American Exceptionalism in Constitutional Amendment

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American Exceptionalism in Constitutional Amendment

Richard Albert

The American traditions of constitutional amendment raise contrasts and continuities with constitutional amendment in much of the rest of the democratic world. On one hand, the United States Constitution stands apart from many foreign democratic constitutions: it is extraordinarily difficult to amend, it does not entrench any current form of formal unamendability, and it has resisted the global trend toward the doctrine of unconstitutional constitutional amendment. On the other, state constitutions in the United States more closely resemble the world’s democratic constitutions: they are freely susceptible to formal amendment, they entrench current forms of formal unamendability, and they recognize the doctrine of unconstitutional constitutional amendment. Constitutional amendment in the United States is therefore peculiar in entrenching both departures from and convergences with constitutional amendment in the larger democratic world. In this article prepared for a symposium on “State Constitutional Change,” I explore how American state constitutions differ from the United States Constitution, yet resemble the world’s other democratic constitutions in how they structure constitutional amendment. I conclude with thoughts on the organizing logic of constitutional amendment under the United States Constitution.

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I. INTRODUCTION

The United States Constitution is unique among the master-text democratic constitutions of the world. Long since James Madison saluted the Philadelphia Convention for having "reared the fabrics of governments which have no model on the face of the globe,"\(^1\) we have often been reminded that there is something different, indeed special, about the United States Constitution. Political philosopher Alexis de Tocqueville observed in the nineteenth century that it is "the most perfect federal constitution that ever existed."\(^2\) Historian George Billias calls American constitutionalism "this country's greatest gift to human freedom."\(^3\) Constitutional scholars Zachary Elkins, Tom Ginsburg, and James Melton highlight the United States Constitution as a rare "example of constitutional superlongevity."\(^4\) And the late Justice Antonin Scalia rejected the use of foreign law to interpret the United States Constitution, precisely because in his view, the Constitution is rooted in distinctly American values.\(^5\)

There is much about the United States Constitution that distinguishes it from others. At a high level of abstraction, few could disagree that the United States Constitution, or any other democratic constitution for that matter, is unique. Many if not most democratic constitutions differ from each other—if not superficially with respect to their text, then intrinsically with respect to their foundations—insofar as democratic constitutions generally spring from the indigenous experiences of the people who agree to be bound by their terms. This expressivist theory of constitutions, as Mark Tushnet describes it, reminds us that "constitutions emerge out of each nation's distinctive history and express its distinctive character."\(^6\) On this view, a democratic constitution proclaims a national identity and reflects the socio-

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legal values that shape the order the constitution governs.\textsuperscript{7} In the United States, the Constitution’s values are rooted in the promise of self-government that opens the doors to the preamble: “We, the People of the United States.”\textsuperscript{8} The authors of the Constitution entrenched this declaration of popular sovereignty to distinguish the new republic from the British model of parliamentary sovereignty.\textsuperscript{9}

Even at a lower level of abstraction, the United States Constitution stands apart from others, both as a matter of constitutional law and constitutional history. Taking an historical perspective, Stephen Gardbaum has situated the United States Constitution at the vanguard of the world’s constitutions for being written, supreme, entrenched against ordinary legislative amendment or repeal, enforced by courts exercising the power of judicial review, and supplemented by a bill of rights.\textsuperscript{10} From the perspective of constitutional law, Steven Calabresi reminds us of the distinctly American legal rules and doctrines authorized by the United States Constitution, namely capital punishment, the nonestablishment norm, the exclusionary rule, and heightened constitutional protections for free speech.\textsuperscript{11} To declare today that the Constitution of the United States is different from other democratic constitutions is therefore both correct and yet perhaps also unoriginal. The forms and features of America’s constitutional exceptionalism have been chronicled many times before, and one could not be faulted for believing there is nothing left to say.\textsuperscript{12}


\textsuperscript{8} U.S. CONST. pmbl.


\textsuperscript{11} Steven G. Calabresi, \textquote{A Shining City on a Hill}: American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law, 86 B.U. L. Rev. 1335, 1405-07, 1410 (2006).

\textsuperscript{12} See, e.g., Seymour Martin Lipset, \textit{American Exceptionalism: A Double-Edged Sword} 17, 23-24 (1997); Lorraine E. Weinrib, \textit{The Postwar Paradigm and American Exceptionalism}, in \textit{The Migration of Constitutional Ideas} 84, 85-86 (Sujit Choudhry ed., 2006); David S. Law & Mila Versteeg, \textit{The Declining Influence of the United States
Yet the story of America's constitutional exceptionalism nonetheless remains incomplete. We cannot fully appreciate the uniqueness of the United States Constitution without highlighting the differences in how constitutional amendment is structured in the United States and other constitutional democracies. There are three major markers of difference. First, the United States Constitution is extraordinarily difficult to formally amend, in contrast to most other less-rigid democratic constitutions. Second, unlike many democratic constitutions, the United States Constitution entrenches no current form of formal unamendability. Third, the doctrine of unconstitutional constitutional amendment has migrated across the democratic world, but has yet to reach the Constitution, and indeed has long been rejected by the United States Supreme Court. Each of these points of distinction is important in its own right, but collectively they suggest foundational differences between the United States and much of the rest of the democratic world.

What complicates and clarifies the nature of America's exceptionalism in constitutional amendment is that the theory and doctrine of constitutional amendment under the United States Constitution differs also from the experience of American state constitutions. Amending state constitutions is much easier than the United States Constitution; some state constitutions entrench current forms of formal unamendability, and some state courts recognize the doctrine of unconstitutional constitutional amendment. On each of these fronts, the tradition of American state constitutions reflects continuities with the larger democratic world and further sharpens the uniqueness of the United States Constitution in constitutional amendment.

In this Article prepared for a Symposium on "State Constitutional Change," I show that American state constitutions often differ from the United States Constitution and in some ways more closely resemble the world's other democratic constitutions in how they structure constitutional amendment. In Part II, I demonstrate that the United States Constitution is more difficult to amend than both foreign demo-

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II. THE DIFFICULTY OF FORMAL AMENDMENT

Master-text democratic constitutions span the range of amendability. Some, like the German Basic Law, are designed to be amendable, and indeed are: the text has been amended dozens of times in accordance with the rules authorizing political actors to formally amend the document.13 Others are designed to be amendable both in theory and reality, but over time, the text becomes virtually unamendable for all but low-stakes matters of provincial, parliamentary, or regional interest, as in the case of Canada.14 Still other master-text constitutions entrench formal amendment rules authorizing political actors to formally amend the constitution for all subjects large and small, but those rules ultimately become inoperable as a result of a divided political climate that prevents the formation of the consensus required to amend the text. The United States Constitution falls in this third category of amendability: today, it is amendable in theory alone.15

14. CONSTITUTION OF CANADA, pt. V.
15. U.S. CONST. art. V ("The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: 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;
A. Constitutional Rigidity

Constitutional amendment in the United States is extraordinarily difficult. There are four general formal amendment procedures in total: two variations on each of two major amendment tracks. For the first pair, the Constitution requires Congress to agree by a two-thirds supermajority to propose an amendment for consideration by the states, three-quarters of which must then ratify the proposal in state legislatures or state conventions, as Congress instructs, in order for the amendment to become law. The second pair alternatively authorizes a two-thirds supermajority of states to petition Congress to call a constitutional convention where the assembled body will propose amendments that must be ratified, if they are to become law, by three-quarters of state legislatures or state conventions, again as Congress chooses. Only the first of these two amendment tracks has ever been successfully used in American history.

It is hard to measure with any reliability the relative rigidity of codified constitutions. For all of their weaknesses, studies of amendment difficulty nonetheless reinforce the impression that the United States Constitution is one of the most difficult democratic constitutions to amend, if not the most difficult. In her empirical study of thirty-nine constitutional democracies, Astrid Lorenz calculates that the four most rigid constitutions belong to Belgium (9.5), the

and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

16. U.S. CONST. art. V.
17. U.S. CONST. art. V.
21. Richard Albert, The Difficulty of Constitutional Amendment in Canada, 53 ALBERTA L. REV. 85, 86 (2015). Elsewhere, I have argued that the Canadian Constitution may be even harder to formally amend than the United States Constitution, at least with respect to matters implicating mega-constitutional politics. Id. at 86-87.
United States and Bolivia (9.0), and the Netherlands (8.5).\textsuperscript{22} On her scale, the least rigid constitutions belong to the United Kingdom (1.0) and New Zealand (1.0), perhaps unsurprising given that neither has a master-text constitution that formally differentiates between constitutional and ordinary law.\textsuperscript{23} In another study of amendment difficulty, Arend Lijphart compares amendment thresholds across thirty-six constitutional democracies on the basis of the majorities required to amend the constitution.\textsuperscript{24} He ultimately ranks the United States at the top of the scale of amendment difficulty, among seven other constitutional democracies: Argentina, Australia, Canada, Germany, Japan, Korea, and Switzerland.\textsuperscript{25}

Consistent with these two indices, the most influential study of amendment difficulty ranks the United States at the top of all other democratic constitutions in its study sample.\textsuperscript{26} Drawing from the amendment experience of thirty-six countries, Donald Lutz analyzes the structure of amendment procedures in order to enumerate the entire universe of official actions that could conceivably constitute a formal amendment rule.\textsuperscript{27} He then assigns a quantum of difficulty to each action—a total of sixty-eight possible component parts in an amendment process, for example according to who may initiate, propose, or ratify an amendment.\textsuperscript{28} Lutz subsequently arrives at an index of amendment difficulty by aggregating the scores assigned to each discrete action.\textsuperscript{29} The result is not surprising: the United States Constitution (5.10) ranks first among all democratic constitutions in its study sample, followed by Switzerland (4.75) and Venezuela (4.75), then Australia (4.65), Costa Rica (4.10), Spain (3.60) and Italy (3.40).\textsuperscript{30} In contrast, Lutz concludes that New Zealand (0.50) has the easiest “constitution” to amend.\textsuperscript{31}

\textsuperscript{23} Id.
\textsuperscript{24} AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 208 tbl.12.1 (2d ed. 2012).
\textsuperscript{25} Id.
\textsuperscript{26} DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 170 (2006).
\textsuperscript{27} Id. at 166-70.
\textsuperscript{28} Id. at 166-68.
\textsuperscript{29} Id.
\textsuperscript{30} Id. at 170.
\textsuperscript{31} LUTZ, supra note 26.
Notwithstanding the difficulty inherent in measuring comparative amendment difficulty, these empirical studies suggest how hard it is to formally amend the United States Constitution. But the lived experience of the Constitution proves just as much. Political actors have ratified only twenty-seven formal amendments since the Constitution was adopted in 1789, an extraordinarily low number given that there have been well over eleven thousand amendment proposals in the same period. The ratio of proposals to ratifications has only increased over the years, highlighting an important trend at the moment: the decelerating frequency of formal amendment under Article V. The last formal amendment was ratified nearly twenty-five years ago in 1992, and next-most recent was ratified twenty years prior in 1971. There were four amendments in the preceding forty-year period, six in the preceding seventy years, and fifteen in the first eighty years of the Constitution. This decelerating pace of formal amendment is paired with a modern fact of constitutional law in the United States: constitutional change today occurs "off the books." What results is an informal amendment, where the authoritative meaning of the Constitution is transformed without a corresponding alteration to its text. The infrequent recourse to Article V has led one scholar to argue that formal amendment is now


33. See U.S. CONST. amend. XXVI (stating that "no law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened").

34. U.S. CONST. amend. XXVI (stating that "the right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age").

35. See U.S. CONST. amends. XXII, XXIII, XXIV, XXV.

36. See U.S. CONST. amends. XVI, XVII, XVIII, XIX, XX, XXI.


irrelevant, a position that I do not share but that nonetheless reflects an influential view of the declining importance of Article V.

But Article V is not necessarily fated to a future of disuse. True, the threshold requirements that make formal amendment difficult are unlikely to change. But the present degree of political division may well evolve over time to become less divided; the opposite occurred from the Progressive Era to the present day. In the 1910s, constitutional amendment via Article V was thought too easy: four constitutional amendments were adopted in rapid succession over a short span of ten years, causing political actors and observers to wonder whether the rules of constitutional amendment should be made harder so as to make amendment less frequent. The point is simply that the present difficulty of formal amendment is not a predictor of formal amendment difficulty in the future. But today it is undeniable that the United States Constitution is hard to amend, perhaps as hard if not harder to amend than most other democratic constitutions.

B. Constitutional Flexibility

Other democratic constitutions are today more frequently formally amended. Lutz’s comparative study is instructive on this front because it determines the amendment rate—the average number of formal amendments passed per year since the coming-into-force of a given constitution—for each country in his study sample. He assigns the lowest amendment rate to the United States (0.13), well below the average score (2.54) and the high score (13.42).

44. Lutz, supra note 26, at 154.
45. Id. at 170. Lutz assigns an amendment rate of 0.00 to the Japanese Constitution because it has not been amended since its adoption. Id. For reasons explained in large part or in whole by political culture, constitutional change in Japan occurs
But Lutz's study ends as early as 1940 (for Argentina) and as late as 1992 (for most countries under study), meaning that he does not account for changes that have occurred in the past twenty-five years. These dated data do not necessarily undermine Lutz's findings, but they do invite the important question whether amendment frequency may have changed over the past generation.

We can update Lutz's comparative study with external sources to identify how many times democratic constitutions have been amended. In Canada, for example, there have been eleven formal amendments since the adoption of the Constitution Act, 1982 through 2015, for an amendment rate of 0.33. In the Czech Republic, there were six formal amendments from the adoption of the Constitution in 1992 to 2010, for the same amendment rate of 0.33. In France, the twenty-four formal amendments from the founding of the Fifth Republic in 1958 to 2010 yields an amendment rate of 0.46. The fifty-eight formal amendments in Germany from the creation of the Basic Law in 1949 to 2010 generates an amendment rate of 0.95. The Indian amendment rate is even higher: 1.58, measuring from the coming-into-force of the Constitution in 1950 through 2010. Other amendment rates include: Italy (0.23, fourteen amendments from 1948 to 2010); South Africa (1.23, sixteen amendments from 1996 to 2009); and Switzerland (1.50, fifteen amendments through the interpretation and re-interpretation of the Constitution by the Cabinet Legislation Bureau. See Richard Albert, Amending Constitutional Amendment Rules, 13 INT’L J. CONST. L. 655, 671 (2015).

46. LUTZ, supra note 26.
47. See Albert, supra note 21, at 88.
50. See Jens Woelk, Germany, in HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY, supra note 48, at 143, 145.
52. Carlo Fusaro, Italy, in HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY, supra note 48, at 211, 218.
from 2000 to 2010). We can also update the amendment rate of the United States Constitution through 2015 (0.12). Some of the few exceptions to the rule that the United States Constitution has one of the lowest amendment rates, or the lowest, appear to be the Spanish Constitution, which has been subject to only one formal constitutional amendment from its adoption in 1978 to 2010, and the Constitutions of Japan (1946), Denmark (1953), Nauru (1968), St. Vincent (1979), and Antigua (1983), which have not yet once been formally amended since their adoption.

<table>
<thead>
<tr>
<th>Constitution #</th>
<th>Amendment Year</th>
<th>Number of Amendments</th>
<th>Amendment Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>1789</td>
<td>27</td>
<td>0.12</td>
</tr>
<tr>
<td>Canada</td>
<td>1982</td>
<td>11 (to 2011)</td>
<td>0.33</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>1992</td>
<td>6</td>
<td>0.33</td>
</tr>
<tr>
<td>France</td>
<td>1958</td>
<td>24</td>
<td>0.46</td>
</tr>
<tr>
<td>Germany</td>
<td>1949</td>
<td>58</td>
<td>0.95</td>
</tr>
<tr>
<td>India</td>
<td>1950</td>
<td>95</td>
<td>1.58</td>
</tr>
<tr>
<td>Italy</td>
<td>1948</td>
<td>14</td>
<td>0.23</td>
</tr>
<tr>
<td>South Africa</td>
<td>1996</td>
<td>16 (to 2009)</td>
<td>1.23</td>
</tr>
<tr>
<td>Spain</td>
<td>1978</td>
<td>1</td>
<td>0.03</td>
</tr>
<tr>
<td>Switzerland</td>
<td>2000</td>
<td>15</td>
<td>1.50</td>
</tr>
</tbody>
</table>

57. The content of this table is drawn from the sources cited in notes 33, 48-56. All data are current through 2010, unless otherwise indicated.
This pattern appears to hold for state constitutions in the United States. Lutz's study, reviews constitutional amendment rates for each of the states, which have a mean amendment rate of 1.23, measuring from the year of the coming-into-force of the constitution through 1991. The high state constitutional amendment rate belongs to Alabama (8.07, 726 amendments since 1901). For our comparative purpose of evaluating the rigidity of the United States Constitution, the best comparators, however, are the state constitutions that have been in force since before or shortly after the coming-into-force of the United States Constitution in 1789. These state constitutions developed alongside the United States Constitution, over much the same period of time. Each has a higher amendment rate than the United States Constitution: Indiana (0.29, forty-seven amendments since 1851); Iowa (0.34, fifty-four since 1857); Maine (0.89, 172 since 1820); Massachusetts (0.51, 120 since 1780); Minnesota (0.77, 120 since 1858); New Hampshire (0.63, 145 since 1784); Ohio (1.05, 173 since 1851); Vermont (0.24, fifty-four since 1793); and Wisconsin (0.87, 146 since 1848).

58. LUTZ, supra note 26, at 158-59.
59. Id. at 158.
Table II: Formal Amendment in the United States

<table>
<thead>
<tr>
<th>Constitution Year</th>
<th># of Amendments</th>
<th>Amendment Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>1789</td>
<td>27</td>
</tr>
<tr>
<td>Indiana</td>
<td>1851</td>
<td>47</td>
</tr>
<tr>
<td>Iowa</td>
<td>1857</td>
<td>54</td>
</tr>
<tr>
<td>Maine</td>
<td>1820</td>
<td>172</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>1780</td>
<td>120</td>
</tr>
<tr>
<td>Minnesota</td>
<td>1858</td>
<td>120</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>1784</td>
<td>145</td>
</tr>
<tr>
<td>Ohio</td>
<td>1851</td>
<td>173</td>
</tr>
<tr>
<td>Vermont</td>
<td>1793</td>
<td>54</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>1848</td>
<td>146</td>
</tr>
</tbody>
</table>

Another more recent source of verification for the unusual difficulty of formal amendment in the United States is an important study by Mila Versteeg and Emily Zackin. Drawing from a number of data sets, Versteeg and Zackin calculated an "average annual revision rate," which represents the total number of years during which a country or U.S. state experienced some form of constitutional change, whether resulting in replacement or amendment, divided by the lifespan of the jurisdiction in years. They arrived at an average annual revision rate across all states of 0.35, a little higher than the rate across all foreign national constitutions of 0.21. By comparison, the average annual revision rate for the United States is 0.07, placing it among the ten lowest rates worldwide, though we should note that this ranking includes non-democratic constitutions where the text and the

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61. See id. The data are current as of January 1, 2015.
62. See generally Mila Versteeg & Emily Zackin, American Constitutional Exceptionalism Revisited, 81 U. Chi. L. Rev. 1641 (2014) (demonstrating that state constitutions share similarities with foreign constitutions).
63. Id. at 1674.
64. Id.
rules they entrench may not matter much.65 Among democratic constitutions alone, the United States ranks in the three lowest average annual revision rates, behind Denmark and Japan.66

There are important reasons for the relative flexibility of state constitutions—reasons that reflect a unique understanding of state constitutionalism that differs from the theory of U.S. constitutionalism.67 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."68 State constitutions are more likely to track the political culture of the governing coalition, which may lead to more frequent constitutional changes.69 State constitutions are more detailed, since they must deal with the day-to-day governmental functions of health, safety, welfare, and morals; they are also more comprehensive than the national constitution because the states retain all residual powers not delegated to the national government.70 This helps to at least partly explain the higher amendment rates for state constitutions because the longer a constitution the higher its amendment rate.71 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 wanted to create flexible constitutions to allow political actors to respond to needs that would inevitably arise

65. Id. at 1675, 1675 n.153.
66. Id. at 1675 n.153.
70. Id. at 16-17.
71. See Donald S. Lutz, Patterns in the Amending of American State Constitutions, in CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS, supra note 68, at 24, 35. Note that state constitutions have over time become "long legislative codes," in contrast to the national Constitution. STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 36 (1996).
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.  

III. FORMAL UNAMENDABILITY

Today, democratic codified constitutions commonly establish at least two categories of provisions: the first are alterable by the formal amendment rules in the text, and the second are resistant to them. Formal unamendability is a second marker of distinction in constitutional amendment between the United States Constitution and much of the rest of the democratic world. Whereas many other democratic constitutions—including some American state constitutions—absolutely entrench constitutional provisions against amendment, the United States Constitution today entrenches no current form of formal unamendability.

In this Article, I use the phrase formal unamendability to refer to two distinguishable though related constitutional designs. First-order formal unamendability refers to the absolute entrenchment of a principle, rule, value, structure, symbol or institution against amendment, meaning that the constitutional text states directly that the thing identified as unamendable is immune to the rules of formal amendment. Second-order formal unamendability refers to the text's identification of at least two different modalities of constitutional change, one reserved for amendment and the other reserved for revision, the latter requiring more far-reaching popular participation than the former, for instance a constituent assembly or a constitutional convention that has the power to propose the adoption of an altogether new constitution. A revision accordingly requires political actors or the people, or both, to meet a higher threshold of direct or mediated popular participation than they are otherwise required to meet for an amendment, the theory being that transformational change may not be achieved with the pro-

cedures used for amendment. In this second constitutional design, formal unamendability refers to provisions that are alterable, only not by ordinary amendment. Today, and indeed since 1808, the United States Constitution entrenches no binding first-order or second-order form of formal unamendability.\textsuperscript{74}

A. The Unlimited Amendment Power

As David Dow has written, "Article V speaks simply."\textsuperscript{75} It tells us there are no current barriers to formal amendment in the United States except procedural ones. Article V imposes process-based limits on how to propose and ratify a formal amendment, and it rejects any content-based restrictions on what is subject to the rules of formal amendment.\textsuperscript{76} Whereas many of the constitutions in the democratic world do impose restrictions on what may be amended,\textsuperscript{77} the United States Constitution entrenches no such restrictions on what may be amended and instead establishes limitations only on how to amend the text of the Constitution.

But this has not always been true. The authors of the United States Constitution decided during the drafting period to defer the slave trade to future consideration by making it temporarily unamendable until the year 1808.\textsuperscript{78} The Constitution was created to be formally amendable, "[p]rovided 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."\textsuperscript{79} The first clause authorized states to permit the moving and importation of slaves, and the second guaranteed that taxation would be census-based.\textsuperscript{80} Both of these temporarily unamendable provisions formed part of the

\textsuperscript{74} See infra Sections III.A-B.
\textsuperscript{75} David R. Dow, When Words Mean What We Believe They Say: The Case of Article V, 76 IOWA L. REV. 1, 29 (1990).
\textsuperscript{76} U.S. CONST. art. V.
\textsuperscript{77} See infra Section III.B.
\textsuperscript{79} U.S. CONST. art V.
\textsuperscript{80} U.S. CONST. art. I, § 9, cls. 1, 4.
The Constitution's infrastructure of slavery. These are said to have been necessary conditions for the slave-holding states to agree to the constitutional bargain, at least for the first generation of the Constitution, since the political actors present at the founding had planned for their successors to revisit the subject twenty years later "with less difficulty and greater coolness." This temporarily unamendable provision is no longer a constraint on political actors, but it does hold historical importance.

All other provisions in the United States Constitution are freely amendable, at least in theory. True, the present difficulty of formally amending the Constitution underlines the claim that it is "freely amendable" in anything but the most theoretical sense of the phrase, whatever the text might allow as a matter of formal law. What best reflects this reality is the Equal Suffrage Clause, a provision that I have elsewhere described as "constructively unamendable." The Equal Suffrage Clause prevents any change to a state's equal representation in the U.S. Senate without that state's consent. To quote from Article V, "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." Scholars have read this provision as entrenching first-order formal unamendability. But its plain reading

82. Linder, supra note 78.
84. See Albert, supra note 43, at 1043.
85. U.S. CONST. art. V.
86. U.S. CONST. art. V.
does not formally foreclose the possibility of unequal state voting power in the Senate. It says only that the state to be deprived of its equal voting power in the Senate must consent to the change. Nevertheless, because no state is likely to consent to its differential representation—unless it were to be disproportionately higher than others, in which case the states with disproportionately lower representation would withhold their own consent—we can predict with some assurance that this provision is unlikely to be used.

The constructive unamendability of a provision like the Equal Suffrage Clause arises out of the evolution of constitutional politics from a climate that might as a formal matter allow a provision to be amended into a climate that makes it unlikely, though never impossible because the text continues to authorize it, to achieve the requisite supermajorities to formally amend that provision.\(^88\) Constructive unamendability therefore contrasts with formal unamendability insofar as it is not an explicit choice of constitutional design to make a constitutional provision formally unamendable. A further difference between formal and constructive unamendability is that a formally unamendable clause is forever unamendable but what may be constructively unamendable today may not remain constructively unamendable tomorrow.\(^89\)

Taking a broader view, we can perceive that the basic architecture of Article V reflects three principles that help political actors evaluate the validity of a constitutional amendment: self-referentialism, procedural strictness, and finality. As to the first, Article V offers political actors no instructions or guidance beyond what appears in its text. Article V details the sufficient conditions for formal amendment. Second, Article V specifies only procedural rules, onerous


\(^{89}\) Of course, no constitutional provision is forever unamendable; a formally unamendable provision cannot withstand revolution, for instance. JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES 70 (2010). Nor can formal unamendability foreclose a contrary judicial interpretation, as shown by the Honduran Supreme Court’s recent decision to disapply a formally unamendable provision in the Honduran Constitution. See Leiv Marsteintreted, The Honduran Supreme Court Renders Inapplicable Unamendable Constitutional Provisions, INT’L J. CONST. L. BLOG (May 2, 2013), http://www.iconnectblog.com/2015/05/Marsteintreted-on-Honduras [https://perma.cc/Q9DD-5LUA].
rules to be sure but only procedural ones, to propose and ratify a formal amendment. Third, in addition to specifying how to propose an amendment to the Constitution, Article V also tells us how we are to identify when the Constitution has been amended. The amendment process becomes final when the requisite majorities have duly proposed and ratified an amendment; there is no intervening step of assessing the constitutionality of a proposal nor does Article V demand a third-party examination of the constitutional correctness of adopting a particular amendment.\textsuperscript{90}

No matter which of the four amendment methods is deployed, the proposal phase requires two-thirds support and the ratification phase demands three-quarters support.\textsuperscript{91} We must therefore appreciate both the simplicity and definitiveness of the enabling clause of the text: when the two-thirds and three-quarters majorities collaborate to approve and ratify an amendment proposal, that proposal becomes "[v]alid to all Intents and Purposes, as part of this Constitution."\textsuperscript{92} That legislative or popular majorities have acted under extraordinary circumstances to reach agreement on a given constitutional amendment is sufficient, under Article V, to inscribe the amendment into the constitutional text. Self-referentialism, procedural strictness, and finality—these are the foundational principles in the architecture of Article V.

B. Limitations on the Amendment Power

Today, it has become more likely than not that a new constitution will entrench a formally unamendable provision. From 1789 to 1944, no more than seventeen percent of all new constitutions entrenched formal amendability; this percentage rose to twenty-seven percent from 1945 to 1988, and since 1989, over fifty percent of all new constitutions entrench a formally unamendable provision.\textsuperscript{93} This appears

\begin{footnotesize}
\begin{enumerate}
\item U.S. Const. art. V.
\item U.S. Const. art. V.
\item U.S. Const. art. V.
\end{enumerate}
\end{footnotesize}
to be a growing trend in constitutional design, though whether it remains prevalent in new constitutions remains yet to be seen in the next wave of constitution-making. For now, however, formal unamendability is more common than ever before, perhaps the best known example being the protection for human dignity in the German Basic Law. The clause reads that “[h]uman dignity shall be inviolable,”94 and this clause is itself entrenched against amendment.95

In an earlier study, I suggested that there are three kinds of first-order formal unamendability: preservative, transformational, and reconciliatory.96 Preservative unamendability disables the formal amendment rule as to provisions that are thought to reflect the self-identity and foundational values of the state.97 For example, the Turkish Constitution makes secularism an unamendable feature of the state.98 Transformative unamendability is an effort to repudiate the past and to embrace a new beginning, often aspirational.99 For instance, the recent Constitution of Bosnia and Herzegovina entrenches all civil and political rights against amendment.100 Reconciliatory unamendability, for its part, seeks to achieve peace between warring parties by granting unamendable rights of amnesty or immunity from criminal or civil prosecution for wrongdoing prior to the drafting or amendment of a new constitution.101 The now-superseded Constitution of Niger entrenched a formally unamendable grant of amnesty for those involved in coups in the recent past, in the hope of moving the country past a difficult period.102

http://etheses.lse.ac.uk/915/1/Roznai_Unconstitutional-constitutional-amendments.pdf [https://perma.cc/P4MG-5DSK].

94. See GRUNDGESETZ, supra note 13, tit. I, art. 1 (1).
95. GRUNDGESETZ, supra note 13, tit. VII, art. 79 (3).
97. Id. at 678.
98. TÜRKİYE CUMHURIYETI ANAYASASI [TCA] [CONSTITUTION], pt. I, art. 2 (Turk.).
100. Id.; ANEKS 4 OPĆEG OKVIRNOG ZA MIR U BOSNI I HERCEGOVINI Koji Jezik [CONSTITUTION], art. X, § 2 (Bosn. & Herz.).
101. Albert, supra note 96, at 693.
I subsequently suggested two additional categories of first-order formal unamendability: bargain-formation and value-expression.\textsuperscript{103} Constitutional designers may choose to entrench a constitutional provision against formal amendment in order to secure either a temporary or permanent bargain and to move on to less contentious matters, as in the case of the Slave Trade Clauses.\textsuperscript{104} Constitutional designers may also entrench a formally unamendable constitutional provision in order to express—and perhaps also to shape—constitutional values. Whatever its efficacy as a matter of law and politics, a formally unamendable rule conveys a message of its importance, either to the constitution’s designers or to its subjects, or both. The French Constitution, for instance, makes republicanism formally unamendable.\textsuperscript{105} The clause originally appeared in the 1884 French Constitution as a repudiation of monarchy and an embrace of the republican model of government.\textsuperscript{106} These two additional categories of the purposes of formal unamendability bring our total to five, though the boundaries separating them from each other are not airtight. They are not mutually exclusive, nor can we claim that they are always clearly distinguishable. Nonetheless, each of the five illustrates a different kind of function that first-order formal unamendability can play.

Democratic constitutions sometimes also entrench forms of second-order formal unamendability. This kind of unamendability is not direct; we perceive it by implication of a constitutional design that establishes at least two different tiers of procedures for formal constitutional change: formal amendment rules and formal revision rules. Formal amendment rules authorize political actors to alter the constitutional text in a way that preserves legal continuity between the period pre-change and post-change. As Carl Schmitt explained, a textual alteration may be called an amendment “only under the presupposition that the identity

\begin{itemize}
\item \textsuperscript{103} Richard Albert, \textit{The Unamendable Core of the United States Constitution}, in \textit{Comparative Perspectives on the Fundamental Freedom of Expression} 13, 16 (András Koltay ed., 2015).
\item \textsuperscript{104} See supra text accompanying notes 78-82.
\item \textsuperscript{105} 1958 \textit{Const.} art. 89 (Fr.).
\item \textsuperscript{106} See Nathalie Droin, \textit{Retour sur la loi constitutionnelle de 1884: contribution à une histoire de la limitation du pouvoir constituent dérivé}, 80 \textit{Revue Française de Droit Constitutionnel} 725, 740 (2009).
\end{itemize}
and continuity of the constitution as an entirety is preserved."107 Moreover, where the amendment does not "offend the spirit or the principles" of the constitution under change and "preserve[s] the constitution itself," the alteration is properly understood as an amendment.108

In contrast, a formal revision entails a more intensely expressed commitment to the change and deeper consequences for the state, although it is also a kind of textual change. The most important distinction between amendment and revision is that revision breaks continuity in the legal order by departing from the fundamental presuppositions of the constitution.109 For example, we might label the change a revision, not an amendment, if the right to free expression entrenched in a democratic constitution were abolished or retrenched in a material way.110 Some democratic constitutions make an explicit distinction between the concepts of amendment and revision, thereby requiring political actors or the people to satisfy different procedures for each of these two kinds of changes.111 Formal revision generally requires more participatory or more democratic procedures to affect the desired change, which is usually a change of high moment. It makes sense for big or bigger-than-usual forms of formal amendment to satisfy more onerous procedures for their legal and sociological validation, and indeed perhaps their moral validation too. The United States Constitution does not make this distinction, either by its text or its interpretation.

Yet this distinction between amendment and revision is common in the American state tradition. It is a conceptually blurry distinction since it is not always clear what separates amendment from revision.112 Still, nearly half of U.S. state

107. CARL SCHMITT, CONSTITUTIONAL THEORY 150 (Jeffrey Seitzer trans., ed., 2008).
108. Id. at 150, 153.
111. See, e.g., BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION], ch. II, art. 44 (Austria); CONSTITUCIÓN ESPAÑOLA [CE] [CONSTITUTION], pt. X, arts. 166-68 (Spain); CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18, 1999, tit. VI, ch. 1, arts. 192-95 (Switzerland).
AMERICAN EXCEPTIONALISM

In the American state tradition, amendment and revision are generally understood to be alternative means of constitutional change,\textsuperscript{11} the former authorizing piecemeal change, for instance to one provision or a set of related provisions, and the latter authorizing comprehensive alterations to more than one provision or subjects, or indeed the adoption of a new text altogether.\textsuperscript{115} 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.\textsuperscript{116} The variable degree of difficulty evident in national constitutions between amendment and revision maps similarly onto state constitutions, where amendment procedures are not only generally different,\textsuperscript{117} but also usually easier to satisfy than revision procedures.\textsuperscript{118}

In the course of constitutional interpretation, state supreme courts have elaborated the distinction between amendment and revision.\textsuperscript{119} The Supreme Court of California, for example, defined the parameters of amendment and revision, both mentioned in the California Constitution.\textsuperscript{120} 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."\textsuperscript{121} A revision, on the other hand, is a

\begin{footnotesize}
\textsuperscript{113} Gerald Benjamin, \textit{Constitutional Amendment and Revision, in 3 State Constitutions for the Twenty-First Century} 177, 178 (G. Alan Tarr & Robert F. Williams eds., 2006).
\textsuperscript{114} G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 38 (2000).
\textsuperscript{116} WALTER FAIRLEIGH DODD, \textit{The Revision and Amendment of State Constitutions} 118 (1910).
\textsuperscript{120} CAL. CONST. art. XVIII, §§ 1-4.
\textsuperscript{121} Livermore v. Waite, 36 P. 424, 426 (Cal. 1894).
\end{footnotesize}
“far reaching change in the nature and operation of our governmental structure”\textsuperscript{122} or that “substantially alter[s] the basic governmental framework set forth in our Constitution.”\textsuperscript{123} Second-order formal amendability is therefore present in the United States, but only at the level of state constitutions.\textsuperscript{124}

Like other democratic constitutions and unlike the United States Constitution, some state constitutions also entrench forms of first-order formal unamendability.\textsuperscript{125} For

\begin{itemize}
\item \textsuperscript{122} Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1286 (Cal. 1978).
\item \textsuperscript{123} Legislature v. Eu, 816 P.2d 1309, 1319 (Cal. 1991).
\item \textsuperscript{124} In many state constitutions that recognize the distinction between amendment and revision, the power of amendment is located in the legislature and the power of revision belongs to constitutional conventions. Compare KAN. CONST. art. XIV, § 1 (authorizing a legislature-centric amendment process), with KAN. CONST. art. XIV, § 2 (authorizing a convention-centric revision process); MINN. CONST. art. IX, § 1 (authorizing a legislature-centric amendment process), with MINN. CONST. art. IX, § 2 (authorizing a convention-centric revision process); NEV. CONST. art. XVI, § 1 (authorizing a legislature-centric amendment process), with NEV. CONST., art. XVI, § 2 (authorizing a convention-centric revision process); N.M. CONST. art. XIX, § 1 (authorizing a legislature-centric amendment process), with N.M. CONST. art. XIX, § 2 (authorizing a convention-centric revision process); WIS. CONST. art. XII, § 1 (authorizing a legislature-centric amendment process), with WIS. CONST. art. XII, § 2 (authorizing a convention-centric revision process). Insofar as the United States Constitution does not formally distinguish between amendment and revision yet, it does authorize both a legislative and conventional route to formal constitutional change; it is possible that the design of Article V was intended to reflect the same separation of functions that we see in state constitutions, namely that the power of amendment belongs to legislatures and the power of revision to a constitutional convention. I am currently developing this point in a paper-in-progress. See Richard Albert, Constitutionalizing the Constituent Power (on file with author).
\item \textsuperscript{125} See, e.g., FLA. CONST. art. I, § 22 (“The right to trial by jury shall be secure to all and remain inviolate.”); KAN. CONST. Bill of Rights, § 11 (“The liberty of the press shall be inviolate . . . .”); N.C. CONST. art. I, § 6 (“The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other.”); N.M. CONST. art. II, § 5 (“The rights, privileges and immunities, civil, political and religious guaranteed to the people of New Mexico by the Treaty of Guadalupe Hidalgo shall be preserved inviolate.”). I am grateful to John Dinan for raising the question whether entrenching the “inviolability” of a right signals its unamendability. This demands further thought and inquiry, though I note that the language of inviolability reflects what we see in constitutions today that make rights unamendable by prohibiting their “diminishment.” See, e.g., CONSTITUTION DE LA RÉPUBLIQUE ALGÉRIENNE DÉMOCRATIQUE ET POPULAIRE [CONSTITUTION], tit. IV, art. 178 (Alg.); CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION], sec. VIII, sub-sec. II, art. 60, § 4(IV) (Braz.); CONSTITUTION DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO [CONSTITUTION], tit. XVIII, art. 185 (Dem. Rep. Congo); CONSTITUIȚIA REPUBLICII MOLDOVA [CONSTITUTION], tit. VI, art. 142(2) (Mold.); GRONDWET VAN NAMIBIE [CONSTITUTION], ch. 19, art. 131 (Namib.); КОНСТИТУЦІЯ УКРАЇНИ [CONSTITUTION], tit. XIII, art. 157 (Ukr.).
\end{itemize}
example, the Alabama Constitution states that “representation in the legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendments”\textsuperscript{126} and that “to guard against any encroachments on the rights herein retained, we declare that everything in this Declaration of Rights is excepted out of the general powers of government, and shall forever remain inviolate.”\textsuperscript{127} The latter provision appears in substantially the same language in the Arkansas Constitution,\textsuperscript{128} which also declares that “the equality of all persons before the law is recognized, and shall ever remain inviolate.”\textsuperscript{129} The Constitution also uses the same language to protect the liberty of the press\textsuperscript{130} and the right to a jury trial.\textsuperscript{131} This tracks the unamendable provisions entrenched in early state constitutions,\textsuperscript{132} including The Fundamental Constitutions of Caroli-
In both of these current and obsolete cases of first-order unamendability, however, the entrenching provision remains vulnerable to formal change since it is not itself entrenched against formal amendment. This design defect raises the possibility of double amendment, another point of similarity in first-order formal unamendability between American states and much of the rest of the democratic world, though it is a structural flaw.

IV. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT

The third marker of distinction between the United States Constitution and much of the rest of the world. It may seem strange to contemplate the possibility of an unconstitutional constitutional amendment but the phenomenon is far from irregular, having taken root in some form or another in almost every major part of the world. The doctrine of unconstitutional constitutional amendment exists today even in the United States. But only state constitutional amendments have ever been declared unconstitutional. No Article V amendment has been successfully challenged under the United States Constitution, further evidence of the Constitution's uniqueness when it comes to constitutional amendment.


134. Double amendment appears to be a disfavored technique. See Virgilio Afonso da Silva, A Fossilised Constitution?, 17 RATIO JURIS 454, 458-59 (2004). Akhil Amar acknowledges that double amendment would "have satisfied the literal text of Article V," but he observes that it is a "sly scheme." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 293 (2005).

135. See Albert, supra note 45, at 662-64.

A. Judicial Deference to Formal Amendment

Whether on procedural or substantive grounds, the Supreme Court has rejected all claims that a duly passed constitutional amendment can be unconstitutional under the United States Constitution. The Court has in all cases deferred, either to the people and their representatives because they have successfully passed the strictures of Article V, or to Congress because as a political institution it is better positioned to resolve questions about the validity of the amendment process. In an early case, the Court refused to invalidate the Eleventh Amendment on grounds that its adoption in Congress had failed to conform to the Presentment Clause, which requires the president to either sign or veto a bill that has met the bicameralism requirements. The Court later deferred to Congress on the question whether Congress alone can select the method of ratification for an amendment that has been proposed to the states, and also on the question whether an amendment has been ratified with sufficient contemporaneity to its initial proposal.

The Court has at least twice rejected major substantive challenges to the constitutionality of an Article V amendment. One involved the Eighteenth Amendment, before it was later repealed by a subsequent Article V amendment. Challengers argued that the amendment, which imposed prohibition, violated federalism, personal liberty, and individual freedoms, but the Court disagreed, holding that amendment “by lawful proposal and ratification, has become part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.” The other major challenge sought to invalidate the Nineteenth Amendment, which granted the right to vote to

139. U.S. CONST. amend. XXI.
women. Similar arguments arose—the amendment violates federalism, for example—and the Court again refused to invalidate an amendment that satisfied the procedures of Article V:

The argument is that so great an addition to the electorate, if made without the State's consent, destroys its autonomy as a political body. This Amendment is in character and phraseology precisely similar to the Fifteenth. For each the same method of adoption was pursued. One cannot be valid and the other invalid.

In both instances, then, the Court declined the invitation to question the validity of a duly passed Article V amendment.

But the Supreme Court has taken a different posture toward state constitutional amendments. The Court has invalidated state constitutional amendments—duly proposed and ratified—for violating the United States Constitution. For example, the Court has relied on the Equal Protection Clause to invalidate a constitutional amendment to the Colorado constitution denying protected-class status to persons based on their sexual orientation. The Court has also struck down a constitutional amendment to the Arkansas Constitution that set term limits on congressional candidates for the U.S. House of Representatives. Lower federal courts have taken a similar position on state constitutional amendments, invalidating them when, in the view of the court, the amendment conflicts with the United States Constitution. This creates a fascinating disjunction: the United States Constitution has often been the basis for invalidating a state constitutional amendment but never for

143. U.S. CONST. amend. XIX.
147. See, e.g., Kitchen v. Herbert, 755 F.3d 1193, 1229-30 (10th Cir. 2014) (declaring unconstitutional Utah constitutional amendment denying right to marry); Colo. Right to Life Committee, Inc. v. Coffman, 498 F.3d 1137, 1151, 1156 (10th Cir. 2007) (holding Colorado constitutional amendment on campaign finance unconstitutional as applied to corporation); Miller v. Moore, 169 F.3d 1119, 1124 (8th Cir. 1999) (ruling Nebraska constitutional amendment on term limits unconstitutional); Bishop v. Holder, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014) (finding Oklahoma constitutional amendment on marriage unconstitutional); Awad v. Ziriax, 966 F. Supp. 2d 1198, 1206-07 (W.D. Okla. 2013) (invalidating Oklahoma constitutional amendment prohibiting courts from considering or using international or Sharia law).
invalidating an Article V amendment. The Supreme Court has exercised intrusive oversight over state constitutional amendments, but it has taken a deferential posture toward formal amendments accomplished using Article V.

B. Judicial Oversight of Formal Amendment

In contrast to the United States Constitution, many other democratic constitutions have served as the referent for invalidating duly passed constitutional amendments. Yaniv Roznai has documented in great detail that constitutional and supreme courts around the democratic world have exercised the extraordinary power to strike down a formal amendment. As Roznai explains, the doctrine of unconstitutional constitutional amendment now exists in some form in countries as diverse in origins and political geography as Argentina, Bangladesh, Brazil, Greece, Italy, Nepal, Peru, Portugal, South Africa, Switzerland, Taiwan, Thailand and Turkey.

Courts have exercised the power to invalidate a constitutional amendment in many different ways. In Colombia, for example, the Constitutional Court has relied on the "substitution of the constitution" doctrine to reject amendments that, in its view, amount to a replacement of the Constitution itself. In Turkey, the Constitutional Court is constitutionally authorized to invalidate an amendment on procedural grounds alone, but it has stretched its mandate to now review amendments on substantive grounds as well. In India, the Supreme Court has rejected constitutional amendments that, in its view, violate the unwritten "basic structure" of the constitution, despite there being no textual limits on the amendment power. In the Czech Republic, the Constitutional Court has interpreted the constitution as containing an unwritten substantive core that prohibits

148. Roznai, supra note 136.
149. Id.
151. See Yaniv Roznai & Serkan Yolcu, An Unconstitutional Constitutional Amendment—The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision, 10 INT'L J. CONST. L. 175, 195-202 (2012).
amendments inconsistent with its fundamental features.\textsuperscript{153} Even in Canada, the foundations have been laid for the Supreme Court to one day follow the emerging global trend toward adopting the doctrine of unconstitutional constitutional amendment.\textsuperscript{154}

American state constitutions have also been a site for constitutional litigation arising out of formal constitutional amendment.\textsuperscript{155} Writing in 1910, Walter Dodd observed that state courts enforced restrictions on constitutional amendment only as to process but not content,\textsuperscript{156} but we have since seen state courts come to play a prominent role in overseeing a larger universe of the processes of constitutional change, be they related to the distinction between amendment and revision, the procedural correctness of amendment or initiatives, or the nature of the majorities required for ratification.\textsuperscript{157} For example, the Montana Supreme Court declared an initiative amendment unconstitutional for procedural defects leading up to the vote.\textsuperscript{158} The Supreme Court of Missouri has invalidated a constitutional amendment for violating the legislative power.\textsuperscript{159} The Iowa Supreme Court rejected an amendment for not complying with the reporting requirements in the legislative record.\textsuperscript{160} As a final example, the Louisiana Supreme Court held unconstitutional an amendment for failing to satisfy the process of amendment.\textsuperscript{161}

V. CONCLUSION

America's unique Constitution has attracted many admirers. Its text and interpretation served as a model for

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\textsuperscript{153} See Kieran Williams, \textit{When a Constitutional Amendment Violates the 'Substantive Core': The Czech Constitutional Court's September 2009 Early Elections Decision}, 36 REV. CENT. & E. EUR. L. 33, 42 (2011).
\textsuperscript{156} See DODD, supra note 116, at 236.
\textsuperscript{159} Power v. Robertson, 93 So. 769, 775-77 (Miss. 1922).
\textsuperscript{160} Koehler v. Hill, 15 N.W. 609, 629-31 (Iowa 1883).
\textsuperscript{161} Graham v. Jones, 3 So. 2d 761, 784 (La. 1941).
\end{flushleft}
constitutional designers around the world, from Africa\textsuperscript{162} to Asia\textsuperscript{163} and Australia,\textsuperscript{164} and from Europe\textsuperscript{165} to the Americas.\textsuperscript{166} It has also inspired the drafters of modern multilateral agreements and helped shape the law of international human rights.\textsuperscript{167} But although the United States Constitution has travelled far from home, it has seldom taken root abroad as a perfect transplant. Heinz Klug explains the reason why:

While many features of the American model have been adopted elsewhere, it has been only in very rare circumstances, such as the Philippines in 1935, where the adopters have not fundamentally transformed the model to suit their own particular circumstances or to

\begin{itemize}
  \item \textsuperscript{162} See, e.g., ADEKEYE ADEBAJO, LIBUTIA'S CIVIL WAR: NIGERIA, ECOMOG, AND REGIONAL SECURITY IN WEST AFRICA 33 (2002); PETER DUNGAN & L.H. GANN, THE UNITED STATES AND AFRICA: A HISTORY 201 (1987); JEREMY I. LEVITT, ILLEGAL PEACE IN AFRICA: AN INQUIRY INTO THE LEGALITY OF POWER SHARING WITH WARLORDS, REBELS, AND JUNTA 99 (2012).


Admiration, then, does not always entail imitation.

But today the United States Constitution may have fewer admirers and even fewer imitators. In a recent interview on Al-Ayat television in Egypt, United States Supreme Court Justice Ruth Bader Ginsburg stirred some controversy in America when she declared, “I would not look to the U.S. Constitution if I were drafting a constitution in the year 2012.”

The influence abroad of the United States Constitution has declined dramatically since its bicentennial, part of the reason why we can no longer imagine a British Prime Minister describing the United States Constitution as “the most wonderful work ever struck off at a given time by the brain and purpose of man.”

New and emerging democracies now turn more frequently to the semi-presidential model of constitutional government than the American model of presidentialism, according to Cindy Skach. Even Bruce Ackerman, whom we know to be the best expositor of American constitutional exceptionalism, has counseled constitutional democracies against adopting American presidential constitutionalism. America’s softening constitutionalism may be attributable to what James Allan and Grant Huscroft see as the widening gulf separating the United States from the world: “the very basics of American constitutionalism,” they write, “are not shared internationally, and sometimes differ greatly.”

Now a constitutional outlier and perhaps no longer a constitutional hegemon, the United States Constitution is also exceptional in the context of constitutional amendment. On three fronts, the Constitution departs from other democratic constitutions: it is more difficult to formally amend than virtually all others; it does not entrench any current form of either first-order or second-order formal unamendability; and it has so far resisted the global trend toward the doctrine of unconstitutional constitutional amendment. What makes these divergences all the more notable is that they distinguish the United States Constitution not only from other democratic constitutions, but also from state constitutions in the United States. There is therefore something unique both about the United States Constitution itself and about America as a federal state whose subnational constitutions more closely resemble the larger world.

It is one thing to identify these markers of difference but another to understand them. It will take much more thought than is possible in these pages to make sense of these differences, both as to why state constitutions are less like the United States Constitution and more like other democratic constitutions, and also as to why the United States Constitution seems on this account to stand alone in the democratic world. But there may be one thread that runs through the reasons why the United States Constitution is more difficult to amend than others, why today it makes nothing formally unamendable, and also why federal courts do not recognize the doctrine of unconstitutional constitutional amendment: the Constitution is rooted in proceduralist values.

The Constitution creates a democracy oriented toward process, not content, and reflects the ultimate procedural value of outcome neutrality. What defines legitimacy is not what the people chooses but whether and how the people manifests its will. This constitutional culture of self-government recognizes that the Constitution derives its le-

177. *The Federalist No. 46*, at 315 (James Madison) (Jacob E. Cooke ed., 1961) (defending the proposition that "ultimate authority, wherever the derivative may be found, resides in the people alone").
gitimacy from popular consent: the Constitution will sanction any end sanctioned by agreement as long as political actors satisfy the rigid rules of Article V. There is one necessary exception to this proceduralist account: constitutional change is possible even where political actors and the people do not abide by the rigid rules of Article V, as long as the will of the people is clear. This consent-based foundation of the United States Constitution reconciles why federal courts have in the past acquiesced to popularly sanctioned transformations achieved outside the formal requirements of Article V, for instance, the post-founding constitutional moments theorized by Bruce Ackerman. On this theory, federal courts should also recognize the validity of a non-Article V amendment made by a majoritarian referendum, an unconventional change Akhil Amar suggests is constitutional.

The basic organizing logic that kindles the courtship between the constitutional text and constitutional politics is therefore rooted in the constitutional tradition of popular choice. In this light, formal unamendability and the doctrine of unconstitutional constitutional amendment pose deep tensions and indeed reflect values incommensurable with the proceduralist and popular foundations of the United States Constitution. The extraordinary difficulty of formal amendment makes formal unamendability and the doctrine of unconstitutional constitutional amendment unnecessary safeguards for ensuring democratic outcomes, which is largely the reason why constitutional democracies have turned to both devices. Article V will defeat most amendments, and those that manage to make it through each of the veto gates along the way to entrenchment will have earned their place in the Constitution on the strength of overwhelming popular will.

The reason why the Constitution is so hard to amend is that it makes institutional consolidation so difficult to achieve. Institutional consolidation refers to the point at

178. See 1 Bruce Ackerman, We the People: Foundations (1991); 2 Bruce Ackerman, We the People: Transformations (1998); 3 Bruce Ackerman, We the People: The Civil Rights Revolution (2014).

which political actors converge in agreement at the same
time and across the political branches of government to
support a proposal, in this case an amendment, with the
support of the people. This is an extraordinary happening
because the Constitution deliberately creates a presumption
against institutional consolidation, not only by requiring su-
permajorities across federalist institutions but by staggering
national and state elections precisely to ensure that the
mood of the moment is carefully weighed against the delib-
erative preferences that form only over a longer time hori-
zon. The American model of constitutional change regards
this institutional consolidation as an unassailably legitimate
expression of popular will. Where political actors and the
people meet the exceedingly high threshold set by Article V,
the logic of institutional consolidation counsels that it is in-
appropriate for the Court to invalidate the resulting amend-
ment. The same would not be true in jurisdictions where in-
stitutional consolidation is relatively easy to achieve, for
instance India, where the formal amendment rule presents
few barriers to constitutional amendment. This is the jus-
tification for reading the basic structure doctrine into the In-
dian Constitution.

George Washington declared in his farewell address
that “[t]he basis of our political systems is the right of the
people to make and to alter their constitutions of govern-
ment,” but he cautioned that the Constitution must be “sa-
credly obligatory upon all” until it is altered. The difficul-
ty of Article V does not undermine constitutional democracy
in the United States. Article V block most efforts at formal
change, and it validates only the few that have broad and
deep support from political actors and the people. But in
this way, amendment difficulty is a guarantor of popular
consent. Article V invites the people to channel their prefer-
ences through political actors, and recognizes that the peo-
ple “are the only legitimate fountain of power.”

180. Albert, supra note 126, at 44-45.
181. India Const. pt. XX, art. 368.
182. Albert, supra note 126, at 22.
183. See Darren Patrick Guerra, Perfecting the Constitution: The Case for the
184. Id.
actors and the people may therefore use Article V to change the Constitution however they wish. But until they agree to the change consistent with the extraordinary supermajorities Article V requires, the Constitution's rigidity fosters stability.

As one of the most rigid constitutions in the democratic world, the United States Constitution needs no interpretative supplement like the "basic structure" doctrine to authorize courts to evaluate the constitutionality of a duly-passed formal amendment. To deny the people their power of constitutional amendment—by designating ex ante a constitutional provision forever unamendable or by holding unconstitutional ex post a constitutional amendment that has successfully navigated the labyrinthine procedures of Article V—is inconsistent with the architecture of constitutional law and politics under the United States Constitution. What nonetheless remains unanswered in this account is a fundamental question: can the people through their representatives exercise their popular will consistent with the proceduralist values of the United States Constitution to adopt an Article V amendment that makes the entire Constitution formally unamendable? The answer is yes, but I leave the how and why to another day.