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## UPDATING CONSTITUTIONAL RULES

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UPDATING CONSTITUTIONAL RULES

I. INTRODUCTION

In the United States, the dominant mode of “updating” constitutional meaning<sup>1</sup> is via a process of judicial interpretation.<sup>2</sup> In a smaller subset of cases constitutional meaning is also updated via “super-statutes” enacted by Congress.<sup>3</sup> The virtual impossibility of formal amendment to the Constitution under Article V<sup>4</sup>

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<sup>1</sup> By updating, I mean to suggest the idea of a constitutional interpreter adopting a new understanding of a constitutional provision, designed to better accord with contemporary attitudes and priorities than a prior understanding, but also anchored in some way in some prior constitutional text, purpose, or practice. Contrast Adrian Vermeule, *Constitutional Amendments and the Common Law*, in Richard W. Bauman and Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* 230 (Cambridge, 2006). Compare also T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich L Rev 20 (1988). The term, however, is obviously itself one which raises complex problems of boundary definition.

<sup>2</sup> David Strauss, *The Irrelevance of Constitutional Amendments*, 114 Harv L Rev 1457, 1487 (2001) (hereafter *Irrelevance*).

<sup>3</sup> William Eskridge, Jr., and John Ferejohn, *Super-Statutes*, 50 Duke L J 1215 (2001).

<sup>4</sup> See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in Sanford Levinson, ed, *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 237

is thus deemed by many to be more or less irrelevant.<sup>5</sup>

A key difficulty with this picture, however, is that it leaves out of account the degree to which against this background there is a serious gap in our ability to update, rather than in some cases more provisionally “work around,”<sup>6</sup> core constitutional “rules” as opposed to “standards.”<sup>7</sup> When it considers such rules the Supreme Court almost always applies a literal as opposed to evolutionary approach to constitutional interpretation.<sup>8</sup> Academic commentators also consistently defend such an approach on the part of the Court, as the preferred one.<sup>9</sup>

In the context of constitutional standards, constitutional scholars make at least four arguments in favor of a present-focused approach to the interpretation of the Constitution: one based on arguments from democracy,<sup>10</sup> another on concerns about constitutional stability,<sup>11</sup> a third based on the potential for constitutional “learning” over time,<sup>12</sup> and a fourth based on more pragmatic considerations

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(Princeton, 1995); Rosalind Dixon, *Partial Constitutional Amendment* (Working Paper 2010) (on file with author).

<sup>5</sup> Strauss, *Irrelevance*, 114 Harv L Rev 1457 (cited in note 2).

<sup>6</sup> See Mark Tushnet, *Constitutional Workarounds*, 87 Tex L Rev 1499 (2009).

<sup>7</sup> On the rules-standards distinction, especially in a doctrinal setting, see, e.g., Kathleen Sullivan, *Foreword: The Justices of Rules and Standards*, 106 Harv L Rev 22 (1992).

<sup>8</sup> No one seriously predicts, for example, that the Court will uphold the recent challenge to the apportionment of Congress on the basis that (on a functional or evolutionary reading of US Const, Art I, § 2, cl 3) the current size of the House violates the assumptions of the Framers about the appropriate ratio of citizens to representatives in Congress: see Ashby Jones, *Does Congress Need More Members? A Lawsuit Says Yes. Lots More*, Wall St J Law Blog (Sept 16, 2009), online at: <http://blogs.wsj.com/law/2009/09/18/should-we-double-the-size-of-the-house-a-lawsuit-says-yes/>. There are, of course, some instances in which the political branches adopt certain constitutional “workarounds” designed to update the effective operation of such rules, and for one reason or another, these workarounds escape judicial consideration: see Tushnet, 87 Tex L Rev 1499 (cited in note 6). However, in many cases, the validity of such workarounds will ultimately come before the Court for consideration in a way that does then raise this same problem of constitutional rule updating.

<sup>9</sup> For a defense of this position from a generally conservative, textualist approach to interpretation, see, e.g., Frank Easterbrook, *Statute’s Domains*, 50 U Chi L Rev 533 (1983); and for the defense of this position by liberal constitutional scholars, see notes 10–12 and accompanying text.

<sup>10</sup> See Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 Const Comm 427 (2007) (hereafter *Constitutional Redemption*); Jack M. Balkin, *Abortion and Original Meaning*, 24 Const Comm 291, 301 (2007) (hereafter *Original Meaning*); Robert Post and Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv CR-CL L Rev 373 (2007).

<sup>11</sup> Post and Siegel, 42 Harv CR-CL L Rev (cited in note 10).

<sup>12</sup> David Strauss, *Common Law Constitutional Interpretation*, 63 U Chi L Rev 877 (1996) (hereafter *Constitutional Interpretation*).

relating to the need to respond to changing technologies and social circumstances.<sup>13</sup> However, when it comes to constitutional rules, these same scholars suggest that, because of concerns about “fidelity” and also institutional capacity, the literal meaning of the text of the Constitution should almost always be controlling.<sup>14</sup>

Yet at the same time, in many cases the literal application of particular constitutional rules has the potential to impose serious error costs.<sup>15</sup> Not only do changes in social circumstances and understandings over time mean that, from a contemporary perspective, a number of core constitutional rules are now no longer optimal.<sup>16</sup> Because such rules often prescribe structures or procedures that affect a variety of substantive legal outcomes, in many cases the error costs involved are also quite significant.

In part because of this, Congress, state legislatures, and even state voters have in several instances sought to design new small “c” constitutional rules aimed at reducing such error costs. In several contexts, such as those involving the Treaty Clause and congressional-executive agreements, the attempt by Congress to pass such “updating legislation” has also enjoyed significant success. However, in other cases, such as *Clinton v New York*<sup>17</sup> and *United States Term Limits Inc. v Thornton*,<sup>18</sup> similar attempts at legislative updating have been far less successful. This is in large part because the Supreme Court has held that, no matter how outmoded they be, the mere presence of certain rules in the original Constitution by itself blocks the enactment of such updating legislation.

There is, however, a clear way to address at least part of this problem: in cases where Congress, state legislatures, or even state voters seek in good faith to offset the error costs associated with constitutional rules, the Court should apply an additional margin of deference to determining the constitutional validity of such ac-

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<sup>13</sup> Balkin, *Original Meaning*, 24 Const Comm at 301 (cited in note 10).

<sup>14</sup> See Strauss, *Constitutional Interpretation*, 63 U Chi L Rev at 881 (cited in note 12); Balkin, *Original Meaning*, 24 Const Comm at 305 (cited in note 10).

<sup>15</sup> The Constitution’s numerical provisions are some of the most extreme instances of rule-like norms, but other examples of potential ongoing significance also include the Emoluments Clause, the clause preventing members of Congress holding any other office (Art I, § 6, cl 2) (including membership in the National Guard), the Natural Born Citizen Clause (Art II, § 1, cl 5), and the Appointments and Removal Clause (Art II, § 2, cl 2).

<sup>16</sup> Contrast William J. Brennan, Jr., *Construing the Constitution*, 19 UC Davis L Rev 2 (1985).

<sup>17</sup> 24 US 417 (1998).

<sup>18</sup> 514 US 779 (1995).

tion—either by way of an additional margin of avoidance, or by way of substantive deference on the merits of a constitutional question, or both.<sup>19</sup>

In some cases, where the constitutionality of a measure is clear, such additional deference will simply serve to confirm the validity of the measure. In other cases, where there is little plausible constitutional basis for upholding federal or state action under existing text or precedent, there will also be no capacity to affect the Court's decision, but for the opposite reason: the case for constitutional invalidity was clear. It is thus only in an intermediate category of case, where there is some real doubt or argument as to constitutional validity, that such a plus factor would have the potential to be decisive and therefore lead to a form of "indirect updating" by the Court. Nonetheless, in a number of important cases, such indirect updating would have a clear capacity to help address current constitutional error costs.

Objections to constitutional rule updating by the Court will also have limited force as applied to this kind of indirect, as opposed to direct, form of constitutional rule updating. Arguments about the need for fidelity to the text of the Constitution have almost no force when applied to indirect updating, because the Court under such an approach is acting in full compliance with the literal requirements of the text of the Constitution. Concerns about judicial error also have far less force, because the relevant process of updating involves a process of cooperation between the Court and legislatures, and also tends to be far more reversible than direct forms of updating.

The argument develops in four parts. Part II sets out the error costs associated with core constitutional numerical rules, such as the two Senators rule and two-thirds majority voting requirement in the Treaty Clause. Part III considers the ways in which Congress and state legislatures (and even voters) have arguably attempted to counter such error costs, and the mixed record of success for such attempts at constitutional rule updating by legislatures. It also outlines the core normative proposal offered by the article, according to which the Court would apply an additional margin of deference to attempts by legislatures to update constitutional rules. Part IV considers objections to constitutional rule updating by the Court,

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<sup>19</sup> For sympathetic proposals, albeit restricted to the interpretation of Article II of the Constitution, compare Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U Chi L Rev 123 (1994).

and shows why such objections have limited applicability to such indirect, as opposed to direct, modes of constitutional rule updating. Part V concludes by considering arguments that the error costs associated with various constitutional rules should instead be addressed by renewed attempts to rely on a process of constitutional amendment, either under Article V or otherwise.

## II. CONSTITUTIONAL RULES AND ERROR COSTS

In noting the literal interpretation given by the Court to most constitutional rules, constitutional scholars such as David Strauss suggest that one justification for this approach on the part of the Court is that for many constitutional rules, it “is more important that [they] . . . be settled than that they be settled right” or optimally.<sup>20</sup> One potential reason for this is that constitutional rules may address questions the particular answer to which is relatively unimportant to individuals, both subjectively and as a more objective matter, considering the welfare and distributive stakes involved.<sup>21</sup> Strauss likens this situation to a form of pure “coordination game,” or cooperative game with multiple equilibria, in which parties are ultimately indifferent between two different strategies, but the payoff to each is much greater if they can “match” that strategy with that of another player.<sup>22</sup>

One of the defining features of constitutional rules is also undoubtedly that a number of them do involve a form of pure coordination game. One plausible example of such a provision, which Strauss points to, is Section I of the Twentieth Amendment, which sets 12 noon on January 20 as the time at which the President and Vice-President Elect assume authority under Article II.<sup>23</sup> Almost no one in America seems likely to mind whether the President is inaugurated on January 19 or 20, or at 12 noon or 1 p.m., but most Americans will care a great deal about having agreement on what the relevant date and time are. The opportunities for watching the inauguration, or selling hotel rooms to those who wish to, seem likely to be almost precisely the same whether the inauguration is held on January 19 or 20; whereas if there is uncertainty as to which

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<sup>20</sup> Strauss, *Constitutional Interpretation*, 63 U Chi L Rev at 907 (cited in note 12).

<sup>21</sup> Id.

<sup>22</sup> Id at 910.

<sup>23</sup> Strauss, *Irrelevance*, 114 Harv L Rev at 1487 (cited in note 2).

date and time apply, there could be a serious constitutional crisis.<sup>24</sup> In such cases, there will also be little capacity from a contemporary perspective for a static or literal reading of constitutional rules to impose error costs, or losses to social welfare (however defined) associated with a suboptimal choice of substantive constitutional norm.<sup>25</sup>

However, in many instances, constitutional rules help create coordination against a very different background, where parties do have strong preferences about the substance of particular constitutional norms, or at least about the results they produce. In such cases, the form of constitutional coordination involved is far closer to a “battle of the sexes” than a pure coordination game,<sup>26</sup> where parties prefer coordination to noncoordination, but each also prefers a different basis for coordination.<sup>27</sup> (Think of a married couple who wish to spend the evening together, one of whom wishes to go the opera, the other to a wrestling match.) There will thus also be far greater potential for the particular choice of constitutional rules made by the Framers to involve error costs, when judged from a contemporary perspective.

Take two core constitutional numerical rules: the two Senators rule and the requirement in the Treaty Clause that treaties be ratified by two-thirds of the Senate. The application of each rule has in recent years had major economic and social consequences, and has created clear “winners” and “losers” on issues which are in fact highly charged “as a matter of morality or public policy.”<sup>28</sup>

In recent years, political scientists have shown that there is a consistent bias in federal spending toward small as opposed to large states.<sup>29</sup> They have also shown that this disparity is almost impos-

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<sup>24</sup> Id.

<sup>25</sup> Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J Legal Stud 399 (1973); Adam M. Samaha, *Undue Process*, 59 Stan L Rev 601 (2006–2007).

<sup>26</sup> Compare Adam Samaha, *Originalism’s Expiration Date*, 30 Cardozo L Rev 1295, 1354–63 (2008).

<sup>27</sup> Douglas Baird et al, *Game Theory and the Law* (Harvard, 1994).

<sup>28</sup> Contrast Strauss, *Constitutional Interpretation*, 63 U Chi L Rev at 916–17 (cited in note 12) (suggesting few Constitutional rules are likely to involve issues that are charged in this way).

<sup>29</sup> In 1995, for example, they have shown that the federal “balance of payments” was negative in six of the then largest states, but positive in eight out of the 10 smallest states: see discussion in Lynn A. Baker and Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Come?* 13 J L & Pol 21, 41 (1997) (citing KSG study).



sible to explain other than by reference to the power of Senators in small states to advance special legislation favoring their state, or legislation, the benefits of which are expected to exceed the costs for citizens in that state, but not the nation as a whole.<sup>30</sup> The two Senators rule also plays a critical role in this because, while the Senate is checked by the House in its capacity to pass such special interest legislation, there is still a clear, statistically significant overall correlation between a state's voting power in Congress and the share it receives of federal government spending.<sup>31</sup>

In the context of the Treaty Clause, the requirements it imposes for successful ratification of a treaty also have major implications for the likelihood that the United States will ratify treaties of major public policy significance. Take two major treaties rejected by the Senate over the last decade: the Comprehensive Nuclear Test Ban Treaty (CNTBT) and the Convention on the Law of the Sea (UNCLOS).<sup>32</sup> The ratification of the CNTBT was rejected by a narrow majority of the Senate in 1999 (48 votes for, and 51 against, ratification), but many commentators suggest that under an ordinary majority rule, it would in fact have prevailed, owing to the potential for increased lobbying efforts by the President.<sup>33</sup> The Law of the Sea Convention, in turn, gained clear supermajority support in the Senate (49 yeas votes as opposed to 30 nays), but failed just short of the two-thirds supermajority support required for successful ratification. The failure by the Senate to ratify each treaty has also clearly had major military and economic consequences.

The failure to ratify the CNTBT has, from a military perspective,

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<sup>30</sup> Id at 41–42. It cannot, for example, be explained by any principled concern to redistribute resources from rich to poor states. Another potentially important distributive consequence of the two Senators rule is that it tends to reduce at least the “descriptive” or visible representation of minority voters in the Senate: see id at 43–47; Neil Malhotra and Connor Raso, *Racial Representation and the U.S. Senate Apportionment*, 88 Soc Sci Q 1038, 1046 (2007).

<sup>31</sup> Baker and Dinkin, 13 J L & Pol at 45 (cited in note 29) (reporting a statistically significant correlation at the 5 percent level). The measure of voting power they use in this context is the “Per Capita Shapley-Shubik Index.”

<sup>32</sup> Comprehensive Nuclear Test Ban Treaty, Sept 24, 1996, 35 ILM 1443; United Nations Convention on the Law of the Sea, Dec 10, 1982, 21 ILM 1261. For discussion of the Comprehensive Nuclear Test Ban Treaty (CNTBT) and U.S. ratification efforts, see Editorial, *The Test Ban Treaty*, NY Times A18 (May 25, 2009). For discussion of the United Nations Convention on the Law of the Sea (UNCLOS) and U.S. ratification efforts, see Michael A. Becker, *International Law of the Sea*, 43 Intl Law 915, 915–21 (2009).

<sup>33</sup> John K. Setear, *The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement*, 31 J Legal Stud S5, S6 (2002). But see Editorial, *Banning the Ban*, The Nation (Nov 8, 1999).

undermined efforts to persuade other nuclear states, such as China, North Korea, India, Pakistan, Indonesia, Iran, Israel, and Egypt, to participate in the regime established by the treaty and has thereby increased the ability of North Korea and India to detonate nuclear weapons without the fear of effective international sanctions.<sup>34</sup> In a domestic context, it has also strengthened the argument for alternatives to the CNTBT regime, such as proposals for a national missile defense system, that themselves have cost billions of dollars and altered the terms of the general foreign policy debate.<sup>35</sup> Economically, failure to ratify the CNTBT has implied the failure to reap the full benefits of past expenditures in anticipation of the CNTBT's taking effect, such as the United States' contribution to a \$1 billion International Monitoring System designed to enforce the CNTBT, and hundreds of millions of dollars of domestic expenditure on a "Stockpile Stewardship" program designed to maintain the safety and integrity of the United States' nuclear arsenal without the use of nuclear testing.<sup>36</sup>

As to the Law of the Sea Convention, the failure to ratify the treaty has been defended as protecting U.S. sovereignty and specifically the integrity of U.S. military operations under the Proliferation Security Initiative (PSI), which authorizes the U.S. military to interdict vessels engaged in the traffic of weapons of mass destruction.<sup>37</sup> Supporters of the Convention, on the other hand, suggest that the United States' failure to ratify the Convention has undermined, rather than helped, promote the effectiveness of the PSI, and also put the United States in a position of strategic weakness in relation to the use of key maritime passages such as in Indonesia where, without a treaty, it must depend on bilateral consent for use of such passages.<sup>38</sup> The economic stakes behind the

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<sup>34</sup> Editorial, *The Test Ban Treaty*, NY Times at A18 (cited in note 32).

<sup>35</sup> Editorial, *Rules of the Game*, NY Times A28 (Jan 30, 2009).

<sup>36</sup> Associated Press, *Bomb "Sniffers" Await Ban Treaty*, Newsday A31 (May 24, 2009); *On Target, Finally; The National Ignition Facility*, The Economist (U.S. edition) (May 30, 2009).

<sup>37</sup> For general discussion of PSI, see Becker, 43 Intl Law at 923–24 (cited in note 32). For arguments against UNCLOS ratification on U.S. sovereignty grounds, see Editorial, *A Sinkable Treaty*, Wall St J A8 (Nov 3, 2007); Frank Gaffney, Jr., Editorial, *LOST Justice*, Wash Times A17 (Oct 16, 2007).

<sup>38</sup> On UNCLOS ratification strengthening PSI, see Editorial, *Unbury This Treaty; The Senate Can Protect American Interests by Ratifying the Law of the Sea Convention*, Wash Post A18 (Oct 31, 2007); Becker, 43 Intl Law at 923–24 (cited in note 32). For maritime passage, see James A. Baker and George P. Shultz, *Why the "Law of the Sea" Is a Good Deal*, Wall St J A21 (Sept 26, 2007).

Convention are also high: they include not only the costs associated with the increased risk of environmental damage to the Arctic without the treaty, but also how major new oil reserves in the Arctic are divided among nations such as Russia, Denmark, Canada, and the United States, in relation to which the longer the United States delays ratifying the treaty, the less likely it is to be able successfully to claim such reserves without serious opposition from these other nations.<sup>39</sup>

Whatever their ultimate view of the two treaties, most commentators therefore agree that, by leading to the defeat of these treaties as part of U.S. law, the Treaty Clause has not only had some distributional consequences, but has also decided issues of significant national importance. In both contexts, demographic changes have also been sufficiently great since 1789 that, from a contemporary perspective, the two Senators rule and Treaty Clause now almost certainly impose literal requirements that are either over- or underinclusive.

In the context of the two Senators rule, increases in population have occurred at substantially higher rates in large as compared to small states. (In 1790, for example, the three smallest states in the union, Delaware, Rhode Island, and Georgia, contained 6 percent of the national population,<sup>40</sup> whereas in 2000, the three smallest states, Wyoming, Vermont, and Alaska, were home to a mere 0.6 percent of voters.<sup>41</sup>) This has meant that voters in small states now have a vastly more disproportionate say in national legislation decision making compared to voters in large states, even when compared to 1790.<sup>42</sup> In the Treaty Clause context, the admission of new states and the increase this has caused in the overall size of the Senate since 1789 has also been such that, even if one assumes that the clause was optimal when it was adopted, from a contemporary

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<sup>39</sup> One estimate is that, under the treaty, the United States would stand to claim an additional 500,000 square kilometers north of the Arctic Circle as a potential additional oil reserve: see Trevor Cole, *Poles Apart; America's "We're Special" Attitude Is Freezing Out Other Countries—and Big Business—in the Arctic*, *The Globe and Mail* (Canada) 30 (Oct 26, 2007). Others claim that the United States would do even better absent a treaty. See, e.g., David R. Sands, *Treaty Sparks Rivalries; Senate Fight Looms Amid Race to North Pole*, *Wash Times* A01 (Nov 12, 2007).

<sup>40</sup> See U.S. Census Bureau, *Census of Population and Housing: 1790 Census*, online at <http://www2.census.gov/prod2/decennial/documents/1790a-02.pdf>.

<sup>41</sup> See U.S. Census Bureau, *Summary Population and Housing Characteristics Part 1, Table 1: Age and Sex: 2000*, online at <http://www.census.gov/prod/cen2000/phc-1-1-pt1.pdf>.

<sup>42</sup> Baker and Dinkin, 13 J L & Pol 21 (cited in note 29).

perspective, it almost certainly imposes error costs in the direction of under-ratification of treaties.

The size of a voting body will have the potential to influence the effective difficulty of obtaining a supermajority in that body for two interrelated reasons: one having to do with the increase in decision costs associated with larger decision-making bodies, and the other with the statistical likelihood that a supermajority of at least quasi-independent decision makers will favor a particular proposal.<sup>43</sup> Decision costs alone can take at least two forms: those opportunity costs implicit in the time taken to debate and vote on a particular proposal, and those costs associated with the potential for “hold-up” or a veto by some members of a collective decision-making body.<sup>44</sup> Both forms of decision cost will also tend to increase consistently with any increase in the size of a representative decision-making body, such as the Senate.<sup>45</sup>

As I have shown elsewhere with Richard Holden, the law of large numbers is another reason why, in larger voting bodies, it may be harder to obtain the supermajority of votes necessary for a particular proposal, such as a proposal that a particular treaty be ratified.<sup>46</sup> Under a supermajority voting rule, the law of large numbers means that, even absent any change in decision costs, in a large decision-making body it is far less likely than in a smaller body that there will be an idiosyncratic draw of preferences or types in favor of such a proposal.

This can be demonstrated by a simple example involving a series of coin tosses in which “heads” is treated as a vote in favor of ratifying a treaty, and “tails” as a vote against ratification. For a voting body with (say) three or six members, the probability of successful ratification is 50 percent or 34 percent, respectively, whereas for a voting body of even 12 or 24, the probability is as low as 19 percent or 8 percent. For a voting body with 100 members,

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<sup>43</sup> Rosalind Dixon and Richard Holden, *Designing Constitutional Amendment Rules—to Scale* (paper for University of Chicago Conference on Constitutional Design, 2009), online at: <http://faculty.chicagobooth.edu/richard.holden/papers/DH.pdf> (hereafter *Designing Constitutional Amendment Rules*).

<sup>44</sup> Gordon Tullock and James Buchanan, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Michigan, 1965).

<sup>45</sup> *Id.*

<sup>46</sup> Dixon and Holden, *Designing Constitutional Amendment Rules* (cited in note 43).

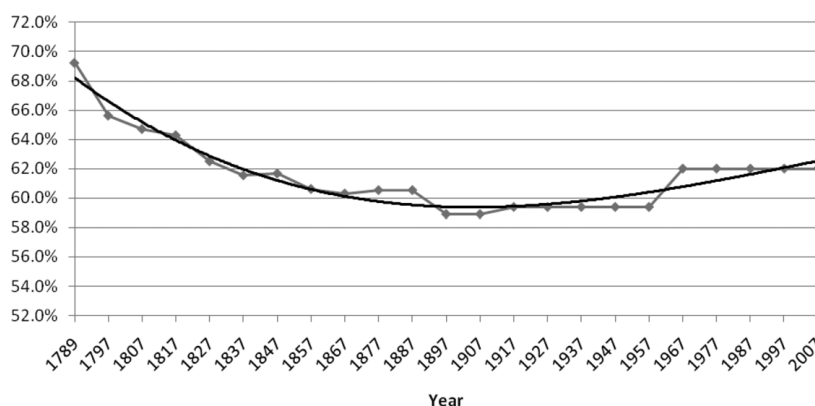


FIG. 1.—Functional equivalent over time to a two-thirds majority voting rule in the original senate (adjusting for increases in senate size).

the probability of successful ratification falls below 1 percent.<sup>47</sup>

If one makes certain stylized assumptions about voting patterns on the ratification of treaties (i.e., that (1) the median U.S. voter is more or less indifferent about whether or not to ratify international treaties in the abstract, (2) the views of the median voter in this context have remained more or less constant over time, and (3) the views of particular members of the Senate on questions of treaty ratification are drawn at least semirandomly from the voting population as a whole, relative to that of the median voter) one can in fact quantify quite concretely the increase this implies over time in the effective difficulty of treaty ratification under the Treaty Clause.

Figure 1, for example, sets out one calculation of the functional equivalent to the original trade-off made by the Framers between what one might call “flexibility” and “rigidity” costs when it came to adopting the requirement of two-thirds majority support for the ratification of treaties for progressive changes in the size of the Senate. (The dotted line shows the “adjusted” supermajority rule for each change in the size of the Senate, which would maintain the original functional trade-off made by the Framers between rel-

<sup>47</sup> This effect is also quite general and does not depend on the binary nature of outcomes in the “coin flip” setting. It applies even where there is a continuum of voter preferences and policy choices: see Richard Holden, *Supermajority Rules* (Working Paper, 2009), available online at: <http://faculty.chicagobooth.edu/Richard.holden/papers/index.html>.

evant competing costs, and its shape reflects not only the gradual “deflation” in the adjusted supermajority rule but also the tie-breaking, or integer-rounding, problem created by there being an even number of Senators at all times. The solid line shows the (third-order polynomial) trend line in the adjusted supermajority rule over time.) The potential error costs these calculations imply from a contemporary perspective are also evident when one considers that several important treaties rejected by the Senate—including UNCLOS—would almost certainly have passed under such an adjusted supermajority threshold.<sup>48</sup>

### III. CONSTITUTIONAL RULE UPDATING—BY LEGISLATURES

In the face of these error costs, the Supreme Court has (for good reason, Part IV suggests) taken almost no steps actively to update various constitutional rules. However, Congress, state legislatures, and indeed even voters have consistently attempted to do so—and in several cases, enjoyed significant success in the passage of such updating legislation. The most prominent example of successful legislative rule updating of this kind in fact involves the Treaty Clause itself and the development by Congress of “congressional-executive agreements” as an alternative pathway to international lawmaking under Article I.

As the effective difficulty of ratifying treaties under the Treaty Clause has increased over the last two centuries in the way figure 1 identifies, so too has the use of executive agreements steadily increased. From the 1890s onward, there has also been a particularly distinct shift in the use of such agreements relative to the treaty form in that, since that time, the United States has not only come to rely more heavily on executive agreements than on treaties;<sup>49</sup>

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<sup>48</sup> See U.S. Senate, *Rejected Treaties*, online at: <http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm#5> (noting 49 votes for, and 30 votes against, ratification of the Law of the Sea Convention in 1960—and thus 62 percent supermajority support for ratification). This, of course, ignores the possibility of strategic voting in the shadow of such an adjusted rule, both in 1960 and subsequently, but such a concern seems largely inapplicable in this context: see, e.g., Mike D. Shear, *The Trail: The Law of the Sea: Almost Swimming in Support*, Wash Post A4 (Nov 1, 2007) (noting increasing bipartisan support for the treaty); Setear, 31 J Legal Stud at 6 (cited in note 33) (suggesting that this and other important treaties would likely have been brought to a successful floor vote under a lower supermajority rule).

<sup>49</sup> Between 1803 and 1838, the ratio of treaties to executive agreements signed by the United States was roughly 2:1 (60 treaties and 27 executive agreements), and between 1840 and 1888 1:1 (215 treaties and 238 executive agreements), whereas thereafter it was at least 1:2. See *Treaties and Other International Agreements: The Role of the United States*

Congress has also developed new forms of executive agreement, based on the model of the McKinley Tariff Act of 1890 and Dingley Tariff Act of 1897, which give the President broad *ex ante* authority to negotiate internationally on behalf of the United States.<sup>50</sup> Whether coincidental or not, this shift has also occurred in close parallel to changes in the relationship between the actual supermajority requirements of the Treaty Clause and the adjusted supermajority rule set out in figure 1, given that in the 1890s, the gap between these two requirements was at its greatest.<sup>51</sup>

At least one way in which to understand the increasing use of congressional-executive agreements, as opposed to treaties, over the last century is, therefore, as a response by Congress to the increasing error costs associated with the literal requirements of the Treaty Clause.<sup>52</sup> It is also now well settled that the use by Congress and the President of such congressional-executive agreements is consistent with both Articles I and II of the Constitution, so that there is little doubt that, if this is the case, Congress has in fact succeeded in using ordinary legislative means to update constitutional meaning (i.e., the supermajority voting rule found in Article II).<sup>53</sup>

In other cases, by contrast, attempts by Congress and other political actors to pass such updating legislation have met with far less success—in large part because the Court has been far less willing to defer to Congress or state legislatures (and voters) in their enactment of substitute constitutional rules. Consider one arguable instance of an attempt by Congress to reduce the practical effect

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*Senate, a Study Prepared for the Committee on Foreign Relations United States Senate by the Congressional Research Service Library of Congress*, S Rep No 106-71 at 39, 106th Cong, 2d Sess (Jan 2001).

<sup>50</sup> For discussion of the effect of the two Acts, see, e.g., Bruce Ackerman and David Golove, *Is NAFTA Constitutional?* 108 Harv L Rev 799, 821–26 (1994–95); Oona A. Hathaway, *Treaties' End: The Past Present and Future of International Lawmaking in the United States*, 117 Yale L J 1236, 1293–94 (2008).

<sup>51</sup> Of course, the use of such congressional executive agreements also greatly increased from the 1930s and 1940s onward, both in the trade context and also much more broadly. This has led some commentators to argue that the overall shift in international lawmaking processes, from treaties to congressional-executive agreements, in fact constitutes a distinct informal Constitutional *amendment* to the Treaty Clause, which occurred around 1944–45. See Ackerman and Golove, 108 Harv L Rev at 873–900 (cited in note 50).

<sup>52</sup> But see *id* at 873–900 (advancing an entirely different theory of why congressional-executive agreements have been recognized as valid in the latter part of the twentieth century, based on a theory of informal Constitutional amendment).

<sup>53</sup> For the general acceptance of the interchangeability of treaties and congressional-executive agreements, see, e.g., Hathaway, 117 Yale L J at 1239 (cited in note 50); Ackerman and Golove, 108 Harv L Rev at 806–08 (cited in note 50).

of the error costs, from a contemporary perspective, of a core Constitutional rule, namely, the enactment of a presidential line-item veto as a means of mitigating the effect of a two Senators rule. A presidential line-item veto clearly does not have an unlimited capacity to reduce disparities in federal spending between small and large states<sup>54</sup> because it is likely to be used by the President for these purposes only in those small states that are not competitive in presidential elections, and even then most likely only in a subset of those states that vote against the incumbent President.<sup>55</sup> However, at least in this subset of cases it does have the potential to reduce the fiscal distortion caused by such a rule. Its actual tendency to do so may also be far from trivial, considering that, on this basis, every Democratic President since 1960, bar one, could potentially have vetoed spending measures in Alaska, Idaho, North and South Dakota, and Wyoming—or five of the twelve smallest states; and every Republican President since Nixon could have vetoed measures in Hawaii and for the most part also Rhode Island.<sup>56</sup>

At the same time, for some Justices at least, there is a real question whether, as a form of purely legislative rule, a line-item veto is consistent with other constitutional provisions, such as those in Article I, Section 7 governing the exercise of a presidential veto. In *Clinton v New York*,<sup>57</sup> a majority of the Court also ultimately rejected the validity of the line-item veto as inconsistent with the procedures in Article I, Section 7. In writing for the Court, Justice Stevens held that there were “important differences between the President’s ‘return’ of a bill pursuant to Article I § 7, and the exercise of the President’s cancellation authority pursuant to the Line Item Veto Act,” including in the timing and comprehensiveness of the relevant power.<sup>58</sup> Stevens noted further that, although the Constitution expressly authorizes the President’s action in the former case,

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<sup>54</sup> For doubts about the effectiveness of a line-item veto, though mostly as a means of reducing overall spending, rather than malapportioned spending, see, e.g., Baker and Dinkin, 13 J L & Pol at 34 (cited in note 29).

<sup>55</sup> Exercising the veto in a small state that has voted for the President’s party, while not directly harming the President’s reelection chances, could still significantly harm the reelection chances of congressional representatives from the President’s party.

<sup>56</sup> Only Presidents Reagan and Nixon, in their second Terms, would not confidently have used such a veto, given their overwhelming national reelection returns which put Rhode Island in the Republican column. The exception to the Democratic pattern was President Johnson, because of his overwhelming victory nationally.

<sup>57</sup> 524 US 417 (1998).

<sup>58</sup> Id at 438–39.



it is silent in the latter; and given both this history and ordinary principles of constitutional construction, there were “powerful reasons for construing constitutional silence as equivalent to an express prohibition.”<sup>59</sup>

An even starker example of where attempts of this kind at legislative updating have failed involves the Qualifications Clauses, and the arguable attempt by state voters to offset the increasing length of congressional tenure allowed by the “deflation” of the age floors in Article I, Section 2, Clause 2. While it certainly seems plausible to think that these age requirements were in part designed to ensure a certain level of maturity or experience on the part of candidates for office, another presupposition of the Framers may have been that they would serve to limit the total number of years that representative served, on average.<sup>60</sup> In the early Republic there was, for example, a strong norm of voluntary retirement or “rotation in office.” Life expectancies, even if somewhat higher for elected officials than the population at large, were also radically lower than now. (For example, in 1789 one calculation suggests that, conditional on living to age 30, average life expectancy was 60—or 30 years beyond the time at which one could first be elected; whereas in 2004, the National Vital Statistic Report shows that, conditional on reaching the ages of 25 or 30, relevant to Qualifications Clauses in Article I, average life expectancy was 79–80—or 54 to 49 years beyond the time of first possible election.) The combined result was that in the decades after the Constitution was first enacted, average congressional tenure was 2–3 years, whereas now it is more than 10 years in the House and 12 years in the Senate.

On this reading, the literal requirements of the Qualifications Clauses have also, progressively, become too low to serve the purposes for which they were enacted. On the Supreme Court’s interpretation of them, they have also directly blocked the possibility of renewal by Congress, state legislatures, and state voters of the relevant eligibility floor.

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<sup>59</sup> Id at 439 (the relevant principles being those relating to the interpretation of text reflecting the product of “great debate” and “finely wrought compromises”).

<sup>60</sup> See, e.g., Madison, *Notes of Debates in the Federal Convention 1787* 109–11 (Athens, 1966) (noting relationship between debate on the age requirements for the Senate and debate over term limits). See also Patrick J. Fett and Daniel E. Ponder, *Congressional Term Limits, State Legislative Turnover: A Theory of Change*, [1993] PS: Pol Sci & Politics 211 (June 1993); Edward J. Lopez, *Congressional Voting on Term Limits*, 112 Public Choice 405, 406 (2001); W. Robert Reed and D. Eric Schansberg, *The House Under Term Limits: What Would It Look Like*, 76 Soc Sci Q 699, 699–70 (1995).

In *United States v Thornton*,<sup>61</sup> in considering a state law imposing term limits on members of Congress, the Court held that the literal requirements of the Qualifications Clauses not only “fix” the eligibility requirements for Congress vis-à-vis candidates’ age. It also held that, according to the principle *expressio unius est exclusio alterius* (the specific excludes the general), which was known to the Framers,<sup>62</sup> these requirements exhaust the full range of qualifications that may legitimately be imposed on members of Congress so that neither the states nor Congress could seek to increase rotation in electoral office by adding to or “supplementing” those qualifications.<sup>63</sup>

The Court applied a similar analysis in *Clinton v New York*, in the context of line-item veto legislation. In the treaty context itself, Professor Larry Tribe has also made cogent arguments, to similar effect, against recognizing broad scope for Congress under Article I to pass congressional-executive agreements—thereby bypassing Article II, Clause 2.<sup>64</sup> For legislative attempts to update constitutional rules to succeed consistently, therefore, what is needed, I argue, is for the Court to afford some additional margin of deference to such legislation—at least equal in force to this *expressio unius* presumption.

In cases where the constitutionality of a measure is clear, such deference may simply serve to confirm the validity of that measure. In other cases, where there is little plausible constitutional basis for upholding federal or state action, under existing text or precedent, such a plus factor will also have no capacity to affect the Court’s decision, but for the opposite reason: that the case for constitutional invalidity is clear (think, here, of Article I congressional-executive agreements before 1937). Only in an intermediate category of case, where there is some real doubt or argument as to constitutional validity, will the constitutional “plus” provided by such a principle potentially be decisive, and even then it must be weighed with other

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<sup>61</sup> 514 US 779 (1995).

<sup>62</sup> Id at 779, 792 n 9. The Court also placed significant reliance on broader historical arguments, considered in *Powell v McCormack*, 395 US 486 (1969), about the specific purposes of the Framers in this context. For a critical analysis of this part of the judgment, see, e.g., Harry H. Wellington, *Term Limits: History, Democracy and Constitutional Interpretation*, 40 NY L Sch L Rev 833 (1996).

<sup>63</sup> 514 US 779, 797.

<sup>64</sup> Lawrence Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv L Rev 1221, 1239–45 (1995).

factors before the Justices can decide how to resolve a particular case.<sup>65</sup>

Notwithstanding this, if the Court were to recognize a principle of indirect updating, this could still be highly significant to the chances of successful legislative updating by Congress and state legislatures in the future.<sup>66</sup> Historically, there is clear support for the significance of the Court showing such deference in the context of the Treaty Clause and congressional-executive agreements, where both the Supreme Court and lower federal courts level have historically shown what is quite clearly a combination of both deliberate constitutional avoidance,<sup>67</sup> and also substantive deference on the merits, when determining the scope of Congress's authority under Article I to enact such agreements.<sup>68</sup>

A further example of the Justices adopting such an approach is also found in the dissenting judgment of Justice Breyer in *Clinton v New York* upholding the constitutionality of a Presidential line-item veto. Not only, for example, did Justice Breyer in this context reject arguments based on the formal gap between the literal requirements of Article I, Section 7 and the line item, on the basis that where “the question is one of literal violation of the law,” the

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<sup>65</sup> See, e.g., *Roper v Simmons*, 543 US 551, 555 (2005) (Kennedy, J) (suggesting that international practice served merely to “confirm” the Court’s finding that the juvenile death penalty is unconstitutional); *Roper v Simmons*, 543 US at 587 (O’Connor, J, dissenting) (suggesting that domestic norms were such that no international consensus could tip the balance toward invalidity); *Knight v Florida* 528 US 990, 993 (1999) (Breyer, J, dissenting from the denial of certiorari) (suggesting that international consensus was sufficient to tip the balance in favor of a grant of certiorari). In this sense, the deference due to legislative attempts to update constitutional rules under such an approach will closely resemble the weight given by the Court in recent cases to evidence of a foreign or international legal consensus in a particular constitutional area.

<sup>66</sup> Compare Dixon, Working Paper 2010 (cited in note 4). In some cases, of course, there is also a further question as to how significant Court judgments themselves are to ultimate constitutional outcomes. See, e.g., debates over the significance of constitutional judgments such as *INS v Chadha* concerning legislative vetoes: see Adam Samaha, *Low Stakes* (paper prepared for the symposium: The Judiciary and the Popular Will, University of Pennsylvania Journal of Constitutional Law, 2010) (on file with author).

<sup>67</sup> In a context such as the Treaty Clause, involving core separation of powers issues, Constitutional avoidance by courts is particularly valuable because it allows Congress and the President to adopt new practices that can themselves act as a “gloss” on the meaning of the text of the Constitution: see *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579 (1952) (Frankfurter, J, concurring).

<sup>68</sup> For examples of avoidance, see, e.g., *Ernest E. Marks Co. v United States*, 117 F2d 542, 546 (CCPC 1941); *Wislar v United States*, 97 F2d 152 (1938), cert denied 305 US 629 (1938). For instances of deference in the application of the nondelegation doctrine prior to 1944, in the particular context of early congressional-executive agreements as substitutes for the treaty form: see, e.g., *Field v Clark*, 143 US 649 (1892); *United States v Curtis-Wright Export Corp.*, 299 US 304 (1936).

Court should not seek to parse compliance as a matter of degree;<sup>69</sup> he also held that even though the relevant veto power “skirt[ed] a constitutional edge” when it came to (more functional) separation of powers and nondelegation principles, it should be afforded an additional margin of deference as “an experiment that may, or may not, help representative government work better,”<sup>70</sup> thereby implicitly connecting such deference to the desirability of offsetting some of the disparities in federal spending caused by the two Senators rule.<sup>71</sup> Moreover, no Justice was willing to uphold the relevant legislation without also endorsing at least some of Justice Breyer’s reasoning in this context.<sup>72</sup>

In the future, the likelihood that many cases involving attempts at legislative rule updating will be “hard” or otherwise evenly balanced also means that, even if some members of the Court are willing to endorse such a principle, this could significantly increase the chances that such rules will successfully survive a judicial challenge.<sup>73</sup> In many of these cases, the importance of the issues involved—such as, for example, in the context of the two Senators rule—will also only add to the overall significance of any such result.

#### IV. OBJECTIONS TO UPDATED CONSTITUTIONAL RULES: DIRECT VERSUS INDIRECT UPDATING

Defenders of the constitutional status quo (in which the Court adopts an evolutionary approach to constitutional standards

<sup>69</sup> 524 US 417, 473 (Breyer, J, dissenting).

<sup>70</sup> *Id.* at 498.

<sup>71</sup> *Id.* at 468–73 (workable government), 498 (representative government).

<sup>72</sup> See *id.* at 497 (O’Connor and Scalia, JJ, dissenting (and concurring in part III of Breyer’s reasoning rejecting automatic application of an *expressio unius* principle)).

<sup>73</sup> Two areas in which such a principle might possibly apply, in addition to those already mentioned, are, for example, attempts by Congress to reduce the racially disparate impact of the two Senators rule or to reduce the resource implications, for the federal courts, of the Twenty Dollars Clause. (On the potential present-day error costs associated with such rules, see, e.g., Malhotra and Raso, 88 Soc Sci Quarterly at 1046 (cited in note 30); Note, *The Twenty Dollars Clause*, 118 Harv L Rev 1665 (2004–2005).) In both cases, there is also a real question as to the scope of Congress’s power under Article I to engage in forms of legislative rule updating by, for example, attempting to create increased minority representation in the House, under the Voting Rights Act of 1965 (VRA), as a partial substitute for representation in the Senate, or Article I as opposed to Article III courts: see, e.g., *Northwest Austin Municipal Utility District Number One v Holder*, 129 S Ct 2504, 2508 (2009) (raising doubts about, though not ruling on, the constitutionality of certain provisions of the VRA); *Northern Pipeline Construction Co. v Marathon Pipe Line Co.*, 458 US 50, 67 (1982) (suggesting clear limits to the scope of Congress’s power to establish Article I courts beyond cases involving pure public rights).

but not rules) make two broad arguments against more direct forms of constitutional rule updating by the Court: one based on a concern about fidelity by the Justices to the text of the Constitution and the costs of disrupting settled expectations about the meaning of constitutional rules,<sup>74</sup> and a second based on a concern about institutional competence and the capacity for judicial error costs in the process of updating.<sup>75</sup>

The first argument is the simplest and most absolute, and turns on the idea that where the text is relatively “rule-like, concrete and specific,” notions of interpretive fidelity on the part of the Justices mean that the text necessarily controls constitutional meaning.<sup>76</sup> A related argument is that if the Court departs from such specific textual provisions in one case, especially those with high public salience, it “greatly increase[s] the risk that the [current] valuable consensus on the text will dissolve generally, increasing the potential for disruption and for outcomes that are, even to those who dislike [the substance of the rule], worse still.”<sup>77</sup> The costs associated with disruption of this kind will also tend, so the argument goes, to be even greater for constitutional rules than standards, because a key function of constitutional rules is to settle constitutional conflict, or to provide a “focal point” for various forms of socially valuable coordination.<sup>78</sup>

The second argument is also straightforward. It turns on the idea that in many areas involving constitutional rules, the subject matter of those rules is such that the Court lacks relevant expertise and information and therefore may misjudge the capacity of the particular rule to advance given objectives, or impose other unintended

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<sup>74</sup> On fidelity, see Balkin, *Original Meaning*, 24 Const Comm 291 (cited in note 10); and on the costs of disrupting settled expectations, see Posner, 2 J Legal Stud at 401 (cited in note 25); Samaha, *Undue Process*, 59 Stan L Rev at 614–20 (cited in note 25); Strauss, *Constitutional Interpretation*, 63 U Chi L Rev 877 (cited in note 12).

<sup>75</sup> Posner, 2 J Legal Stud at 401 (cited in note 25); Samaha, *Undue Process*, 59 Stan L Rev at 614–20 (cited in note 25).

<sup>76</sup> Balkin, *Original Meaning*, 24 Const Comm at 305 (cited in note 10). See also Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv L Rev 1189, 1282–84 (1986–87); Ronald Dworkin, *Taking Rights Seriously* 121–23 (Harvard, 1977) (setting out the idea of “enactment force” as opposed to “gravitational force”).

<sup>77</sup> See Strauss, *Constitutional Interpretation*, 63 U Chi L Rev at 919 (cited in note 12).

<sup>78</sup> Id at 910; Samaha, *Undue Process*, 59 Stan L Rev at 621–23 (cited in note 25); Richard H. McAdams, *Beyond the Prisoner's Dilemma: Coordination, Game Theory, and Law*, 82 S Cal L Rev 209, 240–41 (2009).

costs.<sup>79</sup> Related to this will also be the degree to which, if the Court does err in a particular context in being willing to engage in a form of constitutional rule updating, such error costs are likely to be practically reversible by Congress or state legislatures via ordinary legislative means.

In many, if not all, situations these arguments together also provide a powerful case against the desirability of direct updating of constitutional rules by the Court.<sup>80</sup> However, the force of these arguments simply does not hold when applied to indirect as opposed to direct modes of constitutional rule updating by the Court.

A decision by the Court to apply additional deference to particular legislation, under an indirect updating approach, in no way involves a decision to disregard the text of the Constitution, literally construed. In fact, because it depends for its operation on consideration of the full range of other constitutional sources that provide support for the validity of particular legislative action, it encourages careful attention by the Court to the entire text of the Constitution. Unlike more direct forms of updating, such an approach therefore raises neither any real concern about fidelity in particular cases nor, on slippery-slope grounds, about fidelity to the constitutional text as a whole.

With respect to fears about judicial error costs, such concerns will be vastly less applicable to indirect as opposed to direct approaches to constitutional rule updating. The fact that Congress or state legislatures have primary responsibility under such an approach for designing replacement constitutional rules means that, simply by virtue of the law of large numbers, there is a greater chance that the relevant rules will be well designed from the outset.<sup>81</sup> In some cases, at least, Congress will also have important advantages over the Court in terms of both internal diversity and access to relevant information.<sup>82</sup> For constitutional procedural rules such as the Treaty Clause that touch directly on processes internal to Con-

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<sup>79</sup> On the idea of error costs in the process of Constitutional decision making by the Court, see, e.g., Cass R. Sunstein, *Supreme Court 1995 Term, Foreword: Leaving Things Undecided*, 110 Harv L Rev 4 (1996).

<sup>80</sup> As Note, 118 Harv L Rev 1665 (cited in note 73) suggests, one arguable exception might involve the Twenty Dollars Clause in the Seventh Amendment.

<sup>81</sup> Adrian Vermeule, *Law and the Limits of Reason* 90 (Oxford, 2008).

<sup>82</sup> *Id.*

gress, access to such information will also be particularly valuable.<sup>83</sup>

Even if the Court does in fact err in the process of constitutional rule updating, under an indirect as opposed to direct approach, there will be the added safeguard of a much greater chance of Congress or the states being able to reverse such errors—by ordinary legislative means.

Take a potential decision by the Court to read the word “two” in Article I, Section 3, Clause 1 in a functional way so as to give California, New York, and Texas twelve Senators, Wyoming two Senators, and most other states some number in between (a twelve Senators rule), and thereby preserve the underlying ratio of large to small state representation on which the two Senators rule was based,<sup>84</sup> and compare this to (say) the line-item veto as a more indirect response by Congress to the error costs associated with the two Senators rule.

Assuming a twelve Senators rule were actually implemented, such a decision by the Court would be very difficult to reverse.<sup>85</sup> The main reason for this is that, if the Senate were enlarged so as to give greater representation to large states, Senators who thereby gained office would likely tend to oppose further rounds of reapportionment aimed at reducing the size of the Senate. For such Senators to support such measures would almost certainly mean putting their own office at risk, and broader studies of congressional voting patterns suggest that this means later reapportionment is, at best, unlikely.<sup>86</sup> Another obstacle to reversing such a decision would

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<sup>83</sup> Evidence of this is arguably the decision by Congress to exempt trade-related international agreements, but not most other agreements, from the operation of the filibuster: see, e.g., Hathaway, 117 *Yale L J* at 1261 (cited in note 50). Striking in this context is also the parallel between changes in the requirements for a motion for cloture under Senate Rule 22, and the adjusted supermajority rule set out in figure 1: see Sarah A. Binder and Steven S. Smith, *Politics or Principle? Filibustering in the United States Senate* (Brookings, 1997).

<sup>84</sup> This would preserve the ratio between the population of the largest and smallest three states in 1789 (as measured by the 1790 census). See notes 40–41.

<sup>85</sup> This understanding was, for example, implicit in the attempt by Sen. Dirksen in 1964 to “freeze” the implementation of the Court’s reapportionment decisions: see Robert B. McKay, *Reapportionment: Success Story of the Warren Court*, 67 *Mich L Rev* 223, 228 (1968–69). For how political dynamics of this kind can lead to the de facto entrenchment of Constitutional norms or decisions, see Daryl Levinson, *Political Commitment, Entrenchment, and Self-Enforcement in Constitutional Law*, paper presented to University of Chicago Law School, Law and Politics Workshop, May 13, 2009 (on file with author). On these informal norms, see Ernest A. Young, *The Constitution Outside the Constitution*, 117 *Yale L J* 408 (2007).

<sup>86</sup> Fett and Ponder, [1993] *PS: Pol Sci & Politics* 211, 213 (cited in note 60) (showing

be the potential for collective action problems, given that the potential error costs associated with such a decision (relating to the quality of Senate deliberation and the distinctiveness of the Senate relative to the House) would tend to be borne by Americans generally, rather than by a subset of voters in small or large states or in one party or another.<sup>87</sup>

In the context of line-item veto, by contrast, if Congress at any time came to the view that the line-item veto was not serving its purpose, it could simply undo the error made by the Court in upholding it by repealing the relevant statute that authorized it. The same position would apply in the treaty context if the Senate came to the view that, as a means of international lawmaking, congressional-executive agreements were being overused relative to the treaty form. In key areas of national significance such as those involving human rights or multinational security cooperation, even a minority of Senators could reassert their prior privileges under the Treaty Clause by use of the filibuster.<sup>88</sup> In other contexts, if they were able to gain a majority in favor of their view, Senators could also reassert the need to give broader scope to the Treaty Clause simply by blocking passage of various congressional-executive agreements. At the level of fidelity, judicial error, and the reversibility of any such errors, there is, therefore, a crucial difference between indirect and more direct modes of updating when it comes to objections to the idea of constitutional rule updating by the Court.

## V. AMENDING VERSUS UPDATING

For some, any form of constitutional updating by the Court will nonetheless be ruled out by the fact that Article V, or least equivalent processes of constitutional amendment, are understood to provide the exclusive mode of legitimate constitutional updating.<sup>89</sup> In some countries, where the requirements for successful constitutional amendment are less demanding than in the United States,

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that recently elected members of the House are far more likely to support congressional term-limit proposals than longer-serving members).

<sup>87</sup> Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard, 1965).

<sup>88</sup> See Hathaway, 117 Yale L J at 1304–05 (cited in note 50).

<sup>89</sup> Many though not all scholars in this category are originalists: see, e.g., Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 Cornell L Rev 350 (1987–88); Antonin Scalia, *A Matter of Interpretation* (Princeton, 1997).



such a response seems a quite plausible response to the potential error costs associated with various constitutional rules.

Consider, for example, rules in the Irish and Indian Constitutions governing the ratification of treaties or the size of government, which are somewhat parallel to the two-thirds supermajority requirement in the Treaty Clause or two Senators requirement in Article II. In Ireland, against the backdrop of strong desire for independence from the United Kingdom, the original 1937 Irish Constitution affirmed “the inalienable, indefeasible, and sovereign right” of the Irish nation “to determine its relations with other nations . . . in accordance with its own genius and traditions,” and the right of the Irish people “to decide all questions of national policy, according to the requirements of the common good”; it also specifically provided that “the executive power of the state in or in connection with its external affairs . . . be exercised by or on the authority of the [Irish] government.”<sup>90</sup> Fifty years on, the Irish Supreme Court held that the specificity of these pro-independence rules was such that, despite significant public support in Ireland for increased integration with Europe, correctly interpreted these were a direct bar to Ireland being part of such efforts.<sup>91</sup> This did not mean, however, that such rules ultimately led to any long-term constitutional error costs in Ireland, because under the relatively permissive requirements for amendment established by Article 46 of the Irish Constitution, an amendment to these rules designed to allow ratification of the Single European Act passed comfortably in the same year that the Irish Court handed down its decision.<sup>92</sup>

In India, a similar position has applied in the context of constitutional rules such as those governing the size of government. Because the original Constitution in India contained no explicit provisions regarding the size of the executive, it effectively adopted a “rule” permitting extremely large cabinets.<sup>93</sup> Over subsequent decades this rule proved to involve substantial error costs in terms of

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<sup>90</sup> Irish Constitution, Arts 1, 5, 29.

<sup>91</sup> See, e.g., *Crotty v An Taoiseach* [1987] IR 713 (Walsh, Henchy, Hederman, JJ) (holding that in unamended form Articles 1, 5, and 29 absolutely prevented Ireland from ratifying the Single European Act 1986).

<sup>92</sup> Tenth Amendment to the Constitution of Ireland (passed by clear legislative majority, and 70 percent of voters).

<sup>93</sup> Constitution of India 1949.

its effect on the stability of government.<sup>94</sup> Legislative measures designed to address this problem also proved largely ineffectual.<sup>95</sup> However, because in most instances the constitutional amendment process under Article 368 of the Indian Constitution requires the support of only a simple majority of the Indian parliament, the parliament in 2004 was able to relatively easily pass an amendment to the Indian Constitution seeking to address these error costs by establishing a rule limiting the size of national and state governments to 15 percent of the relevant legislature.<sup>96</sup>

In the United States, by contrast, the difficulty of formal constitutional amendment under Article V of the Constitution means that constitutional amendment is a far less realistic response to the present-day error costs of parallel constitutional rules. The hurdles imposed by Article V are such that, of 11,000 attempts to amend the Constitution over the last 200 years, only 27 (at most) have actually succeeded.<sup>97</sup> On most measures, these hurdles mean that, in global terms, the U.S. Constitution is now either the most or second most difficult to amend.<sup>98</sup> For constitutional rules such as the two Senators rule, the specific requirements prescribed by Article V are also even more demanding than in respect of other constitutional norms, because Article V specifically provides “that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”<sup>99</sup>

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<sup>94</sup> Because governments in India are often minority or coalition governments, there is an inherent tendency for government instability. By creating broad scope for opposition parties to use cabinet posts as a means of promoting defection by members of the governing party, the original Constitution also greatly increased this potential for instability. See *The National Commission to Review the Working of the Constitution*, Final Report, par 4.19 (2002).

<sup>95</sup> See discussion in T. V. R. Shenoy, *There Is No Substitute for Vigilance*, Rediff India Abroad (July 9, 2004) (discussing limits to the Anti-Defection Act 1985).

<sup>96</sup> Indian Constitution 1969, 91st Amendment. For discussion see Mohan Guruswamy, *91st Constitutional Amendment: Not Quite Adequate*, Hindu Business Line (July 20, 2004).

<sup>97</sup> See, e.g., John R. Vile, *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789–2002* (ABC-CLIO, 2003).

<sup>98</sup> Lutz, *Toward a Theory of Constitutional Amendment* 237 (cited in note 4); Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge, 2009).

<sup>99</sup> This makes amendment of Article 1, Section 3, Clause 1, within the confines of the Constitution, close to, if not actually, impossible. One possibility, canvassed by Lynn Baker and Samuel Dinkin (see 13 J L & Pol 21, cited in note 29), is that Article V could be amended in order to remove this requirement of unanimous consent, but such an argument encounters severe difficulties in how it treats the relationship between the general and specific requirements of a particular constitutional clause: see Sanford Levinson, *The Political Implications of Amending Clauses*, 13 Const Comm 107 (1996).

For both the two Senators rule and the Treaty Clause, political realities further mean that, even if these formal legal hurdles to amendment did not exist, it would still be extremely difficult to rely on Article V in order to amend these rules. As Baker and Dinkin argue in the context of Article I, Section 3, Clause 1, “any state that currently receives disproportionately great representation in the Senate relative to its share of the nation’s population benefits from the existing allocation of representation and therefore should have little interest in changing it,” and “the number of such over-represented states has always exceeded the one-third-plus-one necessary to block the mere proposal of any constitutional amendment.”<sup>100</sup> Accordingly, it also follows that Senators from small states will be extremely unlikely to support any amendment which might make it easier to amend Article I, Section 3, Clause 1 and especially one as broad as an amendment to Article V itself.<sup>101</sup>

This same argument holds for use of Article V to amend the Treaty Clause. Why, one might ask, would two-thirds of Senators, other than in the most exceptional cases, vote to remove the right of two-thirds of Senators to decide whether or not to ratify a treaty? As Edwin Corwin suggested in 1940 in criticizing the Treaty Clause, there seems not “the least likelihood that . . . two thirds of the Senate [will] consent to relax that body’s powers” especially in an area of such potential significance.<sup>102</sup> I have shown elsewhere that because it contains the same two-thirds supermajority requirement for congressional approval as the Treaty Clause, Article V is itself one of the most prominent examples of a constitutional rule that, from a contemporary perspective, likely involves error costs.<sup>103</sup> For either the two Senators rule or the Treaty Clause to be successfully amended, the only realistic route for proponents of such change will therefore be informal amendment to the Constitution, other than via Article V, where these problems of endogeneity may be less severe.

Bruce Ackerman, in developing what it is perhaps the leading account of informal amendment in the United States, identifies two

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<sup>100</sup> Baker and Dinkin, 13 J L & Pol at 71 (cited in note 29).

<sup>101</sup> Id at 72.

<sup>102</sup> Edward S. Corwin, *The President: Office and Powers: History and Analysis of Practice and Opinion* 232–40 (NYU, 1940). The events of 1945 support this interpretation: see Ackerman and Golove, 108 Harv L Rev at 889–90 (cited in note 50).

<sup>103</sup> See Dixon Working Paper 2010 (cited in note 4).

instances of large-scale constitutional change outside Article V, namely, the Reconstruction Amendments and the New Deal expansion in federal regulatory power.<sup>104</sup> From these “constitutional moments,” Ackerman concludes that informal constitutional change can occur in the United States where three conditions are met: (1) there is a proposal for small “c” constitutional change; (2) there is a “triggering election,” in which that proposal or analogs to it are centrally at issue; and (3) there is subsequent legislative “ratification” of the proposal by Congress.<sup>105</sup> Ackerman therefore posits that, while the House and Senate certainly have a central role to play in the process of constitutional change, that role will tend to turn on the outcome of ordinary, and not supermajority, voting procedures. This means that informal amendments will tend both to overcome the current small state veto over amendment and also, to a large degree, be as likely in a Congress of today’s size as in 1789.<sup>106</sup>

At the same time, as a solution to the problem of constitutional rule updating, the difficulty with such a process of informal amendment is at least twofold. The first is that many scholars do not acknowledge that such processes exist. Instead, many favor the view that while such constitutional moments clearly involved major constitutional change and were legitimate as a matter of political principle, they occurred almost wholly outside the terms of the Constitution or involved extraconstitutional, not constitutional, processes of change.<sup>107</sup> The second, related difficulty is that, at least as initially formulated, Ackerman’s theory implies extremely infrequent scope for constitutional updating—indeed, it points to amendment at an even slower rate than under Article V.<sup>108</sup> The more Ackerman has been willing to expand his theory to identify further constitutional moments,<sup>109</sup> the more difficult it has also become to delineate such moments from more ordinary moments of

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<sup>104</sup> Bruce Ackerman, *We the People*, vol 1, *Foundations* (Belknap, 1993).

<sup>105</sup> *Id.*

<sup>106</sup> On the relative stability of a 50 percent majority rule, see Dixon and Holden, *Designing Constitutional Amendment Rules* (cited in note 43).

<sup>107</sup> See, e.g., David R. Dow, *The Plain Meaning of Article V*, in Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 117 (Princeton, 1995). See also Tribe, 108 *Harv L Rev* at 1286–88 (cited in note 64).

<sup>108</sup> For criticisms of Ackerman’s theory as underinclusive in this context, see, e.g., Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 *Const Comm* 115 (1994).

<sup>109</sup> See, e.g., Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *Yale L J* 1013 (1983–84).

constitutional contestation, or “dialogue,” in which the Court sees itself as having a central role to play in deciding whether and to what degree constitutional change occurs.

Other proposals designed to overcome the difficulty of formal constitutional amendment under Article V also encounter difficulties when applied to many constitutional rules. One proposal, by Akhil Amar, is that Americans should be free to amend the Constitution via a national referendum process.<sup>110</sup> Whatever its general merits, the difficulty with this proposal as applied to most constitutional rules is that it assumes a degree of popular interest in proposed amendment that simply will not exist in the case of many specific, technical constitutional provisions, such as the Treaty Clause or even the two Senators rule.<sup>111</sup>

A second proposal I have developed elsewhere is that the Court should give some degree of positive force to proposed and failed, as well as successful, constitutional amendments, according to the degree of support they receive in Congress and state legislatures.<sup>112</sup> By enlisting Congress, rather than voters, as the initiator of constitutional change under Article V, my approach is also clearly less sensitive than Amar’s to the need for popular interest in the error costs associated with specific constitutional rules. By adjusting the level of deference enjoyed by congressional or state legislation to the degree of support a proposed amendment enjoys in Congress and state legislatures, my proposal also encounters some of this same difficulty, albeit in less acute form.

No matter how one conceives of applying or redesigning the constitutional amendment process, therefore, it is almost inevitable that an insistence on reliance on such processes as a means of constitutional updating will be simply to endorse, rather than address, the current deficit regarding the updating of constitutional rules. If one takes seriously, as many proponents of amendment exclusivity do, this deficit and its effects in areas such as federal spending,<sup>113</sup> it may therefore be that for the foreseeable future indirect consti-

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<sup>110</sup> See Akhil Amar, *Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum L Rev 457 (1994).

<sup>111</sup> For other criticisms of Amar’s proposal, see Henry P. Monaghan, *Our Perfect Constitution*, 56 NYU L Rev 353 (1981).

<sup>112</sup> Rosalind Dixon, Working Paper 2010 (cited in note 4).

<sup>113</sup> For criticism by Constitutional conservatives of decisions such as *Clinton v New York* and *Thornton*, see, e.g., Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (Yale, 2008).

tutional rule updating is the option which for constitutional conservatives, as well as liberals, is actually the least worst of the available alternatives.

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