

Richard Albert



Constitutional Amendments

Making, Breaking, and Changing Constitutions

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RICHARD ALBERT

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* * *

I have drawn from some earlier writings as a foundation for the substantially new ideas in this book. Chapter 1 draws partially from *The Expressive Function of Constitutional Amendment Rules*, 59 McGill Law Journal 225 (2013); Chapter 2 from *Constitutional Amendment and Dismemberment*, 43 Yale Journal of International 1 (2018); Chapter 3 from *The Difficulty of Constitutional Amendment in Canada*, 53 Alberta Law Review 85 (2015); and Chapter 5 from *Temporal Limitations in Constitutional Amendment*, 21 Review of Constitutional Studies 37 (2016), and *The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada*, 41 Queen's Law Journal 143 (2016). Readers familiar with these works will observe that their content appears much improved here in this book.

Richard Albert
Ottawa, Canada
December 2018

Introduction

Uncharted Terrain in Constitutional Amendment

When is a constitutional amendment an amendment in name alone? The answer matters now more than ever. Reformers around the world are exploiting the forms of constitutional amendment and testing the limits of legal constraint, openly engaging in what Georges Liet-Veaux described at the height of the Second World War as “fraude à la constitution.”¹ In Hungary and Venezuela, lawmakers have perverted the formal rules of change to undermine the norms and practices of democratic government. In France and the United States, the difficulty of updating the constitution using codified procedures of amendment has driven leaders to flout the constitutional text and to stretch the constitution beyond its natural limits, along the way setting precedent for future noncompliance with the constitution as written. And in Turkey and Georgia, incumbents have solidified their advantage in the constitution for years to come by distorting the strength of their temporary majorities to create an entirely new constitution that masquerades as an ordinary amendment. Some of these constitutional changes are undemocratic, others are illegitimate, and still others are illegal. Yet whether they are properly defined as amendments turns on how we understand the amendment power and limits on its use. The question, then, is twofold: What is an amendment and under what conditions should we recognize its validity?

* * *

A constitution and rules for its amendment are like a lock and key: one can hardly work without the other. No wonder nearly all of the world’s codified constitutions—by one count over 96 percent—recognize procedures for altering their text.² The prevalence of amendment rules in constitutions prompts the question why virtually all constitutional designers choose

to write amendment procedures into their constitutions. There is certainly some soft pressure to conform to what appears to be a global norm of codifying rules for constitutional change. But “other constitutions have them, so ours should too” does not seem like a good enough reason to justify including anything in a constitution, especially since the process of constitution-making ordinarily involves fiercely competing interests, finite time and resources, and the highest of costs in the event of failure. The prevalence of amendment rules in the constitutions of the world raises an even more important puzzle: Why are they so often no more than an afterthought in constitutional design?

No part of a constitution is more important than the procedures we use to change it. Whether codified or uncodified, the rules of constitutional amendment stand atop a constitution’s hierarchy of norms and sit at the base of its architecture, simultaneously stabilizing the constitution’s foundation and authorizing reinforcements when needed. These rules are so fundamental that “we might define a constitution as its process of amendment.”³ They open a window into the soul of a constitution, exposing its deepest vulnerabilities and revealing its greatest strengths.

Constitutional amendment rules are the gatekeepers to a constitution. They can specify who is authorized to initiate an amendment and by what majority, when an amendment proposal becomes effective and later expires, where it must be ratified and by whom, and what within the constitution is unchangeable. The codification of amendment rules often at the end of the text proves that last is not always least.

And yet we know all too little about the rules of constitutional amendment. The modern study of constitutional change has focused largely on the methodologies and results of judicial interpretation, on the causes and consequences of executive assertions of authority, and on the rise and recession of legislative power. The overwhelming interest among scholars of constitutionalism in techniques of informal amendment—changes in constitutional meaning without a corresponding modification to the constitutional text—now dominates our learning about how constitutions change, and today almost entirely occupies the field. Amendment rules have as a result been pushed to the sidelines.

My objective here is to bring formal amendment back to the center of the field of constitutional change. I show in this book how amendment works and why it often fails, what we can learn from its various designs around the world, and why amendment matters in constitutionalism.

In the modern tradition of representative government, amendment rules hold special status: they legitimize higher and ordinary law as derived from the consent of the governed.⁴ Amendment rules give the people and their representatives a way to exercise the “fundamental act of popular sovereignty,”⁵ and hence these rules raise a paradox that confirms their importance: the amendment power is fundamental to the survival of a constitutional order but it can be used to destroy the constitution.⁶

Like the Roman deity Janus whose two faces point in opposite directions, amendment procedures are deployable for objectives both good and ill. Amendment rules may be used to reinforce or destroy the constitution’s institutions, to enhance or diminish the rights it codifies, and to accelerate or reverse progress on the mission the constitution sets for itself—in short to build or break the very foundations that amendment rules protect from ordinary change. Akhil Amar has captured the essence of amendment procedures as “defin[ing] the conditions under which all other constitutional norms may be legally displaced.”⁷ Put another way, constitutional rules generally set the “rules of the game in a society” but amendment rules establish the “rules for *changing* the rules.”⁸

We cannot understand the major moments in constitutionalism around the world without diagnosing how amendment has been used and misused in the making and unmaking of constitutions. Central to these episodes have been the development and manipulation of selective variability in amendment procedures, the emergence and expansion of the doctrine of unconstitutional amendment, and the mounting pressure for increased popular involvement in constitutional change. Yet it is in the versatility of amendment rules that we find their greatest strengths. Formally, amendment rules make it harder to change higher law than ordinary legislation. Functionally, they light the path through an orderly process to bring constitutional expectations in line with performance. And symbolically, amendment rules are important also for another reason that has gone mostly unnoticed but is integral to their existence: they often lay bare the most profound values of a constitution.

What follows is an exposition of all aspects of constitutional amendment rules, with answers to questions that remain unanswered and in some cases even unasked. I draw from comparative, doctrinal, historical, and theoretical perspectives to show how constitutions both properly and improperly structure their amendment rules, to explain when amendment is appropriate and when it is not, and to suggest why amendment rules

should be designed to match the content of the change with the procedure used to ratify it. This book is accordingly structured both as a roadmap for navigating the intellectual universe of constitutional amendment and as a blueprint for building and improving the rules of constitutional change.

Scales of Change

Reformers use the power of constitutional amendment for changes of all sorts, from small to large and across the entire scale of constitutional change. Amendment can tweak the constitution when circumstances require a modest adjustment, and it can produce a radical makeover that amounts to building the constitution anew. We accordingly encounter changes ranging from routine to revolutionary. The many different uses of the amendment power suggest a question asked not nearly often enough: Is the amendment power appropriate for all types of modifications to a constitution, or should the power be used only for certain kinds of change?

The Routine and the Technical

Amendment is commonly used to refine the constitution to meet unanticipated needs that reveal themselves as either necessary or convenient for the smooth operation of government. In France and the United States, for example, the original constitutional design failed to account adequately for contingencies in presidential selection. The U.S. Constitution offered a way to respond to presidential death but not clearly enough to presidential disability. The need for reliable presidential leadership in the Cold War era—combined with memories of the poor health of President Dwight Eisenhower and the assassination of President John F. Kennedy in 1963—pressed Congress and the states to pass the Twenty-Fifth Amendment. Ratified in 1967, the amendment authorizes the vice president to act as president when the elected president declares herself temporarily unable to fulfill her duties. The amendment also creates procedures for the vice president and the cabinet jointly to relieve the president of her office until she asserts her fitness to resume the presidency.

Not long after the United States amended its constitution to shore up the presidency, the French Parliament followed suit in 1976 to account for the

possibility of death or incapacity during presidential elections. The revised Article 7 of the constitution now authorizes the Constitutional Council to delay an election in certain stipulated circumstances of a candidate's death or incapacity. For instance, the Council may postpone the election if an official presidential candidate dies before the first round of voting. These amendments in France and the United States were narrow but nonetheless needed technical improvements to each constitution.

The global economic crisis of 2008 spurred a likewise limited but important amendment to the Spanish Constitution, formally amended only rarely, this time in light of political and economic imperatives. In response to the onset of global financial instability, Spain approved a balanced-budget amendment in 2011 to limit deficits to an amount set by the European Union relative to the country's gross domestic product. Article 135 now requires, with some exceptions, that "the State and the Self-governing Communities may not incur a structural deficit that exceeds the limits established by the European Union for their member states." Spain saw a need to address a rising crisis, and lawmakers seized on amendment as the suitable vehicle to do it.

Similarly routine constitutional changes have involved adjustments to federalist arrangements. In Canada, the British North America Act, 1867, was amended in 1886 to authorize the Parliament of Canada to give territories representation in the Senate and House of Commons, and in 1915 another amendment revised the senatorial divisions in the country in light of the admission of four new provinces since Confederation. Both of these amendments were collateral enhancements to the constitution, made as a result of prior changes to enlarge the union of provinces and territories that constitute Canada. The 1886 and 1915 amendments were standard practical changes, neither grand nor bold, each intended only to harmonize the constitution with new legal and political realities of federalism. Likewise in Australia, an amendment in 1910 authorized the federal government to assume debts incurred by a state *at any time* instead of only as of the day the constitution had been enacted. Australia struck eight words from Section 105 of the original text, removing its restrictive reference to state debt "as existing at the establishment of the Commonwealth" and freeing the federal government to intervene whenever warranted in the future to secure the financial health of the federation.

Many amendments around the world have fallen on a comparable point along the scale of constitutional change. Luxembourg amended its

constitution in 1983 to update the text of the oath taken by representatives and bureaucrats when they enter office. South Africa amended its constitution also to update its rules on oath-taking: the First Amendment, adopted the year after the enactment of the constitution, makes clear that an acting president need not retake the oath if she has already taken it once during the pending presidential term. In Bangladesh, the Sixth Amendment in 1981 confirmed that a sitting vice president elected to the presidency ceases to occupy the vice presidency when she becomes president. The Fifteenth Amendment to the Sri Lankan Constitution requires the Commissioner of Elections to certify, as soon as practicable after ballot tabulation, the number of members each district is entitled to return. These amendments are all minor technical changes compared to the significantly more sizable ones that reformers have pursued.

Revolution and Renewal

Amendment has been used for grand political and social objectives. Consider the Forty-Second Amendment to the Indian Constitution, a megachange that reverberated across all three branches of government. Adopted in 1976, it altered fifty-five rules and added two completely new parts to the constitution.⁹ Yet more than these changes in form, the amendment made dramatic substantive changes to the constitution, namely by inserting new values of socialism and secularism into the preamble, committing citizens to new duties, authorizing Parliament to exercise more control over the judiciary, changing the relationship between the president and the cabinet, and prohibiting courts from reviewing constitutional amendments. These changes went far beyond the routine and technical amendments made to repair a constitution. Some even described this large omnibus amendment package as creating a new constitution. This was the position of the Indian Supreme Court. The Court disallowed key parts of this mega-amendment because, in its view, this package of reforms would have destroyed the “basic structure” of the constitution.¹⁰ For the Court, these changes were a constitutional replacement masquerading as a constitutional amendment. This key moment in modern Indian political history raises a question central to the role of courts in constitutional change: Should courts have the power to invalidate a reform that nonetheless satisfies the conditions specified in the codified rules of amendment?

Political reorganization from one form of government to another is neither a routine nor a technical amendment. It modifies virtually everything of significance in the machinery of government, from the locus of decision-making authority, to the structure of legislative accountability, to the very nature of democracy. Recently in 2017, Turkey completed a successful transition from a parliamentary to a super-presidential system that gave the president virtually unlimited powers. The amendment was a package of eighteen new articles that, all told, rewrote or repealed seventy-six existing articles in the constitution, or over 40 percent of the entire text. It took less than one year from proposal to ratification. A similar transformation occurred in Greece in 1986. The country amended its constitution from its formally semi-presidential system to what is now effectively a pure parliamentary form of government, with severely shrunken powers for the president and significantly augmented powers for Parliament. The change involved eleven articles in the constitution and required only one year to complete from start to finish—a relatively short period of time for deliberation and debate on a change of this scale. These rapid renovations of the Greek and Turkish Constitutions nudge us to interrogate the relationship between time and change: Should far-reaching constitutional changes take the same duration to initiate and ratify as more minor mechanistic ones?

Constitutional amendments sometimes transform the constitution into an unrecognizable form more for convenience than partisan advantage. In Finland, for example, the country once had a disaggregated constitution comprised of a handful of distinct and detached higher laws. But it is now a single unified master text that has updated the constitution for the twenty-first century and consolidated the country's basic rules of government into a more accessible format.¹¹ Created in the year 2000, this new Finnish Constitution extinguished all earlier constitutional enactments and incorporated all prior higher laws into thirteen chapters.¹² The new codified constitution now numbers thousands of words fewer than the repealed higher laws combined, cutting the total from approximately 23,000 to 13,000 words. Quite apart from these extraordinary changes in form, the newly consolidated Finnish Constitution introduced significant changes to the content of the constitution, notably by expanding the powers of the Parliament, diminishing those of the president, and constitutionalizing the special status of the Åland Islands.¹³ This new constitutional text for Finland was proposed and approved as an ordinary constitutional amendment. But was it more than a mere amendment?

In Denmark, the people amended their constitution in 2009 to proclaim their commitment to gender equality in matters of royal succession, an area of law that had for one thousand years been discriminatorily limited to men. Today, whether a boy or girl, the firstborn child of any future monarch becomes heir and ultimately king or queen of the country. The constitution had previously assigned this role exclusively to the firstborn son even if he had an older sister. (The current Danish monarch, Queen Margrethe II, ascended to the throne in 1972 as a result of a 1953 amendment making a woman eligible only if she had no brothers, whether older or younger than her.) This Danish reform affects a fundamental right, a contrast with the modifications to the separation of powers in Finland, Greece, India, and Turkey. One might well wonder whether changes to rights should be treated the same as changes that rebalance the allocation of powers. The question for constitution-making presents itself: Should constitutional designers create separate rules for amending rights and government structures? And are two differentiated amendment procedures enough?

The Range of Amendment Effects

Whether a constitutional change amounts to a technical fix or a revolutionary transformation may turn alternatively on its effect. The amendment power has been used to alter constitutions with any number of intended or unintended effects. Is the effect of an amendment a factor in defining a given constitutional change as an amendment? Put another way, must an amendment exert an effect of a predetermined scale in order to be properly called an amendment? Or must we define every constitutional change approved using the codified rules of amendment as an amendment, no matter its effect in law and beyond, across both politics and society?

Consider the range of effects an amendment can have—and ask whether all are proper. One effect of an amendment has been to transform both law and society. The 1976 Portuguese Constitution was rooted in Marxist-Leninist principles, but constitutional changes in 1982 and 1989 set into motion a larger process of “demarxization” to demilitarize the country, to replace the Council of Revolution with a new Constitutional Court, and to remove language from the Marxist era, including references to a “classless society.”¹⁴ These changes were substantial in their effects across the whole of

Portuguese law and society . Should we call a change of this magnitude an amendment, or is it something more?

Another effect of an amendment to a codified constitution is to publicize the change with a new writing. Recently in France, reformers sought to delete the word “race” from the constitution. The constitution recognizes in Article 1 “the equality of all citizens before the law, regardless of origin, race or religion.” The controversial amendment proposal would replace “race” with “gender,” revising the codified constitution to guarantee equality under law without regard to “origin, gender or religion.” This revised language has attracted its share of allies and critics yet one in particular has been quite vocal in opposition. Former president Nicholas Sarkozy objected that the amendment would be purely cosmetic: “If we delete the word racism does that mean that it will no longer exist? This is absurd!”¹⁵ The word “race” had originally been written into France’s 1946 postwar constitution in solidarity against the racist Nazi ideology, and it survived the enactment of Charles de Gaulle’s new constitution in 1958. Sarkozy believes the country should keep “race” in the constitution to remember its past, “so that no one ever forgets the millions of victims of the greatest racist enterprise the world has ever known.”¹⁶ Whether one agrees with Sarkozy, the amendment to remove “race” from the text would make the change visible to all in the country’s constitution. Publicity is an obvious effect a formal amendment will have. But even properly defined amendments can have more far-reaching effects. How much further can—and should—they go?

A pair of Irish amendments on abortion illustrates the use of the amendment power for another effect: to settle controversies. When there is sharp disagreement, an amendment can resolve the matter under law. The settlement can never be permanent, nor should it be, since a constitution should remain changeable according to the preferences of those it binds. But a settlement achieved by constitutional amendment—assuming there is broad and representative participation in its enactment—can bring stability and predictability in law.

And yet, although an amendment can settle disagreement as a matter of current law, it cannot settle disagreement in politics and larger society. The debate on the Eighth Amendment to the Irish Constitution was so divisive that one observer described it as the country’s second partitioning.¹⁷ This 1983 amendment protecting the right to life of the unborn became official with 66.9 percent support in a national referendum. Further referendums and judicial challenges attempted to either overturn or narrow the effect of

the Eighth Amendment. Whatever else might be said about it, the amendment created legal certainty about whether abortion was permissible, though inevitably some doubts persisted at the margins as to when and where the prohibition applied. In the years since, Ireland lived a quiet revolution: people across the land grew gradually more supportive of a woman's autonomy in body and choice, culminating with 66.4 percent of voters reversing the Eighth Amendment when they approved the Thirty-Sixth Amendment in 2018, remarkably by much the same margin as the Eighth had been adopted thirty-five years prior. We may later see the formation of an ascendant political coalition strong enough again to reverse the rule. But the law of abortion in Ireland is settled under the constitution, for now.

The evolution on abortion in Irish law and society suggests that popular views had changed well before referendum day. When voters arrived to cast their ballot, they were simply, but importantly still, confirming a social change concealed beneath the surface of law that had already taken root in the country prior to the ratification of the Thirty-Sixth Amendment. Here, then, is an additional effect of formal amendment: to reflect in law a change in society. An amendment can have this effect whether it is minor or major. The Seventeenth Amendment in the United States offers a fine illustration. It changed how political candidates are selected for the U.S. Senate. No longer are senators chosen by state legislatures, as required by the original constitution.¹⁸ Since the Seventeenth Amendment, senators have been elected by a direct choice of eligible voters in each state.

The Seventeenth Amendment did not take long to ratify. Congress approved it on May 13, 1912, and three-quarters of the states had ratified it less than a year later by April 8, 1913. The rapid ratification of the Seventeenth Amendment might suggest that lawmakers devoted little deliberation to it. But Senate reform had been a subject of national political interest for almost one hundred years.¹⁹ By the time Congress eventually approved the Seventeenth Amendment and transmitted it to the states, over half of the states had already adopted direct senatorial elections, or something quite close to it, by law or practice.²⁰ For example, states would hold elections whose results were nominally "advisory" to the legislatures, but in fact their results proved difficult to ignore since they were essentially instructions to state legislators.²¹ By 1913, at least thirty-four states had effectively evolved by law or practice to elect their senators even before it was required by constitutional amendment.²² The Seventeenth Amendment may be understood as confirming a change that had already substantially

occurred subnationally. This change was labeled an amendment and approved as one, but whether it was substantively in fact an amendment turns on its subject, authority, scope, and purpose, as I will explain in chapter 2.²³

The passage of the Seventeenth Amendment may have been inevitable but we should not underestimate the importance of the mobilization that led to its eventual ratification. The amendment is legitimate not only because it *is* law but also of how it *became* law. The process of democratic decision-making that introduced direct senatorial elections into American politics gave the amendment sociological legitimacy. And this isolates another effect that the amendment power has been used to achieve: where the process of change is free and fair, an amendment generates sociological legitimacy and gives credibility and authority to the outcome .

The first amendment to the modern Canadian Constitution shows how an amendment can be legitimacy-conferring. Adopted immediately after a major renovation of the constitution, the Constitution Amendment Proclamation, 1983, strengthened rights for Indigenous peoples on land claims, treaty agreements, and consultation on future constitutional amendment. These politically and morally imperative modifications had been left out of the earlier package of constitutional changes, and the time had now come to make them official. Parliament could have chosen to pass these crucial measures as ordinary laws, or the federal government of the day could have by its conduct put many of these changes into practice without codifying them into law. But these changes were thought important enough to be written into the constitution through the intricate and demanding process of constitutional amendment required to do it: agreement from both houses of Parliament and also of two-thirds of the ten provinces, where the ratifying provinces represent at least half of the total provincial population. This extraordinary mobilization of political actors conveyed an encouraging message of support for Indigenous peoples, and it doubled as an acknowledgment of past wrongs and a commitment to righting them. In the immediate aftermath of the amendment, Indigenous peoples in Canada could take some comfort from the successful use of a difficult amendment procedure to codify their rights.

A twist on the legitimating effect of amendment—and there are many other possible effects beyond this short list—is to layer a veneer of legitimacy on lawmaking when its true purpose is to consolidate a victory or conquest. For example, what ultimately became known as the “new” Japanese

Constitution of 1946 was not adopted as an altogether new constitution but instead as an amendment to the old Meiji Constitution.²⁴ Article 73 of the Meiji Constitution required two-thirds supermajority agreement of all members in each house of the national legislature in order to approve an amendment. The emperor would then promulgate it. On November 3, 1946, the emperor made the “new” constitution official, stressing that the changes had been made in conformity with the Meiji Constitution: “I rejoice that the foundation for the construction of a new Japan has been laid according to the will of the Japanese people, and hereby sanction and promulgate the amendments of the imperial Japanese constitution effected following the consultation with the Privy Council and the decision of the Imperial Diet made in accordance with Article 73 of the said constitution.”²⁵ Adopting the 1946 constitution as an amendment to the Meiji Constitution allowed postwar Japan to keep its connection to the past and to achieve a significant constitutional change while retaining formal legal continuity. But the content of this constitutional amendment—in particular, the country’s new commitment to pacifism in Article 9—had an equally important political effect: it gave the United States and the world a permanent reminder of the Allied victory in World War II. The form and effect of this constitutional amendment raise a fundamental question to which we shall return: This 1946 change was made as a simple amendment but does it amount to something more than that?

* * *

Some constitutional changes are ordinary housekeeping measures and others are clearly more consequential transformations in law and society. Sometimes it is unclear at the time of the change whether a constitutional reform is minor or major. Although formal amendment can generate textual revisions to which political actors and the people can point as a referent for debate or mobilization, a formal amendment cannot on its own tell us how to evaluate the nature and significance of the constitutional change. We must also know the relevant history, politics, and laws of the jurisdiction, as well how the change is perceived by the relevant legal elite and the people.

Should it matter whether a constitutional change is a technical adjustment or one that transforms the constitution? The answer matters for understanding the change as either an amendment, a new constitution, or perhaps something else. The answer matters also for determining whether changes of varying scale require correspondingly different procedures of enactment. Constitutional theory and design have yet to resolve these questions.

Early Amendment Design

The early American experience hints at answers to some of these questions. This should come as no surprise given that the idea of altering a codified constitution is distinctly American in origin.²⁶ The American experience can shed light on how to design amendment rules, how to distinguish an amendment from other kinds of changes, and why we should amend constitutions at all. But as much as the United States can teach us about early amendment design, the designs themselves are better taken as antimodel than model.

America's First Constitution

The very first amendment rule codified in a national constitution appears in America's original constitution, the Articles of Confederation. Approved by the Continental Congress in 1777 shortly after the Declaration of Independence in 1776, the Articles came into force in 1781 with a difficult amendment rule:

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 afterwards confirmed by the legislatures of every State.²⁷

The three critical features of this amendment rule were inviolability, perpetuity, and unanimity. The rule of inviolability established an obligation to respect the Articles, and created an expectation that those bound by its terms would obey the limits on how they may exercise power. The rule of perpetuity envisioned a strong union of states intended to last indefinitely. And the rule of unanimity imposed an arduous threshold for altering the terms of the perpetual union: Congress and each of the thirteen states had to approve any proposed change. These three features together suggest the beginnings of an answer to what an amendment is and what it is not.

How could the Articles be both inviolable and perpetual and yet contemplate the possibility of their amendment by unanimous agreement? This is a puzzle because surely an amendment to the Articles would undermine both

its inviolability and its claim to perpetuity. In this book—in particular in chapter 2—I develop a theory of amendment suggesting an answer to how a constitution can be both inviolable and perpetual yet also freely amendable. The critical point turns on the scope of change authorized by the act of *amendment* defined as a peculiar type of constitutional modification. In the case of the Articles of Confederation, the reasons it could at once be inviolable, perpetual, and also amendable are both explicit and implicit in its text.

The states had an inviolable responsibility to honor the bargain that had produced the Articles. Congress and the states could later change the Articles using the rule of unanimity, but the inviolability of the underlying duty would continue under the amended constitution. The power of amendment was compatible with the rule of perpetuity since what was envisioned for perpetuity was not the Articles as enacted but rather the Union itself. It was the Union that would endure, not the original rules codified in the Articles. The Articles would be always subject to change using its amendment rules.

There was an unstated but implied limitation on what Congress and the states could do using the power of *amendment* as distinct from the power to make a constitutional change on a larger scale: under the law of the Articles, the states could not use their power to amendment to transform the system of government from a federal to a unitary state even with unanimous agreement. That change would have exceeded the power of states to *amend* the Articles. It would have violated the guarantee that the Union would last perpetually. Transforming the Union into a unitary system using the codified amendment procedure would have violated the federalist foundations of the Articles of Confederation—the central constitutional norm that gives coherence to the Articles and which the constitution indicates is an agreed-upon perpetual feature of the polity. These limitations both explicit and implicit in the amendment rule in Article XIII suggested that a transformative change of that scope would be inconsistent with the existing constitution, and could be properly achieved only by promulgating a new constitution.

Neither Amendment nor Constitution

To be sure, as a practical reality, Congress and states could have agreed among themselves to exercise their power of amendment to convert the Union into a unitary state and to reimagine the whole structure of

government. They could have done so using the unanimity rule in Article XIII. And they could have continued constitutional life under the reformed Articles as though the change had been proper. But the Articles would have remained the Articles only as a legal fiction; the change from federalism to unitarism would have broken legal continuity in the United States. It would have violated the idea of coherent change embedded within the limitations on amendment in Article XIII—the idea that a change, in order to be properly understood as an amendment, must cohere with the existing constitution.

It is possible to imagine three different claims justifying the reform from federalism to unitarism using Article XIII. Congress and the states could have called the change an amendment. But this would have brought the amendment into direct conflict with implicit limitation on what could be changed using the rules of amendment. They could have alternatively described the change as creating a new constitution for a new unitary regime. But as a matter of form, the change would have been codified in the existing Articles of Confederation, with no new promulgated constitution, so it would have been visibly wrong to call it a new constitution. Congress and the states could have taken a third route: to proceed as though the change were a minor adjustment to the Articles in line with its existing form of government. But this too would have been incorrect because the transformation of the Union from federal to unitary would have been—quite obviously to all political actors and the people themselves—an extraordinary modification of the Articles.

These three options assume that Congress and the states would have wanted to keep fidelity with the constitution. A fourth option would have presented itself had Congress and the states freed themselves from their preoccupation with legality: they could have conceded their violation of the rules of change in the Articles, defended their actions as demanded by necessity for the survival of the United States, and reasoned that the change from federalism to unitarism had resulted in a more sustainable form of government albeit different from what had been intended. Claiming the mantle of legitimacy in the face of illegality is a clever strategy that could have worked. This fourth option would have obviated the call to answer the key definitional question about the kind of constitutional change they had made.

Yet it would have been incorrect to define the reform of the Articles from federal to unitary as an *amendment*. It would have been incorrect also to

describe it as creating a new constitution because it would have clearly remained the same master text. And it would plainly have been incorrect to define the change as a minor adjustment since so much would have changed in the transition from federalism to unitarism. Here, then, is the problem: What sort of change would it have been?

The State Tradition in Constitutional Amendment

There were state constitutions even before the Articles of Confederation. Many of these state constitutions were ahead of their time in the complexity and sophistication of their amendment rules. State constitutions applied subject-matter restrictions on amendment, they codified procedures of variable difficulty, and they used temporal limitations to regulate the sequence of steps in the amendment process. Their design of amendment rules reflected the idea of coherent change we encountered in the Articles, a principle that holds the key to unlocking the answer to the question whether a change of extraordinary scale may properly be called an amendment.

The main point of difference between early state constitutions and the Articles of Confederation is the innovation evident in the design of state constitutional amendment rules. A few examples demonstrate the point. The amendment rule in Georgia permitted amendments to its 1777 Constitution only in a convention called for the specific purpose of amending the constitution, and a convention could be called only by a majority vote in a majority of the counties in the state.²⁸ This amendment rule combines a delegated convention with a double majority requirement. What makes this procedure complicated is not only its supermajority threshold for ratification but its burden of execution: gathering a majority of voters in a majority of counties to support an amendment proposal was no easy feat. South Carolina had its own novel amendment design in 1778: a temporal limitation for all constitutional changes. No change could lawfully be made without giving ninety days' notice of the proposed change.²⁹ Maryland's amendment design was groundbreaking its own right. The 1776 Constitution of Maryland codified two procedures, each for different parts of its text.³⁰ One of its procedures required the General Assembly to approve the amendment twice by majority vote on each of two occasions separated by the dissolution and reconstitution of the Assembly after a

general election. This electoral precondition for an amendment was yet another innovation observable in the state tradition.

Like the Articles of Confederation, some state constitutions expressed either implicitly or explicitly in their text the idea of coherent change, requiring that a proper amendment had to keep faith with the existing constitution. Under this important rule, constitutional change could lawfully go only as far as the point at which the change did not transform the constitution into something it was not. To put it differently, these state constitutions—like the Articles of Confederation—could be amended but not replaced using the codified rules of amendment.

The 1777 Vermont Constitution is a prime example. It declared that the constitution would remain in force “forever, unaltered, except in such articles, as shall, hereafter, on experience, be found to require improvement[.]”³¹ There is an obvious tension between the constitution remaining “forever, unaltered” and an unlimited power of amendment: an amendment that changes the core of the constitution violates the rule that the constitution will remain unaltered. Hence the Vermont Constitution’s specification that it may be amended only where it is “found to require improvement[.]” This clarification alleviates the tension by limiting the amendment power only to those changes that aid the constitution in its functioning, consistent with its original design and in coherence with its operating framework. Any change that exceeded this boundary could not be understood as an amendment. The 1776 Constitution of Delaware had a similar structure: it codified a rule prohibiting a specially designated section of its text—part of which included its declaration of rights and fundamental rules—from ever being “violated on any presence whatever.”³² The Delaware Constitution permitted alterations to itself, but provided only that no change would modify the constitution to the point of its mutation into something beyond the bounds of the text’s coherence.

Still today, state amendment design reflects this early practice of distinguishing between small- and large-scale changes. State constitutions, like most other codified constitutions, codify change procedures that preserve continuity in the constitution—changes that keep the constitution coherent. But in contrast with the U.S. Constitution and indeed most other national constitutions in the world, state constitutions often also codify procedures for changes that would be discontinuous were they not made in conformity with the codified rules of change. Discontinuous changes break with the existing legal order and depart from the fundamental presuppositions or

framework of the constitution. For example, we are likely to label the change a discontinuous and not a continuous one if incumbents establish an official religion where there has been none before and there exists a codified equality norm of nondiscrimination. But where the constitution specifies a procedure for making these extraordinary changes, the change is no longer defined as formally discontinuous because the constitution contemplates its possibility. Constitutions that codify this distinction between ordinary and extraordinary changes ordinarily require amending actors to satisfy different procedures for each of these two kinds of changes. Extraordinary reforms generally require more participatory procedures than an ordinary reform, which occurs on a smaller scale and accordingly requires a less involved degree of consent to legitimate it.

The distinction between continuous and discontinuous changes is conceptually blurry because it is not always clear what separates the former from the latter.³³ Still, they are generally understood to be alternative means of constitutional change.³⁴ As Walter Dodd wrote in the definitive early history of state constitutional change, the creation of multiple procedures for altering the constitutional text may be traced to the need to have one mechanism for changes to single provisions and another for changes to the entire constitution.³⁵ The variable degree of difficulty evident in state constitutions is an important marker of difference from the U.S. Constitution: state constitutions make the procedures for continuous changes not only different but easier from those required for discontinuous changes, while the national constitution makes no explicit distinction at all between continuous and discontinuous changes.³⁶ It is in the difference between continuity and discontinuity that resides the answer to the question whether a given change is properly called an amendment or something else.

Defying Amendment Rules

There is a separate category of constitutional change worth distinguishing: revisions to the rules of amendment. These changes take three forms. They occur as a matter of course in a wholesale replacement when a new constitution supersedes the old. For instance, the 2010 Kenyan Constitution replaced the existing 1969 text and along with it the rules of amendment. The rules of amendment change also when they are formally altered in conformity with the codified rules of change in a constitution.

In 1984, for example, Austria amended its amendment rules to strengthen protections for states in the federation. Prior to the change, amendments restricting the power of states required two-thirds supermajority approval only from the National Council; the amendment imposed the additional requirement of two-thirds supermajority approval also from the Federal Council.

The first form of change to amendment rules is not an amendment; it is part of a larger constitutional enactment. The second prompts a question: Should we define a formal change to amendment rules as an amendment? The easy answer is yes, assuming the change complies with the codified rules of constitutional amendment. But the better answer requires deeper engagement with amendment theory, and with the necessary conditions for correctly identifying a given change as an amendment. There may be something special about rules of amendment that makes altering them an extraordinary happening, even if done in conformity with codified procedures.³⁷

Changes to amendment rules occur most controversially in a third way: when lawmakers defy the codified amendment rules by taking another route to amend the constitution—a path not prescribed by the codified constitution. Modifications of this third kind confront us with three questions: one centered on process, a second corollary question directed to effect, and a third addressed to legitimacy. Does the codification of amendment rules imply an exclusive set of legal procedures for formal constitutional change? If yes, how should we treat formal changes approved using uncoded procedures in violation of the codified rules? And does the irregularity of these changes make them illegitimate? For the beginnings of answers to these questions, we turn to India and the United States.

Constitutional Moments and the Basic Structure Doctrine

The theory of constitutional moments and the basic structure doctrine are two of the most influential contributions to the modern study of constitutional change. Briefly stated for now, Bruce Ackerman's theory of constitutional moments uncovers the dualist foundations of the U.S. Constitution to show how leaders have transformed constitutional meaning without a corresponding alteration to the constitutional text,³⁸ while the basic structure doctrine, first articulated by the Indian Supreme Court, enforces implicit

limitations on the power to amend the codified constitution. Each idea has disrupted how we understand the forms and functions of constitutional amendment, each has caused us to rethink the very meaning of constitutionalism and how it translates democracy, legitimacy, and sovereignty into law, and each continues to generate important scholarship critiquing, applying, and extending it both inside and out of the domestic context from which it emerged.

The basic structure doctrine and the theory of constitutional moments of course spring from different social contexts, each driven by a different constellation of political forces and each rooted in a different legal culture. But both are fundamentally concerned with the same idea. The basic structure doctrine and the theory of constitutional moments are variations on the same powerful phenomenon that has spread across a growing number of countries in the world: the alteration of formal amendment rules without a formal amendment.

The Indian Constitution's codified amendment rules were clear when they were written. Nothing in the text was expressly enumerated as unamendable. The default amendment procedure required majority agreement in each house of Parliament, provided at least two-thirds of members were present and voting.³⁹ The Supreme Court brought ambiguity to these rules when it held that fundamental rights were, at least in theory, immune to the amendment power.⁴⁰ Seeking to return clarity to the constitution and to fix what was seen as "an erroneous decision,"⁴¹ Parliament and the states later joined forces to insert a declaration in the amendment rules that "any provision of this Constitution" is amendable "in accordance with the procedure laid down in this article."⁴² This was only one round in a larger battle about what in the constitution is amendable and how, and more centrally about who in India would have the final word on the amendment power.

The Court responded unflinchingly by reining in the unbounded amendment power that Parliament and the states now possessed. The Court asserted the power to invalidate amendments that, in the Court's own view, were inconsistent with the constitution's basic structure.⁴³ Precisely what fits into the basic structure was not then nor is it today spelled out in the constitution. It is not clear even in the collective mind of the Court's judges, as they have not themselves agreed on what counts as the basic structure. The contestability of the theory is evident in the divided bench that split 7–6 on whether the amendment power was limited at all.⁴⁴ Nonetheless the Court later made good on its threat, striking down part of an amendment that had

fully complied with the constitution's clear procedures for amendment.⁴⁵ The results are worth emphasizing. The constitutional text conferred plenary amendment power on Parliament and the states, but the Court chose to restrict that power in its judgments. And the Constituent Assembly that created the constitution had chosen not to codify any unamendable rules but the Court has in its judgments imposed several unamendable norms, with no constitutionally codified referent for reformers to identify what is off limits. The outcome is evident: the country's amendment rules have been altered without a formal amendment.

The United States has lived a similar experience. Elected and appointed leaders defied the rules of amendment in the Founding, the Reconstruction, the New Deal, and the civil rights revolution, transforming the constitution outside of the ordinary rules of amendment in Article V, according to Ackerman's theory of constitutional moments.⁴⁶ The delegates to the Philadelphia Convention wrote an altogether new constitution instead of abiding by their congressional instructions to revise the existing one, the success of the Reconstruction relied on an irregular use of Article V, the New Deal was born of transformative judicial opinions, and the civil rights revolution became law on the strength of landmark statutes. Each of these four series of episodes achieved fundamental constitution-level change without complying with the codified rules of constitutional amendment.

What makes these constitutional moments in the United States resemble the basic structure doctrine in India is not that they occurred outside of Article V. It is that they have altered how the constitution is changed, and also when we recognize a change as valid.

The theory of constitutional moments has often been incorrectly interpreted both inside the United States and in efforts to apply it abroad. A constitutional moment is not just any profound transformation in constitutional meaning. It is a narrower type of change that can be stated with fine precision: it is a precedential change to formal amendment rules without a formal amendment. At bottom, a constitutional moment is a successful reconfiguration of the process and political consensus required to legitimate a constitutional change. There is certainly more to the rich theory of constitutional moments, including a detailed sequence involving institutional confrontation and consolidation as well as popular ratification. But what has not received sufficient scholarly attention is the plain yet powerful implication in the Ackerman retelling of American constitutional history that codified rules of change can themselves be changed without a

corresponding recodification—and yet still continue to exert what amounts to the binding force of legal authority. Understood in this way, it becomes possible to identify constitutional moments around the globe in places where they have gone mostly unnoticed or wholly unseen. The global character of this phenomenon has important implications for how we change constitutions, for how we measure amendment difficulty and whether we should even try, and most importantly for why we codify amendment rules at all.

The Constitution as an Incomplete Code

Leaders in all legal traditions have often felt compelled by political imperatives to forgo the formal rules of constitutional change in order to bring their proposals for major constitutional renewal directly to the people. As Stephen Tierney has observed in what is now the definitive account of referendums, we are witnessing increasing recourse to referendums even where the constitution does not mandate their use.⁴⁷ The use of nonobligatory referendums raises foundational questions about the drivers of constitutional change, the legitimizing sources of constitutional reform, as well as the limits of codifying constitutional rules in a single master text.

The immediate consequence of recourse to discretionary referendums for constitution-level change is to depart from the formal rules of constitutional change for altering the very constitution that presumably binds lawmakers. Yet this is not a catastrophic tension since no constitution, whether codified or not, can ever in reality or in its conscious self-understanding be an exhaustive catalogue of all official rules.⁴⁸ The tension reflects instead an inescapable truth in constitutional change and its relationship with the underlying constitutional order: when leaders make a fundamental break from the rules of constitutional change to formally amend a rule in the constitution, they do more than alter that part of the constitution—they alter the nature of the constitution itself.

Consider a French illustration. The 1958 Constitution, which remains in force today, originally created an Electoral College for presidential selection.⁴⁹ The Electoral College consisted of members of Parliament, mayors, some municipal councilors, and other designated officials numbering almost 80,000.⁵⁰ Charles de Gaulle was the only president ever chosen by this Electoral College, in the very first election held under what was then

a new constitution. After his victory, De Gaulle proposed a constitutional amendment to replace the Electoral College's indirect presidential election with direct presidential election by popular vote. He faced considerable resistance to this major constitutional reform. Parliament feared it would divest the legislature "of its role as the sole bearer of national sovereignty."⁵¹ Unsurprisingly, Parliament rejected his idea because direct presidential election would have eroded Parliament's power over the president and given the president an independent mandate from the people.⁵² De Gaulle therefore could not assemble the parliamentary support he needed to introduce this amendment proposal in conformity with the constitution's codified rules of change. So he improvised.

De Gaulle went over the heads of parliamentarians and held a referendum in 1962 under his authority in Article 11 of the constitution. His power as president under Article 11 appeared to authorize him to poll the people directly in a referendum without parliamentary authorization only for limited purposes unrelated to constitutional amendment. Opponents at the time described his referendum as "unconstitutional."⁵³ De Gaulle nonetheless earned a supermajority majority of 61.75 percent of voters supporting the change. The Constitutional Council later heard a challenge to the amendment-by-referendum and concluded that it had no jurisdiction to rule on the legality of expressions of popular will in a national referendum.⁵⁴ The French Constitution was consequently altered in two ways as a result of this referendum. First, its text was formally revised to codify the new procedure for direct presidential election, over the objections of Parliament. And second, the constitution was changed also without a new writing: De Gaulle's recourse to Article 11 to amend the constitution became a precedent that future presidents could invoke to amend the constitution in the face of an obstructive Parliament. This unconventional referendum rewrote the constitution's formal amendment rules, and it did so with invisible ink that cannot be seen by a plain reading of the text.

Another striking case of an uncoded change to the formal rules of amendment comes from Belgium. Its 1831 constitution is structured as a unitary form, but since 1970 the country has embarked on an ongoing process of federalization, devolving powers to regions and communities known as federated entities and ultimately codifying federalism as a foundational constitutional principle.⁵⁵ The constitution's amendment rules are particularly onerous.⁵⁶ They require the king, the House of Representatives, and the Senate acting jointly as the federal legislative power to issue a declaration

listing the items for constitutional revision. The legislature is then automatically dissolved and new elections follow. The reconstituted federal legislative power returns to the declaration of revisions to negotiate possible amendments, which become official on a two-thirds vote of each chamber provided a two-thirds quorum exists.

The rigid amendment procedure in Belgium has proven poorly suited to the country's conversion from unitarism to federalism.⁵⁷ The evidence resides in a single but powerful fact: political actors have felt it necessary to violate the constitution's onerous amendment rules in the service of this transition. To understand why incumbents thought it essential to break the amendment rules, we must first understand the very precise sequence of decision-making the constitution requires for an amendment.

The constitution permits amendments only on those items listed in the pre-election declaration of revisions but it is often only after the election that lawmakers see what needs changing. It is therefore not uncommon for the declaration of revisions to omit items that lawmakers only later agree require amendment. This problem arose in 2010. But lawmakers chose not to issue a new declaration of revisions outlining what they now realized needed amendment because that would have required a new election. Lawmakers instead created a temporary amendment procedure authorizing amendments to items not listed in the original declaration, in plain defiance of the constitution's codified rules of amendment. Patricia Popelier and Koen Lemmens report that this episode was "highly contested because it circumvented the normal amendment procedure," and they further observe, quite rightly, that it highlights a vital question for constitutionalism: Must leaders abide in all cases by the codified amendment rules or are these rules subject to unconventional modification according to the needs of society?⁵⁸

Legal Amendment or Illegitimate Violation?

The irregular Belgium reform and the French discretionary referendum illustrate the same phenomenon as the Indian basic structure doctrine and the constitutional moments in American history: changes to the rules of amendment without using the codified rules of amendment. And all four moreover raise the same question: Are these changes properly understood as legal constitutional amendments or better described as illegitimate violations of the codified amendment rules? The answer turns on a

fundamental question that is quite possibly the most difficult in the study of constitutional change: What counts as a constitutional amendment?

These four changes are neither legal nor illegitimate. They break from the codified rules of amendment, and accordingly cannot be described as legal in the sense of respecting the lawfully enacted rules of change. And yet while they defy the codified amendment rules, each of these episodes has a claim to sociological legitimacy if it enjoys general acceptance as a valid change to amendment practice, whether or not it violates the codified procedures of amendment from a formalist legal perspective. Where does this leave us? Nowhere nearer to resolving whether these changes are amendments but closer to concluding that they may be illegal yet legitimate.

The Venice Commission has taken a position on whether states should abide by the codified rules of amendment. In its 2009 report on constitutional amendment, the Commission recognized that sometimes “irregular constitutional reform” may be acceptable considering the intended objective, for instance in the consolidation of democracy. But the Commission nonetheless underscored its general position against breaking from the prescribed rules of amendment. For the Commission, strict adherence to law is a condition for imbuing constitutional change with legitimacy.⁵⁹ Later in 2015 when faced with a question on using discretionary referendums, the Commission echoed this view, this time quite definitively: “recourse to a referendum should not be used by the executive in order to circumvent parliamentary amendment procedures.”⁶⁰ For the Commission, the concern is that incumbents might exploit an amendment-by-referendum to realize their centralizing ambitions. The Commission’s formalist views on how to change constitutions serves the public interest in legal certainty, but it also exposes a paradox: the Commission resists the use of discretionary referendums—quite possibly the ultimate device for the expression and aggregation of popular will—out of fear that popular choice could weaken democracy.

And yet appealing directly to the people in a departure from the formal rules of amendment is nothing new. The U.S. Constitution was itself born of a circumvention of the exceptionally onerous rules of change in the Articles of Confederation. The Articles required the consent of Congress and each of the thirteen state legislatures for an amendment to become valid,⁶¹ quite literally an impossible threshold to satisfy as no amendment to the Articles had ever been adopted.⁶² When the Philadelphia Convention gathered “for the sole and express purpose of revising”⁶³ the Articles, the Convention

proposed an altogether new constitution that would become valid when ratified by nine out of the thirteen states—a much lower threshold to create a new constitution than the Articles required for a simple amendment.⁶⁴ The new constitution was ultimately approved in extraordinary conventions in the several states. These were popular assemblies convened for two purposes: to express the choice of the voting peoples and to anchor the constitution in the consent of the governed.⁶⁵ These conventions were not referendums—they were closer to “deliberative plebiscites”⁶⁶—but they were a public forum for popular choice nonetheless, much like referendums, though mediated through representatives.

Courts are not immune to the appeal of constitutional change driven by popular mobilization. Even judges have sometimes pressed lawmakers to give effect to a referendum where the constitution makes no reference to using a referendum as part of the formal amendment process. In Romania, for example, the Constitutional Court suggested in 2012 that the use of an advisory referendum earlier in 2009 to create a unicameral Parliament could later mature into an expectation that future reforms must incorporate a referendum as part of the amending procedure.⁶⁷ And in Thailand, the Constitutional Court recommended the use of a referendum for a particularly important and large-scale constitutional amendment despite the clarity in the country’s amendment rules that no referendum is ever required.⁶⁸

Whether we define these uncodified yet binding changes to formal amendment rules as amendments or something else, examples abound of legislative, executive, and judicial actors around the world modifying formal amendment rules without formally amending them. In Norway, the legislature did not follow the formal amendment procedure in 1905 when its union with Sweden was dissolved, though it had carefully considered the implications of contravening the country’s amendment rules.⁶⁹ In Colombia, the constitution does not grant the president the power to veto a constitutional amendment passed by Congress, and yet the president issued a decree in 2012 vetoing an amendment.⁷⁰ And in Ireland it has now become ordinary political practice to make substantial constitution-level changes with organic laws rather than engaging the referendum-centered process of formal amendment, though formal amendment nevertheless remains frequent.⁷¹

We must also include two types of judicial intervention in our catalogue of changes to amendment rules without recourse to formal amendment. The first occurs when a court imposes implicit limits to what in the

constitution may be amended even where the constitution codifies nothing as unamendable, as in India, whose top court has created the basic structure doctrine. The second arises when a court asserts the power to review the content of an amendment despite being required by the constitutional text to ensure only that an amendment has been properly passed according to the procedures codified in the constitution.

The Content-Procedure Distinction in Amendment Review

The Turkish Constitution authorizes the Constitutional Court to evaluate constitutional amendments for their procedural correctness, but it denies the Court the power to evaluate the content of amendments for coherence with the constitution.⁷² Yet the Court has found a way to justify its leap from procedural to substantive review in what may be described either as defiance of the constitution's amendment rules or as a defense of the constitution's fundamental values.

In a 2008 judgment, the Constitutional Court struck down a set of amendments on wearing headscarves in universities.⁷³ The basis for the Court's decision was not that reformers had violated the constitution's procedures for amendment. It was instead rooted in Article 4 of the constitution, which entrenches several principles as unamendable characteristics of the Turkish Republic.⁷⁴ The relevant unamendable principle in this case was secularism,⁷⁵ which the Court held had been violated by the amendment.

Before the Court could enforce this content-based restriction, it first had to find a way to incorporate content review into the narrow scope of procedural review the constitution authorizes it to perform. The Court defined the problem in terms of competence: the Court explained that it could not approve the procedural correctness of the amendment if the amendment violated the content restriction on what could be amended, here secularism. The Court reasoned that since lawmakers did not have the power to make an amendment to the secular character of the state, it would amount to a procedural violation for them to act outside of their limited powers.

The Court's departure from the constitution's amendment rules is worth interrogating on the merits. But it takes on an additional dimension when we see how inconsistently the Court has applied its own precedent. In a more recent 2016 judgment, the Court held that it could not pierce the

veil of procedure to review the content of an amendment because doing so would render meaningless the constitution's prohibition on content-based review of constitutional amendments.⁷⁶ The case concerned the constitution's rule on parliamentary immunity. The rule gives members of the National Assembly broad immunity for statements, views, and votes in connection with their parliamentary functions, meaning they cannot be arrested, interrogated, detained, or tried, and they are immune from criminal sentences during their term of elected service.⁷⁷ However, this broad protection is subject to the important exception that the Assembly may by law choose to lift this rule of parliamentary immunity.⁷⁸

The dispute arose when the National Assembly adopted an amendment temporarily lifting the constitution's grant of parliamentary immunity to legislators. The amendment made it possible to prosecute those members of the National Assembly who were under criminal investigation. Some members of the National Assembly filed a constitutional challenge to the amendment, arguing that they were authorized to seek redress from the Court under Article 85, which gives them the right to appeal their loss of parliamentary immunity. The Court rejected their request for judicial review, holding that although Article 85 would normally authorize the Court to review the lifting of immunity if it had been passed by an ordinary law, this temporary lifting of immunity was not done by ordinary law—it was a constitutional amendment passed using the constitution's formal amendment rules. The Court then stressed the key point: since the constitution limits judges to reviewing an amendment only for procedural correctness, the Court here could not venture beyond that restriction on its powers. Here is the relevant passage in the Court's decision:

A Law of Amendment adopted through this procedure cannot be at all the subject of judicial (constitutional) review in terms of its content; the procedural review is possible only within the framework specified by Art. 148. Pursuant to Art. 148, judicial review of constitutional amendments in terms of procedural requirements is restricted to whether the requisite (qualified) majority votes were obtained for the proposal and in the ballot, and whether the prohibition on debates under expedited procedure was observed.⁷⁹

In this case, the Court read its powers of judicial review strictly in accordance with the codified rules of change. It held that the Court is

authorized to review an amendment only for procedural correctness, and that this excludes any procedure—like the one in Article 85—that does not relate to the adoption of an amendment.⁸⁰ The Court insisted that any other reading would hollow the constitution's prohibition on anything beyond procedural review, and as a result deny that rule of its intended effect, which was to circumscribe the Court's authority to review amendments.⁸¹

The Court's ruling in this Parliamentary Immunity Case takes the position dictated by a plain reading of the constitution, but it is inconsistent with the reading the Court had given to the same text in the earlier Headscarf Ban Case. On one view, this inconsistency can be reconciled quite simply by highlighting that the constitution designates secularism as unamendable but does not give similar protection to parliamentary immunity. On another view, this inconsistency cannot be reconciled because in one case the court adheres strictly to the codified amendment rules and in another it does not. Following the latter view, these two contrary judgments introduce uncertainty in the jurisprudence of the Court on how it will in the future evaluate claims that an amendment is unconstitutional. These two judgments moreover raise the question whether one or both were driven by constitutional politics instead of constitutional law. In cases where a court acts contrary to a plain reading of a direct instruction or prohibition in the constitutional text, it should not come as a surprise that constitutional politics may offer the best explanation for how a court chooses to resolve a claim that an amendment is unconstitutional. The doctrine of unconstitutional amendment gives courts immense power that is susceptible to exploitation for political purposes, whether to entrench a particular world view, to privilege one set of values over another, or to advance the interests of one or another political party.

* * *

These are only a few illustrations of official disregard for formal amendment rules. When the result has been to alter the rules of amendment with precedential force, we can classify the episode as a constitutional moment in the Ackermanian sense. It is an enduring change to how we recognize valid changes to higher law. In some cases these changes have attracted repudiation, in others they have inspired replication, and in still others they have floated uncomfortably between popular acceptance and rejection. But in all cases these episodes have shown the triumph of pure political power over the rigid strictures of a legal code. One question remains unanswered

still: Is a circumvention of the constitution's formal amendment rules properly described as an amendment, or is it better defined as something else?

The Road Ahead

Constitutional amendment is as old as the first constitution. Yet the idea of amendment has generated remarkably little scholarly inquiry that draws from the richness of comparative, doctrinal, historical, and theoretical perspectives, and even less that is useful for constitutional designers in search of resources to understand the design, functions, and limits of amendment rules. I aim in this book to chart this uncharted terrain, both by mapping the intellectual topography of constitutional amendment rules and also by answering the many questions about amendment that have until now remained unanswered in existing studies of constitutional change.

Constitutions and constitutional changes are born of stories personal to peoples joined together in community. I have drawn from these stories to open each chapter in this book with a moment or episode in the amendment history of a constitution from a different jurisdiction, either to raise a question or to make a point. Each of the chapters offers a deep dive into constitutional changes around the globe with a conscious effort to highlight understudied constitutions whose amendment experiences nonetheless hold generalizable lessons or implications. All told I draw from dozens of constitutions in every region of the world, from Austria to Brazil, the Caribbean to the European Union, Greece to New Zealand, Spain to Taiwan, from countries in the east and west, and in the civil and common law traditions.

Chapter 1—*Why Amendment Rules?*—opens with the recent amendment to abolish presidential terms limits in China. I shine a light on this moment to ask why a one-party state would bother using formal amendment rules to change its constitution: Is it theater or order, or both? My focus in this book is squarely on the procedures we use to amend a constitution. We will of course examine individual amendments, both to explore their content and to evaluate their significance. But in all cases my overriding purpose is to direct our attention more to *how* a given constitution has been altered than only to *what* in the constitution is now new.

Virtually all constitutions codify amendment rules. Amendment rules serve important purposes even if the constitution is never amended at all. I classify into three different categories the many uses of amendment

rules—formal, functional, and symbolic—with examples from around the world. Their formal uses include repairing imperfections, distinguishing constitutional from ordinary law, entrenching rules against easy repeal or revision, and establishing a predictable procedure for constitutional change. Their functional uses include counterbalancing courts, promoting democracy, heightening public awareness, pacifying change, and managing difference. Symbolically, amendment rules can be designed to express constitutional values. But the use of amendment rules to express values leaves open the possibility of inauthenticity. How can we know whether the values expressed in amendment design are authentic? I show with reference to the German Basic Law that it is possible to evaluate the authenticity of the values in amendment rules with recourse to the history of the design and interpretation of those rules. Chapter 1 features constitutions from Afghanistan, Albania, Algeria, Bosnia and Herzegovina, the Central African Republic, Chad, Cuba, Ecuador, France, Germany, Kazakhstan, Kiribati, Saint Lucia, South Africa, Spain, the Russian Federation, the Soviet Union, Ukraine, the United States, and Yugoslavia.

In Chapter 2—*The Boundaries of Constitutional Amendment*—I return to the question that has recurred several times already: What is an amendment? I define an amendment in positive and negative terms, meaning both what an amendment is and what it is not. I construct a descriptive and normative theory of amendment that is structured around four fundamental features of an amendment: its subject, authority, scope, and purpose. The most important feature of an amendment is its scope, which at all times must not exceed the boundaries of the existing constitution. I also differentiate a constitutional amendment from a constitutional dismemberment, the latter a change that is more than an amendment but less than a new constitution. A constitutional dismemberment is incompatible with the existing framework of the constitution. It intends deliberately to disassemble one or more of the constitution's elemental parts by altering a fundamental right, an important structural design, or a core aspect of the identity of the constitution.

This second chapter opens with an example from the United States: the Corwin Amendment, originally introduced as the Thirteenth Amendment, a proposal to make slavery an unamendable right of states—a proposal that Congress officially approved in 1861 and some states later ratified. Was the Corwin Amendment properly described as a constitutional amendment or was it more accurately a constitutional dismemberment? The answer is neither easy nor obvious, but it is surprising. I show that this distinction

between amendment and dismemberment is central to understanding both how constitutions change and how to design the rules of amendment. Chapter 2 discusses additional constitutions from Barbados, Belize, Brazil, Canada, Dominica, Guyana, Ireland, Italy, Jamaica, Japan, and New Zealand.

A word on vocabulary is important. I will use “amendment,” “constitutional amendment,” and its variations throughout this book as a general term to cover the entire scale of change except when I contrast the idea of “amendment” specifically with the new idea of “constitutional dismemberment” as defined in Chapter 2. I will moreover refer to “amendment rules,” “formal amendment rules,” and “rules of change” to refer to procedures used for all types of formal constitutional change, unless I use these terms in contrast to other more specific procedures of formal constitutional change, namely the procedures for constitutional dismemberment.

Having defined a constitutional amendment and its foil—a constitutional dismemberment—I then turn to the parlor game that scholars of national constitutions love to play: comparing the difficulty of constitutional amendment across jurisdictions. Some take pride in boasting of their own constitution’s rigidity, while others see it as a badge of dishonor. In Chapter 3—*Measuring Amendment Difficulty*—I explain why empirical studies that purport to rank constitutions according to their relative rigidity are unreliable. I open the chapter with reference to an early Polish Constitution and the Treaties of the European Union. Both require unanimous agreement for their amendment. The Polish Constitution was virtually impossible to amend yet the Treaties are relatively flexible. How can this be? I show that a purely textual analysis of the codified rules of amendment cannot possibly on its own generate an accurate ranking of the relative amendment difficulty of constitutions.

I show also that rankings of comparative amendment difficulty have a fatal flaw: they either ignore or fail to account for nontextual sources of amendment ease or difficulty. These nontextual sources include uncodified changes to formal amendment rules, popular veneration for the constitution, temporal variability in amendment difficulty, and prevailing cultures of amendment. I moreover define and illustrate three different cultures of amendment—each of which has the effect of either exacerbating or assuaging amendment difficulty: amendment culture as an accelerator of change, as a redirector of change, and as an incapacitator of change. I ultimately arrive at two conclusions: first, that studies of amendment difficulty are doomed to failure; and second, that in any case they may not be

worth the effort. In this third chapter, I highlight constitutions also from Argentina, Australia, Austria, Belgium, Belize, Bolivia, Canada, Chile, Colombia, Costa Rica, Denmark, the Dominican Republic, Equatorial Guinea, Finland, France, Gabon, Germany, Greece, Haiti, Iceland, India, Ireland, Israel, Italy, Japan, the Netherlands, New Zealand, Norway, South Africa, South Korea, Spain, Switzerland, Taiwan, Tanzania, the United Kingdom, Venezuela, and Western Samoa, as well as from American states and the Commonwealth Caribbean.

Chapter 4—*The Three Varieties of Unamendability*—extends the theme of amendment difficulty. I show how constitutions sometimes designate certain rules as unamendable. These unamendable rules are resistant to all legal forms of alteration. They cannot be amended using the codified rules of change. Nor can they be repealed. The only properly legal way to change them is to rewrite the constitution. Why do constitutional designers codify these unamendable rules? I draw from many constitutions around the world to explain seven reasons why constitutional designers choose to codify unamendable rules. *Codified unamendability* is only one variety, however. A second variety is *interpretive unamendability*. It emerges from a judicial decision or an unwritten constitutional norm rooted in the dialogic interactions of political actors. There is a lot of useful research into these first two forms of unamendability.

But there is surprisingly little curiosity about a third variety of unamendability—a form of unamendability that is often more effective in constraining constitutional change than codified unamendability. *Constructive unamendability* arises as a result of the practical impossibility of gathering the required majorities to amend a rule despite that rule being freely amendable in theory. I illustrate how constructive unamendability occurs and operates with reference to federalism, the phenomenon of constitutional veneration, the use of omnibus amendment bills, and the challenge of multi-party incompatibility. In addition to explicating these three varieties of unamendability, I have an additional purpose in this chapter: to reinforce the point that studies of formal amendment difficulty are of little use because they focus only on the codified thresholds needed to amend a constitution and they exclude the degree to which unamendability in its three forms exacerbates formal amendment difficulty.

I begin this fourth chapter on unamendability with a case study from Honduras, whose constitution codifies an unamendable presidential term limit—an unamendable rule that provoked a constitutional crisis.

I moreover explore additional constitutions from Afghanistan, Algeria, Australia, Austria, Bahrain, Belgium, Benin, Bosnia and Herzegovina, Brazil, Burundi, Canada, Cape Verde, the Central African Republic, Colombia, the Republic of Congo, Cuba, the Czech Republic, El Salvador, Estonia, France, Germany, Ghana, Guatemala, Haiti, India, Iran, Italy, Kenya, Luxembourg, Malaysia, Mauritania, Moldova, Montenegro, Morocco, Namibia, Niger, Norway, Portugal, Qatar, Romania, Senegal, Spain, Switzerland, Taiwan, Togo, Turkey, the United Kingdom, and the United States, as well as constitutions from American states.

I open Chapter 5—*The Architecture of Constitutional Amendment*—with the Canadian Constitution, a self-consciously partially codified and partially uncodified constitution that, as a result of intentional design at its creation, omitted rules for its own amendment by domestic lawmakers. Amendment was possible but only if done by a foreign power. This unusual arrangement was not without reason, but it nonetheless raised serious doubts about whether we could recognize Canada as a sovereign state if it lacked the power to amend its own constitution. Canada ultimately codified domestic rules for amending its own constitution. And in building its own rules of constitutional amendment, Canadian reformers innovated modern tools and techniques that hold promise beyond their own borders for structuring an orderly process of constitutional reform when the necessary majorities manage to coalesce around an agreement.

I use the Canadian design of amendment rules to show how far amendment rules have come. Constitutional amendment rules were once very simple in their design. A constitution would codify a one-size-fits-all procedure for amendments to any part of the constitution, and that was it. Today, amendment rules are considerably more complex in their design and in the possibilities they offer constitutional designers for structuring their rules of constitutional change. In this fifth chapter, I examine the architecture of constitutional amendment, specifically the options available to constitutional designers to build their rules of change. I also weigh the strengths and weaknesses of these options and consider when one choice may be better than another. I compare single-track and multi-track pathways in constitutional amendment, single-subject and omnibus amendment bills, and procedures for amendment and dismemberment. I also explain in this chapter why codified unamendability is problematic for democracy, and I suggest an alternative design that can achieve the expressive function of unamendability while not denying the fundamental democratic right of

amendment. In addition, I investigate the relationship between time and change, namely how constitutional designers can use and manipulate time in their design of amendment rules. Finally, I discuss the increasingly frequent practice of judicial review of constitutional amendments. I offer eight justifications a court can use to invalidate an amendment and then elaborate several alternatives to the judicial invalidation of constitutional amendments.

What results is a deep dive into the design of amendment rules with reference to additional constitutions from Albania, Algeria, Australia, Austria, Belgium, Brazil, Cape Verde, Colombia, Costa Rica, Denmark, Ecuador, Estonia, Fiji, Finland, France, Georgia, Germany, Ghana, Greece, Iceland, India, Ireland, Israel, Italy, Japan, Luxembourg, New Zealand, Nicaragua, Nigeria, Norway, Peru, Poland, Portugal, Russia, South Africa, South Korea, Spain, Sweden, Switzerland, Taiwan, Togo, Turkey, the United Kingdom, and the United States, as well as from American states.

In Chapter 6—*Finding Constitutional Amendments*—I turn our eyes to questions that have not yet been answered let alone asked: How and where do constitutions indicate they have been amended? Do they record the change at the end of the original constitution, or do they insert it directly into the founding text? And what about uncodified constitutions: How do they identify constitution-level changes? I offer in this chapter the first analysis into the options available to constitutional designers to codify amendments. I uncover and illustrate four major models of amendment codification in the world, each represented by a different jurisdiction: the appendative model in the U.S. Constitution, the integrative model in the Indian Constitution, the invisible model in the Irish Constitution, and the disaggregative model in the British Constitution. I demonstrate that each model has its own peculiar applications and implications, and I show how each generates its own problems and pathologies. I explore some of these challenges in amendment codification in relation to the Mexican Constitution, an exemplar of the integrative model.

I explain in this sixth chapter why the choices involved in amendment codification concern more than mere aesthetics. Today, constitutional designers do not consider the consequences of codification, but they should. The way amendments are recorded is ultimately a choice about how and indeed whether a people chooses to remember its past. The chapter begins with the Norwegian Constitution's declaration that Jews are "excluded" from the country—a rule that has since disappeared from the codified constitution.

Where has it gone? The answer is driven by the model of amendment codification that Norway has chosen for itself. I draw attention to additional constitutions from Canada, Israel, New Zealand, Saint Lucia, and Spain.

The concluding chapter on *The Rules of Law* returns to where we began: the concept of amendment and its centrality in constitutional life. The fundamental reason for changing a constitution is the same as it is for having one: to reflect the present reality, values, aspirations, and identity of the peoples bound together by higher law. Formal amendment rules are never easy to build nor are they easy to understand. I therefore offer some help in both tasks by creating a blueprint for designing amendment rules, starting from the very first question designers must ask of themselves and their people: What is most important in the polity? From there, I show that the design of amendment rules passes through discrete choices requiring designers to set the foundations of the polity, to choose among pathways to initiate, propose, and ratify an amendment, to select specifications that will put the foundations and pathways into operation, and finally to decide how and where amendments will be recorded. I take readers through each of these choices and ultimately close the chapter with reflections on the democratic values served by a well-functioning process of formal amendment. I note that of course there may be advantages to informal amendment and to methods of change that violate the codified rules of change, but I conclude that there are even greater democracy-enhancing virtues that are possible only with formal amendment. In this final chapter, I examine constitutions from Austria, Costa Rica, Great Britain, India, Ireland, Spain, Switzerland, and the United States.

* * *

There are two purposes animating this entire study of constitutional change: to inspire interest in constitutional amendment and to guide those seeking to understand how constitutions change. My objective will have been fulfilled if this book proves useful to scholars steeped in the field and those new to it, and if it becomes a focal resource for leaders involved in making or remaking their constitution. As I embark on answering the many open questions in constitutional amendment, I hope also to generate a research agenda for the years ahead. The patterns, similarities, and distinctions I identify in the pages to follow are intended to seed conversation and collaboration in the study of constitutional amendment. This book on *Constitutional Amendments: Making, Breaking, and Changing Constitutions* therefore doubles as an analysis of constitutional change and an invitation to join me in further inquiry.

PART ONE
FORMS AND FUNCTIONS

1

Why Amendment Rules?

The democratic world sounded the alarm when China abolished its presidential term limits in 2018.¹ Observers described President Xi Jinping as a “new emperor”² who had made a “power grab”³ to “rule indefinitely.”⁴ His unexpected move to eliminate the two-term limit was part of a package of twenty-one changes approved by the National People’s Congress. In hindsight, we should not have been surprised. After all, Xi controlled the Congress, he had earlier signaled his intention to stay in office beyond a second term, and he held two other positions—General Secretary of the Communist Party and Chairman of the Central Military Commission—neither bound by any term limitation.⁵ What should have surprised observers instead, but did not, was that China insisted on making this change to presidential term limits only in strict conformity with the detailed rules of amendment codified in its constitution. The revelation here is that even a one-party state amends its constitution. But why?

* * *

The main purpose of amendment is evident in the word itself: “to amend,” from the Latin *emendare*, meaning “to free from fault.”⁶ The procedures of constitutional amendment give lawmakers and the people a way to rid their constitution from an observed fault or to update it without having to write an altogether new constitution. Amendment makes it possible to achieve peaceful constitutional change without incurring the costs of its unappealing alternatives: either governing with a flawed constitution unsuited to the times or mounting a revolution accompanied perhaps by violence and the need to start from scratch. Of course, amendments are not always adopted in an orderly process, nor are they all done in incremental fashion. But at its best, constitutional amendment unfolds according to clearly prescribed rules of change. And when amendment procedures are carefully constructed and deployed with deliberation, they translate popular preferences into law while balancing these preferences against the most fundamental values of the polity.

Yet even if a constitution is never amended at all, its amendment rules remain integral to it. We have long moved beyond the idea of amendment as a nothing more than a corrective vehicle—an outdated understanding of amendment evident in the early French Constitution of 1791, which contemplates amendment rules only for this narrow function.⁷ Amendment rules have essential uses beyond altering the codified text of a constitution. The multidimensionality of amendment rules may be divided into three categories: formal, functional, and symbolic. As I explain in this chapter, their formal uses include repairing imperfections, distinguishing constitutional from ordinary law, entrenching rules against easy repeal or revision, and creating a predictable procedure for constitutional change. Their functional uses include checking the court, promoting democracy, heightening public awareness, pacifying change, and managing difference. And symbolically, constitutional amendment rules can be designed to express values. It is unlikely that any single amendment rule will fulfill all of these possible uses; indeed some of these uses stand in tension with each other. What follows, then, is a detached view from above, looking closely at amendment rules to illustrate how they have been used without claiming that these uses are all possible at the same time by the same amendment rule in any given constitutional text.

The Uses of Constitutional Amendment Rules

Today virtually all codified constitutions specify procedures for changing the constitutional text. Formal amendment rules may require reformers to assemble special majority approval from lawmakers or from voters, or they may require both of these in some combination. Codified constitutions sometimes establish subject matter restrictions that prohibit amendments to constitutional rules, they may also impose temporal limitations that compel or constrain the timing and duration of the amendment process, and in addition they may even disable the amendment procedures in times of emergency.⁸ Formal amendment rules therefore generate a blueprint for how and when to amend the constitutional text, who may amend it, where the amendment must be initiated and ratified, and also what within the text is amendable. Yet whether codified or not, amendment rules have many uses, some of them obvious and others not, but all of them fundamental for understanding constitutionalism.

Formal

We begin with a question that may seem to have an obvious answer but in reality does not: Who should fix a typo in a constitution? Imagine the error is a mistake in drafting, undetected in the period of design but discovered sometime after enactment. Suppose further that the error can have serious implications for the powers of lawmakers—on what they can lawfully do if they wish to remain loyal to a plain reading of the constitution without flagrantly violating it and bearing the consequences for acting contrary to the country’s authoritative set of rules.

Several possibilities present themselves, none without its own problems. Leaders could mobilize the support required from popular or legislative majorities to correct the mistake with a constitutional amendment. They could alternatively read the constitution as it should have been written, and conduct themselves as though it had been written correctly, even though the mistake would remain in the text. Or they could seek an order from a court to correct the drafting error.

These were the choices facing Saint Lucia when lawmakers found a mistake in its codified constitution. What made the error significant was its consequence: as incorrectly written, the constitution’s mistaken cross-reference to Section 107—instead of the proper Section 108—meant that Saint Lucia could not accede to the appellate jurisdiction of the new Caribbean Court of Justice without a referendum, and would therefore be left at the mercy of the Judicial Committee of the Privy Council in London as its court of final appeal. As properly written—assuming the constitution had made the correct cross-reference to Section 108—legislators would have been authorized to accede to the jurisdiction of the Caribbean Court of Justice by a much less difficult parliamentary vote alone. When lawmakers discovered this drafting error, their first thought was to amend the codified constitution to change “Section 107” to “Section 108.” But this potential fix confronted legislators with the same challenge as the error itself: amending Saint Lucia’s formal amendment rules requires approval by referendum.

In the end, Saint Lucia sought and received a court order correcting the error in the constitution. A divided court—by a margin of 2–1—held that it was “clear” that “Homer, in the person of the draftsman or printer, nodded.”⁹ For the majority, it was obvious that “the reference to section 107 . . . is no more than a typographical error and should be read as a reference to section 108.”¹⁰ The majority took the position that “it is the duty of

the court to correct what is clearly an obvious typographical error or slip by the draftsman.”¹¹ There was a strong dissent rooted in democratic grounds and in what the judge believed was the appropriate role of the court:

One must be doubly reluctant to make a finding of an anomaly in a provision in a written Constitution. In my view, the reins tighten when the request is to find an error in a constitutional provision requiring democratic participation by a referendum to correct it to say that the provision merely requires approval by the legislature, and not by the people.¹²

This episode hints at one use of formal amendment rules. Though amendment rules are not used on every occasion when a drafting error is discovered, they allow lawmakers to repair imperfections in the design of a constitution by correcting the faults that time and experience reveal. Amendment rules may relatedly be used to bring the constitution in line with expectations about how designers anticipated it would operate. Brannon Denning and John Vile state the point well: “If the nation is to continue with a written constitution that contains the specificity of some of the provisions of the existing document, there will be times when, absent flagrant disregard for constitutional language, some amendments will be required as defects become apparent, or changes are desired.”¹³ Amendment procedures offer a way to respond to the changing political, social, economic, and other needs of the community—needs that the governing constitution may inadequately serve, whether as a result of suboptimal constitutional design or new social circumstances.¹⁴ Amendment rules therefore operate against the backdrop of human error and make it possible to redress shortcomings in the design of the constitution itself.¹⁵

The reason it is usually harder to correct an error in a constitution than in a statute points to a second formal use of amendment rules. In codified constitutions, amendment rules lay bare the distinction between what counts as constitutional and what does not. Ordinary law is typically subject to repeal or amendment by a simple legislative majority, while a constitutional text is often assigned to a higher threshold for alteration.¹⁶ Differential amendment difficulty is generally one of the primary distinctions between the two. As Hans Kelsen explained, “since the constitution is the basis of the national legal order, it sometimes appears desirable to give it a more stable character than ordinary laws. Hence, a change in the constitution is made more difficult than the enactment or amendment of ordinary laws.”¹⁷ The

codification of more demanding thresholds for constitutions than for statutes reflects both the higher significance of constitutions over ordinary law and the view that ordinary law is derivative of constitutional law.¹⁸ Yet designing formal amendment rules so as to retain a constitution's differential entrenchment from ordinary law may be easier said than done because the task requires pinpointing precisely the right level of amendment difficulty.¹⁹ The higher the frequency of formal amendment, the more the constitution may seem like an ordinary law.²⁰

A peculiar complication presents itself in codified regimes: there sometimes exist quasi-constitutional laws that float between ordinary and constitutional law, often closer to one than the other and therefore more or less secure from ordinary repeal.²¹ The best expositor is a super-statute in the United States.²² Modern history has shown that although a super-statute might enjoy constitution-level status in one era, it could be treated like an ordinary statute in another. Hence the fate of the Voting Rights Act, which was once treated as a super-statute but in 2015 was invalidated in significant part by the U.S. Supreme Court.²³

What enables codified amendment rules to distinguish constitutional from ordinary law is their effect, which brings us to their third formal use: they entrench the constitution more rigidly. By their nature, amendment rules protect the present from the future, preserving the known status quo from the unknown that may follow from changing it. On one view, the animating force behind constructing onerous amendment rules is distrust,²⁴ both of ourselves and our successors.²⁵ This is the compelling logic behind Jon Elster's theory of precommitment: amendment rules bind future leaders to the choices of the authoring generation unless they can build an agreement from a sufficiently representative agglomeration of the political community to make changes to those founding commitments.²⁶

The strongest precommitment device is a subject matter restriction on formal amendment, which constitutional designers entrench to privilege something in the constitution's design by making it unamendable.²⁷ John Locke famously wrote *The Fundamental Constitutions of Carolina*, and made them unchangeable, codifying in its text the instruction that "[t]hese fundamental constitutions, in number a hundred and twenty, every part thereof, shall be and remain the sacred and unalterable form and rule of government of Carolina forever."²⁸ For Sandy Levinson, a formally unamendable constitution like this one reveals much about its designers, namely "inordinate confidence in their own political wisdom coupled perhaps with an

equally inordinate lack of confidence in successor generations.”²⁹ Other important design features to entrench a given rule more securely than another include supermajorities and temporal delays in approving an amendment.³⁰

By definition, codified amendment rules structure the process authorizing lawmakers to change the constitutional text and its associated meaning. This underlines another formal use of amendment rules: bringing predictability to constitutional law. Amendment rules construct a legal and transparent framework within which to alter the constitution,³¹ with specifications as to thresholds of approval, necessary quorum requirements, applicable temporal limitations, subject matter restrictions, and other conditions or qualifications. In contrast, informal amendment occurs generally according to extralegal procedures.³² To call informal amendment extralegal is not to make a claim about its legitimacy. As Bruce Ackerman has argued, there exist informal—though nonetheless proper—procedures beyond those expressly detailed in Article V to amend the U.S. Constitution.³³ To describe informal amendment procedures as “extralegal” and formal amendment rules as “legal” is therefore only to highlight how informal amendment procedures differ from formal amendment rules: they are not codified in the constitution for public identification.

Yet codified amendment rules sometimes sow more confusion than they stem. For constitutions with a comprehensive single-track amendment rule—a one-size-fits-all procedure used to amend all amendable constitutional rules, as we see in Article 79 of the Germany Basic Law, under which an amendment becomes valid only with two-thirds agreement in both houses of the national legislature—it is clear that there is only one procedure to formally amend the constitution. But where the constitution codifies a multi-track amendment procedure, the risk of contestation rises and the promise of predictability declines: those opposed to the amendment will almost certainly argue that the most demanding procedure should be used, while those in favor will want to use the least onerous threshold. Ecuador was the site of a serious debate—for some, rising to the level of a constitutional crisis—concerning which specific amendment procedure lawmakers should use to amend presidential term limits. Unsurprisingly, amendment opponents argued that the more rigorous procedure had to be used, while amendment proponents preferred the easier route. The Constitutional Court resolved the disagreement in *Dictamen No. 001-14-DRC-CC*, ruling that the amendment could proceed under the less onerous procedure because it did not change the fundamental structure of the constitution.

Functional

The Ecuadorian Constitution gives the Constitutional Court the power to evaluate the content of a proposed amendment to determine which procedure lawmakers must use to alter the constitution.³⁴ In many countries, though, the constitution is silent about the judicial role in constitutional amendment. In others, like the newly amended Albanian Constitution, the Constitutional Court is restricted to reviewing amendments only for their compliance with the procedures for amendment.³⁵

In still other countries where nothing in the constitution is formally unamendable and there is no judicially imposed basic structure doctrine or its analogue, the rules of amendment act as a counterweight to the court. In these cases, amendment rules offer a critical functional use: they give lawmakers a way to change court judgments. Reformers can use amendment rules to trump the judgments of high courts and to move courts toward new constitutional interpretations.³⁶ In the United States, the Twenty-Sixth Amendment was adopted relatively quickly to nullify a judgment of the Supreme Court. The Court had held in *Oregon v. Mitchell* that Congress could establish a minimum voting age for federal elections but not for state and local elections, a judgment that proved politically unpalatable given that eighteen-year-olds were being sent to fight abroad in the Vietnam War but could not cast ballots at home.³⁷ The amendment took no time to become official: Congress proposed it on March 23, 1971, and the required three-quarters of the states had ratified it before Independence Day that year, a mere three months later on July 1. Without this check on the power of the Court, the only alternative for enfranchising Americans at age eighteen would have been to wait for the Court to reverse itself, at the time an unlikely prospect in the near term for a jurisdiction committed to *stare decisis*.

The impetus to reverse a high court judgment exposes a fault line in constitutional change: Who should have the last word on constitutional meaning? On one theory, the answer is the judiciary, commonly though not always designed to be insulated from the vagaries of the political moment, in theory leading to better answers for the long horizon of time and law. On another theory, the power of the last word belongs to reformers acting on behalf of the people. Amending actors are thought to better reflect the immediate views of the people since they internalize the people's preferences in their decisions. Sometimes the principal actors are the people themselves

who express their views in national referendums—a decision-making device that has steadily grown globally in use over the past century, from fewer than 50 in 1901–10 to roughly 600 in 1991–2000, though the number dropped to about 440 in 2001–10.³⁸ These have not all been constitutional referendums, but the larger trend is evident: the peoples of the world are increasingly more involved in governance. And this has had an effect on how we perceive the purposes of amendment rules.

The right to amend a constitution is above all a right to democratic choice. Amendment rules, then, may be designed and used for a related reason: to promote democracy. Jed Rubenfeld has argued that “[t]he very principle that gives the [U.S.] Constitution legitimate authority—the principle of self-government over time—requires that a nation be able to reject any part of a constitution whose commitments are no longer the people’s own.”³⁹ Rubenfeld concludes that “[t]hus written constitutionalism requires a process not only of popular constitution-writing, but also of popular constitution-rewriting.”⁴⁰ In addition to promoting the majoritarian bases of democracy, formal amendment rules may also promote the substantive dimensions of democracy, namely its counter majoritarian and minority-protecting purposes.⁴¹

Another functional use of amendment rules is linked closely with promoting democracy: heightening public awareness and deliberation. Amendment rules invite lawmakers to debate and negotiate publicly about what they believe best serves the common interest, and they generate information for the public to consider when choosing to support or reject an amendment.⁴² Formal amendment rules can therefore “promote careful consideration of the issues . . . by forcing those in favor of a particular proposition to persuade a larger segment of the population.”⁴³ For Donald Lutz, formal amendment rules are a means “[t]o arrive at the best possible decisions in pursuit of the common good under a condition of popular sovereignty.”⁴⁴ The product of this public deliberation—often a formal amendment inscribed in the text of a constitution—in turn makes possible the publication and reinforcement of constitutional norms. As a result, “[t]he publicity accompanying the change may, in fact, increase public expectations that the change will be honored by the other branches [of government], raising the costs of evasion or under-enforcement.”⁴⁵

Formal amendment rules moreover make possible sweeping but non-violent political transformations. This pacifying purpose is evident in the use of Article V in the United States, which has been described as “a

domestication of the right to revolution.”⁴⁶ Codifying the rules of formal amendment in a constitutional text provides a roadmap for making constitutional changes ranging from modest to major, without having to write an entirely new constitution, to resort to irregular methods of constitutional renewal, or to take up arms.⁴⁷ At the Federal Convention of 1787, George Mason advanced this very point, recognizing that constitutional amendments would be inevitable but that “it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence.”⁴⁸ This pacifying purpose fosters a higher probability of constitutionally continuous changes—rather than constitutionally discontinuous ones—in accordance with the codified rules of change.

Amendment rules may also help to manage difference in a political community. The design of amendment rules in the aftermath of the dissolution of the Socialist Federal Republic of Yugoslavia in 1992 illustrates a particularly fragile resolution to a conflict. As new republics were forming, a major concern was how the Croats, Bosniaks, and Serbs might live together in peace, either in the same country or as neighbors. One answer appears in the eventual Constitution of Bosnia and Herzegovina. The new constitution fragmented the formal amendment power among Croats, Bosniaks, and Serbs in an effort to deny sole decision-making power to any one of the three and in turn to cultivate a culture of consensual decision-making. The design of their constitution’s amendment rules allows an alteration only by a supermajority of the Parliamentary Assembly, whose delegates must include Croats, Bosniaks, and Serbs in equal numbers in the House of Peoples.⁴⁹ A similar arrangement appears in the design of formal amendment rules in Kiribati. The House of Assembly must vote by a supermajority to make any amendment affecting the rights of Banabans, but no such amendment is possible without the consent of the Banaban representative, for whom one seat is reserved in the House of Assembly.⁵⁰

Symbolic

In addition to their formal and functional uses, amendment rules have symbolic uses that affect constitutional politics even where a constitution remains unamended. Consider an example from the Caribbean. Before his deteriorating health forced him to transfer power to his brother Raúl in 2008, Cuban President Fidel Castro watched with satisfaction as the

National Assembly voted unanimously to codify socialism as a fundamental characteristic of the constitution. Article 3 in the amended constitution thereafter proclaimed that “socialism and the social revolutionary political system instituted in this Constitution . . . shall be irrevocable, and Cuba shall never return to capitalism.” Socialism was made a permanent and unamendable part of the constitution in recognition of its centrality to Cuban political life. This declaration has stood the test of time. When Cuba later launched a new constitution-making process in 2018, the state newspaper *Granma* affirmed that socialism would remain the central organizing feature of the country: socialism “is irrevocable, and Cuba will never return to capitalism.”⁵¹

Constitutions are designed to express the values of the polity in many ways. Constitutional values are most commonly declared in the constitution’s preamble. They may also appear in a statement of values in the main text of the constitution, as in Kazakhstan, which declares in Article 1 after the constitution’s preamble that “[t]he Republic of Kazakhstan proclaims itself a democratic, secular, legal and social state whose supreme values are the individual, his life, rights and freedoms,” or in Spain, whose post-preamble states in Section 1 that “Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system.”

We see in the Cuban Constitution that formal amendment rules can themselves be a site for expressing a constitution’s most fundamental values. The Cuban Constitution distinguishes its declaration of socialist foundations from other rules by expressly designating the former as unamendable and impervious to the formal amendment rules that apply to the others. This differential degree of insulation from formal amendment is in this case a proxy for preference. The message both conveyed and perceived is that the socialist foundations of the state are more highly valued than the freely amendable features in the polity. The result is a constitutional hierarchy of importance.

Escalating thresholds of formal amendment achieve the same result: the stricter the level of entrenchment, the higher the constitutional worth of a given rule. Consider the South African Constitution. It codifies three amendment procedures, each usable to amend a limited universe of constitutional rules.⁵² The most demanding procedure requires approval by three-quarters of South Africa’s National Assembly and two-thirds of its National Council of Provinces, and it must be used for any formal amendment to

the constitution's declaration of values and to this amendment rule. The midlevel procedure calls for a lower threshold—two-thirds approval in the National Assembly and two-thirds approval in the National Council of Provinces—and applies to any formal amendment to the Bill of Rights, the National Council of Provinces, and provincial matters. The least demanding rule requires only two-thirds approval in the National Assembly and is assigned to amendments for all other constitutional matters. What results from this escalating threshold of amendment is a constitutional hierarchy, with South Africa's stated constitutional values and the formal amendment procedures at the top, the Bill of Rights and provincial matters in the middle, and all other constitutional rules at the bottom.

A constitutional hierarchy is evident also in the combination of an escalating structure of formal amendment and unamendable rules. The Ukrainian Constitution, for example, sets apart three items from others—human rights and freedoms, national independence, and territorial integrity—by designating them as formally unamendable.⁵³ We can situate these unamendable rules at the summit of the hierarchy. At the intermediate level of the hierarchy of importance, we find the Ukrainian Constitution's statement of general principles, its rules for elections and referenda, and the formal amendment rules themselves, for which the constitution requires a proposal by either the president or two-thirds of the national legislature, adoption again by a two-thirds vote in the national legislature, and ratification in a national referendum.⁵⁴ The remaining rules sit at the lowest level of Ukraine's constitutional hierarchy, for which formal amendment is possible by one of two amendment thresholds: proposal by either the president or one-third of the national legislature, adoption by a majority of the national legislature, followed by a subsequent two-thirds vote in the national legislature.⁵⁵ Like other constitutions that codify unamendable rules or an escalating structure of amendment, or both at once, the Ukrainian Constitution expresses its values in its formal amendment rules.

Authenticity in Amendment Design

The expressive role of amendment rules has so far remained understudied and underappreciated. Yet it raises fundamental questions for constitutional designers and also for scholars seeking to understand why a polity operates as it does. The most important inquiry concerns the authenticity of the

values constitutional designers codify in amendment rules: Do the values expressed in amendment rules reflect authentic political commitments or are they only for show, and how can we possibly know?

Authoritarian Commandeering of Amendment Rules

Codified constitutions became synonymous with democracy in the nineteenth and twentieth centuries.⁵⁶ Authoritarian regimes have seized on this positive identification, exploiting what Giovanni Sartori describes as the “favorable emotive properties” of the word “constitution.”⁵⁷ Authoritarian regimes commonly exploit this association to hide behind a strategically drafted democracy-embracing constitutional text that may appear consistent with democratic constitutionalism but in reality may be only a façade. Sartori describes this phenomenon in greater detail: “[T]he political exploitation and manipulation of language takes advantage of the fact that the emotive properties of a word survive—at times for a surprisingly long time—despite the fact that what the word denotes, *i.e.*, the ‘thing,’ comes to be a completely different thing.”⁵⁸ As William Andrews has observed, “many regimes in the world today have Constitutions without constitutionalism. Tyrants, whether individual or collective, find that Constitutions are convenient screens behind which they can dissimulate their despotism.”⁵⁹

The truth is that “sometimes, constitutions lie.”⁶⁰ Democratic commitments on parchment have been known to conceal undemocratic practices in actuality. The Kremlin’s 1936 Constitution of the Union of Soviet Socialist Republics exposes just how widely political practice may diverge from the constitutional text. For political theorist Benjamin Barber, the Soviet Constitution was merely a smokescreen: it appeared from its words to be “the world’s most effusively rights-oriented constitution” housed in an “unprecedented fortress of human liberty,” but the truth was plainly the opposite.⁶¹ This disjunction between purpose and perception demonstrates the gulf that can develop between the codified legal constitution and the real political constitution.⁶² No regime ever fulfills the entirety of its codified commitments, but some do better than others.⁶³

Formal amendment rules are no less susceptible to authoritarian commandeering. They are a profitable and inexpensive site where authoritarian regimes may express inauthentic values while securing for themselves the goodwill that may come from their public association with democratic

ideals. Examples abound of suspicious amendment design. For example, the Constitution of the Russian Federation codifies an escalating structure of amendment, making it comparatively more difficult to amend civil and political rights than other constitutional rules.⁶⁴ In light of what we know about the reality of rights enjoyment and enforcement in Russia, we should investigate whether this special entrenchment expresses an authentic political commitment to protecting rights. We should ask the same question of other countries not generally recognized as democracies yet whose amendment design broadcasts strong respect for rights and freedoms. The best practice in all cases is to take a skeptical posture to any special or absolute entrenchment of constitutional values, and to evaluate whether the formally entrenched value aligns in reality with constitutional practice.

Text and Reality

Some sham constitutions proclaim a robust commitment to human rights in their formal amendment rules. For instance, Afghanistan, Algeria, the Central African Republic, and Chad all entrench unamendable rules protecting fundamental rights and freedoms, purporting to express the state's authentic commitment to these rights. But these four constitutional regimes appear in David Law and Mila Versteeg's "hall of shame," a list of the twenty-five worst sham constitutions that "combine far-reaching promises with relative little respect for rights in practice."⁶⁵ These constitutional regimes benefit from the goodwill of the uninformed at home and abroad, who read these codified constitutions believing the texts reflect reality when in fact political practice defies these textual guarantees.

Truly democratic and sham constitutions fall on the extremes of the constitutional spectrum. Both are relatively easy to recognize, particularly when compared to the many middle-range regimes whose combination of constitutional text, institutional structures, political practices, and civil society make it difficult to categorize their constitutions as clearly democratic or clearly sham. For these middle-range regimes, the inquiry into the authenticity of the values expressed in their formal amendment rules requires scrutiny of the constitutional text, an evaluation of its use and interpretation by lawmakers, and an inquiry into whether the codified constitutional values align with the lived political culture. This analysis cannot yield a quick answer, but it is more likely than not to produce the correct one.

Amendment Values in Germany

The modern constitutional experience in Germany shows how political culture can align with the values codified in formal amendment rules. The Basic Law's formal amendment rules entrench and express the constitutional value of human dignity: the text states in the first section of Article 1 that "the dignity of man shall be inviolable," and adds that "[t]o respect and protect it shall be the duty of all state authority."⁶⁶ The rest of the article stresses the importance of human dignity: "The German people therefore acknowledges inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world,"⁶⁷ and "[t]he following basic rights shall be binding as directly valid law on legislation, administration and judiciary."⁶⁸ Article 1 is codified as a subject matter restriction on formal amendment, meaning that it is expressly shielded from change by the Basic Law's formal amendment procedures.⁶⁹

In contrast to the inauthentic political commitments codified only for show in sham constitutions, the German Basic Law's commitment to human dignity in its codified amendment rules is an authentic commitment. Its authenticity derives from two principal sources: the history of the Basic Law's design and its interpretation.

The Basic Law's drafters intended to make human dignity its primary constitutional value. The protection of human dignity as an unamendable rule was meant to be a real constraint on conduct and was designed to convey its importance at once internally to those bound by the Basic Law and externally to the wider world.

The Basic Law can be understood only in its historical context. The Parliamentary Council made it a point to pass the Basic Law on May 8, 1949, both to mark the collapse of the Third Reich four years earlier on May 8, 1945, and to signal the beginning of a new constitutional regime.⁷⁰ Konrad Adenauer's statement at the signing and proclamation of the Basic Law echoes this theme of a new beginning: "Today a new chapter is being opened in the ever-changing history of the German people. . . . Those who have witnessed the years since 1933 and the total breakdown in 1945 . . . are with some emotion conscious of the fact that today . . . a new Germany is being created."⁷¹ The Basic Law showed just how different Germany might become.

Rights protections formed the core of the new constitutional regime. The Parliamentary Council resorted to unamendability to emphasize the

importance of fundamental rights in the new Germany.⁷² The Basic Law became the first German constitution to entrench rights for citizens and also to require the state to defend those rights against violation.⁷³ The Parliamentary Council was clear in its purpose: fundamental rights would be central, not peripheral, to the Basic Law, and human dignity would permeate the entire legal order.⁷⁴ Making human dignity unamendable conveyed the message that the individual is “unequivocally superior to the state; the Federal Republic exists for the sake of its citizens rather than vice versa.”⁷⁵

The absolute entrenchment of human dignity has in turn created known boundaries to circumscribe state power. Human dignity today stands at the top of Germany’s constitutional hierarchy. In the leading English-language study of the Basic Law, Donald Kommers and Russell Miller write that the Basic Law “has placed human dignity at the core of its value system,”⁷⁶ and they note that the Basic Law’s human dignity clause “expresses the highest value of the Basic Law, informing the substance and spirit of the entire document.”⁷⁷ The Basic Law has elevated the state’s commitment to human dignity as its most important value both in the symbolism of its codification and also in the effect of its entrenchment.

The consequence of codifying human dignity absolutely against amendment was predictable: it granted the judiciary the power to interpret its meaning. The Federal Constitutional Court has interpreted the human dignity rule as the Basic Law’s supreme value, calling it the “the highest constitutional principle” in the Basic Law.⁷⁸ The Constitutional Court has usually read human dignity alongside other values, namely liberty and equality, each codified in Articles 2 and 3, respectively.⁷⁹

Several Constitutional Court cases show the significance of human dignity in German life. In the early *Microcensus Case*, the Constitutional Court was asked to rule whether the compulsory disclosure of private vacations and recreational trips in a federal census violated the Basic Law’s human dignity protection.⁸⁰ Balancing the privacy of the individual under Article 2 with the state’s responsibility to govern responsibly, the Court recognized that the pressure of general public compliance could conceivably inhibit an individual’s private personal sphere.⁸¹ But the balance here favored the state’s census inquiries, both because the inquiries preserved the respondents’ anonymity and did not compel persons to disclose intimate personal details, and also because individuals have a social responsibility to respond to these mass questionnaires, which are necessary for government planning and operations.⁸²

In upholding the government's census inquiries, the Court discussed the human dignity value. The Court asserted that "[h]uman dignity is at the very top of the value order of the Basic Law."⁸³ Human dignity means that "every human being is entitled to social recognition and respect in the community,"⁸⁴ and that the state must treat persons as something more than "mere objects."⁸⁵ An individual cannot be required "to record and register all aspects of his or her personality, even though such an effort is carried out anonymously in the form of a statistical survey; [the state] may not treat a person as an object subject to an inventory of any kind."⁸⁶ Within an individual's private personal sphere, she is "her own master."⁸⁷

The *Lifetime Imprisonment Case* is another prominent human dignity judgment. It involved a drug dealer killing an addict who had threatened to expose the dealer's criminal acts.⁸⁸ The trial court ruled that the German Penal Code, which set out a mandatory penalty of life imprisonment for killing a person to conceal criminal activity, conflicted with Article 1's human dignity protection.⁸⁹ This lower court held that imposing a life sentence with no possibility of returning to society amounted to treating a person as a mere object, and would therefore violate the state's responsibility to respect every single person's human dignity.⁹⁰ The Constitutional Court was then asked to review the trial court's judgment.

The Court ruled that life imprisonment violates human dignity when the evidence suggests that a prisoner can be rehabilitated.⁹¹ The Court began with Article 2(2) of the Basic Law, which authorizes Parliament to limit an individual's right to personal freedom.⁹² The Court wrote, however, that this parliamentary power is itself limited, most notably by the inviolability of human dignity, which the Court again called "the highest value of the constitutional order."⁹³ The Court stressed that "[t]his means that the state must regard every individual within society with equal worth"⁹⁴ and reiterated that "[i]t is contrary to human dignity to make persons the mere tools of the state."⁹⁵ The Court linked the risk of treating a person as an object to the punishment of lifetime imprisonment: "[T]he state cannot turn the offender into an object of crime prevention to the detriment of his or her constitutionally protected right to social worth and respect" because "it would be intolerable for the state forcefully to deprive [persons of their] freedom without at least providing them with the chance to someday regain their freedom."⁹⁶

The meaning of the Basic Law's human dignity rule becomes clearer in this case. The state is not forbidden from sentencing a convicted criminal

to life imprisonment, but if the state imposes this penalty, it assumes the responsibility to work toward rehabilitating the prisoner to eventually re-enter society.⁹⁷ This responsibility flows from the Basic Law's human dignity protection.⁹⁸ The Court saw this duty to rehabilitate as interconnected with Article 1 insofar as "rehabilitation is constitutionally required in any community that establishes human dignity as its centerpiece and commits itself to the principle of social justice."⁹⁹ The principle that underpins the inviolability of human dignity is the rejection of persons as objects.

Perhaps the most useful case to demonstrate the Basic Law's hierarchy of constitutional values is the 1975 *Abortion I Case*.¹⁰⁰ The subject of the case was the Abortion Reform Act of 1974, which removed criminal prohibitions on abortion as long as the procedure was performed by a licensed physician on a consenting woman during the first twelve weeks of pregnancy.¹⁰¹ Criminal penalties continued to apply for other abortions procured after the third month of pregnancy, with the exception of those pregnancies resulting from rape or incest or those terminated on medical advice.¹⁰² The law also required a woman to consult with a physician or a counseling agency about assistance available to pregnant women, mothers, and children.¹⁰³ Several members of the German Bundestag (the national lower house) as well as a number of German states petitioned the Constitutional Court to review whether the law violated the rules on human dignity and right to life.¹⁰⁴ The Court had a difficult task before it: to weigh the competing rights of the mother and fetus, whose developing life the Court stressed is protected by Article 2(2) of the Basic Law.¹⁰⁵

The Constitutional Court relied on the Basic Law's ordering of values to reach its decision, and ultimately found the abortion law incompatible with the fetus's human dignity and right to life.¹⁰⁶ Before reaching the merits of the case, the Court explained that its deliberation "demands a total view of the constitutional norms and the hierarchy of values contained therein."¹⁰⁷ Recognizing the importance of the case, the Court added that "[t]he gravity and seriousness of the constitutional questions posed become clear if it is considered that what is involved here is the protection of human life, one of the central values of every legal order."¹⁰⁸ The Court stressed that its task was not to judge the abortion law in the abstract against the values established under any other country's constitution but instead directly against the values codified specifically in the German Basic Law.¹⁰⁹ The Court in the end ruled that the law "is void insofar as it exempts termination of pregnancy from punishment in cases where no reasons exist which—within the

meaning of the [present] decisional grounds—have priority over the value order contained in the Basic Law.”¹¹⁰

Constitutional history played a central part in the Court’s judgment. The Court explained that the Basic Law’s entrenchment of the right to life was the result of the destruction of life that Germany had seen in its past: “[T]he categorical inclusion of the inherently self-evident right to life in the Basic Law may be explained principally as a reaction to the ‘destruction of life unworthy to live,’ the ‘final solution,’ and the ‘liquidations’ that the National Socialist regime carried out as governmental measures.”¹¹¹ The Basic Law’s right to life affirms “the fundamental value of human life and of a state concept that is emphatically opposed to the views of a political regime for which the individual life had little significance and that therefore practiced unlimited abuse in the name of the arrogated right over life and death of the citizen.”¹¹² The Court therefore contrasted the Weimar Constitution and the regime that followed it with the Basic Law and the new regime that it sought to create.

The Constitutional Court affirmed that the right extends to the unborn, or what the Court called developing life, noting that the Basic Law is clear in its language that *everyone* shall have the right to life, with no “delimitation of the various developmental stages of human life.”¹¹³ The Court then tied the right to life to human dignity, explaining that the obligation to protect the right to life follows from Article 1: “Wherever human life exists, it merits human dignity; whether the subject of this dignity is conscious of it and knows how to safeguard it is not important. The potential capabilities inherent in human existence from its inception are adequate to merit human dignity.”¹¹⁴ Yet the Court also acknowledged that the state has an obligation to protect the life of the mother and that the mother’s pregnancy exists within her private personal sphere: “The obligation of the state to take the developing life under its protection also exists in principle with regard to the mother. . . . Pregnancy belongs to the intimate sphere of the woman that is constitutionally protected by Article 2(1) in conjunction with Article 1(1) of the Basic Law.”¹¹⁵ It is at this point that the Court invoked the hierarchy of constitutional values to resolve the collision between the rights of the developing life and the rights of the mother.

The Constitutional Court saw the conflict of rights as inhospitable to any compromise: “No compromise is possible that would both guarantee the protection of the unborn life and concede to the pregnant woman the freedom of terminating the pregnancy because termination of pregnancy

always means destruction of the prenatal life.”¹¹⁶ In choosing which of these two rights to privilege, the Court felt itself bound to follow the human dignity rule as its guide: “In the ensuing balancing process, ‘both constitutional values must be perceived in their relation to human dignity as the center of the constitution’s value system.’”¹¹⁷ As a result, the Court elevated the right of the fetus over the right of the mother. In the Court’s view, prohibiting abortion only impairs a woman’s right to self-determination, but abortion destroys life: “When using Article 1 (1) as a guidepost, the decision must come down in favor of the preeminence of protecting the fetus’s life over the right of self-determination of the pregnant woman.”¹¹⁸ The Court conceded that “[p]regnancy, birth, and child-rearing may impair the woman’s right of self-determination and the right to many personal developmental potentialities,”¹¹⁹ but it ultimately held that “[t]he termination of pregnancy, however, destroys prenatal life.”¹²⁰ The difference between the impairment of human dignity and its destruction was therefore great enough to tilt the Court toward protecting the right of the fetus.

As a final illustration of how the Court has interpreted the Basic Law’s inviolable human dignity rule—and in the process has shown the Basic Law’s entrenchment of human dignity to be authentic—consider the more recent *Aviation Security Act Case*.¹²¹ The case arose out of the Aviation Security Act, which Germany adopted in the aftermath of the terrorist attacks of September 11, 2001, in the United States.¹²² The law authorized the German minister of defense, with the consent of the minister of the interior, to order the armed forces to shoot down a commercial aircraft thought to be hijacked for use as a weapon against civilian targets.¹²³ The Court found the law unconstitutional on several grounds, notably because it would “deprive passengers and crew of their right to self-determination and thus make them ‘mere objects of the state’s rescue operation for the protection of others.’”¹²⁴

The Constitutional Court’s refusal to authorize the state to treat a plane’s passengers as objects recalled its earlier decisions in the *Microcensus Case* and the *Life Imprisonment Case*. As Kommers and Miller explain, the Court stated that “killing may not be employed as a means to save others, for human lives may not be disposed of ‘unilaterally by the state’ in this way, even on the basis of a statutory authorization.”¹²⁵ The Court ultimately held that “an aircraft may not be shot down—and there is no constitutional state duty to shoot it down—simply because it may be used as a weapon to extinguish life on the ground, particularly since the ensuing loss of life would not

bring an end to the body politic or the constitutional system.”¹²⁶ The Court again referred to the preeminence of human dignity as a constitutional value: “Human life is intrinsically connected to human dignity as a paramount principle of the constitution and the highest constitutional value.”¹²⁷

These four leading cases on Germany’s inviolable human dignity value verify the authenticity of the political commitments codified in the Basic Law’s formal amendment rules. Their authenticity is evident in the history of the Basic Law’s design and its interpretation. The absolutely entrenched value of human dignity was elevated above the amendable matters with a view to its widespread application across law and politics, and it has been interpreted fulsomely by the Court and in turn respected by lawmakers.

Political Culture and Constitutional Commitment

Yet the constitutional design of the Basic Law and its interpretation by the Constitutional Court do not quite fully explain the alignment between German political culture and the entrenched constitutional value of human dignity. The Basic Law’s design and its interpretation have certainly contributed to the process of “sowing and growing” the constitutional value of human dignity.¹²⁸ The legislature’s deference to the Court has also helped, particularly when the Court has invalidated legislation on the basis of the human dignity rule and the legislature has responded by re-passing the law in conformity with the Court’s recommendations, namely in the 1976 Abortion Reform Act passed in the aftermath of the *Abortion I Case*.¹²⁹ Germans themselves have also embraced as both prudent and correct the absolute entrenchment of human dignity.

The concept of human dignity has risen in public esteem as it has been applied across increasingly more spheres of German life. Not only does human dignity prescribe and proscribe state action, it also influences private action. The Constitutional Court emphasized this point when explaining in the pivotal 1958 *Lüth Case* that the Basic Law entrenches an “objective order of values.” For the Court, the Basic Law “is not a value-neutral document.” It is a value-laden text whose purpose is to protect rights in all spheres. Again from the *Lüth Case*: “This value system, which centers upon dignity of the human personality developing freely within the social community, must be looked upon as a fundamental constitutional decision affecting all spheres of law, both public and private.” The Basic Law’s constitutional hierarchy

thus creates a value system extending beyond the public sphere: “Every provision of private law must be compatible with this system of values, and every such provision must be interpreted in its spirit,” declared the Court.

The constitutional value of human dignity therefore derives its force from its history and entrenchment in the Basic Law, its interpretation by the Constitutional Court, as well its centrality to German political culture. The late German political theorist Kurt Sontheimer observed that modern Germany has become, “not only by the rules of its constitution but also in the reality of its constitutional life . . .[,] a state which has taken seriously its obligations to create favorable external conditions for its citizens to achieve a life in conformity with human dignity.”¹³⁰ The objective ordering of Germany’s highest constitutional value means that it is legally binding upon the entire community, and its objective ordering in law strengthens its normative force in society.¹³¹ This transformation of the Basic Law’s normative aspirations into an objective recognition of what matters most in the country is key for understanding how its codified formal amendment values have become and since remained authentic political commitments.

* * *

Constitutional amendment rules therefore serve formal, functional, and symbolic uses in constitutionalism. They can be used to repair imperfections, distinguish constitutional from ordinary law, entrench rules against easy change, create a predictable procedure for constitutional change, counterbalance the court, promote democracy, heighten public awareness, pacify change, manage difference, and express values. It is important to identify these unique uses because too often we collapse our discussion of amendment rules into the nature of an amendment itself.

Though scholars often fail to distinguish amendment rules from an amendment itself, it is understandable to speak of the act of amendment without properly defining it. After all, it is difficult to distinguish an amendment from other forms of change. But it is not impossible. What, then, is an amendment?

2

The Boundaries of Constitutional Amendment

In his inaugural address as president, Abraham Lincoln threw his support behind a constitutional amendment the U.S. Congress had recently approved. Lincoln went further than merely endorsing the amendment. He campaigned for its ratification and insisted that he had “no objection to its being made express and irrevocable.”¹ Congress had never before approved an unamendable amendment. Yet Lincoln saw no legal barrier preventing lawmakers from making the amendment a permanent part of the constitution. Nor did he oppose the underlying intent of the amendment. The text of the amendment was drafted shrewdly to hide its purpose in plain sight—like much of the rest of the constitution, which embeds slavery deep within its architecture but dares not speak its name:

No amendment shall be made to the Constitution which will authorize or give to Congress power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.²

Named after the congressperson who introduced it, this Corwin Amendment was part of a larger effort to placate the South and to contain secessionist sentiment in the region. It was designed specifically to prohibit Congress from interfering with any state that enslaved any of its residents. For Lincoln, the twin ends of keeping the Union together and the constitution supreme justified the means: better to suffer evil in the nation than to lose the Republic.

The Corwin Amendment contained three mutually reinforcing rules. First, it gave legal authorization for slavery by conferring on each of the states the power to regulate what they did with their own “domestic institutions” inside their borders. This was an enticing carrot for the slave

states: they would promise to remain in the Union in exchange for the right to keep their profitable practice of slavery without having to look over their shoulder in fear of federal intrusion. Second, it guaranteed states the right to slavery by denying Congress the power to “abolish” slavery or to “interfere” with it. The amendment compelled Congress, by constitutional command, to keep its hands off this state power. Third, the Corwin Amendment made itself unamendable. Not only did the Corwin Amendment dispossess Congress of the power to abolish slavery or to interfere with it, but the text of the amendment itself shielded the amendment from future alterations, even if using Article V: “no amendment shall be made to the Constitution” in the future to undo the Corwin Amendment.

Lincoln was only one of hundreds of lawmakers to support the Corwin Amendment. His predecessor in the presidency, James Buchanan, signed the congressional act approving the amendment before it was sent to the states for ratification.³ Ohio and Maryland then ratified the amendment by state legislative vote, and Illinois ratified it by constitutional convention.⁴ The Corwin Amendment was on its way to becoming the Thirteenth Amendment to the U.S. Constitution. But the onset of the Civil War interrupted the march to ratification. We know how the Civil War ended. Its outcome changed the course of a nation. And in one of the great redemptive twists in the history of America, an amendment prohibiting slavery is now inscribed in the U.S. constitution as the actual Thirteenth Amendment.

The original and eventual Thirteenth Amendments confront us with the central question in the entire field of constitutional change: What is an amendment? Each of the two Thirteenth Amendments took a lawful path toward becoming valid alterations to the constitution. They began as proposals approved properly in Congress, and they were both in turn conveyed to the states for ratification. Formally, then, they both look like amendments, consistent with the procedural rules of change codified in the constitutional text. But the question whether a given alteration is an amendment requires an inquiry deeper than asking only whether the alteration is made in conformity with the codified rules of change. Imagine, for instance, using the codified amendment rules in Article V of the U.S. Constitution to repeal the entire Bill of Rights. Could we properly call a change on that scale an amendment? In this chapter I explain why we should distinguish between different types of constitutional alteration. The surprising implication will eventually reveal itself: the Corwin Amendment was correctly

called a constitutional amendment, but the real Thirteenth Amendment is better understood as a more radical constitutional dismemberment.

An Amendment in Name Alone

Some constitutional amendments are not amendments at all. They are self-conscious efforts to repudiate the essential characteristics of the constitution and to destroy its foundations. They dismantle the basic structure of the constitution while at the same time building a new foundation rooted in principles contrary to the old. These constitutional changes entail substantial consequences for the whole of law and society. Political actors must modify their behavior in accordance with new popular expectations, and courts must reinterpret the constitution in harmony with these changes. The reconstructed constitution becomes virtually unrecognizable to the pre-change generation, for whom the constitution now seems entirely new, not merely amended. And yet—here is the problem—we often identify transformative changes like these as amendments no different from others. Examples abound of transformative changes like these. In reality they are amendments in name alone. Consider a few illustrations from the Americas, Asia, and Europe.

The Social State in Brazil

In 2016, Brazil approved a controversial change to its constitution: a limit on public spending for up to twenty years, with annual spending growth tied to the inflation rate of the prior year.⁵ The purpose of the amendment was to narrow the increasing budget gap that had encumbered Brazil in recent years as tax revenues failed to keep pace with rising expenditures.⁶ The immediate effect of the amendment was to gird the country for spending reductions on health and education.

This Public Spending Cap Amendment faced criticism from many corners despite its capacity to help assuage the economic pressures in the country.⁷ The reason for the criticism rests in the constitution's robust protections for social rights. The State commits in its preamble to ensuring the realization of social rights,⁸ and this undertaking is reflected elsewhere in the constitution's text. For example, the constitution identifies

“social values”⁹ as a fundamental principle and declares that one of the constitution’s foremost objectives is “to eradicate poverty and substandard living conditions and to reduce social and regional inequalities.”¹⁰ The constitution moreover enumerates an entire section of social rights, including the rights to food and housing,¹¹ to public healthcare,¹² to social assistance,¹³ and to education.¹⁴ Workers are given a special catalog of rights—rights to minimum wages, unemployment insurance, and wage-reduction protection—that consists of thirty-four separate parts, evidence of how staunchly the constitution seeks to protect labor.¹⁵ The codification of these social rights did not come by happenstance; civil society groups won hard-fought victories “to change the Brazilian reality” with “social demands” that were ultimately translated into this extensive entrenchment of social rights in the constitution.¹⁶ The rest of the constitution has undergone roughly one hundred amendments since coming into force in 1988, but the substantive protections for social rights have not once been touched.¹⁷ That is, until this Public Spending Cap Amendment was ratified.

The realization of social rights is likely to be severely compromised with the spending cap now in force. This is not a change of modest proportions. It will impact an entire generation, and its effects could reverberate far beyond that period. Juliano Zaiden Benvindo has put the point well:

It is no wonder that scholars have stressed how this amendment will signal a change in the Brazilian social contract as it was originally drafted in the Constitution of 1988, a document originated from a broad social participation and wherein social rights have best represented the marriage of that constitutional moment with a new democratic impetus after years of dictatorship.¹⁸

The far-reaching impact of this Public Spending Cap Amendment on the future enjoyment of social rights in Brazil—combined with how directly it undermines the constitution’s founding commitment to social rights—suggests that its purpose and effect will be more than we expect of a mere amendment.

Provincial Secession in Canada

The secession of Quebec from Canada would require a total reconfiguration of national institutions. The composition of Parliament would change

given that the constitution reserves seats for Quebec in both the House and the Senate.¹⁹ The Supreme Court would change as well since its nine-judge complement must include three justices from Quebec.²⁰ Secession would entail enormous implications for citizenship, borders, national debt, the armed forces, commercial and economic relations, mobility and migration, the environment, currency and monetary policy, First Nations, and of course also for political relations between Quebec and Canada.²¹

And yet the Supreme Court of Canada has ruled that secession can proceed by a simple amendment. In the *Secession Reference*, the Court wrote that “under the Constitution, secession requires that an amendment be negotiated.”²² The Court stressed that any amendment arising out of these negotiations must respect unwritten principles of the Canadian Constitution, including federalism, democracy, constitutionalism, the rule of law, and respect for minority rights.²³ Even though the Court did not identify which of Canada’s five amendment procedures is appropriate for formalizing a provincial secession, the Court did take some care to explain why, in its view, secession is possible by amendment:

The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention. It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada.²⁴

The Court took the position that all constitutional changes, be they ordinary or “radical and extensive,” may be accomplished using the rules of constitutional amendment. We can therefore understand Canada’s amendment rules, at least as they have been interpreted by the Supreme Court, as codifying procedures for the entire range of possible changes—from minor adjustments to major revisions. But we might well wonder whether the Court is correct to claim that a constitutional change as sweeping as Quebec’s secession—a change that would transform the country and

its constitution—should be understood as an ordinary constitutional amendment.

Senate Reform in Ireland and Italy

Ireland and Italy recently rejected proposals to change the Senate—in the case of Ireland to abolish it, and in the case of Italy to reduce its power. In Italy in 2016, voters overwhelmingly defeated a major constitutional reform that would have altered 33 percent of the entire constitution,²⁵ including the structure of the Senate, the constitutional status of the regions, and the confidence relationship between the government and Parliament.²⁶ This reform proposal was presented to Italians as a simple amendment to be formalized according to the amendment rules in the constitution. But amendment is not the right concept to understand a reform of this magnitude—one that would have transformed the Italian Constitution.

The same is true of proposal to change the Constitution of Ireland. In the fall of 2013, Irish voters narrowly refused a proposal to abolish the Senate in a referendum closely divided 51.8 percent to 48.2 percent.²⁷ Writing prior to the referendum vote, Oran Doyle surveyed the breadth of the proposal and its consequences: it contained over forty discrete amendments intended not only to abolish the Senate but also to reconstitute the legislature as a unicameral parliament, to modify the rest of the constitution's parts that were predicated on the existence of a Senate, and to prepare the transition from bicameralism to unicameralism.²⁸ We should take care not to overstate matters because the Irish Constitution confers only quite limited powers on the Senate.²⁹ Still, although the Senate's legislative powers are modest relative to many other upper chambers in the world and the Senate's representative function is not what it could be were Ireland a federal as opposed to a unitary State,³⁰ abolishing the Senate would nonetheless have had substantial consequences for the structure of Irish governance and the country's politics. Had the reform proposal been ratified, there would have been seventy-five separate alterations to the text of the constitution, according to one estimate.³¹

What matters more than the number of separate alterations to the Irish Constitution is their combined effect after abolition. Gone would have been the current check on the Assembly's power to pass a bill, as would have been the present capacity to delay an Assembly bill for ninety

days.³² The same would follow for the Senate's other powers, including the power to refer a bill to the people in a referendum and to have a voice in the removal of constitutional actors, including judges, the auditor general, the comptroller general, and the president.³³ More generally, the reorganization of the legislature from bicameral to unicameral would have substantially changed the nature of legislative representation, the lawmaking process in its entirety, the separation of executive-legislative powers, and the functioning of democracy.³⁴ This would have been no small change to the constitution. It would have been a change more significant than what we should understand the ordinary power of amendment to permit .

The War on Japan's Pacifist Constitution

There were calls to replace the Japanese Constitution almost as soon as it was adopted in 1946. Described by many as "MacArthur's Constitution" after the U.S. general who oversaw its drafting, the Japanese Constitution has long been regarded as a foreign imposition, not an autochthonous text reflecting local values.³⁵ Since 1955, the Liberal Democratic Party (LDP) has made it a central plank of its platform to rewrite the constitution and to give Japan a homegrown charter of self-governance.³⁶ The LDP's main target is the constitution's Peace Clause.³⁷ Codified in Article 9, the clause commits Japan "to an international peace based on justice and order" and cements into law the Japanese people's vow to "forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes."³⁸ The LDP's plan is to revise or abolish the clause altogether. But the effect of this change, if it is successful, will be to remake the constitution under the guise of amending it.

Formally amending Article 9 would be no easy feat. The Japanese Constitution establishes a three-step sequence for constitutional amendment: proposal by a two-thirds supermajority vote in each of the two houses of the national legislature, followed by ratification by a simple majority vote in a referendum, and finally promulgation by the emperor.³⁹ Reformers face a hurdle not only from an onerous amendment threshold but also from a conservative culture of formal alteration that has so far resisted modifying Article 9 and the rest of the text as well—the Japanese Constitution has not once been amended since its enactment in 1946.

Today, Article 9 is a superconstitutional norm that reflects deeply rooted Japanese popular values. It is seen as the constitution's most important rule outside of the preambular assertion of popular sovereignty.⁴⁰ The national commitment to peace has become constitutive of Japan's constitutional identity,⁴¹ a "culturally embedded norm,"⁴² and "an anchor of [Japan's] postwar identity."⁴³ This cultural entrenchment of Article 9 did not occur by chance. Article 9 was taught as a point of pride to schoolchildren and figured prominently in the work of the Committee to Popularize the Constitution, which had been convened to organize public lectures, publish books, produce films and songs, and distribute pamphlets to help ease the transition to the new postwar rule of pacifism.⁴⁴ Despite its importance, the Peace Clause today is not formally entrenched against change or repeal. Its vulnerability has allowed political actors to undermine the spirit of Article 9,⁴⁵ as its text has been interpreted and reinterpreted by an executive agency, the Cabinet Legislation Bureau.⁴⁶ The Cabinet Legislation Bureau has since defined Article 9 as banning offensive military force but authorizing a self-defense operation that today amounts to one of the world's largest military budgets.⁴⁷

Lawmakers in Japan may well succeed in altering Article 9. But the effect of this reform would be transformative. It would eradicate one of the core commitments in the constitution. A momentous change on this scale would be more than an amendment. It would be simultaneously a deconstruction and reconstruction of an integral aspect of the Japanese Constitution. This change would be an amendment in name alone.

Amendment or Constitution?

Existing theories of constitutional change correctly recognize that some changes are more significant than others. But these conventional theories generate an unhelpful binary classification: either a constitutional alteration properly amends a constitution or it so radically transforms a constitution that conceptually it yields a new constitution even though no new constitution has been promulgated. According to these conventional theories of constitutional change, the reforms in Brazil, Canada, Ireland, Italy, and Japan would amount conceptually to creating new constitutions. Yet to say that these changes create a new constitution requires us to ignore the reality that the thing we identify as *the* constitution remains in place and in force,

only altered in its text. How, then, can we possibly understand changes like these as producing a new constitution?

There is a better way to understand the forms of constitutional change. The binary distinction between amendment and constitution is much too constraining to accommodate the range of constitutional changes we see around the globe. Reason and experience teach us that there are gradients of change along a scale of magnitude: from small changes that amount to no more than minor adjustments to the text, to medium changes that nonetheless keep the constitution coherent with its pre-change presuppositions, to large ones that completely reimagine the terms of settlement in a given jurisdiction, and to the adoption and promulgation of a new constitution. Recognizing that constitutional change occurs over a broad band of significance—rather than limiting ourselves to a rigid binary classification that elides over nuance—opens new doors for understanding how constitutions change.

The Conventional Theory of Constitutional Change

Begin with a question from John Rawls about the U.S. Constitution: Would repealing the First Amendment's guarantee against a state religion and in turn establishing an official church be a valid use of the formal amendment procedure in Article V?⁴⁸ For Rawls, the answer is no: "[A]n amendment to repeal the First Amendment and replace it with its opposite fundamentally contradicts the constitutional tradition of the oldest democratic regime in the world."⁴⁹ Rawls recognizes that neither the constitutional text nor any constitutional theory can prevent reformers from using Article V to make a change for which they have the necessary support. But he would define the repeal of the First Amendment as a "constitutional breakdown, or revolution in the proper sense, and not a valid amendment of the constitution."⁵⁰ In Rawls's understanding of how constitutions should change, using Article V to repeal the First Amendment would have the effect of creating a new U.S. Constitution, even though the resulting amendment would be formally written into the "old" constitution as a mere amendment and despite there being no promulgation of a new constitution. This Rawlsian view reflects the conventional understanding in the field of constitutional change among those who take the view that a procedurally perfect constitutional amendment can nonetheless be unconstitutional: either an alteration is consistent

with the constitution or the alteration is so transformative that we must recognize that conceptually the effect of the change is not merely to amend the constitution but rather to create a new one.

In the late nineteenth century, Thomas Cooley likewise insisted that an alteration inconsistent with the existing constitution should not be called an amendment. He wrote that an amendment “must be in harmony with the thing amended, so far at least as concerns its general spirit and purpose,” adding that “it must not be something so entirely incongruous that, instead of amending or reforming it, it overthrows or revolutionizes it.”⁵¹ And yet we have seen many examples of constitutional changes formalized using the rules of constitutional amendment that were, in Cooley’s own words, “entirely incongruous” with the existing constitution. For Cooley, we should not define these changes as amendments:

[A]ny step in the direction of establishing a government which is entirely out of harmony with that which has been created under the constitution, . . . though it may be taken in the most formal and deliberate manner, and in precise conformity to the method of amendment established by the constitution, is inoperative in the very nature of things The framers of the constitution must very well have understood that this was the case, and must have acted upon this understanding; and they abstained from forbidding such changes because they would be illegitimate as amendments, and for that reason impossible under the term they were making use of.⁵²

Cooley outlines in this passage the key elements in the conventional theory of constitutional change, all later echoed by Rawls and others theorizing the forms and limits of constitutional change. Their view holds to the twinned fictions that an amendment refers only to an alteration that coheres with existing constitution and that any alteration inconsistent with it must be interpreted as creating a new constitution, even if the old constitution is not formally superseded by a new one.

Cooley makes explicit three points that are ingrained in the conventional theory of constitutional change. First, the conventional theory of constitutional change holds that the test for distinguishing a constitutional amendment from a new constitution is not whether the change is achieved through the process of constitutional amendment codified in the constitution. As Cooley writes, even if a constitutional alteration is “in precise conformity to the method of amendment established in the constitution,” the

change is “inoperative” as an amendment if it is “entirely out of harmony with that which has been created under the constitution.”⁵³ Second, the conventional theory insists that a constitutional change inconsistent with the existing constitution is “illegitimate.” It is not enough that an alteration satisfies the constitution’s formal amendment rules; even a procedurally perfect alteration cannot make an unassailable claim to legitimacy under the conventional theory of constitutional change. Finally, the conventional theory of constitutional change is rooted in the claim that all constitutions implicitly recognize the distinction between a change that qualifies as an amendment and one that creates conceptually a new constitution. Cooley reasoned that the framers “must have acted upon this understanding” and that they “abstained from forbidding” the kinds of changes that would yield a new constitution because it was plain to all that the nature of amendment is to keep the amended constitution in harmony with the old one.⁵⁴

Four Propositions

Reading Cooley alongside Rawls allows us to isolate the four propositions that constitute the conventional theory of constitutional change in the current literature. First, the binary proposition: a constitutional alteration results either in an amendment or conceptually in a new constitution. Second, the substantive proposition: constitutional alterations formalized using the rules of amendment do not always result in a proper amendment. Third, the illegitimacy proposition: constitutional changes using the rules of amendment but resulting in something other than an amendment are illegitimate under the existing constitution. Fourth, the implicit limitations proposition: even where a constitutional text does not identify which kinds of constitutional alterations would qualify as either an amendment or a new constitution, this distinction is implicit in the very nature of an amendment.

These four propositions recur in the modern scholarship on constitutional change. For instance, Walter Murphy argues that “valid amendments can operate only within the existing political system; they cannot deconstitute, reconstitute, or replace the polity.”⁵⁵ The suggestion here is that the use of the amendment power to transform the polity is not an amendment at all, but rather the creation of what we must identify conceptually as a new constitution. More recently in his study of Article V in the United States, Jason Mazzone makes the case that an amendment only “fine-tunes what

is already in place—or, in a metaphor eighteenth-century Americans used, puts the ship back on its original course.”⁵⁶ We can trace these views to the core of Carl Schmitt’s influential theory of constitutional change. Schmitt argues that the authority of reformers to amend a constitution is limited by the constitution itself. Lawmakers, he writes, may amend a constitution “only under the presupposition that the identity and continuity of the constitution as an entirety is preserved.”⁵⁷ He specifies that “the authority for constitutional amendment contains only the grant of authority to undertake changes, additions, extensions, deletions, etc., in constitutional provisions that preserve the constitution itself.”⁵⁸ Any amendment that exceeds this authority effectively creates a new constitution—a constitution-making power that ordinary amending actors are not authorized to exercise, according not only to Schmitt but also to the dominant view in the field.⁵⁹

These conventional views of constitutional change are rooted in the theory of constituent power. Traced to the thought of French revolutionary theorist Emmanuel Joseph Sieyès, the theory posits a rigid division of labor between the people as principals and their agent representatives in government.⁶⁰ The two core concepts are the *pouvoir constituant* and the *pouvoir constitué*,⁶¹ each referring to different groups of persons, one linked to the other in a hierarchical relationship of power. The superior group is the *pouvoir constituant*, which in translation is *constituent power*, a term used to refer to the body of people in whom supreme power resides.⁶² The inferior group is the *pouvoir constitué*, meaning *constituted power*, a term used to refer to the institutions a constitution creates or regulates to carry out the duties and discretionary authority delegated by the people in that constitution. The major premise of the theory is that no constitution can properly be formed by a constituted power; it must instead be created—and understood to have been created—by the exercise of constituent power, which is to say by the people themselves.⁶³ The corollary premise of the theory is twofold: first, only the constituent power can create a new constitution; and, second, the authority of constituted powers is limited to changing the constitution in ways that remain true to the constitution created by the people.

Constituent power is a sociological concept, neither a legal nor a moral one. In the eyes of constituent power—setting aside for now how we identify its exercise—the formal trappings of law are less important than political effectiveness and social acceptance. Where the political class recognizes the validity of a constitutional change and the people approve or acquiesce to it, that change may have a claim to legitimacy though not necessarily to

legality: a constitution can therefore simultaneously be illegal yet democratically legitimate.⁶⁴ In the case of creating a new constitution, the range of valid exercises of constituent power is boundless. There are no rules of process to legitimate the outcome; the very fact that a popular choice has been made is its own source of legitimation. But in the case of altering an existing constitution, the question becomes whether the constituted power responsible for the change has respected the boundaries set the constitution itself.

There are sometimes consequences when constituted powers fail to respect the boundaries of amendment. If lawmakers exceed the limits of their authority as a constituted power, in some jurisdictions judicial invalidation is the remedy for passing an amendment the court believes exceeds the scope of amendment authority. The court annuls the amendment on the theory that the amendment amounts in principle to a new constitution, the conventional rule being that a constitutional change amounting to a new constitution can be valid only if the change is made by constituent power and in no case by an inferior constituted power. Courts therefore see themselves as guarding the constitution from changes they believe would destroy its original design without the approval of the constituent power.

Constitutional Destruction and Reconstruction

This imagery of destruction is familiar in the scholarship on constitutional change. It is so old that it was not new when William Marbury wrote in 1919 that “it may be safely premised that the power to ‘amend’ the Constitution was not intended to include the power to *destroy* it.”⁶⁵ The power of the people to give their consent to a momentous constitutional change is what courts around the world understand themselves, correctly or not, as protecting when they impose limits on the amendment power. For these courts, a constitutional change amounting to more than an amendment cannot be authorized only by the constituted powers of government; it requires the approval of the people acting directly or through institutions speaking validly in their name.

Consider a recent case from Belize. The Supreme Court reviewed the constitutionality of the Eighth Amendment, a controversial amendment purporting to protect the power of the National Assembly to amend the constitution subject to only limited judicial review.⁶⁶ The Court set its sights on two interconnected parts of the Eighth Amendment. One part altered

the Supremacy Clause of the constitution, which states: “This Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.”⁶⁷ The Eighth Amendment attached the following qualification to the Supremacy Clause: “The words ‘other law’ . . . do not include a law to alter any of the provisions of this Constitution which is passed by the National Assembly in conformity with section 69 of the Constitution.”⁶⁸ The other part of the Eighth Amendment that drew the Court’s attention added the following subsection to Section 69 of the constitution, which otherwise codifies the rules of formal amendment: “For the removal of doubts, it is hereby declared that the provisions of this section are all-inclusive and exhaustive and there is no other limitation, whether substantive or procedural, on the power of the National Assembly to alter this Constitution.”⁶⁹

The Court held that both of these parts of the Eighth Amendment violate the basic structure of the constitution, and are therefore “unlawful, null and void.”⁷⁰ The basis for the Court’s decision was the preamble, whose values, the Court wrote, “have to be preserved for all times to come” and “cannot be amended out of existence.”⁷¹ For the Court, these values include the rule of law, the separation of powers, and “maintaining the balance and harmony of the provisions of the Constitution.”⁷² Many of these values do not appear in the preamble.⁷³ We should therefore understand them as unwritten values identified by the Court to be inferred from the preamble and emanating from the spirit of the constitution.

The Court did not deny that the National Assembly can lawfully amend the constitutional text to the full extent of its power under the constitution. Indeed, the Court acknowledged the amendment authority of the Assembly. But the Court also emphasized the limits on the Assembly’s power of amendment:

There is though a limitation on the power of amendment by implication by the words of the Preamble and therefore every provision of the Constitution is open to amendment, provided the foundation or basic structure of the Constitution is not removed, damaged or destroyed. . . . I therefore rule that even though provisions of the Constitution can be amended, the National Assembly is not legally authorized to make any amendment to the Constitution that would remove or destroy any of the basic structures of the Constitution of Belize.⁷⁴

To understand why the Court feared that the Eighth Amendment would have conferred upon the National Assembly the power to “destroy” the constitution, we must examine the rules of formal amendment in Section 69, which the Eighth Amendment had sought to amend by addition. Section 69 authorizes the National Assembly to alter the constitution according to an escalating structure of amendment: escalation means that the threshold of agreement required for amendment varies according to the importance of the rule to be amended. For example, amendments to the constitution’s formal amendment rules, fundamental freedoms, and certain other rules specified in a Schedule require a higher degree of consent (three-quarters agreement of all members of the House of Representatives on the final reading of the amendment) than amendments to most other constitutional rules (two-thirds of all members of the House on final reading).⁷⁵ There are further wrinkles to the formal amendment rules, but there is one basic point to retain for our immediate purposes: while Section 69 codifies different thresholds of escalating amendment difficulty, the constitution does not shield any rule from formal amendment .

The Court questioned the National Assembly’s motivations for amending Section 69: “It seems that the intention is to prevent constitutional principles such as the basic structure doctrine of the Constitution . . . from providing a limit on the power of the National Assembly to alter or amend the Constitution.”⁷⁶ The Court feared the first part of the Eighth Amendment—specifying that “other law” does not refer to any law passed in conformity with the codified rules of amendment in Section 69—would exclude from the Supremacy Clause any amendment passed by the Assembly.⁷⁷ And given that the Supremacy Clause makes the constitution “the supreme law of Belize” and renders any “other law” contrary to it “void,” this part of the Eighth Amendment would have authorized the Assembly to pass laws that are otherwise inconsistent with other parts of the constitution.

The second part of the Eighth Amendment—which amended the amendment rules in Section 69—took the first part one step further. It emphasized that there would be no limitations on the amendment authority of the Assembly other than the procedural specifications in Section 69, some of which impose higher thresholds for certain amendments but none of which make any rule formally unamendable.⁷⁸ For the Court, this second part of the Eighth Amendment extended the amendment power too far; on the Court’s reading, it gave the Assembly the power to destroy the constitution.

The Belizean Supreme Court held fast to the four propositions that are today centrally important to the conventional theory of constitutional change: the binary, substantive, illegitimacy, and implicit limitations propositions. The Court refused to allow reformers to pass the Eighth Amendment using the ordinary rules of constitutional amendment because a change of that magnitude would have yielded an entirely different constitution rooted in a new balance of powers. Yet the Court also suggested that there nonetheless exists a way for reformers to achieve the objectives of the Eighth Amendment: they could pursue the change as an act of constituent power, which is to say by writing and adopting a new constitution. For the Court, a change on the scale of the Eighth Amendment made with recourse only to an inferior constituted power is an illegal and illegitimate modification because it does not rest on the approval of the people as constituent power.

The same pattern is apparent in the judgments of other courts exercising or asserting the power to invalidate an amendment, including most importantly in India, where the Supreme Court's construction many decades ago of the basic structure doctrine has migrated abroad, directly to Belize.⁷⁹ These teachings have shaped our understanding of how constitutions change. But they are in some ways wrong and in others incomplete.

Conventional theory can help us begin to explain what an amendment is, but it lacks the resources to take us the whole way to the answer. Conventional theory can also explain the constitution-making moment when a new constitution is codified against ordinary repeal. But conventional theory demands too big a leap to accept that a constitutional change made as an ordinary amendment amounts to a new constitution even where no new text has been promulgated. And so we return to the question that began our inquiry: What is an amendment?

Amendment and Dismemberment

There are some strategies to distinguish an amendment from other kinds of constitutional change. One technique is procedural: to define an amendment as a change made according to the codified amendment procedures, as Zachary Elkins, Tom Ginsburg, and James Melton do in their superb study of constitutional endurance.⁸⁰ They explain: "we call a constitutional

change an amendment when the actors claim to follow the amending procedure of the existing constitution and a replacement when they undertake revision without claiming to follow such procedure.⁸¹ This procedural approach has the virtue of clarity: it simplifies an otherwise complicated task.

But this approach is too mechanistic for much beyond counting the number of changes made by reformers as formal amendments in a given jurisdiction—and even then the tally may include changes that should not count as amendments and exclude some that should. Many courts today reject this procedural approach when they invalidate a constitutional change that has nonetheless followed the amendment rule. The implicit point—if courts do not make it explicit—is that even some changes that satisfy the amendment procedure are not properly treated as amendments. This procedural approach is moreover underinclusive insofar as it is relevant only for codified constitutions, offering no guidance to evaluate what counts as an amendment to an uncoded constitution. There must a better way to classify a change as an amendment or something else.

Another answer to the question—what is an amendment?—is even more formalist than the strictly procedural approach taken by Elkins, Ginsburg, and Melton. Call it the textual approach: an amendment occurs simply when the codified constitution has been altered. In contrast to the procedural approach, the textual approach does not define an amendment according to the procedure required by the constitution. The textual approach instead looks only to the outcome of the change: where there is an explicit textual alteration, we must identify that change as an amendment. Sanford Levinson is right to reject this approach as “almost literally thoughtless.”⁸² For one, this approach gives us no way to identify amendments in jurisdictions with an uncoded constitution. Furthermore, not all constitutions memorialize their constitutional alterations as stand-alone textual additions sequenced neatly at the end of a codified master text. A package of amendments or a single amendment alone may instead be integrated into many different parts of the original codification, in which case the problem of counting the number textual changes—and therefore of amendments—becomes extraordinarily more complex, as I show in my discussion in Chapter 6 on *Finding Constitutional Amendments*. The textual approach moreover treats all textual modifications as equal in importance when, in reality, there may be significant differences in the relative degree of change they introduce to the constitution. This is obvious in the U.S. Constitution: some alterations are mere adjustments and others are revolutionary, and still others fall

somewhere in between. The textual approach cannot distinguish among these different kinds of constitutional change.

A Content-Based Approach

Neither the strict procedural nor the narrow textual approach is appropriate for understanding what an amendment really is and what it is not. We need instead a versatile approach applicable to both codified and uncoded constitutions, and also to jurisdictions where there are special procedures for constitutional alteration and where there are none. Our approach moreover cannot rely on a court's answer to what counts as a lawful amendment because sometimes judges define an amendment for politically expedient reasons that betray their partisan allegiances.⁸³

The answer, I propose, is a content-based approach for defining an amendment. This approach offers a vocabulary and a conceptual foundation for explaining why the constitutional changes discussed thus far in Belize, Brazil, Canada, Ireland, Italy, and Japan are not amendments but rather something qualitatively different from what we expect an amendment to accomplish. Each of these changes introduces a larger degree of change into its constitutional order than an amendment properly should.

The content-based approach I offer as an alternative to the strict proceduralist and the narrow textualist approaches will yield three conclusions. First, that the changes in Belize, Brazil, Canada, Ireland, Italy, Japan, and elsewhere described in this chapter have the effect of transforming their constitutions. Second, that their shared objectives are to destroy and to remake the core of the present constitution. And, third, that these changes should be understood as more than mere amendments to the constitution.

In this new content-based approach to constitutional change, these reforms are not constitutional amendments; they are better understood as constitutional dismemberments. These are transformative changes with consequences far greater than amendments. They do violence to the existing constitution, whether by remaking the constitution's identity, repealing or reworking a fundamental right, or destroying and rebuilding a central structural pillar of the constitution. A constitutional dismemberment can both enhance and weaken democracy, depending on what in the existing constitution is dismembered. Before more fully introducing the concept of dismemberment, I begin first by defining an amendment.

The Four Fundamental Features of Amendment

There are four fundamental features to a constitutional amendment, properly defined: its subject, authority, scope, and purpose.

The subject of a constitutional amendment is higher law, whether what counts as higher law in a given jurisdiction is codified in a unified master text or disaggregated across different sites of significance. An amendment is commonly reflected in a new writing, but it need not be. An amendment can also result from a change to an unwritten constitution-level norm.⁸⁴ An amendment, then, is not just an alteration to a constitutional text nor is its product always expressed in a codification. But an amendment in all cases makes or confirms an identifiable change to what is recognized as higher not ordinary law.

An amendment is moreover authoritative in both law and politics. In law, an amendment requires compliance, it subordinates all ordinary law, and has the same legal standing as other higher law. There may arise conflicts between two higher laws, and these may in the end be resolved in favor of one over the other, but this does not deny constitutional status to the higher law against which the conflict is resolved. An amendment is authoritative also in politics, requiring reformers to abide by it until and unless they succeed in reversing it. An amendment can survive a breach by reformers but when the relevant legal and political elites cease to accept the authority of the amendment it could cease to be recognized as valid.

The most important feature of an amendment involves its scope. This is the core of what distinguishes an amendment from other changes. An amendment is a constitutionally continuous change to higher law—a change whose content is consistent with the existing design, framework, and fundamental presuppositions of the constitution. A constitutional amendment entails unbroken unity with the constitution being amended. Constitutional continuity is a necessary feature of amendment. Severing the link that keeps the constitution coherent with an amendment results in a constitutionally discontinuous change that pulls reformers outside of the present constitutional order and into a new world where the rules of old may have no legal or political validity. To put it another way, an amendment continues the constitution-making project initiated at the founding or in intervening moments of refounding of the constitution. An amendment improves on the constitution's design where necessary or useful to align expectations about how it should function, fixes its flaws when they

are discovered, but pushes its boundaries no further than its outermost limits.

An amendment may have one of four distinct purposes. It can be corrective, elaborative, reformative, or restorative. I illustrate each of these with examples. These four purposes are not mutually exclusive but they should be distinguished from each other. An amendment—in order to be properly understood as an amendment—must keep faith with the constitution and continue to cohere with the pre-change constitution in fulfilling one or more of these four purposes.

One purpose of amendment is to correct the constitution to align expectations with performance. The Twelfth Amendment to the U.S. Constitution, for example, is properly identified as a corrective amendment. The founding constitution required each presidential elector to cast two votes for president: the candidate with the most votes would become president and the runner-up, vice president.⁸⁵ The election of 1800 exposed the design flaw in this arrangement when two candidates earned the same number of electoral votes.⁸⁶ It took three dozen ballots of voting by state delegations for the House of Representatives to ultimately break the tie and select Thomas Jefferson as president.⁸⁷ Reformers believed it was necessary to correct this technical flaw in the original constitution. They passed the Twelfth Amendment to reduce the possibility of a tie by requiring electors to differentiate their selections for president and vice president.⁸⁸

A constitutional amendment can also be elaborative. An elaboration is a larger change than a correction insofar as it does more than simply repair a fault or bring the constitution into agreement with expectations. Like a correction, an elaboration continues the constitution-making project in line with the current design of the constitution. But instead of repairing an error in the constitution, an elaboration advances the meaning of the constitution as it is presently understood. For example, the Nineteenth Amendment to the U.S. Constitution is best understood as an elaborative amendment. It advances the meaning of the Fourteenth Amendment, which codifies the Equal Protection, Due Process, and Privileges or Immunities Clause. And it builds on the constitutional protection in the Fifteenth Amendment for the right to vote without regard to race. The Nineteenth Amendment makes good on the promise of equality in the Reconstruction by extending constitutional protections to women from discrimination in voting. The expansion of the franchise to women was not corrective in the sense of fixing a design flaw in the constitution. It was an elaborative change consistent with

the existing framework of the constitution and a plain reading of equality rights at the time.

An amendment may alternatively be reformative. In contrast to an elaborative amendment that extends the meaning of the constitution within its outer bounds, a reformative amendment revises an existing rule in the constitution but without undermining the constitution's core principles. Possibly though not necessarily more substantial than a correction, a reform does not enlarge the scope of an existing protection or practice. It instead changes the operation of a feature of the constitution in a nontransformative way. For example, the Twentieth Amendment reformed the original U.S. Constitution by shortening the period between presidential election and inauguration by almost two months, moving the date of president's installation from March 4 to January 20. This amendment is neither corrective nor elaborative, since there was no error in choosing March 4 as the original installation date nor does the change advance the meaning of any part of the presidency, though it does serve the important purpose of mitigating the risks inherent in a lame-duck presidency by requiring a sooner transition from outgoing to incoming president. The amendment is truly reformative in purpose and function because its aim was to put into power the elected president several weeks earlier than the original constitution allowed.

Finally, an amendment can be restorative. In the course of constitutional litigation and political practice, the meaning of the constitution may change so dramatically that lawmakers are moved to mount an effort to return the constitution to what it was prior to a transformative judicial opinion or a new political practice that threatens to erode a deeply held understanding about what the constitution means and allows. In cases like these, lawmakers may seek to restore the constitution to its earlier meaning, believing that the constitution has been improperly redefined or its perimeter stretched too far. The Twenty-Second Amendment was restorative in this sense. Its origins date to the first president, George Washington, who retired after serving only two consecutive terms despite the high probability that he could have remained president for life. Washington refused to run for a third term. His successors followed his example and so strongly reinforced his two-term model that, in 1875, the House of Representatives passed a resolution recognizing that the "precedent established by Washington and other presidents of the United States, in retiring from the presidential office after their second term, has become, by universal concurrence, a part of

our republican system of government.”⁸⁹ Franklin Delano Roosevelt broke this two-term tradition in the Second World War on the argument that the country needed steady leadership during this unprecedented moment of crisis. Shortly after the death of Roosevelt in 1945, Congress approved an amendment proposal limiting presidents to no more than two terms and, by 1951, three-quarters of the states had ratified it, in so doing restoring the constitution to its prior bounds.

Amendments, then, can be corrective, elaborative, reformative, or restorative. The key in all cases is that an amendment—whether it corrects, elaborates, reforms, or restores—must cohere with the existing constitution and must keep the constitution consistent with its pre-change form. Otherwise it is more than an amendment.

We have covered plenty of ground so far. It is worth retracing our steps, if only briefly. I began with a claim: some constitutional amendments are not amendments at all. They may be called amendments, but they go beyond what we expect an amendment to do. An amendment, properly understood, is defined by four fundamental features: its subject, authority, scope, and purpose. An amendment is an authoritative change to higher law that corrects, elaborates, reforms, or restores the meaning of the constitution consistent with its existing framework and fundamental presuppositions. Sometimes approved using special procedures and sometimes not, an amendment has one overriding feature that matters more than all others: the scope of the change. The amended constitution must remain coherent and consistent with the pre-amendment constitution.

The Two Thirteenth Amendments

We are now ready to return to the two Thirteenth Amendments to ask whether both are properly called amendments. One is an amendment, and the other is not. The original Thirteenth Amendment—known as the Corwin Amendment—was an elaboration of the existing constitution, consistent with its meaning, in harmony with its formative principles, and embedded coherently into its architecture. From the perspective of the constitution in force at the time, the Corwin Amendment was not a departure. This federalist constitution gave wide latitude to states to govern themselves and molded the supporting principles of slavery deep into the foundations of the country’s institutions. The close continuity between the

Corwin Amendment and the constitution makes it unsurprising that the slavery proposal earned the support of a supermajority of Congress and was on its way to ratification with the prominent endorsement it had received from Lincoln, then newly installed as president.⁹⁰ The existing constitution could accommodate even the unamendable character of the Corwin Amendment: Article V itself codified an unamendable rule prohibiting changes to the slave trade for at least one generation until the year 1808. The Corwin proposal to give states the unalterable power to practice slavery under law—and to prohibit Congress from interfering with their choice—was therefore a coherent extension of the founding constitution-making project. We can accordingly properly understand the Corwin Amendment as an *amendment*. It did no more than elaborate the meaning of the existing constitution within its natural boundaries.

But the eventual Thirteenth Amendment is improperly called an amendment. Grouped together in what we describe as the Reconstruction of the constitution, the Thirteenth, Fourteenth, and Fifteenth Amendments are better understood as something more than amendments. They do not correct the constitution in terms of fixing an error in its operation, they do not elaborate the constitution's meaning consistent with its legal understanding before Reconstruction, they do not reform the constitution in a way that retains fidelity with its existing design, nor do they seek to restore the meaning of the constitution to what it once meant under law.

The Reconstruction was a transformative moment in the United States. It consolidated the Union victory over the Confederate States and proclaimed the triumph of the free-state north over the slave-state south. Collectively, the Thirteenth, Fourteenth, and Fifteenth Amendments also wrote into the constitution a ringing declaration of the equality of all persons, if only as an aspiration. But the most important function of Reconstruction was to demolish the infrastructure of slavery in the original constitution.⁹¹ The eventual Thirteenth Amendment and the two others that followed it together tore down the major pillars of America's original sin, codified in the constitution for all to see: the Three-Fifths Clause,⁹² the Fugitive Slave Clause,⁹³ the Migration or Importation Clause,⁹⁴ and the Proportionate Tax Clause.⁹⁵

Scholars have suggested that the Reconstruction created a new constitution,⁹⁶ a new constitutional order,⁹⁷ or a new regime.⁹⁸ We can of course conceptualize these three changes as constituting a new regime, a new order, or a new constitution. But as a matter of constitutional form, the U.S. Constitution identifies each of them as an amendment, codified serially in

the founding constitutional text alongside other amendments ratified before and since, many of them mundane by comparison.

Constitutional form and function therefore lead us down different paths as we seek to make sense of the Reconstruction Amendments. Formally, we are compelled to identify these three constitutional alterations as mere amendments, but functionally we know they amount to something more. Yet they are neither mere amendments nor do they amount to promulgating a new constitution, a new order, or a new regime. Their objective was to unmake the constitution as it existed at the time. These constitutional changes are best understood as occupying the space between an amendment and a new constitution. I describe the changes we commonly call the Reconstruction Amendments as constitutional dismemberments.

Three Types of Dismemberment

A constitutional dismemberment can occur suddenly in a big-bang moment or gradually by erosion or accretion. It can occur to constitutions both codified and uncodified, and it can either enhance or deteriorate liberal democracy. These changes are often made using the ordinary rules of amendment, and they are commonly described as amendments or even sometimes as new constitutions. But they are amendments in name alone.

A constitutional dismemberment entails a fundamental transformation of one or more of the constitution's core commitments. A dismemberment is incompatible with the existing framework of the constitution because it seeks to achieve a conflicting purpose. It intends deliberately to disassemble one or more of a constitution's elemental parts. An amendment does not go nearly as far because, properly defined, it keeps the altered constitution coherent with its pre-change identity, rights, and structure. To use a rough shorthand, the purpose and effect of a constitutional dismemberment are the same: to unmake a constitution.

The theory of constitutional dismemberment is not rooted in a normative understanding of the constitution. What matters is the present constitutional settlement and how changes are made to it. Constitutional dismemberment takes no prior view of what a constitution should do, entrench, or protect. Constitutional dismemberment instead sets as its baseline the present commitments and understanding of the constitution and from there evaluates whether a constitutional change

transforms something integral about a constitution's right, structure, or identity.

A constitution, then, may be dismembered either to improve liberal democratic outcomes or to weaken them. We can accordingly speak of the dismemberment of the Turkish Constitution from democratic to authoritarian, just as we can interpret the Reconstruction Amendments as dismembering the infrastructure of slavery in the U.S. Constitution. Whether a change enhances or deteriorates liberal values is unrelated to the nature of a change as either an amendment or a dismemberment.

Constitutional dismemberment fills the void that exists in the conventional theory of constitutional change between an amendment and a new, actual constitution. This middle ground serves as a bridge between these two constitutional changes; it is more than an amendment but less than a new constitution. We can conceptualize this middle ground as the unmaking of a constitution without breaking legal continuity. As a matter of form, the constitution remains what it was prior to the change, except to the extent of the change itself. The theory of constitutional dismemberment accordingly does not recognize a new constitution until a new constitution is in fact self-consciously adopted by the relevant reformers choosing to launch and successfully complete the formal constitution-making process. As I show in this section, constitutional dismemberment occurs in codified, uncoded, and partially codified constitutional regimes—and it makes fundamental changes in constitutional rights, structure, or identity.

A constitutional dismemberment alters one or more of the constitution's essential features—a fundamental right, a load-bearing structure, or a core feature of the identity of a constitution. These are related categories. For example, a dismemberment to a constitution's structure may amount to a dismemberment of its identity. But at a high level of abstraction, these three forms of dismemberment are nonetheless distinguishable from each other and also from smaller-scale constitutional amendments, whether corrective, reformative, elaborative, or restorative. A dismemberment of a constitutional right involves the repeal or replacement of a fundamental right protected by the constitution—not just any right but one that is central to the political community. A dismemberment of a constitutional structure entails a clear break from how the constitution organizes the allocation of power, how it balances competing claims to and the exercise of authority, or how its public institutions function. And a dismemberment of a constitution's identity results either in the extinguishment of a core

constitutional commitment or the simultaneous replacement of a core constitutional commitment with a new one.

Around the world we see examples of each of these three types of dismemberment, some having failed where others have succeeded. I draw from New Zealand, the United States, and the Caribbean—including Barbados, Dominica, Guyana, and Jamaica—to illustrate each of these three types of dismemberment. These examples of dismemberment should be read with the ones discussed earlier in this chapter from Belize, Brazil, Canada, Ireland, Italy, Japan, and the United States.

I begin with an illustration of a dismemberment to constitutional rights. In the nineteenth century, a constitutional change to recognize the United States as a Christian nation gained support across the country. The idea did not make much progress in Congress, but it persisted into the twentieth century with over fifty-five Christian Amendment proposals introduced in Congress since 1947.⁹⁹ The Flanders Amendment, named after its sponsor Senator Ralph Flanders, is one such an example: “This nation devoutly recognizes the authority and law of Jesus Christ, Savior and Ruler of nations, through whom are bestowed the blessings of almighty God.”¹⁰⁰ Imagine if the Flanders Amendment were reintroduced today as a modern version of the Christian Amendment and adopted in conformity with the formal amendment procedures of Article V. Could we properly call that change an amendment?

The Establishment Clause prohibits Congress from passing a law establishing an official religion,¹⁰¹ and since 1947 this prohibition has applied to the states.¹⁰² The Free Exercise Clause prohibits Congress—and, since 1940, the states¹⁰³—from unconstitutionally infringing the right to freely practice one’s religion. The Court has interpreted these twin constitutional protections as having the “common purpose” of securing liberty.¹⁰⁴ Were the Christian Amendment adopted today, it would better reflect its revolutionary effect on the rights protected in the U.S. Constitution to call this change a dismemberment rather than an amendment. Far from continuing the constitution-making project consistent with the existing meaning of the constitution, this Christian Amendment would be a profound departure from the present values of the constitution. It would be a constitutional dismemberment.

We can point to an example of a successful dismemberment of rights in Jamaica. The Constitution of Jamaica is the joint product of an Act of the Parliament of the United Kingdom and an Order in Council in the

name of the Queen. On July 19, 1962, Parliament enacted the Jamaican Independence Act, 1962, which set the terms of Jamaica's independence,¹⁰⁵ and four days later an Order in Council promulgated the Jamaican Independence Constitution.¹⁰⁶ Jamaica's Constitution recognizes a long list of fundamental protections, including the right to life,¹⁰⁷ freedom from arbitrary arrest,¹⁰⁸ detention,¹⁰⁹ and inhuman treatment,¹¹⁰ as well as the liberties of movement,¹¹¹ conscience,¹¹² and assembly.¹¹³ These and other rights were inserted into the constitution in a chapter denominated "Fundamental Rights and Freedoms." None of them, however, was intended to have a new legal effect. The chapter on rights and freedoms was purely a restatement of existing law: the Privy Council declared that this chapter "proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law."¹¹⁴ The text of the constitution reinforces this point.¹¹⁵

In 2011, after decades of efforts at constitutional reform, Jamaican reformers adopted a homegrown Charter of Fundamental Rights and Freedoms as an amendment to the constitution.¹¹⁶ Formally, the Charter repeals and replaces the entirety of the original constitution's chapter on rights and freedoms.¹¹⁷ Derek O'Brien and Se-shauna Wheatle have explained that the effect of the Charter was to quasi-patriate the Jamaican Constitution given that the Charter had been passed as an Act of the Jamaican Parliament, reflecting both popular and political consensus on a local level.¹¹⁸ There was a political imperative for lawmakers to support the Charter when it came up for a final vote: the "failure to support the Charter carried with it the risk that opponents could be characterised as . . . preferring a system of rights protection bequeathed by the former imperial power to something rooted in Jamaican soil and reflecting Jamaican values."¹¹⁹

The Charter codifies rights that could be described as both progressive and conservative. It expands equality rights,¹²⁰ formalizes the right to a healthy environment,¹²¹ and protects the right to vote in free and fair elections.¹²² But it also protects the death penalty and traditional marriage, making both of them immune to constitutional claims under the Charter.¹²³ This combination of rights has led Arif Bulkan to highlight the contrast it raises: "The 2011 Charter embodies a progressive realization of rights, precisely the kind of evolution that is expected to occur in a maturing society. Juxtaposed alongside these reforms, however, are a number of retrograde provisions that dilute previously existing constitutional protections."¹²⁴

The Charter also codifies a significant structural reform that has implications for the constitution's rights and freedoms. The original constitution included a derogation clause that authorized Parliament to pass laws that were inconsistent with the constitution's rights and freedoms.¹²⁵ The Charter repealed that clause, formerly codified in Section 50 of the original constitution.¹²⁶ When combined with the new menu of rights and freedoms, what results from this repeal is a new rights regime beyond the possibility of express derogation by Parliament.

The Charter was created as an amendment using the formal amendment rules in the Jamaican Constitution. Yet given the significant effects of the new Charter—to quasi-patriate the Constitution, to entrench new rights and freedoms that sound in local values, and to protect those rights from direct legislative infringement—it is appropriate to ask whether *amendment* is the proper concept to describe the new Charter. In light of its transformative impact in both law and politics, it is more accurate to say that the Charter dismembered the constitution's prior rights regime.

We can likewise identify an instance of the successful dismemberment of a constitutional structure. In the 1990s, New Zealand changed its electoral system from the traditional commonwealth model of first-past-the-post to a modern system of proportional representation.¹²⁷ Before the proposed reform, New Zealand's Members of Parliament (MPs) had been elected by simple plurality vote in single-member electoral districts. The reform required MPs to be elected according to a combination of prioritized candidate rankings and proportionate votes received by a party.¹²⁸ What largely prompted the change was dissatisfaction with the status quo: party representation in Parliament had often failed to reflect the popular vote,¹²⁹ and the single-party governments produced by the old system magnified legitimate concerns about the lack of political accountability in the unicameral legislature.¹³⁰ The change was the culmination of more than a century-long effort to modernize the country's electoral rules.¹³¹

A national vote in a binding referendum led Parliament to reform the electoral system. The country moved to a mixed-member proportional representation system (MMP).¹³² As in the United Kingdom, New Zealand does not have a codified constitution. The Constitution of New Zealand changes principally by law and convention. The New Zealand Parliament was therefore able to make this significant change by a simple law. It enacted the 364-page Electoral Act 1993, which brought extensive electoral changes into law, specifically to introduce MMP, to create an Electoral Commission,

and to repeal the Electoral Act 1956.¹³³ The Electoral Act 1993 also made significant changes to other laws, including the Constitution Act 1986, the Civil List Act 1979, the Remuneration Authority Act 1977, the Local Elections and Polls Act 1976, the Ombudsmen Act 1975, and the Public Finance Act 1989.¹³⁴

Twenty-years since the first election was held under the new MMP, we can perceive significant institutional, behavioral, and policy consequences,¹³⁵ over and above its constitution-level changes. In contrast to the results under the old first-past-the-post system, no party has since won an outright majority of seats, in large part because more parties are now contesting and winning races under this new system.¹³⁶ It is undeniable that MMP has had a transformative effect on the constitution. The Electoral Act 1993 has “dramatically altered the constitutional dynamics of New Zealand” and “introduced more complexity and uncertainty to the process of governing” because it has “shifted New Zealand’s constitutional structure away from the streamlined hierarchy of agency relationships under a plurality electoral system to a structure requiring transactions between political parties for the exercise of political power.”¹³⁷ In this light, the Electoral Act 1993 is better seen as a dismemberment of the structure of the country’s electoral regime as it existed at the time, not a simple amendment to it.

We can likewise demonstrate the dismemberment of constitutional identity. Several Commonwealth Caribbean constitutions have been dismembered in connection with the establishment of a regional court and the accession of individual countries to its appellate jurisdiction as the court of last resort. The creation of this regional court is one step in a larger process of regional capacity building toward the eventual recognition of true postcolonial independence. In February 2001, ten Caribbean states signed onto the Agreement Establishing the Caribbean Court of Justice, and another two states joined in February 2013.¹³⁸ The Court enjoys both original and appellate jurisdiction,¹³⁹ judges are appointed for the equivalent of life terms until the age of seventy-two,¹⁴⁰ the Court is given a full staff and a complement of officers,¹⁴¹ and the Court is fully financed.¹⁴² The Agreement was intended to give the new Court the leading role in developing a Caribbean jurisprudence without threatening the sovereignty of the signatory Caribbean States.¹⁴³

The Agreement makes the Caribbean Court of Justice the final court of appeal for those countries acceding to its appellate jurisdiction. For these countries, the new Court replaces the Judicial Committee of the Privy

Council in London.¹⁴⁴ This is a significant change in legal authority in the region because accession to the Court's appellate jurisdiction severs one of the remaining colonial vestiges of the legal subordination of the Commonwealth Caribbean to the United Kingdom.

Writing before the creation of the Caribbean Court of Justice, Hugh Salmon captured the importance of this new institution and why the region should create it: "The establishment of a Caribbean Court of Justice represents one of those defining moments which will determine our ability as a nation and as a region to take our destiny into our own hands."¹⁴⁵ For Salmon, the Court was a necessary indigenous institution deeply needed in the region. He questioned why a foreign court remained in the Caribbean: "Can we realistically expect such jurisprudence to be fashioned in tune with those aspirations by a judicial body however distinguished which remains remote both in terms of distance and in terms of the depth of understanding which can only arise from local and regional moorings?"¹⁴⁶ He stressed that it was time to "recognize that the continued existence of a final Court of Appeal located outside the region is an inhibiting factor to the development of an indigenous jurisprudence which is more responsive to the values within our society and our aims and aspirations as independent Caribbean nations."¹⁴⁷

The rise of the Caribbean Court of Justice signals "the sunset of British colonial rule" in the region.¹⁴⁸ When the Court exercises its appellate jurisdiction, it applies the constitution, laws, and common law of the country concerned.¹⁴⁹ The new Court has the power of the last word on both civil and criminal matters, as well as on those concerning the interpretation of national constitutions.¹⁵⁰ Many believe the Court holds great promise for strengthening the region.

Despite these high aspirations for the Court, only four countries have so far acceded to its appellate jurisdiction: Barbados and Guyana in 2005, Belize in 2010, and Dominica in 2015.¹⁵¹ Each of the four signatories formalized its accession either through its domestic formal amendment process or through the legislative process as authorized by the constitution.

In Barbados, Parliament formally amended the constitution to remove references to the Judicial Committee of the Privy Council and to insert the declarative statement that "a decision of the Caribbean Court of Justice is final and shall not be the subject of any appeal or enquiry in any tribunal or other court."¹⁵² In Guyana, the constitution authorizes Parliament to pass a law authorizing the creation of a court of appeal for the Caribbean,

which would serve as the final court of appeal for the country.¹⁵³ Parliament passed that law in 2004 to implement the Agreement Establishing the Caribbean Court of Justice and, among others things, to make the Court the country's tribunal of last resort.¹⁵⁴ In Belize, the national legislature adopted a constitutional amendment "to remove the Privy Council as the final appellate court for Belize and to replace it with the Caribbean Court of Justice,"¹⁵⁵ also substituting the words "Caribbean Court of Justice" for "Her Majesty in Council" wherever it appeared in the Belizean Constitution.¹⁵⁶ Most recently, Dominica adopted a constitutional amendment in which the words "Judicial Committee" were deleted and replaced with "Caribbean Court of Justice" wherever they occurred in the constitution¹⁵⁷ and inserted a rule that in no case shall an appeal "be brought from or in respect of any decision of the Court of Appeal to the Judicial Committee. . . ."¹⁵⁸ The region awaits future national accessions to the appellate jurisdiction of this new Court.

These constitutional changes are more than mere amendments. Although reformers have approved them using the procedures of constitutional amendment, these changes accomplish something different from what we understand amendments to do. These changes deconstruct the constitution; they do not continue to build the constitution as it exists. They are transformative alterations that simultaneously unmake the constitution while reorienting it toward a new direction. But this turn to a new direction does not promulgate a new constitution, since these alterations are formalized within the existing constitution. They are self-conscious efforts to unmake colonial constitutions while retaining legal continuity with the old. Reformers have successfully made these constitutional dismemberments so far in four countries in the region. Other countries may follow.

* * *

When is an amendment more than amendment? When reformers transform the constitution while seeking to retain legal continuity, whether by altering a fundamental right, a central structure, or a core feature of constitutional identity. A change on this extraordinary scale is a constitutional dismemberment. It results in a constitution that is incompatible with the existing constitution, either in its framework, purpose, or fundamental presuppositions. We have seen examples of constitutional dismemberment in this chapter, namely in Brazil, Canada, the Caribbean, Ireland, Italy, Japan, New Zealand, Turkey, and the United States. We encountered several examples of dismemberments also in the introductory chapter. These

dramatic constitutional dismemberments do more than a constitutional amendment should. Properly defined and understood, amendments have a circumscribed purpose: they can be corrective, reformative, elaborative, or restorative, but in all cases the change must remain coherent with the pre-change constitution.

These boundaries of constitutional amendment have implications for defining and identifying a constitutional amendment, for understanding other forms of constitutional alteration, and for designing the rules of constitutional change. The most important implication in the difference between amendment and dismemberment involves constitutional design: the rules of amendment and dismemberment should differ in their degree of difficulty. Given that a dismemberment transforms the constitution beyond its natural bounds into an altogether new form as to rights, structure, or identity, the execution and legitimation of a constitutional dismemberment should require a greater degree of consent than a constitutional amendment. In Chapter 5, the distinction between amendment and dismemberment will feature prominently in my suggestions for how constitutional designers should structure amendment procedures in order best to serve the interests of legal continuity, stability, and predictability in constitutional change.

Before we turn to designing the rules of change—where variable amendment difficulty will be an important strategy for pairing the content of a given change with a specific procedure to approve and legitimate it—we must first interrogate the notion of amendment difficulty. What does it mean to say that a constitution is hard to amend, and how can we reliably compare amendment difficulty across constitutions?

PART TWO
FLEXIBILITY AND RIGIDITY

3

Measuring Amendment Difficulty

Constitutional politics in eighteenth-century Poland and the United States came to a standstill for the same reason. In the United States, the Articles of Confederation could be amended only with the unanimous consent of all thirteen states.¹ Predictably, amending the Articles proved impossible: every attempt failed even though constitutional reform was desperately needed.² Repeated amendment failures prompted lawmakers to call an extraordinary assembly to negotiate amendments to save the Union.³ Again facing the onerous unanimity rule to change the Articles, the Philadelphia Convention disobeyed the instructions it had received from the Continental Congress. Instead of preparing proposals for a package of amendments, the Convention drafted an entirely new constitution. The Convention made another even more audacious move: it set the threshold for ratifying the new constitution much lower than had been required to amend the Articles of Confederation.⁴

Poland had its own encounter with unanimity. Members of national and local assemblies in the Polish-Lithuanian Republic possessed the power to terminate whole legislative proceedings and individual bills simply by exclaiming, “Nie pozwalam,” or in translation, “I will not allow it.”⁵ Known as the liberum veto, the practice was rooted in a core commitment to consensus. The veto proved disruptive for governance,⁶ as progress became rarer and rarer still when the veto had been exercised.⁷ The liberum veto could in theory have been a productive tool to foster unity, but it ultimately proved destructive as lawmakers used the device to spoil the work of Polish assemblies.⁸ The country later abolished the practice when it adopted its constitution in 1791,⁹ only four years after the United States had replaced its own requirement of unanimity in constitutional amendment with a supermajority.¹⁰

Despite these eighteenth-century experiences in Poland and the United States, unanimity does not always entail impossibility. For instance, amending the Treaties of the European Union requires the unanimous

agreement of all member states.¹¹ One might think that building consensus among a multinational body nearly thirty countries in the European Union would be more difficult than meeting the unanimity threshold among thirteen states under the Articles of Confederation. And yet the Treaties of the European Union have been amended many times,¹² more frequently than the Articles, which have fewer veto players and a lower denominator. How can this be? The answer resides in an important observation that has been all but lost among scholars of constitutional change: codified amendment rules alone cannot tell us how difficult it is to amend a constitution. What matters just as much if not more is a combination of uncodified factors, including the norms of constitutional change, the nature of party competition, the intensity of political polarization, the degree of constitutional veneration, and the role courts play in the amendment process.

* * *

Most who know the U.S. Constitution especially well believe it is virtually impossible to amend. Jack Balkin observes that the amendment rules in Article V pose “almost insurmountable obstacles to constitutional revision,”¹³ Sanford Levinson remarks that “Article V makes amendment extraordinarily difficult if not functionally impossible,”¹⁴ and Richard Fallon makes the point that “even under the best circumstances” it is “nearly impossible to achieve significant change in our written Constitution through the Article V process.”¹⁵ The most prominent exception is Vicki Jackson, who rejects what she describes as the “myth” of the unamendability of the U.S. Constitution, pointing to history and the success rate of congressional overrides of presidential vetoes as evidence that the supermajorities required to initiate an amendment are not in fact impossible to assemble.¹⁶

Yet it is not hard to understand why many informed observers describe the constitution as “frozen,”¹⁷ given that its text has been rendered effectively unchangeable in our current moment. Formal amendment requires two-thirds of each chamber of Congress to approve an amendment proposal, and three-quarters of the states in turn to ratify it.¹⁸ As difficult as it may have been at the time of the First Congress to assemble these supermajorities among 59 Representatives, 20 Senators, 10 states, and no political parties, it is considerably harder today with 435 Representatives, 100 Senators, 50 states, and hyperpartisan political parties.¹⁹

What makes the amendment rule in Article V so hard to satisfy is not just the founding design requiring supermajorities at both the proposal and ratification stages. The geographic expansion of the Union has exacerbated

amendment difficulty by quadrupling the denominator for Article V amendments from thirteen in the founding era to fifty since 1967. As Rosalind Dixon explains: “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%.”²⁰ In addition, the deepening political polarization in American society in general and specifically between the two dominant political parties has raised barriers to agreement in first proposing and ultimately ratifying an amendment on virtually any kind of constitutional change, from the mundane to the fundamental.²¹

Among those who study constitutions around the world, the U.S. Constitution is widely regarded as one of the most difficult to change by formal amendment.²² A comparison is instructive: the Indian Constitution has been formally amended over one hundred times since 1950, the German Basic Law roughly sixty times since 1949, and the South African Constitution around twenty times since its adoption in 1996. The U.S. Constitution has been formally amended only twenty-seven times in over two centuries—a minuscule number in light of the more than 11,000 amendments proposed since then.²³ These contrasts are startling, but neither of these measures—the number of amendments since the coming into force of the constitution or the historical rate of amendment failure—is an accurate indication of how difficult it is to amend the constitution. The most we can take from these two markers is that the first is a measure of amendment frequency and the second of amendment success.

We are left, then, with a question: How can we know whether the U.S. Constitution is indeed the most difficult to amend formally in the world? The question may well be unanswerable. It is not even clear why the answer is important nor how it can be useful for constitutional designers in structuring their own formal rules of change. If we could identify which of the world’s constitutions is the most difficult to amend, constitutional designers interested in making their own constitution just as rigid would be mistaken to believe that they could achieve the same degree of rigidity by transplanting its amendment rules into their new design. Importing these procedures alone without the larger context in which they are anchored would ignore a critical factor in constitutional design: the close and determinative interrelationship between constitutional performance and political culture. We will return to the centrality of culture to measuring amendment difficulty, but for now it is worth noting an essential point: studies of formal

amendment difficulty are insufficient and incorrect if they evaluate only the codified rules of change without attention to the larger political and cultural contexts in which those rules are situated. So far, rankings of formal amendment difficulty have yet to prove their worth.

Studies of Amendment Difficulty

Without a theory of constitutional purpose or an informed view on the functions a constitution serves, it is no badge of honor for a country to rank at the top or bottom of the world's most rigid constitutions. What amounts to success or failure in designing amendment rules turns on a prior question: What good is the constitution for? As William Forbath has remarked, correctly in my view, "to ask whether a constitution should or should not be obdurate to change is less fruitful than asking what degree of obduracy or what degree of changeability best suits our purposes."²⁴ A constitution could appropriately be described as a failure if its purpose is to communicate present preferences but its amendment procedure is so onerous that it is impossible to gather sufficient agreement from the relevant actors to keep the constitution current. On this measure, a constitution would be successful if it were as readily amendable as a statute when the circumstances called for change. Yet an ultra-flexible constitution like this one could be considered a failure on another measure. If its purpose is to protect civil rights and liberties from the vicissitudes of ordinary politics but the constitution is entrenched too weakly to resist efforts to weaken those rights and liberties, that constitution has failed where it matters most. Studies of amendment difficulty are therefore of little use unless we know considerably more than only where one country ranks relative to others. The constitutional values we prioritize over others hold the key to answering the question whether rigidity or flexibility makes a good constitution.

Ranking Constitutions

Rankings of amendment difficulty classify constitutions according to what the ranker concludes is their relative degree of rigidity or flexibility. Existing rankings have limited value, however, because as a group they are based, with rare exception, on a purely textual analysis of amendment rules. They

fail to pay needed attention to the informal and nontextual dimensions of constitutional rigidity. What results is by all appearances a clear hierarchy of constitutions. Yet these rankings cannot give an accurate account of comparative amendment difficulty. They are insufficiently complex to incorporate the uncodified indicators of constitutional rigidity.

For instance, Arend Lijphart's influential study of thirty-six democracies focuses exclusively on the type of majorities required for amendment.²⁵ For him, differences in voting thresholds constitute a crucial basis of distinction in measuring the difficulty of constitutional amendment.²⁶ Lijphart ranks seven constitutions in the top group of amendment difficulty (scoring 4.0) in light of their requirement of supermajorities greater than two-thirds: Argentina, Australia, Canada, Japan, South Korea, Switzerland, and the United States.²⁷ Germany (3.5) ranks immediately behind, followed by fifteen countries tied (3.0) on the basis of their two-thirds requirement or its equivalent.²⁸ The next group of eight countries (1.5 to 2.0) requires something between an ordinary majority and two-thirds supermajority. The last group requires only ordinary majorities (1.0), and includes five countries.²⁹

In her own study, Astrid Lorenz ranks thirty-nine democracies.³⁰ Lorenz draws from other studies to integrate into a single classification the voting thresholds, the various voting bodies, and the forums in which the votes occur.³¹ Belgium tops the list with the highest index of amendment difficulty (9.5), followed closely by the United States and Bolivia (9.0), and then the Netherlands (8.5).³² The next three hardest to amend are tied: Australia, Denmark, and Japan (8.0).³³ Canada is next, tied with Chile and Switzerland (7.0).³⁴ The easiest constitutions to amend on her scale are the uncodified constitutions of New Zealand (1.0) and the United Kingdom (1.0).³⁵

Edward Schneier has developed a similar classification based on voting thresholds alone.³⁶ Schneier classifies 101 constitutions into five categories and a total of nineteen subcategories.³⁷ His five main categories represent the voting thresholds a legislature must satisfy in order initiate a formal amendment: simple majority, 60 percent, 65 percent, two-thirds, and 75 percent.³⁸ Schneier divides each of these five categories into one of six subcategories representing the methods and requirements for ratification (for instance, no further action, executive approval, or referendum).³⁹ Yet even Schneier concedes that his classification is limited because it "glosses over important nuances" in formal amendment rules.⁴⁰ As Schneier acknowledges, his classification does not reflect the full range of formal amendment methods: "many constitutions provide alternative methods

including, most frequently, referendums. This [classification] reflects what I believe to be common practice of the method most frequently used in each country.”⁴¹ This raises a second limitation to Schneier’s classification: it is time bound. That one method of formal amendment may today be common practice does not mean that it will remain common practice in the future. Infrequently used methods may later become more frequently used, just as more frequently used methods may eventually lapse into disuse.⁴² The consequence of excluding infrequently used methods of amendment is to fail to capture the full effect of the architecture of formal amendment design on constitutional rigidity. Even if Schneier had considered the entirety of a constitution’s formal amendment design, his classification would still have been incomplete because of its failure to account for informal and nontextual sources of amendment difficulty.

Constitutional Rigidity

Donald Lutz has produced what is so far the leading ranking of comparative formal amendment difficulty.⁴³ In the balance of this chapter, I explain and critique Lutz’s study but I do so for an important purpose that extends far beyond his ranking alone: to identify the limitations in all existing rankings of amendment difficulty, not just Lutz’s own, though Lutz’s study takes centerstage as a useful illustration of where rankings go wrong.

In his detailed study, Lutz seeks to quantify the difficulty of each discrete step in a given amendment process in order to estimate the relative difficulty of whole amendment processes. Lutz surveys amendment procedures across thirty-two democratic states and identifies sixty-eight possible actions “that could in some combination be used to initiate and approve constitutional amendments and that together cover the combinations of virtually every amendment process in the world.”⁴⁴ For instance, initiating an amendment by an executive action is worth 0.25 units of difficulty while initiating an amendment in two separate votes of a unicameral legislature by a two-thirds majority is worth 1.75 units of difficulty.⁴⁵ Lutz identifies thirty different initiating actions, including initiation by a specially appointed body (0.50), by an absolute majority in a bicameral legislature (1.25), and by petition of over 500,000 voters (4.00).⁴⁶ Lutz does the same for the thirty-eight actions required to approve an amendment in his country sample, including a referendum requiring an absolute majority (1.75), the approval of a special

body by an absolute majority (0.65), and national legislative approval on two separate occasions by a two-thirds majority (1.75).⁴⁷ Lutz reserves the lowest scores of difficulty for four different actions in an amendment process: one-third or fewer votes in a special body to ratify an amendment, one-third vote or less in a unicameral legislature to ratify an amendment, an election between two votes to either initiate or ratify an amendment, or an executive action alone to initiate an amendment (0.25).⁴⁸

Aggregating the value of each discrete step in the amendment procedures for all of the thirty-two countries in his study yields an answer to the question which country has the world's most rigid constitution. According to Lutz, the answer is the United States, with 5.10 as its score of amendment difficulty. We can calculate how Lutz arrived at this specific numerical value. Under Article V,⁴⁹ which codifies the amending clause in the U.S. Constitution, the bicameral Congress must vote by two-thirds to initiate an amendment, a step worth 1.60 points toward the entire score for the amendment process in Lutz's study. Next, a successful Article V amendment requires at least three-quarters of the states to ratify the initiated amendment, a step that counts for 3.50 points in Lutz's study. The sum of both parts of this Article V process amounts to the aggregate score of 5.10 that reflects its assigned degree of difficulty for a formal amendment.⁵⁰

The United States is followed next by a tie between Switzerland and Venezuela (4.75), then Australia (4.65), Costa Rica (4.10), Spain (3.60), and Italy (3.40).⁵¹ At the other end of the scale—the most flexible constitution—Lutz ranks New Zealand as the easiest to amend, with a degree of difficulty of 0.50.⁵² For Lutz, it is straightforward to quantify constitutional rigidity in New Zealand because amendment requires only one step: approval by a simple majority in the unicameral legislature. In between these two ends of the scale—the United States at the high end and New Zealand at the low—Lutz situates constitutions as relatively more or less difficult to amend, including the French Constitution (2.50), which is more flexible than the Norwegian (3.35) and the Icelandic (2.75) Constitutions but more rigid than the Greek (1.80) and the Chilean (3.05) Constitutions.⁵³

More Art than Science?

Lutz is clear that his index for quantifying initiation and approval steps in an amendment process is intended only to estimate the relative difficulty

of whole amendment procedures. Yet even with this disclaimer, there is reason to doubt the usefulness of his country rankings as providing even an accurate relative estimate of amendment difficulty. Later in this chapter in the section on “Uncodified Changes to Formal Amendment Rules,” I will highlight the problematic lack of attention in rankings of amendment difficulty—including Lutz’s own—to the many ways that formal amendment rules have been changed by rules and actions unreflected in their text. The next chapter, “The Three Varieties of Unamendability,” will dive deeply into the equally problematic absence in rankings of amendment difficulty of any account of constitutional unamendability. For now, I note a few specific limitations in Lutz’s own study.

The most important problem concerns the standard Lutz uses to rank national constitutions. Others include the challenge of distinguishing major from minor constitutional alterations, the complications involved in accounting for uncodified changes, the insoluble problems of cultural and temporal specificity, and the significant interaction effects that Lutz’s ranking cannot track as a result of his own choices in the design of his study. I set aside the quite serious problem of verification: it has proven impossible in some cases to verify Lutz’s measurements, a problem that one scholar has encountered in her effort to replicate Lutz’s study.⁵⁴ An additional problem with the study is its reliance on outdated data—outdated even at the time the study was originally published (in 1994) and republished (in 2006).

Begin with the most serious limitation in Lutz’s study of amendment difficulty. It relies on the American state experience in constitutional amendment to measure how rarely or frequently national constitutions are amended. Recall that Lutz arrives at his detailed ranking by first quantifying the difficulty of each discrete step in an amendment process so as then to aggregate these values for each given amendment rule in order to calculate the relative difficulty of whole amendment processes. Lutz identifies sixty-eight possible discrete steps in an amendment process and gives each a numerical value representing how onerous he believes it is to complete. For example, approving an amendment by a three-quarters supermajority in a specially constituted body amounts to a difficulty of 0.90, while ratification in a referendum by at least 60 percent contributes 2.00 units of difficulty.⁵⁵ Despite the granularity of Lutz’s study, his findings cannot be applied globally: the list of sixty-eight actions he observes in amendment procedures excludes many other actions found in the constitutions of the world.⁵⁶ That Lutz does not identify many amendment actions we see in constitutions elsewhere

makes it impossible to use his original quantification of amendment actions reliably to expand his study beyond the thirty-two countries he chose.

Here is the more serious problem with using the American state experience as his baseline. American subnational constitutions differ from national constitutions in meaningful ways that matter for how we understand constitutional amendment. As Lutz himself recognizes, state constitutions are significantly shorter in their lifespan, longer in words, and more frequently amended than the U.S. Constitution.⁵⁷ These differences between American state constitutions and the U.S. Constitution cannot be overstated. There are important reasons for the relative flexibility of state constitutions—reasons that reflect a unique understanding of state constitutionalism.⁵⁸ For one, constitutional change in the states is more likely to occur formally through amendment or replacement than informally through constitutional interpretation and political practice. And state constitutions are moreover much more detailed than the U.S. Constitution, making it more likely that they will be amended than a shorter more generalist constitution would be. It risks distorting results to use data from American state constitutions to quantify discrete amendment procedures in order to then apply those values in measuring the difficulty of whole national amendment rules.

Another problem derives from Lutz's choice to exclude alternative amendment procedures from his measurements. For constitutions that codify more than one amendment procedure, Lutz chooses to measure only one of these multiple procedures, and that single measurement is taken to represent the amendment difficulty for the entire constitution. As I explain in the section to follow on "The Missing Case of Canada," this choice ignores the significant interaction effects that take hold among multiple amendment procedures and that in turn may exacerbate amendment difficulty. The consequence is devastating for the reliability of Lutz's ranking as to those constitutions that codify more than one amendment procedure—including Austria, France, India, Switzerland, and the United States, to name just a handful of countries from his sample—and also as to the reliability of their measured rigidity relative to themselves and to each and every other constitution in his study.

We can illustrate an additional limitation with reference to the Constitution of New Zealand, the one ranked as most easily amendable in Lutz's study.⁵⁹ Since only a simple majority vote in the country's unicameral legislature is needed to amend the constitution, it seems obvious to Lutz that this procedure poses the lowest bar to a constitutional change. This

could well be true, particularly where one political party holds a dominant majority in the country's parliamentary system. The fusion of executive and legislative powers coupled with the traditions of responsible government and cabinet solidarity smooth the path toward constitutional reform in a majority government setting, with virtually no meaningful opposition to stand in the way. But it is equally true that a minority government could generate gridlock not unlike what is possible in presidential systems whose interlocking web of institutional checks can bring to a halt any serious effort to pass both ordinary and constitutional laws.⁶⁰ I address this possibility and its effect on amendment difficulty in the next chapter on unamendability, specifically in the section on constructive unamendability.

Four additional problems all involve realities that are downright difficult to quantify. The first, which I describe in the next chapter, concerns the barrier that constitutional veneration raises for formal amendment. Where there is a strong culture of reverence for the codified constitution, reformers determined to alter the codified constitution must contend not only with the formal amendment thresholds but they must also navigate the undercurrent of popular resistance to the very idea of altering the constitution. The second is related to the problem canvassed in the Introduction to this book: how to distinguish "big" changes from "small" ones. Lutz's study does not indicate which alterations he credits as important and transformative, and which ones are more accurately seen as housekeeping measures. In other words, an amendment to move the date of the president-elect's installation would be treated the same as a major reform to change the governing system from parliamentary to presidential. If Lutz found a way to account for multiple amendment procedures, this would at least partly address the problem of distinguishing amendments according to their importance. Third, Lutz cannot account for the problem of temporal variability in constitutional rigidity. A constitution may today be difficult to amend but in the past it may have been, or in the future it may become, much easier to amend—despite there being no change to the formal amendment rules themselves. I discuss this problem in significant detail in this later chapter in the section on "Temporal Variability in Amendment Difficulty."

The fourth additional problem is the perennial challenge of uncodified constitutional changes. Because Lutz focuses exclusively on formal amendments, he misses the vast universe of change that occurs by constitutional interpretation, by political practice, and in our evolving understandings of the constitution—changes that may sometimes be

more substantial than textual alterations. Lutz of course recognizes that constitutions change informally in these ways: for him, the higher the degree of constitutional rigidity, the higher the rate of judicial review, the implication being that courts will update the constitution by interpretation in the face of a rigid constitution that makes formal amendment impossible.⁶¹ And yet we know that even constitutions with a low degree of rigidity can nonetheless invite a high rate of judicial review and, conversely, that constitutions with a high degree of rigidity can still exhibit a low rate of judicial review.⁶² The relationship between amendment and interpretation appears to be more complicated than Lutz acknowledges, a further limitation in his study of amendment difficulty.

The Missing Case of Canada

There is yet another reason to question the usefulness of Lutz's ranking: it is incomplete. The sample of chosen countries is appropriately cross-regional, ranging from Argentina to Portugal, and from Botswana to Sweden. But the study is limited to fewer than three dozen constitutions. Such a limited sample would be understandable if his study gave close scrutiny to the larger political and cultural contexts of amendment, the historical forces that drive or redirect formal constitutional change, and the changing configurations of political coalitions needed to meet the constitution's amendment rules. Yet Lutz's ranking does none of these, nor does any other large ranking of amendment difficulty.

The Most Difficult Constitution to Amend?

Canada is one of the many countries excluded from Lutz's ranking. To be fair, Lutz concedes that he has left out several important countries whose relative constitutional rigidity is worth measuring, including not only Canada but Israel and the United Kingdom as well. He explains why with admirable honesty: "The problem in each of these three cases lies in determining what has constitutional status."⁶³

The formal amendment rules codified in the Constitution of Canada reflect many of the features that are associated in Lutz's ranking with amendment difficulty, either by causation or correlation. Had Lutz measured the

amendment difficulty of the Canadian Constitution using his own methods, he would have found that it ranks near or above the U.S. Constitution. This would have been an important discovery on its own because it would have called into question what appears to be a global presupposition that the U.S. Constitution is the most difficult in the world to amend.

The Canadian case is important because it highlights several limitations in the methodological choices behind Lutz's ranking. As Lutz explains, what makes his comparative inquiry challenging with respect to Canada is the difficulty of identifying what precisely constitutes *an amendment*. A textualist definition of a formal amendment—an alteration to the constitutional text—would map comfortably onto a master text constitutional regime governed by a codified constitution. But Canada does not have a master text codified constitution. It has a partially codified and uncoded constitution that operates differently from the conventional model of a master text regime like the United States. Some parts of the Constitution of Canada are codified—making it seem like a master text constitutional regime—but others are written yet disaggregated, and still others are altogether unwritten. This makes it hard to identify the complete universe of what possesses *constitutional* status, and in turn to identify when a change requires recourse to the procedures of formal amendment. But it is not impossible to apply Lutz's own metrics to count the number of events that have amounted to a constitutional amendment in Canada since the coming into force of the Constitution Act, 1982.⁶⁴

We must turn first to the codified portion of the Constitution of Canada. It clarifies much of the conceptual difficulty Lutz encountered in trying to identify what counts as “constitutional” in Canada. The Constitution Act, 1982 codifies a list of the items that comprise the Constitution of Canada, and we might in turn identify an amendment according to any change brought to any item enumerated on this list. Yet even this clarification is also something of a complication because the very same list suggests that it is a nonexhaustive enumeration. The key word, reproduced below from the Constitution Act, 1982 is “includes,” which suggests that other items form part of the Constitution of Canada though are not identified in its text:

The Constitution of Canada includes

- (a) the *Canada Act 1982*, including this Act;
- (b) the Acts and orders referred to in the schedule; and
- (c) any amendment to any Act or order referred to in paragraph (a) or (b).⁶⁵

The “Constitution of Canada,” then, consists of the Canada Act 1982, a law passed by the Parliament of the United Kingdom.⁶⁶ It also consists of the Constitution Act, 1982 and the Constitution Act, 1867, which created Confederation at the founding of what we know today as Canada.⁶⁷ It also includes a long list of acts and orders identified on a separate schedule appended to the Constitution Act, 1982. And finally, it consists of an amendment to any to these items. This enumeration also comprises items that are by incorporation included in the Constitution of Canada, for example declarations of values and other commitments in the Constitution Acts, 1867 to 1982, in particular the preambular statement in the Constitution Act, 1867, which states in part that Canada shall have “a Constitution similar in Principle to that of the United Kingdom.”⁶⁸ This incorporates by reference the fundamental constitutional principles of the United Kingdom into the Constitution of Canada, though the commitment reflected in the “Similar-in-Principle” Clause was superseded at least in part with the coming into force of the Constitution Act, 1982.

Identifying what is “constitutional” gets us only part of the way to determining what is an amendment in Canada. Alongside the substantive question—what is constitutional?—we must also answer the procedural question—how do we displace an existing constitutional rule or create a new one?—in order to get closer to finding for Canada the value associated with its amendment difficulty on Lutz’s scale of constitutional rigidity. The answer to the procedural question resides also in the Constitution Act, 1982. We will see that Canada has more than one numerical value for amendment difficulty—a possibility that neither Lutz’s ranking nor any other satisfactorily addresses, and that furthermore deepens the complexity in accurately measuring amendment difficulty.

Alternative Amendment Procedures

The Constitution Act, 1982 codifies several different, mutually exclusive amendment procedures, and each is usable only in connection with specific parts of the constitution.⁶⁹ Consider first the default multilateral amendment procedure in Section 38.⁷⁰ This procedure has been successfully used only once.⁷¹ It requires approval from both houses of Parliament and at least two-thirds of the provinces representing at least half of the total provincial population.⁷² This procedure is expressly identified as the “general” default

procedure that must be used to amend all rules and principles not otherwise entrenched under one of Canada's four other amendment thresholds, and it also serves as the designated threshold for specifically enumerated items, including provincial representation in the Senate, senatorial powers and elections, and the creation of new provinces.⁷³ Under Lutz's index, Canada's general default multilateral amendment procedure would score 4.50—the sum of 1.00 for parliamentary approval and 3.50 for provincial approval⁷⁴—good for fourth on his cross-national ranking of amendment difficulty.

But Lutz's index does not account for alternative amendment thresholds nor does it recognize escalating amendment thresholds. The U.S. Constitution, for instance, codifies an alternative amendment threshold authorizing two-thirds of state legislatures to petition Congress to call a constitutional convention where amendments will be proposed and later sent to the states for ratification.⁷⁵ This alternative amendment threshold would score 6.50 on Lutz's scale, by far the highest of all national constitutions in his sample.⁷⁶ Yet because the United States has never used this procedure, Lutz does not measure it. He instead determines that “we can use the lower figure unless or until the more difficult procedure is ever used.”⁷⁷ This choice obscures the possibility that the nonuse of this alternative amendment threshold may itself be the consequence of its perceived amendment difficulty.

The choice to exclude alternative amendment thresholds has implications for measuring amendment difficulty in Canada. Alongside the default multilateral amendment threshold, which is no doubt difficult to satisfy, Canada codifies an even harder threshold requiring approval in both houses of Parliament and in each and every provincial assembly.⁷⁸ This unanimity procedure has not once been successfully used since it was codified in the Constitution Act, 1982. The constitution requires reformers to satisfy this procedure to amend its most important rules, including its structure of formal amendment rules and the monarchy, as well as provincial representation in the House of Commons and the Senate, the use of English or French, and the composition of the Supreme Court of Canada, the last three subject to related but lesser matters amendable by another specially designated lower threshold.⁷⁹ On Lutz's scale, this unanimity threshold would score 5.00 for amendment difficulty: the sum of 1.00 for parliamentary approval and 4.00 for unanimous provincial approval. This would place Canada at a very close second to the United States (5.10) on Lutz's index of difficulty.

Yet the structure of Canada's formal amendment rules is even more complicated than the default multilateral and unanimity procedures suggest. The country's escalating structure of formal amendment creates three more amendment thresholds, for a total of five. The Constitution of Canada codifies a narrow federal unilateral amendment procedure authorizing Parliament to amend its internal constitution and matters of federal executive government.⁸⁰ Lawmakers may not use this procedure to amend matters expressly assigned to another more difficult amendment procedure.⁸¹ This federal unilateral amendment procedure has been used successfully three times.⁸² On Lutz's scale, it would score 1.00 for amendment difficulty.

The Canadian Constitution also codifies a regional amendment rule requiring both houses of Parliament and the assemblies of one or more provinces affected by a given amendment each to agree by majority resolution.⁸³ This procedure may be used only for regional matters whose subject concerns "one or more, but not all, provinces," for example an amendment relating to provincial boundaries.⁸⁴ It has been used seven times, more than any other amendment procedure,⁸⁵ and not necessarily for insignificant matters. This regional amendment procedure would score 3.00 on Lutz's scale, well above the national average level of rigidity on his scale (2.50).⁸⁶

The final amendment procedure authorizes provinces to use the unilateral provincial amendment procedure to amend their own constitutions. This procedure requires only a simple majority of the provincial assembly.⁸⁷ Provinces may use this procedure to amend all matters related to provincial government that are not otherwise expressly assigned a higher amendment threshold.⁸⁸ This threshold would score 0.50 on Lutz's scale.

It would misunderstand the study of amendment difficulty to insist that the scores of all five amendment thresholds must be aggregated in order to arrive at the true measure of Canada's amendment difficulty. But it would also misunderstand amendment difficulty to do what Lutz and others have done in their own rankings: to measure only the highest threshold that is ever actually used in order to quantify a constitution's rigidity. This approach neglects the possibility that Canada's escalating amendment thresholds are less complementary than competing, and that the uncertainty they generate as to which amendment threshold ought to be used for a particular constitutional change is itself a feature that aggravates amendment difficulty. Indeed, we have recently seen evidence of reformers exploiting the Canadian Constitution's uncertainty as to which amendment rule applies

for changes to senatorial selection. Incumbents ultimately and unsurprisingly chose to use the lower federal unilateral amendment threshold instead of the more onerous default multilateral amendment threshold.⁸⁹ This complex design of Canada's formal amendment rules may in fact discourage reformers from pursuing constitutional change through the normal channels of formal amendment and instead drive them to seek unconventional and irregular methods of informal amendment to update the constitution.⁹⁰ The point here is that the complexity of whole formal amendment design packages may itself be a significant source of amendment difficulty that has so far not been quantified in studies of constitutional rigidity.

Cultures of Amendment

The difficulty of amendment is a function of more than the formal amendment rules themselves. In some cases, the cultures of constitutional politics may predominate over the formal amendment rules, leading reformers to disregard the codified constraints on their conduct. In other cases, the particular configuration of power and politics in society may yield new methods of constitutional change that circumvent or even defy the rules of textual alteration. In still other cases, the cultures of constitutional politics do not alter the rules of change themselves but they instead shape how and when those rules are used, if ever at all.

It is difficult enough to measure amendment difficulty drawing only from the formal amendment rules themselves. As Tom Ginsburg and James Melton have observed in their own study of constitutional rigidity, the “development of a cross-national comparative indicator of amendment difficulty [is] quite challenging, and perhaps even impossible, as a theoretical matter.”⁹¹ But to account for whether and how culture exacerbates or assuages constitutional rigidity is an altogether more onerous enterprise that rankings of amendment difficulty have yet to incorporate into their findings. The reason, Ginsburg and Melton explain, is that “certain societal attributes” have a greater effect than institutions—voting thresholds and actors—in determining the ease or difficulty, or frequency or rarity, of constitutional amendment.⁹² Ginsburg and Melton group these political and social attributes into a category they call “amendment culture,” which they define as “the set of shared attitudes about the desirability of amendment, independent of the substantive issue under consideration and the degree

of pressure for change.”⁹³ They use a proxy for measuring amendment culture in a given jurisdiction: for them, it is “the rate at which a country’s previous constitution was amended.”⁹⁴ Since most countries have at least once replaced their constitution, they believe they can identify amendment culture in this way because their “basic intuition is that attitudes toward amendment will be expressed through amendment practices, and that these attitudes will endure in the form of norms that outlast any particular set of institutions.”⁹⁵ In response to the obvious objection—what about countries with only one constitution?—they have taken the following position: “for countries’ first constitutions, we assign the measure a value of zero, since the amendment culture is unknown.”⁹⁶

Ginsburg and Melton have enriched our understanding of amendment difficulty with this study. Their claim is generally testable, it is intuitively attractive, and it helps explain patterns in modern constitutional change. Yet it is possible to refine Ginsburg and Melton’s claims.

I have observed three types of amendment cultures, each with different kinds of observable effects on the difficulty of constitutional change. Amendment culture can accelerate, redirect, or incapacitate formal amendment in a given jurisdiction. I illustrate each of these three amendment cultures in this section, but a word on each is useful now to situate them as distinguishable effects of amendment culture. One effect of amendment culture is to accelerate constitutional change by formal amendment, a reflection of a political or cultural inclination toward, or acceptance of, formal amendment as an appropriate vehicle of constitutional change. This is evident in some African countries and some American states. A second effect of amendment culture is to redirect constitutional change by formal amendment toward other forms of change, indicating a political and social culture that is reluctant to engage the formal amendment process. We can see this type of amendment culture in Japan. A third effect of amendment culture is to incapacitate the amendment process. Here, political and cultural forces combine with codified rules to create an even higher bar for formal amendment, making it virtually impossible to pursue the codified path of constitutional change. Canada and some countries of the Commonwealth Caribbean illustrate this type of amendment culture, the result of which is to halt the amendment effort before it even begins.

Quite apart from its effects on exacerbating or relaxing amendment difficulty, amendment culture may have other effects that are either unrelated, indirectly related, or not principally related to amendment difficulty. For

instance, amendment culture may shape and constrain *how* changes are made to the constitution. We can observe one effect of amendment culture where constitutional changes are by custom made by replacing the constitution altogether, whether the resulting changes are large or small. Rather than accelerating or redirecting amendment, and rather than incapacitating amendment altogether, what we see in this context, for example in Haiti and the Dominican Republic, are new governing coalitions creating new constitutions without involving the challengers—a power play in which “parties do not invest in negotiation, and constitution making becomes an all or nothing proposition,” ultimately leading “to a self-reinforcing pattern of constitutional death.”⁹⁷ We can also perceive another kind of amendment culture that favors more large-scale reforms over minor changes. In South Korea, for example, the common practice has been to use the amendment procedure for transformative changes that effectively replace the constitution but are nonetheless understood as amendments. I focus in this section only on the three categories of amendment culture that have a direct impact on amendment difficulty, but I note, importantly, that amendment culture can exercise real influence on planes other than amendment frequency.

Amendment Culture as Acceleration

Begin with a question: What explains that the Spanish Constitution has been amended only twice in its forty-year history, while many younger constitutions have been amended many times more? One answer could be that the dominant political party in a country with a younger and more frequently amended constitution commands an amendment supermajority that exceeds the amendment threshold, giving the party free rein to do as it wishes. Another could be that polities with more frequently amended constitutions have faced a number of peculiar shocks, and lawmakers managed to reach agreement on those many occasions when an amendment was thought necessary to provide a needed fix. Still another reason could be that amendment culture in high-amendment countries recognizes amendment as a change vehicle that is not undermined by frequent resort to it. This amendment culture credits formal amendment as an appropriate if not expected exercise of governance, the consequence being that amendment is likely often to occur. What results is a culture in which amendment frequency is accelerated relative to other jurisdictions.

We notice this amendment culture in some African countries: the 1996 Constitution of Equatorial Guinea has been amended at least twenty-three times, the 1991 Constitution of Gabon at least seventy-nine times, and the 1977 Tanzanian Constitution at least one hundred times.⁹⁸ Charles Fombad has shown that accelerated amendment is not without substantial costs to stability in the regime: “One of the major causes of political and constitutional instability during Africa’s first three decades of independence was caused by the ease with which post-independence leaders subverted constitutionalism by regularly amending constitutions to suit selfish political agendas.”⁹⁹ For Duncan Okubasu, this acceleration in amendment culture reflects a misuse of constitutional politics that degrades the constitution into something more akin to a statute. He attributes amendment acceleration in some African countries to “a failure of normal politics and an attendant use of constitutional politics in normal politics,” where constitutional politics are “appropriated by the ruling elites such that a constitution is important as formally legitimising a regime and also for thwarting threats toward the regime.”¹⁰⁰ Okubasu observes that constitutions in some African countries “are seen to endure to the extent that they serve only one political regime or players.”¹⁰¹ As policy-programmatic institutions rather than charters of shared transpartisan national purpose, these constitutions are often changed using procedures that are “trivialised just as that of electing political leaders,”¹⁰² the trivialization being the result of “seeking ordinary partisan assurances” and “essentialising constitutional change in political party’s manifestos.”¹⁰³ The costs of using the procedures of constitutional change to secure advantages in normal politics are evident in efforts across the region to use the formal amendment process as a sword in political battles.¹⁰⁴

A similar culture of frequent recourse to amendment exists in American states. Historically, American state constitutions have been amended over 7,500 times, amounting on average to 150 amendments per state.¹⁰⁵ This paints an unmistakable contrast with the U.S. Constitution, whose average annual amendment rate is an exceedingly low 0.07, while the average across all American state constitutions is 0.35, higher than the average of 0.21 for national constitutions around the world.¹⁰⁶ A culture of high amendment frequency prevails among at least a certain group of American states and remains strong even in the face of formally onerous amendment procedures. State constitutions in Alabama, South Carolina, and Texas, for instance, are among the most amended constitutions, yet their formal

amendment procedures seem particularly difficult to satisfy in terms of the thresholds they require.¹⁰⁷ Even states that have reformed their amendment rules specifically to complicate formal amendment have found their efforts overwhelmed by the prevailing culture of frequent amendment. John Dinan notes that “even after some states changed their amendment rules in an effort to limit use of these processes, these states continued to adopt amendments at a high rate, presumably because residents are prone to view amendments as an appropriate means of bringing about changes in governance.”¹⁰⁸ The extent to which amendment is treated as a means to govern the daily affairs of government and the people, to structure how public institutions work, and to express the deepest values of the polity are the keystones for understanding the differential frequency of constitutional amendment between American states and the United States.

The relative flexibility of state constitutions reflects the special character of American state constitutionalism.¹⁰⁹ Subnational constitutional practice in the United States is more likely than its federal equivalent to involve constitutional amendment. As Alan Tarr has explained, “one of the most striking features of state constitutional politics is the tendency to pursue constitutional change through formal mechanisms of constitutional change, through amendment or replacement of the constitution, rather than through litigation.”¹¹⁰ State constitutions more closely track the political culture of the governing coalition, which may lead to more frequent constitutional changes.¹¹¹ But state constitutional amendment frequency should not be mistaken for amendment triviality: state constitutions are often the site of serious debate on amendments to government powers and the scope of rights.¹¹² State constitutions are also more detailed than their national counterpart, since they must deal with the day-to-day governmental functions of health, safety, and welfare; they are also more comprehensive than the national constitution because the states retain all residual powers not delegated to the national government.¹¹³ This helps at least partly to explain the higher amendment rates for state constitutions since usually it is the case that the longer a constitution is the higher its amendment rate will be.¹¹⁴ More broadly, John Dinan’s historical analysis of the development and evolution of processes of formal constitutional change in American states has revealed two points of note: first, state constitutional designers sought to create flexible constitutions to allow lawmakers to respond to needs that would inevitably arise over time; and second, state constitutional designers believed the very process of constitutional change

would produce salutary benefits for active, informed, participatory, and peaceful citizenship.¹¹⁵

Amendment Culture as Redirection

In his study of amendment difficulty, Lutz ranks the Japanese Constitution among the top ten most rigid constitutions.¹¹⁶ The Japanese Constitution certainly seems hard to amend in light of its three steps prescribed for amendment: a supermajority vote in each of the houses of the national legislature to initiate an amendment; a majority vote by referendum to ratify the proposal; and, once ratified, final promulgation by the emperor.¹¹⁷ Yet the Japanese Constitution—not once amended since its promulgation in 1946—might rank even higher after accounting for culturally specific factors, perhaps even as high as displacing the United States from Lutz's top spot. If Ginsburg and Melton are right to suggest that we can quantify a country's amendment culture by proxy according to the rate at which the previous constitution in that jurisdiction was amended,¹¹⁸ then we ought to look to Meiji Constitution, the predecessor to Japan's current constitution. Both constitutions have the same amendment rate: neither the Meiji Constitution nor the current one has ever been formally amended in the ordinary course of constitutional politics.¹¹⁹ In fact, the only amendment in Japanese history is the current constitution, itself adopted under military occupation as a formal amendment to the old Meiji Constitution.¹²⁰

But what is significant about the Japanese case is not the infrequency of constitutional change. In fact, the constitution has changed over time, and quite dramatically, only its evolution has occurred outside of the formal amendment process. Japanese constitutional politics reflect an amendment culture that de-emphasizes formal amendment in the repertoire of legal and political governance. The effect of this amendment culture is to redirect constitutional change from formal to informal mechanisms. In Japan, the task of amendment has been redirected to interpretation, whether by the judiciary, whose conservative political culture has meant very few invalidations of executive and legislative action,¹²¹ or by the Cabinet Legislation Bureau, an executive organ that advises lawmakers on the constitutionality of laws and regulations.¹²² Shigenori Matsui makes the point that “despite repeated calls for total revision or the enactment of a Constitution,”¹²³ these options are effectively off the table because “almost every reform could be

accomplished by means of constitutional interpretation.”¹²⁴ In the end, he writes, “it is doubtful that any constitutional amendment is actually necessary.”¹²⁵ I discussed this point in Chapter 2 in connection with the informal reform of Article 9 of the Japanese Constitution.

The Japanese case is not unique in pushing constitutional change away from formal means to informal ones. All jurisdictions with a codified constitution experience some form of informal change; this is an inevitable reality in the dynamics between codification and the political forces that at once sustain, contest, and interact with the institutions created and regulated by the formal constitution. Yet there is something different about the Japanese case in what appears to be a cultural reluctance to engage the formal process of amendment. This is no doubt related historically to the origins of the constitution, whose central feature is the Peace Clause imposed by force of conquest as a permanent reminder of the penalty of defeat.¹²⁶ Indeed, as soon as the Japanese Constitution came into force after the Second World War, lawmakers mounted efforts to amend it to remove the stain of surrender, but each attempt failed, as have all others since.¹²⁷

Amendment Culture as Incapacitation

A different phenomenon is evident in Canada and in some countries of the Commonwealth Caribbean: amendment culture as an incapacitator of formal change. Begin with the Commonwealth Caribbean. Despite formal amendment rules that make their constitution flexible relative to others—for instance by authorizing formal amendment with a simple majority in a referendum or by qualified legislative majorities—constitutional amendment in the region has often defied the conventional expectation that a low amendment threshold will yield more frequent amendment. As Derek O’Brien explains, these flexible constitutions have remained largely unchanged because agreement on amendment remains difficult to achieve, even at the modest thresholds formally required by the constitution.¹²⁸ The reasons why involve what Ginsburg and Melton suggest fall into the category of amendment culture. First, O’Brien explains, the conservative political culture in the region has bred a reluctance to tinker with inherited institutions, and it has reinforced a fondness for the constitutional text itself.¹²⁹ Second, it has been difficult for political parties to achieve the consensus necessary for amendment, both because of the “political tribalism

and adversarialism” that now appears to be part of the DNA of ordinary and constitutional politics, and also because of institutional incentives that force upon political actors a “winner take all” approach to elections and governance.¹³⁰ A third reason, according to O’Brien, is most fascinating of all: in the face of a low threshold for constitutional amendment, political actors have moderated themselves in how aggressively they have pursued constitutional reform even where they could have achieved it. The best example of this phenomenon in the region is the self-imposition of an unwritten referendum requirement for amendment even where the constitution does not require it.¹³¹ Amendment has accordingly become harder. Amendment culture, then, can have the effect of incapacitating formal amendment, as we sometimes see in certain countries in the Commonwealth Caribbean.

For a stronger form of amendment culture as an incapacitator of formal change, return now to the Canadian Constitution. Judging only according to its codified rules of amendment, the constitution appears by the supermajorities it requires for major constitutional changes to be terribly difficult to amend formally. But we need not know much about the design of the country’s formal amendment rules to appreciate how hard it is to successfully amend the constitution. The country’s modern political history exposes much of what we need to know to arrive at that conclusion. From Patriation to the Meech Lake and Charlottetown Accords, and more recently to the stalled efforts to amend the constitution to codify new rules for senatorial appointment, the evidence points to one undeniable truth: amendment culture in Canada has for now incapacitated major constitutional amendment. The formal amendment process is frozen for all changes that must be made using the default multilateral procedure in Section 38 or the unanimity procedure in Section 41. Constitutional reform today in Canada requires constitutional actors to perform impossible heroics in order to overcome decades of high-stakes amendment failures.

Jamie Cameron gives the best diagnosis of Canada’s modern amendment culture, which in her view is tied to the country’s earliest beginnings and its slow progress toward independence. According to Cameron, nontextual sources make amending the Canadian Constitution more onerous than its textual rules suggest:

It is instructive that Part V’s amendment rules place Canada at the extreme end of the spectrum of textual rigidity, but perhaps more telling that a textual measure dramatically understates the obstacles to constitutional

change. In principle, textual singularity is incomplete as a measure of amendment rigidity because it fails to validate a host of non-quantifiable elements—including situational or factual rigidities—which play a determinative role in enabling and disabling constitutional change.¹³²

For Cameron, the first and most important constraint on constitutional amendment in Canada is not the difficulty of meeting exacting thresholds of approval but rather the absence of formal amendment rules at the country's beginnings.¹³³ The founding Constitution of Canada—the British North America Act, 1867, since renamed the Constitution Act, 1867—did not codify rules for its own amendment. With few exceptions, the power to amend the Constitution of Canada belonged to the Parliament of the United Kingdom.¹³⁴ From 1867 through 1965, the Parliament of the United Kingdom amended the Constitution Act, 1867 a total of twenty-two times.¹³⁵ Some amendments were relatively minor, for example, the repeal of obsolete provisions in the original document.¹³⁶ Some were relatively more important, including amendments to extend the life of the wartime Parliament,¹³⁷ to grant legislative representation in Parliament to territories,¹³⁸ or to change the tenure of office for judges.¹³⁹ And some introduced fundamental changes to the country, for instance, the creation of new provinces.¹⁴⁰ But all of these amendments, whether substantial or not, were made in the same way: by formal constitutional change outside Canada. It took more than one century after Confederation for Canada finally to acquire formal amendment rules that would allow domestic lawmakers to amend the Canadian Constitution on their own.

The quest to design a homegrown package of formal amendment rules for Canada took well over one dozen failed efforts before arriving at an agreement among the many actors in this federation.¹⁴¹ But the ultimate resolution could not overcome what Cameron has called the country's many "legitimacy gaps,"¹⁴² dug and deepened in the years since Confederation. From regional conflicts among provinces, to tensions between the national and provincial governments, to justified vindications from Canada's many peoples and the communities with which they identify, all of these were sharpened in the attempts to negotiate a set of amendment rules. But what was being negotiated, Cameron explains, was more than just the country's foundational amendment rules. It was "an exercise in defining the nation's sovereignty," one that barely succeeded and remains fragile to this day because it emerged from "circumstances of deeply divergent conceptions of

constitutionalism” that many continue to believe have yet to be properly validated by and in law.¹⁴³ What results, as I explain in the next chapter, is a fierce unwillingness on the part of aggrieved political actors to recognize the legitimacy of the constitutional rules of change, which in turn yields an incapacitating *constructive unamendability* of the constitution. The discussion on constructive unamendability will explain in detail how amendment culture can incapacitate the process of formal amendment.

Temporal Variability in Amendment Difficulty

Just as major formal amendment has become virtually impossible today in Canada, the pace of formal amendment in the United States has for now slowed to zero. The last formal amendment in the United States was ratified almost thirty years ago in 1992, two hundred years after James Madison first introduced it and Congress approved it.¹⁴⁴ This Twenty-Seventh Amendment prohibits congresspersons from raising their own salary without public input.¹⁴⁵ The Twenty-Sixth Amendment, the next-most recent amendment ratified twenty years earlier in 1971 in the Vietnam War period, fixes the voting age in federal and state elections at eighteen years old, the same age at which the military draft applies.¹⁴⁶ Prior to 1970, formal amendment appears to have been more frequent: there were four amendments from 1934 to 1970, six from 1871 to 1933, and fifteen from 1789 to 1870.

Amendment Failure in the United States

There have been several failed efforts to amend the constitution in recent years. But only the Equal Rights Amendment came close to becoming reality. Proposed by Congress in 1972 and ultimately declined by the states,¹⁴⁷ the amendment read in part that “equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” Ruth Bader Ginsburg, then a recently tenured professor at Columbia Law School later appointed in 1993 to the Supreme Court of the United States, wrote one year after the proposal of the Equal Rights Amendment that “only those who have failed to learn the lessons of the past” can accept the argument that the amendment is superfluous

to the Equal Protection Clause of the Fourteenth Amendment.¹⁴⁸ Still today years after its defeat, Ginsburg believes it is necessary to adopt the amendment: "I'd like to see in the Constitution a statement that men and women are people of equal citizenship stature. I'd like to see an equal rights amendment in our Constitution."¹⁴⁹ Shortly after the defeat of the Equal Rights Amendment, Stephen Carter remarked that "in the 1980's, Article V is very nearly a dead letter."¹⁵⁰ Bruce Ackerman has made a similar observation, describing Article V as an "obsolescent obstacle course"¹⁵¹ and interpreting the defeat of the amendment as "a signal that Article V will no longer play a meaningful role in the country's constitutional development."¹⁵²

This is not a new perspective on the difficulty of successfully using Article V. Writing in 1885, Woodrow Wilson suggested just how hard it was to amend the constitution in his time when he compared the popular urge forming behind a revolution with what the constitution required for a constitutional amendment: "It would seem that no impulse short of the impulse of self-preservation, no force less than the force of revolution, can nowadays be expected to move the cumbrous machinery of formal amendment erected by Article Five."¹⁵³ One hundred years 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?"¹⁵⁴ DeWitt believed states would hold views too different from each other to meet Article V's supermajority ratification 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 and willing materially to change any part of this System, which shall be to the emolument of an individual State only?¹⁵⁵

How frequently would Article V be successfully deployed to amend the constitution?, Dewitt asked. The answer, he predicted, was that formal amendment would be rare. In the modern light of America's present political divisions, Dewitt seems right because it is unlikely in our day that Congress and the states would reach the required majorities for an amendment. But Dewitt was in fact wrong about the course of history.

Amending Article V

As hard as it is today to formally amend the U.S. Constitution, it was once thought too easy to amend. In the Progressive Era, reformers proposed and ratified four constitutional amendments in rapid succession, all in less than a decade. The Sixteenth Amendment, adopted in 1913, authorizes a direct income tax.¹⁵⁶ The Seventeenth Amendment, also ratified in 1913, establishes direct elections to the U.S. Senate.¹⁵⁷ In 1919, the Eighteenth Amendment imposed prohibition.¹⁵⁸ And in the following year the Nineteenth Amendment enfranchised women.¹⁵⁹ This burst of remarkable amendment activity prompted William Marbury to suggest at the time that the constitution had become much too easy to change—a departure from the dominant view held before the Progressive Era that the constitution was virtually unamendable, not unlike our present view of the constitution: “Until 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,” observed Marbury, referencing the outdated view that “on the contrary, the prevailing impression was that it was almost impossible to amend that great instrument, except by something in the nature of a revolution.”¹⁶⁰ The four successful Progressive Era amendments changed the popular perception of the constitution when together they disrupted the conventional expectations of the exceptional difficulty of formal amendment.

With memories of the recent Progressive Era reforms, two congresspersons proposed an amendment to Article V itself. The amendment proposal, introduced as a joint resolution sponsored by Senator James Wadsworth and Representative Finis Garrett, had one goal: to make the constitution harder to amend.¹⁶¹ Having just seen the constitution amended four times in less than one decade, Wadsworth and Garrett believed the constitution was too easy to amend. They recommended a package of changes that would have had the intended effect of further complicating the ratification of proposed amendments. Their proposal left unchanged the initiation procedure for constitutional amendment: Congress would continue to propose amendments by a two-thirds supermajority vote in each house, and two-thirds of the states would retain the power to petition Congress to call a convention to negotiate, debate, and propose amendments for the states to consider.¹⁶² Wadsworth and Garrett instead crafted their reforms to place three new limitations on the ratification procedure in the states: they proposed, first, that at least one house in each state legislature

would be barred from ratifying a proposed amendment until it had been reconstituted by a regularly scheduled election; second, that any state would be permitted to require a popular vote to confirm a ratifying vote by the legislature; and third, that any state would be authorized to change its vote before three-fourths of the states had ratified the amendment or more than one-quarter of the states had declined to ratify it.¹⁶³

Each of these three limitations on its own would have made it harder to use Article V, but together their impact on amendment efforts could well have been fatal. The first—the electoral requirement—would have made state elections a referendum on amendment ratification, with candidates having to declare themselves on how they would vote on the amendment if elected.¹⁶⁴ This would have delayed ratification where the state elections were not ordinarily scheduled until some significant time after the amendment had been successfully proposed in Congress or by a Constitutional Convention. The second—the confirmatory referendum—would have heightened popular attention on the amendment proposal, which could have had the collateral benefit of bringing the voting eligible peoples of the states into conversation with each other and their representatives about the proposed amendment. But it is the nature of referendums that their outcomes are difficult to predict, particularly on questions of moral disagreement that may find their way into amendment proposals. The third limitation—the rescission option—would have brought an additional layer of uncertainty into the ratification process because any intervening election or new political and social conditions could cause the legislature to retract its vote either to ratify or reject an amendment proposal.¹⁶⁵ This Wadsworth-Garrett Amendment would have made it considerably harder to amend the constitution than Article V already does.

And yet in the decade before the Wadsworth-Garrett Amendment proposal, congresspersons introduced a string of amendment proposals to make Article V *easier* to use. The lengthy period of amendment dormancy from 1870 to 1913 had created the impression that Article V was a practically impregnable barrier to change.¹⁶⁶ Reformers across the country drew inspiration from the intellectual leader of the Progressive Movement, Herbert Croly, who blamed the “insuperably difficult” Article V for distorting constitutional democracy in the United States “into semi-democratic constitutionalism” because the amendment rules were “unquestionably the most formidable legal obstacle in the path of progressive democratic fulfillment.”¹⁶⁷ What emerged as the favored path forward was to find a way to reshape the rules for amendment under Article V. In 1911, Senator Robert

Owen of Oklahoma introduced an amendment that would have reduced from two-thirds to a simple majority the threshold for Congress to propose an Article V amendment.¹⁶⁸ In 1913, Representative Walter Chandler from New York introduced a similar proposal to reduce the congressional level of agreement required to initiate the amendment process.¹⁶⁹ Another proposal, this one from Indiana Representative Edward Crumpacker, would have authorized amendments with the support of a majority in both Houses of Congress and only two-thirds of states, rather than the required three-quarters.¹⁷⁰ Each of these failed, but they combined with others to ring the alarm on the need to reform Article V.

One proposed reform in particular seems to have captured more attention than others, so much so that the *New York Times* featured an article describing it as “a radical change in the method of amending the Constitution of the United States.”¹⁷¹ Senator Robert La Follette introduced in 1912 an amendment that would have changed both the proposal and ratification procedures to amend the constitution. La Follette wanted to make amendment initiation possible in one of two ways: by a majority vote in both houses of Congress, or by a majority legislative or popular vote in ten states. This is considerably lower than the two initiation procedures currently authorized in Article V: two-thirds vote in both houses of Congress to propose an amendment, or a majority legislative vote in two-thirds of the states to petition Congress to call a convention where amendments can be proposed. The La Follette proposal would have changed the ratification threshold as well, from the current threshold of three-quarters of the states approving the amendment in legislative votes or conventions of the people, to approval by a majority of electors in a majority of the states, provided a majority of all electors had voted.¹⁷² La Follette therefore introduced a quorum requirement for ratifying amendments. This could well have complicated the amendment procedure more than had been anticipated at the time. Still, observers regarded his plan as an effort to “liberalize Article V,”¹⁷³ to make it more usable and popularly accessible. We will never know whether his new Article V would have spurred more frequent formal amendment.

The Progressive Era of Constitutional Amendment

The drive to relax the rules of Article V extended well beyond a few congresspersons alone. Theodore Roosevelt’s new Progressive Party made amending the constitution’s amendment rules part of its own plans

for political reform.¹⁷⁴ For Roosevelt, one prime objective was “to provide a more easy and expeditious method of amending the Federal Constitution.”¹⁷⁵ He ultimately lost the presidential election and failed to amend Article V, but only a few years later he could look back on just how significantly the Progressive Movement had galvanized popular support to refashion the constitution in ways that have had a lasting impact.

Although we generally refer to the group engaged in promoting social change in American society from the 1890s to the 1920s as the “Progressive Movement,” the truth is that the objectives pursued and the advancements achieved during this period were impelled by a complex aggregation of agents and forces that defy such simple shorthand.¹⁷⁶ It is nonetheless possible to identify the three objectives, broadly stated, that define what came to be known as the Progressive Movement: improving the exercise and tools of democracy, using government to help those in need, and curbing the influence of privileged interests.¹⁷⁷ The movement declined in the 1920s and ultimately lost its momentum. One of the movement’s amendments, the Eighteenth, was repealed in 1933, fourteen years after it had been adopted in 1919.¹⁷⁸ The movement had never found the right political vehicle to formalize its program, nor could progressives even agree on a common program, perhaps as a result of the tensions among progressives themselves and the lack of a national leader or an organized structure of leadership.¹⁷⁹

But the movement has left a legacy that continues to shape American politics. Reformers wanted to reduce the power of elites in the electoral process,¹⁸⁰ and sought to promote direct democracy in its many forms, including the ballot initiative, the popular referendum, and the recall power.¹⁸¹ The common denominator in these three devices, as Nathaniel Persily writes, was “the delegation of political decisions to the ordinary voter.”¹⁸² South Dakota was the first state to adopt the initiative and the referendum in 1898.¹⁸³ Roughly twenty other states followed suit from 1900 through 1918 as direct democracy grew in popularity and as progressives won an important victory on the constitutionality of direct democracy in the U.S. Supreme Court.¹⁸⁴ The Court held that federal constitutional challenges to state constitutional rules authorizing the initiative or referendum are nonjusticiable political questions over which the Court has no jurisdiction.¹⁸⁵

David Strauss has argued that the four Progressive Era amendments simply formalized changes that had already become political facts. He may be right but these amendments nonetheless reveal how important the

Progressive Era was to achieving meaningful social change in the country, a reality that Strauss himself recognizes despite his thesis about the irrelevance of its successful amendments.¹⁸⁶ Akhil Amar situates these progressive amendments along a “democratizing trendline”¹⁸⁷ that “call[s] dramatic attention to the arc of history,”¹⁸⁸ as Americans amended the constitution to authorize progressive income taxation and the direct election of Senators, and to enfranchise women.¹⁸⁹ Not all progressives supported prohibition, but “the various strands of progressivism were united, however, at the level of basic assumptions.”¹⁹⁰

Another Progressive Era?

Constitutional amendment in the United States is next to impossible, or at least it is today. It could of course in the future become much less daunting, just as it was during the Progressive Era, when constitutional amendment seemed for some too easy in comparison to what it had been before. Today, lawmakers introduce constitutional amendments on all subjects. Congresspersons propose amendments on subjects ranging from campaign finance,¹⁹¹ to prayer in schools,¹⁹² and to presidential term limits,¹⁹³ and state legislatures petition Congress to propose amendments to repeal federal laws,¹⁹⁴ to require a balanced budget,¹⁹⁵ and to prohibit abortion.¹⁹⁶ Some of these amendments, and indeed perhaps most, are introduced by political actors for narrow parochial purposes that David Mayhew describes as position taking, credit claiming, or advertising¹⁹⁷—knowing very well that their amendment proposals stand very little chance of success.

Perhaps the history and methods of the Progressive Movement can offer modern American constitutional reformers a roadmap for achieving formal constitutional change. It would of course be difficult if not impossible to replicate the success of the Progressive Era. Four amendments in the span of a decade is unprecedented in American history since the Bill of Rights. It would be surprising if such a feat were ever to be repeated, but it is most certainly not impossible.

The relative ease of formal amendment then and its difficulty today show that amendment difficulty is variable across time. The contrast between the ultra successful use of Article V during the Progressive Era and in our modern day when there have been only two formal amendments in the last half-century shows that amendment difficulty can change even

where the formal amendment rules remain the same. There are reasons to explain this phenomenon of temporal variability in amendment difficulty, and together they suggest that the variable difficulty of amendment is driven by the particularities of the moment, the consolidation and dissolution of political coalitions, as well as changes to how we govern and are governed. The point is simple but today underappreciated: the present difficulty of formal amendment in the United States is not a good predictor of formal amendment difficulty in the future. The same is true of amendment ease and difficulty in the rest of the world. This suggests that rankings of amendment difficulty are poor indicators of actual rigidity and flexibility unless they account also for temporal variability in amendment success and failure.

Uncodified Changes to Formal Amendment Rules

We have covered a lot of ground to demonstrate why rankings of amendment difficulty are doomed to failure unless they become much more sophisticated in what they set out to measure and how. And yet there is another perhaps even more serious limitation to rankings of amendment difficulty: they fail to account for uncodified changes to formal amendment rules. Sometimes these changes exacerbate amendment difficulty and sometimes they assuage it. In either case, it is a problem for text-based studies of amendment difficulty because formal amendment rules are frequently changed without an accompanying codification. As we learned in the Introductory to this book, this phenomenon has spread around the globe to jurisdictions as varied as India and France, Belgium and the United States, Ireland, Norway, Romania, Thailand, Turkey, and in literally every part of the world.

Here is another example of an uncodified change to a codified amendment rule, this one from Latin America. Colombia is home to a small population of Indigenous peoples. Despite their low numbers, Indigenous peoples in Colombia won significant concessions in 1991: the Constituent Assembly that was responsible for drafting the new Colombian Constitution codified the country's multicultural and multiethnic character, and insisted on protections specifically for Indigenous peoples, including on matters related to self-governance, representation in the Senate, and the preservation of cultural heritage.¹⁹⁸

The new Colombian Constitution codified three amendment procedures but none gave Indigenous peoples a voice on amendments affecting them and their interests.¹⁹⁹ As a result, the constitution left the country's Indigenous peoples virtually defenseless against majoritarian impulses to deny or diminish their rights. But things changed in the year 2012. That year, the Constitutional Court effectively rewrote the constitution's amendment rules. The Court ruled that any amendment concerning Indigenous peoples will be void unless Indigenous peoples are properly consulted about their views on the proposed change.²⁰⁰ The consequence of the Court's judgment was to insert an official duty of consultation with Indigenous peoples in the constitution's formal amendment rules, though this duty was not then nor is it today actually written in the constitutional text. The judgment changed the country's formal amendment rules without a corresponding alteration to their text and, just as importantly, without following the rules of formal amendment themselves. This is neither a new nor an isolated phenomenon. It is an increasingly frequent global trend.

Three Causes of a Global Phenomenon

For decades, codified rules of formal amendment have been modified in circumvention of those very rules and sometimes in direct violation of them. In other words, codified amendment rules have been altered without a corresponding codification. One implication of this trend involves text-based studies of formal amendment difficulty: How can we measure comparative amendment difficulty with any reliability if formal amendment occurs according to rules unseen in the codified text? This is a further quite devastating reason to doubt rankings of amendment difficulty that focus exclusively on a narrow textual analysis of the codified rules of change.

The agents of these informal changes have been courts, legislatures, executives, and the people themselves invoking principles and procedures altogether different from what the codified rules of amendment expressly require. This trend is visible in common and civil law regimes, in presidential and parliamentary systems, and in both the north and south. In some cases, these modifications are one-off aberrations unlikely to be repeated and neither legitimacy-endowed nor legitimacy-conferring. But in other cases, these modifications have become precedential, treated by reformers as both a path and justification for future constitutional change.

There are three related though distinguishable causes of this increasingly common global phenomenon. The first—formal amendment flexibility or rigidity—is two sides of the same problem in constitutional design: where reformers believe, correctly or not, that formal amendment rules are too difficult, they may informally relax the rules, just as they may informally complicate them where they see the rules as too rigid. The second cause derives from the pathologies of the political process: where formal amendment rules are not well designed to frustrate disfavored outcomes or to facilitate favored ones, reformers will seek to repair the roots of the breakdown in the amendment rules. The third cause driving uncodified changes to formal amendment rules has been recourse to the supraconstitutional principle of popular sovereignty as a politically expedient authorization to trump the recognized rules of amendment where the rules have proven inconvenient or obstructive.

In this closing section, I draw from the Canadian experience to illustrate the three ways we have seen formal amendment rules change without an ensuing codification of the new amendment rules: judicial interpretation, legislative or executive action, and the creation of new popular expectations.

Modern Canada's two dramatic failures in major constitutional renewal have shown just how difficult it is to satisfy the country's formal amendment rules. But what has remained largely unappreciated for a long time is that the difficulty of formal amendment in Canada derives equally from sources external to those codified rules. Scholars have recently begun to recognize and theorize why amendments to both mundane and fundamental features of the Canadian polity also require conformity with extra-textual requirements imposed by judicial decisions, parliamentary and provincial statutes, and arguably also by constitutional convention.²⁰¹ When layered onto the codified rules of change, these uncodified rules make major constitutional reform virtually impossible in Canada. More importantly, none of these uncodified reforms to the codified rules were made the way the constitution requires: by formal amendment.

Statutory Conditions on Codified Amendment Rules

Parliamentary and provincial statutes have modified the codified rules of formal amendment in Canada. At the federal level, Parliament passed the Regional Veto Law,²⁰² formally just a simple statute but operationally a

constitution-level constraint on how and when political actors can amend the constitution. The impetus for the law was the 1995 Quebec referendum. The federal government of the day offered the Regional Veto Law as an incentive to Quebec voters: we will give you a veto in constitutional amendment if you reject secession.²⁰³ Quebec opted by the slightest of margins to remain in Canada, and the government in turn made good on its promise. The veto is not exclusive, however: the law grants the same veto power to the other regions of Canada, some of which are defined as provinces and others as provincial groupings: the Atlantic and Prairie provinces, Ontario, and British Columbia.²⁰⁴ The veto works indirectly through the federal government by requiring a cabinet minister first to obtain the consent of each of the five major regions as well as a majority of all provinces *before* introducing a major amendment proposal under Section 38.²⁰⁵ The law therefore confers a functional veto, not a formal one.

The Regional Veto Law is an ordinary statute but its effect is extraordinary. It creates a significant barrier to formal amendment that now makes it even more unlikely that a major amendment will ever succeed. The prohibition on cabinet ministers proposing a Section 38 amendment without provincial consent establishes a prior restraint not otherwise contemplated by the Constitution of Canada.²⁰⁶ In the past, the federal government could have introduced an amendment proposal in Parliament, and perhaps through debate and deliberation could have cobbled together the required parliamentary majority and drawn provincial allies to its side as the amendment project grew in popularity. Now, however, the federal government must recruit provincial allies prior even to proposing an amendment in Parliament, reversing the order envisioned by the constitution and potentially short-circuiting the amendment process before it ever begins. This statutory complication to the constitution's amendment rules has given rise to a nontrivial argument that the Regional Veto Law is unconstitutional.²⁰⁷

Provinces have likewise adopted their own laws that further constrain major constitutional amendment. These provincial laws now require either a binding or advisory province-wide referendum on any formal amendment for which provincial ratification is required.²⁰⁸ For example, Alberta requires a binding provincial referendum before the provincial assembly votes to ratify a major amendment requiring provincial ratification.²⁰⁹ British Columbia similarly prevents the provincial assembly from ratifying a formal amendment unless a binding province-wide referendum first authorizes the assembly to ratify it.²¹⁰ Other provinces and territories,

including New Brunswick, Saskatchewan, and Yukon, authorize but do not require their governments to hold binding referendums before voting on an amendment.²¹¹ Still others, like the Northwest Territories, Nunavut, Quebec, Prince Edward Island, and Newfoundland and Labrador, authorize but do not require an advisory referendum or plebiscite prior to a legislative vote on ratification.²¹²

These provincial and territorial referendum laws are problematic for formal amendment in Canada. They change the constitution's design of formal amendment by introducing an intervening action between proposal and ratification despite the codified amendment rules requiring none. The effect of these subnational laws is not unlike what the Regional Veto Law does: to impose a prior restraint on legislative decision-making. On the one hand, it is politically prudent for provincial lawmakers to consult constituents on a major amendment proposal before they act on it. On the other, the Constitution of Canada does not condition the validity of an amendment on these provincial consultations. What is more, the administration of a referendum or plebiscite only delays the final decision on a proposal that may be subject to a strict three-year time limit for ratification.²¹³

Both of these extra-textual statutory conditions—the requirement that amendments respect the Regional Veto Law as well as provincial and territorial referendum laws—impose formal amendment conditions over and above those required by the codified amendment rules. Canada rejected an explicit provincial veto power for Quebec in both the Meech Lake and Charlottetown Accords. Yet the Regional Veto Law now grants to Quebec and to other provinces and regions just that. Moreover, although Canada has a long history of provincial referendums, none of the constitution's codified amendment rules specifies a provincial referendum in either the proposal or ratification stages. The consequence of the Regional Veto Law and provincial and territorial referendum laws is that federal, provincial, and territorial political actors must now govern themselves according to statutory rules as though they were constitutionally binding.

These laws risk eroding the distinction between the Constitution of Canada and a statute that is legally inferior to it. What makes the constitution a *constitution* is that it enjoys a higher status relative to a statute, that it is more difficult to amend than a statute, and that a statute is derivative of the constitution. These parliamentary, provincial, and territorial statutes affecting constitutional amendment now exercise a constitution-level constraint on the constitution's rules for formal amendment. The problem,

however, is that these statutes have not earned their special status through the channels the constitution requires for achieving constitutional status.

Popular Expectations in Constitutional Amendment

Quite apart from these legislative constraints on constitutional change, formal amendment must now arguably also meet modern popular expectations of increased participation in Canadian democracy. It is possible that there now exists a constitutional convention requiring a national consultative referendum before ratifying any major constitutional amendment. This convention, if one exists, derives from the decision to submit the 1992 Charlottetown Accord to a national referendum, even though the text of Canada's formal amendment rules did not then, nor do they now, require a referendum as a condition for successfully ratifying a constitutional amendment.

Return to the 1992 Charlottetown Referendum, discussed in the introductory chapter. To make the discretionary referendum possible, Parliament passed the Referendum Act authorizing the governor general "to obtain by means of a referendum the opinion of electors on any question relating to the Constitution of Canada."²¹⁴ Quebec chose to hold its own provincial referendum. The federal law made the referendum purely consultative, not legally binding, though a majority vote in favor of the Charlottetown Accord across the provinces would have legitimated the package of reforms and left little choice as a political matter but to ratify it in the provinces where the referendum had passed. But the formal amendment process came to a halt when Canadians rejected the Accord by a nationwide tally of 54.3 percent to 45.7 percent, though it had been approved separately in New Brunswick, Newfoundland, the Northwest Territories, Prince Edward Island, and Ontario.²¹⁵ The outcome of the discretionary Charlottetown referendum was controlling in that it eroded the political will across most of the country to proceed with the formal amendment process.

The choice to put the Charlottetown Accord to a referendum was driven by the failure of the Meech Lake Accord just two years prior. Negotiated and drafted in the model of executive federalism with little public input, the Meech Lake Accord had a fatal flaw, according to a central insider: "the deal had been cooked up behind closed doors by a group of men in suits."²¹⁶ When lawmakers tried again to achieve constitutional peace in Canada

with the Charlottetown Accord, the recent defeat of the Meech Lake Accord could not help but shape their strategy. Rather than negotiating the terms of the new agreement in secrecy as they had done before, the federal and provincial governments created opportunities for public participation and consultation, both with individual citizens and groups formed around shared identity or interests. Negotiations occurred in the open, there was frequent communication with the public through the press, and virtually everyone who wanted to give input could do so in the roving meetings the government held across the country.²¹⁷ The centerpiece of the Charlottetown strategy was the referendum: Canadians across the country would be given an advisory vote on the package of reforms in a nationwide referendum even though the constitution's formal amendment rules do not require referential ratification nor even consultation in connection with a constitutional amendment. Holding a referendum for all Canadians was therefore a discretionary political choice not a legal obligation.

The extraordinary use of a national referendum in the Charlottetown process has led observers to suggest that future constitutional reforms should also incorporate a national referendum.²¹⁸ The argument here is that the Charlottetown referendum has matured into a constitutional convention. On this view, the Charlottetown referendum has set a "binding precedent"²¹⁹ that is "a fact of constitutional reform in Canada now" requiring public ratification for major constitutional reforms.²²⁰ The argument continues: the failure to hold a referendum on any future amendment on the scale of the Charlottetown Accord "is likely to be perceived as illegitimate."²²¹ If a referendum is indeed a new requirement for constitutional amendment, it is despite its absence from the constitution's codified amendment rules.

The year 1992 may have triggered yet another change. There were only two territories at the time of the Charlottetown referendum: the Northwest Territories and Yukon. Both participated in the referendum as partners equal to the provinces.²²² The Referendum Act authorizing the national consultative referendum on the Charlottetown Accord contemplated that voters in all of Canada's electoral districts, whether in a province or a territory, would cast a ballot.²²³ And yet Canada's formal amendment rules made no provision then for territorial participation in amendment, nor do they now. Today, since 1999, Nunavut is a third territory. Because the voters in Canada's territories were treated in the Charlottetown referendum on equal footing with voters in the provinces, they may now expect to play a

formal role in a major constitutional amendment. From the perspective of the territories, the 1992 Charlottetown referendum may now be seen as a precedent that will in the future compel a continuing role for Canada's three territories in major constitutional reforms—even though this rule appears nowhere in the constitution's codified amendment rules.

Judicial Interpretation of Amendment Procedures

In addition to new statutory and conventional restrictions on formal amendment in Canada, the Supreme Court has reconstructed the codified rules of amendment in its interpretation of the Constitution of Canada. In both the *Supreme Court Act Reference* and the *Secession Reference*,²²⁴ the Court modified the codified rules for amending the constitution, and in so doing has not only made it more difficult to amend certain elements of the Constitution of Canada but, even more controversially, it has effectively reserved for itself the power to resolve questions on the constitutionality of future amendments.

Begin with the *Supreme Court Act Reference*, a dispute concerning which amendment threshold applies to changes to the Supreme Court of Canada. The Court declared that its own “essential features”—including but not limited to “the Court’s jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence”²²⁵—cannot be amended outside of the unanimity procedure.²²⁶ On the one hand, the Court’s interpretation clarifies the ambiguity in the text as to whether the Court’s essential features are amendable using either the default multilateral amendment procedure or the unanimity procedure. On the other, the Court’s chosen interpretation is not mandated by the constitutional text, which states only that amendments to “the composition of the Supreme Court of Canada”²²⁷ shall require the unanimity threshold and that most other amendments to the Court must satisfy the lower default multilateral amendment procedure.²²⁸

The skeptical reading of the *Supreme Court Act Reference* suggests that the Court has chosen for strategic purposes to make it even harder to make amendments to the Court than the constitution requires. The Court chose not to define what counts as its essential features with any precision, but rather only to identify generally what they include “at the very least,”²²⁹ and to reserve for itself the power in the future identify what those features

might be. On this view, the Court has effectively immunized itself from amendments. And where disputes arise as to whether a proposed amendment affecting the Court requires either of the unanimity or default multilateral amendment procedures, the Court will be the one to decide which rule must apply. As any institution would do in the interest of its self-preservation, the Court is likely to require reformers to abide by the harder amendment procedure.

The *Secession Reference* is similar in the sense that the Court reached beyond the text of the constitution to impose limitations on the power of formal amendment. The Court explained that any amendment on provincial secession must be governed by the duty to negotiate, and it also ruled that reformers must respect “underlying constitutional principles,” including federalism, democracy, constitutionalism, the rule of law, and respect for minority rights.²³⁰ These principles are not stated in the text of Canada’s formal amendment rules, nor are they expressly identified anywhere as restrictions on amendment except in the Court’s *Secession Reference* as the principles that must govern negotiations on secession. Whether these principles correctly reflect Canada’s constitutional traditions is not the relevant question. It is instead whether the Court was right to depart from the constitution’s catalogue of codified rules to impose uncodified restrictions on future formal amendment.

A secession amendment will also have to respect the terms of the Clarity Act, which Parliament passed in 2000, two years after the Court’s *Secession Reference*.²³¹ In its preamble, the Clarity Act communicates Parliament’s interpretation of the *Secession Reference*, specifically that the Court “confirmed that, in Canada, the secession of a province, to be lawful would require an amendment to the Constitution of Canada” and that the negotiations leading to formalizing the secession of a province “would be governed by the principles of federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.”²³² The Clarity Act creates rules for holding a referendum on secession, including the timing of parliamentary deliberations,²³³ the types of questions to be posed in the referendum,²³⁴ the need to consider views in the province apart from those of the party proposing the referendum,²³⁵ and the criteria for evaluating the sufficiency of the expressed will to secede.²³⁶

Like the Regional Veto Law, the Clarity Act is an ordinary statute passed without recourse to the rules of formal amendment. Yet its effect extends further than an ordinary statute because it is designed to impose constraints

on constitutional amendment beyond those codified in the constitutional text. The most important constraint is the Clarity Act's prohibition on any Minister of the Crown proposing an amendment to authorize the secession of a province unless the Government of Canada has first negotiated the terms of the planned secession, including the division of assets and liabilities, provincial borders, the interests and claims of First Nations, and the protection of minority rights.²³⁷ These kinds of negotiations are of course reasonable expectations to have of lawmakers responsible for arriving at terms for a provincial secession. But it is important to recognize that these changes to how a secession amendment may be made to the Constitution of Canada have been made by a simple statute. The Clarity Act must accordingly be understood for what it is: an ordinary law, like the Regional Veto Law, that has sought informally to modify the constitution's formal amendment rules. And it raises the same puzzle as the judicial, legislative, executive, and popular reconstruction of Canada's formal amendment rules using subconstitutional procedures: Why does it occur?

Three reasons explain why formal amendment rules are informally modified, and each is reflected in the Canadian experience. The Regional Veto Law reveals the first reason: where formal amendment rules are too difficult or too easy, political actors may choose informally to relax or complicate them. Quebec had demanded a veto over constitutional amendments out of understandable fear that the rest of the country could successfully use the multilateral amendment procedure in Section 38 to undermine its distinctive identity and values. Yet giving Quebec veto power would have been impossible using constitution's formal amendment rules. Reformers therefore resorted to the much easier ordinary legislative process to avoid what would have been guaranteed failure had the constitutional change been attempted as a formal amendment to the Constitution of Canada. The *Supreme Court Act Reference* exposes the second reason: where formal amendment rules are not well designed to frustrate disfavored outcomes or to facilitate the outcomes they prefer, political actors may reimagine amendment rules to achieve their preferred objectives. Recognizing that the Supreme Court Act was not protected from ordinary repeal—odd for a law that governs all aspects of the Supreme Court—the Court constitutionalized the statute, and in so doing changed the amendment rules pertaining to the Court itself. And the Charlottetown referendum shows the third reason: where the codified rules of amendment are seen as insufficiently reflective of the will of the people, reformers will invoke the supraconstitutional principle of

popular sovereignty, often resulting in recourse to the people themselves to formalize a new constitutional settlement—even where the constitution does not expressly authorize it. The use of the referendum to ratify the Charlottetown Accord was an extraordinary innovation compelled by a felt need to involve the people more centrally in Canada's constitutional renewal.

The Limits of Codification

Uncodified changes to codified constitutions have long been a fact of constitutional life. We know that an “amendment” cannot be defined only narrowly as a formal alteration to the constitutional text.²³⁸ No surprise, then, that we now recognize across jurisdictions that codified constitutions are amendable both formally using formal amendment rules and also informally through other forces.

Perhaps the phenomenon I have identified here—uncodified changes to formal amendment rules—introduces nothing new to our vocabulary and understanding of constitutional change. Perhaps formal amendment rules are no different from other codified rules and as a consequence we should evaluate their informal modification no differently from the informal modification of other codified rules. On this view, self-government relies on texts, whether a master text or a collection of texts and precedents, and all rules are and moreover should be equally susceptible to informal changes, with similar costs and benefits.

I take the contrary view. Formal amendment rules are different, indeed special, and they can successfully carry out their function to preside over the “rules of the political game” only where they themselves “avoid becoming the political game.”²³⁹ As we discovered in Chapter 1, amendment rules fulfill a cluster of necessary functions in law and politics. And as gatekeepers to the codified text, formal amendment rules specify procedures for altering the constitution, with instructions on who may exercise the amendment power, how an amendment may be initiated, where it must be ratified, when an amendment proposal becomes effective, and what within the text is susceptible to change. No aspect of any constitution is more important than these rules, not only because of their many uses in constitutionalism but moreover because of the possibilities they offer for self-government.

Modern constitutionalism has given us good reason to celebrate the written tradition in which the rules of formal amendment are anchored. Writtness is deeply interconnected with the rule of law, and indeed serves its democratic values, namely predictability, transparency, and publicity. The written tradition gives political actors and the people notice about the rules to which they will be held, it allows the governed to hold their governors to account, and it creates a textual referent for challengers to contest the conduct of incumbents. The uses of writtness moreover extend well beyond these proceduralist functions: it also holds promise for cultivating a culture of public-oriented citizens who come to know, understand, and respect the codified constitution and the moral commitments it entrenches. John Marshall did not understate the importance of writtness when he suggested in *Marbury v. Madison* that the written constitution was at the time “the greatest improvement on political institutions.”²⁴⁰

But modern constitutionalism has also exposed the limits of master text constitutions. We know that constitutions evolve in the course of their interpretation, application, and enforcement in ways that are never completely reflected in the text—a clear departure from our expectation that the rules on the books should match the rules as applied, what Lon Fuller regarded as a fundamental requirement of congruence between law and administration.²⁴¹ Yet even in the democratic world, political actors have undermined the force of written constitutions. We are reminded of the limits of writtness every single day the United States remains actively engaged in combat without a formal congressional declaration of war, as required by the rules codified in the U.S. Constitution.²⁴²

Uncodified changes to formal amendment rules have a more immediate consequence for scholars of constitutional change: they make measuring amendment difficulty virtually impossible without deep immersion in the law and politics of each constitutional state under study. A text-based evaluation of amendment thresholds is unlikely to yield an accurate reflection of the relative difficulty of constitutional amendment across jurisdictions given that some informal modifications to formal amendment rules exacerbate amendment difficulty and others alleviate it. This is yet another reason to question the accuracy of rankings of amendment difficulty.

* * *

Debating the difficulty amending national constitutions has become a popular game among scholars of comparative constitutional law. I have sought to show in this chapter why a true ranking of amendment difficulty is

possible only if measurements account also for nontextual factors that make it easier or harder to amend a constitution. For the reasons I have explained so far, this is extraordinarily difficult to do, perhaps even impossible. But imagine somehow it were possible to remedy each of the limitations I have detailed previously. Imagine it were possible to design and incorporate a reliable measure for amendment culture, to account for alternative amendment procedures and their interaction effects, to design a computation for temporal variability, to quantify the effect of uncodified changes to formal amendment rules, and to identify what precisely amounts to an amendment in a given jurisdiction and to distinguish it from other forms of change. Even still, a ranking of amendment difficulty would have to confront another hurdle: how to measure the effect on amendment difficulty of the three different varieties of unamendability—codified, interpretive, and constructive. I turn next to this challenge.

4

The Three Varieties of Unamendability

Manuel Zelaya lost his battle against the constitution, and his presidency along with it. Elected president of Honduras in 2005, Zelaya found himself with abysmal approval numbers only a few years later in 2009.¹ Undeterred by his evaporating popular support, Zelaya nonetheless set his sights on overriding a constitutional rule prohibiting any president from serving more than one four-year term. His target was a rule unlike most others: the Honduran Constitution explicitly states that the single-term limitation is unamendable, or in the words of the constitution, “the presidential term . . . may not be amended in any case.”² A related rule imposes sanctions even for publicly supporting an amendment to the presidential term.³ And yet Zelaya proposed a non-binding referendum to gauge whether the population wished to amend this unamendable rule,⁴ a strategy described at the time as obviously “nothing but a backdoor effort to change the rules governing presidential succession.”⁵

The president faced opposition from all corners. The Congress, the bipartisan attorney general, the nation’s highest court, the independent Supreme Electoral Tribunal, and opposition parties united against him. Just ahead of the referendum Zelaya had planned to hold, the Supreme Court ordered the military to detain him on charges of treason and abuse of power.⁶ The military entered Zelaya’s home and jarred him out of his sleep with sounds of gunfire.⁷ Zelaya was captured by masked men, removed from his home, and placed on a military airplane, destination unknown, at least to Zelaya. Only when the plane touched down in Costa Rica did Zelaya—who claims to have still been in pajamas—finally know his location.⁸

Looking back on this series of events, what remained lost through it all are the views of Hondurans themselves. The constitution’s unamendable rule prohibited the president from consulting the people on a possible constitutional change. But should Hondurans have been denied the right to

speaking their views on an issue so central to their political life? It is, after all, their constitution, and they are the ones who must live with it.

* * *

Constitutions are sometimes resistant to amendment. Whether by formal design or organic development, certain constitutional commitments are shielded from repeal or modification, even where substantial majorities might wish to undo or alter those commitments. We can identify these commitments as rules of unamendability. Unamendable rules are a subclass of the larger category of amendment procedures that define how, whether, and when the constitution can be amended, and by whom exercising which particular power to alter precisely what within the constitution. There are three different varieties of unamendable rules, though only the first two have been fully developed in studies of constitutional change: *codified* unamendability, a reference to a rule that is formally entrenched in the text of a constitution; *interpretive* unamendability, the result of a declaration or recognition by legal or political elites that a certain rule ought to be treated as unamendable even though no official constitutional enactment entrenches the rule against change; and *constructive* unamendability, which springs from neither design nor official practice but rather from high political barriers that make amendment virtually impossible. In this chapter, I explain each of these three varieties of unamendability with illustrations drawn from around the world. Along the way I suggest that in order for studies of amendment difficulty to produce an accurate measure of constitutional rigidity, scholars must find a means reliably to measure the degree of difficulty that unamendability adds. I ultimately conclude that unamendability in any of its three varieties poses insurmountable challenges for measuring amendment difficulty. In the chapter to follow on *The Architecture of Constitutional Amendment*, I explain why codified unamendability is a suboptimal constitutional design, and I offer alternatives to it.

Codified Unamendability

The most common form of unamendability appears in codified constitutions. Written, visible, and vested with the authority that derives from the process of constitutional enactment, codified unamendability was once rare but it is now increasingly common in modern constitutions. From 1789 to 1944, no more than 20 percent of all new constitutions codified some form of unamendability,

as compared to 25 percent between 1945 and 1988, and now to over 50 percent since 1989.⁹ There are many kinds of codified unamendability, some much more prevalent in constitutional design than others.¹⁰ Some codified forms of unamendability are cast at a high level of generality: for instance, in France the “republican” nature of the state is unamendable,¹¹ and the “democratic” character of the state is unamendable in the Czech Republic.¹² Other codified forms of unamendability are entrenched at a much lower level of specificity; the Turkish Constitution, for instance, makes the national flag unamendable.¹³ There is no limit to what designers may codify as unamendable.¹⁴

Of course, no constitutional rule is really ever unamendable. Most obviously, none can survive revolution.¹⁵ If the political will exists to alter an obdurate constitutional text, a new constitution can be written with the unamendable rule removed or loosened. This would break legal continuity but it would nonetheless overcome the rigidity of the text. Moreover, where constitutional replacement is either impossible, improbable, or ill-advised, the authoritative interpreter of constitutional meaning may find a way to interpret a constitutional amendment as consistent with the formal prohibitions set by the constitution, even if the conventional reading of the amendment would otherwise raise a tension with the formal prohibition.¹⁶ And, as we have seen in Chapter 1, codified unamendability may sometimes be more of an inauthentic expression of constitutional values than an authentic reflection of what matters most. Before we evaluate the choice to codify unamendability, we must understand why constitutional designers choose to codify unamendable rules in the first place. In what follows, I distinguish seven different uses of codified unamendability, and in so doing demonstrate the vast range of rules designers have codified as unamendable.¹⁷

Reassurance

When the Philadelphia Convention gathered in the Assembly Room of the Pennsylvania State House, the authors of what would become the U.S. Constitution resolved the biggest question of all by deciding to defer its resolution. Hidden in plain sight lay their choice to allow states to continue the slave trade without restriction. The constitution made this rule unamendable, giving the states the strongest assurance possible in constitutional design that nothing would interfere with their power to manage what was described as their “internal affairs.”

Yet unless one knows what to look for—and where in the constitution to look for it—this unamendable rule is hard to find. It is buried deep within the text of Article V, but even here it is only a cross-reference in fairly bland terms pointing us to another part of the constitution. Article V lists several ways to amend the constitution, explaining in careful detail the steps required to initiate and ratify an amendment proposal. But then this line appears: “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.”¹⁸ Turning to the cross-referenced clauses yields the following, still not an explicit mention of the slave trade but nonetheless an indirect reference to it:

The Migration and 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.¹⁹

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.²⁰

What emerges is an only somewhat clearer picture of precisely what the constitution codifies as unamendable. In its text and reinforced by the underlying political agreement, the constitution prohibits Congress from in turn prohibiting the states from engaging in “the importation and migration of persons.” This rule protecting the slave trade was unamendable until the year 1808. The constitution also disallows direct taxes unless in proportion to the census or enumeration, a rule that is closely entwined with slavery in light of the constitution’s Three-Fifths Clause, which counted slaves as less than whole persons. This direct taxation rule was unamendable also until 1808.

When a contentious subject divides parties and threatens to derail the constitution-making process, one option is to take the subject off the table by deferring its resolution to a later date.²¹ In these cases, progress on other matters is unlikely unless the contentious subject is dealt with in a way that gives the divided parties some assurance that the ultimate decision will be pushed to the future, and that, for now, the status quo remains undisturbed. These two unamendable rules illustrate this first possible use of unamendability: to reassure actors of an agreement.

Writing in *The Federalist*, James Madison lamented that this American bargain on slavery was necessary to the creation of the Republic. He nonetheless reasoned that it gave needed assurance to those for whom it was a condition for agreeing to the constitution. For Madison, “it were doubtless to be wished, that the power of prohibiting the importation of slaves had not been postponed until the year 1808, or rather that it had been suffered to have immediate operation.”²² But he recognized that “it is not difficult to account, either for this restriction on the general government, or for the manner in which the whole clause is expressed.”²³ From his perspective in 1788, “it ought to be considered as a great point gained in favor of humanity, that a period of twenty years may terminate forever, within these States, a traffic which has so long and so loudly upbraided the barbarism of modern policy.”²⁴ Time proved Madison partly right and wrong. He was right because Congress passed a law in 1807, taking effect on January 1, 1808, prohibiting the importation of slaves into the country.²⁵ But he was wrong because the practice continued illicitly, the domestic slave trade continued as well, and slavery would remain the central fact of American life for many generations to come.

The use of unamendability as reassurance is not concerned with resolving a disagreement between opposing parties. It is intended to give a guarantee that a state of affairs will remain unchanged, freeing parties to proceed with further negotiations or the enactment of the constitutional bargain. Nor is the use of unamendability as reassurance concerned ultimately with bringing competing sides together in unity. It is deployed as a strategy strictly to manage disagreement.

Reconciliation

A related but distinguishable purpose of unamendability is to reconcile opposing parties. Here the objective is to unify competing groups under a shared vision for the future. The immediate aim of this second use of unamendability as reconciliation is to end a conflict between previously conflicting groups; its longer-term aim is to convert former adversaries into allies, foes into friends, and competitors into collaborators. Unamendability as reconciliation makes peace possible between enemies by conferring irrevocable amnesty for prior conduct. The impetus for using unamendability as reconciliation is to strengthen the likelihood that the state will survive

a period of conflict that could threaten to collapse the entire project of constitution-building. We can call this reconciliatory unamendability. It absolves members of rival factions of prior wrongdoing and renounces future claims to criminal or other penalties.

The cases of Niger and Ghana are instructive. Following violent coups in 1996 and 1999, Niger adopted a new constitution, hoping that the new charter would spur citizens to join together in the interest of national peace. For Nigerien constitutional designers, the goal was harmony but the question was how to achieve it. They arrived at what they thought was a good solution: codifying an unamendable rule conferring blanket amnesty to the aggressors in the 1996 and 1999 coups,²⁶ specifying that the amnesty could never be the subject of an amendment even if in the future the necessary popular and legislative majorities wished to repeal or even alter this controversial rule.²⁷ A similar history unfolded in Ghana. After nearly one dozen coups or coup attempts since its independence,²⁸ Ghana struck an agreement to create an innovative ceasefire constitution. The new constitution codified an unamendable amnesty rule for those who had caused or exacerbated the political instability years before.²⁹

These new constitutions in Niger and Ghana granted eternal immunity to the architects, enablers, and executors of these destructive episodes in the life of each country. In both cases, the purposes of this unamendable amnesty were constructive: to put an immediate end to conflict, to achieve peace through absolution of criminal or civil wrongdoing, and to extinguish future claims against those involved.

Preservation

Reassurance and reconciliation both take a pragmatic view of the unamendable bargain. Their shared objective is not in fact unamendability; it is instead to achieve what unamendability allows them to do. When used as either reassurance or reconciliation, unamendability is a means to an end believed to be valuable. In the case of reassurance, unamendability is used to in turn allow constitutional designers to continue the constitution-building project. In the case of reconciliation, unamendability is deployed to cultivate the conditions for peace. In neither case is unamendability intended to convey a normative preference for what is made unamendable—in

the United States, the slave trade, or in Niger and Ghana, immunity. Unamendability in these cases is a politically expedient device.

But unamendability may sometimes be used, in contrast, as an end in and of itself to preserve a feature of the state. Around the world, constitutional designers have made certain principles, values, structures, or other rules unamendable because these rules are seen as reflecting a deep domestic truth. The most basic type of preservational unamendability seeks to preserve something thought to be distinctive about, or fundamentally constitutive of, the state and its peoples. Preservational unamendability aims to freeze some historical conception of the state, looking backward into the past for direction to pilot the state into the future. Just like the interpretive theory of originalism, preservative unamendability is anchored in a rigid philosophy of constitutional interpretation requiring constitutional meaning to be construed through the eyes of the founding understanding. Preservational unamendability reflects the judgment of the authoring group that a given rule is important at the time of the adoption of the constitution and that successor generations should respect the sacredness of both this founding judgment and the unamendable rule itself.

Constitutional designers have used unamendability around the globe to preserve a variety of features in which they see deep meaning and value for the country. For instance, the Afghan Constitution establishes Islam as the official religion of the state, and makes this unification of Church and State unamendable.³⁰ The same is true in Algeria³¹ and Iran.³² Other states forbid religion and the state from intersecting in any way, committing the state to an uncompromising secularism that is made unamendable. We see this approach in Benin,³³ Burundi,³⁴ and Togo.³⁵ In Brazil, federalism may never be abolished,³⁶ while in Indonesia amendments are prohibited to the unitary character of the state.³⁷ Some countries have turned to unamendability to shield republicanism against amendment—including Haiti,³⁸ Italy,³⁹ and Senegal⁴⁰—while others have made monarchism unamendable, namely Bahrain,⁴¹ Morocco,⁴² and Qatar.⁴³ The choice to use unamendability to preserve a feature of the state has the effect of tying the hands of present and future citizens to the political culture that prevailed at the founding. This design strategy may be useful in preempting debate on controversial subjects, though it may also ignite strong reactions in opposition to a feature that does not reflect the popularly accepted reality in the country.

Transformation

Quite apart from reassuring actors and reconciling them, and in contrast to preservation, codified unamendability may be used also as part of a larger effort to transform the state and its surrounding society. Constitutional designers can reinforce their project of social and political reconstruction by codifying forms of unamendability intended to turn the page permanently on the tragic horrors of an earlier time in their history. This form of unamendability—transformational unamendability—seeks to repudiate the past and create a new future. It looks not only backward to what the state once was but also casts its gaze forward to what the state could be, imagining what might be possible if the constitution's unamendable rule takes root in law, politics, and culture. This is sometimes more of an aspiration than a justiciable commitment, but it nonetheless serves to entrench a constitutional value deemed important enough by constitutional designers to make it legally unremovable from the constitutional text.

For instance, the rebuilt Constitution of Bosnia and Herzegovina seeks to arrive at the state's new tomorrow by setting an unamendable floor for all civil and political rights.⁴⁴ The constitution makes undiminishable all rights, including but not limited to the freedoms of expression, association, thought, religion, and assembly.⁴⁵ Several other countries have adopted a similar strategy of shielding all rights from diminishment as a response to a once and often still perilous social and political setting. Consider the Republic of the Congo, which creates an unamendable floor for its entire menu of civil, political, economic, social, and cultural rights.⁴⁶ The same is true of Moldova, where the constitution guarantees in its text that all fundamental rights and freedoms—like equality, education, access to justice, freedom of artistic expression, and the rights to life, a healthy environment, and to petition the government—shall never be diminished.⁴⁷ Namibia and Romania paint a similar portrait of the possible. Their constitutions remove certain rights and freedoms from the field of constitutional play, making them formally undiminishable even in the face of overwhelming majorities intent on repealing those protections.⁴⁸

But fundamental rights and freedoms are not the only types of constitutional rules that are made unamendable within the larger transformative aspirations of constitutional states. Some states have codified very particular electoral rules in an effort to transform the state from a sanctuary for absolute rule into a citadel of democracy. Many constitutional states—for

example the Central African Republic,⁴⁹ El Salvador,⁵⁰ Guatemala,⁵¹ and Mauritania⁵²—make term limits unamendable. The purposes of many of these unamendable rules is the same as what motivates constitutional designers to set an unamendable floor for rights and freedoms: to create a new normal for the exercise of public power, and to set an aspirational standard that the people and their leaders can aim to achieve in transforming their state from one that infringes rules to one that respects them.

Crisis Management

Constitutional designers have turned to unamendability also to help manage moments of crisis or to prevent crises from worsening. What they make unamendable here is neither a principle, value, or structure but rather a rule that prohibits the use of the constitution's amendment procedures. The effect of this unamendable rule is to disable the formal amendment process altogether. Spurred by fears that the amendment process could be hijacked by foreign or nefarious influences, or rushed in the face of a national emergency, or even compromised during times of war or instability, the use of unamendability in crisis management is intended to take the power of formal amendment away from reformers.

It is not unusual for constitutional designers to disable the amendment process during an emergency, martial law, or a state of siege or war, as in the Constitution of Montenegro.⁵³ Constitutions also disable the formal amendment process during periods of regency or succession. When the monarch is absent or unable to serve, constitutions often prohibit formal amendments, perhaps out of fear that the regent named as steward would seek to advantage himself by amending the constitution during the monarch's absence. For instance, in Luxembourg, the constitution declares that "during a regency, no change can be made to the Constitution concerning the constitutional prerogatives of the Grand Duke, his status as well as the order of succession."⁵⁴ The Belgian Constitution imposes a similar prohibition.⁵⁵ In these cases, the objective is the same for all uses of unamendability in crisis management: to deny the power of amendment until the state has returned to a time of normalcy after the state survives a period of some pressure on its institutions.

Constitutional designers may have several motivations for crisis management unamendability. They may worry that extreme conditions might

provoke rushed judgments that could be devastating for governance in the long term. They may be concerned that allowing amendment during emergencies could allow the executive to push through amendments without sufficient deliberation in the heat of the “rally-around-the-flag” effect of emergencies. Constitutional designers might also want to discourage the use of complicated amendment procedures that require an intervening election or legislative dissolution since such votes are difficult to organize during emergencies.⁵⁶ Crisis management unamendability has the consequence of insulating the emergency rules themselves from formal amendment, or at least making them harder to change.⁵⁷

Settlement

Constitutional designers have used unamendability for a separate purpose: to incorporate time for a constitutional settlement to take hold in the aftermath of a particularly charged moment in the life of the state. There are many dramatic occasions when political actors and the people may become intensely engaged in constitutional politics, and after which a respite may be useful to calm passions, to plan next steps, and to give time for clarity to emerge from the intensity or upheaval of the moment. Using unamendability in the service of settlement means prohibiting amendments for a defined period. For instance, constitutions might disable the amendment procedure for a fixed number of years beginning immediately upon the ratification of a new constitution, as we see in the Cape Verdean Constitution.⁵⁸ Constitutions might also prohibit lawmakers from reintroducing a defeated amendment proposal until the passage of a fixed number of months or years, as is true of the Estonian Constitution.⁵⁹ The Portuguese Constitution illustrates another example of how constitutional designers use unamendability in the service of settlement: the constitution prohibits subsequent amendments within a defined period of time after the successful amendment of the constitution.⁶⁰

Value Expression

Unamendability serves an additional purpose related to each of the others: to express constitutional values. We learned in great detail in

Chapter 1 precisely how constitutional designers use amendment rules to express values. When designers distinguish one rule by making it immune to the amendment procedures that ordinarily apply to other rules, the message both conveyed and perceived is that this unamendable rule is more highly valued than those not granted that protection. Whether or not the absolute entrenchment of a given rule is intended to be enforceable, unamendability makes an important statement about the value—either objective or subjective or both—of the rule in that constitutional community.

Codified unamendability is the ultimate expression of importance that constitutional designers can communicate in the constitutional text. For example, the Cuban Constitution's absolute entrenchment of socialism is a statement of the highest significance of socialism in the country,⁶¹ just as the French Constitution's absolute entrenchment of republicanism reflects one of the country's most important constitutional values.⁶² The expressive purpose of unamendability need not necessarily reflect a repudiation of the past; it may instead declare new values without reference to an old or superseded one.

Interpretive Unamendability

Constitutional states sometimes recognize unamendability even where it is not codified in the constitutional text. In many of these cases, a rule becomes unamendable as a result of a binding declaration by the authoritative interpreter of the constitution. Most commonly, this declaration of unamendability will be made by a court, but it may also be made by a legislature that possesses the power of binding constitutional interpretation. Where the authoritative interpreter declares something to be unamendable, the interpreter ordinarily acquires the power to later invalidate a formal amendment deemed to violate the uncodified unamendable rule. Uncodified restrictions on amendment rest on the fusion of two roles that have traditionally been separated across time and institutions: constitutional author and constitutional interpreter.

Uncodified unamendability can arise also without a declaration by an authoritative interpreter. Here it takes the form of an unwritten norm that emerges from some combination of practice, agreement, or acquiescence to in turn yield an uncodified rule that reveals how political actors and the people prioritize their shared values.

Continuity and Discontinuity

The distinction between continuity and discontinuity is critical for understanding how interpretive unamendability arises when it is declared to exist by the authoritative constitutional interpreter. Continuous constitutional change occurs within the existing framework of a legal order while discontinuous constitutional change results in an entirely new legal order. An example of a continuous constitutional change in the United States is the Twenty-Seventh Amendment, which prevents a law increasing the salaries of congresspersons from taking effect until an intervening election of the House of Representatives has been held.⁶³ Or take an example from Canada, where a continuous constitutional change was made to revise all references in the constitution from the “Province of Newfoundland” to the “Province of Newfoundland and Labrador.”⁶⁴ Neither of these changes breaks with the legal order; both are consistent with it.

A discontinuous change may be understood with reference to the course on which a ship sets sail. Where the ship leaves its course and changes direction in midstream, this alteration in trajectory will take it to a new destination unforeseen by those who commissioned the ship to set sail to begin with.⁶⁵ Contrast this to a change to the ship itself that, while substantial, nonetheless keeps the ship on its course without changing its destination. The former is discontinuous because it alters the ship’s direction and destination while the latter maintains continuity in the mission.

Where a constitutional change alters the identity of the constitution or runs counter to its spirit or principles, the change is properly defined as discontinuous because it ignores the fundamental presuppositions of the constitution and fails to cohere with its operational framework. The many constitutional dismemberments discussed in Chapter 2 are examples of discontinuous constitutional changes. Another example of a discontinuous constitutional change is a replacement that results in the adoption of an altogether new constitution, for instance the new 2010 Kenyan Constitution that replaced the previous one, originally adopted in 1969.

Constitutional texts do not ordinarily distinguish between procedures for continuous and discontinuous change.⁶⁶ A judgment must therefore be made whether a proposed amendment will amount to a continuous or discontinuous change. If the change is determined to be continuous—and it is duly authorized by the constitution and adopted with no procedural irregularity—it is likely to become part of the constitution without

sustainable objection to its validity. But if it is determined that lawmakers improperly sought to make a discontinuous constitutional change using the amendment procedures designated for purely continuous changes, that constitutional alteration will not always stand. The basis for this uncodified restriction on the amendment power is the theory that a rule can be unamendable even where an amendment to it is not expressly prohibited in the codified constitution. This effectively creates an uncodified interpretive analogue to codified unamendability.

The Basic Structure Doctrine

The power to police the boundary separating continuous from discontinuous change may in theory rest with any political institution, but it most commonly belongs to courts.⁶⁷ This power entails the dual authority to interpret the constitution as either permitting or disallowing a given constitutional amendment and, in the case of an amendment that exceeds the authority of the amending actor, to enforce uncodified restrictions on amendment by invalidating the constitutional change. Although many courts today have asserted or exercised the power to strike down a constitutional amendment, there is a strong but not irrebuttable claim that the power to invalidate an amendment is democratically objectionable. After all, on what legitimate basis may any political institution declare that a procedurally perfect constitutional amendment is unconstitutional?

The Supreme Court of India wrestled with this question in a series of important judgments. Consider first the rules of amendment codified in the Indian Constitution. The Indian Constitution does not formally codify anything against amendment. With a handful of exceptions, the Indian Constitution authorizes the national legislature to pass amendments with a bare majority vote in each house, provided two-thirds of all members are present.⁶⁸ This relatively easy amendment rule raises the risk that lawmakers might treat the constitutional text like a statutory constitution, amendable as easily as an ordinary law and indeed indistinguishable from one.⁶⁹

The Court first held that the amendment power is unlimited.⁷⁰ Nearly twenty years later, the Court reversed itself by laying the foundation for invalidating a constitutional amendment at some point in the future, holding that the amendment power could not be used to abolish or violate fundamental constitutional rights.⁷¹ Surely sensing that actually invalidating

a constitutional amendment could be too bold a move too soon, the Court held that its holding would apply only prospectively, not retrospectively, and that only henceforth would the national legislature's textually plenary power of amendment be subject to judicial review for consistency with the constitution. This case was a prelude to unveiling the basic structure doctrine a few years later.

In *Kesavananda*, the Court held that the amendment power could be used only as long as it did not do violence to the constitution's basic structure.⁷² The concept of the basic structure was said to include the supremacy of the constitution, the republican and democratic forms of government, the secular character of the state, the separation of powers, and federalism.⁷³ In asserting these elements of the basic structure doctrine—elements that the Court insisted could not lawfully be violated by a constitutional amendment—the Chief Justice wrote that “every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same.”⁷⁴ The Chief Justice identified these basic features of the constitution with reference to the preamble and the “whole scheme of the Constitution.”⁷⁵ It is important to stress here that the constitution's text did not then, nor does it now, enumerate what is “basic,” as in foundational, to its own structure. That judgment of constitutional importance finds its origin in judicial interpretation, not in explicit constitutional design.

A few years later, the Court invoked the basic structure doctrine to invalidate part of a mega-amendment to India's Constitution, including its codified amendment rules.⁷⁶ The amendment had proposed, in part, to limit the Court's power to review future constitutional amendments. The mega-amendment envisioned inserted into the constitution a declaration that “no amendment of this Constitution . . . shall be called in question in any court on any ground”⁷⁷ and that “for the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.”⁷⁸ This mega-amendment package was a direct response to the Court's assertion of supremacy and just the latest move at the time in the battle for constitutional primacy between the national legislature and the Court.

The question for the Court was not whether the legislature's amendment power was subject to implicit limits. That question had been resolved in *Kesavananda*. The question was instead whether the legislature

could overrule the Court using its amendment power. The Chief Justice began from the proposition that although “Parliament is given the power to amend the Constitution,” it is clear for the Court that this “power cannot be exercised so as to damage the basic features of the Constitution or so as to destroy its basic structure.”⁷⁹ The Chief Justice explained why the legislature cannot trump the Court by insulating its amendment from the Court’s review:

Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.⁸⁰

This cornerstone of this basic structure doctrine—that the amendment power is limited by implication of its very nature, even where the constitutional text does not recognize any limitation on its use—has journeyed beyond India to many other countries since its articulation half a century ago.

Variations on the Basic Structure Doctrine

The basic structure doctrine has taken root in many countries beyond India. Consider two high court rulings—one each from Colombia and Taiwan—where judges have invalidated a constitutional change for exceeding what they have interpreted as the implicitly limited amendment power.

The Constitutional Court of Colombia has created the “substitution of the constitution” doctrine, which authorizes Congress only to amend the constitution but not to replace it, on the theory that the power of constitutional replacement “is reserved for the people in their authority as primary constituent power.”⁸¹ As Carlos Bernal has explained, the core of the doctrine is that “the power to amend the constitution comprises the power

to introduce changes to any article of the constitution text” on the condition that “these changes can neither imply a derogation of the constitution nor its replacement by a different one.”⁸² In the Court’s first judgment establishing the doctrine, it emphasized the existence of implicit limitations on the power of amendment:

The power of reform, a constituted power, has material limits, because the power to reform the Constitution does not include the possibility of derogating it, subverting it or substituting it in its integrity.

The derivative constituent power, then, lacks the power to destroy the Constitution. The constituent act establishes the legal order and, because of that, any power of reform is limited only to carrying out a revision. The power of reform, which is constituted power, is not, therefore, authorized to annul or substitute the Constitution from which its competence is derived. The constituted power cannot . . . grant itself functions that belong to the constituent power and, therefore, cannot carry out a substitution of the Constitution not only because it would then become an original constituent power, but also because it would undermine the bases of its own competence. . . .⁸³

The Court stressed that the amendment power is limited, even though the country’s codified constitutional text imposes no explicit limitations on amendment.⁸⁴ The reason why the amendment power is restricted, explained the Court, is that the amendment power is a constituted power, a lesser and bounded power in comparison to constituent power, the latter being a power that is “absolute, unlimited, permanent, without limits or jurisdictional controls, because its acts are political and foundational and not juridical, [and] whose validity derives from the political will of the society.”⁸⁵ The Court saw its role as protecting the constitution from its unauthorized replacement—what the Court described as its “eliminat[ion]” or “substitut[ion]”—by anything but a procedure legitimated by the exercise of constituent power.⁸⁶

Turn next to Taiwan. The Taiwanese Constitution imposes no formal limits on amendment.⁸⁷ Yet the absence of codified unamendability has not stopped the Constitutional Court from striking down a series of constitutional amendments. In one case, the National Assembly adopted a set of amendments in 1999 that the Court subsequently invalidated on both procedural and substantive grounds.⁸⁸

The constitutional challenge began when members of the Legislative Yuan filed a petition alleging many infirmities with an amendment passed by the National Assembly. First, they argued that the amendment had been passed on the strength of votes cast in anonymous ballots in the second and third readings in violation of the constitution's amendment rules.⁸⁹ They also argued that there were irregularities in the vote because some of the amendment proposals had been defeated in the second reading but were still voted on again in the third.⁹⁰ The amendment moreover required the National Assembly to be constituted according to a proportional allocation given to political parties on the basis of votes they had received in the latest election of the Legislative Yuan, a separate constitutional organ.⁹¹ The challengers claimed that this change would make all of those persons unaffiliated with a political party ineligible for selection to the National Assembly.⁹² The challengers raised other concerns, including that the amendment improperly extended term limits and also sowed confusion about their duration.⁹³

The Court declared the amendment unconstitutional. Anonymous balloting, the Court explained, violated the principles of "openness and transparency" in the legislative process.⁹⁴ As for the voting irregularities, the Court held that they "contradict the fundamental nature of governing norms and order that form the very basis and existence of the Constitution, and are prohibited by the norms of constitutional democracy."⁹⁵ The rule of proportional representation in the National Assembly drawn from political party votes received in Legislative Yuan elections violated the principles of "democracy and constitutional rule of law."⁹⁶ The extension of term limits likewise violated the principle of "democratic state of constitutional rule of law."⁹⁷ The Court also explained its reasoning in arriving at its conclusion:

Although the Amendment to the Constitution has equal status with the constitutional provisions, any amendment that alters the existing constitutional provisions concerning the fundamental nature of governing norms and order and, hence, the foundation of the Constitution's very existence destroys the integrity and fabric of the Constitution itself. . . . The democratic constitutional process derived from these principles forms the foundation for the existence of the current Constitution and all [governmental] bodies installed hereunder must abide by this process.⁹⁸

As in other cases around the world where courts have rejected an amendment, here the Taiwanese Constitutional Court set the constitution itself

as the standard for lawful constitutional change. It held that constitutional changes inconsistent with the constitution would destroy the constitution as it is presently understood.⁹⁹ There are echoes in this judgment of the Colombian Constitutional Court's self-given duty to protect the constitution from its "eliminat[ion]."¹⁰⁰

Courts in Colombia, Taiwan, and elsewhere in the world have not built this approach from scratch. Their judgments on the unconstitutionality of an amendment derive from the ideas developed in the Indian Supreme Court's rulings on the basic structure doctrine. They have also drawn from, as has the Indian Supreme Court, the conventional theory of constitutional change, discussed earlier in Chapter 2.

Conventions of Unamendability

A rule can become unamendable not only as a result of a pronouncement by the authoritative arbiter of constitutional meaning, in most cases courts. A rule can become unamendable also over time as it acquires special political or social significance.¹⁰¹ This form of uncodified unamendability derives from the creation of a new constitutional convention. The idea that a convention—which is by definition uncodified—can become unamendable is much less well developed than the distinction between continuous and discontinuous constitutional change, but we can nevertheless illustrate its operation with useful examples. What remains uncodified in the case of uncodified unamendability is not the rule that becomes unamendable—which may in fact be codified in a constitutional text as an ordinary rule—but rather the social fact of its unamendability.

Consider how the unilateral provincial power of amendment in the Constitution of Canada grew unamendable. In Canada's founding constitution, an amendment could be made, with few exceptions, only by the Parliament of the United Kingdom.¹⁰² The Constitution Act, 1867 authorized the individual provinces to amend their own provincial constitution, but it conferred no similar power upon Canada to amend the Canadian Constitution.¹⁰³ The unilateral provincial power was not expressly unamendable; it was a freely amendable rule like any other.

In 1949, the United Kingdom passed an amendment, at Canada's request, authorizing the Parliament of Canada to formally amend the Canadian Constitution.¹⁰⁴ With some exceptions, this amendment gave

Parliament the same amendment power as to the purely federal subjects of the Canadian Constitution that the Constitution Act, 1867 had given provinces as to their own provincial constitutions.¹⁰⁵ The provinces objected that the new amendment could allow an emboldened Parliament to unilaterally amend federal institutions of provincial concern, for instance the composition of the Senate or representation in the House of Commons.¹⁰⁶ Yet whether a province would retain the power to amend its own constitution was never in doubt. The development of Canadian federalism to that point had allowed no other view but that the provinces possessed this unilateral authority.

Canada finally formally divested the United Kingdom of its amendment authority in 1982 when federal and provincial leaders agreed to codify five amendment rules to govern all manner of amendments affecting purely federal or provincial subjects, as well as those affecting both.¹⁰⁷ Federal and provincial lawmakers had tried before on many occasions to design amendment rules that would authorize Canada to amend its own constitution. But they had failed each time, over a dozen in total,¹⁰⁸ due largely to disagreement on the right quantum of agreement for provincial consent to an amendment affecting both levels of government.¹⁰⁹

Yet through it all there was one constant in Canada's efforts for a negotiated settlement on a new set of amendment rules for the country: the provinces would retain their unilateral power to amend their own constitutions. As early as a 1927 Dominion-Provincial Conference, the national government's minister of justice had suggested an amendment structure that left unchanged the unilateral provincial amendment power.¹¹⁰ Later in 1935, the House of Commons convened a special committee to "study and report on the best method by which the British North America Act may be amended. . . ."¹¹¹ The Committee was particularly concerned with protecting provincial powers and fundamental rights as it searched for guidance on "safeguard[ing] the existing rights or racial and religious minorities and legitimate provincial claims to autonomy."¹¹² At the Constitutional Conference of 1950, then Prime Minister Louis St. Laurent stated the federal government's test for agreeing to any new amendment framework: one of the key conditions required that any amendment formula would have to respect the autonomy of provinces in relation to their constitution.¹¹³ The centrality of provincial sovereignty in purely provincial matters persisted throughout subsequent negotiations in the intervening decades.¹¹⁴ The unilateral provincial amendment power was therefore

never in doubt, even amid uncertainty about how Canada would ultimately structure its amendment rules. This provincial power had become a non-negotiable unamendable rule, but it had never been nor was it later codified as unamendable. What occurred instead was the emergence of a conventional understanding among political actors that the province's power to amend its own provincial constitution is a fundamental rule in Canada.

Constructive Unamendability

We have so far covered two varieties of unamendability: codified and interpretive. There is a third category of unamendability that I have described as *constructive unamendability*. A constitutional rule is constructively unamendable when the codified thresholds required to amend it are so onerous that reformers cannot realistically (though they could theoretically) satisfy the standard. What results is the impossibility of amending the rule, even though formally it is amendable.

Constructive unamendability arises when the constitutional text defines a rule as freely amendable but the present political reality reveals that it is not. For instance, the entire constitution in Taiwan may be constructively unamendable now that its amendment rule has been hardened to require steps that appear to make amendment virtually impossible today: the approval of three-quarters of the Legislative Yuan, with a three-quarters quorum, followed by a six-month period of public deliberation on the amendment proposal, and then finally a referendum that must garner majority support from eligible voters.¹¹⁵ This amendment rule is a high threshold in any polity but its difficulty in Taiwan derives principally from the difficulty of gathering supermajority support among the multiple political parties that ordinarily take different views on subjects of constitutional importance.

Constructive unamendability may be imputed to a freely amendable rule or an entire constitution when reformers have expressed their unwillingness or shown their inability to satisfy the constitution's mandated formal amendment procedures. Constructive unamendability is rooted in deep divisions among political actors who ultimately reach the point of stalemate. Under these conditions, formal amendment becomes impossible unless reformers perform miracles to break the stalemate. The stalemate may stem from political incompatibilities, unpalatable preconditions

to formal amendment, or a strong resistance to entertaining thoughts of formal amendment despite the constitutional text authorizing the change reformers are unwilling to attempt. Alternatively or in addition, the stalemate may originate from the structural design of the constitution, for instance a complex horizontal or vertical separation of powers that creates multiple veto points along the path to formal amendment. This constructive unamendability need not be a permanent feature of a given codified rule. Political circumstances may evolve to alleviate the pressures that generated the intractable conditions to begin with, just as an uncontentious rule may later become constructively unamendable as a result of new political fault lines.

Constructive unamendability differs from codified unamendability in form but it has the same effect. Unlike codified unamendability, constructive unamendability is not expressly identified in the constitutional text. But like codified unamendability, the effect of constructive unamendability is to make amendment impossible. Constructive unamendability is similar to interpretive unamendability in both function and form: formally, neither is codified in a constitutional text; and functionally, both result in taking the unamendable matter out of the hands of reformers. The difference between interpretive and constructive unamendability springs instead from their origins. Interpretive unamendability is rooted in intention and arises from either an authoritative declaration or the formation of a constitutional convention: political actors choose by agreement, acquiescence, or imposition that some rule will be unamendable. In contrast, constructive unamendability is not intentional; it is a condition that attaches to the extraordinary difficulty of assembling the required majorities to amend a rule that is nonetheless identified in the constitution as freely amendable.

Unamendability on these terms therefore derives neither from formal constitutional design, as in the case of Brazil, France, or Germany, nor does it derive from constitutional interpretation, as in India, where the Supreme Court has interpreted the “basic structure” of the constitution to be unamendable despite there being no mention of unamendability in the constitutional text. Constructive unamendability is instead the product of constitutional politics requiring reformers to perform impossible heroics to successfully amend the constitution. Constructive unamendability, then, is not a legal construction but rather a political reality that prevents formal change.

The Equal Suffrage Clause

In the United States, the Equal Suffrage Clause is constructively unamendable. The Equal Suffrage Clause creates an exception to the general formal amendment rule in the constitution: a formal amendment ordinarily requires Congress and the states, respectively, to propose a formal amendment by two-thirds vote and to ratify it by a three-quarters supermajority vote,¹¹⁶ but a formal amendment diminishing a state's representation in the Senate requires in addition that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."¹¹⁷ The clause therefore authorizes a change to a state's representation in the Senate only if that state grants its consent. What makes the rule constructively unamendable is that no state would consent to a change that resulted in the direct or relative diminution of its power in American federalism. The Equal Suffrage Clause might as well be rewritten as a codified unamendable rule.

The Equal Suffrage Clause seems by its terms to require the additional consent of only the state deprived of its equal representation in the Senate. But it actually requires the unanimous consent of all states.¹¹⁸ The reason becomes evident when we consider a hypothetical illustration. Assume the required supermajorities agree by formal amendment to reduce Maine's representation in the Senate. According to the Equal Suffrage Clause, the amendment would be invalid without Maine's consent. Yet all other states would likewise be required to consent to the change because their own Senate representation would now be different relative to Maine's, resulting in their deprivation of "equal Suffrage in the Senate."¹¹⁹ As Sanford Levinson explains, "Vermont's failure to consent to [Maine's] reduced representation in the Senate would doom the proposal, since otherwise one would be foisting an 'unequal Suffrage' on Vermont, relative to [Maine]'s, without its consent."¹²⁰ This unanimity requirement highlights what Michael Dorf has referred to as the "near-impossibility"¹²¹ of amending the Senate.

Informed observers appear to have conflated the difficulty of formally amending the Senate with its codified unamendability. For instance, the Supreme Court of the United States has described the Equal Suffrage Clause as a "permanent and unalterable exception[] to the power of amendment."¹²² Leading constitutional scholars have similarly interpreted the clause as formally unamendable: Raoul Berger has described the clause as "expressly excepted from the sweep of the amendment power";¹²³ Douglas Bryant has stated that it "may not be altered and is forever part of the Constitution";¹²⁴

Daryl Levinson has called it “explicitly unamendable”;¹²⁵ Doug Linder has described it as “expressly unamendable”;¹²⁶ Eric Posner and Adrian Vermeule interpret it as “entrenched . . . against subsequent amendment”;¹²⁷ and Jack Balkin deems it “unamendable.”¹²⁸ These interpretations may reflect either a general reference to “unamendability” incorporating its substantive and procedural dimensions as well as its codified and interpretive forms, or these interpretations they may result from a misreading of the clause. In either case, their references to unamendability are imprecise.

The Equal Suffrage Clause does not codify a formally unamendable rule against altering Senate representation. By its own terms, the Equal Suffrage Clause makes Senate representation amendable provided the concerned state(s) consent to the change. This procedural requirement to secure state consent is qualitatively different from the wholesale disabling of formal amendment rules we see in codified rules expressly forbidding amendment. Codified unamendability makes amendment unconstitutional even with the unanimous consent of all concerned lawmakers.¹²⁹ For instance, as discussed in Chapter 1, the German Constitutional Court has enforced the Basic Law’s codified unamendability of human dignity, recognizing human dignity as “a paramount principle of the constitution and the highest constitutional value.”¹³⁰ The human dignity protection, which holds that “human dignity shall be inviolable”¹³¹ and is in turn codified in the constitution as unamendable,¹³² is accordingly distinguishable from the Equal Suffrage Clause.

Some scholars have recognized that the Equal Suffrage Clause is amendable in theory.¹³³ Still, unanimity among states is very likely unachievable on most questions in the United States and perhaps least probable on amending the Senate. The consequence is therefore the same: the Equal Suffrage Clause is unamendable in the United States just as human dignity is unamendable in Germany. But the trigger in each instance is different, and it concerns both how and when unamendability arises. In Germany as in other constitutional states where a rule is deliberately codified against amendment, unamendability is an informed choice contemplated in the pre-promulgation design of the master text constitution. In contrast, constructive unamendability emerges from post-promulgation constitutional politics.

Federal democracies may be more vulnerable to producing forms of constructive unamendability. The design of formal amendment rules in federal democracies often serves to protect dual interests, and as a result confers

veto powers upon both national and subnational units for amendments to federalist institutions. Federal democracies outside the United States codify amendment rules similar to the design of the Equal Suffrage Clause. In Australia, for example, a formal amendment to the powers, boundaries, or representation of a state requires a majority of voters in that affected state to approve the amendment, in addition to first securing a simple majority in both houses of the bicameral national legislature and securing approval in a national referendum.¹³⁴ Austria has a similar rule for amendments to its Federal Council.¹³⁵ It is important to observe, then, that federalism may be a cause of constructive unamendability. I discuss amendment design in federal states more fulsomely in Chapter 5.

Constitutional Veneration

An independent cause or at least a compounding factor in constructive unamendability is what James Madison described in his day as “veneration.”¹³⁶ Madison promoted veneration as an important quality to cultivate for the constitution among the public, the payoff of a venerated constitution being a more stable regime whose codified master text would endure.¹³⁷ Madison thought it was important to discourage frequent amendment in order to keep the original constitution unchanged as much as possible.¹³⁸ He worried that too many amendments and attempts at amendment would convey the impression that the constitution was defective, and this impression would in turn undermine what he saw as the larger good of building veneration for the new constitution.¹³⁹

For Madison, constitutional veneration was a worthwhile objective but for Thomas Jefferson it risked freezing the constitution from needed changes as time and experience exposed the document’s errors and flaws. Jefferson attributed a negative connotation to what Madison saw as a virtue: veneration grew out of the glorification, adulation, or blinding admiration for the constitution. Jefferson stated the problem: “Some men look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment.”¹⁴⁰ He then qualified his position: “I am certainly not an advocate for frequent and untried changes in laws and constitutions. . . . But I know that laws and institutions must go hand in hand with the progress of the human

mind.”¹⁴¹ And he finally offered a solution: “[A]s new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.”¹⁴² Jefferson punctuated his point with an analogy: “We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.”¹⁴³ Jefferson therefore anticipated a problem that Madison did not: that a political culture of constitutional veneration could lead to the constructive unamendability of the constitution.

Today we have an answer to the question that divided Madison from Jefferson: Does a person’s veneration for a constitution make her less likely to support amendments to it? A recent study reveals the answer is yes. When someone feels herself attached to a constitution, she becomes more disposed to rejecting proposals to amend it.¹⁴⁴ There is evidence of something in the nature of a “constitutional status quo bias” for the U.S. Constitution. This status quo bias, when it is challenged by an amendment proposal, exerts a normative resistance to that amendment effort. The reverence a person has for the constitution makes textual alteration less likely because she perceives efforts to tinker with the constitution as undermining the founding design and the founders themselves, for whom someone who venerates the constitution has great respect. There is a great irony in the consequences of venerating the U.S. Constitution: veneration generates pressure for the constitution to change outside of the formal procedures in Article V since the document must remain relevant to the times, but the result is a gap between what the constitution says and what it means, and therefore how well a reader can understand it.¹⁴⁵

Sandy Levinson theorized the profound impact of veneration on constitutional amendment long before social science confirmed that veneration generates a status quo bias. In 1990, Levinson compared the national and state constitutions in the United States, observing that “it is certainly difficult to describe the stance of most citizens toward their state constitutions as one of ‘veneration.’ Many Americans are probably not even aware that they are under the aegis of two constitutions that may significantly differ in their conceptions of governmental institutions and of rights protected against governmental interference.”¹⁴⁶ In contrast to the national constitution, state constitutions have a long history of frequent amendment and also more dramatically of replacement. When Levinson wrote in 1990, the fifty American states had lived through a total of 146 state constitutions,¹⁴⁷

and around fifteen years later their average annual revision rate was measured at 0.35, extraordinarily higher than the rate for the United States at 0.07.¹⁴⁸ Levinson was right when he speculated that “it seems plausible to argue, therefore, that there is some relationship between actual frequency of amendment and Madisonian ‘veneration.’ The more of the former, the less of the latter.”¹⁴⁹ Levinson later issued a call to action for a constitutional convention to rethink—and ultimately, he hoped, to rewrite—the fundamental bargain in the U.S. Constitution. It is a bold call to action that addresses what he believes is the alarming constitutional stasis in which Americans find themselves:

To the extent that we continue thoughtlessly to venerate, and therefore not subject to truly critical examination, our Constitution, we are in the position of the battered wife who continues to profess the “essential goodness” of her abusive husband. . . . Similarly, that there are good features of our Constitution should not be denied. But there are also significantly abusive ones, and it is time for us to face them rather than remain in a state of denial.¹⁵⁰

In the United States, constitutional veneration has combined with other forces to discourage amendment. But the relationship between veneration and amendment can sometimes be altogether different. Andrew Harding explains that in Malaysia, for instance, the culture and practice of hyper-amendment—since 1957, over forty amending acts and six hundred textual alterations—“has had the effect of sanctifying rather than dissipating respect for both the text and spirit of the Constitution.”¹⁵¹ Frequent amendment has solidified an expectation that change will continue to occur within the constitution’s boundaries. The success of the Malaysian Constitution in setting the terms of debate on reform has built a reservoir of goodwill for the constitution in light of its survival through many changes and its endurance for so long.¹⁵² On this theory, frequent amendment can sometimes strengthen public regard for the constitution. It is seen as evidence of the responsiveness of the governors to the concerns and wishes of the governed. This can in turn lead to embracing the constitution as a living reflection of the ever-evolving views of the people as presently constituted, opening the constitution to future changes by a new emerging consensus.

Omnibus Amendment Bills and Multi-party Incompatibility

Another contributing factor to constructive unamendability is evident in Canada's experience with major formal amendment. History has shown that Michael Stein was right to doubt, shortly after the major multilateral constitutional changes in Canada in 1982, whether those changes would "prove to be only a Pyrrhic victory, a largely symbolic success that will effectively bring the process to a halt."¹⁵³ Since then, all major multilateral constitutional changes in Canada have failed, with the exception of a single instance in 1983,¹⁵⁴ which was successful likely due to the momentum generated by the Patriation of the constitution the year before.

Michael Lusztig's theory of "mass input/legitimization" suggests only partially why major multilateral amendment is virtually impossible today in Canada.¹⁵⁵ Lusztig begins by observing that major amendment requires an extraordinarily deep and broad level of agreement by political actors.¹⁵⁶ The prospect of major multilateral amendment efforts creates incentives for multiple constituencies to mobilize behind their interests in order to attain special status for themselves, and to entrench that status in the product of those amendment efforts.¹⁵⁷ According to Lusztig, Canada's various "mega-constitutional orientations" are inherently irreconcilable, the consequence being that major amendment efforts are doomed to failure.¹⁵⁸

Lusztig identifies four conflicting mega-constitutional orientations—pan-Canadian, Quebec, Western, and minoritarian—that give a different answer to the question where sovereignty lies.¹⁵⁹ Three pairs of answers are possible, according to Lusztig: with individuals or collectivities; if with collectivities, with territorial ones or nonterritorial ones, and if with territorial collectivities, with symmetrical or asymmetrical arrangements.¹⁶⁰ In light of these competing visions of sovereignty in Canada, Lusztig concludes that the modern political imperative for mass input and legitimization in major constitutional reforms like the Meech Lake and Charlottetown Accords does not bode well for the successful ratification of amendment packages in a deeply divided consociationalist system like Canada.¹⁶¹ An additional complication results: conferring special status on one group makes it difficult to deny similar status to others.¹⁶² This leads to near-certain amendment failure for major multilateral formal amendment efforts involving fundamental or constitutive principles, the polity's constitutional

identity, or the framework and interrelations of public institutions.¹⁶³ Lusztig and Christopher Manfredi anticipate amendment failure in Canada for major multilateral amendments in the future because reformers will make incompatible and intractable demands, both on the subject of the major amendment efforts themselves and on collateral issues of significance to their constituencies.¹⁶⁴

But multi-party interest incompatibility is insufficient on its own to explain why major multilateral amendment is unlikely today in Canada. There is an as-yet underappreciated aggravating factor that, when combined with multi-party interest incompatibility, dooms major multilateral amendment efforts to failure before they even begin: Canada's practice of using omnibus amendment bills. This political practice may be what most complicates major multilateral amendments in Canada.

The 1987 Meech Lake Accord and 1992 Charlottetown Accord each proposed multiple alterations at once to the constitution, and in both cases the proposals were bundled together in one enormous package of constitutional changes. The inspiration for these omnibus amendment packages was the 1982 Patriation package, which introduced the *Canadian Charter of Rights and Freedoms*, codified a fully domestic set of formal amendment rules, consolidated the many parts of the constitution, and ended the United Kingdom's legal authority in Canada.

The principal purpose of the Meech Lake Accord was to reconcile Quebec with the rest of Canada after Patriation had left many inside and out of Quebec with misgivings about both the agreement itself and the way it had been negotiated. The Accord was designed to address Quebec's five conditions for accepting the Constitution Act, 1982.¹⁶⁵ Had they been approved, these changes would have been formalized as amendments to both the Constitution Act, 1867 and the Constitution Act, 1982. The Accord proposed, for instance, to constitutionalize a declaration that "Quebec constitutes within Canada a distinct society,"¹⁶⁶ to change the method of senatorial selection to give provinces an important role in the choice,¹⁶⁷ to give provinces some control over immigration,¹⁶⁸ to constitutionalize the Supreme Court,¹⁶⁹ and to require the prime minister to convene a conference of first ministers at least once per year.¹⁷⁰ The Meech Lake Accord proposed also to amend the formal amendment rules themselves.¹⁷¹

The Charlottetown Accord was even more extensive in the changes it sought to make to the constitution. The Accord proposed once again to recognize the distinctiveness of Quebec,¹⁷² yet it also proposed to codify a “Canada Clause” that would recognize the values that bind Canadians across the country.¹⁷³ The Accord would have also clarified and in some ways reorganized the federal distribution of powers,¹⁷⁴ made significant changes to the Senate and the House of Commons as well as to the Supreme Court,¹⁷⁵ brought additional protections for linguistic rights,¹⁷⁶ and it too would have amended the rules of formal amendment.¹⁷⁷ The Accord moreover would have codified a requirement of an annual conference of first ministers.¹⁷⁸ Just like the Meech Lake Accord, then, the Charlottetown Accord proposed a series of substantial amendments.

Both deals were patterned after the Patriation model: many changes were built into one enormous package of amendments. But there was an important difference between Patriation on the one hand and the Meech Lake and Charlottetown Accords on the other: the method of ratification. Patriation was an agreement among elites with no direct involvement from voters. It was instead an agreement among the government of Canada and the governments of the provinces.¹⁷⁹ In contrast, the packages in Meech Lake and Charlottetown were to be ratified with a greater measure of public involvement: the Meech Lake Accord was to be ratified in votes of the provincial assemblies, and the Charlottetown Accord in an advisory referendum in every province and territory across the country in addition to votes of the national and subnational assemblies.

The method of ratification is the predicate for why the Meech Lake and Charlottetown Accords were doomed almost as soon as they were bundled as omnibus amendment packages. The method of ratification raised three problems: the problem of veto gates, the problem of incommensurability, and the problem of comprehensiveness. Unlike at Patriation where there were only a small number of eleven major decision makers to convince—and even still the assent of all eleven was not required, according to the Canadian Supreme Court—here in the Meech Lake and Charlottetown Accords the decision makers were multiplied many times over and presented many more veto opportunities to stop the reform efforts. The bigger problem, though, was that some of the various proposals within the same amendment package were in tension with each other. Some groups

certainly were pleased with the gains promised to them, but they opposed some of the concessions offered to others.¹⁸⁰ As Louis Massicotte has explained, there was a peculiar logic behind the omnibus strategy in constitutional reform:

Documents like the Victoria Charter, the final patriation deal, the Meech Lake and Charlottetown Accords were all based on the assumption that nobody would be satisfied by each facet of the deal if considered in isolation, but that we should try to include in the package a little something for everybody, so as to generate a minimal consensus, if not genuine enthusiasm for the whole package.¹⁸¹

Voting in favor of the reforms therefore meant taking the bitter with the sweet, certainly not a rarity in the normal course of legislative logrolling. The difference here was that a concession given to one group could be taken as undermining an important victory sought by another.

A third problem was a function of the comprehensiveness of the packages. Almost every important part of the constitution was in some way affected by these proposals. The sheer volume of proposed changes was a significant problem—and also a cause of the defeat of the two reform packages—because it was not hard to find something to oppose. With few Canadians fully satisfied with what the country would look like after the implementation of either Accord, many saw better reason to oppose the reforms than to depart from the known but still imperfect status quo. Still today, the need for mass input and legitimation combines with the political practice of relying on omnibus amendment bills to make major multilateral amendments close to impossible in Canada.

It is worth considering whether the use of single-subject amendments would in any way assuage the astounding difficulty of formal amendment in Canada, or whether it might exacerbate it. The option may well be moot because it is arguable that Canada is stuck with omnibus bills for major multilateral amendments. What began as an expedient choice may now have matured into a constitutional convention requiring reformers to propose and ratify all major multilateral amendments as omnibus packages. I return to the idea of single-subject amendments more generally in Chapter 5 in our discussion on *The Architecture of Constitutional Amendment*.

Unamendability in Measuring Amendment Difficulty

Each of the three varieties of unamendability complicates the effort to measure amendment difficulty across jurisdictions. Measuring the effect of constructive and interpretive unamendability on the difficulty of formal amendment is daunting and quite likely impossible. Even measuring the effect of codified unamendability is difficult to do, despite the existence of a textual referent for the unamendable rule.

Consider an example from the Czech Republic. The constitution entrenches an instance of codified unamendability. It declares that “the essential requirements for a democratic state” are unamendable. This formally unamendable rule in the Czech Constitution is paired with an interpretative rule, one combining with the other to prevent reformers from changing the constitution in any way that undermines the democratic character of the state:

Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible.¹⁸²

Legal norms may not be interpreted so as to authorize anyone to do away with or jeopardize the democratic foundations of the state.¹⁸³

Both of these rules were put to the test when the Constitutional Court evaluated the constitutionality of an amendment that sought to shorten the term of the Chamber of Deputies.¹⁸⁴ The Court annulled the amendment, and with it the decision of the president to call new elections for the Chamber. The basis of the Court’s decision was its duty, in its view, to protect the material core of the constitution as reflected in the unamendable rule codifying the requirements of democracy against attack.

The argument against the amendment was that it was inconsistent with the “constitutional order” insofar as it changed “an essential requirement for a democratic state governed by the rule of law, which, under Art. 9 par. 2 of the constitution cannot be changed.”¹⁸⁵ The Court specified how the amendment changed an essential requirement for a democratic state: “That requirement is that the free competition among political forces be subject to the same rules, and, especially, to rules set in advance.”¹⁸⁶ The challengers contended that the constitutional amendment should not be seen merely

as either amending or supplementing the constitution but rather as “suspend[ing] a certain provision in it (on the length of the term of office) for a particular term of office, and do[ing] so retroactively.”¹⁸⁷ The consequence, if the challenger were to be believed, would have been to “replace[] the suspended constitutional framework, for this term of office only, with an ad hoc rule based on an agreement between certain political forces.”¹⁸⁸

The Court agreed.¹⁸⁹ It stressed that the constitution is founded on “the basic untouchable values of a democratic society.”¹⁹⁰ For the Court, the constitution is not rooted in positivist parliamentary sovereigntist notion that all duly-passed acts of the legislature are supreme. Instead, the Court explained, the legislature is bound by the constitution irrespective of the quality of legislative majorities that may wish to make a change contrary to its text:

[T]he Czech Constitution provides in Art. 9 par. 2 that “any change in the essential requirements for a democratic state governed by the rule of law is impermissible.” This places the constitutive principles of a democratic society, within this constitution, above legislative competence, and thus “ultra vires” of Parliament. A constitutional state stands and falls with these principles.¹⁹¹

The Court stressed also that the prohibition against changing the democratic character of the state applies equally to judges. As much as legislators, judges must “protect the material focus of the constitutional order” when the constitution is threatened by an improper amendment.¹⁹² The Court observed that the formally unamendable democratic character of the state “is not a mere slogan or proclamation, but a constitutional provision with normative consequences.”¹⁹³

In the end, the amendment was an amendment “only in form, but not in substance.”¹⁹⁴ The Court compared holding elections at intervals that exceed the constitutional term of office with holding elections at shorter intervals, both of which would violate “the principle of regular terms of office” entrenched in the Charter.¹⁹⁵ From a broader view, the Court likened the amendment to an assault on democracy—and democracy had been made inviolable in the Czech Constitution. To violate this democracy principle, “even by a majority or unanimous decision of Parliament, could not be interpreted otherwise than as removal of this constitutional state as such.”¹⁹⁶

What does democracy require? On a narrow reading, democracy requires free and fair elections at regular intervals. A much grander understanding of democracy incorporates protections for civil, political, and human rights, a careful and effective separation of powers with an interlocking web of checks and balances, a fully functioning and independent set of public institutions, a free and fair market economy, pathways for public participation in decision-making, and a commitment to pluralism. It is to a challenge for a court, like the Constitutional Court of the Czech Republic, when it is confronted with a claim arising from a codified rule that the “democratic character” of the state shall be unamendable: How should the court interpret what democracy permits or prohibits? If the Court takes a narrow reading, an unamenable protection for “democracy” may become a toothless defense against attacks on its foundations. But if the Court takes the broadest reading of democracy, an unamendable rule protecting “democracy” risks swallowing up the entire constitution, bringing all constitutional amendments within the purview of a court’s power of judicial review and accordingly its power to invalidate any constitutional amendment for violating the court’s broad understanding of the constitution’s codified commitment to democracy.

In jurisdictions where the high court has asserted or exercised the power to review constitutional amendments, amending the constitution in the face of unamendable protections for “democracy” and other similar notions cast at a high level of generality becomes even more difficult than a strict reading of the constitution’s amendment procedures reveals. Where a particularly aggressive court adopts an expansive reading of codified unamendability, the power to police amendments concerning the “democratic” or “republican” character of the state opens the door to reviewing all manner of amendments. Such a broad interpretation of an unamendable rule or value introduces a significant check on the power of reformers to successfully amend the constitution even where they have satisfied the procedural requirements for a valid constitutional amendment.

This has a significant but unquantifiable effect on how we measure amendment difficulty. None of the existing rankings of amendment difficulty accounts for unamendability in their studies—and with good reason, because it is not clear that one could reliably account across multiple jurisdictions for unamendability in any of its forms, whether codified, interpretive, or constructive. There is a temporal complication as well: courts will over time interpret codified rules of unamendability differently, they

will evolve in their application of interpretive forms of unamendability, and the nature of what makes a constitution constructively unamendable may change as the configuration of political coalitions grows more dominant or fragile from one period to another. These unavoidable realities of constitutional politics raise substantial obstacles to measuring amendment difficulty with any meaningful accuracy beyond anything more than a single jurisdiction at a given moment in time. If only this thin and quite unsatisfactory measurement of amendment difficulty is ever possible, we confront again the question we continue to encounter: Why measure amendment difficulty at all? It is far from clear that this question has a good answer.

PART THREE
CREATION AND REFORM

5

The Architecture of Constitutional Amendment

The founding Constitution of Canada is unique among the constitutions of the world. It is one of the few that did not codify rules for its own amendment, a deficiency that Prime Minister Lester B. Pearson described as an “embarrassment.”¹ The power to amend the Canadian Constitution belonged exclusively to the Parliament of the United Kingdom. This extraordinary delegation of authority between lawmakers across the Atlantic can be traced to the beginnings of Canada’s Constitution: it was an ordinary law passed as an act of the Imperial Parliament in London. The amendment arrangement between Canada and the United Kingdom functioned reasonably well while it lasted—the constitution was amended on twenty-two occasions in its first century²—but over time the estrangement of the domestic amendment power suggested to Canadians and the world that the country was not yet sovereign.³

London had long been ready to relinquish its extraterritorial legislative power of amendment but lawmakers in Canada were not ready to govern themselves without foreign involvement. The most complex questions of self-governance centered on the rules of constitutional amendment: What quantum of agreement would be needed to approve an amendment, should the majorities required for an amendment vary according to its subject matter, and should certain regions across the land be given veto power over amendments of national interest? Canadians tried several times to negotiate solutions but failed at every turn. They settled cautiously instead on the status quo: London would continue to make amendments for Canada.⁴

By the time Canadians finally agreed on a domestic amendment procedure, the country was already 115 years old. In that time—from the founding of Confederation in Canada in 1867 to the codification of the first set of comprehensive amendment rules in 1982—dozens of constitutions around the world had come and gone. Decades of constitutional practice had

generated valuable insights into success and failure in constitutional design. The technology of constitutional change had evolved from the dominant design rooted in rudimentary eighteenth-century models to a recognition that constitutional amendment in the twentieth century required innovations for managing the modern challenges of democracy and diversity. Reformers in Canada ultimately codified a complex structure of escalating amendment rules, evidence both of the intricacies involved in governing a multinational, multicultural, and multiregional country like Canada and also of the failures of existing amendment models abroad to balance change with stability in the way Canada imagined for itself. Canada's difficult but ultimately fruitful experience in designing its own amendment rules opens a window into an essential question in constitution-making: How should constitutional designers structure the rules of constitutional amendment?

* * *

The standard design of constitutional amendment rules in democratic states appears in the world's first national codified constitution. The Articles of Confederation, written in 1777, codifies a procedure for altering everything in the document.⁵ This standard design features amendment procedures that apply comprehensively to the entire body of amendable rules. Whether one procedure or several, the key feature in the standard design is that there is no differentiation among amendment procedures according to the subject matter of the change.

Several early national constitutions adopted this comprehensive approach to amendment. The French Constitution of 1791 authorized amendments of all types by an Assembly of Revision.⁶ The Polish Constitution, also dated 1791, called for an Extraordinary Constitutional Diet to exercise the amendment power in the same comprehensive way.⁷ Examples abound of this comprehensive model of amendment design. More recently, the 1937 Irish Constitution codified a comprehensive rule permitting an amendment of any kind as long as it is passed by the bicameral legislature, approved in a referendum, and later promulgated by the president.⁸ The South Korean Constitution likewise codifies a comprehensive amendment rule,⁹ as does the Italian Constitution,¹⁰ though both offer alternative paths for initiation. In all of these constitutions, the pattern in amendment design is the same, and the essential observation is plain: the amendment rule is one size fits all.

A more complicated design appears in the U.S. Constitution, which replaced the Articles of Confederation in 1789. With one exception for changes to subnational representation in the senate, the U.S. Constitution

creates several procedures of change that may be used to amend all amendable rules,¹¹ and indeed they have been used to alter constitutional arrangements of all types, from technical matters of presidential succession to major transformations in the law and politics of equality.

Today the modern design of amendment rules is even more complicated. Unlike the uniform procedures of change that constitutions have traditionally applied across the entire spectrum of amendable rules, modern constitutions often feature an escalating structure of variable amendment difficulty that reflects a hierarchy of constitutional values. Modern amendment rules may also codify a combination of temporal limitations, electoral preconditions, emergency-period prohibitions, and quorum requirements, each intended to filter popular preferences through representative institutions or to complement them alongside devices of direct democracy, for instance referendums or popular initiatives.

The sheer volume of options in amendment design is an invitation to evaluate the variety of amendment practices in the world to determine what might work best for a given constitution, and what may require further experimentation. In this chapter, I evaluate some of the options available for designing the rules of change. My objective is to offer guidance about what is possible in amendment design and why a given arrangement might work well—and why it might not.

Pathways and Possibilities

In his first State of the Union Address,¹² President Barack Obama urged Congress to reverse the Supreme Court's decision in *Citizens United*, a case holding that corporations may spend unlimited amounts of money in federal elections as long as they do not coordinate their spending with candidates.¹³ The president issued a challenge:

[L]ast week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. They should be decided by the American people. And I'd urge Democrats and Republicans to pass a bill that helps to correct some of these problems.¹⁴

The president later went further, pressing for a constitutional amendment.¹⁵ Many amendments were introduced in Congress, but none succeeded. All were doomed to failure even before they were proposed. The reason is that Congress is the gatekeeper for amending the constitution—and today its sharply divided membership cannot possibly hope to meet the onerous supermajority requirement to initiate an amendment.¹⁶ Absent extraordinary circumstances that catalyze the formation of a rare consensus in Congress, the legal path to an Article V amendment is effectively blocked.

Single-Track and Multi-Track Pathways

One design strategy to overcome the present amendment stasis in the United States is to disperse the power to initiate an amendment. Distributing the initiation power across political actors and institutions—each, on its own, free to propose an amendment—guards against the possibility that a single body could control the fate of all amendment prospects where that body alone possesses the initiation power.

Imagine the U.S. Constitution had authorized President Obama to propose an amendment directly to the people for ratification by referendum. It is far more likely that the amendment would have passed, if only because it would have been proposed at all. Congress did not permit even its proposal. And yet polls at the time of the president's call to action suggested that 80 percent of Americans opposed the ruling in *Citizens United*, a view that brought Americans together across party lines.¹⁷

Well-designed rules of change should offer more than one pathway for initiating an amendment, and more than one for ratification, precisely to avoid the stasis that has for now paralyzed the United States. Constitutions can be more creative still: they can create multiple procedures for amendment and vary the degree of consent required for ratification according to the importance of the change, restricting the use of each amendment rule to different parts of the constitution. This frees reformers from having to meet the same threshold for all types of amendments: they satisfy a lower threshold to amend the constitution on matters of a routine or technical nature, and a more demanding one to make more substantial changes.

Amendment design today has moved well beyond the standard one-size-fits-all arrangement in the first national codified constitution in the United

States. We can map the modern world of amendment design options in a table depicting the range of amendment pathways (see Table 5.1).

Codified constitutions generally adopt one of six formal amendment pathways. What determines a constitution's formal amendment pathway are answers to two questions: (1) how many amendment procedures are available, including options for initiation and ratification; and (2) may these procedures be used to amend all or only some parts of the constitution? The first question yields two broad categories: single-track, for formal amendment rules that codify only one procedure for amendment; and multi-track, for those codifying more than one. The second question yields three categories: comprehensive, which makes all amendable rules susceptible to amendment by all available procedures for formal amendment; restricted, where each amendable rule is amendable only by a specifically designated procedure; and exceptional, which is otherwise a comprehensive pathway except for its creation of a single extraordinary procedure reserved exclusively for one constitutional rule or a set of related rules. These combinations generate six pathways of formal amendment that differ according to the institutions authorized to initiate and ratify a formal amendment targeting all, some, or one of the rules in the constitution.¹⁸ I turn now to illustrating each of these six pathways.

Consider the German Basic Law, an example of the comprehensive single-track pathway. It allows amendments "only by a law expressly amending or supplementing its text," provided the amendment "shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat."¹⁹ Japan likewise codifies this pathway: formal amendment requires the bicameral national legislature to initiate the amendment

Table 5.1. Formal Amendment Pathways

	Single-Track	Multi-Track
Comprehensive	<i>Comprehensive Single-Track</i> (Germany)	<i>Comprehensive Multi-Track</i> (France)
Restricted	<i>Restricted Single-Track</i> (South Africa)	<i>Restricted Multi-Track</i> (Canada)
Exceptional	<i>Exceptional Single-Track</i> (Iceland)	<i>Exceptional Multi-Track</i> (United States)

process with a two-thirds vote, the proposal must then be ratified in a referendum by a majority vote, and the emperor must finally promulgate the amendment.²⁰ This comprehensive single-track pathway has the virtue of clarity: there exists only one formal amendment procedure (it is therefore single-track), and it applies to all amendable constitutional rules (it is therefore comprehensive). But this amendment design makes amendment efforts susceptible to obstruction: amendment becomes legally impossible if this single route is blocked.

The comprehensive multi-track pathway is designed to avoid the problem of obstruction by distributing the amendment power to different actors, each of whom can separately initiate or ratify an amendment.²¹ In the comprehensive multi-track pathway, all amendment procedures are equally usable, and reformers may deploy any of them to make a formal amendment to any amendable rule in the constitution. The French Constitution is a good example. Amendments may be initiated by either the president or members of the national legislature.²² An amendment proposal may take the form of a governmental or private member's bill, the former initiated by a member of the cabinet and the latter by a noncabinet parliamentarian. Both houses of the national legislature must then approve the amendment proposal, which must subsequently be ratified in a national referendum, though a referendum is not necessary when a government amendment bill is ratified with a three-fifths supermajority by Parliament convened in Congress. This pathway creates more than one route to formally amend the constitution. It gives reformers the choice of at least two routes to propose or ratify an amendment. This design allows reformers to bypass a particularly onerous route to amendment where another seems more promising.

Some amendment procedures do not have comprehensive application. They instead have restricted or exceptional application. Consider first the two variations on the restricted pathway. The two restricted pathways create different amendment procedures for amending specifically enumerated parts of the constitution. Here is the difference between the restricted single-track pathway and the restricted multi-track pathway: the restricted single-track pathway makes specifically enumerated parts of the constitution amendable separately by one designated procedure while the restricted multi-track pathway makes specifically enumerated parts of the constitution amendable separately by at least two different procedures. The restricted multi-track pathway avoids the problem of obstruction common to constitutions that codify the restricted single-track pathway: the restricted

multi-track pathway assigns the power of initiation or ratification to multiple actors in order to prevent a single actor from blocking the only route to amendment.

Consider an illustration. Unlike the multiple amendment procedures in the French Constitution's comprehensive multi-track pathway, the multiple procedures in the South African Constitution's restricted single-track pathway cannot be used to amend all constitutional rules. South Africa's three amendment procedures are each deployable only to amend certain rules, and each may be initiated in only one way.²³ The lowest threshold requires two-thirds approval in the National Assembly. This is the constitution's default amending procedure, and it may be used to amend all rules not specially assigned to a higher amendment threshold. The intermediate amendment threshold requires two-thirds approval in both the National Assembly and the National Council of Provinces. This procedure must be used to formally amend the Bill of Rights, as well as any amendment that involves the National Council of Provinces, modifies provincial rights or prerogatives, or changes a constitutional rule relating specifically to a provincial matter. The most difficult formal amendment procedure requires approval by three-quarters and two-thirds, respectively, in the National Assembly and the National Council of Provinces. This amendment threshold governs amendments to the constitution's statement of constitutional values as well as to the highest amendment threshold itself.

In contrast, the restricted multi-track pathway combines the limitations of specifically designated amendment procedures with the flexibility of multiple routes for amending each group of constitutional rules. The Canadian Constitution illustrates this pathway. Its text codifies five amendment procedures, each usable for different parts of the constitution.²⁴ The amendment procedures range from the relatively easy method of unilateral provincial amendment for provincial constitutions, to unilateral federal amendment for narrow matters of federal constitution law, to a regional amendment procedure, a multilateral amendment procedure, and a final procedure requiring the unanimous agreement of federal and provincial actors. The differential degree of legislative approval attached to each procedure creates an escalating structure of constitutional amendment similar to South Africa's amendment rules. The principal difference is that in Canada the power to initiate federal-level amendments belongs to both Parliament and the provinces, while in South Africa an amendment can begin in

Parliament alone. This is what defines the Canadian pathway as multi-track and the South African pathway as single-track.

There is one final pairing to examine. The two exceptional pathways set apart one constitutional rule or one set of related rules for special treatment in constitutional amendment. This special treatment is an exception to what is otherwise a generally applicable comprehensive amendment rule in the constitution. For instance, the Icelandic Constitution codifies the exceptional single-track pathway: there is one general amendment rule that applies comprehensively to the entire constitution, with an exception for any amendment to status of the Lutheran Church.²⁵ For amendments to the Church, an additional step is required: a national referendum. The U.S. Constitution is an example of the multi-track exceptional pathway. Its multiple amendment procedures apply to all amendable rules in the constitution, with one prominent exception: any change to the Equal Suffrage Clause—requiring that each state hold equal voting power in the Senate—requires the consent of the state whose representation in the Senate will no longer be the same as others.²⁶

The Use of Amendment Pathways

Constitutional designers can choose among these six pathways to achieve any number of objectives in governance, namely to reinforce federalism, to enhance or diminish the judicial role, and to express constitutional values. For example, the two exceptional pathways of formal amendment are useful designs to manage the separation of powers between national and subnational governments. These pathways create two amendment thresholds: one that applies uniformly to the entire body of amendable rules in the constitution and another more onerous one that applies exclusively to one constitutional rule or one set of related rules. The higher threshold is often used to give voice and representation to subnational states within a larger federal structure, specifically by granting veto power to subnational states over formal amendments that affect the distribution and scope of subnational powers. This serves both as a signal of good faith in contentious constitutional design and a useful check on the national government embedded within a larger federal arrangement.

The U.S. Constitution shows how this design can reinforce federalism. Its exceptional multi-track pathway protects federalism in the form of

the Equal Suffrage Clause, which requires reformers to secure the consent of a state whose equal representation in the Senate will be affected by an amendment. No other rule in the constitution demands this degree of particularized consent. We know from the records of the Philadelphia Convention of 1787 that the clause was a necessary bargain between large and small states.²⁷ Without this guarantee, small states would not have ratified the constitution.²⁸ This federalism-reinforcing function of the exceptional pathways of amendment design is evident also in Australia.²⁹ To formally amend the Australian Constitution, each house of the bicameral national legislature must adopt a proposal by a simple majority. Between two and six months thereafter, the amendment proposal must be presented to all Australian voters in a national referendum. If a nationwide majority of voters representing majorities in a majority of states approves the proposal, the amendment becomes official with the assent of the governor general. Yet the Australian Constitution's formal amendment rules codify an additional requirement for formal amendments that change the balance of powers between the national and subnational states. Where the amendment affects the powers, boundaries, or representation of a state, the amendment must be ratified also by a majority of voters in that affected state. This is similar to the structure of the Equal Suffrage Clause in the U.S. Constitution.

The same design appears in the Austrian Constitution. The bicameral national legislature consists of the popularly elected National Council and the Federal Council, whose members are chosen proportionately according to population by the subnational legislatures. The constitution's general amendment rule in Article 44 requires approval by two-thirds supermajority vote, subject to a quorum of only one-half in the National Council. But for constitutional laws that restrict the powers and prerogatives of subnational states, the Federal Constitutional Law also requires a quorum of one-half in the Federal Council and two-thirds approval in that chamber. And in order to amend the design, election rules, or eligibility requirements for the Federal Council, reformers must also secure the consent of a majority of members in the Federal Council representing at least four of the nine subnational states.

These six amendment pathways have other uses. Constitutional designers intent on enhancing the judicial role may purposely introduce ambiguity in their design of formal amendment rules. The two restricted amendment pathways appear from experience to be the most vulnerable to interpretive ambiguity. By design, the restricted amendment pathways create more

than one formal amendment procedure, and each procedure is deployable only for specifically enumerated parts of the constitution. Constitutional designers can exploit this restricted pathway by defining only in broad terms which parts of a constitution are amendable by specific amendment procedures, leaving future reformers to resolve which procedure they must follow to formally amend specific constitutional rules, with one probable consequence being that the court will ultimately decide. Though it was unlikely designed with this intention in mind, the Canadian Constitution's restricted multi-track pathway recently led to confusion about which of its five formal amendment procedures applies to formally amending the long-standing practice of prime ministerial appointments to the Senate—until the Supreme Court resolved the ambiguity.³⁰

Formal amendment pathways may also be designed to express values. There are of course many ways to express values in a constitution. Japan's postwar constitution expresses its foundational values in the preamble,³¹ Finland declares its important commitments outside its preambular text,³² and South Africa identifies its own fundamental values in a list near the beginning of its constitution.³³ Constitutional designers can also express constitutional values in amendment rules themselves. The more obvious ways include codifying one or more constitutional rules at a heightened degree of protection within the escalating structure of a restricted pathway of amendment design, or making a rule formally unamendable, or doing both in tandem.

Consider Canada's restricted multi-track pathway. As the degree of procedural difficulty increases from the first to the fifth amendment procedure, the importance of the subject matter associated with each amendment procedure likewise increases.³⁴ Whereas provincial unilateral action may amend a provincial constitution and unilateral federal action may be used to amend a rule dealing exclusively with a narrow federal matter, the Canadian Constitution requires something more—the consent of Parliament and the affected province—to amend provincial boundaries. Similarly, the constitution requires a higher threshold—the approval of Parliament and a supermajority of provinces—to amend provincial representation in the Senate. The constitution reserves the highest quantum of agreement—unanimous consent—for changes to what its drafters regarded as the country's most important constitutional commitments, including Canada's association with the British monarchy. What underpins this pathway is a hierarchy of constitutional importance. This rigid escalating pathway directs reformers

through fixed routes for formal amendment. These routes range from difficult to even more difficult to nearly impossible. As the degree of procedural difficulty rises under this restricted amendment pathway, the subject matter of the rules assigned to these increasing amendment thresholds likewise rises in importance. Constitutional designers may therefore confer special or lesser status on certain rules by assigning them varying degrees of formal amendment difficulty.

A similar hierarchy is observable in the Ghanaian Constitution. Amending certain rules—for example, the constitution's protections for fundamental rights and freedoms³⁵—requires a very high threshold of agreement: there must be a proposal in Parliament and consultation with the Council of State, followed by a referendum with at least 40 percent popular participation and three-quarters approval, then ratification by Parliament, and finally assent from the president.³⁶ In contrast, another group of constitutional rules in the Ghanaian Constitution—including the rule authorizing the president to appoint the Chief of Defense Staff of the Armed Forces³⁷—may be amended by a process requiring a proposal in Parliament, consultation with the Council of State, two successive votes of two-thirds approval in Parliament, and the president's assent.³⁸ The Ghanaian Constitution, then, codifies a multilevel hierarchy that sets fundamental rights and freedoms apart from other rules.

The Nigerian Constitution likewise codifies an escalating structure of amendment that reflects a hierarchy of constitutional importance. At the higher threshold, a formal amendment requires four-fifths approval in both houses of the national legislature as well as two-thirds approval from all subnational legislatures. This threshold applies for amendments to fundamental rights, the creation of new subnational units, adjustments to territorial boundaries, and changes to the formal amendment rules themselves.³⁹ Other constitutional rules may be formally amended with a lower threshold requiring two-thirds approval in both houses of the national legislature and two-thirds approval among subnational legislatures.⁴⁰

Constitutional designers may alternatively express constitutional values by entrenching subject-matter restrictions, or what I have described in Chapter 3 as codified unamendability. Notwithstanding the naivety of a constitutional design that relies on the force of mere words to protect the constitutional text from amendment or replacement, subject-matter restrictions nonetheless reflect the considered judgment of constitutional designers to set apart some rule or rules in the constitution. Whether

this special entrenchment is spurred by a political bargain, Ulyssean self-constraint, or the expression of constitutional values, the predicate is the same: to designate a constitutional rule as special—for instance, as the German Basic Law does by entrenching the rule of human dignity against amendment.⁴¹ Constitutional designers may therefore immunize constitutional values against amendment, and in so doing distinguish these specially protected rules from other rules in order to express their central significance to the polity. Constitutional designers may also combine one of the restricted or exceptional pathways with codified unamendability, building a hierarchy of escalating thresholds of amendment difficulty that culminates at the top with the impossibility of amending an unamendable rule.

Single-Subject Amendments

Return to President Obama's call for a Twenty-Eighth Amendment to reverse the Supreme Court's decision in *Citizens United*. The amendment proposal is today unlikely to clear the high hurdles of Article V, but it has the advantage of being targeted to one subject alone. Single-subject amendments are common in the United States, unlike in Canada where recent amendment failures have been wholesale attempts at all-encompassing constitutional renewal. Yet neither the U.S. Constitution nor the Constitution of Canada requires lawmakers to amend the constitution using either single-subject or omnibus amendment bills. In both cases it is a discretionary political choice to use one or the other, not a constitution-level rule.

A single-subject amendment rule prohibits the use of omnibus bills for amendments and instead requires lawmakers to propose individual amendments that focus on one subject alone. This single-subject rule compels lawmakers to consider every amendment on its own merits, with a distinguishable vote on each proposed change. A typical single-subject rule could be codified in a constitution and require that "no amendment shall embrace more than one subject, which shall be expressed in its title." It is an open question whether a single-subject rule makes amendment easier, even though it may seem like it would.

Omnibus bills may of course expedite voting and implementation but there is a strong case that they undermine our overarching values of democracy and accountability insofar as they do not allow parliamentarians to vote for or against specific items within them. The single-subject rule is intended

partly to prevent logrolling, which occurs when legislators occupying separate interest blocks combine their own proposals as different parts of one bill in order to consolidate their separate minority votes into a working majority to pass the mega-bill whose individual parts might not have otherwise attracted majority support if voted on separately.⁴² The single-subject rule also prevents lawmakers from bundling many amendments in a package of changes unrelated to each other, and also from attaching “riders” to a popular bill in order to ensure the adoption of the rider without considered judgment on it alone but on the strength of the larger bill in which it is placed.⁴³ The single-subject rule moreover simplifies the complicated legislative process by requiring debate on individual legislative proposals on their own merits, generating in the process a more direct debate on the stakes involved.⁴⁴ The rule therefore has a democratic pedigree: it serves the public interests of accessibility to legislative business, information on what representatives do, and accountability for how representatives vote.

Nevertheless there is reason to believe that only omnibus amendment bills could ever lead to successful constitutional reform in Canada, where omnibus bills are now common for major constitutional change. For example, the idea of a “Triple E” Senate—making the Senate elected, equal, and effective—was crucial to western Canada’s support for the Charlottetown package, but this reform was not acceptable to either Ontario or Quebec without the west’s agreement to make other changes that Ontario and Quebec wanted in exchange.⁴⁵ And so this trade led to other trades, which in turn led to trades involving other parties and interests, and by the end of negotiations the Charlottetown package was full of separate compromises that could not stand on their own. Only when cobbled together in an unsteady state could the entire package have had any chance at approval.

Rather than pursuing major constitutional change on the comprehensive scale of the Meech Lake or Charlottetown Accords in Canada, it is worth considering whether success would be more realistically achievable with incremental changes constrained by a single-subject rule. In such a world, lawmakers could tailor amendment bills to address specific problems one item at a time in piecemeal fashion, and require votes on each. This alternative model of a single-subject rule for amendment in Canada would have the anticipated effect of moderating reforms from the comprehensive kind we saw in the Meech Lake and Charlottetown Accords to more targeted changes that do not involve the complex web of interconnected and sometimes unconnected reform packages that have failed in the past. And even

if the single-subject rule did not in the end yield amendments with greater success than is possible today with omnibus amendment bills, the single-subject rule would have the benefit of requiring lawmakers to vote yes or no on each discrete amendment.

The single-subject rule could moreover neutralize the familiar boogeyman that opponents of reform in Canada often invoke to end discussions on constitutional change before they even begin: the problem of “re-opening” the constitution. It is an effective deterrent to threaten that constitutional talks would put virtually everything dear to Canadians on the negotiating table, with nothing assured of surviving talks on a package of constitutional reforms. Where the choice is either the status quo or a bundle of changes unknown in their content or consequence, the prudent decision is to opt for the familiarity of present arrangements, however imperfect. The single-subject rule could obviate the fear of wholesale constitutional overhaul by taking it off the table as a possibility permissible under law.

Yet the almost-certain consequence of adopting a single-subject rule for amendment in Canada would involve the judiciary: the Supreme Court would take on an even bigger role in managing the process of constitutional reform. If amendments in Canada were governed by a single-subject rule, the Court would be called upon using the reference procedure to determine whether a given amendment proposal conforms to the requirement that it must concern only a “single subject.” We have seen state courts in the United States exercise the power of judicial review to determine what constitutes “one subject” for purposes of amendment, using standards like “germaneness” and “common purpose” to evaluate whether a package of amendments relates to a single subject.⁴⁶ We have even seen these courts apply the controversial severability doctrine to excise parts of amendment bills deemed unrelated to the central subject.⁴⁷ How would reformers in Canada react to this extraordinary judicial action? Potentially, then, the single-subject rule could have implications in constitutional practice far beyond a particular amendment itself.

Codifying Procedures for Amendment and Dismemberment

We have so far encountered formal amendment pathways for initiation, proposal, and ratification. We have also seen that amendments may be

limited in the scope of their subject. Another type of distinction that formal amendment rules can both create and regulate returns us to the distinction between amendment and dismemberment.⁴⁸ The standard design of the rules of formal change in the world's constitutions today does not codify the difference between amendment and dismemberment. The overwhelming majority of constitutions define the rules of change exclusively with regard to amendment and fail to codify rules for transforming rights, structure, or identity without breaking legal continuity. In the standard design, making a lawful change of the larger magnitude requires reformers to invest time and resources—as well as to incur the nontrivial risk of failure—to make a new constitution, and as a consequence to break the legal continuity that is invaluable for stability in a constitutional order.

The problem with the standard design is that it encourages reformers to make transformative constitutional changes using the simple procedures of constitutional amendment—procedures that do not require the deep popular support that change on a transformative scale ought to have. The standard design generally codifies one procedure to modify anything in the constitution, from small aesthetic changes to more dramatic ones that shift the locus of authority, diminish or enhance a right or liberty, or reconstruct the infrastructure of government. In other words, the standard design does not vary the procedures of change according to the content of the change itself. This standard design is shortsighted in treating all changes the same way.

Consider the Republic of Georgia. Its constitution has recently undergone an extraordinary transformation. In a series of constitutional changes passed all at once, Parliament altered the constitution from top to bottom, making it virtually unrecognizable when compared to its previous form.⁴⁹ Georgian Dream, the governing party, passed these changes on the strength of its supermajority control of Parliament using the same procedures that would have been required to make minor adjustments to the constitution. Georgian Dream's supermajority control of Parliament left no doubt that the package of reforms would pass.

Georgian Dream has written protections for itself into the constitution. The party's constitutional changes impose restrictions on the rights of its political opposition, most notably by banning electoral blocs.⁵⁰ The reforms consolidate Georgian Dream's powers by abolishing the existing semi-presidential system that separates powers and encourages bipartisanship.⁵¹ In its place, the reforms create a pure parliamentary system that amplifies

the power of the governing majority and gives it free rein to do virtually anything it wants.⁵² These constitutional changes also give Georgian Dream the power to stack the judiciary in its favor; now judges of the Supreme Court are selected by a simple parliamentary vote.⁵³ Georgian Dream's reforms also bring new social and political values into the constitution. They define Georgia as a "social state,"⁵⁴ place restrictions on private property,⁵⁵ and limit marriage to the union of one man and one woman.⁵⁶

This major reform is a new constitution masquerading as a constitutional amendment. Georgian Dream has effectively rewritten the entire constitution without building the popular consent necessary to give legitimacy to a set of reforms so significant that they may as well have been codified in a new constitution. This historic constitutional reform should not have been passed with an easy legislative vote that Georgian Dream could dominate with no risk of real opposition. An extraordinary constitutional transformation on this scale should have been passed with more involved procedures of change and popular legitimation.

No constitutional change should ever be beyond the power of lawmakers and the people. The dismemberments that Georgian Dream has codified into the constitution should not have been barred by the constitution. Nor should Georgian Dream have had to launch a new constitution-making process to make these changes and, as a consequence, to risk the instability and failure involved in the writing of a new constitution. But nor should Georgian Dream have made these dismemberments using the simple procedures of constitutional amendment. As dismemberments, these transformative changes demand a higher level of direct or mediated popular consent since their effect is to unmake the constitution—here, specifically, both its fundamental rights and its basic constitutional structure. All changes should be possible without breaking legal continuity but not without gathering a higher-than-ordinary quantum of agreement from the peoples and institutions needed to legitimate transformative changes.

It is no secret what drove reformers in Georgian Dream to smuggle transformative changes through easy constitution-changing procedures: reformers understandably sought to avoid the risk of failure that attends the creation of a new constitution. Constitution-making is far from easy, and it occurs often in conditions that Jon Elster views as "likely to work against good constitution-making."⁵⁷

The current debate in the United States about convening a constitutional convention to write a new constitution illustrates both the real and

perceived risks in constitution-making.⁵⁸ Many scholars agree with Sanford Levinson that the constitution is broken,⁵⁹ but most have so far resisted his call to action for a constitutional convention to draft a new constitution out of fear of a “runaway convention,”⁶⁰ the concern being that the convention process cannot be regulated by law and that anything is possible when reformers step outside of the constitution to remake it. The reality, however, is that the content of constitutions is “sticky,” as 80 percent of a constitution generally survives after its rewriting.⁶¹ This suggests that a new U.S. Constitution could remain much like what it is today.

One alternative in constitutional design is to make both constitutional amendment and constitutional dismemberment possible while maintaining legal continuity. The rules of change can be structured to permit changes big and small to occur within the same regime without requiring reformers to step outside of the constitution in order to fix a problem.

Some constitutions make this distinction between amendment and dismemberment explicit, and accordingly codify procedures for amendment that differ from those that must be used for dismemberment.⁶² For example, the Swiss Constitution distinguishes between “total” and “partial” revision, the former referring conceptually to dismemberment and the latter to amendment: “The Federal Constitution may at any time be subjected to a total or a partial revision.”⁶³ Total revision “may be proposed by the People or by one of the Chambers, or may be decreed by the Federal Parliament,”⁶⁴ but “[t]he mandatory provisions of international law may not be violated.”⁶⁵ In contrast, partial revision “may be requested by the People, or be decreed by the Federal Parliament,”⁶⁶ but “[a] partial revision must respect the principle of the unity of subject matter; it may not violate the mandatory provisions of international law.”⁶⁷ The Swiss Constitution establishes a further restriction on partial revision: “A popular initiative for partial revision must, moreover, respect the principle of the unity of form.”⁶⁸ This design is consistent with the use of amendment for only narrow changes: international law is the only textual restriction on total revision but, in contrast, the constitution constrains partial revision in many more ways, namely according to subject matter, unity of form, and international law.

Similarly, the Costa Rican Constitution distinguishes between a “partial amendment” and a “general amendment.” The constitution specifies that “the Legislative Assembly may partially amend this Constitution complying strictly with the following provisions,” and goes on to list eight requirements for making a partial amendment, including rules for initiation, required

voting thresholds, as well as quorum requirements and time limits.⁶⁹ The Costa Rican Constitution also outlines a special procedure for making a “general amendment,” a change that goes further than merely fine-tuning the text: “A general amendment of this Constitution can only be made by a Constituent Assembly called for the purpose. A law calling such Assembly shall be passed by a vote of no less than two thirds of the total membership of the Legislative Assembly and does not require the approval of the Executive Branch.”⁷⁰ This amendment design’s strict requirements for partial amendment is consistent with the limited use of amendment, as opposed to the more transformative changes possible with dismemberment, which in Costa Rica or Switzerland may be authorized only by a special body, respectively a Constituent Assembly or the people.

Codifying procedures for both amendment and dismemberment is not without its challenges. As Victor Ferreres Comella has asked with regard to the Spanish Constitution—which codifies procedures for both amendment and dismemberment⁷¹—how are reformers to know when they must follow one procedure instead of another in the event of ambiguity in the text?⁷² He raises the question in terms of the quantity and quality of constitutional changes: “Is it a question of numbers—how many provisions are to be modified? Is it a question of the qualitative importance of the matters under consideration?”⁷³ This is potentially a serious flaw in constitutions that codify procedures for amendment and dismemberment.

The problem of ambiguity can be resolved with clear rules specifying which procedure applies to particular parts of the constitution. As Ferreres Comella himself acknowledges, the Spanish Constitution was drafted without great care, and today exposes many blunders that could have been avoided with better drafting and deliberation about how to reflect its internal hierarchy of constitutional importance in the country’s rules of change. For example, rather than entrenching only Spain’s identity as a constitutional monarchy under the threshold for total revision, the constitution entrenches the entire slate of rules concerning the Crown under that high threshold, meaning that even minor changes which would retain the Crown and the country’s constitutional identity could not be made using the codified rules of partial revision and must instead be made using the codified rules of total revision.⁷⁴ Spain is in some ways, then, a useful example for constitutional designers of what to avoid when codifying procedures jointly for constitutional amendment and dismemberment.

The variable degree of difficulty evident in national constitutions that codify procedures for both amendment and dismemberment maps similarly onto American state constitutions, where amendment procedures are commonly not only different⁷⁵ but also usually easier to satisfy than the more involved dismemberment procedures for larger-scale changes.⁷⁶ Nearly half of American state constitutions formally codify the distinction between amendment and dismemberment.⁷⁷ Amendment and dismemberment in the American state tradition are generally understood as alternative methods of constitutional change,⁷⁸ the former authorizing piecemeal change, for instance to one rule or a set of related rules, and the latter authorizing comprehensive alterations to more than one rule or subject, or indeed the adoption of a new text altogether.⁷⁹

In the course of constitutional interpretation, American state supreme courts have elaborated the distinction between amendment and dismemberment.⁸⁰ The Supreme Court of California, for example, has defined the parameters of amendment and dismemberment, both addressed in the California Constitution. An amendment, the court explained, is “such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.”⁸¹ A dismemberment, on the other hand, is a “far reaching change in the nature and operation of our governmental structure”⁸² or that “substantially alter[s] the basic governmental pathway set forth in our Constitution.”⁸³ The California Constitution locates the power of amendment in both the general electorate and the legislature, the former via popular initiative and the latter by two-thirds vote in each chamber followed by ratification by referendum.⁸⁴ The power of dismemberment, however, resides with a constitutional convention, whose dismemberment proposals must ultimately be ratified by the general electorate in a referendum in order to become valid.⁸⁵ This model departs from many state constitutions, where the power of amendment is located in the legislature alone while the power of dismemberment belongs to constitutional conventions.⁸⁶ But the important point is the distinction between amendment and dismemberment, and the differences in the procedures required to make one change or another.

There is a variation on this model worth noting, though it is a relatively rare exception in modern constitutional design. The Ecuadorian Constitution codifies three levels of formal constitutional alteration, with an intermediate level of change between amendment and replacement.⁸⁷ The constitution recognizes the possibility of amendment, partial amendment,

and total replacement, where amendment authorizes alterations but not to the constitution's structure, rights, or the formal amendment procedure;⁸⁸ partial amendment authorizes alterations, though not to rights or to the formal amendment procedure;⁸⁹ and full replacement is unfettered if done via Constituent Assembly.⁹⁰

Notwithstanding a few exceptions at the national and subnational levels around the world, it appears that codified constitutions generally leave unstated the distinction between amendment and dismemberment, neither recognizing nor implying that amendment and dismemberment entail different consequences and outcomes. The standard democratic design instead defines formal alteration exclusively with regard to amendment. For constitutional designers interested in preserving legal continuity, the best practice is to codify procedures for both amendment and dismemberment. This suggested design for formal alteration properly attends to both the content and process of constitutional change.

Democracy and Unamendability

Many constitutions today feature a design choice that seeks categorically to block the path to constitutional change: codified unamendability, which was the subject of Chapter 4. Unamendability is deeply problematic for democratic constitutionalism. Unamendability undermines the basic promise of democratic constitutionalism by limiting the universe of constitutional possibilities open to those whom the constitution governs. It withholds from the people and their representatives more than a mere procedural right to amend the constitution; it hijacks their most basic of all democratic rights. Where a constitution denies the power of amendment and the fundamental right of self-definition, a democratic constitution cannot be what it is intended to be: a continuing autobiography of peoples, a project of discernment, and an evolving self-portrait.

An Inherent Right

Amendment is more than a structural feature of constitutions. It is a fundamental right that inheres in the nature of a constitution. The right to amend a constitution is part of a larger bundle of democratic rights,

including rights to informed citizenship and deliberative procedures, adequate and equal opportunity to participate in public debate, as well as the right to effective representation.⁹¹ Unamendability undermines each of these. It disables public discourse on the unamendable matter, dilutes the vote of present and future generations as compared to the entrenching generation, negates informed citizenship and devalues deliberation, and denies effective representation to the present generation. Unamendability furthermore presupposes perfection in the design and interpretation of the constitutional text,⁹² and stifles democratic innovation and the collective learning that may persuade present and future generations of the desirability of departing from an absolutely entrenched constitutional rule chosen long ago.⁹³ Unamendability also has an additional negative practical consequence: it denies political actors and the people the power to check judicial interpretations of the constitution's formal rules and informal norms.⁹⁴

The two failures of unamendability are therefore its uncompromising orientation to the past and its restrictions on the freedom of democratic expression. In neglecting the importance of the present political process as a basic protection for the exercise of democratic self-government, unamendability raises the problematic possibility of a disjunction between the unamendable founding values in the constitutional text and the actual values that may later emerge to define the polity.

The force of constitutionalism should derive from the promise that the social contract is to remain a living charter, one whose terms are neither static nor unreflective of the contemporary views of the polity but rather open, dynamic, receptive to new influences, and also adaptable to modern social and political contexts. Unamendability shuts this door.

Constitution as an Action

Historically, the codification of modern constitutions and the power of constitutional amendment have rested on the theory of popular sovereignty, whose fundamental teaching is that the ultimate source of constitutional legitimacy is the consent of the governed. This poses a difficult problem for a constitution that is designed to be unamendable: If the people have no power to update their constitution to reflect their contemporary values, can we call the rules that govern them a constitution?

We can think of a constitution as both a verb and a noun. It can of course be understood as a document, a thing that outlines the structures of government, defines the powers of public institutions, and codifies rights. But it is also an action, a continuing process of self-definition and redefinition, one that invites the people who are to be governed by it to both shape the rules that bind them and to reshape them as might be required by time, experience, and evolving values. The idea of a constitution as an action derives from the Lockean consent theory of legitimacy, which rests on the people's acts of express and tacit consent to validate their government.⁹⁵

The strongest resistance to unamendability is rooted in the powerful idea that "constitution" is a verbal noun that reflects "the action or activity of constituting."⁹⁶ In this sense, constitution is never complete and no settlement is ever final. In other words, a constitution is ever in constitution. The people remain in conversation with each other, seeking always to improve on their present arrangements but knowing that the task, even at its best, is unending. The continuing conversation around the constitution and its contestability are what gives the many peoples living under any constitution validation as participants in the project of constitution and reconstitution, and also what breathes legitimacy into the codified and uncoded agreements that make a constitution central to the life of a polity.

On this account of a constitution as an action, an unamendable constitution is not only a paradox but it is also unconstitutional. Denying the people's power to constitute and reconstitute themselves makes the thing that is said to bind the people unlike what a constitution should be. Of course legitimacy need not be rooted in popular will; it may instead derive from a less procedural and a more substantive theory of democratic constitutionalism, one that elevates a moral reading of constitutional commitments over its participatory dimensions.⁹⁷ The tension between process and content is apparent in the case of a codified unamendable rule: the text privileges the content of the entrenched rule over the capacity to change it, even if a supermajority wishes to abolish or refine its text. This tension exists just as well for constitutions that are constructively unamendable because the consequence is the same as codified unamendability: the text remains unchangeable.

But there is a difference between a constitution or a constitutional rule that is codified as unamendable and one that is constructively unamendable: the latter rests on stronger democratic foundations. The

cause of the Constitution of Canada's constructive unamendability for all but its least important parts is the political climate that prevents the formation of the political consensus required to make an amendment. As a federal state that must negotiate the differences among multiple communities and identities, and indeed among multiple nations,⁹⁸ Canada has been said to stand "at a crossroads" that will prevent the population as a whole from constituting itself as one nation unless a "certain national consciousness" emerges somehow to bind together individuals with dissimilar ethnic, linguistic, regional, and other identities.⁹⁹ These divisions are what led to the striking failure of recent wholesale amendment efforts in 1990 and 1992.

And yet it is in the disharmony of Canadian constitutionalism that we can locate its democratic foundations. The difficulty of political agreement is what protects the constitution. No simple majority can transform the terms of the federal bargain, nor even may a supermajority. Bargain-transforming changes are instead possible only with the approval and legitimation of a particular configuration of political consensus that cuts across the many nations that constitute Canada. Major constitutional changes require agreement not only among parliamentarians but also among a substantial number of legislators in provincial assemblies across the regions of the country. But there is more than this factor—the difficulty of assembling the required parliamentary and provincial agreement—that has produced the constructive unamendability of the Canadian Constitution. There also exist other amendment rules outside the constitutional text.¹⁰⁰ Some provincial laws now require legislators to consult the people in a local referendum before ratifying an amendment proposal. Canada's territories arguably must also be consulted on these amendments as well, further expanding the relevant communities in constitutional change. Reformers must accordingly now contend with new expectations of popular participation that confer upon previously excluded segments of the population an important voice in any future process of constitutional renewal. We could characterize these factors as restrictions on the power of constitutional amendment, and indeed this has been their effect. Yet in a much deeper way, these and other factors that render the Constitution of Canada constructively unamendable could be said to have the salutary consequence of protecting the constitution from changes without the assurance that all of Canada's voices have been heard.

A Democratic Requirement of Unamendability?

The democratic objection to unamendability is strong but it leaves open the question whether there are any circumstances in which unamendability may be an essential requirement of democracy. Consider the U.S. Constitution. Although no codified rule in the constitution today remains unamendable nor has the Supreme Court interpreted the constitution as implicitly requiring any rule or norm to be unamendable, unamendability may nonetheless be a condition precedent to democracy in the United States. Indeed one could argue that the democratic roots of the U.S. Constitution require some form of unamendability, however modest, if the constitution, which is anchored in the concept of popular sovereignty, is to remain internally coherent on its own terms. Perhaps the First Amendment's protections for the exercise of democratic rights should be deemed unamendable as a necessary corollary of the constitution's promise of robust democracy?

Scholars have argued that certain features of the U.S. Constitution should be treated as unamendable even though neither the constitution's text nor its interpretation makes anything unamendable. For example, Walter Murphy has written that human dignity, though it is mentioned nowhere in the constitutional text, is an unamendable constitutional value.¹⁰¹ Bruce Ackerman has proposed that the entire Bill of Rights should be made unamendable.¹⁰² Others have contended that the Eighth Amendment and natural rights should be regarded as unamendable despite there being no rule against their formal amendment in the constitution.¹⁰³ Still others have suggested that religious liberty and the Second Amendment should be treated as implicitly unamendable even though the U.S. Constitution does not designate either, or anything else, as expressly unamendable.¹⁰⁴ It is quite clear that scholars do not agree on precisely what should be unamendable in the United States, if indeed anything should be so designated.

The contestability of fundamental values derives from reasonable disagreement about the core features of the U.S. Constitution. The relative importance of constitutional norms is debatable and so is the basic identity of the polity in the absence of any preemptory textual codification of a hierarchy according to which we can reliably prioritize one norm over another.¹⁰⁵ Melissa Schwartzberg is therefore correct to respond to the inescapable scholarly disagreement on the relative importance of fundamental values that "[e]fforts at restricting the boundaries of constitutional amendment are bound to be challengeable, and reasonable people are likely

to disagree about what constitutes an unalterable principle.”¹⁰⁶ It is a feature not a flaw of the constitution that its textual indeterminacy privileges no particular view because this in turn preserves what Heather Gerken describes as “the ongoing contestability of constitutional law.”¹⁰⁷

There is a deep structural reason why the U.S. Constitution makes nothing unamendable. The intricate design of the separation of powers places significant institutional and political barriers along the path to a successful amendment. Quite deliberately, this makes it difficult to achieve institutional consolidation behind an amendment proposal among the various lawmakers across the national and subnational branches of government.¹⁰⁸ This uncompromising separation of powers and parties mitigates against the peril of parliamentary majoritarianism,¹⁰⁹ where the governing majority can generally do what it pleases. In the American model of presidentialism, passing an amendment requires an extraordinary convergence of preferences. The difficulty of achieving this consolidation makes an amendment worthy of deference when it is achieved. (The rigid separation of powers in the United States therefore mitigates the concern that animated the rise of the basic structure doctrine in India, where an amendment may be achieved, with few exceptions, by a parliamentary majority alone.) Successfully navigating the labyrinthine amendment process in the United States leads to a virtually unassailable sociological legitimacy.

It is worth asking why, given the sacredness of the constitution¹¹⁰—a document modeled after a “political bible”¹¹¹—nothing in it is shielded from the kinds of alterations that could change its basic structure and content. We can understand the choice to leave the constitutional text open to the infinite possibilities of amendment as a way of ensuring its flexibility and endurance.¹¹² In his farewell presidential address, George Washington addressed the interrelationship between the constitution’s sacredness and its susceptibility to amendment. “The basis of our political systems,” he emphasized, “is the right of the people to make and to alter their Constitutions of Government.”¹¹³ But, he added, until the constitution is duly amended, it “is sacredly obligatory upon all.”¹¹⁴ The message here is plain but powerful: whether the choices the people make are good or bad, their choices demand fidelity until the people again change their view. It is not the actual choice—yea or nay, one or the other—that matters, however. What matters is the very act of choosing and the way the choice is reached. The constitution makes no judgment on whether a choice is politically right

or wrong; it assesses only whether the choice conforms to the legal process the constitutional text requires for it to have been made at all. The Supreme Court confirmed this essential fact of the constitution in a much earlier time, observing of the Importation and Migration Clause, Census-Based Taxation Clause, and the Equal Senate Suffrage Clause that “right or wrong politically, no one can deny that the constitution is supreme.”¹¹⁵ If choices like those are acceptable, we can conclude only that rather than privileging substantive outcomes, the constitution hoists procedural rules above all else.¹¹⁶

Perhaps, then, the most appropriate way to frame the concept of popular choice in the United States is to understand that it reflects the procedural value of outcome neutrality.¹¹⁷ Under the U.S. Constitution, no end supported by popular consent is foreclosed because legitimacy is defined by *how* not *what* the people choose.¹¹⁸ If the required number of actors expresses its will according to the rules of Article V, the constitutional culture of self-government in the United States dictates that its will be done. That is both the origin and the continuing source of the legitimacy of the constitution. Indeed, the predicate of Article V is that legitimacy derives from the act of successfully assembling the supermajorities needed to amend the text. The overwhelming aggregation of political and popular will need to amend the constitution makes the very fact of national and subnational approval the reason why changes to the constitutional text are accepted as valid.¹¹⁹ It is not the agreement itself but more specifically the difficulty of securing that agreement that gives legitimacy to the resulting amendment.¹²⁰

The First Amendment’s outcome-neutrality and robust protections for the exercise of democracy double as guarantors of popular choice. This feature is indispensable for a constitution that makes no unalterable precommitment to substantive values. The paradox of the U.S. Constitution, then, is that in order for it to cohere internally as a charter that is freely amendable as a reflection of the prevailing views of political actors and the people—whatever those views may be—it may be necessary to interpret the constitution as implicitly making the First Amendment’s democratic rights formally unamendable. Here the exception to the general rule against unamendability in the United States presents itself: the First Amendment’s democratic rights must perhaps themselves be unamendable in order to preserve the free amendability of the U.S. Constitution.

Alternatives to Codified Unamendability

What often motivates constitutional designers to codify unamendable rules is the conviction that certain rules are more important than others. Their use of formal unamendability establishes a hierarchy of constitutional rank, the most significant rules being shielded from amendment altogether. But there are alternatives to codified unamendability that offer its expressive benefits without its democratic burdens. Rather than elevating a constitutional rule beyond the reach of the amendment process, constitutional designers could take another approach that achieves functionally the same result but with a different form: codifying an escalating structure of restricted amendment pathways to make some constitutional rules harder to amend than others yet without insulating any of them from formal change.

Two positive benefits flow from relying on an escalating structure in lieu of codified unamendability. For one, an escalating structure of amendment achieves the same expressive function as unamendability, identifying for all to see what is thought to be most integral in the polity. Second, the escalating design need not limit itself to two levels of amendment difficulty. The escalating structure can incorporate several degrees of amendment difficulty—as many as designers wish to codify for distinguishing among different classes of rules. We might imagine, for example, a hypothetical federal state designating four thresholds of amendment difficulty, each applicable to a different set of constitutional rules. The lowest threshold—for instance two-thirds agreement of each house in the national legislature—could apply to the least important parts of the constitution, including those that designers anticipate might later need revision. The second-lowest threshold could apply to more important rules and require a more exacting threshold for change, perhaps two-thirds agreement in the national legislature plus majority agreement among the subnational states. The next-highest threshold could apply to very important parts of the constitution and require two-thirds approval of each national chamber and three-quarters of the subnational legislatures. The highest threshold could apply to the essential features of the constitution and accordingly impose a standard that was even more difficult to satisfy: three-quarters approval in each house of the national legislature plus three-quarters of the subnational legislatures along with majority approval of the voting eligible population in the country. This escalating structure of formal amendment

gives constitutional designers the sweet without the sour, offering them the expressive benefits of unamendability while not extinguishing the power of amendment.

If, however, constitutional designers ultimately decide to codify formally unamendable rules, they would do well to avoid the design flaw that we see in virtually all examples of codified unamendability. Consider the French Constitution's unamendable rule: "The Republican form of government shall not be the object of any amendment."¹²¹ The design flaw is evident in its susceptibility to double amendment, leaving open the possibility of amending this rule first by removing the prohibition on changes to republicanism and then transforming the French republic into a monarchy. To correct the design flaw evident in this French amendment rule and others like it around the world, constitutional designers should make the amendment rule itself unamendable. In France, the revised text would read as follows: "The Republican form of government shall not be the object of any amendment. Any alteration to this Article shall be inadmissible." This change comes at little additional political cost and only minimally changes the text, but it is an essential improvement to achieve the objective of making a constitutional rule formally unamendable.

Time and Change

We cannot fully understand how constitutions change without considering how time is incorporated into the design of amendment rules. Constitutions sometimes expressly require reformers to adhere to certain specifications as to the timing of various steps in the amendment process, whether at the initiation, proposal, or ratification stages, or indeed in all of these steps. For example, amendment rules sometimes establish deliberation floors or ceilings to compel reflection on an amendment proposal only during a defined period of time. Amendment rules sometimes also create safe harbor rules that prohibit constitutional actors from proposing amendments when certain events occur. It will become evident that the use of time in amendment design exposes trade-offs between the risk of political brinkmanship and the value of contemporaneity between proposal and ratification.

Safe Harbors

There are two major forms of temporal limitations in constitutional amendment: safe harbors and deliberation requirements. A safe harbor creates an outright prohibition on constitutional amendment during a specified period of time. One of the earliest safe harbors appeared in the first French Constitution, which disallowed amendments to the new constitution for the first two terms of the national legislature.¹²² Safe harbors are common in five different periods of time: (1) states of emergency; (2) periods of succession or regency; (3) the interval following a failed amendment; (4) the interval following a successful amendment; and (5) the period immediately following the adoption of a new constitution. Each of these forms of safe harbors disables the formal amendment process during specified periods of time.

Consider a safe harbor during a state of emergency. In the Spanish Constitution, “[t]he process of constitutional amendment may not be initiated in time of war or under any of the states considered in section 116,”¹²³ a reference to states of “alarm, emergency and siege (martial law).”¹²⁴ Constitutions also codify safe harbors in connection with succession or where a ruler is unable to lead. According to the Constitution of Belgium, for example, “[d]uring a regency, no change can be made in the Constitution with respect to the constitutional powers of the King and Articles 85 to 88, 91 to 95, 106 and 197 of the Constitution.”¹²⁵ Likewise, under the Constitution of Luxembourg, “[d]uring a regency, no change can be made to the Constitution concerning the constitutional prerogatives of the Grand Duke, his status as well as the order of succession.”¹²⁶

Safe harbors sometimes also prohibit amendment in the immediate aftermath of a failed or successful amendment. In Estonia, “[a]n amendment to the Constitution regarding the same issue shall not be initiated within one year after the rejection of a corresponding bill by a referendum or by the Riigikogu,”¹²⁷ which is the unicameral legislature authorized to amend the constitution in collaboration with other institutions.¹²⁸ In the Greek Constitution, “revision of the Constitution is not permitted before the lapse of five years from the completion of a previous revision.”¹²⁹ Albania imposes a similar ban on repeat amendments, though it distinguishes between temporal limitations for amendments rejected by parliamentary vote and by referendum.¹³⁰

The Cape Verdean Constitution illustrates the fifth form of safe harbor: a ban on amendment after the adoption of a new constitution: “This Constitution may be revised, in whole or in part, by the National Assembly after five years from the date of its promulgation.”¹³¹ Yet the constitution also creates an override procedure authorizing an extraordinary supermajority of the National Assembly to bypass this safe harbor.¹³² An escape hatch like the one we see in Cape Verde is not unique. In Portugal, for instance, an extraordinary supermajority is authorized for exceptional reasons to initiate an amendment despite a safe harbor prohibiting it.¹³³

Deliberation Requirements

A deliberation requirement compels lawmakers to consider an amendment proposal within a specified duration of time. This period of time may be either a floor or a ceiling, the former referring to a minimum amount of time an amendment proposal must remain open to deliberation prior to its ratification, and the latter to the maximum amount of time lawmakers and the public may deliberate on an amendment proposal before a ratification vote must be held.

Consider the Italian Constitution. It creates a deliberation floor requiring at least three months between legislative debates on an amendment proposal: “Laws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months, and shall be approved by an absolute majority of the members of each House in the second voting.”¹³⁴ Similarly, the South Korean Constitution codifies a deliberation floor of its own. It requires the president to give the voting public a minimum amount of time to evaluate an amendment: “Proposed amendments to the Constitution shall be put before the public by the President for twenty days or more.”¹³⁵

In contrast, the Costa Rican Constitution codifies a deliberation ceiling. The Legislative Assembly must review the amendment proposal “three times at intervals of six days, to decide if it is admitted or not for discussion.”¹³⁶ The Australian Constitution merges both a deliberation floor and ceiling into its requirements for ratifying an amendment: “The proposed law for the alteration [of the Constitution] must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law

shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.”¹³⁷

There is a third variety of deliberation requirement: the model of intervening elections. This model of constitutional change combines time with the convening of representative institutions by requiring successive parliaments to consent to an amendment, one voting prior to its dissolution and the other voting after an election. The same parliament is prohibited from both proposing and ratifying a formal amendment without an intervening national election to reconstitute the parliament between each of these steps. This model is prominent in Scandinavia, where Denmark, Norway, and Sweden each structure their amendment rules in this way.¹³⁸

Inter-Generational Ratification

Both deliberation floors and ceilings structure how reformers and the public arrive at the consensus required to legitimate a constitutional amendment. But each design is anchored in a different perspective on the nature and form of the political agreement that legitimizes a constitutional amendment and each privileges different values in the formation of constitutional consensus.

Consider two competing approaches to the codification of deliberation floors and ceilings. The American model, which imposes neither a deliberation floor nor a ceiling, authorizes the inter-generational ratification of a constitutional amendment. Inter-generational ratification fragments the amendment power across time and among persons in different eras. In contrast, the Canadian model imposes in some circumstances both a deliberation floor and a ceiling. It therefore makes constitutional amendment conditional on intra-generational ratification and consolidates the amendment power within a defined period of time. Each model reveals complications, some more problematic than others.

The text of the original U.S. Constitution is silent on when amendment proposals must be ratified. Sometimes, however, Congress has imposed a ratification deadline on amendment proposals, an option the constitution leaves open by its very silence. Historically, the average time span from proposal to ratification has been under two years and three months for twenty-four of the twenty-seven amendments to the constitution, but one amendment proposal took over two hundred years to ratify.¹³⁹ The

constitution's silence has with good reason raised questions about how long a state may take to ratify a proposal.

The ratification of the Twenty-Seventh Amendment in 1992 was possible only because the constitution did not require lawmakers to deliberate and vote within a circumscribed period of time. James Madison initially proposed the amendment in the First Congress. Congress approved it and transmitted it to the states in 1789. Six states had ratified it by 1792, and a seventh state ratified it in 1873.¹⁴⁰ Yet it was not until 1978 that another state ratified the amendment, which subsequently led another thirty states to jump aboard in the intervening fourteen years.¹⁴¹ In 1992, Michigan became the thirty-eighth state to ratify the amendment, reaching the three-fourths threshold required for ratification.¹⁴² Despite having taken over two hundred years to ratify, Congress saw no constitutional infirmity in the amendment,¹⁴³ the Department of Justice issued a memorandum defending its constitutional soundness,¹⁴⁴ and a federal court refused to hear a challenge to it.¹⁴⁵ Now codified in the constitution, the amendment requires that “[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.”¹⁴⁶

The amendment rules in Article V do not prohibit Congress from imposing a time limit on states to ratify an amendment proposal.¹⁴⁷ But it was not until the Eighteenth Amendment that Congress first imposed a ratification deadline.¹⁴⁸ The proposal stated that “this article shall become inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States as provided in the Constitution, within seven years from the date of the submission hereof to the State by the Congress.”¹⁴⁹ Similar language has appeared in all amendment proposals or authorizing resolutions since the Twentieth Amendment.¹⁵⁰

Today there are four long-standing amendment proposals awaiting ratification. Each of them has been passed by both houses of Congress, transmitted to the states, and is subject to no expiration date. And each apparently remains viable as a valid amendment pending ratification by the required three-quarters of states, though one is arguably now moot. The first, approved by Congress in 1789, seeks to change the size and number of congressional districts.¹⁵¹ The second, approved by Congress in 1810, would strip American citizenship from anyone who accepts a foreign title of nobility, honor, or dispensation without congressional permission.¹⁵² The third dates to 1924 and proposes to grant Congress the power to regulate

child labor.¹⁵³ The fourth outstanding amendment proposal is the Corwin Amendment, approved by Congress and transmitted to the states in 1861.¹⁵⁴ As I explained in Chapter 2, the Civil War interrupted its ratification and ultimately led to the ratification of the Thirteenth Amendment, abolishing slavery instead of protecting it indefinitely as the Corwin Amendment had proposed to do.

The long interval in the United States between proposal and ratification raises the question whether an amendment without a ratification deadline nonetheless expires after a significant period of time. The answer from political practice is emphatically “no” in light of the Twenty-Seventh Amendment’s ratification over two hundred years after its proposal. The answer from the case law of the U.S. Supreme Court appears also to be “no”: lapse of time does not by itself negate the ratifiability of an amendment passed by Congress and transmitted to the states.¹⁵⁵ According to the Court, whether an amendment has been ratified with sufficient contemporaneity to its proposal is a judgment for Congress to make,¹⁵⁶ and Congress’s judgment is moreover a political question unreviewable by courts.¹⁵⁷ The takeaway from political practice and case law is that the U.S. Constitution authorizes inter-generational ratification: an amendment proposal may be validly ratified by a future generation whose ratifiers may not even have been alive when the amendment was first proposed.

Intra-Generational Ratification

In contrast, the general default amendment procedure in the Constitution of Canada consolidates the amendment power in the hands of present reformers within a compressed period of time: it requires intra-generational ratification and denies the possibility of inter-generational ratification. I take care here to stress the *general* amendment procedure because the Constitution Act, 1982 codifies five separate amendment procedures, each one designated for amendments to specific rules and each increasing in difficulty according to the importance of the rule to which it is assigned.¹⁵⁸ The general amendment procedure codifies both a deliberation floor and ceiling. It requires approval from both houses of Parliament and from at least two-thirds of the provinces which in the aggregate represent at least half of Canada’s total provincial population.¹⁵⁹ This general amendment procedure serves as both the default amendment procedure and a more

targeted one: it must be used to amend all rules not otherwise assigned to another amendment procedure, and it also applies to certain designated rules, for instance senatorial selection, powers, and representation.¹⁶⁰ For our purposes, the key parts of the general amendment procedure are the temporal limitations it applies to amendment ratification:

A proclamation shall not be issued [] before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.

A proclamation shall not be issued [] after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.¹⁶¹

The first part codifies a deliberation floor and the second a deliberation ceiling. Together, they generate the rule that no amendment may become official without lawmakers taking at least one year from the date of its proposal to consider it, nor may an amendment become official after three years from the same date. This is a very small window of time within which to authorize a material change to the Constitution of Canada.

There are both theoretical and actual reasons why this rule makes sense in the Canadian context. As a matter of general theory applicable elsewhere, the rationale for the three-year limit was threefold: first, “to bring closure to an amendment process that was dragging on without ever capturing the necessary support”; second, to “ensure that a forgotten resolution supporting an amendment would not later catch a government by surprise if the requisite support was gained”; and third, “to ensure a proposal was debated at a time when the circumstances surrounding its initiation were still current.”¹⁶² As a Canada-specific matter, however, the one-year rule must be read alongside the cluster of other rules that allow provinces to opt out of amendments that affect provincial powers, rights, or privileges.¹⁶³ In order to invoke this protection, a province must have a reasonable amount of time to consider whether to exercise this opt-out power. The constitution’s formal amendment rules are therefore designed to give provinces one year to evaluate whether to proceed with ratifying the amendment or to opt out from its application.¹⁶⁴

The Constitution of Canada codifies other amendment rules in connection with time. For example, the House or Senate or indeed any

legislative assembly may rescind an earlier-passed resolution of assent to a proposed amendment at any time before the amendment is proclaimed.¹⁶⁵ Newfoundland exercised this power of rescission when a change of government occurred while the Meech Lake Accord was pending in the legislative assemblies.¹⁶⁶ Another temporal amendment rule in Canada allows the House to overcome Senate inaction: an amendment requiring ratification using the regional, general, or unanimity procedure may be made without an authorizing Senate resolution if the Senate has not adopted such a resolution within 180 days of the House of Commons adopting its own authorizing resolution and if the House again adopts it after 180 days.¹⁶⁷ The constitution specifies that this 180-day period does not run while Parliament is prorogued or dissolved.¹⁶⁸

Some observers have attributed the failure of the Meech Lake Accord to the three-year deliberation ceiling.¹⁶⁹ There was some doubt at the time whether the Meech Lake Accord was indeed subject to the three-year time limit in the general amendment procedure.¹⁷⁰ The uncertainty arose from the Meech Lake amendment package itself, parts of which on their own would trigger the general amendment procedure, while others would fall under the unanimity procedure. Only the general amendment procedure requires that an amendment be ratified within three years of its initiation; the unanimity procedure does not. Yet lawmakers proposed the Meech Lake Accord as an omnibus amendment bill and subjected it to the most exacting requirements of both the general and unanimity procedures, requiring Parliament and each of the provinces to approve the bill within three years.

As Warren Newman argues, it may not have been constitutionally necessary to subject the entire Meech Lake Accord to the three-year requirement.¹⁷¹ Lawmakers could have split the package into two parts: one with amendments in relation to matters under the unanimity rule in Section 41, which does not impose a deliberation requirement; and another with amendments in relation to matters under Section 38, which does impose one. Nonetheless, Mary Dawson, the lead advisor to the Government of Canada on constitutional matters at the time of the Meech Lake Accord recently explained why the choice was made to impose the three-year time limit for ratifying the omnibus package of amendments: "The Meech Lake Accord included some amendments that called for the general procedure and others that required unanimous approval. The draft amendments were part of one interrelated package. I advised that both the three-year limitation period and the need for unanimity would apply simultaneously."¹⁷²

Lawmakers therefore chose, correctly or not, a ratification strategy reflecting the concept of *cumul*, which refers to the informal combination of requirements in two or more amendment procedures.¹⁷³

Soon after its negotiation in 1987, the Meech Lake Accord seemed on its way to ratification, with Parliament and over two-thirds of the provinces having ratified it.¹⁷⁴ But the accord began to show signs of distress in the face of opposition from lawmakers across the country.¹⁷⁵ As the deadline approached—with three provinces having yet to ratify the amendment package—Canada's first ministers gathered to negotiate a way toward ratification. They eventually arrived at an agreement: in exchange for the three premiers agreeing to put the accord to a vote before the deadline, all premiers agreed in turn to place before their legislatures a separate resolution that would address the concerns of the three holdouts.¹⁷⁶ Despite these eleventh-hour efforts, two provincial legislatures failed to ratify the accord by the deadline, leading to the defeat of the entire package.

This outcome may puzzle observers. After all, the accord had been approved by all parties in the Parliament of Canada and by eight of ten provinces representing almost 95 percent of the entire population of Canada.¹⁷⁷ The unraveling of the Meech Lake Accord cannot of course be explained by one factor alone, but the interpretation and design of Canada's amendment rules were a proximate cause. As Peter Oliver has observed, "as the last days of that three-year period elapsed and as two small provinces succeeded in blocking the way forward for the others, the amending formula came to be seen as more than just a procedure, but in fact part of the problem."¹⁷⁸

Time and Brinkmanship

These contrasting American and Canadian experiences with constitutional amendment expose the trade-offs between the risk of political brinkmanship and the value of constitutional contemporaneity when constitutional designers choose to associate temporal limitations to the ratification of an amendment proposal. The risk of political brinkmanship rises as a ratification deadline approaches. But the absence of a ratification deadline makes possible inter-generational ratification, which might undermine the political and sociological value of contemporaneity between proposal and ratification. The question whether constitutional designers should codify deliberation requirements does not yield a definitive answer as to the better

practice in constitutional design. The best answer can come only from reflection on the purpose of constitutional amendment and the values most important to the formation of constitutional consensus in a given jurisdiction. In either case, the choice to codify or reject temporal limitations is not one that would be wise to recommend for universal application. The choice must fit the unique cultural, historical, legal, political, and social specificities of a given jurisdiction, as with all matters of constitutional design. The choice moreover need not always be a zero-sum trade-off between brinkmanship and contemporaneity. We can imagine a middle path that strikes a constructive balance between both ends.

The United States has lived its own Meech Lake moment. The failure of the Equal Rights Amendment in the United States highlights the risk of political brinkmanship when a ratification deadline looms. In 1972, Congress approved an amendment proposal to formally recognize gender equality. Here is the text of the proposal Congress transmitted to the states :

Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

Article—

Section 1. Equality of rights under law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.¹⁷⁹

Congress attached a seven-year ratification deadline to this amendment proposal.¹⁸⁰ As was the case for the Meech Lake Accord, early days proved promising for the Equal Rights Amendment: within one week, seven states had ratified it; within one month, fourteen states; and within one year, thirty states—only eight states fewer than the thirty-eight required for ratification.¹⁸¹ Yet in subsequent years, only five additional states ratified the proposal, bringing the number to thirty-five.¹⁸² As the seven-year ratification

deadline approached and it seemed unlikely that three more states would ratify the amendment,¹⁸³ Congress passed a resolution extending the ratification period for just over three more years:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding any provision of House Joint Resolution 208 of the Ninety-second Congress, second session, to the contrary, the article of amendment proposed to the States in such joint resolution shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States not later than June 30, 1982.*¹⁸⁴

This congressional extension attracted significant attention at the time. Scholars debated whether Congress had the authority to extend the period of ratification, whether the rule of presentment required the president to sign the measure, and whether it was proper for Congress to change a deadline after it had already been set.¹⁸⁵ The Equal Rights Amendment ultimately failed, even with the ratification extension—although some later relied on the two-hundred-year ratification of the Twenty-Seventh Amendment to argue that the time limit had been unconstitutional all along and that the Equal Rights Amendment remained open indefinitely for states to ratify until they achieved the three-quarters mark for ratification.¹⁸⁶

In the United States, modern amendment practice has revealed a preference for a seven-year ratification deadline. It may therefore be worth asking whether the three-year deadline in Canada is too little time to ratify an important amendment.¹⁸⁷ The late Richard Simeon observed that the failure of the Meech Lake Accord “was more likely a result of the brinkmanship tactics employed than of the rule itself” and, therefore, that three years is not necessarily too short.¹⁸⁸ But perhaps the nature of the relationship between time limits and brinkmanship is altogether different—not correlative but rather causative. Perhaps rather than understanding brinkmanship as something to which lawmakers have recourse independently of and without instigation by time limits, we should consider that time limits may cause lawmakers to engage in brinkmanship when their objective is either to defeat an amendment subject to a time limit or to extract concessions on the amendment itself or on other issues, related or not. This fragmentation of power across time gives lawmakers an important weapon to fight an amendment proposal or to improve their bargaining position as

the deadline approaches and their vote increases in influence. In both the Meech Lake Accord and the Equal Rights Amendment, strategic lawmakers charted a roadmap to victory where their own interests were concerned: either to seek concessions on the amendment or on some other matter of consequence to them, or alternatively to hold out until time expired should their demands have gone unfulfilled.¹⁸⁹

This risk of political brinkmanship need not dissuade constitutional designers from codifying deliberation ceilings. Although deliberation ceilings may aggravate the possibility of amendment failure, they nonetheless offer important advantages—though whether reward outweighs risk is a judgment for constitutional designers to make with due regard to local norms. In addition to ensuring a definitive end to an amendment process, to foreclosing ghost amendments, and to focusing decision-making, deliberation ceilings concentrate the formation of constitutional consensus within a defined period of time. Where amendment rules fragment power across actors by dispersing the initiation and ratification powers, deliberation ceilings promote both contemporary and representative consensus. They promote representative consensus insofar as the ratifying actors generally differ in form and interest from the initiating actors. And deliberation ceilings moreover promote intra-generational contemporaneity between the separate approval votes for initiation and ratification. These two values—contemporaneity and representativeness—in turn combine to reinforce the sociological legitimacy of the resulting amendment.

Time and Contemporaneity

And yet inter-generational ratification may also generate sociological legitimacy. Where an amendment is ratified across generations, its success may be said to reflect the considered intertemporal judgment of the constitutional community. The strengths of inter-generational ratification echo Jed Rubenfeld's thesis on time and change. He makes the case that "written self-government does not demand that new constitutional principles be adopted whenever a majority so wills" but rather "only when a people is prepared to make a significant *temporal* commitment to them."¹⁹⁰ Rubenfeld argues that our understanding of self-government should require something more than the support of "actual people of the here and now"¹⁹¹ and be anchored in a less presentist notion of sovereignty. He suggests that we must instead

reimagine the formation and sustainability of constitutional consensus. For Rubenfeld, constitutional consensus should take shape over time; and in order to reflect the sociological legitimacy that only the people's popular will can confer, arriving at constitutional consensus cannot privilege the consent of the governed today over the consent of the governed over time. On this theory, reformers should act in the name of the people "not in governance by the present will of the governed, or in governance by the atemporal truths posited by one or another moral philosopher, but rather in a people's living out its own self-given political and legal commitments over time—apart from or even contrary to popular will at any given moment."¹⁹²

This view counsels pause in answering the question whether an amendment proposal should remain ratifiable for generations. Intra-generational ratification does not reflect the considered judgment of the constitutional community where the ratifying supermajority is fleeting and unsustainable, nor where the people and their representatives are pressed to action by special circumstances, such as a national emergency or crisis. In these circumstances, supermajority approval for an important constitutional amendment may not in fact reflect stable and representative support. This situation is precisely why many national constitutions expressly prohibit reformers from amending the constitution during periods of great insecurity, for instance in times of war or siege or succession, when passions may move lawmakers to make choices they would not otherwise make in periods of normalcy.

Inter-generational ratification may make it possible to respond to this concern, though it would not necessarily solve it. Assume an amendment rule is silent on whether an amendment must be ratified within a defined period of time, as is the case with the U.S. Constitution. This permissive amendment rule would allow an extended ratification period not unlike the two centuries it took to ratify the Twenty-Seventh Amendment. However, it would also allow instantaneous ratification that would not test the durability of the supermajorities that had expressed their support for the amendment. Constitutional designers should therefore be explicit in their design of amendment rules if they wish to force inter-generational ratification. They may, for instance, prohibit ratification prior to the expiration of a certain period of time, such as an extended deliberation floor. An inter-generational deliberation floor would be unusual: imagine a deliberation floor prohibiting lawmakers from ratifying an amendment within one generation, or twenty years after its initiation. By the time the ratification

deadline had expired, the people may have adopted an entirely new constitution altogether.¹⁹³

Instead of requiring inter-generational ratification, constitutional designers could adopt the U.S. Constitution's model of allowing it, leaving the choice up to each group of reformers in its own time.¹⁹⁴ If that is the path designers choose, other rules should be adopted alongside this open-ended amendment ratification rule. These additional rules would make it possible for both amending actors and the public to verify that the constitutional consensus behind an amendment has indeed remained stable and representative over time. We can verify the durability of the constitutional consensus behind an amendment by designing rules requiring amending actors to confirm a prior rescission or ratification where the ratification process extends across more than one generation or some other significant period. This would make it possible for generations separated by time to act in conversation rather than in isolation.

The U.S. Constitution exposes a design flaw on this point because it does not create clear rules on whether, while an amendment is pending, a state has the power to rescind a prior ratification or to ratify an amendment that it has in the past rejected. As a consequence, an amendment ratified across generations in a regime where the constitutional text imposes no ratification deadline creates a serious risk of giving the artificial appearance of considered supermajority approval or rejection for the amendment. This flawed constitutional design conceals the possibility that there might had never existed, in any single period, a durable supermajority to ratify or reject an amendment. Sanford Levinson calls the silence of the constitution on this point the "easiest example" of something to change in the design of Article V.¹⁹⁵

To avoid uncertainty, constitutional designers should be explicit about whether ratifying bodies—state legislatures, state conventions, or indeed others—possess the right to rescind a prior amendment ratification or to ratify an amendment previously rejected. But this right should apply only until constitutional actors arrive at the ratification threshold required to officially adopt a constitutional amendment.¹⁹⁶ To illustrate, where the ratification threshold in a federalist constitution requires two-thirds of subnational states to consent to the amendment proposed by the national government, it should be clear from the text of the constitution whether and how a state may negate its prior ratification of an amendment as long as the two-thirds ratification threshold has not yet been met. If the objective of designing

amendment rules in this way is to foster the kind of non-presentist sociological legitimacy that comes from inter-generational ratification, then it would not be enough simply to authorize subnational states to rescind or ratify a prior decision. It would be advisable for constitutional designers also to choose between two additional options: either to require subnational states to confirm or reject their prior decision if significant time has passed between the original amendment proposal and the final subnational ratification, or to establish a presumption that the prior decision remains valid unless the subnational state chooses to reverse it.

The first option would require constitutional designers to designate a specific period of time after which final ratification of a pending amendment would require confirmation of prior ratifications or rejections. The second option would require no specific designation of the period of time for which a prior ratification or rejection remains valid. And it would not pose challenges as to its application because there would be an understanding that the original decision on ratification remains valid until the relevant constitutional actors make an intervening decision reflecting the contrary intent, specifically to reverse either a ratification or a rescission.

Three other considerations in the design of temporal limitations merit some mention. First, constitutional designers may vary the duration of time for which a pending amendment remains valid according to the importance of the subject matter of the amendment. For matters of heightened importance, reformers could be required to deliberate for a longer period of time than they would devote to less important matters. The variability of temporal limitations within the larger structure of amendment rules is not unusual, as many constitutional democracies vary the amendment thresholds according to the amendable subject matter.¹⁹⁷ Second, temporal limitations such as deliberation ceilings and floors need not be limited exclusively to federal states like Canada and the United States; they may be used productively as well in unitary states, in both parliamentary and presidential forms of government, in republics and constitutional monarchies, and indeed in any democratic state where amendment rules are codified. Third, deliberation ceilings and floors may not in fact be *deliberative*. Establishing minimum or maximum periods of time for ratifying an amendment does not on its own ensure that the choice will be informed or even debated, nor does it encourage deliberative decision-making. Constitutional designers and their successors will need to create additional procedures to build a culture of public deliberation on amendments.

The manipulation of time in these ways is yet another important—but often overlooked—feature of constitutional amendment rules that constitutional designers should consider incorporating in how they structure their procedures of constitutional change.

Judicial Review of Constitutional Amendments

According to the dominant view in the field today, the judicial invalidation of constitutional amendments rests on democratic foundations. Yaniv Roznai offers the best exposition of this view, applying the theory of constituent power to define the relationship between constituent and constituted powers as a delegation of limited authority.¹⁹⁸ His theory is important and worth reading in all of its sophisticated detail. Here I offer only a very short summary.

Constituent power is a pre-constitutional authority that controls both how a constitution is made and also how constituted powers exercise their limited delegated authority to change the constitution in the name of the people. As Roznai explains, the constituent power—the body we consider “the people”—creates a constitution, and in turn authorizes the constituted powers—the organs of government—to act in the people’s name consistent with the constitution. These constituted powers are authorized to alter the constitution as long as any alteration to it does not undermine the constitution as built by the constituent power. The constituent power alone has the competence to change the constitution in a way that departs materially from what the old constitution has established as law. From here it is a short step to the assertion that democracy requires courts to protect the constituent power’s choice to concretize its sovereign will in higher law at the moment of constitutional creation. The power of courts to protect this agreement, the argument continues, includes the authority to invalidate constitutional changes made by constituted powers that go beyond the popularly-approved limits of the constitution. The argument concludes: the judicial act of striking down a transformative change is a justifiable intervention to safeguard the terms of the original bargain approved by the people. On this view, the doctrine of unconstitutional amendment is a triumph of democracy.

But on another understanding of constitutional change, the doctrine of unconstitutional amendment denies democratic choice to reformers and

the people. The extraordinary act of invalidating a procedurally perfect constitutional amendment is an example of what Ran Hirschl has labeled the “judicialization of mega-politics,” a now-common phrase referring to the most important matters of political significance that constitute, define, and divide polities—and that are now often adjudicated by high courts boldly intervening into the political sphere.¹⁹⁹ Courts around the world have with increasing frequency resolved matters that were once seen as strictly political, not at all legal: from banning political parties in Algeria and Turkey, to ruling on prime ministerial and presidential eligibility in Colombia and Russia, to determining the electoral outcomes in Mexico and Taiwan, to hearing disputes on fiscal policy and foreign affairs in Brazil, Israel, Peru, and the United Kingdom, to evaluating the constitutional legitimacy of the regime itself in Fiji and South Korea.²⁰⁰ Striking down amendments fits comfortably on this list for those who see in it a judicial arrogation of power at the expense of democratic self-governance.

How a Court Becomes Supreme

Reformers ordinarily possess the power to amend the constitution in order to overrule a judicial decision. The doctrine of unconstitutional constitutional amendment gives courts a trump card: the power to invalidate an amendment. Only this power of invalidation can make a court truly supreme in its jurisdiction.

The global jurisprudence on unconstitutional constitutional amendment suggests eight justifications a court may invoke to assert or exercise the power to declare an amendment unconstitutional even where the codified constitution declares no rule to be formally unamendable. These are eight justifications for invalidating an amendment that, in the view of a court, would do more than correct, elaborate, reform, or restore the constitution within its boundaries and presuppositions. Some of these justifications involve monitoring the process of constitutional amendment, others focus on evaluating the content of a constitutional amendment, and still others offer justifications rooted in uncodified rules and values to protect the constitution from attacks to its foundations. What follows is a roadmap for how courts could choose to invalidate amendments they regard as unlawful or illegitimate attempts to dismember the constitution where the constitution does not codify anything as formally unamendable.

One set of justifications is aimed at enforcing the constitution's codified procedures for formal amendment. Here there are three possible procedural violations a court could invoke to overrule an amendment.

First, an amendment could be ruled unconstitutional because it was made using the wrong procedure. As we saw in Chapters 1, 3, 4 and earlier in this chapter, some constitutions—like the Constitutions of Canada and South Africa²⁰¹—codify multiple procedures for amendment, and each procedure keyed to a specific set of rules, meaning that one procedure cannot be used to amend a rule that is expressly made amendable by another procedure. Courts could invalidate an amendment for having been passed using the wrong procedure. We can identify this first justification as a *subject-rule mismatch*.

Second, as we learned earlier in this chapter, some constitutions impose a time limit for passing a constitutional amendment. For instance, the Australian and Italian Constitutions require that an amendment must be debated for a certain period of time before a ratifying vote.²⁰² Part of the reasoning for imposing a time limit for ratification is contemporaneity: reformers and the people should deliberate on the same question under the same social and political conditions within the same period of time because only in this way can we be certain that a successful amendment has achieved the support of a contemporaneous majority of amending actors. A court could invalidate an amendment that violates time-related rules for its adoption and ratification. This second strategy enforces a *temporal limitation*.

The third procedural basis for invalidating an amendment is an *irregularity in administering the vote*. Perhaps the vote was somehow rigged or unfair, the voting machines were hacked, there was confirmed voter suppression or some other challenge that amounts to a non-trivial obstacle to casting one's vote on the amendment, whether as a legislator in a parliament, as a voter casting a ballot in a referendum, or as some other actor registering her views on the amendment. The court could peer behind the official results of the amendment to interrogate the vote itself. Faced with evidence of an irregularity, a court could in turn invalidate that amendment.

Another set of strategies for invalidating an amendment is aimed at evaluating the content of the amendment for its coherence with the existing constitution. In contrast to the three types of procedural unconstitutionality—which concern *how* an amendment is made—this content-based review involves *what* the amendment is about. Here, too, there are three possibilities for an unconstitutional amendment.

The first relates to what we might identify as the *founding principles* of a constitution. A constitutional amendment might violate an important principle deemed constitutive of the constitution itself. We can trace this idea to the German Federal Constitutional Court. In a judgment early in its existence in 1951, the Court adopted the reasoning of the Bavarian Constitutional Court:

That a constitutional provision itself may be null and void is not conceptually impossible just because it is a part of the Constitution. There are constitutional principles that are so fundamental and so much an expression of a law that has precedence even over the Constitution that they also bind the framers of the Constitution, and other constitutional provisions that do not rank so high may be null and void because they contravene these principles.²⁰³

A court could take this route, striking down an amendment for breaching one or more principles the court identifies as fundamentally rooted in the founding moment. An example in the United States might be the founding secular norm that makes it unacceptable for reformers to establish a national religion.

The second strategy under these content-based justifications for invalidating an amendment where there is no codified rule of unamendability in the constitution is to interpret the constitution as anchored in an *evolved norm* that may not have been evident at the founding, but that the judiciary has over the course of developing its jurisprudence identified as a special norm that sits at the apex of the constitutional order. In theory, a constitutional amendment to ban flag burning in the United States, for example, could be held unconstitutional for violating the norm of wide latitude for political speech, currently the most strongly protected form of speech in the Supreme Court's First Amendment case law.²⁰⁴

A third content-based strategy for striking down an unconstitutional amendment is to define a given amendment as *a new constitution in disguise*. As we discussed in Chapter 2, all constitutions have an internal architecture, and changes made to their architectural core amount to more than mere amendments. This was the theory underlying the Indian Supreme Court's idea of the "basic structure doctrine," which the court created to protect the constitution from revolutionary transformations made with recourse to the simple rules of constitutional amendment. A similar approach

could be taken to nullify a constitutional change that seeks to do considerably more than we expect of a constitutional amendment. A high court might therefore conclude that this was a new constitution masquerading as an amendment.

There is a third category of unconstitutionality, more notional than conventional, but nevertheless a source of useful judicial tools. This category contains two justifications. In the first of these two, a court could find that a constitutional amendment is unconstitutional when measured against an *unwritten constitutional norm*. Neither codified in the constitutional text nor the result of the court's jurisprudence, an unwritten constitutional norm underpins the constitutional order and allows it to operate the way it does. An example of an unwritten constitutional norm in the United States may be the unwritten rule against court packing,²⁰⁵ though recent events could eviscerate its status as an American constitutional convention. A court could enforce an unwritten constitutional norm as a rule binding on reformers when they amend the constitution. Indeed, a recent line of scholarship demonstrates that common law courts have enforced unwritten constitutional norms,²⁰⁶ contrary to the mistaken conventional view that has dominated the field for decades.

The second of these strategies involves *supra-constitutional law*. If a country is a member of an international organization governed by a charter of rules, there may also be an adjudicatory body responsible for enforcing those rules.²⁰⁷ In the case of a signatory country amending its constitution in violation of an international charter, the adjudicatory body could find the amendment in conflict and therefore incompatible with the organization's charter of rules. Amendments in Nicaragua in 2004 and Togo in 2005 were held to violate the rules of regional multinational organizations.²⁰⁸ A domestic court could also enforce these supra-constitutional rules.

Each of these strategies is possible on the level of theory. In reality, though, the particular configuration of constitutional politics in a given country could preclude their use. It is also worth noting that the doctrine of unconstitutional constitutional amendment can be useful in the defense of democracy, but it is susceptible to misapplication, just as any other judicial doctrine. It can also be a superfluous device in a court's arsenal. The doctrine is most important in countries where the constitution can be easily amended, as in India, whose constitution is in most cases amendable by a simple legislative majority. In contexts like these, courts can arguably serve as a check on bare legislative majorities that might exploit the permissive

rules of constitutional amendment to make transformative constitutional changes without sufficient deliberation or popular support. This is the strongest justification for the doctrine of unconstitutional constitutional amendment.

Alternatives to Invalidation

Yet whether democracy demands the doctrine of unconstitutional amendment of course depends on one's view of what democracy requires. Although courts in many countries around the world have either adopted or asserted the power to invalidate a constitutional amendment, courts in many others have taken the contrary view, declining to recognize the power to review amendments.²⁰⁹

For instance, in Ireland, where amendment requires ratification by referendum, the Supreme Court has taken the popular sovereigntist view that no amendment can be unconstitutional.²¹⁰ In the United States, the Supreme Court has effectively withdrawn itself from amendment controversies, classifying them as political questions to be resolved by lawmakers.²¹¹ In France, the Constitutional Council has crafted an approach that we might describe as jurisdictional self-limitation. The Council has restricted its own power on amendment questions, asserting that it lacks the jurisdiction to review constitutional amendments.²¹² The Constitutional Court of the Republic of Georgia has arrived at the same conclusion—that it cannot invalidate amendments—but it has relied on a formalist justification: it refuses to inquire into the constitutionality of amendments on the theory that once amendments become official they form part of the constitution, and the court has no authority to evaluate the constitutionality of the constitution itself.²¹³

Constitutional designers have alternatively taken a proceduralist view of the judicial role. They have sometimes codified a prohibition on courts from engaging in substantive judicial review of constitutional amendment. In Turkey, for example, the constitution restricts the Constitutional Court to reviewing amendments only for their conformity with the procedures required to propose and ratify an amendment. This prohibition is stated plainly in the codified constitution.²¹⁴

There are democratic alternatives situated between invalidating amendments on the theory of constituent power and accepting them

outright on formalist, proceduralist, or popular sovereigntist grounds. One option built on the theory of democratic dialogue has to my knowledge yet to be implemented: a court could declare an amendment incompatible with its own reading of the constitution, though the effect of its declaration would be purely advisory with no binding legal consequence. Here the judicial role would be catalytic, not obstructive, and would put judges into conversation with reformers to invite them to have a second look at the amendment. This would be a variation on the design of the United Kingdom Human Rights Act and the New Zealand Bill of Rights Act for the judicial review of statutes.

Pre-Ratification Review in Canada

There is another variation on the judicial review of amendments. Courts commonly evaluate the constitutionality of an amendment *after* the amendment has become official. Reformers have already introduced, debated, ratified, and promulgated the amendment before the court evaluates whether it is inconsistent with the constitution's content-based restrictions, in the case of substantive review, or with its process for adopting the amendment, in the case of procedural review.

Canada has taken a different path. The now-standard practice is to review both the substantive and procedural constitutionality of a constitutional amendment before it is ratified, and even before the amendment process is formally initiated. The Canadian contribution to the debate on the judicial review of constitutional amendments shines a light on the stakes involved in *when*—before or after promulgation—the court reviews the constitutionality of an amendment.

The Canadian Supreme Court has a long history of advising lawmakers through its reference jurisdiction on how and whether to amend the constitution. In current practice, lawmakers will ask the Court for its opinion on whether an amendment bill or proposal is constitutional. Although the Court has the power to decline to answer, the Court generally agrees to give guidance to lawmakers—and lawmakers typically follow the Court's advice.

In the *Patriation Reference*, the essence of the question before the Court was whether the federal government was bound by law to secure the consent of none, some, most, or all of the provinces before undertaking a major constitutional reform.²¹⁵ The Court ultimately advised by a margin of 7–2

that there was no judicially enforceable law requiring the federal government to secure the agreement of the provinces.²¹⁶ The Court also advised, by a margin of 6–3, that the federal government was bound by a legally unenforceable constitutional convention requiring it to secure substantial provincial consent before seeking to amend the constitution on a significant matter affecting federal-provincial relations.²¹⁷ The Court’s advisory opinion exercised what seems to have been binding political effect on lawmakers despite its formally advisory legal function.

In the high stakes involved in constitutional renewal at the time—especially with the continuing risk of Quebec’s secession—we might have expected the force of political will to overrun a mere advisory opinion. Then prime minister Pierre Trudeau had threatened to go over the heads of the provinces directly to the people in a national referendum that would have legitimated the new constitution as the people’s own.²¹⁸ Yet the Court’s Solomonic answer to the question whether the federal government was required to secure the consent of the provinces for this major reform compelled the federal government to drop its plan to proceed unilaterally without provincial consultation and consent,²¹⁹ and instead to proceed multilaterally in conformity with the Court’s declaration that “a substantial measure of provincial consent is required.”²²⁰

The federal government’s initial preference for a referendal route to Patriation echoed the core of its proposal for an amendment formula. Trudeau had proposed in his “People’s Package” that the constitution would be amendable in one of two ways: according to the Victoria Formula or by referendum in the face of provincial stalemate on a proposed amendment.²²¹ But ultimately the chosen path followed the Court’s advice in the *Patriation Reference*. Bruce Ackerman and Robert Charney are right that Trudeau missed an opportunity when he relented in the face of the Court’s advisory opinion.²²² Trudeau could have—and in their view should have—called a national referendum on the new constitution, both to break the stalemate among premiers and to give Canada its democratic moment—a moment that Canada, decades later, has yet to live.²²³

The prime minister’s choice at the time to take the non-referendal path to Patriation and instead to accept the Court’s advice had three important consequences for making and remaking the constitution in Canada. First, it set an important precedent that the Court would be consulted on major questions concerning constitutional reform. Second, the political choice to consult the Court using the reference procedure and to abide by the

Court's ruling entailed the collateral consequence that the Court's advice on constitutional reform would followed in all but the most extraordinary circumstances. And, third, the prime minister's choice to accept the Court's advice bolstered the legitimacy of Court as an institution properly involved in overseeing the process of constitutional amendment in Canada. When Trudeau ceded his ground, the Court grew in status and importance, both real and perceived. No major national constitutional change to Canada's Constitution involving the federal and provincial government could henceforth be made without the Court weighing in on how the change could be made if indeed it could be made at all.

In 1998, sixteen years after Patriation, lawmakers returned to the Court in another case of constitutional change in Canada. In the *Secession Reference*, lawmakers asked the Court for its advice on whether and how Quebec could leave Confederation.²²⁴ The Court constructed a legal-political framework within which lawmakers could negotiate the terms of a province's exit from Canada. With notable exceptions, lawmakers on both sides of the secession debate have found victory in the Court's judgment—evidence that lawmakers recognize, if not accept, the Court's role in giving advice on a fundamental matter of political self-understanding and constitutional change.

Another sixteen years later, in 2014, lawmakers again turned to the Court to resolve two disputes on the meaning and scope of the amendment rules in the constitution. Both the *Senate Reform Reference* and the *Supreme Court Act Reference* confirmed that lawmakers will go to the Court for answers on whether, how, and by whom the constitution may be amended—even where that amendment affects the Court's own powers.²²⁵ Both of the 2014 references locate enormous interpretive authority within the Court on future constitutional amendment in Canada. The key concepts to emerge from these references are the idea of Canada's "constitutional architecture" and the Court's "essential features," neither codified in Part V nor defined anywhere with specificity, and both to be elaborated by the Court itself in the course of its interpretation of the constitution. The lesson from these 2014 references is that political actors cannot today make an amendment that affects either of these open-textured concepts without the approval of the Supreme Court of Canada.

We can understand what the Court did in each of these periods of constitutional change since and including Patriation as directing political decisionmaking on both procedural and substantive grounds in a

pre-ratification review of constitutional change. The Court's advisory opinion in the *Patriation Reference* was a pre-ratification procedural review on the process lawmakers could lawfully and legitimately use to patriate the constitution. The Court also engaged in a form of pre-ratification substantive review because the procedure the Court suggested lawmakers should follow was dictated by the content of the constitutional changes lawmakers wished to make. Had the constitutional changes not involved federal-provincial relations as they did, the Court would not have given the same instructions on how lawmakers should proceed. The Court's pre-ratification review of the Patriation package was therefore both substantive and procedural.

The same is true of the *Secession Reference*, the *Senate Reform Reference*, and the *Supreme Court Act Reference*. In each of these, the Court was asked for advice on how lawmakers could make major changes to the constitution before the changes had been promulgated. How a province can secede from the country, how to reform the Senate, and how to change the structure of the Court—these constitutional questions were the heart of the matter in each of these three references, and for each question the Court laid out the process the constitution requires lawmakers to follow.

Pre-ratification review of constitutional amendment gives the Supreme Court of Canada considerable power. It allows the Court to achieve the same result that foreign courts achieve when they invalidate a duly-passed constitutional amendment. Yet the Canadian Court avoids having to nullify the expressed will of the people and their elected representatives. This makes it less likely that the Court will fear the consequences of defying popular will and more likely that the Court will feel liberated to review the amendment question on the merits without worrying about the fallout from undoing an amendment that has already been promulgated with the support of the people. Pre-ratification review in Canada relieves the Court of the pressure it might otherwise feel to approve a popularly supported amendment—one that has survived the veto gates in the amendment process and by the fact of its survival enjoys a considerable measure of legal and sociological legitimacy. Put another way, pre-ratification review frees the Court to do what other courts do when they invalidate an amendment, but without confronting the strongest version of the countermajoritarian critique that faces any court daring to invalidate a promulgated constitutional amendment.

We have explored in detail the many parts and pitfalls of amendment rules. From their various pathway designs to the use of single-subject amendment bills, from the choice to codify rules for both amendment and dismemberment to the use and misuse of unamendability, and from the manipulation of time to the role of courts in constitutional amendment, many options present themselves for constitutional designers faced with the task of building an amendment structure. In the concluding chapter to this book—entitled *The Rules of Law*—I chart a roadmap for designing amendment rules for a codified constitution, beginning with how to anchor the foundations of the constitution, then considering how to put into operation the pathways and specifications that are necessary for their proper functioning, and finally arriving at a critical choice among four major models of amendment codification. I also return to the themes addressed in earlier chapters, including the purposes of amendment, the differences in scales of change, and the implications of constitutional rigidity and flexibility. First, however, I turn to an essential inquiry in amendment design that has surprisingly remained both unaddressed and unasked: How do we know when and where a constitution has been amended?

6

Finding Constitutional Amendments

There was much to celebrate at the bicentennial of the Norwegian Constitution in 2014. Home to the second-oldest codified constitution in the world, Norway could take pride in having found the elusive formula for constitutional endurance. Yet every country has a past, and not all of it is worth rejoicing. In 1814, the original Norwegian Constitution banned Jews from the country and repudiated religious beliefs contrary to the established Evangelical-Lutheran faith. The constitution did not disguise its intentions. The codified text proclaimed outright that “Jesuits and Monastic orders shall not be tolerated”¹ and “Jews are furthermore excluded from the Kingdom.”² Today the Norwegian Constitution reveals no hint of the hateful language that once appeared in its text. We find instead assurances that “all inhabitants of the realm shall have the right to free exercise of their religion,” and “all religious and belief communities should be supported on equal terms.”³ There is no visible marker of any change to the constitution. The replaced text is gone, neither indicating that the constitution was changed nor indeed how, when, or where the alteration was made. We are left with an enlightened text presenting Norway to the world without the mistakes of its past. Where did the old text go?

Four Models of Codification

Constitutional designers rarely ask two questions they should: How and where will the constitution indicate that it has been amended? The *how* concerns whether to keep the superseded text or to strike it altogether, and the *where* involves whether to integrate the amendment into the original text or to codify it elsewhere. Constitutional designers commonly defer these questions to future generations until the very moment when the reality of a ratified amendment forces lawmakers to answer them.

And yet choosing how and where to codify an amendment involves more than mere aesthetics. It is ultimately a choice about how and whether a people chooses to remember its past. These choices involved in recording alterations to the constitutional text entail implications for how interpreters of constitutional meaning will read the constitution in the course of adjudication, whether the constitution will become a focal point of reference in constitutional politics, and how intensely citizens may come to venerate their constitutional text. Constitutional designers would do well to answer these two questions prior to enacting the constitution.

In this chapter, I draw from the world's constitutions to introduce four models for codifying constitutional amendments. The U.S. Constitution exhibits what I identify as an *appendative* model: amendments are appended sequentially to the end of the text. As the text of the U.S. Constitution grows longer with each amendment, its internal form remains unchanged and its existing words untouched, though an amendment will change their meaning either directly or by implication. The Indian Constitution illustrates what I describe as the *integrative* model: amendments are incorporated directly into the master text of the original constitution. Amendments integrated into the Indian Constitution rewrite the existing text. What results from the dozens of amendments to the Indian Constitution is an internal remodeling that nonetheless preserves the external form of the original construction. The appendative model therefore adds a new wing to the constitutional edifice while the integrative model often though not always renovates its existing parts. The Irish Constitution adopts the *invisible* model: the constitution does not indicate where the amendment has been codified. This invisible model shares with the integrative model the commonality of internal renovation and external preservation. The British Constitution adopts a fourth model that I describe as *disaggregative*, a form of codification characteristic of uncoded constitutions that situate their constitutive rules and principles in different sites of constitutional importance. As we will see, the disaggregative model combines features of the appendative, integrative, and invisible models. We will see also quite clearly that none of these four models of amendment codification reflects an optimal design for recording constitution-level changes.

The Appendative Model

It is no accident of history that the U.S. Constitution appends its amendments sequentially to the end of its master text. The First Congress debated whether to interweave constitutional amendments into the original text or to leave the founding document unchanged and codify amendments as an addendum to it. This question of constitutional form did not arise in the abstract. It was forced upon Congress by an amendment proposal to insert new words before “We the People,” the preambular battle cry that opens the doors to the constitution:

In the introductory paragraph of the constitution, before the words “We the people,” add “Government being intended for the benefit of the people, and the rightful establishment thereof being derived from their authority alone.”⁴

For Roger Sherman, this would have been the wrong way to codify amendments. At the time, Sherman was a member of the First Congress. He had been one of a select few to sign all three of America’s constitutive texts: the Declaration of Independence, the Articles of Confederation, and the U.S. Constitution. Sherman believed that incorporating amendments directly into the original text would threaten the integrity of the constitution, and even risk its ruin: “We ought not to interweave our propositions into the work itself, because it will be destructive of the whole fabric.”⁵ Sherman made a consequentialist argument for retaining the original text as enacted. The constitution would no longer be the same, he feared, if amendments were inserted directly into it. Preserving the constitution meant only one option: leaving its original words untouched and appending amendments to it. Otherwise, he wrote, “we might as well endeavor to mix brass, iron, and clay, as to incorporate such heterogeneous articles; the one contradictory to the other.”⁶

There was a further point of contention about how to codify amendments, and it concerned the question of authority. Did the First Congress and the ratifying states even have the right to tinker with the original text? Sherman believed they did not. He argued that incorporating amendments directly into the text would effectively replace the constitution and uproot the very foundations of authority on which the First Congress and the states themselves were based:

The constitution is the act of the people, and ought to remain entire. But the amendments will be the act of the State Governments. Again, all the authority we possess is derived from that instrument; if we mean to destroy the whole, and establish a new constitution, we remove the basis on which we mean to build.⁷

Samuel Livermore, also seated in the First Congress, agreed with Sherman on this question of authority. He warned that “if we destroy the base, the superstructure falls of course,” the base being the original text and the superstructure the Republic itself.⁸

Seen from our modern perspective, Sherman and Livermore surely exaggerated the risks involved in choosing how to codify amendments to the constitution. The Republic would not have fallen nor would the constitution have been destroyed had one or the other path been chosen. But how were they to know? They were beginning a new project of democratic self-government that had no prior national model to follow, few subnational experiments to draw from, and certainly no guarantee of success. Perhaps the First Congress should be excused, then, for erring on the side of caution to preserve the hard-won victories reflected in the original constitution.

James Madison saw things differently. He argued that amendments should be integrated into the original text. Form, he said, is rarely ever more important than substance. But the form of codification was one of those rare instances when, in his view, form should take priority because of its implications for substance. Madison believed that inserting amendments into the original text would produce clarity and make the text less susceptible to inconsistent interpretation than a constitution whose amendments were simply appended serially to the master text. There was also, for Madison, “a neatness and propriety in incorporating the amendments into the constitution itself; in that case, the system will remain uniform and entire,” making it easier to identify “those parts to which they naturally belong, than it will if they consist of separate and distinct parts.”⁹¹ Though he was attentive to form, Madison was in the end less concerned with aesthetics than with function. For him, the virtue of integration was directly related to how the meaning of the constitution would be discerned: integrating amendments into the original text of the constitution would frontload the work of harmonizing the new with the old, rather than deferring the task of harmonization largely to judicial interpretation over the course of

subsequent generations. He made this argument a focal part of his pitch to his fellow congresspersons:

We shall then be able to determine its meaning without references or comparison; whereas, if they are supplementary, its meaning can only be ascertained by a comparison of the two instruments, which will be a very considerable embarrassment. It will be difficult to ascertain to what parts of the instrument the amendments particularly refer. . . .¹⁰

History has proven Madison's first instincts right. Today it remains a challenge to reconcile the meaning of some amendments with the original constitution, whether for judges interpreting the text, presidents exercising constitutional authority according to its allocation of powers, legislators writing laws they hope will survive the scrutiny of judicial review, and citizens reading their own constitution.

Of course, amendments are neither self-executing nor self-interpreting. Someone must reconcile the new meaning with the old, and that responsibility ordinarily belongs to judges. The American practice of appending amendments therefore raises a related but distinguishable challenge: constitutional amendments in the United States have sometimes changed the meaning of earlier-passed amendments, though neither the extent of the change to the earlier rule nor even the effect of the new rule is always expressed in the text of the superseding amendment. This problem of harmonization was a central pillar of Madison's argument against the appendative approach the United States ultimately chose. It was far from a trivial concern.

Harmonization is a serious challenge in codifying amendments. But it is not an American problem alone. It will soon become clear that the problem of harmonization is not unique to countries that choose for either principled or contingent reasons to append amendments to their constitution rather than integrating them into it.

Over two centuries now since the writing and ratification of the U.S. Constitution, we know from the richness of modern constitutionalism that the American founding debate between the integrative and appendative approaches did not exhaust the many possibilities for how constitutions can codify alterations to their text. There are several models worth distinguishing, each one in use today somewhere around the world, though some are more common than others.

The Disaggregative Model

The British Constitution, just like the Constitutions of Israel and New Zealand, illustrates the disaggregative model of constitutional amendment. Changes of constitutional importance do not appear in a single codified constitutional document, nor are they necessarily always formalized in a text, for instance in the case of changes to and by constitutional convention. Constitutional amendments in Britain appear in Acts of Parliament and also in unwritten constitutional norms that govern the conduct of lawmakers and in the unspoken understandings shared by the legal and political elite about how the polity does and should operate.

The disaggregative nature of constitutional change in Britain is evident in how changes have been made to the constitution. From the Magna Carta in 1215 to the Bill of Rights in 1689 and the Act of Settlement in 1701—each of these changed the British Constitution in a material way. All are distinct and separate laws that exist tangibly detached from each other in the various spaces that combine to make the constitution what it is. The same is true of the Parliament Acts (1911–49), the Representation of the People Acts (1918), the Human Rights Act (1998), and the other parliamentary laws that are recognized as having special political status despite their creation by and vulnerability to ordinary lawmaking procedures. These formal laws are not codified in a single master text. They are codified in their own separate sites of constitutional importance, physically removed from others.

Here a contrast with the appendative model in the United States proves useful. The Twenty-First Amendment to the U.S. Constitution repealed the Eighteenth, the former eliminating the prohibition on the manufacture, sale, and transportation of alcohol that had been ordered by the latter. Both amendments changed the material meaning of the constitution and both are codified sequentially in the same constitutional text. In Britain, however, a change of central importance to the meaning of the constitution is codified differently: the European Union (Withdrawal) Act 2018 is an Act of Parliament introduced to repeal the European Communities Act 1972, also a parliamentary law. Each of these constitution-level changes to the British Constitution is codified separately as its own separate legislative enactment yet it is clear in language and intent that both are related given that one intends to repeal the other.

For many in Britain, it is odd to speak of “amending” their constitution, the term of choice for significant constitutional changes being instead

“reform.”¹¹ In the formal sense, we might say that the British Constitution can be modified, but not amended, since it changes only by unwritten constitutional norms and parliamentary law, neither of which is reflected in a formally codified and aggregated master text.¹² But in a deeper sense, significant changes in constitutional norms or parliamentary law have the same functional effect as a formal amendment insofar as they modify the rules of law in Britain that political actors and the people recognize as valid.

All constitutions recognize rules of change, even those constitutions incorrectly labelled *unwritten*. No constitution is unwritten, at least not entirely, nor is any constitution ever fully written. The U.S. Constitution is written in a single master text document, but many of its most important principles float invisibly beyond the four corners of its text.¹³ The converse is true of the British Constitution: it is not codified in a single master text but many of its fundamental elements are written somewhere, only in disaggregated form. More “political” than “legal,” the British Constitution is governed largely “by politics, its processes, its values, its conventions and the *de facto* relationships between politicians, political parties and the people.”¹⁴ The real distinction, then, between the U.S. and British Constitutions—each thought to sit on opposite ends of the spectrum of constitutional form—is not between writtenness and unwrittenness. It is rather between the formal adoption of an aggregated codification of important laws and principles of government supplemented by unwritten norms in the United States and, in Britain, the combination of the formal adoption of a disaggregated codification of laws of equal status along with an accretion of norms and practices.¹⁵ Whether a rule in Britain is *constitutional* therefore does not turn on writtenness. What matters more is whether it is received as binding by the relevant actors and whether reformers and lawmakers conform their conduct to it out of a sense of obligation.¹⁶

Yet countries with a master text constitution can also take a disaggregative approach to codification. For instance, the Italian Constitution combines the disaggregative and integrative models. The constitution is codified in a text that is amendable by a special procedure authorizing the alteration of its text and it is amendable also by the adoption of separately codified constitutional laws that change the meaning of the constitution but leave the master text unchanged. In the first sixty-five years since the coming into force of Italy’s 1947 Constitution, reformers approved fourteen amendments and twenty disaggregated constitutional laws.¹⁷

The Integrative Model

We have so far seen the appendative model in the United States and the disaggregative approach of the British Constitution. Another way to codify constitutional amendments is to integrate them directly into the text of the original master text constitution. This integrative approach is evident in the Indian Constitution. In effect since 1950, the constitution creates three different procedures for amendment, each varying as to the majority and quorum required in Parliament and also as to whether subnational ratification is necessary.¹⁸ Successful amendments are entered directly into the constitution in the appropriate section concerned with the subject matter of the amendment. Once inserted into the existing constitution, these amendments can replace, alter, add, or delete text.

The Indian practice is to update the original constitution to reflect the content of the amendment, almost as though the amendment had been written into the text at its creation. The distinguishing feature of the integrative approach is that it makes clear in the text how and where the original constitution has been changed. Textual alterations in the Indian integrative model are accompanied by various notations—brackets for new text and a footnote reproducing the old text—indicating that what now appears in the constitution had not been there before.

Take the preamble in the Indian Constitution. When it was first written, it read “We, the People of India, having solemnly resolved to constitute India into a sovereign democratic republic . . . do hereby adopt, enact and give to ourselves this Constitution.” Today, the preamble reflects new language inserted by the Forty-Second Amendment in 1976. Here is how it appears in the official Indian Constitution today:

We the People of India, having solemnly resolved to constitute India a
¹[sovereign socialist secular democratic republic] . . . do hereby adopt,
 enact and give to ourselves this Constitution.

¹ Subs. by the Constitution (Forty-second Amendment) Act, 1976, s. 2, for “sovereign democratic republic” (w.e.f. 3-1-1977).

The bracketed text contains the new language inserted into the constitution by Section 2 of the amendment. The accompanying footnote informs us that the amendment took effect on January 3, 1977. The footnote also

archives the original language, noting that it had been “substituted by” the new text in brackets.

In this integrative model, both additions and deletions to the existing text are identified in a similar way. The First Amendment, for instance, adopted in 1951 only one year after the coming into force of the constitution, makes a special provision for affirmative action in education as an exemption from the prohibition on state discrimination on grounds of religion, race, caste, sex, or place of birth. The amendment is codified in the original article dealing with nondiscrimination, and it is identified clearly as an addition to the constitution. The amendment authorizes an exception allowing the state to derogate from the nondiscrimination rule with acts of positive discrimination in favor of certain disadvantaged groups:

15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

...

¹[(5) Nothing in this article or in clause (2) or Article 29 shall prevent the State from making any special provision for the advancement of any socially or educationally backward classes of citizens or for the scheduled Castes and the Scheduled Tribes.]

¹ Added by the Constitution (First Amendment) Act, 1951, s. 2.

The bracketed text identifies the new language added to the constitution. The accompanying footnote indicates that the section was inserted by an amendment.

This integrative approach transforms the codified master text constitution into an ever-evolving living document, not only metaphorically in how its rules and principles are understood over time, but quite literally in its form. At its enactment in 1950, the constitution contained 395 articles and eight schedules; by 2015, it had grown to 448 articles and 12 schedules.¹⁹ In the course of constitutional amendment in India, the constitutional text is updated, reorganized, and recodified in an effort to keep it coherent.²⁰ This integrative model, with its attendant notations, may make it easier for a lawyer to navigate the old and new texts. But it is likely to be confounding for a layperson. The internal reconfiguration of a constitution using the integrative model may come at a cost to how citizens understand and relate to their constitution.

There is a fascinating interrelation between the integrative model of amendment codification in the Indian Constitution and the basic structure doctrine innovated by the Supreme Court.²¹ The Court has not asserted that the basic structure doctrine requires the integrative approach to amendment codification but the result of integration has in fact been to retain the basic architectural design of constitution. Integrating amendments into the original text has not disturbed the external form and framework of the constitution. This is consistent with what the basic structure seeks to do: to prevent reformers from making a constitutional dismemberment to the Indian Constitution using only the ordinary rules of constitutional amendment.

The Invisible Model

The way the Irish Constitution codifies amendments likewise keeps the text coherent but its strategy differs from the integrative approach in the Indian Constitution. Rather than identifying with bracketed text and footnotes where the text has been altered, the Irish Constitution keeps the document free of any markings. There is no indication interspersed within its many parts and articles that the constitution has been altered even once since its adoption in 1937. The Irish Constitution gives readers the impression that it has survived in its original form—with no additions, deletions, or modifications. And yet in its approximately eighty-year life so far, the Irish Constitution has been amended more often than the U.S. Constitution, whose text has been altered only twenty-seven times since 1787. How, then, does the Irish Constitution codify its many constitutional amendments?

The Irish Constitution takes what can be described as an *invisible* approach to codifying amendments. It inserts, removes, and changes the constitutional text without any clear indication of what in the text has been altered, how it has been altered, or when precisely it was altered. All that appears in the main text are clean pages with no accompanying notes, no references, and no other details that could quite readily alert readers that something new may have been inserted, something old may have been removed, or that anything at all may have changed.

Consider the Thirty-Fourth Amendment. Signed into law on August 29, 2015, the amendment proposal had been approved a few months earlier in May by over 60 percent of Irish voters in a referendum. It proposed to make marriage open to all persons without regard to sex. The amendment, now

codified in the constitution, appears as a fundamental right in Article 41, labeled “The Family,” in a brand new Section 4: “Marriage may be contracted in accordance with law by two persons without distinction as to their sex.” Other family rights include the natural right to family life in Section 1, the right of mothers to care for their family in Section 2 and, in Section 3, the duty of the state to protect the institution of marriage. Had a reader looked at Article 41 on August 28, 2015—the day before the amendment became official—the entire article would have shown only three sections. It was only later that the amendment would appear almost without notice in an altogether new Section 4.

This invisible approach nonetheless gives readers a way to identify what in the text has been amended. But finding *where* in the text the alteration has been made remains a difficult task. The first few pages of the Irish Constitution are devoted to a list of Amending Acts that have proposed to amend the constitutional text. The list consists of two headings: the title of the amending act, along with a short description of its purpose and content; and the date of its coming into force, but only if the proposal has been successfully approved. With this list, readers can reliably know what has been amended and when the amendment became official. But this list of Amending Acts says relatively little about each amendment. For example, what appears in the description for the First Amendment, made official on September 2, 1939, is that it “extended to conflicts in which the State is not a participant the provision for a state of emergency to secure the public safety and preservation of the State in time of war or armed rebellion.” The Third Amendment, codified on June 8, 1972, “allowed the State to become a member of the European Communities.” The Ninth Amendment, signed into law on August 2, 1984, “extended the right to vote at Dáil elections to certain non-Irish nationals.” And so the list continues, with these rather short descriptions of each amendment.

These descriptions and their associated dates tell us very little about where the new amendment appears in the actual text of the Irish Constitution. This remains a mystery without some investigative work. An enterprising reader interested in identifying where a given amendment has changed the text would have to locate two copies of the official constitution: a copy that was official immediately prior to the amendment and a copy that became official as of the day of the amendment but before any subsequent amendment, since an intervening amendment could again change the text of the amendment the reader was currently investigating without any notice.

For example, the Thirty-Third Amendment, which created an intermediate Court of Appeal, became official on November 1, 2013. An official copy of the Irish Constitution immediately prior to this date identifies only two kinds of courts: “The Courts shall comprise Courts of First Instance and a Court of Final Appeal.”²² But after the Thirty-Third Amendment, the same article reads: “The Courts shall comprise: i Courts of First Instance; ii a Court of Appeal; and iii a Court of Final Appeal.” The rest of the constitution’s part on “The Courts” was also changed where necessary to account for the new Court of Appeal, including a new section explaining the powers and jurisdiction of the appellate court in a new Article 34(4) as well as collateral changes elsewhere throughout the constitution.

The most accurate way to identify precisely where the textual changes had been made would be to compare old and new texts side by side. Only then could the reader find all of the places—by my rough count nearly ten different locations throughout the entire constitution—where the Thirty-Third Amendment had modified the existing constitutional text. This is no easy task when compared with either the integrative approach of the Indian Constitution or the appendative approach of the U.S. Constitution, the former with its obvious textual notations and the latter with its sequential additions to the text. Nevertheless, the invisible model in the Irish Constitution is not without its virtues.

The Problem of Obsolescence

Return to the appendative model in the United States. Unlike the integrative model we see in the Indian Constitution, the appendative approach leaves the original text untouched. This makes it possible for an amendment to nullify a provision in the original constitution while nonetheless leaving that provision codified in the text, though without legal effect. Today the U.S. Constitution is replete with obsolete words throughout, not only in the original constitution but in its subsequent amendments as well. Consider the effect of the Thirteenth Amendment. Like all other amendments to the constitution, it is codified sequentially after the original text of the constitution in chronological order of its adoption. By the plain words of its text, the Thirteenth Amendment abolished slavery and involuntary servitude, except where servitude is a punishment for crime. But by implication the Thirteenth Amendment also repealed the Fugitive Slave Clause and

Three-Fifths Compromise. Both of these vestiges of slavery are still today visible in the constitutional text, the former requiring the return of fleeing slaves to their captors and the latter counting a slave as three-fifths of a person for purposes of taxation and congressional representation.

The same internal inconsistency is evident elsewhere in the constitution. The Twelfth Amendment created a new method for presidential and vice presidential selection, yet the old one—which required electors to cast two votes for president, with the candidate who earned the second-most votes becoming vice president—remains codified in the constitutional text. The Seventeenth Amendment establishes direct elections for the U.S. Senate, but also leaves intact in the constitution the original method of senatorial selection by state legislative appointment. The Twentieth Amendment changes the start date for the new congressional session and the Twenty-Fifth Amendment modifies the rules of presidential succession, yet in both cases the original contrary text survives. And of course the Twenty-First Amendment expressly repeals the Eighteenth, though the latter remains codified as though it were still law. There are many more examples but these few suffice to show the point: the appendative approach yields obsolete and even outright incorrect text.

Time and Social Change

Quite apart from obsolescence and incorrectness, sometimes the appendative approach results in embarrassing discrepancies between text and reality when the present day has outrun the codified constitution. The Nineteenth Amendment is a powerful example in light of Hillary Clinton's nomination as the Democratic presidential candidate in 2016, the first time a woman has led a major party into the general election. Ratified in 1920, the Nineteenth Amendment authorized women across the land to vote: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." Consistent with the appendative approach of the U.S. Constitution, the amendment appears after the Eighteenth, with no corresponding changes anywhere in the preceding text. But had the United States followed the integrative approach, the Nineteenth Amendment would presumably have updated the nearly thirty exclusively masculine pronouns that appear still today throughout the constitution. Perhaps the most noteworthy masculine pronoun, in light

of the Clinton nomination, is found in Article II. There, the constitution explains in reference to the president of the United States, “He shall hold his Office during the Term of four Years . . .,” and “Before he enter on the Execution of his Office, he shall take [an] Oath or Affirmation. . .” Article I contains similar language as to Congress: it suggests that only men are eligible for election to the House of Representatives and the Senate.

Of course no question of law today turns on the outdated reality that the constitution codifies the masculine pronoun alone with reference to public office. Women have for a long time been elected to Congress, and no one would point to the constitution’s obsolete language as a barrier to electing a woman to any office. But the question did arise in 1916 when Jeannette Rankin became the first woman elected to the House of Representatives. The *New York Times* published a letter at the time arguing that Rankin could not lawfully take her seat in Congress because the constitution’s masculine pronoun disqualified her.²³

The alternative is to change the original text to replace all exclusively masculine pronouns with gender-neutral references to persons or to both women and men using either the integrative or invisible approach. This choice went from theory to reality in Spain in 2018, when the majority of the country’s new government ministers refused to take their oath of office with reference to the *consejo de ministros* and instead invoked the *consejo de ministras y ministros*, stressing the presence and equal status of women in the council of ministers.²⁴ They followed their symbolic defiance with action, taking their case to the Spanish people to call for revising the exclusively male pronouns in the Spanish Constitution to refer also to women.

Reimagining the U.S. Constitution

Inconsistencies in the constitutional text are not without consequence. Eventually, someone has to resolve them when a legal claim requires clarity that the text alone cannot provide. The doctrine of incorporation, for example, raised the deeply contested question whether the Fourteenth Amendment should be interpreted as applying the protections of the Bill of Rights to the states through the Due Process Clause. Today the Supreme Court has settled the matter: the Bill of Rights indeed applies to the states, just not in its entirety, the operative theory being selective as opposed to total incorporation.²⁵ It took some time to arrive at this conclusion.

Although this interpretive battle would have been fought no matter the model of amendment codification, the controversy over incorporation derived at least partly from the limitations inherent in the appendative approach. Had the integrative approach been used to codify the Fourteenth Amendment, there might well have been less ambiguity about its effect on the Bill of Rights, the powers of states, and on the countervailing rights of their citizens. The drafters would have been required to indicate whether and how the Fourteenth Amendment was intended to affect the individual guarantees in the Bill of Rights.

As it turns out, it is possible today to imagine what the U.S. Constitution would have looked like as an integrated text. We might even call it a model Madisonian Constitution since James Madison had advocated this integrated approach in the First Congress.²⁶ For Madison, the clarity that comes with interspersing new texts directly into the old was a major reason for preferring an integrative approach over the appendative approach the First Congress ultimately chose to take:

We shall then be able to determine its meaning without references or comparison; whereas, if they are supplementary, its meaning can only be ascertained by comparison of the two instruments, which will be a very considerable embarrassment. It will be difficult to ascertain to what parts of the instrument the amendments particularly refer; they will create unfavorable comparisons; whereas, if they are placed upon the footing here proposed, they will stand upon as good foundation as the original work.²⁷

Looking back across history, some amendments can be rather straightforwardly integrated. The First, Third, and Fourth Amendments, for example, can all be inserted alongside the other rules constraining the powers of Congress in Article I.²⁸ But for the most part integrating amendments into the constitution's original text proves difficult. Some amendments contain multiple sections, and each section might more appropriately fit into a different part of the constitution. It is in this choice of where to codify each amendment, and also in how to rephrase the amendment if necessary to fit it into the constitution's existing language, that the present meaning of the integrated constitution could have differed from what it is today. Had Madison won the day on this question of constitutional form, the present constitution would have an altogether different appearance and in all likelihood a different meaning as well.

The Appendative Model in Society

The appendative model has implications for social relations outside of the law. After the Tea Party victories in the 2010 midterm congressional elections in the United States, the House Republican caucus called for a return to the country's roots. Part of the return to the country's origin story included reciting the text of the original constitution aloud on the floor of the chamber.²⁹ But the Republican Party's public reading conspicuously omitted the many words in the constitution that authorize and perpetuate slavery—words that remain written though not in force.

Vestiges of slavery and reminders of injustices are visible still today in the constitution. It is not immediately obvious that there is anything good to be gained from a permanent reminder of seeing the hateful inequities in America's past written into the constitution. If one understands a constitution as a window into the deepest reaches of the soul of its people, most of the constitution as written reflects the country of old, no longer the current reality. Why, then, should the text continue to honor the memory of earlier times and peoples? Why must the constitution—for many a testament to how far the country and its people have come from its troubled origins—continue to confront the present with memories of yesterday, in many cases of the suffering of earlier generations? Perhaps either the invisible or integrative approaches to amendment codification could more gently reconcile America's past of injustice with its modern march toward a more egalitarian future.

Yet there may be a hidden virtue in the appendative model as it exists in the United States. The appendative model makes the constitution a public record of a country's many mistakes, a living history lesson both of the wrongs of a previous time and of the moments when the extraordinary mobilizations of people have tried to make amends for those mistakes. Painful though it may be to see permanently inscribed in the country's most important national document the many ways the state has over time failed its people, the appendative approach turns the constitution into a memory aide for the progress made thus far and also into an invitation to treat the American project of self-government as a work forever in progress. Americans have made a choice, says Akhil Amar, not to "whitewash" the constitution: "Rather than prying loose and carting off embarrassing textual remnants of America's imperfect history, like the Fugitive Slave Clause or the Three-Fifths Clause, We, the People, have added on new rooms to

the old edifice.”³⁰ Amar sees the appendative model in the United States as lighting the path to a better republic:

History, of course, is still happening. Had amendments been blended into the original text, the document might seem perfect and complete, as is. But the manner of adding amendments to the end reminds us that we ourselves—We, the People today—should ponder how we might leave our posterity a better document than we inherited.³¹

The appendative model therefore doubles as a call to action for Americans to continue their progress toward the more democratic, more equal, and more just society that their predecessors have shown the world is possible. The constitutional text traces the “democratizing trendline” of amendments over time, recalling how the power of amendment has been used to extend the right to vote, to improve the mechanisms of representative democracy, and to aspire to greater equality.³² Though there remains much work to do, this appendative approach to amendment codification makes it impossible for anyone to deny the great strides the American people have taken since the founding to fulfill the promise written in its preamble “to form a more perfect Union.” For all of its faults, the constitution presents itself to the world naked, both as it has been and as it is today, baring for all to see the hardest truths of its lived history.

But there is a dissonance between the text of the constitution—so revered at home and abroad—and its codification of horrors from days long passed. Rather than remove or rewrite those words, the constitution adds new words that are meant to speak louder than the old. Their greater recency is supposed to signal their primacy, and indeed this is the operative rule in law, where a decision today overrules implicitly if not expressly one that was made yesterday on the same subject. And so we quite rightly take the more recent Thirteenth Amendment as overriding the Fugitive Slave Clause. We rightly take the Fourteenth Amendment as nullifying the Three-Fifths Clause. The latter-adopted decision controls in law, absent extraordinary circumstances. But this rule in constitutional law does not have the same salience in society, where legalistic appeals to the details of jurisprudence or regulation do not resonate as much as the power of emotive appeals to words and narrative. No latter-passed rule can remove the stains of injustice written into a constitution without quite literally erasing its words. This

is where the invisible model prevails. No wonder Norway has chosen that model to deal with its own past.

The Problem of Harmonization

Constitutions using the appendative model are not the only ones to confront the challenge of internal inconsistency. This challenge arises when a latter-passed amendment comes into interpretative conflict with either an original provision of the constitution or an earlier-passed amendment that remains valid. The integrative approach to constitutional amendment mitigates this risk by virtue of the work done at the moment of codification to alter the text where the amendment may have an impact. But how do constitutions using the disaggregative model of codification respond to the challenge of internal inconsistency? Finding a way to address these inconsistencies raises a problem of harmonization: how to reconcile two or more separately codified rules that are valid in law. This challenge differs from the problem of obsolescence where a codified rule has lost legal validity yet remains codified.

The Canadian Hybrid Model of Codification

The four models for codifying amendments are not mutually exclusive nor are they necessarily the only ones we see in the world.³³ But they offer a useful framework to expose and evaluate how constitutions codify their amendments. The Canadian Constitution—both disaggregative and integrative—highlights the possibility of a hybrid model of codification. It is disaggregative like the British Constitution because there is no single master text constitution in Canada to which amendments must be made and in which all amendments appear. The Constitution of Canada is a collection of materials both written and unwritten, codified and not, and about which there remain open questions as to where all of them are located. The constitution itself acknowledges its disaggregated form, declaring in the Constitution Act, 1982 that “the Constitution of Canada includes (a) the *Canada Act 1982*, including this Act; (b) the Acts and orders referred to in the schedule; and (c) any amendment to any Act or order referred to in paragraph (a) or (b).”³⁴ These three categories of items do not reflect the entire corpus of materials that comprise the constitution. The word “includes”

in the definition of the constitution suggests that there are other items that possess constitutional status. The Supreme Court of Canada confirmed this reading of the constitution when it recognized parliamentary privilege, nowhere written in the text, as part of the constitution.³⁵ Other unwritten norms form part of the constitution yet by definition are not expressly stated in the text.

The disaggregated model of codification in Canada is evident in the adoption of the Constitution Act, 1982 itself. The new rules it codifies—for instance, a charter of rights, an amendment formula, and the power of judicial review—all appear in their own self-standing constitutional enactment. These new rules are not written into Canada's founding Constitution Act, 1867.³⁶ They are codified in a separate constitutional act of equal status. Both texts must be read together to identify what the constitution requires. Yet these are not the only constitution-level laws in Canada: there are many of them, each separately codified, self-standing constitutional acts of equal legal weight that, taken together, comprise the written parts of the Canadian Constitution. This pattern mirrors the British Constitution.

Yet the Constitution of Canada also simultaneously takes the integrative approach to codifying change. When an amendment is made to one of its many disaggregated constitutional items, the constitution records the change directly in the text of the act or order, accompanied by an explanatory footnote indicating what in the original constitutional item was changed, and when the change was made. For example, appointed senators could once serve for life when the Constitution Act, 1867 created the Senate of Canada. But an amendment in 1965 imposed a mandatory retirement age of seventy-five. Here is how the text appears today:

29. (1) Subject to subsection (2), a Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.
- (2) A Senator who is summoned to the Senate after the coming into force of this subsection shall, subject to this Act, hold his place in the Senate until he attains the age of seventy-five years⁽¹⁸⁾.

...

18. As enacted by the *Constitution Act, 1965*, S.C. 1965, c. 4, which came into force on June 2, 1965. The original section read as follows:

29. A Senator shall, subject to the Provisions of this Act, hold his Place in the Senate for Life.

This format reminds us of the Indian integrative model. In both cases the original text is updated to reflect the change, with a note indicating how the amendment changed the original text and when the change occurred. In the amendment to the term of service in the Senate, the note labeled “18” identifies the amending constitutional law, its date, as well as the phrasing that appeared in the constitutional act in its original form in Section 29. These examples show how the Constitution of Canada contains disaggregative and integrative features that make it resemble both the British and Indian Constitutions in how it codifies amendments.

Reconciling Constitution Acts

When Canada adopted its modern Constitution Act, 1982, the religious equality protection in Section 15(1) raised the question whether Catholic schools in the province of Ontario could continue to receive the special provincial subsidy guaranteed in the much earlier Constitution Act, 1867 without the same subsidy flowing equally to other denominational schools. A group of Canadian parents brought this claim to the Supreme Court, arguing that Ontario could not lawfully fund a secular school system alongside separate Catholic schools without also supporting the Jewish day schools and independent Christian schools where they were sending their own children.³⁷ The challenge for the Court was to find a way to harmonize these two Constitution Acts, each a part of purportedly equal force and authority of the Constitution of Canada. Had Canada possessed a master text constitution and also adhered fully to the integrative model of amendment codification, the question could well have been resolved at the moment of amendment. The authors of the latter-passed Constitution Act, 1982 would have altered the existing master text in all places where the new equality protection had the effect of changing the earlier-adopted rules. But the Canadian practice of disaggregated codification did not require integrating the new rules into the old text; a new self-standing Constitution Act could be adopted without an exhaustive accounting of every effect the amendment would have.

The Court ultimately applied the reverse of the ordinary rule of construction where two statutes collide. Instead of finding that the latter-adopted rule governs—here, that the rule of religious equality in the Constitution Act, 1982 must modify the special protection given to Catholic schools in

the Constitution Act, 1867—the Court held that the subsidy for Catholic schools could not be undone by implication of the rule of religious equality. The Court reasoned that the protection for Catholic instruction in Section 93 of Constitution Act, 1867 was “the product of an historical compromise which was a crucial step along the road leading to Confederation.”³⁸ Without this subsidy, Canada would not have been born:

Without this “solemn pact”, this “cardinal term” of Union, there would have been no Confederation. . . . As a child born of historical exigency, s. 93 does not represent a guarantee of fundamental freedoms. . . . [T]he province could, if it so chose, pass legislation extending funding to denominational schools other than Roman Catholic schools without infringing the rights guaranteed to Roman Catholic schools under s. 93(1). . . . However, an ability to pass such legislation does not amount to an obligation to do so.³⁹

The Court concluded that the earlier-passed rule should trump the latter-passed rule. The founding compromise in the Constitution Act, 1867—requiring public funding in Ontario for the secular school system and also for the Catholic separate schools—could not be undone by the religious equality rule in the Constitution Act, 1982. The Court was compelled to resolve this controversial question—and to somehow harmonize the old text with the new—as a direct consequence of the disaggregative model of amendment codification.

When to Harmonize

Harmonization can happen at the time of codification and also sometime thereafter. It occurs after codification in the appendative and disaggregative models, once the court has been presented with a conflict between two or more valid rules, or in the case of the British Constitution in theory between two constitutional statutes.⁴⁰ But in the case of the integrative and invisible models, harmonization occurs prior to codification when choosing where to codify the amendment. Amending authors in these two traditions must determine at the time of codification where each amendment impacts the existing constitution, and accordingly how to incorporate the new rule into the old text. One critical difference in

harmonization across models of amendment codification is therefore the temporal factor *when* it should occur: at the moment of amendment by reformers or later in the course of interpretation, likely by judges. When the failed Equal Rights Amendment was pending ratification, Ruth Bader Ginsburg observed: “Yes, there will be work left for the judiciary,”⁴¹ recognizing that the appendative model of codification in the United States defers harmonization to the future.

A related problem of clutter involves *how* to codify the harmonization. The Indian Constitution opts to codify the harmonization with a citing reference explaining in a footnote how the new has changed the old, and when the change occurred. This could make for an unruly text. The invisible approach in the Irish Constitution is roughly the Indian integrative approach without the detail and disclosure of the change—and accordingly without the clutter. The integrative and invisible models both rewrite the existing constitution in what we might describe as renovating or remodeling the existing constitutional text. In contrast, the appendative and disaggregative models in the United States and Britain, respectively, add new text to the constitution without altering the old. As a result, the appendative and disaggregative models generally leave the written parts of the constitution unchanged, supplementing it with new writings that may create interpretative difficulties in the future but that do not generate clutter.

The Problem of Incorporation

The integrative and invisible models confront a related challenge unknown in the appendative and disaggregative models: the problem of incorporation. Reformers and bureaucrats operating within the first pair of models must choose where in the existing text to incorporate new rules while those within the second pair hold no such discretion. The task is easy when an amendment targets a discrete item, as in the Twenty-Third Amendment to the Indian Constitution replacing the words “twenty years” with “thirty years” to extend the reservation period for Scheduled Castes and Tribes and Anglo-Indians. The task grows in complexity when even a single amendment affects a constitution over many of its parts and rules. A compound effect occurs when similarly far-reaching changes are made to the same constitution time and again as amendments cause it to become more detailed and often longer.

Incorporating an amendment in either the integrative or invisible model takes time and care to do well. It requires a close familiarity with the existing constitution, how it has been interpreted in court and how political actors have used it in public discourse, and also a fulsome understanding of what is intended by the new amendment. When incorporation is done right, choosing prudently how and where in the text to incorporate a change can yield legal certainty, textual coherence, and aesthetic unity. But in the heat of battle for a constitutional amendment, the advantages of careful incorporation may be outweighed by the urgency of codification to consolidate the victory and to formalize the fact that the amendment has passed.

The Politics of Codification in Mexico

The problem of incorporation is particularly pronounced in Mexico.⁴² An exemplar of the integrative model, the Mexican Constitution still today contains no more than its original 136 articles. When the constitution is amended, the changes are integrated into its original text with one of two notations accompanying each modification: an *addition* indicates new language inserted into the text, and a *reform* is a revision to the wording of an existing rule. Whether it is an addition or a reform, each amendment is imprinted with the date of its enactment date along with its location in the Official Federal Gazette.

The Mexican Constitution has been altered around seven hundred times since its beginnings in 1917. The overwhelming majority of the original text has in some way been changed by addition or reform—including the codified amendment rule itself.⁴³ The result of this virtually unprecedented amendment mania is most visible in the length of the constitution. At its enactment, the text spanned 22,000 words; by its centennial in 2017, it had swelled to 67,000 words.⁴⁴ The constitution would have in any case grown longer after these seven hundred alterations, given the kinds of changes they have introduced into the text. Neither the appendative, disaggregative, nor the invisible model could have kept the constitution from growing as long. Nor could a more careful integration have significantly curtailed its expansion. Besides, today the trouble is not principally the length of the Mexican Constitution. It is instead the disorder that results from how lawmakers have incorporated amendments into the constitution using the integrative model.

The extraordinary length of the Mexican Constitution is accordingly only a symptom of what really ails it: political parties have used the constitution as both a code and political platform, often using formal amendment to make changes that are more appropriately suited to enactment at the level of ordinary law. The forces of constitutional politics in the country have pushed parties to codify their political programs and agreements in the constitution in order to convey the authenticity and authority of their plans, and also to give them durability.⁴⁵ Were their policy choices adopted as ordinary laws, lawmakers would place their plans at risk to change by the Congress alone and also by judicial review.⁴⁶ Codifying programs and policy in the constitution insulates them from change on both fronts: Congress cannot revise them without a cross-party supermajority as well as a majority of the states, and courts have rejected the idea that an amendment can be unconstitutional, meaning that the only check on change is the amendment rule itself, whose relative ease has transformed what should be a significant restraint into not much of one at all.⁴⁷

The constitution codifies enormous regulatory frameworks and quite specific rules that would in many other jurisdictions take the form of ordinary legislation that implements a constitutional command. These frameworks and rules have sometimes been integrated into the constitution without attention to how they will affect the rest of the text. The consequence has been to create a constitution that looks like several separate blocks of legislation combined into one incoherent document.

For example, rather than affirming a general right to education with implementing legislation to follow, the constitution devotes pages upon pages to the details of instruction, including rules about syllabi, teacher hiring and promotion, and evaluative procedures for schools.⁴⁸ Instead of declaring that simply private property is a privilege afforded by the state and indicating that Congress will pass associated laws, the constitution does it all. It itemizes all forms of public property, in addition to citizenship restrictions on ownership, instructions specific to livestock property, peasant farmers, and one dozen particular crops, as well as property rules for charities, banks, farms, and telecommunications.⁴⁹ One of the constitution's longest and most meticulously written sections covers political parties and elections.⁵⁰ It includes rules on party and candidate registration, as well as campaign financing revolving around a precise formula that governs public funding for party infrastructure, election activities, and separate training programs. The constitution also codifies rules on access

to media for campaign commercials, including specific time allocations for political parties down to the duration by minute and even the time of day when advertisements must air. The constitution moreover outlines details on the creation, powers, and duties of a National Electoral Institute. This exhaustive enumeration is not limited to the body of election law. The constitution codifies similarly legislation-like rules on anticorruption efforts,⁵¹ the city council,⁵² the newly federalized Mexico City,⁵³ and labor laws.⁵⁴

Confusion and Disorder in Codification

Integrating amendments into the original Mexican Constitution without accompanying adjustments to keep the constitution comprehensible and coherent in both form and content has not been without consequence. The Mexican Constitution is one of the five most difficult in the world to interpret with any reliability.⁵⁵ Overflowing with inconsistencies and ambiguities, the document cannot claim to possess what we expect of either a constitution or a code: it has neither the clarity nor the accessibility of a constitution, nor does it reflect the meticulous precision of a code. No wonder there is a serious debate in the country about whether to rewrite the entire text.

The disorder in the document is apparent on a close reading. Consider some of the many examples from a recent study aimed at proving the pressing need to reorganize the constitutional text.⁵⁶ The most glaring problem is the twinned deficiency of subject matter variety within the same constitutional article and subject matter repetition across different articles. To give a few examples, the composition of the Senate is split between Articles 56 and 57, the right to trial is divided between Articles 13 and 14, criminal defense protections appear in Articles 20 and 21, agency rules and prerogatives are located in Articles 6, 26, and 28, citizenship and naturalization in Articles 30, 32, and 37, territorial delimitations are found in Articles 42, 45, and 48, and the judiciary is structured across Articles 94 to 107 and 123. A related problem concerns the incorporation of rules in sections that may have historically been correct but are today improper. For instance, rules regulating the Attorney General and the Office of the Public Prosecutor are codified in the chapter on the federal judiciary. This was right in the nineteenth century, when both offices were part of the judiciary. But its placement is misleading ever since an amendment in 1900 moved

both offices to the executive. The creation of the 1917 Constitution did not update their placement, and today the misplacement survives.

Moreover, duplication is rampant. Article 130 states a general prohibition on leaders in religious office concurrently holding any public office, and yet the same rule is restated in Articles 55 and 82, the former specifying the qualifications for Congress and the latter for the presidency. We can also spot outright errors due to careless integration, and different phrases are used to refer to the same concept due to latter-passed amendments that have used more modern vocabulary, namely “human rights” in Article 1 and “fundamental rights” in Article 18 and elsewhere. And the age of the hundred-year-old text is evident in the outdated and unbecoming language it sometimes uses, for instance a reference in Article 11 to “pernicious foreigners who reside in the country.” Appropriate or not when the constitution was adopted one century ago, today this wording is inconsistent with the modern realities of globalism.

The obvious question to ask is whether any of these deficiencies in the text actually matter. In constitutional law, the problem of incorporation has serious consequences for how to interpret the text in the face of a dispute about its meaning. The muddled text in Mexico complicates this important legal task. But in constitutional politics, the constitution in Mexico remains the focal point and the ultimate prize in national politics, catalyzing public debate and instantiating the power of the ruling party while standing above other institutions as the country’s unifying national symbol. It appears that the imperatives of constitutional politics have prevailed in Mexico at the expense of clarity in constitutional law.

The Mexican case illustrates the risk of malfunction in the integrative model of amendment codification. It demonstrates that contemporaneous integration—as opposed to simple appending to the end of the text—does not always leave the amended constitution clean and coherent. Successful integration requires careful deliberation on how and where to incorporate the new rules, and strong party cooperation to invest the political and legal energies do it the right way contemporaneous with the codification.

Constitutional Veneration and the Appearance of Finality

Whether a master text constitution adopts one or another model of amendment codification may have implications for how the people perceive their

constitution. In the early days of the new American republic, Chief Justice John Marshall cautioned that if a constitution “would partake of the proximity of a legal code,” it could “scarcely be embraced by the human mind” and “probably never understood by the public.”⁵⁷ In his view, a constitution “requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.”⁵⁸ Although this is a somewhat self-serving declaration for a judge to make—since judges are the ones, in the United States, who are to “deduce” the “minor ingredients” from the “important objects”—there is more than a kernel of truth in his advice to constitutional designers.

Imagine one constitutional text with no markings, and another text full of footnotes and cross-references. The footnotes in the second text would point readers to the fully cited constitutional laws that altered the text of the constitution, and we would also find repealed language from the original text bracketed next to legal citations. It would be comprehensive but it would resemble a working draft very much in progress, neither a thought nor a word ever finalized. The first text would be easier to read, straightforward, and uncluttered in its presentation, like a published book might look.

No constitution is ever finished, whatever its text might suggest by its appearance. All constitutions remain susceptible to change: formally to correct discovered faults, to insert something new, or to remove something old; and informally as interpretation infuses the text with new meaning or as unwritten constitutional norms mature and lose their force over time. Though it may look unblemished in its form, a constitutional text presented as “final” remains always an illusion. Yet this is the impression conveyed by the invisible model of codification. The text never appears in any other way but perfected. The same is true of the appendative model of codification: what is written is seen and presented as final, although the accumulating appendages to the text signal to the political community that the constitution remains open to modification.

The appearance of finality in the constitutional form of the invisible and appendative models contrasts with the suggestion of contingency in the integrative model. The alterations scattered visibly throughout the text of the Indian Constitution suggest that the text, and perhaps with it the foundations of the polity, remain contestable. Amendments in this integrative model could be seen as fixes to mistakes, and this may in turn breed doubts about the text and whether it contains a great many other

errors elsewhere. While the integrative model lays bare the errors and improvements to the constitutional text, the appendative and invisible models conceal the full extent of change, and in doing so could conceivably inspire greater confidence in the constitution. There is a temporal distinction as well. The invisible and appendative models keep the political community oriented toward the possibilities of the future: any successful mobilization of peoples generating a new change will see the fruits of their victory reflected in the text, unadulterated by footnotes or other markings. If finality and contingency in how we codify amendments have consequences for constitutional veneration, the disordered Mexican Constitution may well be in danger of decline.

In the United States, constitutional veneration is seen as both a blessing and a curse. The high esteem in which Americans hold their constitution has complicated what is already an extraordinarily difficult procedure for formal amendment: Why ever would the people fiddle with or worse yet replace what many see as divinely inspired?⁵⁹ Yet the strong attachment Americans have for their constitution also has its advantages: it has helped channel disagreement through the constitution using its rules of formal and informal change, making the text both the battleground and the lodestar in constitutional politics, with opposing parties appealing to the constitution as both reason and authority for their vision of government.⁶⁰ Older than any other codified constitution in history, it has endured in its original form for over two centuries, to be sure with significant textual additions in the intervening years, in a world when the average constitution has lasted only nineteen years.⁶¹

To say that the U.S. Constitution has lasted for so long because it is venerated overlooks an important question: What makes people respect their constitution? There remains much to learn about constitutional veneration, and also how political actors can foster a deeper connection between citizen and text, assuming this is a public good worth time and effort. A recent study on state constitutions concludes that the way we write constitutions and what we codify in their texts has no impact on how Americans feel about their own state constitution and whether they will venerate it.⁶² We have no similar study for national constitutions, though if the pattern holds it would seem that the way constitutions codify amendments is unlikely to have an impact on veneration either. The study did find, however, that familiarity with the constitution and pride in one's country or state are closely tied with constitutional approval.⁶³

Upon initial thought, one might think this point is unrelated to the form of amendment codification. But the less cluttered and more seamless the constitutional text, the more it may facilitate familiarity, in which case one might conclude that the appendative and invisible models of codification are more likely than the integrative model to lead to constitutional approval. More study is needed to evaluate this claim. Yet it is worth recalling that the Philadelphia Convention wrote the U.S. Constitution in the American tradition of textuality, drawing from the people's reverence for texts, religious texts in particular,⁶⁴ and creating what Thomas Paine would later observe had become a "political bible."⁶⁵ The text, in Clinton Rossiter's description, "[p]lain to the point of severity, frugal to the point of austerity, laconic to the point of aphorism,"⁶⁶ was written with short, pithy, and accessible language precisely to allow enfranchised Americans to become familiar with the document.⁶⁷

Fidelity and Authority

In the early years of the American republic, some members of the First Congress worried that appending amendments to the end of the document would reduce an amendment to a mere "postscript" to the original text.⁶⁸ Too frequent amendment would yield a postscript that could eventually grow longer than the "original composition," not unlike "a careless written letter."⁶⁹ The opposing view sought to keep the original text untouched as a "monument" to its authors, a reminder of what many believed to be "the perfection of the original."⁷⁰ On this view, amendments were not necessary parts of the whole, and indeed some "did not conceive any of the amendments essential."⁷¹

The choice whether to read appended amendments as more than postscripts or to treat them as superfluous to the main text is rooted in competing visions of the authority of amendments. The concern that an amendment would be reduced to a mere postscript and the view that it be interpreted as superfluous are both informed by the conventional understanding in constitutional theory that the powers of making and amending constitutions derive from different sources of authority. To make a constitution is an act of constituent power, an ultimate expression of the will of the people, while to amend a constitution is a mediated act of a constituted power authorized to speak in the name of the people only as long as the

amending act remains continuous with the framework of the enacted constitution.

Those who opposed the Bill of Rights wanted to set it apart from the original text. This detachment would signal that the Bill of Rights was less significant and perhaps also less authoritative than what had been adopted in extraordinary conventions of the people in the founding moments of the U.S. Constitution. Opponents did not think these amendments were important enough to put into the text of the Philadelphia project, and accordingly they wanted their codification as amendments to reflect their secondary status. As one scholar describes this ploy to undermine the Bill of Rights, “the amendments were not supposed to share the high authority of the original Constitution and should be clearly distinguishable from the latter in order to make their alleged superfluity visible.”⁷² Today amendments have in some cases taken primacy over the initial constitution. The Fourteenth Amendment, for instance, has transformed how the original text and its earlier-adopted amendments are interpreted in court. This amendment—as well as others before it and since—have also changed how the people relate to their constitution. Where the U.S. Constitution once represented the forces of oppression, for some today it gives hope for emancipation. Where it once spoke only to a narrow class of persons, it now sings to an ever-expanding group of rights holders. We might accordingly describe the appendative model of amendment codification in the United States also as agglutinative, since the meaning of the existing constitutional text is changed over and over again as subsequent rules are appended to it.

The matter of authority presents itself differently in the Irish invisible model. In choosing to delete original and existing text without much notice, the Irish Constitution expresses authority in the present moment, and suggests that what matters is the current settlement, neither privileging what has come before nor what may come next. Authority in the invisible model is presentist, speaking to the what appears now in the constitution, always subject to change, yet always current in its codification. The original text is not separated from the modern text, a powerful metaphor for the message of popular sovereignty underpinning the constitution: here the people rule, today. In contrast, the placement of amendments at the end of the U.S. Constitution paints a portrait of the country’s evolution, bringing the memory of the past ever into the foreground, whether as a standard to follow or as a reminder of errors to avoid. If Winston Churchill was right

that “a nation that forgets its past has no future,” the appendative model has an additional virtue: it keeps the past always in the present.

The work of reconciling old and new writings may be done best at the time of amendment. The innovators of the change are present and their vision is at its clearest in the amendment period, making it more likely that the purpose of the change and its implications will be captured in its language and in how and where the change is codified. The clutter of the Indian Constitution makes it less aesthetically pleasing than the U.S. Constitution, yet the latter does not by its text harmonize the old with the new, something the Indian Constitution seeks to do contemporaneously with the amendment. For purely aesthetic purposes, the best path may be the invisible model of the Irish Constitution. It rids the text of the clutter in the integrative model of the Indian Constitution. Perhaps instead of codifying citing references to the amendments along with their accompanying details about how, when, and what has been amended directly in the text, an alternative approach could feature a schedule to the constitution that includes a detailed account of each of the changes, when and how they are made, which of the constitution’s existing provisions are impacted, and a statement of purpose behind the amendment to give clarity to successors and those tasked with interpreting the constitution.

* * *

The choices confronting constitutional designers today are no different from what they have been for generations. Which electoral system should we adopt? How should we separate powers? Should we create abstract or concrete judicial review? What kinds of rights should we codify, and how should they be phrased? These questions of constitutional design are some of the most important there are. But what has remained largely unexplored and undertheorized is where in the constitution future amendments should be located and how they should be codified.

The four models of amendment codification in use around the world have their advantages and also their weaknesses. The appendative model in the U.S. Constitution tracks the evolution of American history along its arc of social progress, though it remains a permanent reminder of the painful past. The integrative model in the Indian Constitution offers a detailed record of each textual alteration, marking not only what has changed but also how and when the change was formalized, though with the attendant clutter of footnotes and brackets throughout the text. The disaggregative model in the British Constitution relieves constitutional designers of the burden

of harmonization at the front end of the process but generates a constitution spread across multiple sites of detached codification. And the invisible model in the Irish Constitution presents the document as a coherent, uniform, and unadulterated text that inspires confidence in the stability of the regime, yet erases reminders of yesterday, denying the people a public record of where they have been. None is ideal, but each is now the norm where it is used—a norm ordinarily resulting from a principled or contingent choice made by reformers at the time of amendment.

How, then, should reformers codify alterations to their text: Is one model best? Reformers need not deny themselves the advantages of competing models by locking themselves into one single model for all alterations. There is nothing to stop reformers from choosing a different form of codification depending on the particularities of a given amendment, on the constitutional politics of the moment, and on the interests at stake. Reformers can decide contemporaneously at the time of amendment whether to integrate or append a modification, to altogether replace old text with new using the invisible model, or to create a new constitution-level document with equal status. Reformers might find it more practical to use the invisible model of codification where the change resembles the drafting error that occurred in the writing of the Saint Lucian Constitution.⁷³ They might alternatively prefer the integrative model in the case of recurring changes in the text, for instance where a change makes the constitutional text gender-neutral where it once used only male pronouns, as in the Spanish Constitution discussed earlier in this chapter. For larger changes that are likely to have far-reaching consequences in law and society—and in which courts are likely to be centrally involved—the appendative model may offer the best option for codification, as it defers resolution to the future. But these options are all available to constitutional designers and their successors. There may well be clarity in the consistency of adhering one single model of amendment codification, but the best practice may counsel against locking the constitution into a one-size-fits-all rule for all alterations.

Conclusion

The Rules of Law

What is an amendment, what are amendment rules for, and how should constitutional designers build the procedures of constitutional change? There are remarkably few good answers to these all-important questions. There are admittedly answers to the first, but they require an intellectual leap that fails to align form with function: they identify a transformative change conceptually as a new constitution even though no new constitution has been promulgated. On the second, scholars rarely distinguish between the procedures used to amend a constitution and constitutional amendments themselves—and this results in insufficient precision about the purposes of amendment rules as opposed to the purposes of particular amendments. And the third question—how to design amendment rules—remains unaddressed in any comprehensive way despite its centrality to the making and endurance of constitutions. Constitutional designers therefore have too few resources to guide them in constructing the rules of amendment, and scholars do not have a clear portrait of the significance of amendment rules in the project of constitutionalism.

No part of a constitution is more important than its rules of change. Reformers can use them to enhance or weaken democracy, to expand or retrench rights, and to improve or indeed destroy the constitution itself. Constitutional designers must accordingly be especially careful when they construct the rules of amendment. These rules set the default standard for what counts as a valid change, who may initiate and ratify it, what threshold of agreement is required and how long lawmakers have to reach it, and whether anything in the constitution should be unchangeable.

Yet we know from experience that amendment rules are often the last thing on the agenda in constitution-making. Constitutional designers instead focus more closely on other questions, including whether to create a

parliamentary or presidential system, what kind of constitutional review to adopt, and how best to protect rights and freedoms. All of these are critical choices in the making of a constitution but the design of amendment rules should be a high priority as well.

Amendment rules have proven quite versatile since they were first created and codified. Chapter 1 revealed just how multifaceted they are. They have formal uses in constitutionalism, namely repairing imperfections, distinguishing constitutional from ordinary law, entrenching rules against easy repeal or revision, and creating a predictable procedure for constitutional change. Amendment rules also have functional uses, including counterbalancing courts, promoting democracy, raising public awareness, pacifying change, and managing difference. Amendment rules have an important symbolic use as well: they can be designed to express a rank-ordering of constitutional values. These many uses of amendment rules may not all be possible at the same time and in the same constitution. But they offer constitutional designers many possibilities for self-governance.

As is true of building an edifice, constructing the rules of constitutional change requires careful thought about design and operation. The task is complex and can be done most effectively after arriving at a fulsome self-understanding of the purposes of the constitution for which the rules are being designed. Designers should also weigh how to balance competing interests between flexibility and rigidity, concentrated and decentralized authority, and direct and representative participation by the people. In what follows, I chart a general roadmap to build the rules of amendment for any codified constitution.

A Blueprint for Amendment Design

Amendment rules are organized around four sets of fundamental choices, each involving a different stage in amendment design. The first is a set of choices about the foundations of the polity, while the second requires a choice among six pathways to initiate, propose, and ratify an amendment. The third is a set of decisions about the specifications that will put the amendment foundations and pathways into operation. And the fourth concerns the form of codification: How will amendments be recorded in the constitution? Constitutional designers can sequence these four sets of

fundamental choices as a guide for building amendment rules specifically suited to their own local history, experience, and ambitions for the state and its people.

Foundations

Formal amendment rules are anchored in the foundational distinction between constitutional amendment and dismemberment. As we discovered in Chapter 2, amendment and dismemberment fall on opposite ends of the scale of constitutional change. An amendment keeps the constitution coherent with itself but a dismemberment marks a fundamental break with the core commitments or presuppositions of the constitution. Properly understood, an amendment entails a defined subject, authority, scope, and purpose. Its subject is higher law as opposed to ordinary law, and it is authoritative in both law and politics. Its purpose is to correct, elaborate, reform, or restore the meaning of the constitution in a way that keeps faith with the constitution. The scope of an amendment is its most important factor: for a change to be correctly defined as an amendment, the change must keep unbroken unity with the constitution being amended, signaling that the act of amendment is a coherent continuation of the constitution-making project initiated at the founding and at intervening moments of refounding. In contrast, a constitutional dismemberment entails a major change to one or more of a constitution's core commitments. A dismemberment alters a fundamental right, a constitutional structure, or a central aspect of the identity of a constitution. It is inconsistent with the existing constitution and results in unmaking at least one of its essential features. A constitutional dismemberment is simultaneously a destruction and reconstruction of the constitution.

Distinguishing between what counts as an amendment or a dismemberment can be done at the stage of constitutional creation. Designers can create different procedures for amending the constitution and others for dismembering it, the former requiring a lower degree of agreement than the latter. What emerges is a hierarchy of constitutional importance, with some parts or principles of the constitution assigned to amendment procedures and others to dismemberment procedures. As I showed in Chapter 5, some constitutions codify the distinction between amendment

and dismemberment, including the Austrian, Costa Rican, Spanish, and Swiss Constitutions. These can serve as a guide for codifying procedures along the full spectrum of constitutional change, from the routine and technical to the revolutionary and transformative—all while keeping legal continuity in the regime.

Designing rules for amendment and dismemberment at the stage of constitutional creation forces a choice: What is most important in the polity? The more important matters are made changeable only using the more involved procedures of dismemberment, while the less important ones are changeable using the easier procedures of amendment. Constitutional designers can also choose to codify unamendable rules to shield from future alteration what they regard as the fundamental features of the polity. In this scenario, amendment design would contain rules changeable by amendment, rules changeable by dismemberment, and unamendable rules changeable only by creating a new constitution.

Today most constitutions leave unstated the distinction between amendment and dismemberment. Constitutions generally neither recognize nor imply that amendment and dismemberment entail different consequences and outcomes. The standard democratic design instead defines constitutional change exclusively with regard to amendment. Of course, it does not follow from the non-codification of the distinction between amendment and dismemberment that the distinction does not exist or that its non-codification will foreclose its emergence from other sources. We learned in Chapter 2 that courts will sometimes enforce the distinction between amendment and dismemberment in their creation and application of the basic structure doctrine or its equivalent in cases where the distinction is left uncoded. The difference here is that courts, not constitutional designers, are the ones to determine what is most important in the polity, what counts as an amendment or dismemberment, and how reformers can make the changes they wish to the constitution. When courts take this action, they exercise the functions of both constitutional author and interpreter—two functions that have historically been separated but are now increasingly fused into a single body as the doctrine of unconstitutional constitutional amendment grows in use around the world. We learned in Chapter 5 that constitutional designers have many institutional design options at their disposal if they wish to confer upon courts the power to review constitutional changes—or to deny them this power outright.

Pathways

The second set of choices confronting constitutional designers involves the power to initiate, propose, and ratify a constitutional change. I explained in Chapter 5 what each option offers as strengths and weaknesses. Codified constitutions generally embed one of six formal amendment pathways into their formal amendment foundations. The pathways of formal amendment vary according to the number of procedures available for formally amending the constitution and according also to the range of the constitutional rules open to formal amendment by those procedures. Constitutional designers can choose among one of two categories for how many procedures to codify: *single-track*, for formal amendment rules codifying only one procedure for formal amendment; and *multi-track*, for formal amendment rules codifying more than one procedure. These tracks differ according to the institutions authorized to initiate a formal amendment, to make an amendment proposal, and to ratify an amendment.

Amendment rules can also authorize the use of all, some, or one of these procedures to amend all, some, or one of the rules in a codified constitution. In this choice, constitutional designers can select among three options: a *comprehensive* design, where all amendable rules are amendable by all available procedures; a *restricted* design, which makes each amendable rule amendable by a designated procedure for formal amendment; and an *exceptional* design, which creates an extraordinary procedure reserved exclusively for one constitutional rule or a set of related constitutional rules. These two sets of options generate six possible combinations for constructing pathways of change: comprehensive single-track and multi-track; restricted single-track and multi-track; and exceptional single-track and multi-track amendment pathways. I explained in Chapter 5 how constitutional designers can use these pathways to achieve any number of objectives in governance, for instance to reinforce federalism, to enhance or diminish the judicial role, and to express constitutional values.

Specifications

Amendment rules are therefore anchored in the foundational distinction between amendment and dismemberment, and they are structured around one of six pathways. Yet these foundations and pathways

are neither self-executing nor do they provide the entire blueprint for amendment design. They must be supplemented by specifications that set into motion their operation. These specifications are often the first thing readers observe when reading amendment rules. Of the several types of formal amendment specifications, five appear with regularity in codified constitutions.

First, formal amendment rules codify thresholds specifying the quantum of agreement needed to use any of their procedures. Constitutional designers sometimes also specify quorum requirements that lawmakers must meet to validly deploy an amendment procedure. Constitutional designers have wide latitude to tailor these thresholds to their local political culture and norms.

Second, constitutions often codify subject matter restrictions on amendment. One type of restriction presents a choice between single-subject or omnibus amendment bills. We evaluated this choice in Chapters 4 and 5. A second type of subject matter restriction involves the choice to codify unamendability.

Unamendable rules make it unlawful to change features designers choose to immunize from the procedures of constitutional amendment. Examples of unamendable features appearing with some frequency in constitutions around the world include secularism, theocracy, republicanism, monarchism, federalism, unitarism, or and democracy. Unamendable rules may also prohibit constitutional changes that violate principles of international law or diminish fundamental rights and freedoms. As we discussed in Chapters 2 and 5, there is a deep interconnection among unamendability, amendment, and dismemberment.

There are many reasons why constitutional designers might codify an unamendable rule. We encountered these reasons in Chapter 4. Unamendability can be used as a design strategy to reassure political actors and the people, reconcile competing factions, preserve constitutional values or identity, transform the state and its people, manage crises, settle an open question that may otherwise be unresolvable, and to express the jurisdiction's most profound constitutional values. Sometimes unamendability arises absent either a codification, an unwritten constitutional norm, or a judicial intervention: here it occurs when the political climate makes it impossible to amend a particular rule even though that rule is in theory freely amendable. Chapter 4 introduced and illustrated this phenomenon called *constructive unamendability*.

Third, constitutions may seek to regulate the relationship between time and change. Chapter 5 showed that formal amendment specifications may also regulate changes with respect to the timing of the various steps comprising the amendment process. We learned that deliberation requirements and safe harbor rules allow constitutional designers to control the period when amendment is possible and how much time lawmakers must reserve for amendment debate and deliberation. Deliberation requirements—both floors and ceilings—compel lawmakers to consider the merits and demerits of an amendment proposal over the course of a defined period of time. Safe harbors do the opposite: they prohibit reformers from making amendment proposals for a defined period of time.

Fourth, constitutions often impose electoral preconditions on amendment, requiring successive votes separated by an election. For instance, some prohibit the same voting body from both proposing and ratifying formal amendments without an intervening election to reconstitute the body before the second vote.

A final example of the kinds of specifications available to designers are defense mechanisms. These tools suspend the power of constitutional amendment when certain political or social conditions arise, namely war, siege, emergency, succession, regency, or some other extreme condition in which a state and its people might find themselves. We discussed these kinds of specifications in Chapter 4.

Codification

There remains another choice for constitutional designers: How to record changes to the constitution? Chapter 6 revealed four models of amendment codification as they are practiced around the world. In the appendative model, used in the U.S. Constitution, amendments are appended chronologically to the end of the constitution. The integrative model in the Indian Constitution incorporates amendments directly into the master text of the original constitution, with notations and markings throughout indicating the nature of the changes. The Irish Constitution uses an invisible model of amendment codification: new text replaces the old with little indication of what has changed or how. The fourth model is the oldest: the British approach to amendment codification reflects a disaggregative model of recording amendments in separate sites of constitutional importance

across the body of written law that comprises part of its uncodified and disaggregated constitution. The choice of one or another model of codification is not without consequence. Each model has its own problems and pathologies, and each must confront separate challenges of obsolescence, harmonization, incorporation, and authority. Constitutional designers have only ever rarely made the choice of codification model at the point of constitutional creation. It has more often been made after promulgation in the heat of amendment—when passions are high and reason may be compromised. But now, with the useful explanations in this book of each of these models, constitutional designers can more clearly evaluate how best to codify amendments before the constitution is enacted.

Having selected a model of codification and layered their preferred pathways and specifications atop their chosen foundations, constitutional designers might feel confident predicting how easy or difficult amendment will be once the constitution is promulgated. Yet this view would fail to recognize that amendment difficulty derives equally and in some cases even primarily from nontextual sources. We explored this important point in Chapter 3. The cultures of amendment may have more of an impact on amendment difficulty than the formal rules themselves. We distinguished among three amendment cultures: a culture that accelerates amendment, one that redirects amendment, and another that incapacitates amendment. Chapter 3 also highlighted the temporal variability of amendment difficulty: the teaching here is that the same set of amendment rules in the same constitution in the same jurisdiction can in one era be used frequently with great success but prove virtually impossible to use in another.

The Democratic Values of Constitutional Amendment

There are advantages to changing the constitution outside the rules of formal amendment. For one, the instability and relative impermanence of informal amendment can be recast as a virtue: it authorizes lawmakers to adapt the constitution to changing times and exigencies without the risk of formal amendment failure.¹ In addition, the uncodified process of informal amendment fosters dialogic interactions among political actors and the people, and these kinds of interactions can be socially constructive.² An additional benefit involves constitutional contestation: the difficulty in both

identifying and defining the content of an informal amendment promotes the continuing contestability of constitutional law.³ Contestability is arguably valuable because it has the potential to enhance civic participation in elaborating constitutional meaning,⁴ and it might moreover promote judicial minimalism, to the extent this is a desirable posture for courts.⁵ Informal amendment can therefore entail important benefits for a political community.

Formal amendment has its own democracy-enhancing virtues. At their best, constitutional amendment rules create a public, predictable, and transparent way to express the aggregated preferences of lawmakers and the people they represent. Formal amendment rules telegraph when and how a constitution changes, and they produce legislatively or popularly validated changes that are accepted as authoritative. Their procedures invite civic engagement when they are invoked and, whether the amendment is ultimately successful after it is proposed, the process of formal amendment performs an educative function in society as reformers and voters consider choices about what they wish for their constitution and themselves.

The codification of amendment rules makes the rules of change knowable and accessible. Codification reassures reformers, their opponents, and the people of the standard the constitution requires to change the rules of law in society. When a change is successful, formal amendment then publicizes the result of collective action in a new writing that offers a visible and overt referent for future debate and coordination—useful also for subsequent efforts to reverse the new change. Publicity is the core of the reason why respecting formal amendment procedures is central to the rule of law: “[t]his textual referent, being available and apparent, enables more people to understand the fact that there has been constitutional change and to take note of it than if the change comes informally.”⁶ Brannon Dennings adds, in contrast, that “reliance on informal change can produce a constitutional culture in which people feel less and less bound by the words of the document which supposedly governs them.”⁷ In cases of formal amendment, the new constitutional writing will have been legitimated by the procedures used for its approval—assuming the procedures are properly designed to assure political actors and the people that the new rule is supported by a sufficiently representative body of voters.

In a constitutional democracy governed by a codified constitution, lawmakers should abide by the codified rules for constitutional change where the change they seek to make is governed by a clear rule.

Circumventing the codified rules of change may achieve a politically favorable outcome but in the end it degrades the constitution and undermines the rule of law. It degrades the constitution by signaling that the constitutional text does not in fact bind in all cases, and that its authority is contingent on variable political preferences. It moreover undermines our expectations for the rule of law in three ways. It gives the impression that it is proper to create law “on an ad hoc basis,”⁸ when instead law should spring from known procedures allowing opportunities for open and meaningful deliberation about its implications. Circumventing the codified rules of change is also a “failure to publicize” the laws relied upon by reformers.⁹ When the law is not known, it cannot be properly followed, understood, or challenged as to its constitutionality. Finally, third, the rule of law rejects the “failure of congruence between the rules as announced and their actual administration.”¹⁰ The rules on the books should as much as possible match the rules in practice; otherwise, their discordance leads to confusion and the possibility of arbitrary conduct.¹¹

* * *

A constitutional amendment is an event of high moment in the life of a constitutional state. It commonly requires an extraordinary legislative measure, popular agreement, or both.¹² Its legitimacy derives from the direct or mediated approval of the people to change the meaning of their constitution.¹³ The choice to amend a constitution should reflect the considered judgment of the community and the sociological legitimacy that only deliberative procedures can confer.

What validates a formal amendment is not its content alone but also the process by which it comes into existence. When majorities overcome the formal barriers to lawful constitutional change, the change itself is validated by two forms of legitimacy. The change is validated, above all, by the sociological legitimacy of the relevant publics accepting it, either affirmatively or by acquiescence, as justified and deserving of their support.¹⁴ Second, the change is validated by the legal legitimacy of satisfying the codified standard for creating new constitutional commitments.¹⁵ Meeting that standard is important to keep fidelity with the commitments made by the authoring generation.¹⁶ The justification for accepting new constitutional commitments created by an amendment to the first set of commitments is that, if properly designed, the amendment process requires some measure of representative supermajority agreement expressed at one or more points in time.¹⁷ There is even greater reason to accept new constitutional

commitments as valid when the amendment procedures used to formalize the change are designed to reflect the considered judgments of all parts of the constitutional community.¹⁸

Edmund Burke was right to insist that “a state without the means of some change is without the means of its own conservation.”¹⁹ An unamendable constitution is not a reasonable option in the modern world. It would lack the legitimacy of present popular consent,²⁰ it would expose the exaggerated self-assurance the authoring generation has in itself and the distrust it harbors for its successors,²¹ and its formal rigidity could conceal a brittle flexibility that might ultimately provoke instability.²² Yet hyper flexibility is as inadvisable as hyper rigidity because it erodes the distinction between a constitution and a statute. The prime objective in amendment design, then, must be to create rules of change that keep the constitution stable and true to popular values yet always changeable when necessary.

Notes

Introduction

1. Georges Liet-Veaux, “La ‘fraude à la constitution’: Essai d’une analyse juridique des révolutions communautaires récentes: Italie, Allemagne, France” (1943) 59 *Revue du droit et de science politique en France et à l’étranger* 116, 145.
2. See Francesco Giovannoni, “Amendment Rules in Constitutions” (2003) 115 *Public Choice* 37, 37.
3. Herman Finer, *The Theory and Practice of Modern Government* (Henry Holt & Company, 1949) 127.
4. Peter Suber, *The Paradox of Self-Amendment* (Peter Lang Publishing, 1990) 21.
5. Melissa Schwartzberg, *Democracy and Legal Change* (Cambridge University Press, 2007) 6.
6. See Ulrich K. Preuss, “The Implications of ‘Eternity Clauses’: The German Experience” (2011) 44 *Israel Law Review* 429, 430.
7. See Akhil Reed Amar, “The Consent of the Governed: Constitutional Amendment Outside Article V” (1994) 94 *Columbia Law Review* 457, 461.
8. Bjørn Erik Rasch & Roger D. Congleton, “Amendment Procedures and Constitutional Stability,” in Roger D. Congleton & Birgitta Swedenborg (eds.), *Democratic Constitutional Design and Public Policy* (MIT Press, 2006) 319, 321 (emphasis added).
9. Arun K. Thiruvengadam, *The Constitution of India: A Contextual Analysis* (Hart Publishing, 2017) 216.
10. *Minerva Mills Ltd. v. Union of India*, (1981) 1 S.C.R. 206. Much of the Forty-Second Amendment survived the Court’s constitutional review. I situate *Minerva Mills* in its larger legal and political context in Chapter 4.
11. Prior to 1999, there were four constitution-level laws: the Instrument of Government (1919/94); the Parliament Act (1928/7); the Act on the High Court of Impeachment (1922/273); and the Ministerial Responsibility Act (1922/274). See Jaakko Husa, *The Constitution of Finland: A Contextual Analysis* (Hart Publishing, 2011) 23. There were also two acts with special status: the Self-Determination Act for Åland (1991/1144) and the Act on the Acquisition of Real Property in Åland (1975/3).
12. Finland Const., s. 131.
13. I thank Elin Hofverberg at the Library of Congress for her assistance in gathering and interpreting the materials from this constitutional consolidation.

14. See Catarina Santos Botelho, “Constitutional Narcissism on the Couch of Psychoanalysis: Constitutional Unamendability in Portugal and Spain” (2019) 21 *European Journal of Law Reform* 346, 361–62.
15. “‘Race’ Out, Gender Equality In as France Updates Constitution” (June 28, 2018) *France 24*.
16. “Francois Hollande to Remove Word ‘Race’ from French Constitution” (February 1, 2013) *The Telegraph*.
17. Tom Hesketh, *The Second Partitioning of Ireland: The Abortion Referendum of 1983* (Brandsma Books, 1990).
18. United States Const., art. I, s. 3 (superseded).
19. See George H. Haynes, *The Election of Senators* (Henry Holt and Co., 1912) 101–04.
20. David A. Strauss, “The Irrelevance of Constitutional Amendments” (2001) 114 *Harvard Law Review* 1457, 1497.
21. Jay S. Bybee, “Ulysses at the Mast: Democracy, Federalism, and the Sirens’ Song of the Seventeenth Amendment” (1997) 91 *Northwestern University Law Review* 500, 537.
22. Elva Wiegand, “A History of the Movement for the Direct Election of Senators” (June 1934) Master’s Thesis, Department of History, University of Southern California, 49.
23. I explain these four fundamental features of an amendment in Chapter 2.
24. Robert E. Ward, “The Origins of the Present Japanese Constitution” (1956) 50 *American Political Science Review* 980, 1004, n.59.
25. Harold S. Quigley, “Japan’s Constitutions: 1890 and 1947” (1947) 41 *American Political Science Review* 865, 866 (quoting *Official Gazette*, extra, Nov. 3, 1946, p. 1).
26. Lester Bernhardt Orfield, *The Amending of the Federal Constitution* (University of Michigan Press, 1942) 1.
27. Articles of Confederation, art. XIII.
28. Georgia Const. (U.S.), art. LXIII (1777).
29. South Carolina Const., art. XLIV (1778).
30. Maryland Const., art. LIV (1776).
31. Vermont Const., prmb. (1777).
32. Delaware Const., art. 30 (1776).
33. See Donald S. Lutz, “Toward a Theory of Constitutional Amendment” (1994) 88 *American Political Science Review* 355, 356.
34. G. Alan Tarr, *Understanding State Constitutions* (Princeton University Press, 2000) 38; Richard Albert, “American Exceptionalism in Constitutional Amendment” (2016) 69 *Arkansas Law Review* 217, 237–40.
35. Walter Fairleigh Dodd, *The Revision and Amendment of State Constitutions* (Johns Hopkins University Press, 1910) 118.
36. See Bruce E. Cain & Roger G. Noll, “Malleable Constitutions: Reflections on State Constitutional Reform” (2009) 87 *Texas Law Review* 1517, 1524; Robert F. Williams, “State Constitutional Law Processes” (1983) 24 *William & Mary Law Review* 169, 226.
37. See Richard Albert, “Amending Constitutional Amendment Rules” (2015) 13 *International Journal of Constitutional Law* 655; Richard Albert “The Structure of Constitutional Amendment Rules” (2014) 49 *Wake Forest Law Review* 913.

38. See Bruce Ackerman, *We the People—Volume I: Foundations* (Harvard University Press, 1991); Bruce Ackerman, *We the People—Volume II: Transformations* (Harvard University Press, 1998); Bruce Ackerman, *We the People—Volume III: The Civil Rights Revolution* (Harvard University Press, 2014).
39. India Const., art. 368.
40. *Golaknath v. State of Punjab*, 1967 S.C.R. (2) 762.
41. Hari Chang, *The Amending Process in the Indian Constitution* (Metropolitan, 1972) 214.
42. The Constitution (Twenty-Fourth Amendment) Act, 1971.
43. *Kesavananda Bharati Sripadagalvaru v. Kerala*, 1973 S.C.C. (4) 225.
44. *Ibid.*
45. *Minerva Mills Ltd. v. Union of India*, 1981 S.C.R. (1) 206.
46. Ackerman (n 38).
47. Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012) 7.
48. See generally John Gardner, “Can There Be a Written Constitution,” in Leslie Green & Brian Leiter (eds.), *Oxford Studies in Philosophy of Law, Volume 1* (Oxford University Press, 2001) (probing the limits of writtenness).
49. France Const., art. 6 (later amended in 1962).
50. Stanley H. Hoffmann, “The French Constitution of 1958: I. The Final Text and Its Prospects” (1959) 53 *American Political Science Review* 332, 342.
51. Henry W. Ehrmann, “Direct Democracy in France” (1963) 57 *American Political Science Review* 883, 883.
52. See Jean-Philippe Derosier, “The French People’s Role in Amending the Constitution,” in Richard Albert, Xenophon Contiades, & Alkmene Fotiadou (eds.), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing, 2017) 321.
53. See François Mitterand, *Le Coup d’État permanent* (Plon, 1964) 113.
54. Décision no. 62-20 DC, 6 novembre 1962.
55. Belgium Const., art. 1.
56. *Ibid.* art. 195.
57. Patricia Popelier & Koen Lemmens, *The Constitution of Belgium: A Contextual Analysis* (Hart Publishing, 2015) 43–45.
58. *Ibid.* 44.
59. European Commission for Democracy through Law (Venice Commission), *Report on Constitutional Amendment*, CDL-AD(2010)001, 11–12 December 2009, 6.
60. *Ibid.* 37.
61. Articles of Confederation, art. XIII.
62. Benjamin Fletcher Wright, “Consensus and Continuity—1776–1878” (1958) 38 *Boston University Law Review* 1, 19.
63. *Journals of the Continental Congress 1774–1789* (February 21, 1787) Volume XXXII, 74 (United States Government Printing Office, 1936).
64. United States Const., art. VII.

65. Richard S. Kay, “The Illegality of the Constitution” (1987) 4 *Constitutional Commentary* 57, 75.
66. Bruce Ackerman & Neal Katyal, “Our Unconventional Founding” (1995) 62 *University of Chicago Law Review* 475, 562.
67. Bianca Selejan-Guțan, *The Constitution of Romania: A Contextual Analysis* (Hart Publishing, 2016) 245.
68. Khemthong Tonsakulrungruang, “Entrenching the Minority: The Constitutional Court in Thailand’s Political Conflict” (2017) 26 *Washington International Law Journal* 247, 259–60.
69. Cristina Bucur & Bjørn Erik Rasch, “Institutions for Amending Constitutions,” in Roger D. Congleton et al. (eds.), *The Oxford Handbook of Public Choice* (Oxford University Press, 2019) Volume 2, 156, 162.
70. The Council of State ultimately declared the president’s veto unconstitutional but nonetheless effective. See Decision number 11001-03-24-000-2012-00220-00 (IJ) (September 16, 2014). I am grateful to Vicente F. Benitez R. for advising me on how to interpret this case.
71. See Fiona de Londras & David Gwynn Morgan, “Constitutional Amendment in Ireland,” in Xenophon Contiades (ed.), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Routledge, 2013) 179, 183–86.
72. Turkey Const., art. 148 (“[T]he verification of constitutional amendments shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under expedited procedure was observed.”).
73. For a thorough discussion of the case, see Yaniv Roznai & Serkan Yolcu, “An Unconstitutional Amendment—The Turkish Perspective: A Comment on the Turkish Constitutional Court’s Headscarf Decision” (2012) 10 *International Journal of Constitutional Law* 175.
74. Turkey Const., art. 4.
75. *Ibid.* art. 2.
76. Decision of the Constitutional Court of the Republic of Turkey, June 3, 2016, E. 2016/54; K. 2016/117, Resmi Gazete [Official Gazette], June 9, 2016, No. 29737 (“Parliamentary Immunity Case”) (translation by Ali Acar on file). For a discussion of this case, see Richard Albert, “Constitutional Amendment and Dismemberment” (2018) 43 *Yale Journal of International Law* 1, 26–29.
77. Turkey Const., art. 83.
78. *Ibid.* There is another constitutional rule to note: Article 85 gives members of the National Assembly the right to appeal their loss of parliamentary immunity directly to the Constitutional Court, which can annul their loss of immunity if it does not occur in accordance with the Constitution. *Ibid.* art. 85.
79. Parliamentary Immunity Case (n 76) para. 11.
80. *Ibid.* para. 13.
81. *Ibid.* paras. 14–15.

Chapter 1

1. People's Republic of China Const., art. 79 (superseded by art. 45 of reform package).
2. Robert Fulford, "New Emperor has a Lot to Hide, and the Power to Make It Happen" (March 16, 2018) *National Post*.
3. Chris Buckley, "How Xi Jinping Made His Power Grab: With Stealth, Speed and Guile" (March 7, 2018) *New York Times*.
4. Chun Han Wong, "Xi Jinping Clear to Rule Indefinitely as China Scraps Presidential Term Limits" (March 11, 2018) *Wall Street Journal*.
5. Chris Buckley & Adam Wu, "Ending Terms Limits for China's Xi Is a Big Deal. Here's Why" (March 10, 2018) *New York Times*.
6. Walter A. Skeat, *A Concise Etymological Dictionary of the English Language* (Clarendon Press, 1885) 133.
7. France Const., tit. VII, art. 1 (1791) ("L'Assemblée nationale constituante déclare que la Nation a le droit imprescriptible de changer sa Constitution; et néanmoins, considérant qu'il est plus conforme à l'intérêt national d'user seulement, par les moyens pris dans la Constitution même, du droit d'en réformer les articles dont l'expérience aurait fait sentir les inconvénients, décrète qu'il y sera procédé par une Assemblée de révision en la forme suivante. . .") (superseded).
8. See Richard Albert, "The Structure of Constitutional Amendment" (2014) 49 *Wake Forest Law Review* 913.
9. *The Matter of the Attorney General's Reference (Constitutional Questions) Act Cap 17:18 of the Revised Laws of Saint Lucia*, SLUHCVP2012/0018, 2013: March 27; May 24, para. 36.
10. *Ibid.*
11. *Ibid.* para. 37.
12. *Ibid.* para. 61.
13. Brannon P. Denning & John R. Vile, "The Relevance of Constitutional Amendments: A Response to David Strauss" (2002) 77 *Tulane Law Review* 247, 275.
14. See Raymond Ku, "Consensus of the Governed: The Legitimacy of Constitutional Change" (1995) 64 *Fordham Law Review* 535, 542.
15. See Bjørn Erik Rasch & Roger D. Congleton, "Amendment Procedures and Constitutional Stability," in Roger D. Congleton & Birgitta Swedenborg (eds.), *Democratic Constitutional Design and Public Policy: Analysis and Evidence* (MIT Press, 2006) 319, 326.
16. See Andrés Sajó, *Limiting Government: An Introduction to Constitutionalism* (Central European University Press, 1999) 39–40; Edward Schaefer, *Crafting Constitutional Democracies: The Politics of Institutional Design* (Rowman & Littlefield, 2006) 222.
17. Hans Kelsen, *General Theory of Law and State* (Anders Wedberg transl., Harvard University Press, 1945) 259.
18. See Donald S. Lutz, "Toward a Theory of Constitutional Amendment," in Sanford Levinson (ed.), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press, 1995) 237, 240.

19. See John R. Vile, *Contemporary Questions Surrounding the Constitutional Amending Process* (Praeger, 1993) 2.
20. See Kathleen Sullivan, “Constitutional Amendmentitis” (1995) *The American Prospect* 22–23.
21. See Richard Albert & Joel Colón-Ríos (eds.), *Quasi-Constitutionality and Constitutional Statutes: Forms, Functions, Applications* (Routledge, 2019).
22. See William N. Eskridge, Jr. & John Ferejohn, “Super-Statutes” (2001) 50 *Duke Law Journal* 1215.
23. See *Shelby County v. Holder*, 570 U.S. 529 (2013) (invalidating the act’s preclearance formula).
24. See Donald J. Boudreaux & A. C. Pritchard, “Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process” (1993) 62 *Fordham Law Review* 111, 123–24.
25. Lawrence G. Sager, “The Birth Logic of a Democratic Constitution,” in John Ferejohn et al. (eds.), *Constitutional Culture and Democratic Rule* (Cambridge University Press, 2001) 110, 124.
26. See Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge University Press, 2000).
27. See Richard Albert, “Constitutional Handcuffs” (2010) 42 *Arizona State Law Journal* 663.
28. John Locke, “The Fundamental Constitutions of Carolina,” in Francis Newton Thorpe (ed.), *The Federal and State Constitutions* (Government Printing Office, 1909) 2743, 2786.
29. Sanford Levinson, “The Political Implications of Amending Clauses” (1996) 13 *Constitutional Commentary* 107, 112.
30. Elster (n 26) 104. See Richard Albert, “Temporal Limitations in Constitutional Amendment” (2016) 21 *Review of Constitutional Studies* 37.
31. See Vivien Hart, “Democratic Constitution Making” (2003) 107 *United States Institute of Peace Special Report* 1, 4.
32. See Rosalind Dixon & Richard Holden, “Constitutional Amendment Rules: The Denominator Problem,” in Tom Ginsburg (ed.), *Comparative Constitutional Design* (Cambridge University Press, 2012) 195, 195.
33. Bruce Ackerman, “Transformative Appointments” (1988) 101 *Harvard Law Review* 1164, 1179.
34. Ecuador Const., art 443.
35. Albania Const., art. 131.
36. Rosalind Dixon, “Constitutional Amendment Rules: A Comparative Perspective,” in Tom Ginsburg & Rosalind Dixon (eds.), *Comparative Constitutional Law* (Edward Elgar, 2011) 96, 98.
37. 400 U.S. 112 (1970).
38. Matt Qvortrup, “Conclusion,” in Matt Qvortrup (ed.), *Referendums Around the World* (Palgrave Macmillan, 2014) 247.
39. Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (Yale University Press, 2001) 174.

40. Ibid.
41. Roger D. Congleton, *Perfecting Parliament: Constitutional Reform, Liberalism, and the Rise of Western Democracy* (Cambridge University Press, 2011) 287.
42. Ibid. 327.
43. Ku (n 14) 571.
44. Lutz (n 18) 239–40.
45. Denning & Vile (n 13) 279.
46. Walter Dellinger, “The Legitimacy of Constitutional Change: Rethinking the Amendment Process” (1983) 97 *Harvard Law Review* 386, 431.
47. Dixon (n 36) 97.
48. Max Farrand (ed.), *The Records of the Federal Convention of 1787* (Yale University Press, rev. ed. 1966) Volume I, 203.
49. Bosnia and Herzegovina Const., art. X.
50. Kiribati Const., art. 124.
51. Kirk Semple, “New Cuba Constitution, Recognizing Private Property, Approved by Lawmakers” (July 22, 2018) *New York Times*.
52. South Africa Const., s. 74.
53. Ukraine Const., art. 157. The Ukrainian case exposes the futility of codifying a rule against amendment when reformers or aggressors assert themselves against the constitutional text. See Yaniv Roznai & Silvia Suteu, “The Eternal Territory? The Crimean Crisis and Ukraine’s Territorial Integrity as an Unamendable Constitutional Principle” (2015) 16 *German Law Journal* 542. Yet codified unamendability nonetheless exercises an important expressive function. See Richard Albert, “The Expressive Function of Constitutional Amendment Rules” (2013) 59 *McGill Law Journal* 225.
54. Ukraine Const., art. 156.
55. Ibid. art. 155.
56. William G. Andrews, *Constitutions and Constitutionalism* (D. Van Nostrand Company, 2d ed. 1963) 22.
57. Giovanni Sartori, “Constitutionalism: A Preliminary Discussion” (1962) 56 *American Political Science Review* 853, 855.
58. Ibid.
59. Andrews (n 56) 22–23.
60. David S. Law & Mila Versteeg, “Sham Constitutions” (2013) 101 *California Law Review* 863, 865.
61. Benjamin R. Barber, “Constitutional Rights—Democratic Instrument or Democratic Obstacle?,” in Robert A. Licht (ed.), *The Framers and Fundamental Rights* (AEI Press, 1992) 23, 30.
62. Jan-Erik Lane, *Constitutions and Political Theory* (Manchester University Press, 2d ed. 2011) 45.
63. Ibid.
64. Russia Const., arts. 134–37.
65. Law & Versteeg (n 60) 899.
66. Germany Basic Law, art. 1(1).
67. Ibid. art. 1(2).

68. Ibid. art. 1(3).
69. Ibid. art. 79(3).
70. Ernst Benda, “The Protection of Human Dignity (Article 1 of the Basic Law)” (2000) 53 *Southern Methodist University Law Review* 443, 445.
71. “Document 7: The Signing and Proclamation of the Basic Law (Grundgesetz), 23 May 1949,” in Carl-Christoph Schweitzer et al. (eds.), *Politics and Government in Germany, 1944–1994: Basic Documents* (Berghahn Books, 1995) 17, 17.
72. Werner Heun, *The Constitution of Germany: A Contextual Analysis* (Hart Publishing, 2011) 23.
73. See Dennis L. Bark & David R. Gress, *A History of West Germany: From Shadow to Substance 1945–1963* (Basil Blackwell, 1989) 225.
74. See Christian Starck, “Constitutional Definition and Protection of Rights and Freedoms,” in Christian Stark (ed.), *Rights, Institutions and Impact of International Law According to the German Basic Law* (Nomos Verlagsgesellschaft, 1987) 19, 22.
75. Craig T. Smith & Thomas Fetzer, “The Uncertain Limits of the European Court of Justice’s Authority: Economic Freedom Versus Human Dignity” (2004) 10 *Columbia Journal of European Law* 445, 450.
76. Donald P. Kommers & Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 3d ed. 2012) 44.
77. Ibid. 355.
78. *Eppler Case* (1980), 54 BVerfGE 148, in Kommers & Miller (n 76) 406–07.
79. Kommers & Miller (n 76) 355.
80. Ibid. 356 (translating the *Microcensus Case* (1969), 27 BVerfGE 1).
81. Ibid.
82. Ibid. 356–57.
83. Ibid. 356.
84. Ibid.
85. Ibid. The Constitutional Court rejects conduct treating persons as objects. In a later case implicating the human dignity value, the Court ruled unconstitutional the use of a polygraph in a criminal matter. As Kommers and Miller write, “[t]o elicit the truth by attaching persons to a machine, said the Court, is to regard them as objects and not as human beings capable of telling the truth through ordinary questioning.” Ibid. 363.
86. Ibid. 356.
87. Ibid.
88. Ibid. 363 (translating the *Life Imprisonment Case* (1977), 45 BVerfGE 187).
89. Ibid. Capital punishment was not an option; it is prohibited in Article 102 of the Basic Law.
90. Ibid. 363.
91. Ibid. 367.
92. Ibid. 364.
93. Ibid.
94. Ibid.
95. Ibid.

96. Ibid.
97. Ibid. 366.
98. Ibid.
99. Ibid.
100. Ibid. 374 (translating the *Abortion I Case* (1975), 39 BVerfGE 1).
101. Ibid.
102. Ibid.
103. Ibid.
104. Ibid. The right to life rule states that “[e]veryone shall have the right to life and physical inviolability.” Germany Basic Law, art. 2(2).
105. Kommers & Miller (n 76) 376–77.
106. Ibid. 374.
107. Ibid. 374.
108. Ibid.
109. Ibid.
110. Ibid.
111. Ibid.
112. Ibid.
113. Ibid.
114. Ibid. 376.
115. Ibid.
116. Ibid.
117. Ibid. (quoting the *Abortion I Case* (1975), 39 BVerfGE 1).
118. Ibid. 377.
119. Ibid.
120. Ibid.
121. Ibid. 396 (discussing and translating in part the *Aviation Security Act Case* (2006), 115 BVerfGE 118).
122. Ibid.
123. Ibid.
124. Ibid. (quoting the *Aviation Security Act Case* (2006), 115 BVerfGE 118, 154).
125. Ibid. 397.
126. Ibid.
127. Ibid.
128. Eckart Klein, “Human Dignity in German Law,” in David Kretzmer & Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International, 2002) 145, 159.
129. See Kommers & Miller (n 76) 384–85.
130. Kurt Sontheimer, “Principles of Human Dignity in the Federal Republic,” in Paul Kirchhof & Donald P. Kommers (eds.), *Germany and Its Basic Law: Past, Present, and Future—A German–American Symposium* (Nomos Verlagsgesellschaft, 1993) 213, 216.
131. Stéphanie Henneute-Vauchez, “A Human *Dignitas*? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence” (2011) 9 *International Journal of Constitutional Law* 32, 43.

Chapter 2

1. Abraham Lincoln, *First Inaugural Address* (March 4, 1861).
2. H.R. Resolution 80, 36th Congress, 12 Stat. 251 (1861).
3. Rogers M. Smith, “The Limits of Legalism” (1999) 108 *Yale Law Journal* 2039, 2059 n.89.
4. Elai Katz, “On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment” (1996) 29 *Columbia Journal of Law & Social Problems* 251, 277.
5. Paulo Trevisani, “Brazil’s Senate Passes Constitutional Amendment to Cap Public Spending” (December 13, 2016) *Wall Street Journal*.
6. Anna Edgerton & Mario Sergio Lima, “Temer Proposes Spending Cap in Effort to Fix Brazil’s Budget” (June 15, 2016) *Bloomberg*.
7. See Anthony Boadle & Marcela Ayres, “Brazil Senate Passes Spending Cap in Win for Temer” (December 13, 2016) *Reuters*.
8. Brazil Const., preamble.
9. *Ibid.* art. 1, § IV.
10. *Ibid.* art. 3, § III.
11. *Ibid.* arts. 6–11.
12. *Ibid.* arts. 196–200.
13. *Ibid.* arts. 203–04.
14. *Ibid.* arts. 205–14.
15. *Ibid.* art. 7, §§ I–XXXIV.
16. Juliano Zaiden Benvindo, “The Forgotten People in Brazilian Constitutionalism: Revisiting Strategic Behavior Analyses of Regime Transitions” (2017) 15 *International Journal of Constitutional Law* 332, 352.
17. See Juliano Zaiden Benvindo, “The Brazilian Constitutional Amendment Rate: A Culture of Change?” (August 10, 2016) *International Journal of Constitutional Law Blog*.
18. Juliano Zaiden Benvindo, “Preservationist Constitutional Amendments and the Rise of Antipolitics in Brazil” (October 26, 2016) *International Journal of Constitutional Law Blog*.
19. See Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.), ss. 22, 37, 40.
20. See Supreme Court Act, R.S.C., 1985, c. S-26, s. 6.
21. For a discussion of these and other implications, see Robert Young (ed.), *The Secession of Quebec and the Future of Canada* (McGill-Queen’s University Press, 1998).
22. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 97 [“*Secession Reference*”].
23. *Ibid.* paras. 88–105.
24. *Secession Reference* (n 22) para. 84.
25. Steve Scherer & Gavin Jones, “Renzi to Resign After Referendum Rout, Leaving Italy in Limbo” (December 3, 2016) *Reuters*.
26. See Lorenza Violini & Antonia Baraggia, “The Italian Constitutional Challenge: An Overview of the Upcoming Referendum” (December 2, 2016) *International Journal of Constitutional Law Blog*.

27. Harry McGee & Steven Carroll, “Seanad to Be Retained After Government Loses Referendum” (October 5, 2013) *Irish Times*.
28. Oran Doyle, “Ireland Considers Move to Unicameral Parliament” (July 7, 2013) *International Journal of Constitutional Law Blog*.
29. See Eoin Carolan, “Bicameralism and Its Discontents—Ireland’s Senate: An Introduction” (October 16, 2014) *Verfassungsblog*.
30. See David Kenny, “The Failed Referendum to Abolish Ireland’s Senate: Rejecting Unicameralism in a Small and Relatively Homogeneous Country” in Richard Albert, Antonia Baraggia, & Cristina Fasone (eds.), *Constitutional Reform of National Legislatures: Bicameralism Under Pressure* (Edward Elgar, 2019).
31. UCD Constitutional Studies Group, UCD Sutherland School of Law, *A Guide to the Referendum on the 32nd Amendment to the Constitution* (2013) 4.
32. *Ibid.*
33. *Ibid.*
34. See Oran Doyle, “The Dynamics of Constitutional Change” (2013) 102 *Studies: An Irish Quarterly Review* 191, 199–200.
35. Sandra Madsen, “The Japanese Constitution and Self-Defense Forces: Prospects for a New Japanese Military Role” (1993) 3 *Transnational Law & Contemporary Problems* 549, 555. For an inquiry into the blurry distinction between imposition and autochthony, see Richard Albert, “Constitutions Imposed with Consent?,” in Richard Albert, Xenophon Contiades, & Alkmene Fotiadou (eds.), *The Law and Legitimacy of Imposed Constitutions* (Routledge, 2018) 103.
36. See Masumi Ito, “LDP Returns with All Its Old Baggage” (December 25, 2012) *Japan Times*.
37. Japan Const., art. 9.
38. *Ibid.*
39. Japan Const., art. 96.
40. Kenneth L. Port, “Article 9 of the Japanese Constitution and the Rule of Law” (2004) 13 *Cardozo Journal of International and Comparative Law* 127, 157.
41. See Chaihark Hahm & Sung Ho Kim, “To Make ‘We the People’: Constitutional Founding in Postwar Japan and South Korea” (2010) 8 *International Journal of Constitutional Law* 800, 814.
42. Akihiro Ogawa, “Peace, a Contested Identity: Japan’s Constitutional Revision and Grassroots Peace Movements” (2011) 36 *Peace & Change* 373, 374.
43. David Arase, “Japan, the Active State? Security Policy After 9/11” (2007) 47 *Asian Survey* 560, 562.
44. See Koseki Shoichi, *The Birth of Japan’s Postwar Constitution* (Westview Press, 1997) 217–22; John M. Maki, “Japanese Constitutional Style,” in Dan Fenno Henderson (ed.), *The Constitution of Japan: Its First Twenty Years, 1947–1967* (University of Washington Press, 1968) 27; Craig Martin, “Binding the Dogs of War: Japan and the Constitutionalization of Jus Ad Bellum” (2008) 30 *University of Pennsylvania Journal of International Law* 267, 304 n.102.
45. J. Mark Ramseyer & Eric. B. Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan* (University of Chicago Press, 2010) 19.

46. See Craig Martin, “The Legitimacy of Informal Constitutional Amendment and the ‘Reinterpretation’ of Japan’s War Powers” (2017) 40 *Fordham International Law Journal* 427, 468–89.
47. See Ashley Kirk, “What Are the Biggest Defence Budgets in the World?” (October 27, 2015) *The Telegraph*.
48. John Rawls, *Political Liberalism* (Columbia University Press, 1993) 238.
49. *Ibid.* 239
50. *Ibid.*
51. Thomas M. Cooley, “The Power to Amend the Federal Constitution” (1893) 2 *Michigan Law Journal* 109, 117.
52. *Ibid.* 119.
53. *Ibid.*
54. *Ibid.*
55. Walter F. Murphy, “Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity,” in Sanford Levinson (ed.), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press, 1995) 163, 177.
56. Jason Mazzone, “Unamendments” (2005) 90 *Iowa Law Review* 1747, 1754.
57. Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer transl. ed., Duke University Press, 2008) 150.
58. *Ibid.*
59. The leading modern account of this view appears in Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2017); see also Yaniv Roznai, “Amendment Power, Constituent Power, and Popular Sovereignty,” in Richard Albert, Xenophon Contiades, & Alkmene Fotiadou (eds.), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing, 2017) 23, 24–37 (arguing that the amendment power is limited); David Landau & Rosalind Dixon, “Constraining Constitutional Change” (2015) 50 *Wake Forest Law Review* 859, 866–67 (discussing the dominant view in the field); Ulrich K. Preuss, “The Implications of Eternity Clauses: The German Experience” (2011) 44 *Israel Law Review* 429, 435–45 (tracing the history of unconstitutional constitutional amendment in Germany); Douglas Linder, “What in the Constitution Cannot Be Amended?” (1981) 23 *Arizona Law Review* 717, 728–33 (suggesting that the Corwin Amendment would have created a new U.S. Constitution); Walter F. Murphy, “An Ordering of Constitutional Values” (1980) 53 *Southern California Law Review* 703, 754–57 (arguing that an amendment can be unconstitutional); George D. Skinner, “Intrinsic Limitations on the Power of Constitutional Amendment” (1920) 18 *Michigan Law Review* 213, 221 (arguing that Article V is limited).
60. Emmanuel Joseph Sieyès, *Qu’est-ce que le Tiers état?* (Éditions du Boucher, 2002) (originally published in 1789).
61. *Ibid.* 53.
62. *Ibid.*
63. *Ibid.* 53.

64. See Richard Albert, “Four Unconstitutional Constitutions and Their Democratic Foundations” (2017) 50 *Cornell International Law Journal* 169.
65. William L. Marbury, “The Limitations Upon the Amending Power” (1919) 33 *Harvard Law Review* 223, 225 (italics in original).
66. See *British Caribbean Bank Limited v. Attorney General of Belize*, Claim No. 597 of 2011 (2012) [“Belize Claim 597”].
67. Belize Const., s. 2.
68. Belize Claim 597 (n 66) para. 9.
69. *Ibid.* para. 10.
70. *Ibid.* para. 85.
71. *Ibid.* para. 45.
72. *Ibid.*
73. Belize Const., prml.
74. *Ibid.*
75. Compare Belize Const., s. 69(3) (establishing higher amendment threshold for certain rules), with *ibid.* s. 69(4) (establishing lower amendment threshold for certain rules).
76. *Ibid.*
77. Belize Claim 597 (n 66) para. 9.
78. *Ibid.* para. 10.
79. I discuss the basic structure doctrine in detail in Chapter 4.
80. Zachary Elkins, Tom Ginsburg, & James Melton, *The Endurance of National Constitutions* (Cambridge University Press, 2009) 55.
81. *Ibid.*
82. 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 Sanford Levinson (ed.), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press, 1995) 13, 25.
83. For a useful discussion of this problem, see Yaniv Roznai, “Unconstitutional Constitutional Change by Courts” (2017) 51 *New England Law Review* 3.
84. See Richard Albert, “How Unwritten Constitutional Norms Change Written Constitutions” (2015) 38 *Dublin University Law Journal* 387; Richard Albert, “Constitutional Amendment by Stealth” (2015) 60 *McGill Law Journal* 673.
85. United States Const., art. II, s. 3.
86. Bruce Ackerman, *The Failure of the Founding Fathers* (Harvard University Press, 2005) 55.
87. Edward J. Larson, *A Magnificent Catastrophe: The Tumultuous Election of 1800* (Free Press, 2007) 241–70.
88. See Bruce G. Peabody & Scott E. Gant, “The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment” (1999) 83 *Minnesota Law Review* 565, 617–20.
89. Stephen W. Stathis, “The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver?” (1990) 7 *Constitutional Commentary* 61, 64.

90. It may be argued that Lincoln saw the abolition of slavery as consistent with the idea of perfecting the constitution. As Gary Jacobsohn has written, Lincoln believed “that those involved in the interpretation and enforcement of the Constitution were morally and legally obliged to pursue the aspirational content of the Declaration [of Independence], and the legitimacy of their efforts in this regard hinged on their success.” Gary J. Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States* (Princeton University Press, 1993) 104. This may well have been Lincoln’s view but it was not the view that prevailed when the constitution was designed—and that is what matters for measuring the change wrought by the actual Thirteenth Amendment. Lincoln succeeded in updating the constitution—but it was a complete refounding and reimagining of the constitution and the country, wholly inconsistent with the initial design of the constitution.
91. See Jamal Greene, “Originalism’s Race Problem” (2011) 88 *Denver University Law Review* 517, 519.
92. United States Const., art. I, s. 2, cl. 3.
93. *Ibid.* art. IV, s. 2, cl. 3.
94. *Ibid.* art. I, s. 9, cl. 1. This clause was made temporarily unamendable until the year 1808. See *ibid.* art. V.
95. *Ibid.* art. I, s. 9, cl. 4. This clause was likewise made temporarily unamendable until the year 1808. See *ibid.* art. V. For a discussion of the uses and designs of unamendability, see Richard Albert & Bertil Oder (eds.), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer, 2018).
96. See, e.g., Eric Foner, “Blacks and the Constitution 1789–1989” (1990) 183 *New Left Review* 63, 68; Thurgood Marshall, “The Constitution’s Bicentennial: Commemorating the Wrong Document?” (1987) 40 *Vanderbilt Law Review* 1337, 1340; Donald G. Nieman, “From Slaves to Citizens: African-Americans, Rights Consciousness, and Reconstruction” (1996) 17 *Cardozo Law Review* 2115, 2116.
97. See Jack M. Balkin & Sanford Levinson, “Understanding the Constitutional Revolution” (2001) 87 *Virginia Law Review* 1045, 1097.
98. See Bruce Ackerman, *We the People—Volume 1: Foundations* (Harvard University Press, 1991) 46, 58–80.
99. See John R. Vile, *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789–2002* (ABC-CLIO, 2003) 64–65.
100. See Mark Douglas McGarvie, *Law and Religion in American History: Public Values and Private Conscience* (Cambridge University Press, 2016) 141.
101. United States Const., amend. I.
102. See *Everson v. Board of Education*, 330 U.S. 1 (1947).
103. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).
104. See *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 313 (2000).
105. Jamaica Independence Act 1962, 10 & 11 Eliz. 2 c. 40 (UK).
106. Jamaica (Constitution) Order in Council 1962, Court at Buckingham Palace, July 23, 1962.
107. Jamaica Const., art. 14.
108. *Ibid.* art. 15.

109. *Ibid.*
110. *Ibid.* art. 17.
111. *Ibid.* art. 16.
112. *Ibid.* art. 21.
113. *Ibid.* art. 23.
114. *Director of Public Prosecutions v. Nasralla*, [1967] 2 A.C. 238 (PC) 247 (appeal taken from Jamaica).
115. Jamaica Const., art. 26.
116. The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, April 7, 2011 [“Jamaican Charter”]. For an overview of constitutional change in the region, see Richard Albert, “Constitutional Reform in the Caribbean” (2017) 16 *Election Law Journal* 263.
117. Jamaican Charter, s. 2.
118. Derek O’Brien & Se-shauna Wheatle, “Post-Independence Constitutional Reform in the Commonwealth Caribbean and a New Charter of Fundamental Rights and Freedoms for Jamaica” (2012) *Public Law* 683, 699.
119. *Id.*
120. Jamaica Charter, s. 2.
121. *Ibid.*
122. *Ibid.*
123. *Ibid.*
124. Arif Bulkan, “The Limits of Constitution (Re)-making in the Commonwealth Caribbean: Towards the ‘Perfect Nation’” (2013) 2 *Canadian Journal of Human Rights* 81, 82–83.
125. Jamaica Const., July 23, 1962, art. 26, s. 8. (superseded).
126. Jamaica Charter, s. 3.
127. See Jack Vowles, “The Politics of Electoral Reform in New Zealand” (1995) 16 *International Political Science Review* 95, 113.
128. Jack H. Nagel, “What Political Scientists Can Learn from the 1993 Electoral Reform in New Zealand” (1994) 27 *PS: Political Science & Politics* 525, 525.
129. Janet Mackey, “The New Zealand Experience of Changing Electoral Systems,” in M. A. Griffith-Traversy (ed.), *Democracy, Parliament and Electoral Systems* (University of Chicago Press, 2002) 141, 142.
130. Jonathan Boston et al., “The 1996 General Election in New Zealand: Proportional Representation and Political Change” (1997) 69 *Australian Quarterly* 1, 2–3.
131. See James B. Bolger, “New Zealand Adopts PR: A Prime Minister’s View” (July 1, 2001) *Policy Options*.
132. Peter Aimer & Raymond Miller, “Partisanship and Principle: Voters and the New Zealand Electoral Referendum of 1993” (2002) 41 *European Journal of Political Research* 795, 798 (reporting the referendum result: 53.9 percent to 46.1 percent).
133. Electoral Act 1993, Pub. Act. 1993, No. 87 (NZ).
134. *Ibid.* ss. 271–84.
135. Jonathan Boston, “Institutional Change in a Small Democracy: New Zealand’s Experience of Electoral Reform,” in F. Leslie Seidle & David C. Docherty (eds.),

- Reforming Parliamentary Democracy* (McGill-Queen's University Press, 2003) 25, 34.
136. Matthew S. Shugart & Alexander C. Tan, "Political Consequences of New Zealand's MMP System in Comparative Perspective," in Nathan F. Batto et al. (eds.), *Mixed-Member Electoral Systems in Constitutional Context* (University of Michigan Press, 2016) 247, 249.
 137. Matthew S. R. Palmer, "Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution" (2006) 54 *American Journal of Comparative Law* 587, 604–05.
 138. Agreement Establishing the Caribbean Court of Justice, *opened for signature* Feb. 14, 2001.
 139. *Ibid.* art. III.
 140. *Ibid.* art. IX.
 141. *Ibid.* art. XXVII.
 142. *Ibid.* art. XXVIII.
 143. *Ibid.* prmb.
 144. *Ibid.* 64–65.
 145. Hugh M. Salmon, "The Caribbean Court of Justice: A March with Destiny" (2000) 2 *Florida Coastal Law Journal* 231, 231.
 146. *Ibid.* 234.
 147. *Ibid.*
 148. *Ibid.* 227.
 149. Sheldon A. McDonald, "The Caribbean Court of Justice: Enhancing the Law of International Organizations" (2004) 27 *Fordham International Law Journal* 930, 931.
 150. Agreement Establishing the Caribbean Court of Justice (n 138) art. XXV.
 151. Salvatore Caserta & Mikael Rask Madsen, "Between Community Law and Common Law: The Rise of the Caribbean Court of Justice at the Intersection of Regional Integration and Post-Colonial Legacies" (2016) 79 *Law & Contemporary Problems* 89, 90.
 152. Constitution (Amendment) Act, 2003, art. 9(c).
 153. Guyana Const., art. 123.
 154. Caribbean Court of Justice Act 2004, Act No. 16 of 2004, Part III.
 155. Belize Constitution (Seventh Amendment) Act, 2009.
 156. *Ibid.* art. 2.
 157. Constitution of Dominica (Amendment) Act, 2014, arts. 3-7.
 158. *Ibid.* art. 9.

Chapter 3

1. Articles of Confederation, art. XIII.
2. Benjamin Fletcher Wright, "Consensus and Continuity—1776–1878" (1958) 38 *Boston University Law Review* 1, 19; *see also* 19 *Journals of the Continental Congress*

- 112–13, 124–25 (February 3, 1781) (proposing congressional power to collect import duties); 20 *Journals of the Continental Congress* 469–71 (March 12, 1781) (proposing congressional power over states); 20 *Journals of the Continental Congress* 257–59 (April 18, 1783) (proposing temporary grant of congressional power to collect import duties and requesting supplementary funds from states); 21 *Journals of the Continental Congress* 894–96 (August 22, 1781) (failing to make amendments after report prepared recommending amendments); 24 *Journals of the Continental Congress* 260 (April 18, 1873) (proposing expense-sharing for common defense or general welfare according to population); 26 *Journals of the Continental Congress* 317–22 (April 30, 1784) (proposing temporary grant of congressional power for fifteen years to regulate commerce with the states, and requiring the assent of only nine states); 28 *Journals of the Continental Congress* 201–05 (March 28, 1785) (proposing to give Congress permanent and broader powers in the regulation of commerce); 31 *Journals of the Continental Congress* 494–98 (August 7, 1786) (proposing seven additional Articles to the Articles of Confederation).
3. See Sanford Levinson, “‘Veneration’ and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment” (1990) 21 *Texas Tech Law Review* 2443, 2448–49.
 4. United States Const., art. VII (“The ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”).
 5. Jerzy Lukowski, “‘Machines of Government’: Replacing the Liberum Veto in the Eighteenth-Century Polish-Lithuanian Commonwealth” (2012) 90 *Slavonic and East European Review* 65, 69.
 6. *Ibid.* 69–70.
 7. Dalibor Roháč, “The Unanimity Rule and Religious Fractionalisation in the Polish-Lithuanian Republic” (2008) 19 *Constitutional Political Economy* 111, 122.
 8. John Gilbert Heinberg, “History of the Majority Principle” (1926) 20 *American Political Science Review* 52, 67.
 9. Dalibor Roháč, “‘It Is by Unrule That Poland Stands’: Institutions and Political Thought in the Polish-Lithuanian Republic” (2008) 13 *Independent Review* 209, 213.
 10. Compare Articles of Confederation, art. XIII (requiring unanimous agreement for amendment), with United States Const., art. V (requiring supermajority agreement for amendment).
 11. Treaty on European Union, art. 48.
 12. See Steve Peers, “The Future of EU Treaty Amendments” (2012) 31 *Yearbook of European Law* 17, 19–22.
 13. Jack M. Balkin, “Sanford Levinson’s Second Thoughts About Our Constitutional Faith” (2012) 48 *Tulsa Law Review* 169, 171.
 14. Sanford Levinson, “Still Complacent After All These Years: Some Ruminations on the Continuing Need for a ‘New Political Science’” (2009) 89 *Boston University Law Review* 409, 422.
 15. Richard H. Fallon, Jr., “American Constitutionalism, Almost (But Not Quite) Version 2.0” (2012) 65 *Maine Law Review* 77, 92.

16. Vicki C. Jackson, “The (Myth of Un)amendability of the US Constitution and the Democratic Component of Constitutionalism” (2015) 13 *International Journal of Constitutional Law* 575.
17. See Daniel Lazare, *The Frozen Republic: How the Constitution Is Paralyzing Democracy* (Harcourt Brace, 1996).
18. United States Const., art. V (1789). The constitution also authorizes amendment by constitutional convention in a special assembly convened for that purpose, but this convention process has never successfully been used.
19. Eric Posner, “The U.S. Constitution Is Impossible to Amend” (May 5, 2014) *Slate*. A full complement of senators would have numbered 26, representing 13 states, but New York did not elect its senators prior to the installation of the First Congress, while North Carolina and Rhode Island had not yet ratified the constitution.
20. Rosalind Dixon, “Partial Constitutional Amendments” (2011) 13 *University of Pennsylvania Journal of Constitutional Law* 643, 653 (italics in original).
21. See David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776–1995* (Lawrence: University Press of Kansas, 1996) 426; Richard H. Pildes, “Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America” (2011) 99 *California Law Review* 273, 332–33; Daryl J. Levinson & Richard H. Pildes, “Separation of Parties, Not Powers” (2006) 119 *Harvard Law Review* 2312, 2333.
22. See, e.g., Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (Oxford University Press, 2006) 21; Dieter Grimm, “Types of Constitutions,” in Michel Rosenfeld & András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 98, 111; Mark Tushnet, “*Marbury v. Madison* Around the World” (2004) 71 *Tennessee Law Review* 251, 260 n.36.
23. The U.S. National Archives and Records Administration, *Amending America: Proposed Amendments to the United States Constitution, 1787 to 2014*. [“Amending America”].
24. William E. Forbath, “The Politics of Constitutional Design: Obduracy and Amendability—A Comment on Ferejohn and Sager” (2003) 81 *Texas Law Review* 1965, 1965.
25. Arend Lijphart, *Patterns of Democracy* (Yale University Press, 2d ed. 2012) 208.
26. *Ibid.* 206.
27. *Ibid.*
28. *Ibid.*
29. *Ibid.*
30. Astrid Lorenz, “How to Measure Constitutional Rigidity: Four Concept and Two Alternatives” (2005) 17 *Journal of Theoretical Politics* 339, 358–59
31. *Ibid.* 346.
32. *Ibid.* 358–59.
33. *Ibid.*
34. *Ibid.*
35. *Ibid.*

36. Edward Schneier, *Crafting Constitutional Democracies: The Politics of Institutional Design* (Rowman & Littlefield Publishers, 2006) 222–25.
37. *Ibid.* 224–25.
38. *Ibid.*
39. *Ibid.*
40. *Ibid.* 223.
41. *Ibid.* 225.
42. For a discussion of constitutional change by disuse or desuetude, see Richard Albert, “Constitutional Amendment by Constitutional Desuetude” (2014) 62 *American Journal of Comparative Law* 641; Richard Albert, “Constitutional Disuse or Desuetude: The Case of Article V” (2014) 94 *Boston University Law Review* 1029.
43. Donald S. Lutz, *Principles of Constitutional Design* (Cambridge University Press, 2006).
44. *Ibid.* 166.
45. *Ibid.* 167.
46. *Ibid.* 167.
47. *Ibid.* 167–68.
48. *Ibid.*
49. United States Const., art. V.
50. Lutz (n 43) 169.
51. *Ibid.* 170.
52. *Ibid.*
53. *Ibid.*
54. See Lorenz (n 30) 351.
55. Lutz (n 43) 168.
56. See Lorenz (n 30) 342.
57. Lutz (n 43) 159.
58. See John Dinan, “‘The Earth Belongs Always to the Living Generation’: The Development of State Constitutional Amendment and Revision Procedures” (2000) 62 *Review of Politics* 645.
59. Lutz (n 43) 170.
60. For a discussion of how parliamentary systems can sometimes function as presidential systems despite their formal differences, see Richard Albert, “Presidential Values in Parliamentary Systems” (2010) 8 *International Journal of Constitutional Law* 207; Richard Albert, “The Fusion of Presidentialism and Parliamentarism” (2009) 57 *American Journal of Comparative Law* 531.
61. *Ibid.* 178–79.
62. See Jonathan L. Marshfield, “The Amendment Effect” (2018) 98 *Boston University Law Review* 55.
63. Lutz (n 43) 179–80 n.16.
64. Constitution Act, 1982, being Schedule B to the Canada Act 1982, 1982, c. 11 (UK) [“Constitution Act, 1982”].
65. *Ibid.* s. 52(2).
66. Canada Act, 1982, c. 11 (U.K.).
67. Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.) [“Constitution Act, 1867”].

68. *Ibid.* preamble.
69. *See* Constitution Act, 1982, ss. 38–49.
70. *Ibid.* s. 38(1). A province may in certain circumstances opt out of an amendment made using this general default procedure. *Ibid.* s. 38(3).
71. *See* Constitutional Amendment Proclamation, 1983, SI/84-102, (1984); *see also* Peter W. Hogg, *Constitutional Law of Canada* (Thomson Carswell, 5th ed. 2007) (2012 update) Volume I, ch. 1, 1-7-1-8 (cataloguing all constitutional amendments).
72. Constitution Act, 1982, s. 38(1).
73. *Ibid.* s. 42(1).
74. The default multilateral amendment procedure may be initiated by either of the two houses of Parliament or by the legislative assembly of a province. *See ibid.* s. 46(1).
75. United States Const., art. V.
76. Lutz (n 43) 170.
77. *Ibid.* 169.
78. Constitution Act, 1982, s. 41.
79. *Ibid.*
80. *Ibid.* s. 44.
81. *Ibid.*
82. *See* Fair Representation Act, S.C. 2011, c. 26; Constitution Act, 1999 (Nunavut), S.C. 1998, c. 15; Representation Act, 1985, S.C. 1986, c. 8, s. 3; *see also* Hogg (n 71) (cataloguing all constitutional amendments).
83. Constitution Act, 1982, s. 43.
84. *Ibid.*
85. *See* Constitution Amendment, 1998 (Newfoundland Act), SI/98-25, (1998); Constitution Amendment, 2001 (Newfoundland and Labrador), SI/2001-117, (2001); Constitution Amendment Proclamation, 1997 (Quebec), SI/97-141; Constitution Amendment Proclamation, 1993 (Prince Edward Island), SI/94-50, (1994); Constitution Amendment Proclamation, 1993 (New Brunswick Act), SI/93-54, (1993); Constitution Amendment Proclamation, 1987 (Newfoundland Act), SI/88-11; *see also* Hogg (n 71) (cataloguing all constitutional amendments).
86. Lutz (n 43) 170.
87. Constitution Act, 1982, s. 45.
88. *Ibid.*
89. The Supreme Court of Canada was ultimately asked to clarify which amendment threshold applies. *See Reference re Senate Reform*, [2014] 1 S.C.R. 704.
90. *See* Richard Albert, “Constitutional Amendment by Stealth” (2015) 60 *McGill Law Journal* 673 (arguing that lawmakers have sought to circumvent the onerous formal amendment rules by creating a constitutional convention that will bind their successors functionally in much the same way as a formal amendment); Richard Albert, “Quasi-Constitutional Amendments” (2016) 65 *Buffalo Law Review* 739 (showing that Canadian lawmakers have deliberately chosen to make constitution-level changes with recourse to subconstitutional procedures as a result of amendment difficulty); Richard Albert, “The Difficulty of Constitutional Amendment in Canada” (2015) 53 *Alberta Law Review* 85 (examining the factors that make constitutional amendment so difficult in Canada).

91. Tom Ginsburg & James Melton, “Does the Constitutional Amendment Rule Matter at All?” (2015) 13 *International Journal of Constitutional Law* 686, 693.
92. *Ibid.* 699.
93. *Ibid.*
94. *Ibid.* 708.
95. *Ibid.*
96. *Ibid.*
97. Zachary Elkins, Tom Ginsburg, & James Melton, *The Endurance of National Constitutions* (Cambridge University Press, 2009) 188.
98. Charles Manga Fombad, “Some Perspectives on Durability and Change Under Modern African Constitutions” (2013) 11 *International Journal of Constitutional Law* 382, 391–401.
99. *Ibid.* 383.
100. Duncan Okubasu, “The Implication of Conflation of Normal and ‘Constitutional Politics’ on Constitutional Change in Africa,” in Richard Albert, Xenophon Contiades, & Alkmene Fotiadou, *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing, 2017) 327, 331.
101. *Ibid.* 331.
102. *Ibid.*
103. *Ibid.* 332.
104. Adem K. Abebe, “Taming Regressive Constitutional Amendments: The African Court as a Constitutional (Super) Constitutional Court” (2019) 17 *International Journal of Constitutional Law*.
105. John Dinan, *State Constitutional Politics: Governing by Amendment in the American States* (The University of Chicago Press, 2018) 23.
106. *See* Mila Versteeg & Emily Zackin, “American Constitutional Exceptionalism Revisited” (2014) 81 *University of Chicago Law Review* 1641, 1674, 1675, 1675 n.153.
107. John Dinan, “State Constitutional Amendments and American Constitutionalism” (2016) 41 *Oklahoma City University Law Review* 27, 34–35.
108. Dinan (n 105) 29.
109. John Dinan, “‘The Earth Belongs Always to the Living Generation’: The Development of State Constitutional Amendment and Revision Procedures” (2000) 62 *Review of Politics* 645.
110. Alan Tarr, “State Constitutional Politics: An Historical Perspective,” in G. Alan Tarr (ed.), *Constitutional Politics in the States: Contemporary Controversies and Historical Patterns* (Praeger, 1996) 3, 3.
111. *See* Daniel J. Elazar, “The Principles and Traditions Underlying State Constitutions” (1982) 12 *Publius* 11, 17–18.
112. Jonathan L. Marshfield, “Modes of Subnational Constitutionalism” (2011) 115 *Penn State Law Review* 1151, 1195.
113. *Ibid.* 16–17.
114. *See* Donald S. Lutz, “Patterns in the Amending of American State Constitutions,” in Tarr (n 110) 24, 35. State constitutions have over time become “long legislative codes,” in contrast to the national constitution, which is more of a framework

- agreement. See Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (Princeton University Press, 1996) 36.
115. See John J. Dinan, *The American State Constitutional Tradition* (University Press of Kansas, 2006) 63.
 116. Lutz (n 43) 170.
 117. Japan Const., art. 96.
 118. Ginsburg & Melton (n 91) 708.
 119. See David S. Law, “The Myth of the Imposed Constitution,” in Denis J. Galligan & Mila Versteeg, *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013) 239, 251.
 120. Robert E. Ward, “The Origins of the Present Japanese Constitution” (1956) 50 *American Political Science Review* 980, 1004 n.59.
 121. David S. Law, “The Anatomy of a Conservative Court: Judicial Review in Japan” (2009) 87 *Texas Law Review* 1545, 1547.
 122. Jun-ichi Satoh, “Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court’s Constitutional Oversight” (2008) 41 *Loyola of Los Angeles Law Review* 603, 624–25.
 123. Shigenori Matsui, *The Constitution of Japan: A Contextual Analysis* (Hart Publishing, 2011) 273.
 124. *Ibid.*
 125. *Ibid.*
 126. George P. Fletcher, “The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt” (2002) 111 *Yale Law Journal* 1499, 1537.
 127. See John W. Dower, *Empire and Aftermath: Yoshida Shigeru and the Japanese Experience, 1878–1954* (Harvard University Press, 1979) 433–34; Michael A. Panton, “Politics, Practice and Pacifism: Revising Article 9 of the Japanese Constitution” (2009) 11 *Asian-Pacific Law & Policy Journal* 163, 182–84.
 128. Derek O’Brien, “Formal Amendment Rules and Constitutional Endurance: The Strange Case of the Commonwealth Caribbean,” in Albert, Contiades, & Fotiadou (n 100) 293, 294.
 129. *Ibid.* 309.
 130. *Ibid.*
 131. *Ibid.* 310.
 132. Jamie Cameron, “Legality, Legitimacy and Constitutional Amendment in Canada,” in Richard Albert & David R. Cameron (eds.), *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge University Press, 2018) 98, 121.
 133. *Ibid.* 122.
 134. See Constitution Act, 1867, s. 92(1) (authorizing provincial legislatures to amend their own provincial constitution); s. 101 (authorizing Parliament of Canada to amend the constitution as to certain judicial matters).
 135. Guy Favreau, *The Amendment of the Constitution of Canada* (Queen’s Printer, 1965) 4–7.
 136. See Statute Law Revision Act, 1893 (repealing obsolete provisions of the Constitution Act, 1867); Statute Law Revision Act, 1950 (same).

137. See British North America Act, 1916.
138. See British North America Act, 1886.
139. See British North America Act, 1960.
140. See British North America Act of 1871 (ratifying Manitoba Act); British North America Act, 1949 (confirming Terms of Union between Canada and Newfoundland).
141. See James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Canada Communication Group, 1996) 25–63.
142. Cameron (n 132) 122.
143. *Ibid.* 120.
144. 1 *Annals of Congress* 451 (June 8, 1789) (introducing amendment proposal); 1 *Journal of the First Session of the Senate* 88 (September 25, 1789) (approving amendment proposal).
145. See United States Const., amend. XXVII.
146. United States Const., amend. XXVI (1971).
147. H.J. Resolution 208, 92nd Congress, 86 Stat. 1523 (1972). The Equal Rights Amendment had originally been subject to a seven-year expiration date, but Congress later extended the ratification deadline by three years. H.J. Resolution 638, 95th Congress (1978). The procedural steps for 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" (1979) 2 *Harvard Journal of Law & Public Policy* 19, 19–22. Two other noteworthy amendment efforts are the balanced budget amendments proposed first in 1981 and next in 1995. See S.J. Resolution 58, 97th Congress (1981) (adopted by the Senate but not in the House of Representatives); H.J. Resolution 1, 104th Congress (1995) (adopted by the House of Representatives but rejected by the Senate).
148. Ruth Bader Ginsburg, "The Need for the Equal Rights Amendment" (1973) 59 *American Bar Association Journal* 1013, 1013.
149. Michelle Boorstein, "Ruth Bader Ginsburg Calls for Equal Rights Amendment to the Constitution" (February 2, 2018) *Washington Post*.
150. Stephen L. Carter, "Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle" (1985) 94 *Yale Law Journal* 821, 842.
151. Bruce Ackerman, "Transformative Appointments" (1988) 101 *Harvard Law Review* 1164, 1183.
152. Bruce Ackerman, "Interpreting the Women's Movement" (2006) 94 *California Law Review* 1421, 1436; see also Serena Mayeri, "A New E.R.A. or a New Era? Amendment Advocacy and the Reconstitution of Feminism" (2009) 103 *Northwestern University Law Review* 1223, 1291 ("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."); but see Vicki C. Jackson, "Democracy and Judicial Review, Will and Reason, Amendment and Interpretation: A Review of Barry Friedman's *The Will of the People*" (2010) 13 *University of Pennsylvania Journal of Constitutional Law* 413, 452 ("'[A]mendophobia,' or a tendency to discount amendment as a possible response

- to a constitutional decision also might be thought to sap the system of an important method of reinvigorating our Constitution and of maintaining an appropriate balance between judicial interpretation and public decision-making over what the Constitution should mean.”).
153. Woodrow Wilson, *Congressional Government: A Study in American Politics* (Houghton Mifflin Company, 1885) 242.
 154. John DeWitt, “Essay II” (October 27, 1787), in Ralph Ketcham (ed.), *The Anti-Federalist Papers and the Constitutional Convention Debates* (New American Library, 1986) 189, 195.
 155. *Ibid.*
 156. United States Const., amend. XVI.
 157. *Ibid.* amend. XVII.
 158. *Ibid.* amend. XVIII. This amendment was later repealed by formal amendment. *Ibid.* amend. XXI.
 159. *Ibid.* amend. XIX.
 160. William L. Marbury, “The Limitations Upon the Amendment Power” (1919) 33 *Harvard Law Review* 223, 223.
 161. See Justin Miller, “Amendment of the Federal Constitution: Should It Be Made More Difficult?” (1926) 10 *Minnesota Law Review* 185, 185.
 162. *Ibid.* 186.
 163. *Ibid.*
 164. *Ibid.* 186–87.
 165. *Ibid.* 187.
 166. John R. Vile, “American Views of the Constitutional Amending Process: An Intellectual History of Article V” (1991) 35 *The American Journal of Legal History* 44, 59.
 167. Herbert Croly, *Progressive Democracy* (The Macmillan Company, 1914) 230.
 168. See S.J. Resolution. 43, 62nd Congress (July, 26, 1911), in *Amending America* (n 23), line 2584.
 169. See H.J. Resolution 95, 63rd Congress (June 10, 1913), in *Amending America* (n 23), line 2687.
 170. See H.J. Resolution 375, 62nd Congress (January 2, 1913), in *Amending America* (n 23), line 2634.
 171. “Way to Amend Constitution” (August 6, 1912) *New York Times*.
 172. *Ibid.*; see also S.J. Resolution 131, 62nd Congress (August 5, 1912) (introducing amendment proposal).
 173. See Kenneth P. Miller, *Direct Democracy and the Courts* (Cambridge University Press, 2009) 157.
 174. William E. Forbath, “Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule” (2006) 81 *Chicago-Kent Law Review* 967, 977–78.
 175. William Schambra, “The Saviors of the Constitution” (Winter 2012) *National Affairs*.

176. Peter G. Filene, “An Obituary for “The Progressive Movement”” (1970) 22 *American Quarterly* 20, 34.
177. Benjamin Parke De Witt, *The Progressive Movement* (MacMillan, 1915) 4–5.
178. United States Const., amend. XXI.
179. See Arthur S. Link, “What Happened to the Progressive Movement in the 1920’s?” (1959) 64 *American History Review* 833, 842.
180. James A. Henretta, “Foreword: Rethinking the State Constitutional Tradition” (1991) 22 *Rutgers Law Journal* 819, 824.
181. See Julian N. Eule, “Judicial Review of Direct Democracy” (1990) 99 *Yale Law Journal* 1503, 1546.
182. Nathaniel A. Persily, “The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West” (1997) 2 *Michigan Law & Policy Review* 11, 13.
183. See David B. Magleby, “Taking the Initiative: Direct Legislation and Direct Democracy in the 1980s” (1988) 21 *Political Science and Politics* 600, 602.
184. See Kenneth P. Miller, *Direct Democracy and the Courts* (Cambridge University Press, 2009) 34–36.
185. *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912).
186. See David Strauss, “The Irrelevance of Constitutional Amendments” (2001) 114 *Harvard Law Review* 1457, 1489–90.
187. Akhil Reed Amar, “Architecture” (2001) 77 *Indiana Law Journal* 671, 686 n.62.
188. *Ibid.* 685.
189. *Ibid.*
190. David E. Kyvig, *Repealing National Prohibition* (The Kent State University Press, 2000) 8.
191. See H.R.J. Resolution 31, 113th Congress (2013).
192. See H.R.J. Resolution 42, 113th Congress (2013).
193. See H.R.J. Resolution 19, 113th Congress (2013).
194. See H.R. Resolution 12-1003, 68th General Assembly, Regular Session (Colo. 2012).
195. See S. Con. Resolution 4007, 62d Legislative Assembly, Regular Session (N.D. 2011).
196. See S. Con. Resolution 132, 45th Legislative Assembly, Regular Session (Idaho 1980).
197. David R. Mayhew, *Congress: The Electoral Connection* (Yale University Press, 1974) 49–61.
198. Colombia Const., arts. 7, 8, 70, 72, 171, 246, 330–31.
199. *Ibid.* arts. 374–79.
200. *Sentencia C-317* (2012).
201. See, e.g., Richard Albert, “Constructive Unamendability in Canada and the United States” (2014) 67 *Supreme Court Law Review* (2d) 181; Emmett Macfarlane (ed.), *Constitutional Amendment in Canada* (Toronto University Press, 2016); Cameron (n 132) 98.
202. An Act respecting constitutional amendments, S.C. 1996, c. 1 [“Regional Veto Law”].
203. See Robert A. Young, “Jean Chrétien’s Québec Legacy: Coasting Then Stickhandling Hard” (2004) 9 *Review of Constitutional Studies* 31, 38–39.

204. *Regional Veto Law*, s. 1(1).
205. *Ibid.*
206. See David E. Smith, “The Canadian Senate: What Is to Be Done?,” in Christian Leuprecht & Peter H. Russell (eds.), *Essential Readings in Canadian Constitutional Politics* (University of Toronto Press, 2011) 43.
207. See Andrew Heard & Tim Swartz, “The Regional Veto Formula and Its Effects on Canada’s Constitutional Amendment Process” (1997) 30 *Canadian Journal of Political Science* 339, 340–41.
208. C. E. S. Franks, “A Continuing Canadian Conundrum: The Role of Parliament in Questions of National Unity and the Processes of Amending the Constitution,” in J. Peter Meekison, Hamish Telford, & Harvey Lazar (eds.), *The State of the Federation 2002: Reconsidering the Institution of Canadian Federalism* (McGill-Queen’s University Press, 2004) 35, 44.
209. Constitutional Referendum Act, RSA 2000, c. C-25, ss. 2(1), 4.
210. Constitutional Amendment Approval Act, RSBC 1996, c. 67, sec. 1; Referendum Act, RSBC 1996, c. 400, sec. 4.
211. See Referendum Act, SNB 2011, c. 23, ss. 12–13 (establishing quorum requirement for vote to bind government); The Referendum and Plebiscite Act, SS 1990-91, c. R-8.01, s. 4 (establishing quorum and threshold requirements for vote to bind government); Public Government Act, SY 1992, c-10, s. 7 (authorizing provincial assembly to decide *ex ante* whether referendum vote will bind government).
212. See, e.g., Consolidation of Plebiscite Act, RSNWT 19888, c. P-8, s. 5; Elections and Plebiscites Act, SNWT 2006, c. 15, s. 48; La Loi sur la consultation populaire, LRQ 2000, c. C-64.1, s. 7; Plebiscites Act, RSPEI 1988, c. P-10, s. 1. See also Elections Act, SNL 1992, c E-3.1, s. 218 (authorizing non-binding plebiscite on federal amendment).
213. See Constitution Act, 1982, s. 39(2).
214. Referendum Act, s. 3(1), S.C. 1992, c. 30.
215. See *The 1992 Federal Referendum—A Challenge Met: Report of the Chief Electoral Officer of Canada* (January 17, 1994) Part 2, 58.
216. Mary Dawson, “From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution: Patriation, Meech Lake, and Charlottetown” (2012) 57 *McGill Law Journal* 955, 983.
217. *Ibid.*
218. See, e.g., Dawson (n 216) 997; Peter Leslie, “Canada: The Supreme Court Sets Rules for the Secession of Quebec” (1999) 29 *Publius* 135, 142; Kenneth McRoberts, “After the Referendum: Canada with or without Quebec,” in Kenneth McRoberts (ed.), *Beyond Quebec: Taking Stock of Canada* (McGill-Queen’s University Press, 1995) 403, 413; Matthew Mendelsohn, “Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics” (2000) 33 *Canadian Journal of Political Science* 245, 251; Jeffrey Simpson, “The Referendum and Its Aftermath,” in Kenneth McRoberts & Patrick J. Monahan (eds.), *The Charlottetown Accord, the Referendum, and the Future of Canada* (University of Toronto Press, 1993) 193, 193; Robert C.

- Vipond, “Seeing Canada Through the Referendum: Still a House Divided” (1993) 23 *Publius* 39, 54; José Woehrling, “La modification par convention constitutionnelle du mode de désignation des sénateurs canadiens” (2009) 39 *La Revue de droit de l’Université de Sherbrooke* 115, 125; see also Richard Albert, “The Conventions of Constitutional Amendment in Canada” (2016) 53 *Osgoode Hall Law Journal* 399 (examining the claim that a convention of referendal consultation now exists).
219. Roger Gibbins & David Thomas, “Ten Lessons from the Referendum” (1992) 15 *Canadian Parliamentary Review* 3, 3.
220. Kathy L. Brock, “Learning from Failure: Lessons from Charlottetown” (1993) 4 *Constitutional Forum* 29, 32.
221. R. Kent Weaver, “Political Institutions and Conflict Management in Canada” (1995) 538 *Annals of American Academy Political & Social Science* 54, 65
222. See Elections Canada, *The 1992 Federal Referendum: A Challenge Met* (Office of the Chief Electoral Office, 1994) 58.
223. Referendum Act, S.C. 1992, c. 30, ss. 3(1), 6(1).
224. *Reference re Supreme Court Act, ss. 5 and 6*, [2014] 1 S.C.R. 433 [“*Supreme Court Act Reference*”]; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [“*Secession Reference*”].
225. *Supreme Court Act Reference* (n 224) para. 94.
226. *Ibid.* paras. 90–105.
227. Constitution Act, 1982, s. 41(d).
228. *Ibid.* s. 42(d). A narrow class of amendments remains open to Parliament to make as ordinary legislation under the authority granted by the Constitution Act, 1867 (n 67) s. 101.
229. *Supreme Court Act Reference* (n 224) para. 94.
230. *Secession Reference* (n 224) paras. 88–105.
231. An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference, S.C. 2000, c. 26 [“Clarity Act”].
232. *Ibid.* preamble.
233. *Ibid.* ss. 1(1)–(2).
234. *Ibid.* s. 1(4).
235. *Ibid.* ss. 1(5), 2(3).
236. *Ibid.* s. 2(1)–(2).
237. *Ibid.* s. 3(2).
238. Sanford Levinson, “Designing an Amendment Process,” in John Ferejohn et al. (eds.), *Constitutional Culture and Democratic Rule* (Cambridge University Press, 2001) 271, 274.
239. Daryl J. Levinson, “Parchment and Politics: The Positive Puzzle of Constitutional Commitment” (2011) 124 *Harvard Law Review* 657, 745.
240. 5 U.S. (1 Cranch) 137, 178.
241. Lon L. Fuller, *The Morality of Law* (Yale University Press, 1964) 39.
242. United States Const., art. I, sec. 8, cl. 11.

Chapter 4

1. Stephen Gibbs, “Zelaya Stages Honduras ‘Road Show’” (July 25, 2009) *BBC*.
2. Honduras Const., art. 374 (absolutely entrenching Article 239); *Ibid.* art. 239 (“A citizen who has held the Office of President under any title may not be President or a Presidential Designate.”).
3. *Ibid.* art. 239 (“Any person who violates this provision or advocates its amendment as well as those that directly or indirectly support him shall immediately cease to hold their respective offices and shall be disqualified for ten years from holding any public office.”).
4. Tracy Wilkinson & Alex Renderos, “Honduran Army Coup Sends Elected President into Exile” (June 29, 2009) *Seattle Times*.
5. Miguel A. Estrada, “Honduras’ Non-Coup” (July 10, 2009) *Los Angeles Times*.
6. Marc Lacey, “Leader’s Ouster Not a Coup, Says the Honduran Military” (July 1, 2009) *New York Times*.
7. Elisabeth Malkin, “Honduran President Is Ousted in Coup” (June 28, 2009) *New York Times*.
8. William Booth & Juan Forero, “Honduran Military Sends President into Exile; Supportive Congress Names Successor” (June 29, 2009) *Washington Post*.
9. Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2017) 20–21.
10. Richard Albert & Bertil Emrah Oder, “The Forms of Unamendability,” in Richard Albert & Bertil Emrah Oder (eds.), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer, 2018) 1.
11. France Const., art. 89.
12. Czech Republic Const., art. 9.
13. Turkey Const., arts. 3, 4.
14. Richard Albert, “The State of the Art in Constitutional Amendment,” in Richard Albert, Xenophon Contiades, & Alkmene Fotiadou, *The Foundations and Traditions of Constitutional Amendment* (Hart, 2017) 7.
15. Jeffrey Goldsworthy, *Parliamentary Sovereignty* (Cambridge University Press, 2010) 70.
16. See Andrew Friedman, “Dead Hand Constitutionalism: The Danger of Eternity Clauses in New Democracies” (2011) 4 *Mexican Law Review* 77, 87.
17. When I first wrote about codified unamendability in 2008, 2009, and again in 2010, I identified three uses of unamendability: preservation, transformation, and reconciliation. See Richard Albert, “Counterconstitutionalism” (2008) 31 *Dalhousie Law Journal* 1; Richard Albert, “Nonconstitutional Amendments” (2009) 22 *Canadian Journal of Law and Jurisprudence* 5; Richard Albert, “Constitutional Handcuffs” (2010) 42 *Arizona State Law Journal* 663. I have since identified other uses of codified unamendability. I later wrote about two more uses of codified unamendability: securing a bargain and expressing constitutional values. See Richard Albert, “The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada” (2016) 41 *Queen’s Law Journal* 143; Richard Albert “The Expressive

- Function of Constitutional Amendment Rules” (2013) 59 *McGill Law Journal* 225; Richard Albert, “The Unamendable Core of the United States Constitution,” in András Koltay, *Comparative Perspectives on the Fundamental Freedom of Expression* (Wolters Kluwer, 2015).
18. United States Const., art. V.
 19. *Ibid.*, art. I, s. 9, cl. 1.
 20. *Ibid.*, art. I, s. 9, cl. 4.
 21. See Rosalind Dixon & Tom Ginsburg, “Deciding Not to Decide: Deferral in Constitutional Design” (2011) 9 *International Journal of Constitutional Law* 636, 644.
 22. *The Federalist* No. 42 (James Madison) (Jacob E. Cooke ed., Wesleyan University Press, 1961) 281.
 23. *Ibid.*
 24. *Ibid.* 281–82.
 25. An Act to Prohibit the Importation of Slaves into any Port or Place Within the Jurisdiction of the United States, from and after the First Day of January, in the Year of our Lord One Thousand Eight Hundred and Eight, 2 Stat. 426, 9th Congress, Sess. II, Ch. 22, March 2, 1807.
 26. Nigeria Const., art. 141.
 27. *Ibid.* art. 136.
 28. Patrick J. McGowan, “African Military Coups d’État, 1956–2001: Frequency, Trends and Distribution” (2003) 41 *Journal of Modern African Studies* 339, 363–64.
 29. Ghana Const., Schedule 1, ss. 34, 35, 37.
 30. Afghanistan Const., art. 149.
 31. Algeria Const., art. 178.
 32. Iran Const., art. 177.
 33. Benin Const., art. 156.
 34. Burundi Const., art. 299.
 35. Togo Const., art. 144.
 36. Brazil Const., art. 60, s. 4.
 37. Indonesia Const., art. 37.
 38. Haiti Const., art. 284–4.
 39. Italy Const., art. 139.
 40. Senegal Const., art. 103.
 41. Bahrain Const., art. 120.
 42. Morocco Const., art. 106.
 43. Qatar Const., art. 145.
 44. Bosnia and Herzegovina Const., art. X, s. 2.
 45. *Ibid.*
 46. Congo Const., art. 220.
 47. Moldova Const., art. 142.
 48. Namibia Const., art. 131; Romania Const., art. 152.
 49. Central African Republic Const., art. 108.
 50. El Salvador Const., art. 248.
 51. Guatemala Const., art. 281.

52. Mauritania Const., art. 99.
53. Montenegro Const., art. 156.
54. Luxembourg Const., art. 115.
55. Belgium Const., art. 197.
56. See Elliot Bulmer, *Emergency Powers* (International IDEA, 2018) 31.
57. Ibid.
58. Cape Verde Const., art. 309.
59. Estonia Const., s. 168.
60. Portugal Const., art. 284.
61. Cuba Const., s. 4.
62. France Const., art. 89.
63. United States Const., amend. XXVII.
64. Constitutional Amendment, 2001 (Newfoundland and Labrador) (Canada).
65. Jason Mazzone, “Unamendments” (2005) 90 *Iowa Law Review* 1747, 1776.
66. But when they do, they codify different procedures for both types of change, usually requiring different sequences of legal action and voting thresholds. Discontinuous changes demand a more exacting process than continuous ones. See, e.g., Austria Const., art. 44; Spain Const., arts. 166–68; Switzerland Const., arts. 192–95.
67. The Norwegian Constitution is the most prominent exception to the general rule observed around the world that courts are the ones to review the constitutionality of constitutional amendments. See Norway Const., art. 112; see also Eivind Smith, “Old and Protected? On the ‘Supra-Constitutional’ Clause in the Constitution of Norway” (2011) 44 *Israel Law Review* 369, 383–87 (discussing the Norwegian legislature’s power to ensure the conformity of a constitutional amendment with the spirit of the constitution).
68. India Const., art. 368.
69. What generally distinguishes a law from a constitution is that the former is usually subject to a lower threshold for amendment. See András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Central University Press, 1999) at 39–40. The more often a constitution is formally amended, the more it begins to seem like an ordinary law. See Kathleen M. Sullivan, “Constitutional Amendmentitis” (September 1995) 23 *The American Prospect* 20 at 22–23.
70. See *Sri Sankari Prasad Singh Deo v. Union of India*, 1951 AIR 458, 1952 SCR 89.
71. *Golak Nath v. State of Punjab*, 1967 AIR 1643, 1967 SCR (2) 762.
72. *Kesavananda Bharati Sripadagalvaru v. Kerala*, 1973 SCC (4) 225.
73. Ibid. at para. 316.
74. Ibid.
75. Ibid. at para. 318.
76. *Minerva Mills Ltd. v. Union of India*, 1980 AIR 1789, 1981 SCR (1) 206, SCC (2) 591.
77. Constitution (Forty-second Amendment) Act, 1976, s. 55.
78. Ibid.
79. *Minerva Mills* (n 76).
80. Ibid.

81. Mario Cajas Sarria, “The Unconstitutional Constitutional Amendment Doctrine and the Reform of the Judiciary in Colombia” (September 1, 2016) *International Journal of Constitutional Law Blog*.
82. Carlos Bernal, “Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine” (2013) 11 *International Journal of Constitutional Law* 339, 341.
83. Manuel José Cepeda Espinosa & David Landau (eds.), *Colombian Constitutional Law: Leading Cases* (Oxford University Press, 2017) 341.
84. Joel Colón-Ríos, “Beyond Parliamentary Sovereignty and Judicial Supremacy: The Doctrine of Implicit Limits to Constitutional Reform in Latin America” (2013) 44 *Victoria University Wellington Law Review* 521, 531.
85. *Ibid.* 530–31 (quoting Sentencia 551/03).
86. *Ibid.* 531 (quoting Sentencia 551/03).
87. See Republic of China Const., ch. XIV.
88. See *Constitutional Interpretation No. 499*, 2000/3/24.
89. *Ibid.*
90. *Ibid.*
91. *Ibid.*
92. *Ibid.*
93. *Ibid.*
94. *Ibid.*
95. *Ibid.*
96. *Ibid.*
97. *Ibid.*
98. *Ibid.*
99. The Taiwanese Constitutional Court has since dialed back its activism in constitutional politics. See Ming-Sung Kuo, “Moving Towards a Nominal Constitutional Court? Critical Reflections on the Shift from Judicial Activism to Constitutional Irrelevance in Taiwan’s Constitutional Politics” (2016) 25 *Washington International Law Journal* 597.
100. *Ibid.*
101. See Gert Jan Geertjes & Jerfi Uzman, “Conventions of Unamendability: Covert Constitutional Unamendability in (Two) Politically Enforced Constitutions,” in Albert & Oder (n 10) 89.
102. See Richard Albert, “The Values of Canadian Constitutionalism,” in Richard Albert & David. R. Cameron, *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge, 2017) 4–5.
103. Constitution Act, 1867, 30 & 31 Victoria, c. 3, pt. VI, s. 92 [“Constitution Act, 1867”].
104. British North America (No. 2) Act, ch. 81, 12, 13 & 14 Geo. 6 (1949).
105. *Ibid.* s. 1.
106. William R. Lederman, “Notes on Recent Canadian Constitutional Developments” (1950) 32 *Journal of Comparative Legislation and International Law* 74, 75–76.

107. Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, 1982, c. 11 (U.K.), Part V.
108. In one of the leading studies on constitutional amendment in Canada, James Ross Hurley details the many failed efforts to patriate the constitution. See James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Minister of Supply and Services, 1996) 25–60.
109. Simone Chambers, “Contract or Conversation: Theoretical Lessons from the Canadian Constitutional Crisis” (1998) 26 *Politics and Society* 143, 146.
110. Précis of Discussions: Dominion-Provincial Conference, Nov. 3–10, 1927, Sessional Paper No. 3, 18 George V (King's Printer, 1928) 11.
111. Order of Reference, Jan. 28, 1935, in *Proceedings and Evidence and Report: Special Committee on British North America Act* (King's Printer, 1935) iv.
112. *Ibid.*
113. Remarks of Louis St. Laurent, in *Proceedings of the Constitutional Conference of Federal and Provincial Governments*, Ottawa, Jan. 10–12, 1950 (King's Printer, 1950) 10.
114. See, e.g., Statement by A. Brian Peckford, Nov. 2, 1981, Doc. 800-15/011, in *Federal-Provincial Conference of First Ministers on the Constitution* (Ottawa 1981); Statement of Peter Lougheed, Alberta Proposal: Amending Formula for the Canadian Constitution, Feb. 5–6, 1979, Document 800-10/023, in *Federal-Provincial Conference of First Ministers on the Constitution* (Ottawa 1981); Statement of Conclusions, Third Working Session, in *Federal-Provincial Conference of 1971*, 2, Feb. 9, 1971; Canadian Constitutional Charter of 1971, art. 54, in Secretariat of the Constitutional Conference, *Constitutional Conference*, Victoria, British Columbia, June 14–16, 1971; Guy Favreau, Minister of Justice, *The Amendment of the Constitution of Canada* (Queen's Printer, 1965) 38–39.
115. Jiunn-rong Yeh, *The Constitution of Taiwan: A Contextual Analysis* (Hart Publishing, 2016) 13.
116. United States Const., art. V. The U.S. Constitution also authorizes formal amendment via constitutional convention, but this procedure has never been successfully used. See Michael B. Rappaport, “Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them” (2010) 96 *Virginia Law Review* 1509, 1512.
117. United States Const., art. V. “Changing” a state's representation in the U.S. Senate can mean that the state's representation is either increased or diminished relative to the representation of other states.
118. Sanford Levinson, “Designing an Amendment Process,” in John Ferejohn et al. (eds.), *Constitutional Culture and Democratic Rule* (Cambridge: Cambridge University Press, 2001) 271, 284.
119. See Sanford Levinson, “The Political Implications of Amending Clauses” (1996) 13 *Constitutional Commentary* 107, 122 n.32.
120. *Ibid.*
121. Michael C. Dorf, “The Constitution and the Political Community” (2011) 27 *Constitutional Commentary* 499, 506.
122. *Dodge v. Woolsey*, (1855) 59 U.S. (18 How.) 331, 348.

123. Raoul Berger, “New Theories of ‘Interpretation’: The Activist Flight from the Constitution” (1986) 47 *Ohio State Law Journal* 1, 6.
124. Douglas H. Bryant, “Unorthodox and Paradox: Revising the Ratification of the Fourteenth Amendment” (2002) 53 *Alabama Law Review* 555, 562.
125. Daryl J. Levinson, “Parchment and Politics: The Positive Puzzle of Constitutional Commitment” (2011) 124 *Harvard Law Review* 657, 697 n.128.
126. Douglas Linder, “What in the Constitution Cannot Be Amended?” (1981) 23 *Arizona Law Review* 717, 717.
127. Eric A. Posner & Adrian Vermeule, “Legislative Entrenchment: A Reappraisal” (2002) 111 *Yale Law Journal* 1665, 1681.
128. Jack M. Balkin, “The Constitution as a Box of Chocolates” (1995) 12 *Constitutional Commentary* 147, 149.
129. Of course, lawmakers and citizens could alternatively decide to adopt an altogether new constitution and thereby create a new constitutional regime.
130. Donald P. Kommers & Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 2012) 397 (quoting Aviation Security Case (2006), 115 BVerfGE 118, 152).
131. German Basic Law, art. 1(1).
132. *Ibid.* art. 79(3).
133. *See, e.g.*, Richard Albert, “Constructive Unamendability in Canada and the United States” (2014) 67 *Supreme Court Law Review* (2d) 181, 196–98; Joel Colon-Rios, “The Three Waves of the Constitutionalism-Democracy Debate in the U.S. (and an Invitation to Return to the First)” (2010) 18 *Willamette Journal of International Law and Dispute Resolution* 1, 33 n.110; Elai Katz, “On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment” (1996) 28 *Columbia Journal of Law and Social Problems* 251, 278.
134. Australia Const., art. 128.
135. Austria Const., arts. 26, 34–35, 44.
136. *The Federalist* No. 49 (n 22) 340.
137. *Ibid.*
138. *Ibid.*
139. *Ibid.*
140. Thomas Jefferson, “Letter to Samuel Kercheval Monticello” (July 12, 1816) *The Writings of Thomas Jefferson* (Paul Leicester Ford ed., G.P. Putnam’s Sons, 1899) Volume 12.
141. *Ibid.*
142. *Ibid.*
143. *Ibid.*
144. *See* James R. Zink & Christopher T. Dawes, “The Dead Hand of the Past? Toward an Understanding of ‘Constitutional Veneration’” (2016) 38 *Political Behavior* 535.
145. *Ibid.* at 556.
146. Sanford Levinson, “Veneration and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment” (1990) 21 *Texas Tech Law Review* 2443 at 2455.

147. *Ibid.* at 2454.
148. See Mila Versteeg & Emily Zackin, “American Constitutional Exceptionalism Revisited” (2014) 81 *University of Chicago Law Review* 1641 at 1674.
149. Levinson (n 146) 2455.
150. Sanford Levinson, *Our Undemocratic Constitution* (Oxford University Press, 2006) 20.
151. Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart Publishing, 2012) 103.
152. I thank Andrew Harding for his advice on interpreting this phenomenon in Malaysia.
153. Michael B. Stein, “Canadian Constitutional Reform, 1927–1982: A Comparative Case Analysis Over Time” (1984) 14 *Publius* 121, 139.
154. See Constitutional Amendment Proclamation, 1983, SI/84-102, (1984) Canada Gazette II, 2984.
155. Michael Lusztig, “Constitutional Paralysis: Why Canadian Constitutional Initiatives Are Doomed to Fail” (1994) 27 *Canadian Journal of Political Science* 747, 748.
156. See *ibid.*
157. See *ibid.*
158. Lusztig (n 155).
159. *Ibid.* 752.
160. *Ibid.* 753–54.
161. *Ibid.* 770.
162. See *ibid.* For example, the Charlottetown Accord satisfied Quebec’s demand for recognition of its distinctiveness but this undermined the western provinces’ demand for provincial equality—a demand that the Charlottetown Accord codified by giving all provinces a veto over major constitutional amendments and also by making side payments to western Canada as additional compensation. See *ibid.* 761.
163. See Christopher P. Manfredi & Michael Lusztig, “Why Do Formal Amendments Fail? An Institutional Design Analysis” (1998) 50 *World Politics* 377, 380. See also David R. Cameron & Jacqueline D. Krikorian, “Recognizing Quebec in the Constitution of Canada: Using the Bilateral Constitutional Amendment Process” (2008) 58 *University of Toronto Law Journal* 389, 394.
164. See Manfredi & Lusztig (n 163) 399.
165. See Peter W. Hogg, *Meech Lake Constitutional Accord Annotated* (Carswell, 1988) 3–4.
166. Meech Lake Accord, Schedule s. 1.
167. *Ibid.* Schedule s. 2.
168. *Ibid.* Schedule s. 3.
169. *Ibid.* Schedule s. 6.
170. *Ibid.* Schedule s. 8.
171. *Ibid.* Schedule s. 9.
172. Charlottetown Accord, IA1.
173. *Ibid.*
174. *Ibid.* IB, III.

175. Ibid. IIA–C.
176. Ibid. IA3.
177. Ibid. IV.
178. Ibid. IID.
179. The agreement was formalized as a statute of the Parliament of the United Kingdom. See Canada Act 1982, 1982 c. 11.
180. Richard Johnston, “An Inverted Logroll: The Charlottetown Accord and the Referendum” (1993) 26 *Political Science and Politics* 43, 43.
181. Louis Massicotte, “Omnibus Bills in Theory and Practice” (2013) 36 *Canadian Parliamentary Review* 13, 15.
182. Czech Republic Const., art. 9(2).
183. Ibid. art. 9(3). According to the constitution, the text “may be supplemented or amended only by constitutional acts.” Ibid. art. 9(1). A constitutional act requires the agreement of three-fifths of all members of the Chamber of Deputies as well as three-fifths of all Senators present. Ibid. art. 39(4).
184. See 2009/09/10—Pl. ÚS 27/09: *Constitutional Act on Shortening the Term of Office of the Chamber of Deputies*.
185. Ibid. s. I.
186. Ibid.
187. Ibid.
188. Ibid.
189. The Court agreed on three interconnected bases: as to procedure, competence, and substance. I focus in this summary only on the substantive grounds for the Court’s decision to annul the amendment.
190. Ibid. s. IV (internal citations omitted).
191. Ibid.
192. Ibid.
193. Ibid.
194. Ibid. s. V.
195. Ibid.
196. Ibid. s. IV.

Chapter 5

1. Lester B. Pearson, “Introduction,” in Guy Favreau (ed.), *The Amendment of the Constitution of Canada* (Queen’s Printer, 1965) vii.
2. Ibid. 4–7.
3. Lawmakers in Canada could amend some narrow matters on their own. See Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.) ss. 92, 101.
4. James Ross Hurley, *Amending Canada’s Constitution: History, Processes, Problems and Prospects* (Minister of Supply and Services Canada, 1996) 26.
5. Articles of Confederation, art. XIII.

6. France Const., tit. VII (1791) (superseded).
7. Poland Const., art. VI (1791) (superseded).
8. Ireland Const., art. 46.
9. South Korea Const., arts. 128–30.
10. Italy Const., art. 138.
11. United States Const., art. V.
12. Barack Obama, “The 2010 State of the Union Address” (January 27, 2010) *The Obama White House Archives*.
13. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
14. Obama (n 12).
15. See Fredreka Schouten, “President Obama Wants to Reverse Citizens United” (February 9, 2015) *USA Today*.
16. The federal convention route is available in theory but it has not yet been used successfully.
17. See Dan Eggen, “Poll: Large Majority Opposes Supreme Court’s Decision on Campaign Financing” (February 17, 2010) *Washington Post*.
18. For purposes of this classification, I do not distinguish the power to initiate an amendment within the same branch of government (for instance, between two houses of the bicameral legislature), but I do distinguish the power to initiate an amendment among the different branches of the national government (for instance, between president and legislature) and between national and subnational government institutions (for instance, between national and subnational legislatures).
19. German Basic Law, art. 79.
20. Japan Const., art. 96.
21. I include in this pathway all alternative amendment procedures, whether they are genuine alternatives or whether they authorize alternative routes in the event of an amendment failure through another route.
22. France Const., art. 89.
23. South Africa Const., sec. 74.
24. See Constitution Act, 1982, being Schedule B to the Canada Act, 1982, ss. 38–48 [“Constitution Act, 1982”].
25. Iceland Const., art. 79.
26. United States Const., art. V.
27. Max Farrand (ed.), *The Records of the Federal Convention of 1787* (Yale University Press, 1911) Volume II, 629–31.
28. *Ibid.* Volume I, 196, 201.
29. Australia Const., s. 128.
30. *Reference re Senate Reform*, [2014] 1 S.C.R. 704.
31. Japan Const., prml.
32. Finland Const., ss. 1–5.
33. South Africa Const., s. 1.
34. Constitution Act, 1982, ss. 38–48.
35. Ghana Const., arts. 12–33.
36. *Ibid.* art. 290.

37. Ibid. art. 212.
38. Ibid. art. 291.
39. Nigeria Const., s. 9.
40. Ibid.
41. German Basic Law, arts. 1, 79.
42. Millard H. Ruud, “No Law Shall Embrace More Than One Subject” (1958) 42 *Minnesota Law Review* 389, 391.
43. Ibid.
44. Ibid.
45. See Dominique Leydet, “Compromise and Public Debate in Processes of Constitutional Reform: The Canadian Case” (2004) 43 *Social Science Information* 233, 246–47.
46. See Rachael Downey et al., “A Survey of the Single Subject Rule as Applied to Statewide Initiatives” (2004) 13 *Journal of Contemporary Legal Issues* 579, 628.
47. See Stanley H. Friedelbaum, “Initiative and Referendum: The Trials of Direct Democracy” (2007) 70 *Albany Law Review* 1003, 1021–22; Stephanie Hoffer & Travis McDade, “Of Disunity and Logrolling: Ohio’s One-Subject Rule and the Very Evils It Was Designed to Prevent” (2004) 51 *Cleveland State Law Review* 557, 563–67.
48. We encountered this distinction in Chapter 2.
49. “Georgia Revises Constitution ‘Without Public Consent’” (June 27, 2017) *OC-Media*.
50. Georgia Const., art. 37 (on file with author; translation provided by Malkhaz Nakashidze).
51. Ibid. chs. III, IV.
52. Ibid.
53. Ibid. art. 61 § 2.
54. Ibid. at prml., art. 5.
55. Ibid. art. 19.
56. Ibid. art. 30.
57. Jon Elster, “Forces and Mechanisms in the Constitution-Making Process” (1995) 45 *Duke Law Journal* 364, 394.
58. “American Might See a New Constitutional Convention in a Few Years; If It Did, That Would Be a Dangerous Thing” (September 30, 2017) *The Economist* (describing the dangers of a constitutional convention).
59. Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (Oxford University Press, 2006).
60. See Michael B. Rappaport, “Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them” (2010) 96 *Virginia Law Review* 1509, 1528–31.
61. See Ozan O. Varol, “Constitutional Stickiness” (2016) 49 *University of California-Davis Law Review* 899, 902–03.
62. See, e.g., Austria Const., art. 44; Costa Rica Const., arts. 195–96; Spain Const., arts. 166–68; Switzerland Const., arts. 192–95.
63. Switzerland Const., art. 192, para. 1.
64. Ibid. art. 193, para. 1.

65. *Ibid.* art. 193, para. 4.
66. *Ibid.* art. 194, para. 1.
67. *Ibid.* art. 194, para. 2.
68. *Ibid.* art. 194, para. 3.
69. Costa Rica Const., art. 195.
70. *Ibid.* art. 196.
71. Spain Const., arts. 167–68.
72. Victor Ferreres Comella, *The Constitution of Spain: A Contextual Analysis* (Hart Publishing, 2013) 60.
73. *Ibid.*
74. *Ibid.* 57.
75. See Robert F. Williams, “State Constitutional Law Processes” (1983) 24 *William & Mary Law Review* 169, 226.
76. Bruce E. Cain & Roger G. Noll, “Malleable Constitutions: Reflections on State Constitutional Reform” (2009) 87 *Texas Law Review* 1517, 1524.
77. See Gerald Benjamin, “Constitutional Amendment and Revision,” in G. Alan Tarr & Robert F. Williams (eds.), *State Constitutions for the Twenty-First Century* (State University of New York Press, 2006) Volume 3, 177, 178.
78. G. Alan Tarr, *Understanding State Constitutions* (Princeton University Press, 2000) 38.
79. See Michael G. Colantuono, “The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change” (1987) 75 *California Law Review* 1473, 1478.
80. See, e.g., *Bess v. Ulmer*, 985 P.2d 979, 982 (Alaska 1999); *Adams v. Gunter, Jr.*, 238 So.2d 824, 829–30 (Fla. 1970); *In re Opinion to the Governor*, 178 A. 433, 439 (R.I. 1935).
81. *Livermore v. Waite*, 102 Cal. 113, 118–19 (Cal. 1894).
82. *Amador Valley Joint Union High School District v. State Board of Equalization*, 583 P.2d 1281, 1286 (Cal. 1978).
83. *Legislature v. Eu*, 816 P.2d 1309, 1319 (Cal. 1991).
84. California Const., art. XVIII, ss. 1, 3, 4.
85. *Ibid.* ss. 2, 4.
86. Compare Kansas Const., art. XIV, s. 1 (authorizing a legislature-centric amendment process), with Kansas Const., art. XIV, s. 2 (authorizing a convention-centric dismemberment process); Minnesota Const., art. IX, s. 1 (authorizing a legislature-centric amendment process), with Minnesota Const., art. IX, s. 2 (authorizing a convention-centric dismemberment process); Nevada Const., art. XVI, s. 1 (authorizing a legislature-centric amendment process), with Nevada Const., art. XVI, s. 2 (authorizing a convention-centric dismemberment process); New Mexico Const., art. XIX, s. 1 (authorizing a legislature-centric amendment process), with New Mexico Const., art. XIX, s. 2 (authorizing a convention-centric dismemberment process); Wisconsin Const., art. XII, s. 1 (authorizing a legislature-centric amendment process), with Wisconsin Const., art. XII, s. 2 (authorizing a convention-centric dismemberment process).
87. Ecuador Const., arts. 441–44.

88. Ibid. art. 441.
89. Ibid. art. 442.
90. Ibid. art. 444.
91. Robert A. Dahl, *Toward Democracy: A Journey* (University of California Press, 1997) 61–68.
92. Melissa Schwartzberg, *Democracy and Legal Change* (Cambridge University Press, 2007) 202–03.
93. Ibid. 197.
94. Ibid. 200.
95. See John Locke, *Two Treatises on Government* (Thomas Hollis ed., A. Millar et al., 1764) Book II, Chapter 8, sec. 122.
96. Hanna Fenichel Pitkin, “The Idea of a Constitution” (1987) 37 *Journal of Legal Education* 167, 168.
97. See James Allan, “Thin Beats Fat Yet Again—Conceptions of Democracy” (2006) 25 *Law and Philosophy* 533, 535; Frank I. Michelman, “Brennan and Democracy” (1998) 86 *California Law Review* 399, 401–11.
98. See Jeremy Webber, *Reimagining Canada* (Montreal: McGill-Queen’s University Press, 1994) 40–74.
99. See Michel Seymour, “Quebec and Canada at the Crossroads: A Nation Within a Nation” (2000) 6 *Nations & Nationalism* 227, 237.
100. I discuss this point in detail in Chapters 3 and 4.
101. Walter F. Murphy, “The Art of Constitutional Interpretation: A Preliminary Showing,” in M. Judd Harmon (ed.), *Essays on the Constitution of the United States* (Kennikat Press, 1978) 156.
102. Bruce Ackerman, *We the People—Volume I: Foundations* (Harvard University Press, 1991) 16.
103. Corey Brettschneider, *Democratic Rights: The Substance of Self-Government* (Princeton University Press, 2010) 156; Jeff Rosen, “Was the Flag Burning Amendment Unconstitutional?” (1991) 100 *Yale Law Journal* 1073, 1084–89.
104. Miriam Galston, “Theocracy in America: Should Core First Amendment Values Be Permanent?” (2009) 37 *Hastings Constitutional Law Quarterly* 65, 124; David Harmer, “Securing a Free State: Why the Second Amendment Matters” (1998) *Brigham Young University Law Review* 55, 77.
105. Laurence H. Tribe, “A Constitution We Are Amending: In Defense of a Restrained Judicial Role” (1983) 97 *Harvard Law Review* 443, 440.
106. Schwartzberg (n 92) 147.
107. Heather K. Gerken, “The Hydraulics of Constitutional Reform: A Skeptical Response to *Our Undemocratic Constitution*” (2007) 55 *Drake Law Review* 925, 937.
108. Daryl J. Levinson & Richard H. Pildes, “Separation of Parties, Not Powers” (2006) 119 *Harvard Law Review* 2311, 2330–47.
109. Robert J. Lipkin, “The New Majoritarianism” (2000) 69 *University of Cincinnati Law Review* 107, 149.
110. See Wayne Franklin, “The US Constitution and the Textuality of American Culture,” in Vivien Hart & Shannon C. Stimson (eds.), *Writing a National Identity: Political,*

- Economic, and Cultural Perspectives on the Written Constitution* (Manchester University Press, 1993) 10.
111. Thomas Paine, *Rights of Man* (Hypatia Bradlaugh Bonner ed., Watts & Co., 1910) 98.
 112. Beau Breslin, “Is There a Paradox in Amending a Sacred Text?” (2009) 69 *Maryland Law Review* 66, 72. Although it may have been the intention at the time of its design, the constitution cannot today be described as formally flexible.
 113. Horace Binney, *An Inquiry into the Formation of Washington’s Farewell Address* (Parry & McMillan, 1859) 215.
 114. *Ibid.*
 115. *Dodge v. Woolsey*, 59 U.S. (18 How.) 331.
 116. Akhil Reed Amar, “Civil Religion and Its Discontents” (1989) 67 *Texas Law Review* 1153, 1164–65.
 117. Akhil Reed Amar, “Philadelphia Revisited: Amending the Constitution Outside Article V” (1988) 55 *University of Chicago Law Review* 1043, 1044 n.1.
 118. *The Federalist* No. 46 (James Madison) (Jacob E. Cooke ed., Wesleyan University Press, 1961) 315 (defending the proposition that “ultimate authority, wherever the derivative may be found, resides in the people alone”).
 119. Brannon P. Denning & John R. Vile, “The Relevance of Constitutional Amendments: A Response to David Strauss” (2002) 77 *Tulane Law Review* 247, 274.
 120. Michael C. Dorf, “Equal Protection Incorporation” (2002) 88 *Virginia Law Review* 951, 987.
 121. France Const., art. 89.
 122. France Const., art. 3 (1791) (superseded).
 123. Spain Const., s. 169.
 124. *Ibid.* s. 116.
 125. Belgium Const., art. 197.
 126. Luxembourg Const., art. 115.
 127. Estonia Const., art. 168.
 128. *Ibid.* arts. 161–68.
 129. Greece Const., art. 110.
 130. Albania Const., art. 177.
 131. Cape Verde Const., art. 309.
 132. *Ibid.*
 133. Portugal Const., art. 284.
 134. Italy Const., art. 138.
 135. South Korea Const., art. 129.
 136. Costa Rica Const., art. 195.
 137. Australia Const., art. 128.
 138. *See* Denmark Const., s. 88; Norway Const., art. 121; Sweden Inst. of Gov., art. 16.
 139. *See* The U.S. National Archives and Records Administration, “Constitution of the United States: Amendments 11–27” (2015) *The Charters of Freedom*. By law, though not required by the constitutional text, the Archivist of the United States issues a certification when the required number of states have ratified an amendment. *See* 1 United States Code § 106b (1988).

140. Gideon M. Hart, “The ‘Original’ Thirteenth Amendment: The Misunderstood Titles of Nobility Amendment” (2010) 94 *Marquette Law Review* 311, 327 n.88.
141. Richard A. Primus, “When Should Original Meanings Matter?” (2008) 107 *Michigan Law Review* 165, 209 n.157.
142. David P. Currie, “The Constitution in Congress: Substantive Issues in the First Congress” (1994) 61 *University of Chicago Law Review* 775, 851 n.449.
143. Paul E. McGreal, “There Is No Such Thing as Textualism: A Case Study in Constitutional Method” (2001) 69 *Fordham Law Review* 2393, 2431.
144. Memorandum from the Office of the Assistant Attorney General (November 2, 1992) in U.S. Department of Justice Office of Legal Counsel, *Opinions of the Office of Legal Counsel: Consisting of Selected Memorandum Opinions Advising the President of the United States, The Attorney General and Other Executive Officers of the Federal Government In Relation to Their Official Duties* (U.S. Department of Justice, 1992) Volume 16, 102.
145. See *Boehner v. Anderson*, 809 F. Supp. 138 (D.D.C. 1992).
146. United States Const., amend. XXVII.
147. Adam M. Samaha, “Dead Hand Arguments and Constitutional Interpretation” (2008) 108 *Columbia Law Review* 606, 649.
148. Peter Suber, “Population Changes and Constitutional Amendments: Federalism Versus Democracy” (1987) 20 *University of Michigan Journal of Law Reform* 409, 423–24.
149. United States Const., amend. XVIII.
150. Michael J. Lynch, “The Other Amendments: Constitutional Amendments that Failed” (2001) 93 *Law Library Journal* 303, 305.
151. 1 Public Resolution 3, 1st Congress, 1 Stat. 97 (1789).
152. 11 Public Resolution 2, 11th Congress, 2 Stat. 613 (1810).
153. H.R.J. Resolution 184, 68th Congress, 43 Stat. 670 (1924).
154. H.R. Resolution 80, 36th Congress, 12 Stat. 251 (1861).
155. *Coleman v. Miller*, 307 U.S. 433 (1939).
156. *Ibid.* 454.
157. *Ibid.* *Coleman* refined the earlier holding in *Dillon v. Gloss*, 256 U.S. 368 (1921), which held that ratification “must be within some reasonable time after the proposal.” *Ibid.* 375. Nonetheless it is unclear whether the modern Court would resolve the issue in the same way.
158. See Constitution Act, 1982, ss. 38–49.
159. *Ibid.* s. 38(1).
160. *Ibid.* s. 42(1).
161. *Ibid.* s. 39.
162. Katherine Swinton, “Amending the Canadian Constitution: Lessons from Meech Lake” (1992) 42 *University of Toronto Law Journal* 139, 146.
163. Constitution Act, 1982, ss. 38(2)–(4), s. 40.
164. Swinton (n 162).
165. Constitution Act, 1982, s. 46(2).
166. Hurley (n 4) 112.

167. Constitution Act, 1982, s. 47(1).
168. *Ibid.* s. 47(2).
169. See, e.g., Special Joint Committee of the Senate and House of Commons on the Process for Amending the Constitution of Canada, *The Process for Amending the Constitution of Canada* (Supply and Services Canada, 1991) 31; Gordon Robertson, *Memoirs of a Very Civil Servant: Mackenzie King to Pierre Trudeau* (University of Toronto Press, 2000) 342–48; Patrick J. Monahan, “After Meech Lake: An Insider’s View” (October 13, 1990) The Inaugural Thomas G. Feeney Memorial Lecture delivered at the University of Ottawa.
170. Compare Gordon Robertson, “Meech Lake—The Myth of the Time Limit” (1989) 11 *Choices* 1 (arguing that time limit should not apply), with R. E. Hawkins, “Meech Lake—The Reality of the Time Limit” (1989) 35 *McGill Law Journal* 196 (arguing that time limit should apply) and F. L. Morton, “How Not to Amend the Constitution” (1989) 12 *Canadian Parliamentary Review* 9 (arguing that the entire debate was flawed).
171. See Warren J. Newman, “Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada” (2007) 37 *Supreme Court Law Review* (2d) 383, 400.
172. See Mary Dawson, “From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution: Patriation, Meech Lake, and Charlottetown” (2012) 57 *McGill Law Journal* 955, 983.
173. For a discussion of *cumul*, see Jacques-Yvan Morin & José Woehrling, *Les constitutions du Canada et du Québec—du régime français à nos jours* (Les Éditions Thémis, 2004) T1, 531.
174. See Bruce P. Elman & A. Anne McLellan, “Canada After Meech” (1990) 2 *Constitutional Forum* 63, 64.
175. See Michael B. Stein, “Improving the Process of Constitutional Reform in Canada: Lessons from the Meech Lake and Charlottetown Constitutional Rounds” (1997) 30 *Canadian Journal of Political Science* 307, 320.
176. Ronald L. Watts, “Canadian Federalism in the 1990s: Once More in Question” (1991) 21 *Publius* 169, 178.
177. See C. E. S. Franks, “The Myths and Symbols of the Constitutional Debate in Canada” (1993) Queen’s University Institute of Intergovernmental Relations Reflections Paper No. 11.
178. Peter Oliver, “Canada, Quebec, and Constitutional Amendment” (1999) 49 *University of Toronto Law Journal* 519, 592.
179. H.R.J. Resolution 208, 92nd Congress, 86 Stat. 1523 (1972).
180. *Ibid.*
181. Orrin G. Hatch, “The Equal Rights Amendment: A Critical Analysis” (1979) 2 *Harvard Journal of Law and Public Policy* 19, 19–20.
182. *Ibid.* 21.
183. See Leo Kanowitz & Marilyn Klinger, “Can a State Rescind Its Equal Rights Amendment Ratification: Who Decides and How?” (1977) 28 *Hastings Law Journal* 979, 981.

184. H.R.J. Resolution 638, 95th Congress, 92 Stat. 3799 (1978).
185. See Ruth Bader Ginsburg, “Ratification of the Equal Rights Amendment: A Question of Time” (1979) 57 *Texas Law Review* 919; J. William Heckman, Jr., “Ratification of a Constitutional Amendment: Can a State Change Its Mind?” (1973) 6 *Connecticut Law Review* 28; Grover Rees III, “Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension” (1980) 58 *Texas Law Review* 875; Comment, “The Equal Rights Amendment and Article V: A Framework for Analysis of the Extension and Rescission Issues” (1978) 127 *University of Pennsylvania Law Review* 494.
186. See Allison L. Held et al., “The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States” (1997) 3 *William & Mary Journal of Women & the Law* 113. However, the more persuasive view is that the Equal Rights Amendment proposal expired when the deadline passed without ratification. See Brannon P. Denning & John R. Vile, “Necromancing the Equal Rights Amendment” (2000) 17 *Constitutional Commentary* 593.
187. One might ask also whether three years is too long. Following the defeat of the Meech Lake Accord, a special parliamentary committee recommended shortening the time limit to two years. See Special Joint Committee of the Senate and the House of Commons on the Process for Amending the Constitution of Canada (n 169) 30–31.
188. See Richard Simeon, “Why Did the Meech Lake Accord Fail?” in Ronald L. Watts & Douglas M. Brown (eds.), *Canada: The State of the Federation 1990* (Queen’s University Institute of Intergovernmental Relations, 1990) 15, 28.
189. The “height” of the deliberation ceiling is relevant. Where the ceiling is high—and, for instance, extends beyond electoral term limits—the incentives for constitutional actors would be different from the incentives under a lower ceiling. These differences are worth exploring in greater detail, as is the relative effect of the height of the ceiling as compared to the very presence of a ceiling, whatever its height.
190. Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (Yale University Press, 2001) 175 (emphasis in original).
191. *Ibid.* 11.
192. *Ibid.*
193. The average lifespan of a constitution is nineteen years. See Zachary Elkins, Tom Ginsburg, & James Melton, *The Endurance of National Constitutions* (Cambridge University Press, 2009) 2.
194. This was suggested by Clyde Wells, Premier of Newfoundland and Labrador. See Clyde Wells, “Constitutional Amendment and Constituent Assemblies” (1991) 14 *Canadian Parliamentary Review* 8, 9–10.
195. Sanford Levinson, “Designing an Amendment Process,” in John Ferejohn et al. (eds.), *Constitutional Culture and Democratic Rule* (Cambridge University Press, 2001) 271, 281.
196. Note here that ratifying bodies have two ways of rejecting an amendment: they may adopt a resolution expressly rejecting it or they may refuse to take action on it. In the case of inaction, it is difficult to conceptualize how a ratifying body could confirm its

- prior rejection of an amendment proposal unless inaction after a certain period of time were taken to mean rejection or the ratifying body were required to memorialize their rejection in some verifiable way.
197. I discuss variability in amendment thresholds in Chapters 1, 3, and 4, and earlier in this chapter under the headings “Pathways and Possibilities” and “Democracy and Unamendability.”
 198. Yaniv Roznai, *Unconstitutional Constitutional Amendments; The Limits of Amendment Powers* (Oxford University Press, 2017) 105–34.
 199. Ran Hirschl, “The Judicialization of Mega-Politics and the Rise of Political Courts” (2008) 11 *Annual Review of Political Science* 93, 94.
 200. *Ibid.* 100–06.
 201. South Africa Const., s. 74; Constitution Act, 1982, ss. 38–49.
 202. Australia Const., s. 138; Italy Const., art. 138.
 203. See Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Ekin Press, 2008) 85 (quoting Walter F. Murphy & Joseph Taneenhaus (eds.), *Comparative Constitutional Law: Cases and Commentaries* (Palgrave Macmillan, 1977) 659–65).
 204. See *Citizens United* (n 13) 339 (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.” (citation omitted) (citing *Buckley v. Valeo*, 424 U.S. 1, 19 (1976))); *NAACP v. Claiborne Hardware Company*, 458 U.S. 886, 913 (1982) (“This Court has recognized that expression on public issues ‘has always rested on the highest rung of the hierarchy of First Amendment values.’ . . . ‘[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.’ . . . There is a ‘profound national commitment’ to the principle that ‘debate on public issues should be uninhibited, robust, and wide-open.’” (citations omitted) (first quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980); then quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964); and then quoting *New York Times Company v. Sullivan*, 376 U.S. 254, 270 (1964))); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”).
 205. See Adrian Vermeule, “The Atrophy of Constitutional Powers” (2012) 32 *Oxford Journal of Legal Studies* 421, 424–25.
 206. See Farrah Ahmed, Richard Albert, & Adam Perry, “Judging Constitutional Conventions” (forthcoming 2019) *International Journal of Constitutional Law*; Farrah Ahmed, Richard Albert, & Adam Perry, “Enforcing Constitutional Conventions” (forthcoming 2019) *International Journal of Constitutional Law*.
 207. See Yaniv Roznai, “The Theory and Practice of ‘Supra-Constitutional’ Limits on Constitutional Amendments” (2013) 62 *International and Comparative Law Quarterly* 557.

208. See Stephen J. Schnably, “Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal” (2008) 62 *University of Miami Law Review* 417, 461–79.
209. See Richard Albert, Malkhaz Nakashidze, & Tarik Olcay, “The Formalist Resistance to Unconstitutional Constitutional Amendments” (2019) 70 *Hastings Law Journal* 101.
210. *Finn v. The Attorney General* [1983] I.R. 154; *Riordan v. An. Taoiseach (No. 1)* [1999] 4 I.R. 321.
211. *Leser v. Garnett*, 258 U.S. 130 (1922); *National Prohibition Cases*, 253 U.S. 350 (1930); *Dillon* (n 157); *Coleman* (n 155).
212. CC décision no. 2003-469DC, Mar. 26, 2003, Rec. 293; CC décision no. 92-312DC, Sept. 2, 1992, Rec. 76; CC décision no. 62-20DC, Nov. 6, 1962, Rec. 27.
213. Ruling N2/2/486, July 12, 2010; Ruling N1/3/523, October 24, 2012; Ruling N1/1/549, February 5, 2013.
214. Turkey Const., art. 148. I discussed in Chapter 1 how codified prohibitions like these are subject to manipulation and outright noncompliance.
215. *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 [“*Patriation Reference*”].
216. *Ibid.* 809.
217. *Ibid.* 910–11.
218. Peter H. Russell, “The End of Mega Constitutional Politics in Canada” (1993) 26 *Political Science and Politics* 33, 34.
219. Peter H. Russell, “Constitution,” in John C. Courtney & David Smith (eds.), *The Oxford Handbook of Canadian Politics* (Oxford University Press, 2010) 21, 30.
220. *Patriation Reference* (n 215) 904–05.
221. See Richard Simeon, “An Overview of the Trudeau Constitutional Proposals” (1981) 19 *Alberta Law Review* 391, 391–92.
222. Bruce A. Ackerman & Robert E. Charney, “Canada at the Constitutional Crossroads” (1984) 34 *University of Toronto Law Journal* 117, 128.
223. *Ibid.* 129.
224. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [“*Secession Reference*”].
225. *Reference re Senate Reform*, [2014] 1 S.C.R. 704 [“*Senate Reform Reference*”]; *Reference re Supreme Court Act*, [2014] 1 S.C.R. 433 [“*Supreme Court Act Reference*”].

Chapter 6

1. Norway Const., art. 2 (superseded).
2. *Ibid.*
3. *Ibid.* art. 16.
4. 1 *Annals of Congress* 734, House of Representatives, 1st Congress, 1st Session (August 13, 1789).

5. Ibid. 734.
6. Ibid. 734–35.
7. Ibid. 735.
8. Ibid. 736.
9. Ibid. 735.
10. Ibid.
11. Robert Blackburn, “Constitutional Amendment in the United Kingdom,” in Xenophon Contiades (ed.), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Routledge, 2013) 359, 361–62.
12. Anthony King, *The British Constitution* (Oxford University Press, 2007) 8.
13. See Akhil Reed Amar, *America’s Unwritten Constitution: The Precedents and Principles We Live By* (Basic Books, 2012); Laurence H. Tribe, *The Invisible Constitution* (Oxford University Press, 2008).
14. Dawn Oliver, “The United Kingdom,” in Dawn Oliver & Carlo Fusaro (eds.), *How Constitutions Change: A Comparative Study* (Hart Publishing, 2011) 329, 333.
15. See Michael Foley, *The Silence of Constitutions: Gaps “Abeyances” and Political Temperament in the Maintenance of Government* (Routledge, 1989).
16. See John Gardner, “Can There Be a Written Constitution?,” in Leslie Green et al. (eds.), 1 *Oxford Studies in Philosophy of Law* (Oxford University Press, 2011) 162, 170. Gardner stresses how the law is received by its users, namely courts and law-applying officials, not the people at large.
17. See Tania Groppi, “Constitutional Revision in Italy: A Marginal Instrument for Constitutional Change,” in Contiades (n 11) 203, 212.
18. India Const., art. 368.
19. Arun K. Thiruvengadam, *The Constitution of India: A Contextual Analysis* (Hart Publishing, 2017) 215.
20. The text is not free of inconsistencies and incoherence. For example, some amendments were later invalidated by judicial interpretation as contrary to the basic structure doctrine but today remain codified in the constitutional text. See, e.g., India Const., art. 368(4)–(5). These amendments are bracketed and accompanied by a footnote identifying the case that invalidated them.
21. I discuss the basic structure doctrine in the Introduction, Chapter 4, and Chapter 5.
22. Ireland Const., art. 34(2) (2010) (superseded).
23. Norma Smith, *Jeannette Rankin: America’s Conscience* (Montana Historical Society Press, 2002) 103.
24. María Ramírez, “Can #MeToo Fix Spain’s Language Problem?” (July 27, 2018) *The Atlantic*. “Ministros” suggests an exclusively male council, while “ministras y ministros” clearly defines the council as consisting of both women and men.
25. Following the Supreme Court’s incorporation of the First Amendment against the states in *Gitlow v. New York*, 268 U.S. 652 (1925), the debate turned to which other rights should be applied to the states. Total incorporationists argued that the entire Bill of Rights should constrain the states, while selective incorporationists preferred to evaluate the application of each right individually. See *Adamson v. California*, 332 U.S. 46 (1947); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

26. See Edward Hartnett, “A ‘Uniform and Entire’ Constitution; Or, What if Madison Had Won?” (1998) 15 *Constitutional Commentary* 251, 284–99.
27. 1 *Annals of Congress* (n 4) 735 (James Madison)
28. United States Const., art. I.
29. Philip Rucker & David A. Fahrenthold, “After Wrangling, Constitution Is Read on House Floor, Minus Passages on Slavery” (January 7, 2011) *Washington Post*.
30. Akhil Reed Amar, “Architexture” (2002) 77 *Indiana Law Journal* 671, 687.
31. *Ibid.* 686.
32. *Ibid.* 686 n.62.
33. For example, the European Union renumbers provisions when a change is made to a treaty. I thank Vlad Perju for sharing this example with me.
34. Constitution Act, 1982, enacted as Schedule B to the Canada Act 1982, 182, c. 11 (U.K.), s. 52(2) [“Constitution Act, 1982”].
35. See *New Brunswick Broadcasting Company v. Nova Scotia*, [1993] 1 S.C.R. 319.
36. Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.) [“Constitution Act, 1867”].
37. *Adler v. Ontario*, [1996] 3 S.C.R. 609, para. 1.
38. *Ibid.* para. 29.
39. *Ibid.* paras. 29, 30, 48. (emphasis in original).
40. The Supreme Court of the United Kingdom recently encountered a related question on the hierarchy of domestic norms. See *R (HS2 Action Alliance Ltd.) v. Secretary of State for Transport* [2014] UKSC 3.
41. Ruth Bader Ginsburg, “Sexual Equality Under the Fourteenth and Equal Rights Amendments” (1979) *Washington University Law Quarterly* 161, 176.
42. I am grateful to Andrea Pozas-Loyo for her careful and comprehensive advice in identifying how this problem manifests itself in Mexico. I am grateful also to Rodrigo Camarena González and Roberto Niembro for their help in interpreting amendment practice in Mexico.
43. The amendment rule in Article 135 has been amended twice, first in 1966 and again in 2016. The more recent change incorporates the legislature of Mexico City in the ratification of amendments.
44. See Diego Valadés, “Reflexión en torno al centenario de la Constitución” (February 5, 2017) *México Social*.
45. Fix-Fierro Héctor, Diego Valadés, & Daniel Márquez, “Toward the Reorganization and Consolidation of the Text of the Constitution of the United Mexican States of 1917. Introductory Essay” (paper on file).
46. Francisca Pou-Giménez & Andrea Pozas-Loyo, “The Paradox of Mexican Self-Reinforcing Hyper-Reformism,” in Richard Albert, Carlos Bernal, & Juliano Zaiden Benvindo, *Constitutional Change and Transformation in Latin America* (Hart, 2019).
47. Jose Angel Quintanilla, “The Dynamics of Constitutional Change in Mexico: New Data from Reformar sin Mayorías” (February 10, 2014) *International Journal of Constitutional Law Blog*.
48. Mexico Const., art. 3.
49. *Ibid.* art. 27.
50. *Ibid.* art. 41.

51. Ibid. art. 113.
52. Ibid. art. 115.
53. Ibid. art. 122.
54. Ibid. art. 123.
55. James Melton et al., “On the Interpretability of Law: Lessons from the Decoding of National Constitutions” (2012) 43 *British Journal of Political Science* 399, 417.
56. Héctor, Valadés, & Márquez (n 45). I draw from this important source for the examples to follow.
57. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).
58. Ibid.
59. See Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (Oxford University Press, 2006) 17–24.
60. See H. Jefferson Powell, *A Community Built on Words: The Constitution in History and Politics* (University of Chicago Press, 2005) 6; Joshua Braver, “Exporting U.S. Counter-Interpretation: Redeeming Constitutional Supremacy in the U.K.” (2016) 47 *Georgetown Journal of International Law* 867, 894–95.
61. Zachary Elkins, Tom Ginsburg, & James Melton, *The Endurance of National Constitutions* (Cambridge University Press, 2009) 2.
62. Nicholas O. Stephanopoulos & Mila Versteeg, “The Contours of Constitutional Approval” (2016) 94 *Washington University Law Review* 113, 168–69.
63. Ibid. 170.
64. Wayne Franklin, “The US Constitution and the Textuality of American Culture,” in Vivien Hart & Shannon C. Stimson (eds.), *Writing a National Identity: Political, Economic, and Cultural Perspectives on the Written Constitution* (Manchester University Press, 1993) 9, 10.
65. Thomas Paine, “Rights of Man, Part II. Combining Principles and Practice,” in George H. Evans (ed.), *The Political Writings of Thomas Paine* (New York, 1835) Volume II, 145, 180–81.
66. Clinton Rossiter, *1787: The Grand Convention* (W.W. Norton & Company, Inc., 1987) 287.
67. Akhil Reed Amar, *American’s Constitution: A Biography* (Random House, 2005) xi.
68. 1 *Annals of Congress* 737 (August 13, 1789) (John Vinning).
69. Ibid.
70. Ibid. (George Clymer).
71. Ibid.
72. Mehrdad Payandeh, “Constitutional Aesthetics: Appending Amendments to the United States Constitution,” (2010) 25 *BYU Journal of Public Law* 87, 116.
73. I discuss this case in Chapter 1.

Conclusion

1. See, e.g., Xenophon Contiades & Alkmene Fotiadou, “Models of Constitutional Change,” in Xenophon Contiades (ed.), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Routledge, 2013) 417, 442.

2. See Heather K. Gerken, “The Hydraulics of Constitutional Reform: A Skeptical Response to *Our Undemocratic Constitution*” (2007) 55 *Drake Law Review* 925, 934.
3. See *ibid.* 937–41.
4. See *ibid.* 941; Reva B. Siegel, “Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA” (2006) 94 *California Law Review* 1323, 1328.
5. See Gerken (n 2) 941. For a discussion of judicial minimalism, see generally Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press, 1999) (describing and defending the theory of judicial minimalism, which encourages judges to resolve matters on narrow grounds so as to promote democratic deliberation).
6. See Brannon P. Denning & John R. Vile, “The Relevance of Constitutional Amendments: A Response to David Strauss” (2002) 77 *Tulane Law Review* 247, 279.
7. Brannon P. Denning, “Means to Amend: Theories of Constitutional Change” (1997) 65 *Tennessee Law Review* 155, 237.
8. Lon L. Fuller, *The Morality of Law* (Yale University Press, 1964) 39.
9. *Ibid.*
10. *Ibid.*
11. See Roscoe Pound, “Law in Books and Law in Action” (1910) 44 *American Law Review* 12 (distinguishing between the law on the books and the law in action).
12. Richard Albert, “Nonconstitutional Amendments” (2009) 22 *Canadian Journal of Law & Jurisprudence* 5, 5.
13. See Richard Albert, “Constitutional Handcuffs” (2010) 42 *Arizona State Law Journal* 663, 665.
14. See Richard H. Fallon, Jr., “Legitimacy and the Constitution” (2005) 118 *Harvard Law Review* 1787, 1795.
15. See *ibid.* 1794.
16. There is a third form of legitimacy worth noting—moral legitimacy—which the constitutional change may possess if it is morally justifiable and respect worthy. See *ibid.* 1796–97. But this is a content-based feature not assessable without more information about the given amendment. It is possible, in fact, for an amendment to possess both legal and sociological legitimacy without possessing moral legitimacy.
17. See Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge University Press, 2000) 99–105.
18. See Christopher L. Eisgruber, *Constitutional Self-Government* (Harvard University Press, 2001) 19.
19. Edmund Burke, *Reflections on the Revolution in France, and on the Proceedings in Certain Societies in London Relative to That Event* (J. Dodsley, 1790) 29.
20. See Walter Dellinger, “The Legitimacy of Constitutional Change: Rethinking the Amendment Process” (1983) 97 *Harvard Law Review* 386, 386–87.
21. See Sanford Levinson, “The Political Implications of Amending Clauses” (1996) 13 *Constitutional Commentary* 107, 112–13.
22. A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 8th ed. 1982) (1915) 66.

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