions as similar in kind, as hierarchically indistinguishable, and as ratified by We the People, regardless of their true origins. Despite any efforts to minimize the effects of such an abrupt change, differentiating between popular sovereign and government institution-created constitutional textual norms would disrupt stable, longstanding practices, and interfere with tradition and continuity.

Admittedly, I advance a counter-intuitive break with traditional practices. In resolving cases in which two constitutional provisions irreconcilably conflict, the federal courts have never treated a sub-class of constitutional

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Free Exercise Clause. Such an amendment would seek to either obliterate or alter the contours of the Free Exercise Clause.

359. *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that Congress may not by statute alter the scope of its Fourteenth Amendment enforcement legislative powers as defined by Supreme Court precedent).

360. Bruce Ackerman has advanced a similar argument in connection with the Twenty-sixth Amendment. *See* ACKERMAN, FOUNDATIONS, *supra* note 121, at 91. Ackerman argues that a superstatute constitutional amendment may overrule Supreme Court-created doctrinal norms. I agree with Ackerman on this point. I, however, am arguing for something beyond Ackerman's point. I am arguing that a superstatute constitutional amendment cannot overrule a popular sovereign-generated constitutional amendment. Although Ackerman has argued that overcoming Article V hurdles is not a necessary condition to a legitimate constitutional amendment, I argue that it also might not be a sufficient condition to legitimate constitutional amendment.

textual norms as different in kind and hierarchically superior to all other constitutional textual norms. Judicial recognition of two categories of constitutional textual norms may entail considerable reconfigurations of the constitutional landscape. Yet despite the pragmatic concern for stability, tradition, and continuity, the legal system ought not ignore the difference between constitutional textual norms emanating from We the People and constitutional textual norms sourced in government institutions. In briefest terms, maintaining the status quo violates foundational meta-norms, and damages the legitimacy of the constitutional system. Prudential concerns for stability, tradition, and continuity ought not triumph over foundational meta-norms and the legitimacy of the constitutional system.

Let me expand this argument a bit further. Treatment of all constitutional textual norms as similar in kind violates the consistency principle meta-norm, the global dictate to treat like cases in a like manner.[361] From Equal Protection Clause reasoning to the rationale of stare decisis, the consistency principle pervades the legal system. Every day, lawyers build arguments and courts decide cases on the principle that a given case is similar to some previously decided case, and therefore should be treated in the same manner as that previously decided case. The rule of law requires consistent adherence to norms even when adherence produces problematic results in particular cases. A legal system that fails to apply norms when their application would give rise to pragmatic problems is not a system governed by rules. In such a system, the "rules" do not determine outcomes, but instead merely serve to prop-up and rationalize outcomes arrived at by pragmatic judgments. By treating constitutional textual norms emanating from different sources as similar in kind, courts fail to treat constitutional textual norms as courts treat norms in general—in accordance with the source, hierarchic, and categoric axioms—and thereby violate the global dictate to treat like cases alike.

Violation of the consistency principle alone, however, cannot override the pragmatic concerns for stability, tradition, and continuity favoring the status quo. Although a failure to treat like cases alike should always raise eyebrows, no legal system could hope for complete consistency. Both the frailties of the human mind and the decentralization of the judicial system render some degree of inconsistency inevitable. Invariably, norms will sometimes be applied in a given set of cases, but will be ignored in another set of essentially indistinguishable cases. Moreover, pragmatic concerns for stability, tradition, and continuity, as opposed to mere inadvertence or error, may often motivate (and even justify) such consistency principle violations.

361. *See supra* text accompanying notes 26-30.

Blindly adhering to the consistency principle, without any consideration for pragmatic concerns, is just as problematic as ignoring the consistency principle whenever adherence would bring about undesirable outcomes. Why then should we seek to eradicate the particular inconsistency that I highlight? Why is inconsistent treatment of constitutional textual norms more distressing than inconsistency in other areas where courts treat like cases in a dissimilar manner?

To begin, treating constitutional textual norms differently violates deeply-ingrained and fundamental meta-norms. The failure to follow rules, or decide cases consistent with extant norms, becomes deeply problematic, even corrosive, when the rules or norms in question are the deeply-ingrained, irrefutable building blocks of our legal system. Undercutting the source, hierarchic, and categoric axioms damages foundations on which the legal system rests. Moreover, ignoring the source, hierarchic, and categoric axioms when dealing with constitutional textual norms undercuts their democratic legitimacy-reinforcing power.[362] To put the matter bluntly, to allow a government-generated amendment to trump a popular sovereign generated constitutional provision is to allow ordinary government to overrule We the People. This violation of the consistency principle strikes at the very core of the popular sovereignty values underlying our constitutional system.[363]

The pragmatic concerns for stability, tradition, and continuity militating in favor of the status quo are considerable. Yet, should the legal system perpetuate a practice that is incompatible with foundational deeply-ingrained, incontrovertable, democracy-reinforcing meta-norms? Should tradition, inertia, and a past failure to perceive the incongruity between those meta-norms and long-standing practices override democracy reinforcing meta-norms? Maintaining the status quo requires the creation of an ad hoc exception to the source, hierarchic, and categoric axioms simply because the principled and consistent approach yields an unsettling, nontraditional, and unorthodox conclusion. Surely, where democracy-reinforcing building block meta-norms are concerned, we must demand more than ad hoc exceptions designed to shoehorn extant practices into axiomatic principles. A premeditated, inconsistent application of norms constituting the legal system's major popular sovereignty premises simply works too much damage to the rule of law. In sum, the argument in favor of the dual-source thesis, and in favor of recognizing two separate classes of constitutional

362. *See supra* text accompanying notes 92-93.

363. This is somewhat ironic, given that the orthodox mythology sourcing all constitutional textual norms in We the People seeks to legitimize the constitutional system. Ultimately, however, a legitimizing theory that is merely a fiction does not serve its legitimizing function.

textual norms, does not grow out of some peculiar fetish for consistency. To the contrary, the consistency principle violation caused by the status quo treatment of all constitutional textual norms as similar in kind, regardless of their true source, is uniquely problematic. Violation of the consistency principle here is particularly disturbing because it allows constitutional provisions generated by ordinary government to trump constitutional provisions emanating from the popular sovereign.

Of course the confection of some principled, rather than merely pragmatic, rationale for treating constitutional textual norms differently than all other norms would provide a convenient way to preserve the practice of treating all constitutional textual norms as similar in kind, and avoid a major violation of the consistency principle. The problem, however, is that no such principled rationale exists, except as a post hoc distinction created specifically for the purpose of propping up the otherwise incongruous classification of all constitutional textual norms that emanate from two distinct sources as similar in kind. After all, under the orthodox mythology locating the source of all constitutional textual norms in We the People, the notion that constitutional norms emanate from a different source than statutory, administrative, or common law norms justifies the separate categorization of constitutional norms separate and apart from the various sub-constitutional norms. If the differences in sources serves to categorically separate constitutional norms from sub-constitutional norms, then on what principled grounds can the legal system ignore source differences when looking at constitutional norms alone?

In the final analysis, government utilizes legal norms as instruments for asserting authority and as warrants for exercising power. Authority and power demand that individuals subsume their will, judgment, best interests, values, and beliefs to that which the authority or power-wielding figure requires, permits, or prohibits. Because authority and power displace individual will, the exercise of authority and power must be justified and legitimized. The authority asserted and the power warranted under an internally inconsistent legal system will treat similar cases in an unlike manner and dissimilar cases alike. Authority and power applied in such an inconsistent manner, especially when the inconsistency involves the application of democracy-reinforcing building block meta-norms, degrades its own legitimacy.[364] While no complex, modern legal system can aspire to

364. My reason for insisting on internal consistency in this area parallels the reason that Jules Coleman has identified for seeking out the internally coherent set of principles underlying tort law. *See* Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349 (1992) (stating that legal norms must be coherent and consistent because they constrain individual liberty).

complete internal consistency, a legal system should at least seek a congruous alignment between its practices and its foundational, democracy-reinforcing meta-norms. At the very least, exposure of the popular sovereignty-eroding practice of treating all constitutional textual norms as sourced in We the People and as similar in kind—a practice which allows government-generated constitutional textual norms to trump constitutional textual norms bearing a valid popular sovereignty pedigree—shifts the burden of persuasion onto those who might advocate maintaining the status quo.

VI. CONCLUSION

To be sure, I have not covered all of the bases. At the very least, however, I have outlined an argument demonstrating that the dual-source thesis better describes the true sources of constitutional textual norms than the orthodoxy. If the dual-source thesis is correct, then consistent application of the source, hierarchic, and categoric axiomatic meta-norms prohibits the repeal of a constitutional provision emanating from the popular sovereign by a newly-minted and conflicting government institution-generated constitutional amendment. Yet many questions remain. First and foremost, what does it mean for constitutional textual norms to emanate from We the People? I have only begun to answer this question with a negative thesis—a constitutional textual norm cannot be characterized as emanating from We the People if We the People never deliberated over the norm, never arrived at a discernable and deliberated consensus, or if the constitutional textual norm contradicts a discernable and deliberated popular consensus. This working thesis is sufficient to question the popular sovereignty pedigree of the Twenty-seventh, Twenty-sixth, Twenty-second, and Eighteenth Amendments. But what about the remaining amendments? What about the clauses in the body of the Constitution? I have assumed herein that the Bill of Rights and main body of the Constitution emanate from We the People. Until we have developed a comprehensive positive theory for separating popular sovereign-generated from government-generated constitutional textual norms, however, we will not be able to turn this assumption into a confident conclusion.

Nothing in the evidence of the original understanding behind Article V sustains the orthodox reading. There is no evidence confirming the idea that Article V provided two mechanisms through which We the People may ratify new constitutional textual norms. There is no evidence demonstrating that the popular constituent convention method of this binary system was intended as a safety valve available when the state legislature route produces a false negative. Moreover, the original understanding of Article VII makes it

unlikely that this could have been the original intent behind Article V. And even if this had been the original intent, the orthodoxy still must confront the possibility of false positives—instances where state legislatures ratify amendments over which We the People have not yet reached a decisive and deliberated choice to create new higher law—which are not, in any way, classifiable as emanating from the popular sovereign.

Does a constitutional amendment alter truly conflicting preexisting constitutional provisions? The conventional response is that such a constitutional amendment would undoubtedly have that effect. This Article, however, argues that such an amendment might *not* have such an effect. So long as we accept the dual-source thesis, this conclusion follows from a consistent application of the source, hierarchic, and categoric meta-norms governing the adjudicating of all cases in which legal norms conflict. Thus, returning to the hypothetical that began this Article, despite ratification by Congress and the state legislatures in compliance with Article V of a RFRA-like amendment, the contours of the Free Exercise Clause might remain completely undisturbed. Of course, this conclusion rests on the convenient assumption that the Free Exercise Clause emanates from We the People, while the RFRA-like Twenty-eighth Amendment does not. The assumption has been useful for the purpose of advancing the dual-source thesis. The next major step, however, involves the more complex world without such simplifying assumptions. To be precise, the next major step involves devising a workable set of principles for separating constitutional provisions emanating from We the People from constitutional provisions emanating from ordinary state legislatures. The easy part—establishing that constitutional textual norms emanate from two sources—is behind us. Ahead lies the real challenge: Precise line drawing between popular sovereign-generated and government institutions-generated constitutional provisions.