PANEL VI: WHAT ARE WE TO DO ABOUT DYSFUNCTION?

CONSTITUTIONAL DISUSE OR DESUETUDE: THE CASE OF ARTICLE V

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Article V of the United States Constitution is in decline and disuse. Studies of comparative formal amendment difficulty, the decelerating pace of Article V amendments, and the relative infrequency of Article V amendments in the

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modern era – the most recent having been ratified roughly one generation ago, and the next-most recent a generation earlier – confirm the impression that Article V's federalist supermajority requirements make the United States Constitution one of the world's most difficult to amend formally. The consequence of formal amendment difficulty has been to reroute political actors pursuing constitutional change from formal to informal amendment. The attendant decline and disuse of Article V as a vehicle for constitutional amendment suggests that Article V may itself have changed informally. In this Article, I explore whether Article V has been informally amended by constitutional desuetude.

INTRODUCTION

It was once considered "settled" that valid constitutional change in the United States occurs exclusively through Article V.[1] This formalist interpretation of the United States Constitution insisted that a constitutional amendment was possible only with the federalist supermajorities entrenched in Article V, which authorizes four general formal amendment procedures.[2] Today, however, formalism has given way to a functionalist interpretation recognizing that the Constitution may change informally without a textual amendment through Article V.[3] Scholars have shown that "non-Article V

[1] *See* Harry Pratt Judson, *The Essentials of a Written Constitution*, *in* IV THE DECENNIAL PUBLICATIONS 313, 320 (1903). Bruce Ackerman argues that the decisive break with the conventional process of formal amendment under Article V occurred in the 1860s when political actors used unconventional strategies to amend the Constitution. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1065-70 (1984). By 1950, a scholar could observe casually that "more constitutional change has resulted from judicial and administrative interpretation, statutory elaboration, and custom and usage than from formal constitutional amendment." Paul J. Scheips, *The Significance and Adoption of Article V of the Constitution*, 26 NOTRE DAME L. REV. 46, 66 (1950).

[2] Article V provides:

> 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.

U.S. CONST. art. V.

[3] *See* Clifton McCleskey, *Along the Midway: Some Thoughts on Democratic Constitution-Amending*, 66 MICH. L. REV. 1001, 1012 (1968) ("Every schoolboy knows that our Constitution is subject to change through informal processes as well as through formal amendment."). Yet whether a constitutional norm becomes entrenched formally or functionally, its effectiveness in regulating behavior "depends on the success of an

means" may amend the Constitution informally with the same binding effect as a formal constitutional amendment.[4] For example, informal amendments may result from "constitutional moments" that spring from institutional conflict and dialogue,[5] "super-statutes" upon which we confer quasi-constitutional status,[6] "constitutional workarounds,"[7] or "constitutional showdowns"[8] that amend the Constitution without altering its text, new constitutional constructions,[9] or authoritative legislative, executive, or judicial constitutional interpretations.[10]

Informal amendment may also occur as a result of constitutional desuetude, as I have recently theorized.[11] Constitutional desuetude occurs when an entrenched constitutional provision loses its binding quality upon political actors as a result of its conscious sustained disuse and public repudiation by preceding political actors.[12] The phenomenon of constitutional desuetude is limited to constitutional democracies with written constitutions, and it both resembles and differs from other forms of informal amendment.[13] Constitutional desuetude is similar because it changes constitutional meaning without altering the constitutional text. Yet it is different because it renders the constitutional text politically invalid though it remains entrenched and unchanged.[14] As I have illustrated with reference to a seven-part framework, constitutional desuetude is distinguishable from other forms of constitutional

underlying sociopolitical commitment to play by the constitutional rules." Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 698 (2011).

[4] Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 37, 54 (Sanford Levinson ed., 1995). *But see* ROBERT JUSTIN LIPKIN, CONSTITUTIONAL REVOLUTIONS 59-60 (2000) (challenging the view that informal amendments are functionally equivalent to formal amendments).

[5] 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 15-26, 409 (1998).

[6] William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1230-31 (2001).

[7] Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1510 (2009).

[8] ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 67 (2010).

[9] KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 3-17 (1999) (observing that constitutional construction seeks "to elaborate a meaning somehow already present in the text, making constitutional meaning more explicit without altering the terms of the text itself").

[10] Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 3, 13 (Douglas Greenberg et al. eds., 1993).

[11] Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMP. L. (forthcoming 2014) (on file with author).

[12] *Id.*

[13] *Id.*

[14] *Id.*

obsolescence, namely atrophy, dormancy, supersession, judicial interpretation, and amendment by convention.[15]

In this article, I apply this seven-part framework for constitutional desuetude to the United States Constitution. I suggest that Article V – which entrenches the rules for formally amending the Constitution – may itself be at risk of informal amendment by constitutional desuetude. I do not conclude that Article V has in fact been informally amended by constitutional desuetude, but I explore the circumstances under which such an amendment could conceivably occur. I also suggest that we should distinguish between successful and unsuccessful uses of Article V; the former are indeed rare and in decline, but the latter now occur more frequently than ever before.

I begin, in Part I, by evaluating the design and disuse of Article V. I analyze the architecture of Article V and explain how it structures formal amendment. I also show why the conventional interpretation of the Equal Suffrage Clause – that it is formally unamendable – appears to be mistaken. Part I also highlights the declining successful uses of Article V but notes that Article V has indeed remained in use, albeit mostly unsuccessfully, since the founding. I nonetheless suggest that Article V is no longer used nor perceived as a vehicle for constitutional change. In Part II, I explore how Article V may have reached its current state of disuse, inquiring whether Article V has been informally amended by any of the notable methods of informal amendment in the United States. I subsequently apply the seven-part framework for constitutional desuetude to Article V and ultimately conclude that Article V has not yet been, though one day could become, informally amended by constitutional desuetude. Part III offers observations about constitutional change in the United States and suggests lines of future inquiry.

I. THE DESIGN AND DISUSE OF ARTICLE V

There have been thousands of Article V proposals since the coming into force of the Constitution in 1789, yet only thirty-three have met its congressional supermajority requirements.[16] Of those, only twenty-seven have been ratified by the state supermajorities needed to entrench a formal amendment textually.[17] The Constitution's last formal amendment was ratified over twenty years ago in 1992,[18] 200 years after James Madison introduced it[19]

[15] *Id.*

[16] Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691, 692 (1996).

[17] *Id.*

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

[19] 1 ANNALS OF CONG. 434 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison) ("But no law varying the compensation last ascertained shall operate before the next ensuing election of Representatives.").

and Congress approved it.[20] The next most serious recent Article V effort was the Equal Rights Amendment, proposed by Congress in 1972[21] but ultimately rejected by the states prior to its expiration date in 1982.[22] At the time, Stephen Carter observed that "[i]n the 1980's, Article V is very nearly a dead letter."[23] The defeat of the Equal Rights Amendment was interpreted as "a signal that Article V will no longer play a meaningful role in the country's constitutional development."[24] Transformative social changes were seen as possible, and perhaps more viable, if pursued instead through channels of informal amendment like judicial interpretation.[25]

A. *The Design of Article V*

Written constitutions commonly entrench one or more formal amendment procedures to modify their text.[26] For example, the German Basic Law entrenches a rule that its text may be amended "only by a law expressly

[20] S. JOURNAL, 1st Cong., 1st Sess. 88 (1789).

[21] H.R.J. Res. 208, 92d Cong. (1972) ("Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. Sec. 3. This amendment shall take effect two years after the date of ratification." (internal quotation marks omitted)).

[22] H.R.J. Res. 638, 95th Cong. (1978). The Equal Rights Amendment had originally been subject to a seven-year expiration date, but Congress later extended the ratification deadline by three years. The procedural steps to extending the Equal Rights Amendment's ratification deadline have been summarized and analyzed. *See* Orrin G. Hatch, *The Equal Rights Amendment Extension: A Critical Analysis*, 2 HARV. J.L. & PUB. POL'Y 19, 19-22 (1979). Two other noteworthy Article V amendment efforts are the balanced budget amendments proposed first in 1981 and next in 1995. *See* H.R.J. Res. 1, 104th Cong. (1995) (adopted by the House of Representatives but rejected by the Senate); S.J. Res. 58, 97th Cong. (1981) (adopted by the Senate but not in the House of Representatives).

[23] Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 842 (1985).

[24] Bruce Ackerman, *Interpreting the Women's Movement*, 94 CALIF. L. REV. 1421, 1436 (2006); *see also* Serena Mayeri, *A New E.R.A. or a New Era? Amendment Advocacy and the Reconstitution of Feminism*, 103 NW. U. L. REV. 1223, 1291 (2009) ("After the ERA's defeat, conventional wisdom held that Article V's prescribed process was no longer a viable path to constitutional change, except perhaps for very specific, technical alterations.").

[25] *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 306-08 (illustrated reprt. 2005). Justice William Brennan favored issuing an opinion that "would have the effect of enacting the Equal Rights Amendment, which had already passed Congress and was pending before the state legislatures. But Brennan was accustomed to having the Court out in front, leading any civil rights movement. There was no reason to wait several years for the states to ratify the amendment." *Id.*

[26] Bjørn Erik Rasch & Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, *in* DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY 319, 325 (Roger D. Congleton & Birgitta Swedenborg eds., 2006) ("Almost all constitutions specify procedures for rewriting or replacing the constitutional text . . . .").

amending or supplementing its text,"[27] and that an amendment may be made only with supermajority approval in both houses of the national legislature.[28] The Basic Law was recently amended in 2009 pursuant to this formal amendment rule when political actors passed a balanced-budget amendment known as the "debt brake" to manage governmental borrowing and structural government deficits.[29] This amendment is properly described as *formal* insofar as it was made pursuant to entrenched textual amendment rules and ultimately inscribed within the Basic Law as a new writing.[30]

1. Formal Amendment Then and Now

The very idea of formal amendment has American roots: "Although many of our political and legal institutions take their origin from English and occasionally Continental conceptions, such is not the case in the fundamental matter of altering the constitution," writes Lester Orfield, emphasizing that "[t]he idea of amending the organic instrument of a state is peculiarly American."[31] One of the earliest formal amendment rules in the modern era appears in the Articles of Confederation, the predecessor to the United States Constitution.[32] Adopted in 1777, the Articles of Confederation entrenched an onerous formal amendment rule requiring both approval from the unicameral national legislature and unanimity among the thirteen states.[33] Formal amendment under this unanimity rule was a "virtual impossibility."[34] The

[27] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBI. I, art. 79(1) (Ger.).

[28] *Id.* art. 79(2) ("Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.").

[29] *See* Achim Truger & Henner Will, *The German "Debt Brake": A Shining Example for European Fiscal Policy?*, *in* DEBATES AND POLICIES: THE EURO AREA IN CRISIS/LA ZONE EURO EN CRISE 155, 158-59 (Catherine Mathieu & Henri Sterdyniak eds., 2013).

[30] *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] arts. 109-110, 104-105, 115, 129-130, 143d.

[31] LESTER BERNHARDT ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 1 (1942).

[32] Scholars debate whether the Articles of Confederation was a constitution or a treaty. *Compare* SANFORD LEVINSON, CONSTITUTIONAL FAITH 130 (1988) (referring to the Articles as "in effect, our first national constitution"), *with* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1446 (1987) (distinguishing the Articles as a confederacy or league of sovereign states). I refer to the Articles of Confederation only to illustrate an early example of a formal amendment rule.

[33] ARTICLES OF CONFEDERATION of 1781, art. XIII ("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 the United States, and be afterward confirmed by the legislatures of every State.").

[34] William A. Platz, *Article Five of the Federal Constitution*, 3 GEO. WASH. L. REV. 17, 18 (1934).

Philadelphia Convention predictably rejected a similar unanimity rule for the United States Constitution.[35] Rather than amending the Articles of Confederation, the Philadelphia Convention chose to reconstitute the United States with a new founding instrument of government in light of the relative ease of adopting a new constitution compared to ratifying an amendment to the Articles.[36] What resulted was a less demanding formal amendment rule in Article V, designed as a response to the difficulty of formally amending the Articles of Confederation.[37]

The United States Constitution today entrenches very challenging formal amendment rules in Article V.[38] Under Article V, the Constitution may be amended in the following ways: (1) two-thirds of both Houses of Congress may propose an amendment, and three-quarters of the states must ratify it in either a legislative vote or a convention, the choice being up to Congress; or (2) two-thirds of the states may call a convention to propose amendments, and three-quarters of the states must ratify it either in a legislative vote or a convention, and again the choice is up to Congress.[39] These procedures – two mechanisms to propose amendments and two to ratify them – generate four methods of formal amendment.[40] Any formal amendment proposal under Article V must clear these procedural hurdles in order to become inscribed in the constitutional text. The simplicity and clarity of Article V's enabling clause allow us to identify when the Constitution has been formally amended: when the two-thirds and three-quarters majorities collaborate to approve and ratify an amendment proposal, that proposal becomes "[v]alid to all Intents and Purposes, as part of this Constitution."[41]

As David Dow has written, "Article V speaks simply."[42] Article V tells us that an amendment becomes valid only if it adheres to the procedures detailed

[35] Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 299-300 & n.159 (1997). At the time of the Constitution's adoption, eight state constitutions provided for their own amendment. William Howard Taft, *Can Ratification of an Amendment to the Constitution Be Made to Depend on a Referendum?*, 29 YALE L.J. 821, 824 (1920).

[36] KEITH L. DOUGHERTY, COLLECTIVE ACTION UNDER THE ARTICLES OF CONFEDERATION 130-31 (2001).

[37] Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 112-13 (1993) ("In fact, the Founders conceived Article V as a remedy to the overly difficult amendment process under the Articles of Confederation.").

[38] Article V is less demanding only insofar as it does not require unanimity. The United States Constitution nonetheless remains one of the world's most difficult constitutions to amend. DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 171 (2006).

[39] U.S. CONST. art. V.

[40] *See* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 459 (1994).

[41] *Id.*

[42] David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*,

in the text of Article V. Those rigid procedures are defined with a level of specificity that distinguishes Article V's language from some of the more open-textured provisions in other parts of the United States Constitution.[43] Yet there is a deeper purpose beneath the architecture of Article V. The Framers brandished Article V to make the case that the Constitution was worth ratifying, even in the face of criticisms that the Constitution as written was not perfect. "'Why,' say they, 'should we adopt an imperfect thing?'," questioned the critics.[44] In response to those objections, the Framers recalled some of the objectives they had set for the United States Constitution: constitutional flexibility and constitutional endurance. George Mason referenced both constitutional flexibility and constitutional endurance at the Philadelphia Convention, cautioning that since the constitutional text the Framers had devised would not be perfect – defects would "probably appear in the new System,"[45] according to Alexander Hamilton – the Framers should create a process that would allow Americans to fix those imperfections.[46]

One of the Framers' objectives was to ensure the document's flexibility and its receptiveness to change. They recognized that they could not conceive of all contingencies that might arise in the life of the Republic; future contingencies were, in the Framers' words, "illimitable in their nature."[47] Elbridge Gerry insisted that "accommodation is absolutely necessary," adding that "defects may be amended by a future convention."[48] But the Framers did not intend flexibility to correspond to extreme ease of amendment. They instead targeted the compromise position between a statutory constitution, which can be revised with ordinary majorities like a statute, and an absolutely entrenched constitution, which cannot be amended: "The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered

76 IOWA L. REV. 1, 29 (1990).

[43] *See, e.g.*, U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); *id.* amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."); *id.* amend. I ("Congress shall make no law respecting an establishment of religion . . . ."); *id.* art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . . .").

[44] THE FEDERALIST NO. 85, at 522 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[45] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 558 (Max Farrand rev. ed., 1911).

[46] 1 *id.* at 202-03 ("Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence.").

[47] THE FEDERALIST NO. 34, *supra* note 44, at 203 (Alexander Hamilton).

[48] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 45, at 519.

faults."[49] The evolution of the United States Constitution has proven itself to be flexible without the relative ease of statutory changeability.

Second, the flexibility of the Constitution also serves an instrumental purpose: to secure its endurance. To a certain point, the more malleable the document, the more likely its survival and continued appeal as the nation's compass in constitutional law and politics; in contrast, the more rigid the document, the more likely it would invite its own defiance as an antiquated relic unable to help resolve social and political conflict.[50] Worse yet, rigidity would risk descending the nation into violence and instability. The threat of violence continued to worry George Washington as he left the presidency. But he saw in Article V the promise for channeling popular sentiment into a structured, rather than unruly, response:

> If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates.—But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the [customary] weapon by which free governments are destroyed.[51]

The design of Article V invites citizens to act through their legislators to request a new constitutional convention, authorizes state legislators to petition Congress for changes to the constitutional framework, and enables Congress itself to propose amendments to the Constitution.[52]

2. Formal Unamendability

Modern constitutions often establish at least two categories of constitutional provisions: the first are amendable pursuant to the formal amendment procedures written in the text of the constitution; the second are absolutely unamendable and therefore impervious to the formal amendment procedures that are otherwise necessary and sufficient to amend the constitutional provisions in the first category. Modern constitutions entrench a variety of

[49] THE FEDERALIST NO. 43, *supra* note 44, at 275 (James Madison).

[50] *See* ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 82 (2009) (observing that "below some threshold, flexibility should clearly enhance constitutional endurance," and that "[f]lexibility can ameliorate pressures for change, forestalling more radical overthrow of constitutional documents").

[51] WASHINGTON IRVING, THE LIFE AND TIMES OF WASHINGTON 780 (New York, G. P. Putnam & Sons 1876) (alteration in original) (footnotes omitted) (quoting President George Washington, Farewell Address (Sept. 19, 1796)).

[52] U.S. CONST. art. V. The Constitution's majoritarian presuppositions may confer upon Americans an unwritten power of simple majoritarian constitutional amendment. *See* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1060 (1988) ("The principles of popular sovereignty underlying our Constitution require that a deliberate majority of the People must be able to amend the Constitution if they so desire.").

constitutional amendment provisions against formal amendment, including rights and liberties;[53] social, cultural, political, or religious principles;[54] national territory;[55] political procedures;[56] and institutional structures or arrangements.[57] Their constitutional designers chose to insulate them against the possibility of formal amendment.

Though a written constitution may entrench formally unamendable provisions, there is reason to doubt whether a written constitution can ever truly be unamendable. Constitutional designers and constitutional reformers might approach the question differently. For constitutional reformers, an

[53] *See, e.g.*, CONSTITUTION OF THE PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA 1989, tit. IV, art. 178 (amended by the constitutional revision of 1996) ("No constitutional revision may infringe on . . . the fundamental freedoms, on the rights of man and of the citizen."); USTAV BOSNE I HERCEGOVINE [CONSTITUTION] art. X(2) (1995) (Bosn. & Herz.) (establishing that no law may abridge the freedoms enumerated in Article II); CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 60 (Braz.) (prohibiting any amendments limiting individual rights and guarantees); CONSTITUTION DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO tit. XVIII, art. 185 (2006) (insisting that no law may alter the democratic structure of the republic); CONSTITUTIA REPUBLICII MOLDOVA tit. VI, art. 142(2) (1994) (barring any revisions restricting the fundamental rights and freedoms of citizens); Конституція України [CONSTITUTION] June 28, 1996, tit. XIII, art. 157 (Ukr.) (prohibiting amendments restricting rights and freedoms).

[54] *See, e.g.*, CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CUBA ch. XV, art. 137 (codification of 1992) (making socialism unamendable); KONSTITUISAUN REPÚBLIKA DEMOKÁTIKA TIMOR-LESTE [CONSTITUTION] pt. VI, tit. II, § 156(1) (2002) (East Timor) (establishing national independence as unamendable); ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] art. 177, 1368 [1989] (Iran) (entrenching official religion against amendment); TÜRKIYE CUMHURIYETI 1982 ANAYASASI [1982 CONSTITUTION] pt. I, art. 4 (1982) (Turk.) (making securalism unamendable).

[55] *See, e.g.*, CONSTITUTION DU BURKINA FASO tit. XV, art. 165 (1991) (making national territory unamendable); CONSTITUTION DU CAMEROON pt. XI, art. 64 (1972) (barring amendment affecting the territorial integrity of the State); LA CONSTITUCIÓN DE LA REPÚBLICA DE GUINEA ECUATORIAL tit. V, art. 134 (2011) (Eq. Guinea) (same); Конститутсияи (Сарқонуни) Ҷумҳурии Тоҷикистон [CONSTITUTION] pt. X, art. 100 (1994) (Taj.) (same).

[56] *See, e.g.*, CONSTITUCIÓN DE LA REPUBLICA DE EL SALVADOR tit. IX, art. 248 (1983) (making presidential term unamendable); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA tit. VII, art. 281 (1985) (same); CONSTITUIÇÃO DE REPÚBLICA PORTUGUESA pt. IV, § II, art. 290(1)(i) (1976) (making political pluralism unamendable); CONSTITUTION DE LA VII RÉPUBLIQUE, Nov. 25, 2010, tit. XII, art. 175 (Niger) (2010) (same); CONSTITUTIA ROMANIEI tit. VII, art. 152 (Rom.) (1991) (same).

[57] *See, e.g.*, 1975 SYNTAGMA [SYN.] [CONSTITUTION] 26, 110 (Greece) (making semi-presidentialism unamendable); UUD 1945, ch. XVI, art. 37, § 5 (Indon.) (1945) (making unitarism unamendable); Art. 139 Costituzione [Cost.] (It.) (making republicanism unamendable); KUWAITI CONST. pt. V, art. 175 (1962) (making the Amiri succession system unamendable).

unamendable constitution lacks the legitimacy of popular consent.[58] As Walter Dellinger argues, "[a]n unamendable constitution, adopted by a generation long since dead, could hardly be viewed as a manifestation of the consent of the governed."[59] Moreover, constitutional reformers would see naiveté in a constitutional design that relies on the force of mere words to protect the constitutional text from amendment or substitution.[60] Even an unamendable constitution cannot survive revolution, observes Jeffrey Goldsworthy,[61] and the rigidity of an unamendable constitution may in fact provoke it, suggests the late Albert Venn Dicey.[62]

Constitutional designers would have to concede that an unamendable constitution is defenseless in the face of popular will to the contrary.[63] Constitutional designers would likewise have to concede that unamendability betrays the self-assurance they have in themselves and the distrust they bare for others.[64] Yet they would defend unamendability as an important, if only symbolic,[65] check on majoritarian democracy.[66] They would point to

[58] Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 120-22 (2008) ("[A]s the degree of entrenchment of a constitutional provision (or its authoritative interpretation by a constitutional court) increases, so too does the difficulty of reconciling the provision (or its interpretation) with democratic principles."); Frank I. Michelman, *Thirteen Easy Pieces*, 93 MICH. L. REV. 1297, 1303 (1995) ("We would not feel we had proper self-government if everything that mattered in our higher law were irrevocably and permanently placed beyond the people's sovereign reach.").

[59] Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 386-87 (1983).

[60] Melissa Schwartzberg, *Should Progressive Constitutionalism Embrace Popular Constitutionalism?*, 72 OHIO ST. L.J. 1295, 1308 n.55 (2011).

[61] JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY 70 (2010) ("Of course, a constitution prohibiting the amendment of some part of it could be overturned by revolution, but the same is true of any constitution.").

[62] A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 66 (Macmillan 8th ed. 1915).

[63] JOHN RAWLS, POLITICAL LIBERALISM 233 (expanded ed. 2005); Amar, *supra* note 40, at 496 n.154.

[64] *See* Sanford Levinson, *The Political Implications of Amending Clauses*, 13 CONST. COMMENT. 107, 112-13 (1996) (referring to proponents of unamendability as "persons who had an inordinate confidence in their own political wisdom coupled perhaps with an equally inordinate lack of confidence in successor generations").

[65] Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 471 (1991).

[66] *See* Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT, *supra* note 4, at 275, 276-79 ("Amendability suggests, to put it crudely, that basic rights are ultimately at the mercy of interest-group politics, if some arbitrary electoral threshold is surpassed and amenders play by the book."); Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 1002 (2011) (comparing unamendability with the Indian basic-structure doctrine, stating that both

Germany's postwar Basic Law, which makes human dignity protections unamendable,[67] as well as France's rejection of monarchy and its corresponding absolute entrenchment of republicanism[68] to illustrate how constitutional designers may deploy unamendability as a preemptive device to prevent the reoccurrence of a problematic past. Yet it would remain an open question whether unamendable provisions actually prevent political actors from doing what their text proscribes.[69]

The architecture of Article V consists of two forms of formal unamendability. One is formal temporary unamendability and the other is constructive unamendability. First, Article V makes two items formally temporarily unamendable: the importation of slaves and census-based taxation.[70] Both were entrenched as immune from formal amendment until the

"seek[] to remove critical features of a democracy from immediate majoritarian pressure").

[67] ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON 17-19 (2013) (pointing to the German Basic Law and several other constitutions that make human dignity unamendable, and observing that such a provision requires interpreting all other constitutional provisions with the purpose of protecting dignity); *see also* Matthias Mahlmann, *The Basic Law at 60: Human Dignity and the Culture of Republicanism*, 11 GERMAN L.J. 9, 10 (2010) ("Nazism still legitimizes the guarantee of human dignity today by the abominable, vivid barbarism of its negation."). The Basic Law holds that "[h]uman dignity shall be inviolable," GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] pt. I, art. 1(1) (Ger.), and expressly designates it as unamendable. *Id.* pt. VII, art. 79(3). One of the ironies of German constitutional history is that one of unamendability's most prominent advocates was Carl Schmitt, *see* CARL SCHMITT, LEGALITY AND LEGITIMACY 51-58 (Jeffrey Seitzer ed. & trans., 2004), a leading apologist for Nazi fascism. WILLIAM E. SCHEUERMAN, CARL SCHMITT: THE END OF LAW 15 (1999).

[68] Claude Klein & András Sajó, *Constitution-Making: Process and Substance*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 419, 439 (Michel Rosenfeld & András Sajó eds., 2012) (discussing the French approach to substantive limitations on formal amendment). The French unamendable constitutional provision read as follows: "The Republican form of the Government cannot be made the subject of a proposed revision. Members of families that have reigned in France are ineligible to the presidency of the Republic." *Law Partially Revising the Constitutional Laws, Aug. 14, 1884*, *in* CONSTITUTIONAL AND ORGANIC LAWS OF FRANCE 168, 168 (Charles F.A. Currier ed. & trans., 1893). The provision was proposed by Jules Ferry, who opposed monarchy and hoped instead to create a stable republic. Nathalie Droin, *Retour sur la loi Constitutionnelle de 1884: Contribution à une Histoire de la Limitation du Pouvoir Constituent Derive*, 80 REVUE FRANÇAISE DU DROIT CONSTITUTIONNEL 725, 740 (2009) (Fr.).

[69] *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 320 (1991) ("Constitutional history is full of eloquent warnings against putting too much faith in legal rules limiting the power of future Americans to redefine the popular will. Nonetheless, entrenching the Bill [of Rights] might make the triumph of a Nazi-like movement more difficult.").

[70] Alongside the Three-Fifths Clause and the Fugitive Slave Clause, these two clauses formed part of the Constitution's institutional infrastructure protecting slavery. Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517, 518-19 (2011).

year 1808. The relevant passage in Article V reads as follows: "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 . . . ."[71] Article I, Section 9, Clause 1 concerns the importation of slaves, and states:

> The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.[72]

Article I, Section 9, Clause 4 concerns census-based taxation: "No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."[73]

To immunize a constitutional provision against formal amendment is to make a statement about its importance to the founding moment or the larger polity. It may also be, as in the case of the Importation Clause, the result of a grand bargain without which a constitution would be impossible.[74] By expressly protecting the slave trade against amendment until the year 1808, Article V entrenches the rule that the slave trade could not be amended "until its own internal time limit ran its course."[75] Article V prohibited restrictions on the importation of slaves until that year, though it did permit a tax levied for each slave imported into the United States.[76] Congress ultimately passed a law prohibiting the slave trade; the law came into force on January 1, 1808, but it did not affect the lawfulness of slavery itself within the United States.[77]

The impetus for entrenching a rule on census-based taxation followed from the Constitution's protection for the slave trade. It was part of the larger constitutional design to make the least possible disturbance for slavery: the Three-Fifths Clause, the Fugitive Slave Clause, the Insurrection Clause, the Domestic Violence Clause, and the Importation Clause making unamendable the slave trade – all of these were specific constitutional protections for slavery.[78] As Jack Balkin has written, "[a]lthough the Constitution made

[71] U.S. CONST. art. V.

[72] *Id.* art. I, § 9, cl. 1.

[73] *Id.* art. I, § 9, cl. 4.

[74] *See* Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1807 n.175 (2006).

[75] Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 19.

[76] Sandra L. Rierson, *The Thirteenth Amendment as a Model for Revolution*, 35 VT. L. REV. 765, 791-92 (2011).

[77] Paul Finkelman, *The American Suppression of the African Slave Trade: Lessons on Legal Change, Social Policy, and Legislation*, 42 AKRON L. REV. 431, 460-63 (2009) (observing that the law did nothing to abolish slavery).

[78] Alexander Tsesis, *Undermining Inalienable Rights: From Dred Scott to the Rehnquist*

oblique references to slavery at several places, the protection of slavery was very much built into its structure."[79] The Census-Based Taxation Clause sprang from the same family tree as the Three-Fifths Clause.[80] Bruce Ackerman explains that the Three-Fifths Clause "grant[ed] the slave states a representational bonus in the House in exchange for their paying an extra three-fifths share of 'direct taxes.'"[81] Census-based taxation and the slave trade were therefore deeply interconnected.

By shielding the Importation and Census-Based Taxation Clauses from formal amendment until the year 1808, Article V disabled itself as to those two clauses for a defined period of time. These two clauses are similar to the formally unamendable provisions we commonly see in modern constitutions, the difference being that they are only temporarily unamendable. There is another difference, explains Jim Fleming: Whereas modern constitutions may entrench unamendable provisions to express their constitutive principles, "Article V entrenched features of the Constitution that were vulnerable to being repealed through democratic procedures, precisely because they manifested such deep compromises with our constitutive principles and ordained such an imperfect Constitution."[82] In the case of the Importation Clause, its temporary entrenchment reflected a compromise between the slave trade and the equality principle.[83]

3. Constructive Unamendability

Constructive unamendability is the second unique design feature of Article V. In contrast to the formal temporary unamendability that characterizes the Importation and Census-Based Taxation Clauses, constructive unamendability refers to a provision that is unamendable despite not being textually entrenched against formal amendment. In one of the leading studies on constitutional unamendability, Melissa Schwartzberg calls this form of unamendability de facto entrenchment and explains that it arises when "amendment is virtually impossible because of exceptionally high procedural barriers to change."[84] I

Court, 39 ARIZ. ST. L.J. 1179, 1198-99 (2007).

[79] J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1707 (1997).

[80] U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other persons.").

[81] Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 12 (1999).

[82] JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY 219 (2006).

[83] *Id.* (observing that the Framers likely struck this balance to "'form a more perfect Union' than the Articles of Confederation" and that this deep compromise was necessary to that end).

[84] MELISSA SCHWARTZBERG, DEMOCRACY AND LEGAL CHANGE 12 (2007).

use the phrase *constructive* unamendability to stress both that a provision is unamendable and that its unamendability derives not from a textual command, but from a political climate that makes it practically unimaginable, though always theoretically possible, to achieve the necessary combination of approval and ratification.

The Equal Suffrage Clause in Article V is an example of a constructively unamendable provision. It guarantees that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."[85] Scholars have mistakenly understood it as an example of a formally unamendable provision.[86] Yet the Equal Suffrage Clause is not absolutely entrenched against formal amendment because it does not disable the amendment rule.[87] The reason why appears in the Equal Suffrage Clause's own terms: "No State, *without its Consent*, shall be deprived of its equal Suffrage in the Senate."[88] Article V does not expressly forbid a formal amendment to a state's relative voting power in the Senate; on the contrary, it contemplates that possibility when it declares that a state may be deprived of its equal voting power in the Senate where that state waives its right to equal suffrage.[89] The Equal Suffrage Clause therefore implies an exception to itself: If a state grants its consent, that state may constitutionally

[85] U.S. CONST. art. V.

[86] *See, e.g.*, Raoul Berger, *New Theories of "Interpretation": The Activist Flight from the Constitution*, 47 OHIO ST. L.J. 1, 6 (1986) (stating that the Equal Suffrage Clause was "expressly excepted from the sweep of the amendment power"); Douglas H. Bryant, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 562 (2002) (concluding that it "may not be altered and is forever a part of the Constitution"); Levinson, *supra* note 3, at 697 n.128 (describing it as "explicitly unamendable"); Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1681 (2002) (characterizing it as "entrenched . . . against subsequent amendment").

[87] The drafting history of the Equal Suffrage Clause at the Philadelphia Convention reveals that Roger Sherman appears to have been the first to propose protecting the equality of state suffrage in the Senate. On September 15, 1787, he proposed exempting both the importation of slaves and equal state suffrage from the rules of Article V, effectively making them formally unamendable. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 45, at 629. When Sherman moved to vote on his proposal, it took the following language: "[T]hat no State shall without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate." *Id.* at 630. His proposal was defeated by a margin of eight to three. *Id.* Gouverneur Morris later proposed a similar text without reference to the "internal police" power of states, providing "that no State, without its consent shall be deprived of its equal suffrage in the Senate." *Id.* at 631. This formulation was adopted without debate or opposition. *Id.* The Philadelphia Convention therefore resisted conferring upon states the unamendable power to choose whether to import slaves beyond 1808, but agreed to entrench against amendment a state's choice to diminish its own representation in the Senate.

[88] U.S. CONST. art. V (emphasis added).

[89] Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229, 291 (2005).

be deprived of its equal voting power in the Senate.[90] Though it may be theoretically possible to amend the Equal Suffrage Clause,[91] it is unamendable as a matter of political reality because no state would consent to diminished representation in the Senate, hence the constructive unamendability of the Clause.

The Equal Suffrage Clause has federalist origins. Madison explained that it was designed "as a palladium to the residuary sovereignty of the States,"[92] many of which were understandably wary of entering into a new compact that would eviscerate the existing Articles of Confederation.[93] The States had been dominant under the Articles, and the new United States Constitution would shift the locus of power from the states to the new national government.[94] The Senate was the answer proffered by the Convention to reassure the states. As Bradford Clark writes, "under the compromise reached at the Constitutional Convention, the states' representatives agreed to the supremacy of federal law (and the corresponding displacement of state law) only on the condition that the Senate (structured to represent the states) would have the opportunity to veto all forms of supreme federal law."[95] The states' power in this respect manifests itself in the Senate's status as the only national institution given a role in promulgating all three forms of federal law identified in the Supremacy Clause.[96] Douglas Smith describes the Equal Suffrage Clause as a "constitutional essential,"[97] without which the Philadelphia Convention would not have reached agreement on the new constitution.

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[90] Levinson, *supra* note 64, at 122.

[91] Miriam Galston, *Theocracy in America: Should Core First Amendment Values Be Permanent?*, 37 HASTINGS CONST. L.Q. 65, 107 (2009) (observing that Article V does not contain any truly unamendable provisions).

[92] THE FEDERALIST NO. 43, *supra* note 44, at 275 (James Madison).

[93] *See* Richard C. Schragger, *Decentralization and Development*, 96 VA. L. REV. 1837, 1849-50 (2010) ("But to the Anti-Federalists the new Constitution was dramatically centralizing. The new United States had overthrown a king . . . and its respective states were jealous of their own prerogatives and worried about regional domination.").

[94] *See* Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891, 892 (1990) ("The government ultimately created by the Articles of Confederation amounted to a loose confederation of states that derived its authority from acceptance of the principles of the confederation by the state legislatures through ratification."); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 307-09 (1987) ("Opposition to the Constitution's adoption was rooted in a deep fear of national power.").

[95] Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1605-06 (2007).

[96] Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CALIF. L. REV. 699, 702-03 (2008) ("The Senate is the only federal institution that the Constitution requires to participate in the adoption of all three forms of federal law recognized by the Supremacy Clause.").

[97] Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of*

Article V was designed in large part to protect states from the self-aggrandizing designs of the federal government. Each of Article V's mechanisms for amending the Constitution ensures that states will have the capacity to protect themselves and their interests against the national government. In the first two methods of amendment – two-thirds of each House of Congress proposes amendments for ratification by three-quarters of the states – states are protected because they must grant their approval to a congressional proposal to amend the Constitution. In the second pair of methods of amendment – the convention-centric mode of amendment – states are protected because they are the ones which not only initiate the process of amendment but moreover give the amendment proposals final sanction or disapproval.

Article V's protection for states also takes the form of disabling Congress. The language of Article V's amendment mechanism is "peremptory," argued Alexander Hamilton, observing that it leaves Congress no discretion on whether to convene a constitutional convention when so demanded by the requisite number of state legislatures: "[T]he national rulers, whenever nine states concur, will have no option upon the subject. . . . The words of this article are peremptory. The congress '*shall* call a convention.' Nothing in this particular is left to the discretion of that body."[98] Hamilton pointed to Article V itself in order to assuage the concerns of states that their interests would be overridden by the national government: "We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority."[99] Article V was therefore meant to be what Brannon Denning describes as a "federalism-reinforcing" barrier to constitutional change.[100] This assured that no amendment would come to pass without something close to consensus across the nation.[101]

B. *The Disuse of Article V*

The pace of formal amendment in the United States is decelerating. Article V remains invoked by political actors but its successful use has declined since its entrenchment. Of the twenty-seven formal amendments inscribed in the text of the Constitution since its ratification in 1789, fifteen were ratified from the founding through 1870.[102] The first ten, the Bill of Rights, were ratified in the

Confederation and the Constitution, 34 SAN DIEGO L. REV. 249, 322 (1997).

[98] THE FEDERALIST NO. 85, *supra* note 44, at 525 (Alexander Hamilton).

[99] *Id.* at 525-26.

[100] Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155, 178 (1997).

[101] RICHARD B. BERNSTEIN, AMENDING AMERICA 15 (1993).

[102] *See* U.S. CONST. amend. XV (1870); *id.* amend. XIV (1868); *id.* amend. XIII (1865); *id.* amend. XII (1804); *id.* amend. XI (1795); *id.* amend. X (1791); *id.* amend. IX (1791); *id.* amend. VIII (1791); *id.* amend. VII (1791); *id.* amend. VI (1791); *id.* amend. V (1791); *id.* amend. IV (1791); *id.* amend. III (1791); *id.* amend. II (1791); *id.* amend. I (1791).

same year, 1791.[103] From 1871 through 1933, there were six formal amendments.[104] From 1934 through 1967, there were four formal amendments.[105] From 1968 through 1991, there was only one formal amendment.[106] And since 1992, over twenty years ago, there has likewise been only one formal amendment.[107] Article V has in fact become so infrequently used that Article V amendments have even been described as irrelevant.[108]

In addition to the decelerating pace of formal amendment, the content of formal amendment has changed as well. As John Vile observes, "[m]ost amendments ratified over the course of the last sixty years have dealt with minor structural features of the Constitution or with voting rights."[109] András Sajó agrees, observing that since the Reconstruction Amendments, "amendments have been concerned with the technique of government," with the exception of the Prohibition Amendment, which was an effort to entrench morality.[110] The changing orientation of successful uses of Article V compelled Robert Dixon, writing in 1968, to refer to Article V as the "comatose article of our living constitution."[111] Whether it is dead or comatose can be answered by asking whether Article V has fallen into either disuse or desuetude. But first let us recognize that the declining use of Article V is attributable to its difficulty.

1. The Difficulty of Article V

"Nothing is 'easy,'" writes Henry Paul Monaghan, "about the processes prescribed by Article V."[112] Scholars today describe the requirements of

[103] The promise of a Bill of Rights was effectively a condition precedent to the ratification of the United States Constitution. George D. Skinner, *Intrinsic Limitations on the Power of Constitutional Amendment*, 18 MICH. L. REV. 213, 215 (1920). The declared purpose of the Bill of Rights was to recognize and protect fundamental rights, both enumerated and unenumerated. *See* Selden Bacon, *How the Tenth Amendment Affected the Fifth Article of the Constitution*, 16 VA. L. REV. 771, 776 (1930).

[104] *See* U.S. CONST. amend. XXI (1933); *id.* amend. XX (1933); *id.* amend. XIX (1920); *id.* amend. XVIII (1919); *id.* amend. XVII (1913); *id.* amend. XVI (1913).

[105] *See id.* amend. XXV (1967); *id.* amend. XXIV (1964); *id.* amend. XXIII (1961); *id.* amend. XXII (1951).

[106] *Id.* amend. XXVI (1971).

[107] *Id.* amend. XXVII (1992).

[108] David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1459-60 (2001) ("It is only a slight exaggeration to say that [informal amendment processes] are the only means of change we have.").

[109] JOHN R. VILE, REWRITING THE UNITED STATES CONSTITUTION: AN EXAMINATION OF PROPOSALS FROM RECONSTRUCTION TO THE PRESENT 7 (1991).

[110] ANDRÁS SAJÓ, LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM 42 (1999).

[111] Robert G. Dixon, Jr., *Article V: The Comatose Article of Our Living Constitution?*, 66 MICH. L. REV. 931, 931 (1968).

[112] Henry Paul Monaghan, *We the People[s], Original Understanding, and*

Article V as practically impossible to meet.[113] For instance, Bruce Ackerman views Article V as establishing a "formidable obstacle course."[114] Sanford Levinson argues that "Article V, practically speaking, brings us all too close to the Lockean dream (or nightmare) of changeless stasis,"[115] and that it is "the

Constitutional Amendment, 96 COLUM. L. REV. 121, 144 (1996).

[113] *See, e.g.*, Jack M. Balkin, *Sanford Levinson's Second Thoughts About Our Constitutional Faith*, 48 TULSA L. REV. 169, 171 (2012) (stating that the amendment procedures of Article V pose "almost insurmountable obstacles to constitutional revision"); Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 682 (2009) (stating that Article V "makes it almost impossible to amend the Constitution"); Joel I. Colón-Ríos, *De-Constitutionalizing Democracy*, 47 CAL. W. L. REV. 41, 48-49 n.31 (2010) (stating that the amendment procedure contained in Article V "establishes requirements that are so difficult to meet . . . that it makes constitutional amendments almost impossible" (citing SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 95 (2006))); Joel Colón-Ríos & Allan C. Hutchinson, *Democracy and Revolution: An Enduring Relationship?*, 89 DENV. U. L. REV. 593, 602 (2012) (describing Article V as "one of the most demanding constitutional amendment processes in the world"); Eric S. Fish, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1234 (2012) ("During the last century, the Article V amendment process has ceased to be an engine of significant change."); Sanford Levinson, *How I Lost My Constitutional Faith*, 71 MD. L. REV. 956, 969 (2012) ("By making it functionally impossible to amend the Constitution with regard to anything controversial, Article V stultifies, indeed infantilizes, our policies both directly and indirectly."); Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859, 874 (2007) (stating that Article V makes amendment "almost impossible by the difficulties placed in its path"); Sanford Levinson, *Still Complacent After All These Years: Some Rumination on the Continuing Need for a "New Political Science,"* 89 B.U. L. REV. 409, 422 (2009) ("Article V makes amendment extraordinarily difficult if not functionally impossible."); Landon Wade Magnusson, *Article V Versus Article 89: Why the U.S. Does Not Overturn Supreme Court Rulings Through Amendment*, 62 SYRACUSE L. REV. 75, 115 (2012) (referring to the difficulty of the Article V process); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1975 (2011) (referring to the academic notion that "the Constitution is very old and almost impossible to amend"); Justin Pidot, *Jurisdictional Procedure*, 54 WM. & MARY L. REV. 1, 29 (2012) ("Article V imposes such high hurdles to constitutional amendment that it places this approach beyond practical reality."); Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 211 (2008) ("My own inclination is to regard the possibility of formal constitutional amendment as generally remote."); Garrick B. Pursley, *Defeasible Federalism*, 63 ALA. L. REV. 801, 865 (2012) ("There is fairly broad consensus today that Article V's process is too onerous to provide for sufficient adaptability."); Ilya Somin & Sanford Levinson, *Democracy, Political Ignorance, and Constitutional Reform*, 157 U. PA. L. REV. ONLINE 239, 243-44 (2008), http://www.pennlawreview.com/online/157-U-Pa-L-Rev-PENNumbra-239.pdf, *archived at* http://perma.cc/5YSD-LWHC (stating that the requirements of Article V make it "almost impossible to enact any major amendment").

[114] Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1077 (2004).

[115] LEVINSON, *supra* note 113, at 21.

Constitution's most truly egregious feature."[116] Rosalind Dixon has described the "virtual impossibility of formal amendment to the Constitution under Article V."[117] Jeffrey Goldsworthy observes that "the supermajoritarian requirements of Article V are so onerous as to be arguably undemocratic, by making it much too easy for minorities to veto constitutional amendments."[118] Vik Amar explains that Article V establishes "particular and cumbersome processes."[119] And Richard Fallon laments that "[e]ven under the best of circumstances, the requirement that three-fourths of the states must ratify constitutional amendments makes it nearly impossible to achieve significant change in our written Constitution through the Article V process."[120] Article V, in short, is seen as a dead end.

This is not a new perspective on the difficulty of successfully using Article V. Writing in 1885, Woodrow Wilson decried the "cumbrous machinery of formal amendment erected by Article Five."[121] Even earlier, at the adoption of the Constitution, John DeWitt doubted whether it would ever be possible to amend the Constitution using Article V: "[W]ho is there to be found among us, who can seriously assert, that this Constitution, after ratification and being practiced upon, will be so easy of alteration?"[122] DeWitt believed states would have views too different to meet Article V's required supermajority threshold:

> Where is the probability that three fourths of the States in that Convention, or three fourths of the Legislatures of the different States, whose interests differ scarcely in nothing short of every thing, will be so very ready or willing materially to change any part of this System, which shall be to the emolument of an individual State only?[123]

The answer, he predicted, was that formal amendment would be rare.

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[116] Sanford Levinson, *Meliorism v. "Bomb-Throwing" as Techniques of Reform*, 48 TULSA L. REV. 477, 491 (2013).

[117] Rosalind Dixon, *Updating Constitutional Rules*, 2009 SUP. CT. REV. 319, 319.

[118] Jeffrey Goldsworthy, *Constitutional Cultures, Democracy, and Unwritten Principles*, 2012 U. ILL. L. REV. 683, 694. As Henry Taft has written, however, Article V deliberately "render[ed] the wishes of the one-fourth nugatory," and was "based on high governmental efficiency and embodies a concession made by all the states and their people in order to secure the benefits of the union." Henry W. Taft, *Amendment of the Federal Constitution: Is the Power Conferred by Article V Limited by the Tenth Amendment?*, 16 VA. L. REV. 647, 649 (1930).

[119] Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037, 1043 (2000).

[120] Richard H. Fallon, Jr., *American Constitutionalism, Almost (But Not Quite) Version 2.0*, 65 ME. L. REV. 77, 92 (2012).

[121] WOODROW WILSON, CONGRESSIONAL GOVERNMENT 242 (1901).

[122] JOHN DEWITT, ESSAYS I AND II (1787), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 189, 195 (Ralph Ketcham ed., 2003).

[123] *Id.*

The structure of Article V partly explains its difficulty. Yet the difficulty of Article V is not the result of an intentional design to prevent democratic corrections to the constitutional text. It derives instead from the desire of states to protect their own provincial interests. As Charles Merriam writes, "[t]hat the Constitution was made difficult to amend was not due to the desire to prevent democratic change, but to the jealousy of the states, who feared the conditions they had exacted in a series of painful compromises might be swept away by a bare majority of their sister states, if unchecked by a requirement of an extraordinary majority."[124] For this reason, Patrick Henry saw Article V as more rigid than flexible, calling it "miraculous" that a supermajority of states would ever agree to ratify proposed amendments.[125] Henry, an opponent of ratification,[126] made it clear how he felt about the prospect of ever using Article V if the Constitution were ratified: "The way to amendment, is, in my conception, shut."[127] For him, the balance that Madison saw in Article V was erroneous, illusory, imagined, or some combination of these.

Today, Article V's state supermajority ratification threshold has become functionally even more difficult to achieve as a result of the expansion of the Union. As Rosalind Dixon explains, the increased number of states – from thirteen in 1789 to fifty since 1967 – has changed the denominator for Article V, which has increased the Constitution's amendment difficulty.[128] Dixon explains: "All else being equal, this change in the denominator for Article V has implied a directly proportionate increase in the difficulty of ratifying proposed amendments."[129] Dixon furthermore observes that today's fifty-state denominator under Article V would be equivalent to a founding-era state supermajority ratification threshold lower than two-thirds: "On one calculation, if one were to try to adjust for this change in the denominator for Article V, the *functional* equivalent to the 75% super-majority requirement adopted by the framers would in fact now be as low as 62%."[130] Thomas Jefferson predicted this denominator problem, in 1823, when he wrote:

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[124] CHARLES EDWARD MERRIAM, THE WRITTEN CONSTITUTION AND THE UNWRITTEN ATTITUDE 6-7 (1931).

[125] Patrick Henry, Address at the Virginia Ratifying Convention (June 5, 1788), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 122, at 199, 204.

[126] Sanford Levinson, *"Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment*, 21 TEX. TECH. L. REV. 2443, 2447 (1990) (stating that Patrick Henry was a "chief adversary of the new Constitution" and focused on the "difficulty of amendment as a reason for rejecting the entire document").

[127] Henry, *supra* note 125, at 203.

[128] Rosalind Dixon, *Partial Constitutional Amendments*, 13 U. PA. J. CONST. L. 643, 653 (2011).

[129] *Id.*

[130] *Id.*

> [T]he States are now so numerous that I despair of ever seeing another amendment to the Constitution, although the innovations of time will certainly call, and now already call, for some, and especially the smaller States are so numerous as to render desperate every hope of obtaining a sufficient number of them in favor of "Phocion's" proposition.[131]

The Constitution's amendment difficulty therefore derives partly from Article V's structure.

Political parties and increased political polarization may have exacerbated the difficulty of Article V. As American political parties have become nearly evenly divided across both the federal and state governments over the last two generations, writes David Kyvig, "divisions within society together with the requirements of Article V frustrated every attempt to bring about fundamental change."[132] Kyvig adds that the close balance between political parties and among the forces of federalism alongside the "centripetal power of the federal government and the centrifugal strength of the states" have combined to inhibit agreement on formal amendment.[133] Daryl Levinson and Rick Pildes observe that political parties in the United States "today are both more internally ideologically coherent and more sharply polarized than at any time since the turn of the twentieth century."[134] Rick Pildes connects the onset of today's hyperpolarized politics to the adoption of the Voting Rights Act of 1965:

> [T]his polarization reflects the deep structural and historical transformation in American democracy unleashed in 1965 by the enactment of the VRA. That moment began the process of ideologically realigning the political parties and of purifying them, so that both parties are far more ideologically coherent, and differentiated from each other, than at any time in many generations. The culmination of that historical transformation – which can be seen as the maturation or full realization of American democracy – is today's hyperpolarized partisan politics.[135]

Pildes concludes that "[t]he reality is that the era of highly polarized, partisan politics will endure for some time to come."[136] This only complicates an already difficult formal amendment process that relies on strong supermajorities across both the federal and state institutions. Nevertheless, as Christopher Eisgruber cautions, measuring amendment difficulty is itself difficult because amendment difficulty turns "upon a number of cultural

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[131] Letter from Thomas Jefferson to George Hay (Aug. 1823), *in* 1 THE JEFFERSON CYCLOPEDIA 715 (John P. Foley ed., 1900).

[132] DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995, at 426 (1996).

[133] *Id.*

[134] Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2333 (2006).

[135] Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 332-33 (2011).

[136] *Id.* at 333.

considerations, such as the extent to which state politics differ from national politics and the extent to which people are receptive to or skeptical about the general idea of constitutional amendment."[137] The difficulty of measuring amendment difficulty has not discouraged scholars from comparing amendment difficulty across nations. In such measures, the United States has ranked among the most difficult to amend.[138]

2. The Consequences of Formal Amendment Difficulty

The consequence of the difficulty of Article V has been to reroute political actors pursuing constitutional change from formal to informal amendment. Today, the battleground for constitutional change is what Bruce Ackerman calls a "transformative appointment[] to the Supreme Court."[139] Ackerman explains that Article V's formal model of dual federalism, requiring assent from both national and state institutions, has been replaced by a new informal method of constitutional change that relies on the assent of only national institutions.[140] The Electoral College selects the President in a national election, which in turn authorizes the President's use of the appointment power to trigger a "decisive break with the constitutional achievements of the past generation."[141] The United States Senate then debates the merits of the President's Supreme Court nominee.[142] And the Supreme Court subsequently either adopts or rejects an informal constitutional amendment intended to change the Constitution fundamentally.[143] This new model of informal amendment codifies constitutional change in "transformative judicial opinions that self-consciously repudiate preexisting doctrinal premises and announce new principles that redefine the American people's constitutional identity,"[144] rather than in a formal written change to the constitutional text.

The difficulty of formally amending the Constitution has accordingly pushed "a significant amount of constitutional change off the books,"[145] and forced political actors to update the Constitution informally through non-

[137] CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 22 (2001).

[138] *See, e.g.*, AREND LIJPHART, PATTERNS OF DEMOCRACY 220-22 (1999) (demonstrating that Article V makes the United States Constitution one of the world's most difficult to amend formally); LUTZ, *supra* note 38, at 171.

[139] Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 165 (1988).

[140] *Id.* at 1171 (distinguishing formal amendment from transformative appointments on the basis of the consent of only national institutions needed in the latter).

[141] *Id.* at 1173.

[142] *Id.* at 1172.

[143] *Id.*

[144] *Id.* at 1173.

[145] Stephen M. Griffin, *The Nominee Is . . . Article V*, 12 CONST. COMMENT. 171, 172 (1995).

Article V methods,[146] leaving the actual constitutional text unchanged. As Lawrence Church observes, the amendment procedures under Article V are "too cumbersome and erratic to serve as the sole vehicle for constitutional development in a complex and rapidly changing society."[147] There are several other more flexible modes of constitutional change that do not rely on the mechanistic procedures of Article V in order to keep the constitutional regime current and reflective of new social and political equilibria. They result in unwritten changes to the Constitution that may be as constraining as a formal amendment.

That the United States Constitution is both written and unwritten is therefore now uncontroversial.[148] The Constitution is "much more, and much richer, than the written document."[149] Though we cannot deny the importance of the constitutional text, it "is only one component of the country's actual constitution."[150] The written constitution cannot completely reduce to writing the principles of natural rights that form our higher law and against which we judge the moral legitimacy of our positive law.[151] Nor can it reflect the political forces, democratic traditions, and judicial precedent that constitute the Constitution.[152] Whether something is *constitutional* therefore depends less on where or whether it is codified than whether political actors perceive it as politically legitimate and conform their conduct to it.[153]

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[146] Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 618-19 (2008) (explaining that Article V's stringency is a possible explanation for "creative judicial 'interpretation' of the text" and other non–Article V methods of establishing supreme law).

[147] W. Lawrence Church, *History and the Constitutional Role of Courts*, 1990 WIS. L. REV. 1071, 1078.

[148] *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012); LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION (2008).

[149] David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 934 (1996).

[150] John Harrison, *Enumerated Federal Power and the Necessary and Proper Clause*, 78 U. CHI. L. REV. 1101, 1127 (2011).

[151] Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 715-16 (1975) (observing that while an essential element of American constitutional law is the reduction to written form of natural rights, the Framers generally recognized that "written constitutions could not completely codify the higher law").

[152] Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991, 996 (2009) (asserting that the bulk of the nation's constitutional law is established by "political forces, tradition, and judicial precedent").

[153] John Gardner, *Can There Be a Written Constitution?*, *in* 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 162, 170 (Leslie Green et al. eds., 2011) (positing that whether a law is part of the Constitution is determined by how it is received by its users, including the courts and other law-applying officials).

No single branch of government can make an informal amendment on its own; other branches or institutions must either participate directly or acquiesce.[154] We may therefore understand the concept of informal amendment by judicial interpretation as an informal amendment initiated by the judiciary and ratified by other branches through acquiescence or approval. For instance, the ratification may occur when the other branches decide not to override the judicial interpretation with a formal amendment to the Constitution. It may also occur where an effort to amend formally the informal amendment fails to achieve the necessary majorities. Bruce Ackerman's study of informal amendment demonstrates how informal amendment in the United States may occur through sustained institutional interactions among the judiciary, the legislature, the executive branch, and the public in a five-stage process in which a constitutional impasse between political institutions is presented to the people in recurring elections, after which one or more of the formerly resistant institutions concedes defeat in the face of popular choice.[155]

Yet that informal amendment occurs does not make it legitimate. Whether informal amendment enjoys legitimacy is arguable,[156] and depends upon our understanding of legitimacy, whether sociological, moral, or legal.[157] Informal amendment may also entail risks, namely its capacity to undermine the constitutional text, its overreliance on courts, as well as its potentially injurious effect on constitutional dialogue.[158] Relatedly, although informal amendment by judicial interpretation may be the least complicated method of amendment, a constitutional community may be better off amending its constitution through the formal amendment process, even if the court's interpretation would lead to the same result.[159] The public debate and participation that would follow from

[154] WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 18 n.51 (2007).

[155] ACKERMAN, *supra* note 5, at 20-25. Scholars have critiqued Ackerman's theory of constitutional moments. *See, e.g.*, James E. Fleming, *We the Unconventional American People*, 65 U. CHI. L. REV. 1513, 1539 (1998) ("How is it possible that Ackerman could believe it necessary to develop his theory of constitutional amendment and transformation outside Article V in order to realize 'the possibility of popular sovereignty' and 'the possibility of interpretation'?"); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 797 (1992); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1225 (1995).

[156] *See* Jack Wade Nowlin, *The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis*, 89 KY. L.J. 387, 407-10 (2001).

[157] *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794-1801 (2005).

[158] Denning, *supra* note 100, at 236-42 (describing the "vices" of non–Article V amendments).

[159] DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 324 (1996) (arguing that informal judicial amendments suffer from two main defects: courts represent a "very small sample of

formal amendment make it "more likely to maintain citizen consensus on the provisions of the constitution and compliance with its provisions."[160] Even so, that informal amendment may in some ways be problematic does not obviate its incidence.

3. The Parochial Uses of Article V

Although the rise and comparative ease of informal amendment has reduced the need to amend the Constitution formally, Article V has always remained in frequent, albeit unsuccessful, use. There have been many failed amendment proposals each decade from the founding through the 1990s: beginning with 196 in the 1780s, to a low of 22 in the 1850s, to a high of 2598 in the 1960s, and settling now to just under 1000 proposals in each of the 1980s and 1990s.[161] When compared to the declining number of successful formal amendments over the same period, the trend suggests that the number of failed amendment proposals has increased as the number of successful formal amendment has declined.

The latest twenty-year period during which Article V has remained unsuccessfully used shows that political actors have nevertheless continued to use Article V. Political actors have proposed formal amendments to such matters of legal and moral disagreement as prayer in school,[162] campaign finance,[163] flag desecration,[164] presidential term limits,[165] the definition of marriage,[166] the national budget,[167] gun rights,[168] and abortion.[169] States also

the population," and their judgments lack the same exposure that a referendum would require).

[160] *Id.*

[161] JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-2002, at 539 (2d ed. 2003). There were over 1900 amendment proposals in the Constitution's first century through the year 1889, and another 1600 in the subsequent thirty-four years. *See* Herman V. Ames, *The Amending Provision of the Federal Constitution in Practice*, 63 PROC. AM. PHIL. SOC'Y 62, 63 (1924).

[162] *See* H.R.J. Res. 42, 113th Cong. (2013) (proposing an amendment to clarify that the Constitution neither prohibits nor requires voluntary prayer in schools).

[163] *See* H.R.J. Res. 31, 113th Cong. (2013) (proposing an amendment relating to congressional and state authority to regulate campaign contributions and expenditures).

[164] *See* H.R.J. Res. 19, 113th Cong. (2013) (proposing an amendment to give Congress power to prohibit the desecration of American flags).

[165] *See* H.R.J. Res. 15, 113th Cong. (2013) (proposing an amendment to remove presidential term limits).

[166] *See* H.R.J. Res. 106, 108th Cong. (2004) (proposing an amendment that marriage shall consist of a union between a man and a woman).

[167] *See* S.J. Res. 1, 105th Cong. (1997) (proposing an amendment to require a balanced budget).

[168] *See* H.R.J. Res. 438, 102d Cong. (1992) (proposing an amendment repealing the Second Amendment).

[169] *See* H.R.J. Res. 155, 101st Cong. (1989) (proposing an amendment to protect unborn

continue to use Article V, albeit unsuccessfully. Political actors in states often urge Congress to pass constitutional amendment proposals for their subsequent ratification. Recent subjects of state efforts for formal amendment have included similarly contentious subjects, namely campaign finance,[170] the definition of marriage,[171] and judicial elections.[172] Therefore, although constitutional scholars have criticized the design of Article V for its difficulty, Article V has yet to be repudiated by political actors, who continue to use it.

Yet political actors may be using Article V for narrow parochial purposes. Recognizing that the path to formal amendment may in fact be blocked due to the design of Article V, the rise of political parties and increased political polarization as well as the new denominator for state ratification, political actors may nonetheless have strategic self-regarding and self-entrenching reasons to exploit the signaling function that introducing an Article V amendment proposal serves. A political actor may be driven to introduce a formal amendment proposal to serve her interest in creating the impression for constituents that she is an effective voice for them, though there may be no prospect that her proposal will ever proceed past its introduction in Congress. As Mark Tushnet explains, even where a congressperson can somehow gather the required majorities to send an amendment proposal to the states, she is more likely to pursue her desired change through ordinary congressional legislation, which is a more direct, more straightforward, and much faster process.[173] Once the congressional law is passed, she might then be more inclined to bear the costs of pursuing a formal amendment through Article V.[174]

These parochial purposes may be defined in terms of what David Mayhew identifies as three kinds of electorally oriented activities in which

children).

[170] *See* S.J. Res., 88th Gen. Assemb., Jan. Sess. (R.I. 2012) (passing a Joint Resolution urging Congress "to pass and send to the states a constitutional amendment permitting state and federal regulation and restriction of independent political expenditures"); *see also* 158 CONG. REC. S7344-45 (daily ed. Dec. 3, 2012) (acknowledging the Joint Resolution).

[171] *See* H.R.C. Memorial, 47th Leg., Reg. Sess. (Ariz. 2005) (passing the Concurrent Memorial urging Congress to "propose an amendment to the Constitution of the United States to acknowledge marriage as between one man and one woman"); *see also* 151 CONG. REC. 13,146 (June 20, 2005) (acknowledging the Concurrent Memorial).

[172] *See* H.R. Res. 120, 1997 Leg., Reg. Sess. (La. 1997) (passing a House Resolution urging Congress to propose an amendment "to provide for election of members of the federal judiciary"); *see also* 144 CONG. REC. 16,076 (July 17, 1998) (acknowledging the House Resolution).

[173] Mark V. Tushnet, *Entrenching Good Government Reforms*, 34 HARV. J.L. & PUB. POL'Y 873, 874 (2011) (reasoning that if a politician has the congressional support necessary to propose an amendment to the states, then she also has enough votes to enact this change through ordinary legislation and will likely pursue this more straightforward method).

[174] *Id.*

congresspersons engage: position taking, credit claiming, and advertising.[175] At a time when formal amendment is exceedingly difficult, the modern use of Article V among both national and state political actors may reflect a combination of all three of these activities: advertising, which Mayhew defines as "any effort to disseminate one's name among constituents in such a fashion as to create a favorable image but in messages having little or no issue content";[176] credit claiming, defined as "acting so as to generate a belief in a relevant political actor (or actors) that one is personally responsible for causing the government, or some unit thereof, to do something that the actor (or actors) considers desirable";[177] and position taking, defined as "the public enunciation of a judgmental statement on anything likely to be of interest to political actors."[178] Where a congressperson introduces a formal amendment to abolish the income tax,[179] for instance, she may have these aims in mind.

Even the historically unused national convention procedure has been used in this way. The national convention procedure – requiring two-thirds of states to petition Congress to call a convention and three-quarters of states to ratify the amendment proposals – has not once been used successfully since the Constitution's adoption.[180] It has therefore reached the longest possible period of sustained disuse for a constitutional provision in the Constitution.[181] In light of this Article V procedure's disuse, Akhil Amar has asked, as an aside, whether the disuse of the national convention process has rendered it obsolete: "Does the [nonuse] of two of Article V's four paths mean that they too have somehow lapsed?"[182] Amar posed the question rhetorically, suggesting to readers that the convention process had not lapsed into desuetude, much like the as-yet unused right of the people to alter and abolish their government has

[175] DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 73 (1974).

[176] *Id.* at 49.

[177] *Id.* at 52-53.

[178] *Id.* at 61.

[179] *See* H.R.J. Res. 16, 113th Cong. (2013).

[180] *See* William B. Fisch, *Constitutional Referendum in the United States of America*, 54 AM. J. COMP. L. 485, 490 (2006). Scholars have explored its present viability as a method to amend the Constitution formally. *Compare* Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1535 (2010) (arguing that the process as currently understood "does not work"), *with* Gerard N. Magliocca, *State Calls for an Article Five Convention: Mobilization and Interpretation*, 2009 CARDOZO L. REV. DE NOVO 74, 75 (challenging the view that the process is "not a practical device" for constitutional change).

[181] Two modern efforts have come very close to securing the agreement of thirty-four states to petition Congress to call a convention. In the 1980s and 1960s, states fell just short of the two-thirds supermajority needed to petition Congress successfully to call a convention to consider amendments to balance the budget and to override the Supreme Court's one-person one-vote decisions, respectively. *See* Ruth Bader Ginsburg, *On Amending the Constitution: A Plea for Patience*, 12 U. ARK. LITTLE ROCK L. REV. 677, 680-81 (1990).

[182] Amar, *supra* note 40, at 499 n.164.

not lapsed from disuse since 1789.[183] Though it has not been used successfully for over 220 years, Article V's convention process has not actually remained unused.

Political actors continue to contemplate the use of the national convention procedure despite the absence of any actionable precedent to structure its use.[184] As early as 1789, states began petitioning Congress to call a convention, with additional notable periods of active petitioning in the 1830s, the 1860s, the 1890s, and into the 1920s.[185] Since then, states have often petitioned Congress to call a convention,[186] apparently hundreds of times.[187] As of 1937, at least thirty-six states had petitioned Congress to call a convention.[188] Three more recent examples include a Colorado petition to Congress for a constitutional convention to repeal the Patient Protection and Affordable Care

[183] *Id.*

[184] The lack of precedent raises important questions about how a convention would actually proceed, including how states would be represented at a convention, how to determine the scope of the convention's agenda, how the time and place of the convention is fixed, and how to tally state petitions. *See, e.g.*, Arthur Earl Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949, 951-99 (1968) (exploring the role of the national legislature in the event of a constitutional convention); James Kenneth Rogers, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL'Y 1005, 1005 (2007) (interrogating the procedure of the constitutional convention and stating that "[m]any questions exist about the use of this amendment process"); John R. Vile, *American Views of the Constitutional Amending Process: An Intellectual History of Article V*, 35 J. AM. LEGAL HIST. 44, 63-64 (1991) (remarking that constitutional conventions have sparked "lots of scholarly speculation" as to convention procedure); Douglas G. Voegler, *Amending the Constitution by the Article V Convention Method*, 55 N.D. L. REV. 355, 366-406 (1979) (discussing the issues raised by the Article V convention method); Hugh Evander Willis, *The Doctrine of the Amendability of the United States Constitution*, 7 IND. L.J. 457, 459 (1932) (exploring the procedure of a constitutional convention).

[185] *See* Ralph R. Martig, *Amending the Constitution – Article V: The Keystone of the Arch*, 35 MICH. L. REV. 1253, 1267-69 (1937).

[186] *See* STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., STATE APPLICATIONS ASKING CONGRESS TO CALL A FEDERAL CONSTITUTIONAL CONVENTION III (Comm. Print 1961) ("Since the Constitution's adoption 171 years ago, there have been over 200 state applications calling for conventions to amend the Constitution on a wide variety of subjects . . . ."). The petitioning process begins with a state passing a resolution or memorial. *See* THOMAS H. NEALE, CONG. RESEARCH SERV., R42589, THE ARTICLE V CONVENTION TO PROPOSE CONSTITUTIONAL AMENDMENTS: CONTEMPORARY ISSUES FOR CONGRESS 28-29 (2012). The resolution or memorial is then received and acknowledged by one of the Houses of Congress. *Id.*

[187] *See* Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501, 510 (1994) ("[O]ver five thousand bills proposing amendments and hundreds of state applications calling for a convention have been introduced in Congress . . . .").

[188] Martig, *supra* note 185, at 1267.

Act,[189] a North Dakota petition to Congress for a constitutional convention to condition an increase in federal debt on the approval of state legislatures,[190] and an Idaho petition to Congress for a constitutional convention to draft a right to life amendment.[191]

Scholars consider a convention possible.[192] Recently on September 24 and 25, 2011, Lawrence Lessig and Mark Meckler co-chaired a conference at Harvard Law School on holding a new Constitutional Convention.[193] That the national convention process remains used despite little success is perhaps best demonstrated when states rescind their Article V petitions to convene a constitutional convention out of concern that a constitutional convention would not limit itself to the narrow subject for which the convention was proposed

[189] *See* H.R. Res. 12-1003, 68th Gen. Assemb., Reg. Sess. (Colo. 2012) (petitioning Congress for an amendment repealing the Affordable Care Act); 252 CONG. REC. H5009 (daily ed. July 18, 2012) (acknowledging the Colorado House Resolution).

[190] *See* S. Con. Res. 4007, 62d Leg. Assemb., Reg. Sess. (N.D. 2011) (petitioning Congress for an amendment concerning the federal debt); 158 CONG. REC. S1459 (daily ed. Mar. 7, 2012) (acknowledging the North Dakota Senate Concurrent Resolution).

[191] *See* S. Con. Res. 132, 45th Leg., Reg. Sess. (Idaho 1980) (petitioning Congress for a right-to-life amendment); 126 CONG. REC. 6172 (Mar. 21, 1980) (acknowledging the Idaho Senate Concurrent Resolution).

[192] *See, e.g.*, RICHARD LABUNSKI, THE SECOND CONSTITUTIONAL CONVENTION: HOW THE AMERICAN PEOPLE CAN TAKE BACK THEIR GOVERNMENT 6 (2000) (exploring how the American people should use Article V to initiate a constitutional convention); LEVINSON, *supra* note 113, at 24 (asking readers to consider the idea of a new convention); Arthur Earl Bonfield, *Proposing Constitutional Amendments by Convention: Some Problems*, 39 NOTRE DAME L. REV. 659, 671 (1964) ("From [Article V's] language alone it would seem clear that Congress was to be under a firm and nondiscretionary obligation to call a Convention when sufficient applications from two-thirds of the states are tendered."); Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 875 (1968) (stating that the misinformation and unknowns surrounding the implementation of a constitutional convention prompted the author to introduce a proposal designed to implement Article V's convention amendment provision); Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1, 25 (1979) (suggesting that the path of a convention approach to amendment may be taken today); Michael Stokes Paulsen, *How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention*, 34 HARV. J.L. & PUB. POL'Y 837, 838 (2011) (remarking that once two-thirds of the states have asked for a constitutional convention, Congress has no choice but to call the convention as it is a "nondiscretionary ministerial duty"); Arthur H. Taylor, *Fear of an Article V Convention*, 20 BYU J. PUB. L. 407, 428 (2006) (stating the an Article V convention can reshape the future course of our nation and remains the only viable means to check judicial activism); Bruce M. Van Sickle & Lynn M. Boughey, *A Lawful and Peaceful Revolution: Article V and Congress' Present Duty to Call a Convention for Proposing Amendments*, 14 HAMLINE L. REV. 1, 4 (1990) (claiming that Congress is constitutionally obligated to call a convention at this time).

[193] *See Conference on the Constitutional Convention*, CONF. CONST. CONVENTION, http://www.conconcon.org (last visited Feb. 15, 2014), *archived at* http://perma.cc/KP5Z-ZMJ8.

and could instead become a "runaway convention."[194] While the Article V convention procedure has yet to be invoked successfully, it has in fact been used since the founding.

The modern use of Article V for parochial purposes reflects Stephen Skowronek's theory of constitutional evolution: when established governmental processes appear to break down, political actors may redeploy old institutions, like Article V, to operate in new ways and create new procedures, like informal amendment, to preserve the whole and ensure constitutional continuity.[195] The modern parochial use of Article V also aligns with the tentative conclusions in Darren Latham's study of the historical amendability of the Constitution.[196] Explaining that the procedure for a congressperson to introduce a bill for either a law or an amendment had become virtually free and without barrier by the beginning of the twentieth century, Latham explores the kind and frequency of bill introductions over the course of the Constitution's history.[197] Latham divides the last two centuries into seven eras. During the first era, also known as the founding era (1791–1812), congresspersons introduced serious bills and were optimistic about their eventual success despite the difficulty of introducing them.[198] The Antebellum era (1813–1858) saw a minor diminishment in the optimism for successful passage; the Civil War era (1859–1868) was an exceptional period for legislation.[199]

It was during the Gilded Age era (1869–1886), suggests Latham, that we began to witness the use of bill introductions for political grandstanding.[200] This period, as well as the subsequent Populist-Progressive era (1887–1916)

[194] Several states have taken this action, including Idaho, S. Con. Res. 129, 55th Leg., 1st Reg. Sess. (Idaho 1999) (withdrawing the petition and urging other states to do the same); *see also* 146 CONG. REC. 1449 (Feb. 23, 2000) (acknowledging the Idaho Senate Concurrent Resolution), North Dakota, S. Con. Res. 4028, 57th Leg. Assemb., Reg. Sess. (N.D. 2001) (rescinding the petition and urging other states to take such action); *see also* 147 CONG. REC. 5905 (Apr. 6, 2001) (acknowledging the North Dakota Senate Concurrent Resolution), and Utah, H.R.J. Res. 15, 54th Leg., Gen. Sess. (Utah 2001) (withdrawing the application to Congress); *see also* 147 CONG. REC. 19,025 (Oct. 9, 2001) (acknowledging the Utah House Joint Resolution). To read more on the possibility of a runaway convention, see Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 742 (1993).

[195] *See* Stephen Skowronek, *Twentieth-Century Remedies*, 94 B.U. L. REV. 795, 796 (2014) (manuscript at 2) (explaining how "progressives responded to the crisis of governability in their day by redeploying the institutions embedded in the constitutional framework").

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

[197] *Id.* at 187-88.

[198] *Id.* at 254.

[199] *Id.*

[200] *Id.*

was characterized by pessimism about amendment success.[201] During the Suffrage-Prohibition era (1917–1930), amendment optimism reached its peak, given the recent and contemporaneous successful Article V efforts.[202] Today, however, during the Modern era (1931–2004), there is a deep pessimism about the prospect of successfully using Article V, and the increasing frequency of amendment bill introductions is attributable to legislative credit seeking and related parochial purposes.[203] Latham observes that "[a]mendability's demise is reflected not only in the careerism-dependent character of amendment proposing activity, but also in the decline in number of already proposed amendments making it out of Congress to be ratified by the states."[204] He stresses the point that "the amendment-passing rate during the Constitution's first eighty years was dramatically higher than the rate for the last 136."[205] Constitutional change nonetheless still occurs in the United States, only not using the procedures entrenched in Article V.

II. THE METHODS OF INFORMAL AMENDMENT

The decline and disuse of Article V as a vehicle for constitutional amendment suggests that Article V may have itself changed informally since its creation. The challenge, however, is to explain how Article V has changed, if indeed it has changed at all. One possibility is that Article V has been informally amended. Constitutions, and the provisions entrenched within them, change in many ways. From alteration to replacement and from judicial interpretation to legislative action, written constitutions are generally subject to modification through both formal and informal amendment procedures.[206] Whereas formal amendment refers to textual constitutional change made in conformity with the amendment rules entrenched in the text of the constitution, informal amendment refers to a change in meaning without a corresponding change in text, as Heather Gerken explains, "the alteration of constitutional meaning in the absence of textual change."[207] Has Article V been informally amended such that it is no longer useable?

A. *Formal and Informal Amendment*

Both formal and informal amendment preserve continuity in the constitutional regime and are therefore distinguishable from discontinuous

[201] *Id.*

[202] *Id.*

[203] *Id.* at 255.

[204] *Id.*

[205] *Id.*

[206] *See* Francesco Giovannoni, *Amendment Rules in Constitutions*, 115 PUB. CHOICE 37, 37 (2003).

[207] Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 DRAKE L. REV. 925, 929 (2007).

forms of constitutional change,[208] namely revision or revolution.[209] To borrow from John Rawls' definition of amendment, both formal and informal amendment "adjust basic constitutional values to changing political and social circumstances, or . . . incorporate into the constitution a broader and more inclusive understanding of those values."[210] Whether and when the constitution

[208] *See* ANDREW ARATO, CIVIL SOCIETY, CONSTITUTION, AND LEGITIMACY 90 (2000) ("[C]omplete legal discontinuity involving both a change of legal orders and the utilization of another method of constitutional change . . . has political effects that are not present when legal change is continuous. When an order is changed outside its own rules of change, there is inevitably a legal hiatus . . . .").

[209] Scholars distinguish between constitutional amendment and constitutional revision. The basic distinction holds that constitutional amendment conforms to the constitutional text and existing framework of government whereas constitutional revision implicates more far-reaching changes that depart from the presuppositions of the constitutional order. *See* MURPHY, *supra* note 154, at 498 n.4 (distinguishing "amendment" from "revision"); Mark E. Brandon, *The "Original" Thirteenth Amendment and the Limits to Formal Constitutional Change*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT, *supra* note 4, at 215, 221-36 (exploring the limits of constitutional change, including amendments and constitutional interpretation); Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1520 (2009) (distinguishing between constitutional amendments and constitutional revisions); William L. Marbury, *The Limitations upon the Amending Power*, 33 HARV. L. REV. 223, 225 (1919) (stating that an amendment is a change or addition within the "lines of the original instrument"); Howard Newcomb Morse, *May an Amendment to the Constitution Be Unconstitutional?*, 53 DICK. L. REV. 199, 199 (1949) (suggesting that an informal amendment would not be unconstitutional "for the reason that it had not been integrated into the Constitution and, therefore, had not become an amendment"). *But see* JOHN R. VILE, CONSTITUTIONAL CHANGE IN THE UNITED STATES 73-76 (1994) (observing that the line separating different forms of constitutional change is not always clear). Constitutional texts may also distinguish amendment from revision. *See, e.g.*, BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBI No. 1/1930, art. 144 (Austria) (distinguishing procedures for amendment and revision); C.E., B.O.E. nn. 166-68, Dec. 29, 1978 (Spain) (establishing different procedures for amendment and revision). Though the distinction appears nowhere in the text of the United States Constitution, it is prominent in the text of state constitutions. *See* Gerald Benjamin, *Constitutional Amendment and Revision*, *in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 177, 178 (G. Alan Tarr & Robert F. Williams eds., 2006) (observing that twenty-three state constitutions expressly reference the term "revision").

[210] JOHN RAWLS, POLITICAL LIBERALISM 238 (1993). For Rawls, it is unconstitutional to use Article V to do more than adjust, incorporate, or remedy. *Id.* at 238-39. Where a constitutional amendment goes beyond these limitations, the Court could legitimately declare that it "fundamentally contradicts" America's constitutional tradition because "the successful practice of its ideas and principles over two centuries place restrictions on what can now count as an amendment, whatever was true at the beginning." *Id.* at 239. Rawls' paradigmatic illustration is an effort to repeal the First Amendment. *Id.* at 238-39. Rawls explains, "Should that happen . . . that would be constitutional breakdown, or revolution in the proper sense, and not a valid amendment of the constitution." *Id.* at 239 (footnote omitted).

has been amended consequently reveals itself to be a complex inquiry not easily answered by a quick tally of the intervening additions to the constitutional text since the constitution's original adoption.[211] The study of constitutional amendment must therefore account for amendments made both formally pursuant to formal amendment rules and informally by political actors, social movements, and institutional dynamics often in response to the difficulty of completing a formal amendment.

1. The Forms of Informal Amendment

There are many methods of informal amendment. We can understand informal amendment as occurring when, as Tom Ginsburg and Eric Posner define it, "political norms change, or courts (possibly responding to political pressures) 'interpret' or construct the constitution so as to bring it in line with policy preferences."[212] Perhaps the best way to conceptualize informal amendment is Heather Gerken's hydraulics metaphor: Where the natural path of formal amendment is difficult or blocked, alternative paths open to political actors to achieve its functional equivalent.[213] As David Strauss has argued, informal amendment has been more common and perhaps even more important than formal amendment: "The most important changes to the Constitution – many of them, at least – have not come about through changes to the text. They have come about either through changes in judicial decisions, or through deeper changes in politics or in society."[214] The difference between formal and informal amendment is not that one is law and the other is not; it is, as Stephen Griffin suggests, that the former is textually entrenched law while the latter is not.[215] Major methods of informal amendment include judicial interpretation, national legislation, executive action, implication, and convention.

[211] Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT, *supra* note 4, at 13, 25-32.

[212] Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1600 (2010).

[213] Gerken, *supra* note 207, at 927. But we should not assume that informal amendment will not occur in democracies where formal amendment is not difficult. *See* Michael Besso, *Constitutional Amendment Procedures and the Informal Political Construction of Constitutions*, 67 J. POL. 69, 75 (2005) (explaining that informal political construction of constitutions takes place in the states regardless of the "relative ease of state constitutional amendment").

[214] Strauss, *supra* note 149, at 905.

[215] STEPHEN M. GRIFFIN, LONG WARS AND THE CONSTITUTION 16 (2013).

2. Conventional Forms of Informal Amendment

Informal amendment occurs most frequently by judicial interpretation.[216] When national courts of last resort in states with strong-form judicial review interpret the constitution in new ways, they effectively "amend" it by changing its meaning with binding effect.[217] Donald Lutz has found that informal amendment by judicial interpretation is more likely to occur in countries with a low rate of formal amendment and a long-established constitution. In his study of over thirty constitutional states, Lutz concludes that the combination of amendment rate and constitutional longevity in Australia, Finland, Ireland, and the United States suggest frequent informal amendment by judicial interpretation as a supplement to the formal amendment process.[218] His data also suggest that Denmark, Germany, Iceland, Italy, and Japan are nearing the point where they might see higher levels of activity in informal amendment by judicial interpretation.[219] Article V has not been informally amended in this way.

Informal amendment may also result from national legislation. In the United States, the theory of superstatutes illustrates, with important limitations,[220] how

[216] It is difficult, as Ruth Gavison suggests, to distinguish informal amendment from interpretation. Ruth Gavison, *Legislatures and the Phases and Components of Constitutionalism*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 198, 203 (Richard W. Bauman & Tsvi Kahana eds., 2006) (suggesting that legal effect may stem as much from interpretation as from amendment because "for all practical purposes, the law is what the authoritative interpreters say it is"). All forms of constitutional interpretation would result in an informal amendment were they treated as binding. One significant difference between informal amendment by judicial interpretation and judicial interpretation itself may turn on the level at which the interpretation occurs. Whereas judicial interpretation by the national court of last resort is binding and may therefore be understood as an informal amendment, judicial interpretation by other courts is generally not nationally binding and is therefore less identifiable as an informal amendment.

[217] *See* EDWARD SCHNEIER, CRAFTING CONSTITUTIONAL DEMOCRACIES 225-26 (2006) ("The seemingly formidable powers of the courts to interpret the Constitution (and thus 'amend' it) has been the subject of considerable debate.").

[218] LUTZ, *supra* note 38, at 178. Interestingly, however, in Finland informal amendment by interpretation has occurred more as a result of executive and legislative interpretation than judicial interpretation. *See* JAAKKO HUSA, THE CONSTITUTION OF FINLAND: A CONTEXTUAL ANALYSIS 221 (2011).

[219] LUTZ, *supra* note 38, at 178.

[220] The theory of superstatutes is limited insofar as we may identify a superstatute only retrospectively, not prospectively. For example, assume Congress passes a statute by a simple majority at Time 1. At Time 2, the statute has achieved status as a superstatute as a result of its public salience. Further assume that, at Time 3, Congress passes another statute by a simple majority, amending either expressly or by implication a provision in the superstatute passed at Time 1. On these facts, the theory of superstatutes cannot tell us whether the latter-passed statutory amendment is valid, whether the superstatute will be judged impervious to the latter-passed amendment, or whether courts would ignore the

national legislation may informally amend a constitution. William Eskridge, Jr. and John Ferejohn have shown that certain statutes, passed in the normal course of the legislative process, achieve quasi-constitutional status as a result of four criteria: first, they introduce a new principle or policy whose effect is substantial; second, the new principle or policy becomes foundational or axiomatic to political actors; third, they result from long and deliberative public discussions and substantial reflection by political actors; and fourth, they require some elaboration from bureaucrats and judges in order to achieve their intended effect.[221] Superstatutes, write Eskridge and Ferejohn, "acquire their normative force through a series of public confrontations and debates over time and not through a single stylized dramatic confrontation."[222] Superstatutes shape and are themselves influenced by social norms.[223]

Superstatutes, as Eskridge and Ferejohn argue, may occasionally change constitutional meaning.[224] They do so by trumping ordinary legislation and by establishing "foundational principles against which people presume their obligations and rights are set, and through which interpreters apply ordinary law."[225] Superstatutes remain inferior to constitutional law and may be repealed by simple legislation, but their public salience induces legislators and judges to afford them special solicitude.[226] Eskridge and Ferejohn suggest that the Sherman Antitrust Act of 1890, the Civil Rights Act of 1964, and the Endangered Species Act of 1973 are examples of superstatutes.[227] Beyond the United States, superstatutes may include the Canada Health Act,[228] the Canadian Bill of Rights of 1960,[229] and the United Kingdom Human Rights Act of 1998.[230] Article V has not been informally amended in this way, either.

statutory amendment. The theory of superstatutes, moreover, could not have predicted whether the statute passed at Time 1 would earn the status of superstatute at Time 2, or whether the statute passed at Time 3 would itself become a superstatute. Nonetheless, the theory of superstatutes is helpful to conceptualize how national legislation may informally amend the written constitution.

[221] Eskridge, Jr. & Ferejohn, *supra* note 6, at 1230-31.

[222] *Id.* at 1270.

[223] *Id.* at 1276.

[224] *Id.* at 1216.

[225] *Id.*

[226] *Id.* at 1216-17 & n.3 ("Although they do not exhibit the super-majoritarian features of Article V constitutional amendments and are not formally ratified by the states, the laws we are calling super-statutes are both principled and deliberative and, for those reasons, have attracted special deference and respect.").

[227] *Id.* at 1231-46.

[228] Canada Health Act, R.S.C., 1985, c. C-6.

[229] Canadian Bill of Rights, S.C. 1960, c. 44.

[230] United Kingdom Human Rights Act of 1998, c. 42; *see also* Eskridge, Jr. & Ferejohn, *supra* note 6, at 1265 ("The pre-Charter Bill of Rights in Canada, the Human Rights Act of 1977 in the District of Columbia, and the new Bill of Rights adopted in the United Kingdom are examples of [superstatutes].").

Informal amendment may also follow from executive action.[231] One prominent example in the United States concerns the treaty-making power, which has been amended informally as a result of presidential action.[232] The treaty-making power is entrenched in the Constitution and confers upon the President the "power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[233] It therefore requires the Senate to confirm the President's execution of a treaty. Yet it has recently become common practice for the President to bypass Senate confirmation by entering into sole-executive agreements that achieve the same functional ends as treaties.[234] The President typically invokes his independent constitutional powers, the scope of which is undefined in the United States Constitution.[235]

In 1945, Myres McDougal and Asher Lans argued that sole-executive agreements had become "interchangeable" with treaties ratified under the treaty-making power.[236] Freed of the need for Senate ratification, Presidents have increasingly exploited the power to enter into sole-executive agreements.

[231] For instance, it has been argued that Canada could grant Quebec its independence as an Associate State informally, without a formal amendment, using the executive actions of delegation and treatymaking. *See* R.A. Mayer, *Legal Aspects of Secession*, 3 MANITOBA L.J. 61, 65-66 (1968-1969) ("Though formal constitutional amendment must be rejected as a practical method of achieving secession, it may be possible for Quebec to achieve the same result by informal methods.").

[232] GRIFFIN, *supra* note 215, at 30 (suggesting that the evolution of the President's treaty-making powers constituted "an amendment-level change to the constitutional order outside the Article V amendment process").

[233] U.S. CONST. art. II, § 2.

[234] *See* Joseph P. Tomain, *Executive Agreements and the Bypassing of Congress*, 8 J. INT'L L. & ECON. 129, 129-32 (1973) ("The use of executive agreements, through which the President may conclude international accords without consideration by the Senate, has proved increasingly troublesome for the Congress.").

[235] *See* Hanna Chang, *International Executive Agreements on Climate Change*, 35 COLUM. J. ENVTL. L. 337, 341-42 (2010) ("The key unknown with respect to sole executive agreements is the precise scope of the President's independent power in foreign affairs."); Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 916-19 (2004) ("[S]ome executive agreements are within the constitutional power of the President."); Kevin C. Kennedy, *Congressional-Executive Tensions in Managing the Arms Control Agenda – Who's in Charge?*, 16 N.C. J. INT'L L. & COM. REG. 15, 18-23 (1991) ("Other authorities have suggested just . . . that the President possesses the independent constitutional power to conclude an international agreement on any subject touching upon foreign relations with another country."). *See generally* Anne E. Nelson, *From Muddled to* Medellin, *A Legal History of Sole Executive Agreements*, 51 ARIZ. L. REV. 1035 (2009) (tracing and evaluating the history of sole-executive agreements).

[236] Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 187-88 (1945).

By one count, Presidents entered into roughly thirty international agreements without Senate confirmation in the Constitution's first fifty years,[237] but in the last fifty years they have entered into approximately 15,000 sole-executive agreements.[238] The Supreme Court has generally approved this presidential practice, rejecting arguments that sole-executive agreements circumvent the constitutional requirement of Senate consent.[239] We can therefore understand the rise of sole-executive agreements as an informal amendment to the treatymaking power.

War powers have also been amended informally by executive action. The President's modern powers as Commander-in-Chief exceed what the founding generation anticipated, perhaps most notably with respect to the President's power to engage the United States in war without seeking a congressional declaration of war or even congressional approval,[240] even though the constitutional text authorizes only Congress to declare war.[241] In a detailed analysis published in 1987 using congressional and State Department reports, one estimate concluded that the President had sent troops or arms abroad 137 times without congressional approval – and often in the face of congressional disapproval – from the adoption of the Constitution through 1970.[242]

[237] WALLACE MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 4 (1941).

[238] Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 319 (2006).

[239] *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003) ("At a more specific level, our cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic."); Dames & Moore v. Regan, 453 U.S. 654, 682-87 (1981) (finding that the President has "some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate"); United States v. Pink, 315 U.S. 203, 229-30 (1942); United States v. Belmont, 301 U.S. 324, 330-31 (1937). Bradford Clark has argued that constitutional history and structure contradict the Supreme Court's modern view of sole-executive agreements. Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1654 (2007).

[240] LEVINSON, *supra* note 113, at 22.

[241] U.S. CONST. art. I, § 8, cl. 11 (authorizing Congress to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"). The Constitution is not without ambiguity about whether any single institution over another possesses the warmaking power. Although it confers upon Congress the power to declare war, to "raise and support Armies," *id*. art. I, § 8, cl. 12, to "provide and maintain a Navy," *id.* art. I, § 8, cl. 13, and to "make Rules for the Government and Regulation of the land and naval Forces," *id*. art. I, § 8, cl. 14, the Constitution also states that "[t]he President shall be commander in chief of the Army and Navy of the United States," *id*. art. II, § 2. The Supreme Court has acknowledged that the Constitution entrenches several provisions "implementing the Congress and President with powers to meet the varied demands of war," notably the provisions above. *See* Lichter v. United States, 334 U.S. 742, 755 (1948).

[242] *See* L. Gordon Crovitz, *Presidents Have a History of Unilateral Moves*, WALL ST. J., Jan. 15, 1987, at 22.

Presidential practice has therefore created a precedent for executive action. Courts and Congress have both been involved in creating this informal amendment: courts have reinforced these broad presidential powers in foreign affairs and Congress has often failed to object in a meaningful way to these assertions and actions of presidential power.[243] These changes amount to "an amendment-level change to the constitutional order outside the Article V amendment process,"[244] argues Stephen Griffin, who points to President Harry Truman's decision to commit troops to the 1950 Korean War as the key marker in the new presidential power to initiate war.[245] Article V has not been informally amended by executive action.

3. Unconventional Forms of Informal Amendment

Written constitutions may alternatively be amended informally by implication. Informal amendment by implication occurs when a latter-passed constitutional provision or amendment supersedes a provision or amendment without expressly overturning it. Paul Clark frames this concept in terms of "practical incompatibility," where "the basic principles underlying two provisions are incompatible" and when "although the language of both

[243] DAVID A. STRAUSS, THE LIVING CONSTITUTION 121 (2010) (explaining that these expansions of presidential authority have been established "by the evolution of traditions and practices outside the courts: presidents exercised more and more power, and Congress, and the society generally, did not object"). Arthur Schlesinger has traced the history of the rise of presidential war powers and the corresponding decline of congressional war powers. *See* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 35-204 (2004). In the face of presidential ascendancy in war powers, Congress passed the War Powers Resolution in 1973, over President Richard Nixon's veto, to try to reassert its role in war making. *See* War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (2012)). Many have questioned the effectiveness of the War Powers Resolution. *See, e.g.*, J. Brian Atwood, *The War Powers Resolution in the Age of Terrorism*, 52 ST. LOUIS U. L.J. 57, 60-74 (2007) (suggesting that Congress may be "politically intimidated in times of crisis" and unable to examine the case for war carefully); Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149, 1174-82 (2001) (arguing that the War Powers Resolution "has not had the impact the enacting Congress intended"); Edward Keynes, *The War Powers Resolution: A Bad Idea Whose Time Has Come and Gone*, 23 U. TOL. L. REV. 343, 356 (1992) (explaining that Presidents have found ways to circumvent the War Powers Resolution); John Patera, *War Powers Resolution in the Age of Drone Warfare: How Drone Technology Has Dramatically Reduced the Resolution's Effectiveness as a Curb on Executive Power*, 33 HAMLINE J. PUB. L. & POL'Y 387, 403-17 (2012) (observing that an analysis of the War Powers Resolution "tells a story of consistent technical violations by the executive branch"); John W. Rolph, *The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm*, 40 NAVAL L. REV. 85, 91-100 (1992) ("Five procedural flaws central to the proper functioning of the Resolution account for its being circumvented or ignored with impunity by the executive branch.").

[244] GRIFFIN, *supra* note 215, at 30.

[245] *Id.* at 70-77.

provisions would permit each to exist without contradiction, one would limit the other so much that for all practical purposes they are regarded as incompatible."[246] Writing in 1930, Selden Bacon developed the thesis that the Tenth Amendment had informally amended Article V by implication in that its reservation of undelegated powers to the states or the people[247] divested Congress of the power to select the method by which states ratify formal amendment proposals.[248] As Bacon argues:

> The Tenth Amendment, in short, said: If the Federal Government wants added direct powers over the people or the individuals rights of the people, it must go to the people to get them; the power to confer any such added direct powers over the people and their individual rights is reserved to the people; and the right, at the option of Congress, to get such added powers from any other source, is wiped out.[249]

The Supreme Court of the United States has itself recognized that the Constitution may be informally amended by implication. In a case concerning state sovereign immunity, the Court held that Fourteenth Amendment informally amended the Eleventh Amendment by implication: "We think that the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment."[250] The Court continued:

> In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.[251]

The case concerned whether a class action against a State could recover retroactive retirement benefits as compensation for that State's employment discrimination on the basis of gender.[252] The Court weighed the relationship between the Eleventh Amendment and the Fourteenth Amendment, and concluded that the latter-passed Fourteenth Amendment had implicitly limited the Eleventh Amendment. Though the Eleventh Amendment states that "[t]he

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[246] Paul A. Clark, *Limiting the Presidency to Natural Born Citizens Violates Due Process*, 39 J. MARSHALL L. REV. 1343, 1345 (2006).

[247] U.S. CONST. amend. X.

[248] Selden Bacon, *How the Tenth Amendment Affected the Fifth Article of the Constitution*, 16 VA. L. REV. 771, 782 (1930).

[249] *Id.*

[250] Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

[251] *Id.*

[252] *Id.* at 448.

Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State,"[253] the Fourteenth Amendment authorizes Congress to authorize private suits like class actions against states acting in violation of civil rights.[254] The Fourteenth Amendment has therefore been interpreted as having amended the Eleventh Amendment informally. This form of informal amendment not does explain the decline and disuse of Article V.

Written constitutions are also susceptible to informal amendment by convention. This occurs when a political practice is adopted and repeated, and gradually hardens over time into what Michael Gerhardt calls "non-judicial precedent."[255] One example concerns whether the Vice President of the United States *becomes* President upon the President's death, or whether the Vice President simply assumes the powers and duties of the presidency as a caretaker. The text of the United States Constitution is ambiguous on this point. The relevant clause states that:

> [I]n the case of the removal of the President from Office, or of his Death, Resignation, or inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.[256]

The textual ambiguity in the Succession Clause is twofold. First, in stating that "the same shall devolve on the Vice President," the Constitution is unclear as to whether it means to refer to the "said Office," in which case the succeeding Vice President would *become* President, or alternatively to "the Powers and Duties of the said Office," in which case the Vice President would only exercise the powers and duties of the presidency without actually becoming President. The second ambiguity relates to the second half of the Clause, specifically whether the command that the succeeding Vice President "shall act accordingly" as President means that the Vice President becomes only the *acting* President instead of the official President. This interpretative difference was important, as Akhil Amar writes, because it determined whether an ascending Vice President would be called "President," and whether he would receive a presidential salary, which was both higher than the Vice President's own and immune from congressional amendment, in turn freeing

[253] U.S. CONST. amend. XI.

[254] *Fitzpatrick*, 427 U.S. at 456.

[255] MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 111 (2008).

[256] U.S. CONST. art. II, § 1, cl. 6.

him to execute presidential powers without fear of congressional diminishment of his pay.[257]

Vice President John Tyler resolved the ambiguity upon the death of President William Harrison in 1841. In what amounted to an inaugural address in the days following Harrison's passing, Tyler took the view that he had become President: "For the first time in our history the person elected to the Vice-Presidency of the United States, by the happening of a contingency provided for in the Constitution, has had devolved upon him the Presidential office."[258] The office, not merely its powers and duties, had devolved upon him. He swore the oath of office as President, identified himself in his signature as "President," and moved into the White House.[259] Tyler faced some opposition to his claim to the presidency; some referred to him as "Acting President" and challenged his action.[260] But he considered himself President and conducted himself as such.

The Tyler precedent resolved the question left open by the constitutional text.[261] Subsequent Vice Presidents followed the Tyler precedent and proclaimed themselves President when they succeeded to the presidency.[262] As Joel Goldstein writes, "[a]lthough Tyler's claim probably contradicted the Framers' intent, later Vice Presidents who found themselves in that situation embraced his position and ultimately the Tyler precedent became accepted as constitutional reality."[263] Over a century later, in 1967, the Twenty-Fifth Amendment constitutionalized the Tyler precedent by textually entrenching the until then unwritten rule that "in the case of the removal of the President from office or of his death or resignation, the Vice President shall become President."[264] As subsequent Vice Presidents followed the Tyler precedent and

[257] Akhil Reed Amar, *Applications and Implications of the Twenty-Fifth Amendment*, 47 HOUS. L. REV. 1, 18 (2010).

[258] John Tyler, Inaugural Address (Apr. 9, 1841), *in* 1 INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES FROM WASHINGTON TO LINCOLN 179, 179-80 (John Vance Cheney ed., 1904).

[259] Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505, 521 (1995).

[260] *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS 178-79 (2005) (referring to New York Democrat John McKeon's argument that Tyler was no more than a Vice President exercising presidential power); John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 FORDHAM L. REV. 907, 918-19 (2010) (explaining that members of the Whig Party referred to Tyler as the "Acting President").

[261] Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 966 (2010).

[262] Akhil Reed Amar, *Presidents Without Mandates (with Special Emphasis on Ohio)*, 67 U. CIN. L. REV. 375, 379 (1999).

[263] Goldstein, *supra* note 261, at 966.

[264] U.S. CONST. amend. XXV, § 1.

treated it as binding convention, their actions effectively amounted to informal amendment.

Whether Article V has been informally amended into its current state of decline by convention is a harder question than whether it has been informally amended by judicial interpretation, national legislation, executive action, or implication. We cannot yet conclude that Article V has been informally amended by a concretized convention against its use. Whether a convention exists turns on three criteria, as posited by Ivor Jennings: first, whether there are precedents; second, whether political actors believe they are bound by the rule of conduct suggested by those precedents; and third, whether there is a reason for the rule.[265] The second criterion suggests no convention against the use of Article V. As discussed above,[266] political actors continue to use Article V and cannot yet be said to believe themselves bound by a rule prohibiting or even discouraging its use. It is equally difficult to argue that there are precedents against the use of Article V. As it stands, Article V is indeed used quite often, albeit unsuccessfully, because the costs of introducing an amendment proposal are not high enough to dissuade a congressperson from introducing an amendment she knows to be futile.

B. *Informal Amendment by Constitutional Desuetude*

The modern interpretation of the Commerce Clause belies its founding interpretation.[267] The United States Supreme Court's interpretation of the Commerce Clause has evolved since the adoption of the United States Constitution from expansive to limited, and again from broad to narrow.[268] So

[265] W. IVOR JENNINGS, THE LAW AND THE CONSTITUTION 136 (5th ed. 1967).

[266] *See supra* Part I.B.3.

[267] Whether scholars agree or disagree with the Court's modern interpretation, they recognize the shift in interpretation. *Compare* Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 873 (2002) ("[O]riginal understanding [of the Commerce Clause] has been warped and was eventually abandoned."), *with* Calvin H. Johnson, *The Panda's Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause*, 13 WM. & MARY BILL RTS. J. 1, 4 (2004) (arguing that the Commerce Clause's changing interpretation "does not mean that the modern Commerce Clause is illegitimate").

[268] The Commerce Clause was interpreted broadly from the founding through 1890s, then narrowly until the mid-1930s. *Compare* Daniel Ball, 77 U.S. (1 Wall.) 557, 564-66 (1871) ("To the extent in which each agency acts in that transportation [of commodity], it is subject to the regulation of Commerce."), *and* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) (interpreting commerce power broadly), *with* R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 374 (1935) (finding that Congress's actions are "in no proper sense a regulation of the activity of interstate transportation"), *and* Hammer v. Dagenhart, 247 U.S. 251, 273-74 (1918) (interpreting commerce power narrowly). The Commerce Clause was then again interpreted broadly until the mid-1990s, and since then has generally been interpreted more narrowly. *Compare* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253-57 (1964) ("Congress was not restricted by the fact that this particular obstruction to interstate

substantially different is the new interpretation that we might well be tempted to suggest that the original Commerce Clause is today obsolete. May we therefore describe the Commerce Clause as having fallen into desuetude? The answer is no. We could more accurately say that the early-nineteenth-century interpretation of the Commerce Clause is today obsolete. But the Commerce Clause itself remains valid as a matter of law. That the Commerce Clause has been and remains susceptible to competing constitutional interpretations does not make it desuetudinal. On the contrary, that the Commerce Clause has been an active battleground for constitutional contestation confirms its legal and political relevance inasmuch as political actors continue to regard the Clause as an important arena for framing and settling disputes. What then is constitutional desuetude, and how does a constitutional provision ever fall into it?

1. The Concept of Constitutional Desuetude

I have elsewhere argued that written constitutions may be informally amended by an underappreciated method of informal amendment: constitutional desuetude.[269] Constitutional desuetude occurs when an entrenched constitutional provision becomes politically inoperative as a result of sustained and conscious disuse by political actors.[270] Informal amendment normally leaves the constitutional text unchanged and politically valid as it supplements and clarifies constitutional meaning as a result of judicial interpretation or national legislation, for example.[271] But informal amendment by constitutional desuetude differs insofar as it leaves the constitutional text unchanged, and indeed textually entrenched, but renders it politically invalid.[272] Whether Article V has been informally amended by constitutional desuetude is an open question.

That Article V may be susceptible to constitutional desuetude is paradoxical insofar as Article V sets the standard against which we judge the legitimacy of constitutional amendment in the United States. It is, as Kent Greenawalt has argued, the "supreme criterion of law" in the United States,[273] which H.L.A. Hart understood as the defining source of law or a measure of legal validity for

commerce with which it was dealing was also deemed a moral and social wrong."), *and* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37-39 (1937) (interpreting Commerce Power broadly), *with* United States v. Morrison, 529 U.S. 598, 607-09 (2000) (finding that a law regarding gender-motivated violence falls outside Congress's authority under the Commerce Clause), *and* United States v. Lopez, 514 U.S. 549, 567-68 (1995) (interpreting commerce power narrowly).

[269] *See* Albert, *supra* note 11.

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 659 (1987).

legal rules.[274] Yet Article V's amendment by constitutional desuetude is not out of the question: whereas Article V prescribes the rules for formal constitutional change, it does not govern nor can it foreclose informal constitutional change. The possibility therefore exists for Article V itself to change over time by one of the many methods of informal amendment.[275]

The desuetude of Article V entails at least three possible outcomes, each of which is admittedly difficult to imagine.[276] First, it could mean that a formal Article V amendment is impossible. Second, it could mean that the political cost of using Article V is prohibitive. Third, it could mean that any formal amendment achieved through Article V is invalid as a matter of law. Although I ultimately conclude below that Article V is not desuetudinal, these problematic outcomes are not the reasons why. First, the desuetude of Article V would not mean that an Article V amendment is impossible; it would mean only that political actors had foreclosed to themselves the use of Article V. Second, Article V's desuetude would not result only from the prohibitive political cost of invoking Article V; political actors would also have to openly repudiate Article V for public-regarding reasons. Third, the desuetude of Article V would not necessarily mean that an Article V amendment is legally invalid; it could instead mean that a court would rule that its use is legally valid and judicially enforceable but politically unpalatable and publicly illegitimate. This has occurred in Canada with respect to the disallowance and reservation powers, as I have shown in theorizing constitutional desuetude.[277]

Constitutional desuetude is distinguishable from other forms of constitutional obsolescence, as I have argued.[278] For example, it is different from dormancy, which we may use to characterize the reserve powers of dismissal and dissolution held by the Governor General in Australia – powers that are by design intended to be used only rarely.[279] It is also distinguishable

[274] H.L.A. HART, THE CONCEPT OF LAW 103 (2d ed. 1994).

[275] Article V itself does not seem susceptible to informal amendment by judicial interpretation. The Supreme Court has suggested that Article V disputes are nonjusticiable political questions. *See* Coleman v. Miller, 307 U.S. 433, 454 (1939). The Supreme Court has also held, in the context of challenges to the constitutionality of the Eighteenth and Nineteenth Amendments, that the text of Article V is the sole source of authority on the constitutionality of formal amendments. As long as a formal amendment adheres to the procedural strictures specified in Article V, it is valid and binding. *See* Leser v. Garnett, 258 U.S. 130, 136 (1922) ("This Amendment is in character and phraseology precisely similar to the Fifteenth. For each the same method of adoption was pursued. One cannot be valid and the other invalid."); Nat'l Prohibition Cases, 253 U.S. 350, 386 (1920) (stating that the proposed Amendment, after going through the proper ratification procedure, becomes "a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument").

[276] I am grateful to Mark Tushnet for helping me think through this analysis.

[277] *See* Albert, *supra* note 11.

[278] *Id.*

[279] *Id.*

from supersession, which occurs when a textually entrenched constitutional provision is superseded, though not textually removed, by a latter-entrenched provision, as was the case with the Eighteenth and Twenty-First Amendments.[280] We may also differentiate constitutional desuetude from what results when courts invoke the political question doctrine with respect to an entrenched provision, for example, the Guarantee Clause, which has remained under- or unenforced by the political branches.[281] Constitutional desuetude should also be distinguished from informal amendment by implication, which changes the meaning of an entrenched constitutional provision but does not altogether extinguish that provision.[282] We should also separate constitutional desuetude from constitutional atrophy, which applies in regimes with either written or unwritten constitutions; constitutional desuetude applies only to written constitutions.[283]

2. A Framework for Constitutional Desuetude

Constitutional desuetude may occur in any constitutional state. For instance, it has been suggested in passing, though not fully explored, that constitutional desuetude may have occurred in France and Singapore. With regard to the French Constitution, Article 41 authorizes the Constitutional Council to resolve a standstill in the legislative process between the president of either legislative chamber and the government as to the constitutionality of a proposed bill or a legislative amendment.[284] In the ten years following the Constitution's adoption, from 1959 to 1968, the Council intervened eight times; since then the Council has intervened only three times, prompting Alec Stone Sweet to state that Article 41 has "has for all practical purposes fallen into desuetude."[285] As to Singapore, Thio Li-ann suggested in 1997 that the practice of appointing nonconstituency members of parliament,[286] which is intended to ensure at least nominal opposition in Parliament, had fallen into desuetude even though "[i]t remains in the constitution."[287] (The practice is not, however, desuetudinal. Steve Chia Kiah Hong was appointed to the role in 2002; there are currently three sitting Non-Constituency Members of Parliament.[288] In an interesting twist, Li-ann was herself named a Nominated Member of Parliament in 2007.[289])

[280] *Id.*

[281] *Id.*

[282] *See supra* Part II.A.3.

[283] *See* Albert, *supra* note 11.

[284] 1958 CONST. art. 41 (Fr.).

[285] ALEC STONE SWEET, THE BIRTH OF JUDICIAL POLITICS IN FRANCE 57 (1992).

[286] CONSTITUTION OF THE REPUBLIC OF SINGAPORE art. 39 (1965).

[287] Thio Li-ann, *The Elected President and the Legal Control of Government:* Quis Custodiet Ipsos Custodes*?*, *in* MANAGING POLITICAL CHANGE IN SINGAPORE: THE ELECTED PRESIDENCY 100, 106 (Kevin Tan & Lam Peng Er eds., 1997).

[288] The website of the Parliament of Singapore contains archival records of former

While constitutional desuetude may occur in any constitutional state, it is noteworthy only where the regime is governed by a real, not a sham, constitution. We expect sham constitutions to reflect a significant disjuncture between the constitutional text and reality;[290] the opposite is true of constitutions anchored in polities respectful of both the rule of law and the attendant constitutional duties and obligations they impose on political actors.[291] Democratic states will usually exhibit a gulf between the formal written constitution and the real political constitution, but it will be much narrower than what we observe in authoritarian states.[292] Although authoritarian regimes adopt written constitutions that look indistinguishable from democratic constitutions, they primarily serve public relations purposes. As Karl Loewenstein writes, "[s]o deeply implanted is the conviction that a sovereign state must possess a written constitution that even modern autocracies feel compelled to pay tribute to the democratic legitimacy inherent in the written constitution."[293] Where evidence reveals that constitutional desuetude may have occurred in France and Singapore, the French illustration would be of greater analytical value given that France ranks higher in terms of democratic outcomes than Singapore,[294] and it has been shown to more closely align its political practices with its constitutional text than Singapore.[295] That

members of Parliament. Steve Chia Kiah Hong served as a Non-Constituency Member of Parliament from 2002 to 2006. *See 10th Parliament*, PARLIAMENT OF SING., http://www.parliament.gov.sg/history/10th-parliament (last visited Feb. 15, 2014), *archived at* http://perma.cc/43CB-XZWN. Today, there are three Non-Constituency Members of Parliament. *See List of Constituencies*, PARLIAMENT OF SING., http://www.parliament.gov.sg/list-constituencies#Non-Constituency_Member_of_Parliament (last visited Feb. 15, 2015), *archived at* http://perma.cc/VN6F-E94R.

[289] *See Member's Profile: Thio Li-ann*, PARLIAMENT OF SING., http://www.parliament.gov.sg/mp/thio-li-ann (last visited Feb. 15, 2014), *archived at* http://perma.cc/P7QC-NED6.

[290] Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, 59 MCGILL L.J. 225, 262 (2013).

[291] Sham constitutions are in no way "constitutional" apart from "the most nominal sense of the term" because they are only a "convenient cloak for naked power." KARL LOEWENSTEIN, POLITICAL POWER AND THE GOVERNMENTAL PROCESS 136 (2d ed. 1965).

[292] *See* JAN-ERIK LANE, CONSTITUTIONS AND POLITICAL THEORY 50-51 (2d ed. 1996) (discussing the use of "camouflage constitutions" in authoritarian systems).

[293] LOEWENSTEIN, *supra* note 291, at 136.

[294] ECON. INTELLIGENCE UNIT, DEMOCRACY INDEX 2012: DEMOCRACY AT A STANDSTILL 4-5 (2013) (ranking France and Singapore twenty eighth and eighty first, respectively).

[295] David Law and Mila Versteeg have quantified the degree to which constitutions achieve their promises with respect to rights. *See* David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863, 886 (2013). They have shown that the French Constitution is more overperforming and less underperforming than the Singaporean Constitution. *Compare id.* at 949 (reporting France's underperformance score as 0.917), *and id.* at 943 (reporting France's overperformance score as 0.944), *with id.* at 945 (reporting Singapore's underperformance score as 0.714), *and id.* at 941 (reporting Singapore's overperformance score as 0.438). Overperformance measures "the extent to which countries

the French Constitution is an actual constraint on political actors would make French constitutional desuetude well worth studying.

The study of constitutional desuetude in the United States likewise meets our criteria. The United States Constitution is a binding constitutional text situated within a democratic polity. One possible example of constitutional desuetude involves the constitutional requirement that only a "natural born citizen" is eligible for the presidency.[296] Peter Spiro has argued that the declining significance of citizenship could lead "to the possible evisceration of the natural born qualification through practice,"[297] creating an inconsistency between political practice and the constitutional text. Spiro anticipated the possibility of the desuetude of the Natural Born Citizen Clause in light of the general political consensus reached by political actors on former Republican presidential candidate Senator John McCain's eligibility for the presidency.[298]

McCain was the Republican nominee for President in 2008. Born in 1936 in the Canal Zone, he arguably became a citizen only a year later as a result of a statute retroactively granting citizenship to any child of a U.S. citizen parent born in the Canal Zone after 1904.[299] That political actors resolved his eligibility "outside the courts," as Spiro writes, means that "[i]f non-judicial actors – including Congress, editorialists, leading members of the bar, and the People themselves – manage to generate a constitutional consensus, there isn't much that the courts can do about it."[300] A similar consensus may crystallize around the presidential eligibility of Senator Ted Cruz, a United States Senator from Texas who was born in Canada to an American mother.[301] The continuing

overperform in the sense of respecting rights that are absent from their constitutions." *Id.* at 897. In contrast, underperformance measures "the extent to which countries fail to uphold the rights found in their constitutions." *Id.*

[296] U.S. CONST. art. II, § 1, cl. 5.

[297] Peter J. Spiro, *McCain's Citizenship and Constitutional Method*, 107 MICH. L. REV. IMPRESSIONS 42, 46 (2008), http://www.michiganlawreview.org/assets/fi/107/spiro.pdf (last visited Feb. 15, 2014), *archived at* http://perma.cc/MD4A-LUL6.

[298] *Id.* at 42.

[299] *Id.*

[300] *Id.*

[301] *See, e.g.*, Aaron Blake, *Can Ted Cruz Run for President? And Should He?*, WASH. POST (Aug. 19, 2013, 12:45 PM), http://www.washingtonpost.com/blogs/the-fix/wp/2013/03/20/supporters-push-for-ted-cruz-for-president, *archived at* http://perma.cc/LFR4-U28C; Michael Catalini, *Is Canadian-Born Ted Cruz Eligible to Run for President?*, NAT'L J. DAILY (May 1, 2013), http://www.nationaljournal.com/politics/is-canadian-born-ted-cruz-eligible-to-run-for-president-20130501, *archived at* http://perma.cc/3BU8-95XX; David A. Graham, *Yes, Ted Cruz Can Be Born in Canada and Still Become President of the U.S.*, ATLANTIC (May 1, 2013, 1:23 PM), http://www.theatlantic.com/politics/archive/2013/05/yes-ted-cruz-can-be-born-in-canada-and-still-become-president-of-the-us/275469, *archived at* http://perma.cc/JN7N-HJ2G; Ed Whelan, *Ted Cruz, Originalism, and the "Natural Born Citizen" Requirement*, NAT'L REV. ONLINE (May 7, 2013, 12:39 PM), http://www.nationalreview.com/bench-memos/347616/ted-cruz-originalism-and-%E2%80%9Cnatural-born-citi

evolution of the Natural Born Citizen Clause could eventually amount to an informal amendment by constitutional desuetude pursuant to which the Clause remains textually entrenched but with a meaning transformed informally yet nonjudicially.

The question whether a constitutional provision has been informally amended by constitutional desuetude is answerable with reference to criteria about what desuetude entails, how it occurs, and whose acceptance it requires. Building on Stephen Griffin's five-part test for identifying an informal amendment,[302] I have proposed a seven-part framework for identifying and anticipating constitutional desuetude.[303] Constitutional desuetude occurs when, first, a constitutional reordering is prompted informally by the sustained disuse of an entrenched constitutional provision and, second, that provision becomes expressly repudiated by political actors.[304] Third, the repudiated rule is replaced by a new unwritten constitutional rule, which sets the standard for future conduct by political actors.[305] Fourth, the new unwritten rule assumes a binding quality despite its informal development and nonentrenchment.[306] Fifth, political actors self-consciously follow the new rule, believing themselves bound by their predecessors' intentionally engineered constitutional reordering.[307] Sixth, the new constitutional rule permeates the legal and political classes' conventional understanding of the constitution.[308] Finally, despite the nontextual entrenchment of a new rule that is contrary to the repudiated rule, the repudiated rule remains textually entrenched.[309] I have illustrated the phenomenon of constitutional desuetude with reference to the Canadian Constitution, where I have most clearly observed it.[310]

3. The Desuetude of Article V?

From 1876 to 1950, Congress' failure to pass major civil rights legislation pursuant to its powers under the Reconstruction Amendments did not extinguish its power to do so. As Akhil Amar explains: "Unsuccessful efforts

zen%E2%80%9D-requirement, *archived at* http://perma.cc/GH58-BUFM.

[302] Stephen M. Griffin, *Constituent Power and Constitutional Change in American Constitutionalism*, *in* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 49, 49-66 (Martin Loughlin & Neil Walker eds., 2007). Griffin's distinction between formal and informal constitutional change categorizes formal amendment and judicial interpretation as formal changes, and other changes occurring through the political process as informal changes. *Id.* at 52.

[303] *See* Albert, *supra* note 11.

[304] *Id.*

[305] *Id.*

[306] *Id.*

[307] *Id.*

[308] *Id.*

[309] *Id.*

[310] *Id.*

to exercise an explicit power do not always – indeed, do not generally – cause the power to disappear from the document in form or in substance."[311] Unsuccessful use alone is insufficient to establish constitutional desuetude. This helps us understand why Article V survives when measured against our seven criteria for constitutional desuetude. The twenty years during which Article V has remained unsuccessfully used has not yet reached the point of sustained disuse. Indeed, although Article V has not been successfully used, it remains often invoked for parochial purposes not intended to proceed beyond simply introducing an amendment proposal for narrow advertising, credit claiming, or position taking objectives. This suggests that political actors have not yet repudiated Article V as valid constitutional rule. In the absence of Article V's repudiation, no new rule has emerged as the new standard for political conduct, which in turn means that we cannot identify a new norm-generative and binding standard, nor can we discern self-conscious behavior by political actors to follow the new rule.

The rise of informal amendment as a political alternative to Article V has not yet replaced Article V as a legally valid vehicle for constitutional amendment. Informal amendment, most notably by judicial interpretation, has only supplemented the Constitution's textually entrenched methods of constitutional change. We therefore cannot conclude that the decline and disuse of Article V has resulted from its repudiation and consequent replacement by a new unwritten rule of informal amendment. Informal amendment may have become the norm in the United States and it may indeed set a standard for future conduct by political actors, but its frequency has not made Article V obsolete. Without the constitutional reordering that is necessary for constitutional desuetude, it is not yet arguable that a new rule of conduct – a new rule of recognition, as I have suggested in describing what occurs when a constitutional provision has been informally amended by desuetude[312] – has permeated the conventional understanding of the Constitution. Article V remains entrenched in the constitutional text, rarely successfully used but nevertheless often invoked, and therefore still seen by political actors as authoritative.

For now, it is too soon to state that Article V has been informally amended by constitutional desuetude. Although Article V has not been used to entrench a formal amendment for a generation, Article V is still useable, it remains politically, morally, and sociologically legitimate, and it continues to be used by political actors. But its usability, legitimacy, and use may change in the years ahead. The case for the constitutional desuetude of Article V will grow stronger as Article V remains unused to entrench a new written amendment and as constitutional change continues to occur exclusively pursuant to informal amendment, most notably through judicial interpretation. Should political actors join constitutional scholars in repudiating Article V as broken

[311] AMAR, *supra* note 148, at 354.

[312] Albert, *supra* note 11.

or unwise, the case will grow even stronger, and could begin to consolidate a new conventional understanding of the Constitution that Article V is unusable and illegitimate. The opposite scenario nonetheless remains possible: Article V could once again become a viable tool for constitutional change.[313] Even Bruce Ackerman concedes that political actors could once again turn to Article V to amend the Constitution formally.[314]

CONCLUSION

Writing in 1919, William Marbury suggested that amending the United States Constitution may have become too easy.[315] At the time, the United States was in the midst of a progressive revolution that had successfully entrenched four formal amendments from 1913 to 1920,[316] one authorizing a national income tax,[317] another requiring direct senatorial elections,[318] another imposing prohibition,[319] and the fourth granting the franchise to women.[320] The frequency of formal amendment surprised Marbury because, as he wrote, "[u]ntil lately, it appears never to have occurred to any one in this country that there need be any fear that the Constitution could be too readily amended."[321] Marbury continued: "[T]he prevailing impression was that it was almost impossible to amend [the Constitution], except by something in the nature of a revolution."[322] The difficulty of formally amending the Constitution had become a matter of public concern, so much so that prominent intellectuals convened a group called the Committee on the Federal Constitution, headquartered the organization in New York, and gave itself the mission of designing and advocating new and less difficult methods of formal amendment.[323] The prevailing impression soon became that Article V might not be difficult enough.[324]

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[313] One scholar argues that "[r]eports of Article V's demise have been greatly exaggerated" and that "the amending provision has more recently enjoyed something of a resurrection, both in Congress and among legal academics." A. Christopher Bryant, *The "Irrevocable" Thirteenth Amendment*, 26 HARV. J.L. & PUB. POL'Y 501, 502 (2003).

[314] *See* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1811 (2007) (suggesting that certain circumstances "could force the protagonists into a desperate effort to crank up the antiquated state-centered machinery of Article V").

[315] *See* Marbury, *supra* note 209, at 223.

[316] *See* VILE, *supra* note 209, at 21-22.

[317] U.S. CONST. amend. XVI.

[318] *Id.* amend. XVII.

[319] *Id.* amend. XVIII (repealed 1933).

[320] *Id.* amend. XIX.

[321] *See* Marbury, *supra* note 209, at 223.

[322] *Id.*

[323] Jos. R. Long, *Tinkering with the Constitution*, 24 YALE L.J. 573, 573 (1915).

[324] Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 319 n.57 (2001).

The conventional view of Article V has changed once again. Today, Article V is widely seen as too difficult. It is described as an "iron cage with regard to changing some of the most important aspects of our political system."[325] That the perception and use of Article V remains ever evolving suggests that Article V is not necessarily fated to the disuse we have attributed to it as a matter of either its original constitutional design or the contemporary polarization of American politics. It has been roughly only twenty years since its last successful use.[326] But Article V has in its history lain dormant for longer periods of time. For sixty years, from 1804 to 1864, Article V was not successfully used to entrench a formal amendment. Then came three formal amendments in rapid succession from 1865 to 1870.[327] Again for forty years from 1871 to 1912, a shorter period but still twice as long as our current period of Article V disuse, there was no formal amendment pursuant to Article V. Then, in 1913, two formal amendments were ratified[328] and two more came to pass by the end of 1920.[329] It therefore remains unclear whether the present-day disuse of Article V reflects a larger recalibration in the rules of constitutional change or just another commonly recurring period of sustained disuse.

The informal amendment by constitutional desuetude of Article V remains a possibility. The study of constitutional change would benefit from further study into the theory of constitutional desuetude with respect to its costs and remedies. As I have explored elsewhere, constitutional desuetude threatens to weaken the rule of law, to complicate the judicial role in constitutional interpretation and in responding to political actors' claims of constitutional authority, and to muddle our understanding of written constitutionalism.[330] But it also holds promise to better align the written constitution with the real constitution, to compel political actors to keep current the constitutional text, and to bring needed nuance to what it means to describe a constitution as written.

Perhaps the most interesting question that follows from constitutional desuetude is the most difficult to resolve: What should result from constitutional desuetude? Answering this question requires us to interrogate related issues, namely whether courts should sever desuetudinal constitutional provisions from the constitutional text, whether political actors should create an easier and expedited formal amendment process reserved exclusively for repealing desuetudinal constitutional provisions, or whether constitutional

[325] LEVINSON, *supra* note 113, at 165.

[326] The Twenty-Seventh Amendment was ratified on May 7, 1992. *See* U.S. CONST. amend. XXVII.

[327] The Fifteenth, Fourteenth, and Thirteenth Amendments were ratified in 1970, 1968, and 1865, respectively. *See id.* amend. XV; *id.* amend. XIV; *id.* amend. XIII.

[328] *See id.* amend. XVII; *id.* amend. XVI.

[329] *See id.* amend. XIX; *id.* amend. XVIII.

[330] *See* Albert, *supra* note 11.

democracy can tolerate constitutional desuetude without a text-oriented remedy. A rich agenda awaits further research as political actors confront the reality that the constitutional text can sometimes be informally amended by constitutional desuetude.