University of Chicago Law School
Chicago Unbound

Public Law and Legal Theory Working Papers | Working Papers

2014

The Function of Article V

Aziz Huq

Follow this and additional works at: http://chicagounbound.uchicago.edu/public_law_and_legal_theory

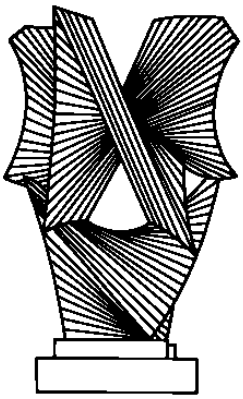
Part of the Law Commons

Recommended Citation
Aziz Huq, "The Function of Article V" (University of Chicago Public Law & Legal Theory Working Paper No. 470, 2014) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406089..

This Working Paper is brought to you for free and open access by the Working Papers at Chicago Unbound. It has been accepted for inclusion in Public Law and Legal Theory Working Papers by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 470



THE FUNCTION OF ARTICLE V

Aziz Z. Huq

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

April 2014

This paper can be downloaded without charge at the Public Law and Legal Theory Working Paper Series:
http://www.law.uchicago.edu/academics/publiclaw/index.html
and The Social Science Research Network Electronic Paper Collection.

The Function of Article V

(forthcoming in 163 *University of Pennsylvania Law Review* – (2014))

Aziz Z. Huq[*]

Abstract

What good is Article V? The Constitution's amendment rule renders the text inflexible, countermajoritarian, and insensitive to important contemporary constituencies. Comparative empirical studies, moreover, show that textual rigidity is not only rare in other countries' organic documents but highly correlated with constitutional failure. To promote our Constitution's survival and to counteract Article V's 'dead hand' effect, commentators argue, Americans have turned to informal amendment through the courts or 'super' statutes. Article V, the conventional wisdom goes, is a dead letter. Against this pervasive skepticism, I propose that Article V instead played an important but hitherto unrecognized function in the early Republic. Article V mitigated a 'hold up' dilemma that could have precluded ratification and undermined the new Constitution's stability. By hindering strategic deployment of textual amendment, Article V-induced rigidity fostered a virtuous circle of investment in new institutions such as political parties and financial infrastructure. Recognition of Article V's role in the early Republic leads to a more nuanced view of the Constitution's amendatory regime. In effect, we have a two-speed Constitution—with Article V-induced rigidity at the inception supplemented gradually over time by informal judicial or statutory amendment protocols.

[*] Assistant Professor of Law, University of Chicago. I am indebted to Anthony Casey, Ros Dixon, Michael Dorf, David Fontana, Tom Ginsburg, Mark Graber, David Law, Sanford Levinson, Miguel Schor, and Mila Versteeg for their terrific and thoughtful comments and criticisms, as well as to participants in workshops at the University of Wisconsin Law School and Drake Law School, who gave useful feedback. Mishan Wroe provided her usual terrfic research assistance, for which I am exceedingly grateful. I am also pleased to acknowledge the support of the Frank Cicero, Jr. Faculty Fund. All errors, textually entrenched and otherwise, are mine alone.

Electronic copy available at: http://ssrn.com/abstract=2406089

Introduction

What good is Article V? The amendment rule crafted in 1787 renders the Constitution one of "the most inflexible" ever written.[1] Commentators calumnify Article V for making the constitutional text obdurately unresponsive to changing public sentiment.[2] Other scholars depict the handful of amendments that do pass its gauntlet as excessively nationalist in orientation.[3] Worse, empirical studies of constitutions across the globe find that textual rigidity is highly correlated with early constitutional demise. In that light, our Constitution's "longevity … defies expectations."[4] As a result, Article V has become "the constitutional provision … to hate."[5] Scholarly cottage industries have emerged to explain not only how Americans over time have seized upon alternative avenues for constitutional change, such as the Supreme Court,[6] framework statutes,[7] and populist "constitutional moments."[8] In effect, scholars have given up on

---

[1] ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 101 (2009) [hereinafter Elkins et al., ENDURANCE]; *see also* WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 49 (2011) (describing the amendment process as "intractable"); Rosalind Dixon, *Partial Constitutional Amendments*, 13 U. PA. J. CONST. L. 643, 645–46 (2011) [hereinafter Dixon, *Partial Constitutional Amendments*] ("Article V imposes some of the most onerous hurdles in the world for the ratification of amendments."); Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 362 (1994) (same).

[2] *See, e.g.*, Rosalind Dixon, *Updating Constitutional Rules*, 2009 SUP. CT. REV. 319, 321 [hereinafter Dixon, Updating Constitutional Rules] ("[C]hanges in social circumstances and understandings over time mean that, from a contemporary perspective, a number of core constitutional rules are now no longer optimal."); Stephen N. Griffen, *The Nominee Is … Article V*, *in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 51–53 (William N. Eskridge, Jr. & Sanford Levinson, eds., 1998).

[3] *See, e.g.*, Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1513 (2010) ("[T]he constitutional amendment method has allowed Congress to promote amendments that accord with its own preferences ….").

[4] ELKINS et al., ENDURANCE, *supra* note 1, at 65; *Id*. at 123 (noting that the United States "do[es] not seem to fit" the predictions of comparative analyses of constitutional survival).

[5] John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV., 1929, 1954 (2003); *see also* John O. McGinnis & Michael B. Rappoport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1727 (2010) ("Article V is almost universally criticized as being too stringent rather than too permissive."). For a particularly sharp version of the critique, *see* Stephen M. Griffin, *The Nominee Is … Article V*, 12 CONST. COMMENT. 171, 173 (1995).

[6] David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 905–15 (1996) [hereinafter Strauss, *Common Law Constitutional Interpretation*] (arguing for the priority of judicial doctrine over constitutional text). The same article makes the point that "legislators and even ordinary citizens, in their encounters with the Constitution, act in ways [consistent with a process of incremental constitutional change]." *Id*. at 925; *accord* Strauss, *Irrelevance*, *supra* note 9, at 1505 ("The people rule not through discrete, climactic, political acts like formal constitutional amendments, but in a different way—often simply through the way they run their nonpolitical lives, sometimes combined with sustained political activity spread over a generation or more.").

[7] *See* ESKRIDGE & FEREJOHN, *supra* note 1, at 6–9; *id*. at 12–13 ("America enjoys a constitution of statutes supplementing its written Constitution as to the most fundamental features of government."); *see also* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1218 (2001) (introducing concept).

[8] *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 3–31 (1998) [hereinafter ACKERMAN, TRANSFORMATIONS] (offering up a theory of "higher lawmaking" to explain extra-textual amendments during Reconstruction and the New Deal); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 459 (1994) (arguing that "Congress would be obliged to call a convention to propose revisions [to the Constitution] if a majority of American voters so petition; and that an amendment or new constitution could be lawfully ratified by a simple majority of the American electorate"); *see also* Bruce Ackerman, *We the People Rise Again*, SLATE, June 4, 2012, available at http://hive.slate.com/hive/how-

Electronic copy available at: http://ssrn.com/abstract=2406089

Article V in favor of these substitute modalities of constitutional change. The conventional wisdom is, accordingly, that "our system would look the same today if Article V of the Constitution had never been adopted and the Constitution contained no provision for formal amendment."[9]

This Article questions the consensus view of Article V's irrelevance. Rather than always being superfluous, I argue, Article V-induced rigidity played an important, if unacknowledged, role in promoting the Constitution's survival at a key moment in American history—the early decades of the Republic. In the antebellum period, textual rigidity mitigated a problem of strategic "hold up" by key interest groups. Strategic invocation of the amendment power, I suggest, could have precluded the Constitution's ratification, handicapped the development of essential national institutions such as financial infrastructure and political parties, and even precipitated secession. By hindering the strategic use of textual amendments, Article V-induced rigidity fostered a virtuous circle of investments in new subconstitutional institutions—I offer political parties and financial infrastructure as specific examples. At the same time, it deferred conflict on highly divisive questions, unresolved in the Constitution's text, until the Union could better withstand the shock of their resolution. Without Article V, therefore, there might be eulogies rather than encomia today for the 1787 Constitution.

By contrast, informal amendments of the sort lauded today provide no solution to the early Republic's hold-up problem. In the first decades of the new Republic, after all, neither the Court nor Congress played the expansive role that judges and legislators do today in crafting workarounds and constraints to non-functioning constitutional rules (even if they were extraordinarily creative when it came to developing functional subconstitutional institutions to give life to the document's larger aspirations). To redound to non-Article V mechanisms of constitutional amendment to explain the Constitution's early survival is therefore anachronistic. Instead, recognition of Article V's stabilizing function in the early Republic should lead to a more nuanced view of the Constitution's amendment regime. In effect, we have a 'two-speed' Constitution: On the one hand, Article V-induced rigidity during the early Republic enabled the development of national institutions necessary to anchor the new nation. And on the other hand, those very institutions over time created flexibility-generating judicial or statutory amendment alternatives in ways that facilitated adaption to changing times and shifting democratic preferences. Both formal rigidity and informal flexibility, that is, have contributed to constitutional survival—but have done so at different times.

That a constitution survives, of course, is no guarantee that its institutional contents or substantive direction are optimal in social welfare terms or desirable on normative grounds. Indeed, it is important to note at the outset that my analysis on this Article is oriented toward explaining the brute fact of the Constitution's survival. I do not intend to offer a normative or welfarist claim either to the effect that any specific feature of the federal Constitution is desirable, or that its continued survival in its observed form to the contemporary period is

---

can-we-fix-constitution/article/we-the-people-rise-again. A variant on this argument relies on legislative action. *See* Dixon, *Updating Constitutional Rules*, *supra* note 2, at 336–40 (arguing that courts should look sympathetically on legislative efforts to update constitutional rules).

[9] David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1459 (2001) [hereinafter Strauss, *Irrelevance*].

Electronic copy available at: http://ssrn.com/abstract=2406089

desirable. Most obviously, the Constitution as originally drafted fell far short of democratic and equality ideals by allowing for a limited franchise and accomodating the peculiar institution of slavery. Similarly, my argument is orthogonal to the oft-made contemporary plaint that radical constitutional reform is desirable, say, on democratic grounds.[10]

The central task of the Article is to identify and describe the causal mechanism linking textual rigidity to constitutional survival in the early Republic. To develop that account, I draw on law-and-economics literature about the design of long-term, relational contracts. Many such contracts are necessarily "vague or silent on a number of key issues"—much like a constitution.[11] The literature identifies strategic breach and opportunistic renegotiation as central impediments to successful contracting. Recently, scholars have suggested that a written contract's internal resistance to change (*e.g.*, through a no-modification clause) can promote efficient, after-the-fact investments by parties and can thereby increase the likelihood of the contract's survival.[12]

Mutatis mutandi, the same dynamic unfolds in the constitutional context. A constitution's text embodies a deal between powerful national-level interest groups, each of whom can each threaten to exit (*e.g.*, by secession) from the deal.[13] The drafters, like parties to a private deal, are unable to detail fully in the text how all conceivable disputes should be resolved.[14] Hence, constitutions are inevitably incomplete.[15] Once ratified, a necessarily incomplete constitution will succeed only if interest groups invest in supplemental national institutions, such as political and financial infrastructure, to anchor the new nation. Inevitably, such investments must be tailored to a given constitution's particulars. But this very specificity creates a serious problem.[16] Parties who make such investments lock themselves in to this particular constitution. They thus make themselves vulnerable to "hold-ups" by other parties, who can try to expropriate a greater share of national wealth through renegotiation of the original deal by textual amendments. A strategic hold-up might involve either changing a rule that is in the text already, or addressing a question left unresolved by the original text. Either way, proponents of a strategic amendment hope to exploit the fact that other parties with post-ratification investments will cede some surplus—and hence accept a disfavored amendment—rather than risk constitutional failure and

---

[10] For a cogent argument along these lines, see SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

[11] Jean Tirole, *Incomplete Contracts: Where Do We Stand?*, 67 ECONOMETRICA 741, 741 (1999).

[12] *See, e.g.*, Christine Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 J. LEG. STUD. 203, 205 (1997) ("Contrary to traditional wisdom, the parties to a contract may be better off if the law enables them to tie their hands, or ties their hands for them, in a way that prevents them from taking advantage of certain ex post profitable modification opportunities."). I rely on Jolls not for the specific mechanisms she identifies—respecting moral hazard and preference change over time—but on her general insight into the value of contractual rigidity.

[13] *See, e.g.*, Daniel Sutter, *Enforcing Constitutional Constraints*, 8 CONST. POL. ECON. 139 (1997) (analyzing constitutions as incomplete contracts); *accord* Phillippe Aghion & Patrick Bolton, *Incomplete Social Contracts*, 1 J. EURO. ECON. ASS'N 38, 38–41 (2003).

[14] Tirole, *supra* note 11, at 741–42 (noting the pervasiveness of contractual incompleteness in political life).

[15] The phrase "incomplete contract" can refer either to (1) obligational incompleteness, where a term (such as price or quantity in the ordinary contracting context) is not included, and (2) insufficient state contingency, because of a failure to fully realize the potential gains from trade in all future states of the world. Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 730 (1992). In this Article, I mean the phrase "incomplete contracting" to refer to insufficient state contingency.

[16] ELKINS et al., ENDURANCE, *supra* note 1, at 71.

wholesale loss of their constitution-specific investments.[17] The shadow of strategic amendment threats will undermine a constitution's chances of getting off the ground. Post-ratification, it can also engender inefficient underinvestment and conflict.

Textual rigidity directly mitigates these problems by limiting parties' ability to engage in strategic post-ratification hold-ups.[18] To borrow from Albert Hirschman's famous vocabulary of exit, voice, and loyalty, rigidity limits opportunities for voice (*i.e.*, amendment) as a way of maintaining loyalty (*i.e.*, investment in new national institutions).[19] At the same time, rigidity indirectly reduces the likelihood of outright exit through secession. It further facilitates "cooperative investment" in new subconstitutional institutions such as political parties and banks. Such investments not only enable the realization of welfare gains immanent in the new constitutional order,[20] but also anchor parties into the constitutional deal by raising the cost of exit.[21] In effect, Article V encourages all parties to have 'skin in the game.' A positive feedback mechanism thereby arises, as investment induces confidence, which in turn yields more investment; the prospect of exit recedes from sight. The odd fact that the Constitution is famously silent about secession is then explained by the fact that Article V itself raises the costs of secession, hence making it unattractive.

The argument proceeds as follows. Part I sets forth the conventional view of Article V, emphasizing the puzzle of our Constitution's surprising longevity. The heart of the Article is Part II, which identifies and describes a causal link between textual inflexibility and constitutional survival. I also furnish here evidence of the mechanism's operation during the early Republic. Part III then identifies and responds to potential objections, elaborates some consequences of the foregoing analysis, and then concludes by pointing toward how the analysis supports a "two-speed" account of the Constitution.

I. Article V in Constitutional Theory

---

[17] The idea of a "hold-up" in contract law is broader than the sense in which I am using the term. *See* 1A A. CORBIN, CORBIN ON CONTRACTS § 171, at 105 (1963) (using the term to refer to a situation in which a party to a contract, through economic duress, forces the other party to agree to a contract modification); *see also* Steven Shavell, *Contractual Hold-up and Legal Intervention*, 36 J. LEG. STUD. 325, 326–27 (2007) (discussing a range of hold-up problems).

[18] This assumes that the constitution is substantively justified. Of course, there may be a "severe conflict between constitutionality and justice." MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 13 (2006).

[19] To be clear, my argument is distinct from Hirschman's. His book is in large measure a critique of the perverse effects of relying on exit rights, and a description of alternative dynamics, such as one in which "loyalty holds exit at bay and activates voice." ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 78 (1970). The analogies between constitutional commitment and amendment in my argument and loyalty and voice in Hirschman's are suggestive, but hardly exact parallels.

[20] For a development of the concept of a cooperative investment, *see* Yeon-Koo Che & Donald B. Hausch, *Cooperative Investments and the Value of Contracting*, 89 AM. ECON. REV. 125, 126 (1999) (defining a cooperative investment as one that "generate[s] a direct benefit for a trading partner").

[21] The basic intuition here echoes Ernest Young's observation that there is "a set of political institutions" that do "most of our constitutive work [*i.e.*, establishing the various instruments through which governance happens] to … outside the Constitution itself." Ernest A. Young, *The Constitution Outside the Courts*, 117 YALE L.J. 408, 456 (2007).

This Part first describes how Article V works and explores the critiques offered by both comparative constitutional scholars and normative theorists. I also explore why informal mechanisms of constitutional amendments via judicial decisions or super-statutes cannot explain the fact that our Constitution's longevity "defies expectations."[22]

A. The Mechanics of Article V

Article V of the 1787 Constitution provides:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.[23]

Article V thus creates what is basically a two-stage proposal. The first stage (proposal) is done either by supermajorities in Congress or among the several states' legislatures. The second (ratification) requires larger supermajorities of the states acting in either legislatures or conventions.[24] In practice, only Congress proposes amendments, and with one exception, only state legislatures do the ratifying.[25] The de facto threshold for constitutional amendment, therefore, is two-third supermajorities in Congress plus successful votes in 75 state houses (assuming one is Nebraska's unicameral chamber).[26]

---

[22] ELKINS et al., ENDURANCE, *supra* note 1, at 65 ("There may be good reasons to adopt the Philadelphia model … but constitutional endurance is not one of them.").

[23] U.S. CONST. ART. V.

[24] The states are permitted to determine their own thresholds for ratification. *See* Dyer v. Blair, 390 F. Supp. 1291, 1306 (N.D. Ill. 1975) (Stevens, J.).

[25] Michael Stokes Paulsen, *A General Theory of Article V: The Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 734 (1993) (noting that no national convention has ever been called); Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 28 CONST. COMMENT. 53, 60 (2012); *see also* RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 126 (1988) (describing the use of state conventions for the Twenty-First Amendment). One consequence is that uncertainty lingers about how conventions might work. *Compare* William W. Van Alystne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295, 1305 (concluding that limited conventions are constitutional), *with* Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 198 (1972) (taking the opposite view).

[26] One reason for the dominance of the congressional proposal route is its lower transaction costs. Lutz, *supra* note 1, at 361–62.

The Framers included multiple mechanisms in Article V in response to cross-cutting pressures in the Philadelphia Convention.[27] Different factions amongst the delegates distrusted either the proposed federal government or the several states.[28] Delegates also divided "between the contending republican faiths of the era, often characterized as Whig versus Federalist."[29] Whereas Whigs believed "people shared a capacity and a willingness to identify and support the best interests of the community," Federalists "assumed that people's interests varied and that government served as an arbiter between them."[30] To allay fears on all sides, the Convention settled on a "compromise" mechanism that allowed either the federal government or state institutions to be bypassed entirely.[31] Whether Convention members expected that the combination of veto gates and voting rules contained in Article V to be especially onerous, though, is unclear. On the one hand, the delegates were keenly aware of their own fallibility. On June 11, Virginia delegate George Mason warned them that the "plan now to be formed will certainly be defective," and so "[a]mendments therefore will be necessary and it will be better to provide then, in an easy, regular and Constitutional way than to trust to chance and violence."[32] On the other hand, recorded votes belie Mason's concerns. On September 10, for example, the Convention voted to reject a ratification requirement of two-thirds of the states and instead unanimously endorsed a three-quarters voting rule for ratification.[33]

In the ensuing ratification debates, partisans for the Constitution nevertheless characterized its amendment rule as an optimum. Article V, wrote Madison in the *Federalist 43*,

---

[27] *See* DAVID E. KYVIG, EXPLICIT & AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at 55–60 (1996) (describing debates on amendment procedures at the Philadelphia Convention). The Constitution does not provide a voting rule for use by a ratifying state legislature.

[28] On June 11, 1787, George Mason expressed concern that Congress would abuse a power over constitutional amendments. 4 THE FOUNDER'S CONSTITUTION 577 (Philip B. Kurland and Ralph Lerner, eds., 1987) (quoting Mason as saying: "As the proposing of amendments is … to depend … ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case"). Alexander Hamilton, by contrast, warned that "[t]he State Legislatures will not apply for alternations but with a view to increase their own power." *id.*; *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 557–58 (Max Farrand, ed. 1966) [hereinafter 2 FARRAND] (noting Elbridge Gerry's concern that "two-third of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the State-Constitutions altogether"); *see also* KYVIG, *supra* note 27, at 57 (summarizing debate between Gerry and Hamilton).

[29] KYVIG, *supra* note 27, at 61.

[30] *Id*. at 61–62.

[31] *Id*. at 60 ("Article V evinced the essential compromise struck between the proponents of a strong central government and the advocates of retained state power.").

[32] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 202–03 (Max Farrand, ed. 1966); *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 286 (2005) [hereinafter AMAR, AMERICA'S CONSTITUTION] (describing a concern among the delegates that "an overly stiff amendment mechanism in a governing document ultimately doomed the document to irrelevance by inviting outright repudiation"). On the other hand, Philip Hamburger has argued that "[i]n 1776, it was assumed that a constitution had to be permanent, in the sense of being lasting and even rigid, subject only to alteration by the people." Philip Hamburger, *The Constitution and Social Change*, 88 MICH. L. REV. 239, 263 (1989). On this view, only "perfecting" amendments were envisaged by the Framers. *Id.* at 301. Other historians dispute this view. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 613 (1969) ("The American government never pretended … to perfection or to the exclusion of future improvements."). Whoever has the better of the historical argument, the "perfecting" only understanding of Article V seems squarely at odds with constitutional practice as it developed.

[33] 2 FARRAND, *supra* note 28, at 555. The vote on the motion for a two-third voting rule was held first, and was defeated five-six. *Id*.

was "stamped with every mark of propriety" and "guards equally against the extreme facility that would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."[34] The Madisonian position lingers in some quarters, where Article V is still glossed as "a compromise between two competing policies … a sensible mechanism for change."[35] The new constitution's amendment rule also received little attention even in the state conventions.[36] Only in the Virginia Convention did Patrick Henry's bleak claim that "the way to amendment is, in my conception, shut" stimulate some debate about amendment protocols.[37]

Article V, then, was a compromise between fundamentally divergent accounts of government and human nature. It passed into final, binding organic law attended by relatively little scrutiny.[38] Its puzzles would ripen only in the fullness of time.

B. The Puzzle of Article V

Neither Madison nor Patrick Henry possessed the empirical resources to establish whether Article V was, in fact, anomalously rigid or excessively yielding. Only in the last two decades have political scientists and legal scholars developed a stock of comparative knowledge about how constitutions work that permits the benchmarking of Article V against other constitutional amendment rules.[39] This section sketches the basic findings of that empirical research to show that Article V is, as Patrick Henry complained, unusually rigid. More importantly, I emphasize that the document's survival in light of this rigidity is a puzzle given the positive correlation between textual inflexibility and constitutional death—a puzzle that cannot be dissolved by recourse to extra-textual modalities of amendment.

---

[34] THE FEDERALIST NO. 43, at 284 (Madison) (I. Kramnick, ed. 1987). But, on the other hand, in the final Federalist paper, Alexander Hamilton did emphasize the ease of amending pursuant to Article V, and contrasted it to the difficulty of "establishing in the first instance, a complete Constitution." THE FEDERALIST NO. 85, at 485 (Hamilton); *see also* THE FEDERALIST NO. 23, at 184–85 (Hamilton) (explaining that because the "circumstances that endanger the safety of nations are infinite," then "no constitutional shackles can wisely be imposed" on national security powers, and thereby suggesting another exogenous motor of constitutional change); THE FEDERALIST NO. 37, at 243 (J. Madison) (arguing that the Constitution "provide[d] a convenient mode of rectifying … errors, as future experience may unfold them").

[35] Henry Paul Monaghan, *We the Peoples, Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 144 (1996); *see also* Dillon v. Gloss, 256 U.S. 368, 374 (1921) ("All amendments must have the sanction of the people of the United States, the original fountain of power . . . and ratification by these assemblies in threefourths
of the States shall be taken as a decisive expression of the people's will and be binding on all."). Kyvig also insists that "in reality the amending process carried out the Founders' intentions." KYVIG, *supra* note 27, at 475. This is an especially surprising claim given that Kyvig himself lucidly documents the plural, inconsistent and indeed mutually contradictory "intentions" of the various members of the Philadelphia Convention.

[36] According to Pauline Maier's recent comprehensive study, Article V was either praised (in Massachusetts) or not a subject of comment (in New Hampshire, North Carolina, and New York). PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 191, 220, 371 & 419 (2010).

[37] KYVIG, *supra* note 27, at 78–79.

[38] *Cf.* Melissa Schwartzberg, *The arbitrariness of supermajority rules*, 49 SOC. SCI. INFO. 61, 72 (2010) (identifying a "lack of reason supporting the supermajoritarian amendment threshold" at the Philadelphia Convention).

[39] Indeed, some argue that this study is still in its infancy. David S. Law, *Constitutions*, *in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 376, 384 (P. Cane & H.M. Kritzer, eds. 2010) ("[W]e know little about the conditions under which [constitutional text] succeeds in the sense of either defining practice or improving social welfare.").

1. Textual Rigidity and Constitutional Endurance

From the first major comparative study of why constitutions survive, it has been clear that Article V is an outlier. In 1994, political scientist Donald Lutz published a path-marking study using data sets covering 50 American states and 32 nations' constitutions.[40] Comparing amendment processes on a single numerical scale, Lutz found that "the United States has the second-most-difficult amendment process" after the former Yugoslavia.[41] The same study also analyzed the correlation between the choice of amendment rule and constitutional survival.[42] It identified a curvilinear relationship between amendment rates and durability, with constitutions tending to survive longest if amended at "moderate" rates.[43] Reanalysis of the same data, however, suggested that the relationship between amendment rate and durability was "very weak" and "one can have extremely little confidence in the estimated optimal rate of amendment."[44] Lutz's finding might also be explained by a missing variable in his regressions. For example, a country exposed to external military or fiscal shocks may as a result both amend its constitution frequently and also repeatedly skirt constitutional death.[45]

More recent empirical work has addressed these criticisms. The most comprehensive effort along these lines is a study based on data about 935 constitutional systems operating between 1789 and 2006.[46] This study finds "strong evidence" that "formally rigid constitutions die more frequently" than flexible ones.[47] To identify predictors of constitutional endurance, the study's authors—Ginsburg, Elkins, and Melton—construct a multivariate event-history model. Their model enables calculation of a baseline estimate of constitutional mortality. It then allows for estimates of the effect of diverse endogenous design and exogenous economic and political factors to be calculated.[48] To address collinearity problems, the study defines "amendment ease" by regressing amendment rate "on a set of amendment procedure variables and as well as on a host of factors that should predict political reforms."[49] The Ginsburg, Elkins, and Melton study is presently the gold standard in empirical comparative constitutional analysis.

---

[40] Lutz, *supra* note 1, at 355.
[41] *Id*. at 362.
[42] *Id*. at 360, 362 (Tables 2 & 5). Both tables divide the sample into eight subsamples based on the rate of a constitution's formal amendment, and then shows the average duration of a constitution in that subsample.
[43] *Id*. at 360, 362.
[44] John Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 L. & SOC. INQ. 501, 522 (1997); *see also* Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, 96, 105 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1833634 (noting that "for many existing studies [including, presumably Lutz's] the number of independent observations is sufficiently small that there is not enough statistical power to pick up the distinct effect of various hurdles to amendment").
[45] In addition, any effect of an amendment rule on constitutional survival may be confounded by other constitutional design decisions. TORSTEN PERSSON & GUIDO TABELLINI, THE ECONOMIC EFFECTS OF CONSTITUTIONS 105–12 (2005) (presenting cross-national data on the effects of these design variables). A further problem is that powerful elites may respond to changes in formal institutions by establishing informal regimes that "fully offset" changes in de jure power. Daron Acemoglu & James A. Robinson, *Persistence of Power, Elites, and Institutions*, 98 AM. ECON. REV. 267, 287 (2008) (noting that such offsetting is "broadly consistent with a number of historical examples").
[46] ELKINS et al., ENDURANCE, *supra* note 1, at 48–51 (describing methodology whereby dataset was constructed). A Constitution is defined as a text that is self-identified in its text as a higher law, or that is defined "the basic pattern of authority by establishing or suspending an executive or legislative branch of government." *Id*.
[47] *Id*. at 82.
[48] *Id*. at 129–39 (describing model in detail).
[49] *Id*. at 101.

Consistent with Lutz's study, Ginsburg, Elkins, and Melton find that the U.S. Constitution "is scored as one of the most inflexible" ever drafted, scoring a 0.04 on a scale from 0 to 1.0.[50] They further conclude that amendment ease is a "strong predictor of longevity", although its effect is curvilinear, with the very easiest-to-amend documents being especially fragile.[51] In addition to textual flexibility, Ginsburg, Elkins, and Melton conclude that "inclusive provisions," greater textual scope (*i.e.*, more subject-matter coverage), and greater specificity promote a constitution's survival.[52]

To explain these results, Ginsburg, Elkins, and Melton offer a general causal model for the life and death of constitutions. They argue that the creation of post-ratification enforcement mechanisms is "key" to constitutional survival.[53] That is, they emphasize how constitutional designers must focus on providing sufficient 'sticks' for enforcers in the basic document to ensure parties do not shade or defect after ratification. To be sure, Ginsburg, Elkins, and Melton also briefly touch on the possibility that 'carrots' may matter when they talk of 'locking in' a constitution by "establish[ing] increasing streams of political benefits [that] may be better able to withstand external pressures."[54] But this is not their main focus. And as Part II aims to show, it is possible that constitutional survival derives from a mechanism that turns less on the prospect of punishing defectors and more on the entanglement of contracting parties in positively productive relationships.

All three of the factors their empirical analysis highlights as correlates of constitutional survival, Ginsburg, Elkins, and Melton explain, make enforcement of constitutional rules easier by increasing the number of stick-wielders. That is, inclusivity draws into the constitutional bargain a larger number of potential enforcers, whose diverse interests are then reflected in an increasingly specific text. Similarly, flexibility is desirable because the ease of amendment "induces smaller groups to mobilize for constitutional amendment" by giving them a greater "stake in the survival of the document," which can be amended to expand the bargain and account for emergent interests and problems.[55] In contrast, a terse, inflexible, and under-inclusive constitution is likely to sap the incentives for potential enforcers to organize and act for the collective good.[56]

This model yields puzzlement when applied to the U.S. context—as Ginsburg, Elkins, and Melton candidly say. "Specificity, inclusion, and flexibility," they note, are not virtues

---

[50] *Id*.
[51] ELKINS et al., ENDURANCE, *supra* note 1, at 140.
[52] *Id*. at 139, 141.
[53] *Id*. at 76 (A "key factor in calculus of … breach is the ability of other parties to the bargain to enforce the terms of the agreement.").
[54] *Id*. at 91.
[55] *Id*. at 88–89.
[56] Ginsburg, Elkins, and Melton describe the initial Constitution as having "low" initial levels of inclusion. *Id*. at 163. There is persistent debate on how to gauge the representativeness of the Constitution's drafting. *Compare* AMAR, AMERICA'S CONSTITUTION, *supra* note 32, at 18, 64–68 (arguing that ratification involved "the widest imaginable participation rules" at least "in the eighteenth century," and also underscoring the democratic pedigree of Article I's franchise rule), *with* WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION 181 (2007) (noting that "the Framers were, demographically speaking, unrepresentative in the extreme" and "felt the need to conceal their intentions" because of this unrepresentativeness).

possessed by the 1787 Constitution.[57] To the contrary, our Constitution's longevity "defies explanation" on this theory because it "embodies many of the elements that … should lead to increased mortality rates."[58] This puzzle, it should also be noted, resists easy dissolution by ascribing American national success solely to economic and demographic factors. The analysis performed by Ginsburg et al. controls for a host of such non-legal factors and still finds text to be a significant influence on constitutional survival. Their work, in order words, is strong counsel against the simple expedient of disregarding textual specifications of epiphenomal formalisms. To the contrary, the fixed verbal content of constitutional law seems to matter, even if it is not exhaustive of all potential causes of regime survival. Assuming that one takes the U.S. Constitution as having survived until now[59]—as both they and I do—there is a puzzle in how to reconcile textual rigidity and constitutional survival in the American context.

2. The Informal Amendment Solution

But is there a simple solution to this puzzle? To explain the survival of the U.S. Constitution, Ginsburg, Elkins, and Melton contend that Article V has been supplemented with "informal flexibility…through informal [judicial] interpretation and various bisectional compromises."[60] They build here on other scholars' proposals that formal "constitutional amendments have not been an important means of changing the constitutional order" in light of alternative, informal means.[61] Commentators have thus elaborated Court-centered accounts, which point out that once congressional or executive power swells, it is the judiciary that steps in to legitimate the change.[62] These accounts point to decisions such as *McCulloch v. Maryland*[63] and *Crowell v. Benson*[64] as instances in which the Supreme Court has de facto ratified constitutional transformation.[65] Alternatively, Congress-centered accounts of constitutional change identify framework "super-statutes" as key vectors of constitutional change those that "transform Constitutional baselines," "create entrenched governance structures and norms," and guide the development of norms otherwise only ambiguously articulated in the textual constitution.[66] Alternatively, constitutional change can be identified as a series of "transformative moments" at which politically mobilized popular movements change the "higher law" without changing the constitutional text.[67] Given these informal alternatives to Article V,

---

[57] ELKINS et al., ENDURANCE, *supra* note 1, at 166.
[58] *Id*. at 65.
[59] One might alternatively argue that the Constitution failed in 1861, and that the post-Civil-War dispensation is fundamentally a new one. This view is sufficiently unusual today I do not address it in this Article.
[60] *Id*. at 177; *id*. at 163 ("Judicial review (as well as the evolution of popular understandings) has provided a mechanism for updating the Constitution, thus ensuring that its allegedly timeless principles are applied to modern realities ….").
[61] Strauss, *Irrelevance*, *supra* note 9, at 1459; *cf.* Sanford Levinson, *Political Implications of the Amending Clauses*, 13 *Const. Comm.* 107, 109 (1996) [hereinafter Levinson, *Political Implications*] ("[I]t is naïve to identify 'amendment' only as formal textual additions (or subtractions).").
[62] Strauss, *Irrelevance*, *supra* note 9, at 1467–73.
[63] 17 U.S. (4 Wheat.) 316 (1819).
[64] 285 U.S. 22 (1932).
[65] Strauss, *Irrelevance*, *supra* note 9, at 1473 (invoking both *McCulloch* and *Crowell* to make this point).
[66] ESKRIDGE & FEREJOHN, *supra* note 1, at 6–9; *id.* at 12–13 ("America enjoys a constitution of statutes supplementing its written Constitution as to the most fundamental features of government.").
[67] Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1056-57 (1984). For an application of this theory to the Reconstruction, see BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 142–50 (1991). Critiques of Ackerman's theory have refined the account of the specific mechanisms involved in

the mystery of our Constitution's rigidity might seem to explain. Simply put, it is easy to amend the Constitution—just not through Article V.

But the puzzle is not so easily dissolved. Alternative mechanisms that rely on legislative or judicial action[68] cannot explain constitutional survival, particularly in the early Republic, for three reasons. First, neither judicial benedictions nor landmark statutes can entirely pick up the slack left by Article V-induced rigidity in a way that explains the Constitution's survival because neither is a full substitute for Article V on its own terms. Judicial and legislative mechanisms are channels for adding to, not subtracting from, the constitutional fabric. Neither Congress nor the courts can easily eliminate undesirable constitutional text.[69] Imagine, to use a non-U.S. example, an emergency powers provision that destabilizes governments by vesting presidents with power to declare unilaterally suspensions of legislative rule.[70] Neither legislative nor judicial action can do much to resolve the ensuing hazards.[71] The limits on informal amendment thus at least hint that something more is needed to explain the Constitution's survival.

Second, legislative and judicial mechanisms for constitutional change outside Article V interact with and hinder enforcement via the specificity-based mechanisms identified by Ginsburg, Elkins and Melton. Amending outside Article V increases the cost of specificity-based constitutional enforcement because it increases uncertainty about what is in the constitution and thereby makes it more costly to identify and police violations. Under a regime wherein informal

---

"transformative." *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1068 (2001) (emphasizing the importance of "[p]artisan entrenchment through presidential appointments to the judiciary"); James E. Fleming, *We the Unconventional American People*, 65 U. CHI. L. REV. 1513, 1537–39 (1998) (emphasizing the importance of creative acts of judicial review). *But see* David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 40 (1990) ("[T]he bottom line is that if the Constitution is to continue to be the ultimate source that protects individual rights against encroachment by government power and political majorities, then the affirmative words in Article V must be understood to negative other conceivable modes of amendment.").

[68] For the purposes of this discussion, I treat Ackerman's theory of controversial moments as a form of constitutional change that occurs through legislatures and courts. The populist and political elements of his accounts are orthogonal to my point here.

[69] *See* LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 10, at 160 (2006) [hereinafter LEVINSON, OUR UNDEMOCRATIC CONSTITUTION] ("Clever adaptive interpretation is not always possible, however, and Article V has made it next to impossible to achieve such adaption where amendment is thought to be a necessity"). This is not to say it is impossible to eliminate constitutional text through legislative or judicial action. An example may be the treatment of the Republican Form of Government Clause of Article IV. *See Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (finding arguments under that clause nonjusticiable). It might also be argued that the Court once read certain rights clauses so narrowly as to sap them of any real meaning. Until *District of Columbia v. Heller*, 554 U.S. 570 (2008), some might have said as much about the Second Amendment. But it would seem more difficult for the Court to achieve the same elimination effect respecting much-criticized structural provisions, such as apportionment rules for the House and Senate or the Electoral College mechanism. *See* LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 10, 49–62, 81–97 (developing further criticisms). Congress, however, might be able in some instance to develop workarounds. *See* Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2000).

[70] A well-known example is Article 48 of the Weimar Constitution. RENÉ BRUNET, THE NEW GERMAN CONSTITUTION 308 (Joseph Gollomb trans., 1922).

[71] Could an undesirable provision be remedied simply by being ignored? Although there are provisions of the U.S. Constitution that have fallen into desuetude, it is worth noting the role that courts have played in stymieing their development. *See, e.g.*, *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (treating Guaranty Clause of Art. IV as raising only political questions); *Slaughter-House Cases*, 83 U.S. 36 (1873) (narrow construction of the privileges and immunities clause of the Fourteenth Amendment). In practice, it thus seems that desuetude is enabled by judicial intervention.

amendment is allowed, violators of an original deal can cloth transgressions in the terminology of extra-textual amendment. They can thus seek to obscure self-dealing conduct. Moreover, historical experience suggests that doubt will often arise as to whether a non-Article V constitutional amendment has even worked.[72] This conduces to even more uncertainty about the constitution's content. Finally, the potential for extra-textual amendment undermines potential enforcers' incentive to labor for changes to be memorialized in constitutional text. In all these ways, the availability of extra-textual amendment works at cross-purposes to the enforcement mechanism envisaged by Ginsburg, Elkins, and Melton. This suggests that informal amendment mechanisms have complex and partially offsetting effects—undermining some causes of constitutional enforcement while contributing to a regime's durability in other ways.

Finally, and perhaps most importantly, the key legislative and judicial contributions to constitutional development come too late to explain the survival of the 1787 Constitution. As Ginsburg, Elkins, and Melton persuasively demonstrate, a constitution is at gravest risk of demise in the very first two decades of its existence.[73] And yet the leading account of our "republic of statutes" focuses on such enactments as the Sherman Act of 1890, Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Social Security of 1935.[74] With their exception of the Sherman Act, these key statutory props of the American constitutional order are twentieth-century creations.[75] The temporal distribution of judicial review is also such that it must be rejected as an adequate substitute for Article V at the instant of greatest need.[76] Judicial review of state or federal statutes was rare prior to the Civil War.[77] This should not surprise: The federal judiciary developed institutional capacity to hear the volume of cases necessary to play a leading role in constitutional development only after the Civil War.[78] Consistent with this view, analyses

---

[72] Keith Whittington, *From Democratic Dualism to Political Realism: Transforming the Constitution*, 10 CONST. POL. ECON. 405, 411 (1999) (developing this point in reference to Ackerman's account of dualist democracy).

[73] ELKINS et al., ENDURANCE, *supra* note 1, at 120 (noting that constitutions have a "median survival time" of nineteen years and that their risk of death peaks at age seventeen).

[74] ESKRIDGE & FEREJOHN, *supra* note 1, 6–24 (providing a general overview of their argument, and mentioning these enactments).

[75] Another possible exception concerns what Eskridge and Ferejohn call the "monetary constitution." *Id*. at 311. But their argument is that "an independent central bank presiding over a national paper currency," which they view as the central and defining element of the monetary constitution, "emerged as a superstatuory framework regime only in fits and starts." *Id*. at 313. Only with the Federal Reserve Act of 1913 did the framework finally distill. *Id*. at 333–39. Thus, even the monetary constitutions fit the temporal pattern they imply in other domains.

[76] Indeed, the leading argument in favor of "the claim about the irrelevance of the amendment process" is explicitly offered "in the context of a mature democratic society, not a fledgling constitutional order." Strauss, *Irrelevance*, *supra* note 9, at 1460. The mechanism I develop below concerns "how [the constitution] becomes established in the first place" and not "how a constitutional system changes." *Id*. My argument has a distinct domain from Professor Strauss's.

[77] *See* Aziz Z. Huq, *When was Judicial Self-Restraint?*, 100 CAL. L. REV. 579 (2012) [hereinafter Huq, *Judicial Self-Restraint*]; *see also* Mark A. Graber, *The New Fiction:* Dred Scott *and the Language of Judicial Authority*, 82 CHICAGO-KENT L. REV. 177, 180–81 (2007) (counting twenty pre-Civil War cases in which the Court imposed constitutional limits on congressional power but finding no "judicial tradition, activist or restrained . . . at the time when *Dred Scott* was decided"). In recent years, revisionist accounts of judicial review have sought to identify a more robust role for the Court in the early republic. But even self-consciously revisionist accounts marshal only weak evidence of judicial activity on constitutional matters in that period. Tom S. Clark & Keith E. Whittington, *Ideology, Partisanship, and Judicial Review of Acts of Congress, 1789-2006*, at 11 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1475660 (graphing trends in judicial review).

[78] *See* Howard Gillman, *How Political Parties can use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. PO. SCI. REV. 511, 512 (2002) (arguing that the "understaffed and unpaid"

of antebellum judicial review furnish scant reason to believe courts were an effective substitute for Article V change. There are two instances in which the Court invalidated federal statutes before the Civil War. In the first instance, the Court struck down an insignificant fragment of the 1789 Judiciary Act based upon a dubious statutory interpretation.[79] That same year, the Court ducked confrontation with Congress by allowing the legislature to disestablish existing federal courts—starkly illustrating the court's powerlessness in the teeth of political opposition.[80] Almost sixty years later, the Court once again invalidated a federal law, and this time garnered vigorous criticism while failing to check a march to civil war and a concomitant repudiation of the Court's legal reasoning.[81] Given this track record, it simply cannot be said that federal courts or Congress effectively bore the responsibility of ratifying and enabling fundamental change in the early Republic as arguably they do today.

One response to this would be to insist on the constitutional creativity of early generations of American politicians. Indeed, it is indupitably true that early legislators viewed the Constitution as a central lodestar for their work, as the late David Currie demonstrated in his magisterial and extensive history of the Constitution in Congress.[82] Moreover, there was no wholesale absence of "unconventional adaptation" and "political innovation" through the political crises of the early Republic.[83] Nevertheless, the most important constitutional crisis of the early Republic did produce a (surpassingly rare) constitutional change in the form of the Twelve Amendment, rather than some extra-textual shift.[84] Further, Currie's history suggests that fidelity to the Constitution limited, rather than expanded, the options from which conscientious legislators could choose. Path-dependent institutional legacies from the ensuing decisions should thus not be mistaken for conscious efforts at constitutional transformation.[85] Indeed, I will argue in Part II that much of this institutional back-and-fill should be understood as subconstitutional institutional development that was enabled by textual rigidity, rather than constitutional transformation that formally demanded a constitutional amendment.[86]

Only one proposed model of informal constitutional change addresses events during the early Republic. It focuses on legislated compromises between Northern and Southern states beginning with the 1820 Missouri Compromise and ending with the 1854 Kansas-Nebraska Act, which each promoted "sectional balance" by maintaining the equilibrium between slave and free

---

judicial infrastructure headed by justices perennially distracted by the travails of riding circuit of 1800 had "become by century's end a real third branch of government").

[79] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

[80] *See Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

[81] That case, of course, is *Dred Scott v. Sanford*, 60 U.S. 363 (1857).

[82] *See generally* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801 (1997). For a specific example of important legislation in the early Congress with constitutional overtones, see the discussion of removal power questions in Aziz Z. Huq, *Removal as a Political Question*, 62 STAN. L. REV. 1, 10 & n.33 (2013) [hereinafter "Huq. *Removal*"].

[83] Joanne Freeman, *The Election of 1800: A Study in Political Change*, 108 YALE L.J. 1959, 1968-69 (1999).

[84] *Id*. at 1989.

[85] Ongoing work by my colleague Alison LaCroix on the use of federal spending in the early Republic attests to the perceived binding force of the written constitution, and the perceived need for Article V-mediated change to the text before the deployment of measures universally viewed as desirable.

[86] It is important to concede though, that the line between constitutional change and subconstitutional institutional development is a contestable one, and I do not claim otherwise.

states in the Senate.[87] Sectional balance legislation, however, was not perceived at the time as amending the Constitution. Rather, it was understood as liquidating a principle immanent "from the beginning … in the projection of an equal number of new free and slave states in the territories in the 1780s."[88] Such legislation evinced loyalty to the original deal. The use of sectional balance legislation, therefore, is not evidence of successful amendment, but instead evidence that the rigidity and stability of the original constitutional deal played a role in promoting constitutional survival.

In sum, informal amendment protocols, whether they rely on judicial decisions, framework statutes, or constitutional moments, can provide only a partial explanation of the Constitution's longevity. In particular, they do a poor job of explaining constitutional survival in the parlous antebellum period.

C. The Normative Critique of Article V

The positive puzzle of Article V invites a suite of normative objections to Article V. If the latter provision is unusually rigid, then the range of possible amendments will be functionally cabined to only "perfecting" measures[89] that are relatively inconsequential.[90] As a result, many commentators condemn Article V as "comatose"[91] and functionally "irrelevant."[92] Two lines of criticism follow. The first focuses on Article V's countermajoritarian effect. The second condemns Article V's distributive consequences.

Consider first the countermajoritarian critique. Many commentators claim that, "from both a historical and comparative perspective … Article V makes even the proposal of amendments by Congress too difficult."[93] Inflexibility imposes the "dead hand"[94] of past

---

[87] *See* Barry Weingast, *Designing Constitutional Stability*, *in* DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY: ANALYSIS AND EVIDENCE 343, 357–58 (Roger D. Congelton & Birgitta Swedenborg, eds., 2006) [hereinafter Weingast, *Designing Constitutional Stability*] (arguing that "an additional institution … called sectional balance" was needed to provide "a static security for southerns and their property in slaves" (emphasis omitted)); ELKINS et al., ENDURANCE, *supra* note 1, at 83 (adopting sectional balance argument). Weingast's claim appears to be that these laws in effect *changed* the Constitution by adding a new element to the deal.

[88] Weingast, *Designing Constitutional Stability*, *supra* note 87, at 357.

[89] Hamburger, *supra* note 32, at 301.

[90] *See* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1741 (2007) ("A funny thing happened to Americans on the way to the twenty-first century. We have lost our ability to write down our new constitutional commitments in the old-fashioned way.")

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

[92] Strauss, *Irrelevance*, *supra* note 9, at 1459; *accord* Id? R.G. Dixon, *supra* note 91, at 932 (arguing that Article V has become "little more than a constitutional toy for occasional distract and amusement").

[93] Dixon, *Partial Constitutional Amendments*, *supra* note 1, at 655 *accord* LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 10, at 165 ("Article V constitutes an iron cage with regard to changing some of the most important aspects of our constitutional system."); Griffin, *supra* note 5, at 173; *see also* Stephen Holmes, *Precommitment and the paradox of democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 195, 195 (J. Elster & R. Stagstad, eds. 1988) [hereinafter Holmes, *Precommitment*] ("Why should a constitutional framework, ratified two centuries ago, have such enormous power over our lives today?").

[94] *See* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 609 (2008) ("Th[e] dead hand complaint can be broken into three claims: that it is feasible for the living to depart from arrangements indicated by the Constitution; that our generation participated in little of the process responsible for the text; and that the Constitution is otherwise imperfect for our time."); *accord* McGinnis & Rappaport, *supra* note 5, at 1730.

generations on current preferences.[95] The countermajoritarian critique focuses on Article V's supermajoritarian character.[96] By demanding extraordinarily large coalitions at both the proposal and the ratification stage, Article V endows current minorities with disproportionate power to block efforts by supermajoritian coalitions of more than seventy percent of the nation to fix perceived constitutional problems. A blocking minority, moreover, may reflect the interests and beliefs of a bygone political era that no longer commands majoritarian assent and yet is able to maintain disproportionate national influence. Rigidity has immediate costs insofar as it prevents correction of what some perceive as unjust or dysfunctional parts of the 1787 Constitution, such as the Senate's apportionment rule, the ill-defined scope of executive power, and the use of life tenure for federal judges.[97] These concerns have prompted proposals of an extra-textual plebiscitary mechanism for fundamental change without supermajoritarian consent.[98]

'Dead hand' criticism need not collapse into wholesale rejection of constitutional entrenchment. Even an ardent majoritarian can in good conscience endorse off-the-rack governance structures to reduce the transaction costs of governing by eliminating each successive generation's need to recreate basic democratic frameworks.[99] She might also endorse the 1787 Constitution as an adequate if imperfect "blueprint for democratic governance" in which there is some circulation of elective officer-holders and a framework that both reduces the risk of defection[100] and also "discourage[s] frivolous attempts to revise the Constitution every time political deadlock occurs."[101] That is, endorsing majoritarianism is not the same as rejecting constitutionalism. Nevertheless, even if some constitutional entrenchment is desirable, Article V may still go too far. After all, many other constitutions operate without its extreme rigidity. It is hard to see why the United States needs so much more textual rigidity than other countries.

---

[95] *See* Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251, 251 (1996) (developing objection from democracy to constitutional inflexibility); *see also* Levinson, *Political Implications*, *supra* note 61, at 123 (accepting the justification for entrenchment in some cases, such as the First Amendment, but also arguing that there are "no good reasons to support the formal status engendered by Article V" on other questions). It is important to note that constitutional binding is dissimilar from the kind of self-dealing that individuals engage in (with the most famous example being Ulysses tying himself to the mast) in as much as the Founding generation and current generations are wholly different entities. *See* JON ELSTER, ULYSSES UNBOUND 92 (2000) [hereinafter ELSTER, ULYSSES UNBOUND].

[96] Holmes, *Precommitment*, *supra* note 93, at 195 ("Why should a minority of our fellow citizens be empowered to prevent amendments to the Constitution?").

[97] *See* LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 10, at 25–158; *accord* ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2001) (developing arguments from democratic theory against current national democratic structures).

[98] *See* Amar, *Consent of the Governed*, *supra* note 8, at 457 (explaining that citizens have a legal right to amend the Constitution "via majoritarian and populist mechanism akin to a national referendum, even though that mechanism is not explicitly specified in Article V"); *see also* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044 (1988) (arguing for "constitutional amendment by direct appeal to, and ratification by, We the People of the United States").

[99] STEPHEN HOLMES, PASSIONS AND CONSTRAINTS: THE THEORY OF LIBERAL DEMOCRACY 163 (1995) (comparing constitutional rules to grammatical rules, which "do not merely retrain a speaker" but also "allow interlocutors to do many thanks they would not otherwise have been able to do or even have thought of doing").

[100] Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 TEX. L. REV. 1985, 1995 (2003); *see also* Jon Elster, *Intertemporal Choice and Political Thought*, *in* CHOICE OVER TIME, 35, 38 (Jon Elster & G. Loewenstein, eds., 1992) [hereinafter Elster, *Intertemporal Choice*] ("The purpose of entrenched clauses … is to ensure a reasonable degree of stability in the political system and to protect minority rights.").

[101] HOLMES, *supra* note 99, at 155.

A second line of criticism of Article V identifies a failure to accommodate specific constituencies in the amendment process. Hence, Article V is criticized both as being too friendly to the several states and as evincing excessive hostility to local interests. On the one hand, Article V is condemned for allocating too large a role to the states qua political entities, in lieu of reflecting the preferences of citizens on a roughly per capita basis.[102] Given the peculiar political geography of the United States, this means a "large majority [must] dread and sometimes submit to constitutional innovations appealing only to a minority."[103] On the other hand, different critics allege that the national convention mechanism for proposing amendments is so "broken" that Congress maintains an "effective veto" on constitutional change and uses it exclusively to "promote amendments that accord with its own preferences."[104] Another pro-federalism critique argues Article V is flawed because it creates agency slack between the national electorate and its various representatives in federal and state governments.[105] On the latter view, Congress's de facto agenda-control over the process of constitutional amendment pursuant to Article V may "expand the federal government and increas[e] Congress's ability to extract rents and redistribute wealth."[106] On this view, extensions of the franchise achieved by the fifteenth, nineteenth, and twenty-sixth amendment are not occasions for celebration, but are to be condemned as efforts to "provid[e] a source of voters [for] the enacting coalition" and thereby "increas[e] the likelihood of redistribution of wealth through government."[107]

Criticism of Article V, however, is not universal. A handful of commentators claim that because the Constitution's original design was optimal, it makes sense to make formal change as costly as possible.[108] Taking constitutional perfection yet further, other commentators propose

---

[102] Writing in the early 1960s, Charles Black thus identified and condemned the possibility of a successful constitutional amendment being enacted with the support of a bare 40 percent of the nation's population. *See* Black, *supra* note 25, at 959.

[103] *Id*.

[104] Rappaport, *supra* note 3, at 1512–13. To the extent that this argument is founded on an originalist claim about federalism, it is puzzling As Kyvig explains, however, the supermajority rules of Article V already "reflected the Founders' vision of federalism" and the appropriate level of deference to states. KYVIG, *supra* note 27, at 471. To criticize Article V on federalism grounds, Kyvig suggests, is to second-guess the Framers' calibration of the federal-state balance. Interestingly, Rappaport goes far beyond the position of the celebrated states' rights advocate John Calhoun, who anticipated that Article V would protect the South from Northern domination up to the point where secession would be required. *See* John C. Calhoun, *A Discourse on the Constitution and Government of the United States*, *in* A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 111, 158 (Richard K. Cralle ed., 1968). This again suggests that Rappaport's baseline conception of federalism at work is non-originalist in nature.

[105] Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 161–62 (1993).

[106] *Id*. at 115; *id*. at 129–30 (arguing that "many of the amendments indirectly facilitated the institutional ability of Congress to serve as a source of rents").

[107] *Id*. at 143. Boudreaux and Pritchard imply that these expansions of the franchise, which are generally seen as normative desirable and indeed long overdue, were in fact welfare-reducing. They thus argue that giving African-Americans and women the vote "exacerbate[d] the collective-action problem of the electorate generally" by "reduc[ing] average voter monitoring of politicians." *Id*. at 143. They hence seem to assume that African-Americans and women *ought* always to be have excluded from the electorate—a view I do not share.

[108] *See, e.g.*, Joseph R. Long, *Tinkering with the Constitution*, 24 YALE L.J. 573, 580, 589 (1915) ("The constitution of the United States is justly regarded as the greatest instrument of government ever ordained by man. For more than a century it stood almost unchanged….. The present mode of amendment assures its stability while permitting natural evolution."); *see also* LAWRENCE G. SAGER, JUSTICE IN PLAINSCLOTHES: A THEORY OF AMERICAN

that Article V has in fact enabled an effective sorting of good, ratified amendments from undesirable, unratified amendments.[109]

Neither line of defense, however, is successful. Both reason backward from the perceived perfection of the original 1787 text and later constitutional amendments. But the original constitution contained explicit protections for the slave trade and awarded representational subsidies based on states' possession of slave populations.[110] Nor are all subsequent amendments equally laudable.[111] For example, amendments now hymned for their emancipatory, democracy-promoting consequences may also have had the perverse collateral effect of strengthening other kinds of political exclusion.[112] Other amendments now celebrated for rectifying errors in the 1787 constitution failed for decades to have meaningful effect on the ground.[113] It requires a pinched field of vision to discern perfection in these outcomes. Nor does the historical pattern of failed amendments provide ground for Whiggish enthusiasm. Among the failed amendments littering American history are proposals that today would likely be viewed by many as desirable, including bans on child labor,[114] equal rights for women,[115] and the full enfranchisement of

---

CONSTITUTIONAL PRACTICE 164 (2004) (arguing that "the Article V requirements for the amendment of the Constitution are an attractive part of the pragmatic justice-seeking quality to our constitutional institutions"); McGinnis & Rappaport, *supra* note 5, at 1720 ("[T]he rules for enacting and amending the United States Constitution are in large measure desirable."). These arguments for the Constitution's optimality rest on the epistemic benefits of Article VII's supermajoritarian character of Article VII, *id*. at 1096 (invoking Condorcet's jury theorem); and on the idea that Article V's obduracy prompted the Framers to take into account the interests of subsequent generations, Sager, *supra*, at 164 ("The obduracy of the Constitution to amendment requires of members of the ratifying generation that they chose for the Constitution principles and provisions not just for themselves but for their children."). Neither of these arguments is persuasive, even aside from obvious flaws in the 1787 Constitution. First, it is not clear the demanding conditions for Condorcetian epistemic advantage, in particular the assumption of uncorrelated errors, and were in fact met in 1787. *See* Christian List & Robert E. Goodin, *Epistemic Democracy: Generalizing the Condorcet Jury Theorem*, 9 J. POL. PHIL. 277, 286 (2001). To the contrary, the intensive deliberations around the Constitution undermine any inference that the condition of independent errors was satisfied. *Cf.* ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 30 (2009). And because a 1787 supermajority is numerically smaller than a 2012 majority, *id*. at 11, the Condorcet's theorem favors the latter and not the former. Second, Sager's argument in favor of Article V assumes that constitutional rigidity induced members of the Founding generation to act in a benevolent way, by taking into account the preferences of future generations. But Sager does not explain either how the Founding generations could intuit what those preferences would be, or what induces a benevolent—as opposed to a condescending or hostile—view of future generations.

[109] This is an argument invoked by scholars at opposite poles of the political spectrum. *Compare* Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561, 1564 (1998) (arguing that "most of the ratified amendments, by any measure, were desirable revisions"), *with* McGinnis & Rappaport, *supra* note 5, at 1724–28 (lauding Article V on the basis of proposed amendments that have failed).

[110] *See* DAVID WALDENSTEICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION 3, 71–105 (2009) (noting six constitutional clauses that "directly" concern slavery, and five others known by the Framers to have important effects on slavery—all but one of which "protect[ed] slavery").

[111] McGinnis & Rappaport, *supra* note 5, at 1697.

[112] For example, Section 2 of the Fourteenth Amendment was drafted in a way that confirmed the exclusion of women from the mandatory franchise, and was understood to do so at the time. *See* Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1612–13 (2012) (discussing enactment history).

[113] Hence, the mere enactment of the Reconstruction Amendments did not redress the compounding effects of slavery. For a recent, narrative account of this history see DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACKS FROM THE CIVIL WAR TO WORLD WAR II (2009).

[114] J. Res. 13, 36th Cong., 12 Stat. 251 (1861).

[115] H.R.J. Res. 208, 92nd Cong., 86 Stat. 1523 (1972).

citizens residing in the District of Columbia.[116] It is hardly obvious these measures were "of doubtful value,"[117] or that the nation was better off upon their defeat. Defenses of Article V grounded in constitutional perfectionalism, in short, rest on highly controversial normative and empirical judgments.[118] They cannot be sustained without implausible assumptions about the wisdom of the Founding generation and the precision of Article V as a sorting device.

* * *

Article V, in sum, presents a puzzle. Constitutions tend to survive when they are flexible. Yet our Constitution is both among the world's most rigid and its oldest. This is anomalous and calls for explanation. The rigidity of Article V, moreover, generates a suite of trenchant normative critiques. To date, its defenders have failed to respond to those charges. They have failed to answer Patrick Henry's question: Why so much rigidity?

II. The Function of Article V in the Early Republic

This Part develops an answer to Part I's puzzle by showing that Article V-induced rigidity can foster constitutional longevity. Drawing on recent literature on long-term contracting, it identifies two beneficial effects from textual inflexibility that may conduce to constitutional survival during the first few decades of a constitution's existence. First, rigidity mitigates a potentially fatal 'hold-up' problem that can preclude constitutional ratification and discourage vital investments in the institutions needful to make a new constitution work in its early decades. Second, the post-ratification investments induced by textual rigidity catalyze a virtuous circle, yielding long-term anchoring effects. My aim here is to show that both mechanisms are possible in theory and to offer evidence of their operation during the early Republic.[119]

I should clarify at the outset that my claim is not about the original expectations of the Framers even though it is focused on the first decades of the Constitution's existence. I do not claim that the Framers envisaged or intended the mechanism limned here. The drafting history of the Constitution, and indeed eighteenth-century political science more generally, evinced scant grasp of the "difficulties encountered in conceptualizing and modeling incomplete contracting."[120] "[R]ealistic and gifted as they were, many of their key assumptions proved to be false, and the constitution they created has survived not because of their predictions but in spite of them."[121] My claim thus concerns actual not intended effects. To adapt Adam Ferguson's dictum, our Constitution's survival may be "the result of human action, but not the execution of any human design."[122]

---

[116] H.R.J. Res. 554, 95th Cong. 92 Stat. 3795 (1978).
[117] McGinnis & Rappaport, *supra* note 5, at 1726.
[118] *Cf.* Henry Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981) (arguing against claims that the Constitution supplies solutions to all emergent social problems).
[119] To be clear, my claim is about the value of textual rigidity *early in the life of a constitution*. As Part III.C explains, rigidity is likely substantially less desirable in later periods of constitutional development.
[120] Tirole, *supra* note 11, at 742.
[121] DAHL, *supra* note 97, at 141.
[122] ADAM FERGUSON, AN ESSAY ON THE HISTORY OF CIVIL SOCIETY 110 (F. Oz-Salzberger, ed. 1995) (1767).

This Part begins by explaining why it is appropriate to model the Constitution as an incomplete contract. It then introduces relevant concepts and findings from the literature on transaction costs in contracting. The central sections of this Part then apply those concepts to the constitutional context. My aim in so doing is not to show a precise fit between private-law mechanisms and public-law dynamics. Rather, the extensive private law literature serves as a launching point for specification of similar—not identical—dynamics in the constitutional context. I conclude by offering evidence that the mechanisms described here operated in the early Republican context.

A. The Constitution as a Long-Term Relational Contract

There is a large literature analyzing constitutions as contracts.[123] Because it yields at least two ways of modeling a constitution as a contract, we can usefully begin by clarifying which sort of model this Article will pursue.

1. Two Views of Constitutions as Contracts

First, and most obviously, a constitution can be viewed as a contract between citizens and the state. This version of "constitution as contract" is, of course, familiar from normative political philosophy. For instance, John Locke famously identified the emergence of a "compact" through the agreement of citizens with the aim of "mutual preservation of … lives, liberties, and estates."[124] The Lockean view conduces to normative questions about the scope of authority delegated to the state and the rights reserved to the people. It is less useful as a heuristic for understanding constitutional stability simply because it is not the people per se that pose a threat to constitutional stability. With the exception of rare instances of massive popular unrest, it is not generally the people as an undifferentiated whole that imperils constitutional survive.[125] Rather, "[o]rdinary people often play a peripheral role in the breakdown of democracy."[126] A heterogeneous and geographically diffuse population will rarely be able to challenge the state in

---

[123] ELKINS et al., ENDURANCE, *supra* note 1, at 66–72 (making the analogy and drawing on the incomplete contracting literature); Stefan Voigt, *Constitutional Political Economy: Analyzing Formal Institutions at the Most Elementary Level*, *in* NEW INSTITUTIONAL ECONOMICS: A GUIDEBOOK 363, 367–68 (E. Brousseau & J. Glachant, eds., 2008); Sutter, *supra* note 13, at 139; *accord* Aghion & Bolton, *supra* note 13, at 38–41. Another line of theoretical work focuses on the problems of "self-enforcing constitutions" but takes up essentially the same set of concerns and problems. *See, e.g.*, Sonia Mittal & Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century*, 28 J. L. ECON. & ORG. 1, 2 (2010); *see also* Yadeira González de Lara, Avner Greif & Saumitra Jha, *The Administrative Foundations of Self-Enforcing Constitution*, 98 AM. ECON. REV.: PAPERS & PROCEEDINGS 105, 105 (2008) (describing the rule of law as an example of "equilibria with rulers constrained by those 'administrators' who implement policies").

[124] JOHN LOCKE, OF CIVIL GOVERNMENT, IN TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 142, 155 (Ian Shapiro, ed., 2003).

[125] Hence, some argue that regimes can be deposed through unmediated popular action. *See, e.g.*, HANNAH ARENDT, ON REVOLUTION 38 (rev ed. 2006) (identifying at least the *start* of the 1789 French revolution with a "multitude on the march" … "the multitude of the poor and the downtrodden, who every century had been hidden in darkness and shame"). Another example of a populist revolt, less well recalled today, is the French Commune of 1871; for a concise history, *see* ALISTAIR HORNE, THE TERRIBLE YEAR: THE PARIS COMMUNE, 1871 (1971).

[126] NANCY BERMEO, ORDINARY PEOPLE IN EXTRAORDINARY TIMES: THE CITIZENRY AND THE BREAKDOWN OF DEMOCRACY 19-20 (2003) (developing the point that "popular defection from democracy is not as common as some of the more tragic cases of democratic collapse have led us to believe")

the absence of intermediating institutions such as political parties or ethnic or religious organizations.[127] Hence, I do not pursue this way of analyzing the Constitution any further.

Instead, this Article builds upon the second model of the constitution as contract. This second model focuses not on the relationship between the people and the state, but on interactions between the various major interest groups that compete for state power. In this model, a written constitution can be understood as a contract between those diverse powerful parties—be they states (as in the U.S. context), economically powerful interest groups, or even tribes or ethnic groupings—whose cooperation is needful to establishing a long-term cooperative relationship and to enable mutually beneficial cooperative action. Because it trains more explicitly and directly on the most common causes of constitutional death, this model provides the more salient lens for analyzing problems of constitutional survival. Hence, this way of modeling constitutions has been employed profitably in explaining how judicial review arose in certain Asian countries as a form of "insurance" for both "prospective governing parties" and "prospective opposition parties" that alike feared permanent lock-out of government after electoral defeat.[128]

This Article thereafter models the U.S. Constitution as a deal between powerful interest groups rather than as the product of popular sovereignty. I take this approach not because the latter is normative disreputable or irrelevant but because it does not capture the dynamics most relevant to the risk factors for constitutional demise. Moreover, I do not provide a precise algorithm for determining which interest groups are salient to the analysis in the U.S. context. It suffices here to state that organized groups are relevant insofar as their agreement in an original constitutional deal is necessary for an ensuing regime to be resilient against significant shocks. In the American context, for example, this obviously includes the thirteen states and likely also organized, economically powerful interest groups, such as creditors, merchants, and slaveholders.[129] Despite the absence of any textual language respecting secession, states de facto had the power to threaten exit from the Union, as the events of the 1860s amply show.[130] I am agnostic as to whether the relevant pool of parties needs to be expanded further, and hence disclaim any effort at superfluous precision. Rather, I focus on the question of how the Constitution induced stability by encouraging all necessary parties to enter the initial constitutional deal and then by dissuading them from exiting in destabilizing ways during the acutely vulnerable first two decades of the early Republic.[131]

---

[127] The basic collective action problem is identified in MANCUR OLSEN, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 34 (1965).

[128] TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 25 (2003).

[129] *See, e.g.*, CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 19–51 (rev. ed. 1985) (cataloguing "economic interests" active in the Founding period, and including slaveholders, creditors, and the "innumerable manufacturing, shipping, trading, and commercial interests").

[130] There are independent reasons not to include a textual right of secession. *See* MIKHAIL FILIPPOV, PETER C. ORDESHOOK & OLGA SHVETSOVA, DESIGNING FEDERALISM: A THEORY OF SELF-SUSTAINABLE FEDERAL INSTITUTIONS 105 (2004) ("A formally recognized right of secession … legitimates the view that the existing union can be dissolved and recreated on new terms ….").

[131] This model glosses over a number of important difficulties. First, it applies a model of individual precommitment to collectivities (such as states and interest groups) that have diverse degrees of internal organization and formal decisional capacity. *Cf.* Jon Elster, *Don't Burn Your Bridge Before You Come To It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1758–60 (2003) [hereinafter Elster, *Don't Burn Your Bridge*]. Second, it ignores the fact that the composition of a state's population changes over time, such that a

To view the Constitution as a contract is to surface two important qualities. First, a constitution qua contract has a long-term, *relational* quality in that it involves not merely an instantaneous exchange of goods (such as one sees on spot markets) but also the making of durable cooperative interactions by all parties in order to create a contractual surplus.[132] Second, the constitution qua contract is *incomplete* in the sense that the contracting parties have not written down contractual solutions to all possible future contingencies.[133] Incompleteness arises for several reasons. A threshold one relates to the high cost of imagining and resolving all possible contingencies in a single document.[134] In the constitutional context especially, it is impossible for drafters, who have limited time and political capital, to anticipate and to write down all possible future states of the world, let alone to provide comprehensive and unambiguous governance solutions for all those states of the world.[135] Both the "cost of processing and using … information" about potential states of the world and "the cost of writing a contingent contract in a sufficiently clear and unambiguous way that it can be enforced"[136] ensure that most contracts are in some measure incomplete. Further, even with unlimited time and political capital, bounded rationality would prevent drafters from complete specification of a constitution as contract.[137]

The relational quality and the incompleteness of a constitution qua contract are intertwined. As the expected duration and complexity of the relations underpinning a constitution increase, the costs of writing down ex ante solutions for all future contingencies grows, if only

---

constitution as contract eventually binds a class of persons who were not alive at the point of contracting. ELSTER, ULYSSES UNBOUND, *supra* note 95, at 98. To the extent I am concerned here with the first two generations after the Constitution's ratification, the second difficulty may be mitigated here.

[132] *See* Melvin Eisenberg, *Relational Contracts*, *in* GOOD FAITH AND FAULT IN CONTRACT LAW 291, 291–96 (Jack Beatson & Daniel Friedmann eds., 1994) (discussing possible definitions of "relational contract"); *see also* Ian Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854, 856 (1978) (coining the term "relational contract").

[133] *See* STEVEN SHAVELL, FOUNDATIONS OF THE ECONOMIC ANALYSIS OF LAW 299 (2004) [hereinafter SHAVELL, FOUNDATIONS] ("An aspect of contractual practice is … is that contracts are significantly incomplete [because they] omit all manner of variables and contingencies that are of potential relevance to the contracting parties."). Tirole argues that "there is unfortunately no clear definition of 'incomplete contracting' in the literature" but assumes a set of restrictions on the standard model of contracts based on unforeseen contingencies, the cost of writing contracts, and the cost of enforcing contracts. Tirole, *supra* note 11, at 743–44.

[134] OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 70 (1985) (mapping different governance solutions in contracting) [hereinafter WILLIAMSON, ECONOMIC INSTITUTIONS] ("[F]or long-term contracts executed under conditions of uncertainty, complete presentation is apt to be prohibitively costly if not impossible."); *accord* SHAVELL, FOUNDATIONS, *supra* note 133, at 299; Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691, 696 (1986) (hypothesizing "a situation in which it is prohibitively difficult to think about and describe unambiguously in advance how all the potentially relevant aspects of the production allocation should be chosen as a function of the many states of the world"). In addition to the reasons for incompleteness listed in the main text, Shavell also lists enforcement costs and the impossibility of judicial verification. SHAVELL, FOUNDATIONS, *supra* note 133, at 300. Because those grounds are not relevant to my analysis, I do not address them here further.

[135] WILLIAMSON, ECONOMIC INSTITUTIONS, *supra* note 134, at 70.

[136] Oliver Hart & John Moore, *Incomplete Contracts and Renegotiation*, 56 ECONOMETRICA 755, 756 (1988) [hereinafter Moore, *Incomplete Contracts and Renegotiation*].

[137] Paul L. Joskow, *Vertical Integration*, *in* HANDBOOK OF NEW INSTITUTIONAL ECONOMICS, 319, 322 (C. Ménard & M.M. Shirley, ed. 2005) [hereinafter Joskow, *Vertical Integration*].

because the range of contingencies grows as a constitution's expected lifespan increases.[138] A basic insight of this contracting literature therefore is that there is a "trade-off between rigidity and flexibility" analogous to the one that exists in constitutional design between the benefits of specification and the gains from adaption.[139]

2. The Hold-up Problem in Private Contracting

A large law-and-economics literature about barriers to contracting developed in the wake of Ronald Coase's famous article asking why contracting parties opt to internalize a transaction within a firm rather than using the market.[140] Coase's analysis identified a comparison of the marginal "costs of organizing" production inside and outside the firm as pivotal to this decision.[141] When the costs of organizing through market mechanisms are relatively high, it is worth fashioning a long-term and relational incomplete contract—*i.e.*, the firm. Coase's insight generated a range of hypotheses about how incomplete, relational contracts can be designed to address problems specifics to particular industries and parties.[142] His analysis pointed toward different ways in which contracts could respond to heterogeneous barriers to contracting,[143] including adverse selection problems, information asymmetries,[144] and the need for high-powered rather than low-powered incentives to make a contract succeed.[145]

One kind of private contracting problem has special relevance for understanding the role of textual rigidity in 'constitutions qua contracts.' It is the problem of "hold-ups,"[146] otherwise known as the problem of "post-contractual opportunist behavior."[147] Hold-up problems can arise whenever parties must make post-contractual investments in assets specific to their relationship.[148] An investment-backed asset is specific when a contracting party's next-best return from the asset is substantially less than the return from the asset within the context of the

---

[138] Some commentators go so far as to define relational contracts in terms of their incompleteness. *See, e.g.*, Charles Goetz & Robert Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1091 (1981) ("A contract is relational to the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations.").

[139] *Compare* Oliver Hart & John Moore, *Contracts as Reference Points*, 123 Q. J. ECON. 1, 2 (2008) [hereinafter Hart & Moore, *Contracts as Reference Points*], *with* Elster, *Intertemporal Choice*, *supra* note 100, at 43 (identifying the need to find "an optimal balance between stability and rigidity" in constitutional design); *accord* Ferejohn, *supra* note 40, at 502.

[140] RONALD COASE, THE FIRM, THE MARKET, AND THE LAW 1–31 (1988).

[141] *Id*. at 31.

[142] *See* Pierre Garrouste & Stéphane Saussier, *The Theories of the Firm*, *in* BROUSSEAU & GLACHANT, *supra* note 123, at 23, 24 (exploring the "competing theories of the firm" developed after Coase); WILLIAMSON, ECONOMIC INSTITUTIONS, *supra* note 134, at 79, fig. 3.2.

[143] For an early survey, *see* Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 AM. ECON. REV. 112, 114–22 (1971) (listing four species of market failures that "involve transaction costs that can be attenuated by substituting internal organization and market exchange").

[144] WILLIAMSON, ECONOMIC INSTITUTIONS, *supra* note 134, at 81–83.

[145] Garrouste & Saussier, *supra* note 142, at 28.

[146] SHAVELL, FOUNDATIONS, *supra* note 133, at 326–27 (discussing a range of hold-up problems); *see also* Victor P. Goldberg, *Regulation and Administered Contracts*, 7 BELL J. ECON. & MANAGEMENT SCI. 626, 439–41 (1976) (describing hold up problem as one or providing protection for the "right to be served").

[147] Benjamin Klein, Robert G. Crawford, & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. L. & ECON. 297, 298 (1978).

[148] Joskow, *Vertical Integration*, *supra* note 137, at 322. Williamson uses the phrase "asset specificity." WILLIAMSON, ECONOMIC INSTITUTIONS, *supra* note 134, at 52–54.

contractual relationship.[149] Imagine a printing press built with specifications for a particular newspaper that generates a joint annual surplus of $1.5 million, where the next-best use of the press (for a different publisher with distinctive and different needs) would yield only $500,000.[150] Once the press has made its investment, the newspaper can threaten to breach in order to extort a greater share of the jointly produced surplus from the investing party.[151] Because the second-best use of the asset pays out much less to the investing party, the latter stands to realize a large loss by walking away from the contract. Accordingly, it is rational to accede to renegotiation.[152] Even when the dependency is bilateral, the possibility of hold-up can still lead to haggling that dissipates the gains from trade.[153]

The potential for hold-up has both ex ante and ex post effects. Ex ante, a potential investing party will rationally anticipate the possibility of hold-up and so decline to enter into contracts where that risk exists.[154] Otherwise Pareto-superior deals will, as a result, remain unrealized. Ex post, parties that do enter deals will dissipate resources on both hold-ups and resistance to hold-ups, resulting in intracontractual disputes and haggling that expend resources without commensurate social gain.[155] Solving the hold-up problem is valuable, therefore, because it enables otherwise Pareto-superior deals to be negotiated and honored in ways that maximize their value.

The relationship-specificity of assets created by post-contractual investment and the consequent specter of a hold-up can be observed across the landscape of private contracting.[156] Consider, for example, a coal-burning power generation facility that benefits from being located at the "mouth" of a mine, but that thereby renders itself vulnerable to hold-up.[157] Or think of an automobile manufacturer that may wish for a subsidiary supplier to invest in specialized manufacturing hardware, and even to co-locate, in order to minimize production costs, only to

---

[149] *See* Joskow, *Vertical Integration*, *supra* note 137, at 322 ("[R]elationship-specific investments are investments which, once made, have a value in alternative uses that is less than the value in the use originally intended to support a particular trading relationship").

[150] The now somewhat antiquated example is loosely adapted from Klein et al., *supra* note 147, at 300.

[151] Another way of stating the problem is that "one party to a contract agrees to a proposed modification either because of expected dire consequences should that party not agree to the modification or because the available remedies for breach by the other party are inadequate to deter breach by the other party." Daniel A. Graham & Ellen R. Pierce, *Contract Modification: An Economic Analysis of the Hold-Up Game*, 52 L. & CONTEMP. PROBS. 9, 9 (1989). The potential breaching party, Williamson argues, is distinct from an ordinary contracting party in that she acts with "self-interest seeking with guile." WILLIAMSON, ECONOMIC INSTITUTIONS, *supra* note 134, at 47.

[152] I assume here a one-shot interaction. Repeat-play circumstances may render other strategies rational.

[153] Joskow, *Vertical Integration*, *supra* note 137, at 327.

[154] Jolls, *supra* note 12, at 208.

[155] *Id*.; *see also* Klein et al., *supra* note 147, at 301 ("Even if transactors are risk neutral, the presence of possible opportunistic behavior will entail costs as real resources are devoted to the attempt to improve posttransaction bargaining positions in the event … opportunism occurs.").

[156] *See* Victor P. Goldberg, *Relational exchange: Economics and complex contracts*, *in* READINGS IN THE ECONOMICS OF CONTRACTS 16, 16 (Victor P. Goldberg, ed., 1989) ("Much economic activity takes place within long-term, complex, perhaps multiparty contractual (or contract-like) relationships; behavior is, in varying degrees, sheltered from market forces.").

[157] *See* Paul L. Joskow, *Vertical Integration and Long Term Contracts: The Case of Coal-burning. Electric Generating Stations*, 1 J. L. ECON. & ORG. 33 (1985).

find that the supplier baulks out of a fear of hold-up.[158] It is even possible to find hold-ups in contracts over human capital. A famous example involves the tough bargaining by actor James Gandolfini over whether he would appear in later seasons of the lucrative HBO series *The Sopranos*, which resulted in the actor roughly doubling his $400,000 per episode salary—the network being the object of the hold-up.[159] As these examples suggest, an investment's specificity can take many forms, from location to physical design or human capital allocations.[160] The hold-up problem may be also especially acute in circumstances in which a post-contract-formation investment is cooperative in nature in that it "generate[s] a direct benefit for the trading partner.[161] Such cooperative investments are "critically important in modern manufacturing."[162] Empirical studies confirm that the hold-up problem is not merely hypothetical, but has significant cost-efficiency effects in contracting.[163]

Hold-up problems arise in both incomplete and complete contracts, albeit in different ways. Hold-up can arise either when an incomplete contract does not address an unexpected exogenous event that provokes one party to seek renegotiation or when post-contracting investments expose one party to others' opportunism. With a complete contract, changed circumstances can also lead to hold-up.[164] For instance, Gandolfini's contract was likely complete in the sense that it specified a salary.[165] The latter dispute can hence be described either in terms of an incomplete or a complete contract: It either concerned the breach of a complete contract followed by de novo deal-making (from HBO's perspective), *or* the modification of an incomplete contract that did not state when modifications were permitted (from Gandolfini's view). The problem can accordingly be framed either as one of contractual commitment or gap-filling. For the purposes of this Article, there is little need to distinguish between these two characterizations, even if the distinction has significance in the private contracting context.

There are several ways of mitigating the potential for hold-ups, not all of which translate well into the public-law context. Among the first solutions to be identified in the law-and-economics literature involved vertical integration. One firm would purchase the other and thereby eliminate the possibility of interfirm hold-up.[166] Arranging deals within the firm,

---

[158] Klein et al., *supra* note 147, at 308–10 (discussing the purchase of Fisher Body by General Motors). For an important challenge to the conventional account of this purchase, *see* Douglas Baird, *In Coase's Footsteps*, 70 U. CHI. L. REV. 23, 30–31 (2003) (arguing that "the integration of Fisher and Chevrolet took place before acquisition. GM's acquisition of Fisher Body in 1926 was not the main event [and] the acquisition may have had almost no effect on the way in which Chevrolet interacted with Fisher at the plant level").

[159] SHAVELL, FOUNDATIONS *supra* note 133, at 328.

[160] WILLIAMSON, ECONOMIC INSTITUTIONS, *supra* note 134, at 95–96.

[161] *See* Che & Hausch, *supra* note 20, at 125–26; *cf.* Tirole, *supra* note 11, at 747 ("Roughly speaking, an investment is cooperative if it affects the trading partner's surplus more than the investing partner's surplus.").

[162] Che & Hausch, *supra* note 20, at 127 (giving examples).

[163] One study of a large naval construction contract found that "overall organization costs represent about 14 percent of the total costs of the components and activities" studied. Scott E. Masten, James W. Meehan, Jr., & Edward A. Snyder, *The Costs of Organization*, 7 J. L. & ECON. 1, 2, 20–21 (1991).

[164] For an analysis that identifies the need for mechanisms to generate enduring commitments even in the absence of incompleteness, *see* Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519, 537–38 (1983).

[165] The cases discussed *infra* in text accompanying note 177 might also characterized as concerning complete contracts.

[166] The seminal paper in this literature is Oliver Williamson, *Transaction Cost Economics: The Governance of Contractual Relations*, 22 J. L. & ECON. 233 (1979). For development of the idea, *see* WILLIAMSON, ECONOMIC

although it mitigates the hold-up problem, is not costless. Rather, it "sacrifices the high-powered incentive advantages of market exchange and, consequently, demands greater investments in monitoring and administration."[167] Some evidence nevertheless suggests that integration "becomes more likely in the presence of relationship-specific human capital."[168] However promising as a private-law solution, vertical integration cannot be transposed easily to the public-law context. A constitution cannot by mere ipse dixit dissolve a diverse and conflictive pool of interest groups into a harmonious whole.

A second possible solution is to draft the contract to include various complex mechanisms that dampen renegotiation.[169] For example, a leading analysis postulates that mechanisms for verifiable communication between parties in some circumstances will enable the maintenance of efficient investment levels.[170] Like vertical integration, the specific contractual solutions proposed in this line of analysis do not translate easily into the context of constitutions as contract.[171] An exception is the possibility of "offering to the potential cheater a future 'premium,' more precisely, a price sufficiently greater than average variable (that is, avoidable) cost to assert a quasi-rent stream that will exceed the potential gain from cheating."[172] Examples of the latter mechanism include long-term implicit contracts with particular suppliers and interfirm reciprocity agreements, both of which create an enduring stream of benefits the present-discounted value of which is greater than the benefits from cheating.[173] As explained below, something akin to this mechanism might be discerned in the American constitutional context, although there are easier ways of modeling the solution found in the public-law context.

The third solution to hold-ups explored in the private-law literature does, however, bear directly on public law problems. Indeed, this solution may paradoxically be easier to employ in the public-law context than in the private-law context. This is the possibility of declining to

---

INSTITUTIONS, *supra* note 134, at 90; Sanford J. Grossman & Oliver Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691, 695 (1986) (exploring vertical integration and explaining that "the owner of the asset" is defined as the party with "the right to control all aspects of the asset that have not been explicitly given away by contract"); *accord* Klein et al., *supra* note 147, at 302–07. Notice that the hold-up problem is not necessarily solved by vertical integration, but displaced: It will sometimes be the case that the purchased firms managers have unique knowledge, and can therefore engage in a hold up of the purchasing firms management. *Id*. at 302–03.

[167] Masten et al., *supra* note 163, at 6.

[168] *Id*. at 21.

[169] For a survey of potential solutions in the contract literature, *see* Richard Holden & Anup Malani, *Contracts versus Assets and the Boundary of the Firm* (draft Jan, 2012) (on file with author); *see also, e.g.*, Aaron Edlin & Stefan Reichelstein, *Holdups, Standard Breach Remedies, and Optimal Investment*, 86 AM. ECON. REV. 478 (1996); Phillippe Aghion & Patrick Bolton, *An Incomplete Contracts Approach to Financial Contracting*, 59 *Rev. Econ. Stud.* 473 (1992). Maximizing efficiency may also be framed as a question of determining "the optimal ownership structure ... to minimize the overall loss in surplus due to investment distortions." Grossman & Hart, *supra* note 166, at 710.

[170] Hart & Moore, *Incomplete Contracts and Renegotiation*, *supra* note 136, at 776 (but also noting that this solution is not available if parties are risk neutral).

[171] Independently, Shavell notes that "the use of contractually specified mechanisms does not appear to be very important in reality," although no evidence is supplied on this point. SHAVELL, FOUNDATIONS, *supra* note 133, at 348.

[172] Klein et al., *supra* note 147, at 304.

[173] *Id*. at 304–05.

enforce modifications to a contract.[174] After two parties sign a contract that requires relationship-specific investments on the part of Party A, that is, a court asked to enforce a modification of the contract elicited by Party B will demur, and instead enforce the terms of the contract as originally drafted. A rule against modification of this kind "assures prospective contract parties that signing a contract is not stepping into a trap" and so enables Pareto-superior deals.[175]

In practice, the effect of no-modification clauses pursuant to American contract law is unclear. The "pre-existing duty rule" sometimes has the effect of barring certain sorts of modifications, and hence mitigates certain hold-up problems.[176] For example, in the case-book staple of *Alaska Packers' Association v. Domenico*, the Ninth Circuit Court of Appeals declined to enforce a salary-increasing modification negotiated by the crew of a fishing vessel in the midst of an Alaska salmon run, at a time at which no substitute crew could possibly be found.[177]

In other instances, though, "courts simply ignor[e] the pre-existing duty rule" or find ways to circumvent it.[178] "Freedom of contract" principles are often cited as ground for such refusals.[179] Even more problematic is the fact that "[t]hose who make a contract, may unmake it…. Whenever two men contract, no limitation self-imposed can destroy their power to contract again."[180] In other words, there is a generally available mechanism for the rendering no-modification clauses nugatory—which is to enter into a side-contract that counteracts the terms of a chronologically earlier contract.[181] These difficulties have provoked arguments in favor of adopting a more formal rule in favor of the "enforcement of contractual terms constraining modifications."[182]

If no-modification clauses resolve a hold-up problem that can arise in private law contracting (both for incomplete and complete contracts), can they be employed to address analog concerns in the public law context? An alternative answer is developed in the next

---

[174] SHAVELL, FOUNDATIONS, *supra* note 133, at 332–33 ("Legal intervention to prevent price from exceeding the optimal price would in principle be desirable …."); Graham & Pierce, *supra* note 151, at 9–10 (noting the risk of holdup as a justification for judicial nonenforcement of a contract). For early treatments of the possibility, *see* Varouj A. Aivazian, Michael J. Trebilcock, & Michael Penny, *The Law of Contract of Modifications: The Uncertain Quest for a Bench Mark of Enforceability*, 22 OSGOODE HALL L.J. 173 (1984); Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521 (1981).

[175] *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 927 (7th Cir. 1983) (Posner, J.).

[176] *See* CORBIN, *supra* note 17, at §171, at 105 ("[N]either the performance of a duty nor the promise to render a performance already required by duty is sufficient consideration for a return promise."). The Uniform Commerce Code allows good faith modifications. U.C.C. §2-209(1) & cmt. 1 (1987).

[177] *Alaska Packers' Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902); *see also LingenfeldeGr v. Wainwright Brewing Co.*, 103 Mo. 578, 15 S.W. 44 (1891); *Rose v. Daniels*, 8 R.I. 381 (1866). Other examples of pre-existing duty rules include price-regulation statutes, *see* SHAVELL, FOUNDATIONS, *supra* note 133, at 343, admiralty rules for salvage, *see Post v. Jones*, 60 U.S. (19 How.) 150 (1856), and utility regulations, *see* Goldberg, *supra* note 156, at 426. Since *Alaska Packers* concerned a fixed term (salary), it might be characterized as a case about enforcement simpliciter. But note that from the crew's perspective, the case concerned an incomplete term—specifically the conditions for modification.

[178] Graham & Peirce, *supra* note 151, at 15.

[179] For an exemplary statement of freedom of contracting, *see, e.g., Continental Basketball Ass'n, Inc. v. Ellenstein Enters., Inc.*, 669 N.E.2d 134, 139 (Ind. 1996).

[180] *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 278, 387–88 (N.Y. 1919) (Cardozo, J.).

[181] Jolls observes that it is possible in some contexts to prevent side-contracting. Jolls, *supra* note 12, at 230–31.

[182] *Id*. at 236.

section. But as a threshold matter, notice a key difference between private and public law contexts. In the private law context, courts are unwilling to enforce no-modification clauses and it is hard to prevent parties contracting around the clause via a new, offsetting contract. But a defining feature of the constitutional context is the absence of effective third-party enforcement.[183] Supreme Courts and their ilk, after all, are "the product of constitutional negotiation," not extrinsic to the constitutional order.[184] It is the parties themselves who must necessarily make the decision whether or not to comply with a constitution, seek amendment, or withdraw. Unlike in the private-law context, no-modification clauses in the public law context can effectively take an option (modification) off the table. The parties are effectively moved by such a clause from a three-option situation (adhere to the contract, modify, or exit) to a two-option world (adherence or exit). As a consequence, the reasons that no-modification clauses are not more commonly employed in the private-law context do not translate well into the public-law domain.

It is also worth noting that no-modification clauses in private contracts are perceived as having nontrivial collateral costs. An across-the-board rule of contractual inflexibility might have benefits but it also impedes otherwise warranted adjustments in light of changed circumstances. Proposals to enforce no-modification rules as a result often suggest an exception for contractual responses to unanticipated and exogenous changes in background circumstances.[185] Some long-term contracts already attempt to draw a distinction between desirable and undesirable modifications. For example, "prime plus" clauses in loan agreements and "price protection" clauses with pari passu effect in supply contracts in effect operate as sorting devices to allow some desirable forms of change, but not undesirable change motivated by hold-ups.[186]

In sum, an extensive literature concerning private contracting has identified a spectrum of transaction costs that impede the formation or consummate execution of durational contracts. An important strand of that literature identifies hold-up as a risk: the exploitation of parties who have invested in relationship-specific assets that lock them into a contract. Among the solutions offered in the literature is the possibility of no-modification clauses. While there are reasons these are not (yet) common in ordinary contracting, those reasons do not translate well into the public law context.

B. The Role of Textual Rigidity in Promoting Constitutional Survival

The foregoing discussion sets the stage for an account of the causal mechanism linking constitutional rigidity to constitutional survival. Succinctly stated, the mechanism works as follows: In conditions in which cooperative investments are pivotal to the survival of a novel constitution order, a well-crafted constitution might plausible be written with an onerous amendment rule akin to Article V. This amendatory provision operates much like a no-modification rule in ordinary contracting: It switches the parties' choice set from three options—adhere to the contract, modify, or exit—to two—adherence or exit. This change elicits parties

[183] Elster, *Don't Burn Your Bridge*, *supra* note 131, at 1759–60.
[184] ELKINS et al., ENDURANCE, *supra* note 1, at 72.
[185] Jolls, *supra* note 12, at 228–30.
[186] Klein et al., *supra* note 147, at 317 (giving examples).

entrance to the constitution as contract ex ante, and then renders more likely cooperative investments that otherwise would be put on hold or rationed for fear of hold-ups.

We can take the analysis one step further. Notice that textual rigidity takes the 'modify' option off the table but not the 'exit' option. Indeed, as in the private law context, it is hard to see how the exit option could be effectively eliminated absent the use of violence or coercion. And yet, even in the absence of coercion, it is possible that textual rigidity may also mitigate the risk of outright exit from the constitutional order. Rigidity indirectly addresses the risk of exit by eliciting cooperative investments from multiple parties toward the creation of new institutions tied to a new constitution. The costs sunk by those parties into cooperatively produced institutions have the effect of raising the stakes of departure for any of the parties. By making exit more costly, rigidity makes it less likely. Threats of defection also become less credible. The overall effect of textual rigidity is not just to address fears of midstream hold-up by opportunistic contracting partners, that is, but also to elicit an entangling web of mutually beneficial cooperative investments that enmesh all parties into a specific constitutional regime.

I analyze this causal mechanism in its two stages. First, I look more closely at the link between constitutional rigidity and the hold-up problem. In the course of the argument, I point to evidence that this mechanism operated in the early American republic. Second, I look at the link between entangling institutions and constitutional survival. Again, I offer examples of specific institutions that may have played this role in the decades immediately after ratification, which is when rigidity has greatest utility.

1. The Preconditions for Constitutional No-Modification Rules

If textual rigidity can mitigate the risk of ex ante failure to enter a Pareto-superior private contract and the ex post underinvestment in the coproduction of goods under the contract, might the same mechanism work at the constitutional level? A threshold step in answering this question is to identify the circumstances under which hold-up is likely to be a problem, and to ascertain whether the U.S. Constitution falls within this class of cases.

The problem of hold-up is likely to arise only when two preconditions are met: oligopolistic political competition and a thin national institutional infrastructure. First, constitutions installed in the absence of political competition pose no such concern. Thus, a constitution imposed by dint of external military force,[187] or by a single monopolistic political party,[188] need not be drafted with the risk of hold-up in mind. Second, drafters may rightly be less concerned about hold-up when robust national institutions already exist because the latter vitiate the need for new, post-ratification cooperative investments.[189] Given these possibilities, not every founding father or mother should be worried about the hold-ups problem. And in many constitution-making contexts, it will be quite likely that either one or the other of these preconditions for textual rigidity will not be met. Indeed, the absence of other rigid, long-lasting constitutions that has been identified by Ginsburg, Elkins, and Melton suggests that these two conditions are rarely both satisfied.

---

[187] Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857 (2003).
[188] ELKINS et al., ENDURANCE, *supra* note 1, at 173–74.
[189] The Constitutions of the French Fourth and Fifth Republics likely fall into this class. *Id*. at 170–71.

The period of the drafting and ratification of the U.S. Constitution, however, was characterized by both oligopolistic political competition and a thin national institutional infrastructure. *First*, the coalition in favor of more robust federal action viewed the several states as not merely potential but actual spoilers of the cooperative enterprise of maintaining independence from European domination and achieving economic flourishing.[190] Prior to the Philadelphia Convention, states had notoriously declined to accede to the Confederation Congress's fiscal and military requests despite the grave financial strains imposed by the Revolutionary War.[191] As early as 1782, Rhode Island had signaled that it would decline to ratify a proposed five percent impost on imported goods.[192] In 1786, New Jersey and New York also indicated their unwillingness to continue contributions to the confederated fisc.[193] Internal divisions in Congress also induced an "inability" on the national legislature's part "to frame and implement satisfactory foreign policies," leaving states vulnerable to the maneuvers of European great powers.[194]

A concern with states as potential spoilers was also reflected in the concessions made during drafting and ratification to states that were implicitly or explicitly threatening exit from the federal project. During the Philadelphia Convention, for example, small states resisted any deviation from the Articles of Confederation rule of equal representation for each state.[195] One result of this pressure was the "Great Compromise," involving different apportionment rules for the federal House and the Senate.[196] During ratification, the Constitution's supporters also evinced concern that pivotal states would decline to accede to the new document, imperiling the entire exercise.[197] That these concerns were powerful enough to alter the views of Madison and others on a bill of rights suggests that the Framers' concerns about defection from the national process were substantial.[198]

The Framers' obvious grounds for concern about states' exit from the Constitution creates a puzzle: Why did they not expressly bar secession in the text of the Constitution? Not only was the Constitution silent on that point, but through the antebellum period there was a

---

[190] A concern with hold-up also implies some stable identification of group interest, such as a system of states (as in the U.S. context) or political parties. I focus on states. I am grateful to Mark Graber for pressing this point.

[191] *See* JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 25 (1996) (noting fiscal crisis). The problem arose as a result of depreciation of the Continental currency that was "Weimar-like in its rapidity and completeness." DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 116 (2003).

[192] RAKOVE, *supra* note 191, at 25.

[193] *Id*. at 31–32.

[194] *Id*. at 26–27 (discussing Spain's closure of New Orleans and the lower Mississippi River in April 1784); *see also* Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 618 (1999) ("[M]any of the Union's problems related in one way or another to its inability to present a credible threat of force.").

[195] MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 56 (1913) (noting that the Delaware delegation was instructed that state equality was non-negotiable).

[196] *Id*. at 105.

[197] This is a dominant theme in the canonical account of ratification offered by Maier, *supra* note 36, at passim**.**

[198] Nor was the problem of managing states' rights end in 1789. *Cf.* Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 748 (2010) ("The history of 'Our Federalism' from 1789 to 1865 (and beyond) is the history of the impact of the centrifugal effects of sectionalism on the emerging American national polity." (footnote and citation omitted)).

"lively and inconclusive debate over whether the Constitution permitted states to secede."[199] The argument developed in the balance of this Part offers a reason for this silence: The Framers did not typically rely on "parchment" prohibitions to attain structural design goals.[200] Instead, they relied on clever institutional design to cultivate appropriate incentives and to produce stable equilibrium. Reliance on textual rigidity to deter secession coheres with the indirect, structural strategies deployed elsewhere in the Constitution to mitigate systemic risks.

Second, the several states as of 1787 were hardly equipped with robust national institutions of the kind seen in Europe. To the contrary, a central aim of the new Constitution was the creation of national institutions backed by cooperative investments that would effectively produce much-needed public goods. Hence, in describing the impulse for a new constitutional framework James Madison diagnosed in the pre-1787 confederation a "want of concert in matters where common interest requires it … [a] defect . . . strongly illustrated in the state of our commercial affairs," a lacuna he attributed to "the perverseness of particular States whose commerce is necessary."[201] States' opportunism, Madison suggested, induced a dearth of cooperative investments in national institutions with public-good characteristics.

Consistent with Madison's concerns, the Philadelphia Convention opened with the "recogn[ition] that the actions of individually rational states produced irrational results for the nation as a whole."[202] Recalcitrance of the states, as noted above, had already imperiled the nascent union. During the Revolutionary War, the requisitions system through which the Continental Congress funded military efforts sometimes yielded only 37 percent of the monies sought,[203] with compliance dropping at moments to 12 percent with hostilities' end.[204] The confederation's ongoing inability to service foreign and domestic debts also posed a direct risk to sovereignty, since it rendered the national government incapable of responding to great power threats, exemplified by Spain's closure of the Mississippi River and New Orleans, or foreign policy irritants, such as the Barbary pirates.[205] These failures made the case for new national institutions all the more compelling.

---

[199] David A. Strauss, *The New Textualism in Constitutional Law*, 66 GEO. WASH. L. REV. 1153, 1155–56 (1998).
[200] *See* THE FEDERALIST NO. 48, at 309 (James Madison) (I. Kramnick ed., 1987).
[201] James Madison, *Vices of the Political System of the United States*, *in* JAMES MADISON: WRITINGS 69, 71 (Jack N. Rakove ed., 1999).
[202] Robert D. Cooter & Neil S. Siegel, *Collective-Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 118 (2010). Recent originalist accounts of the Founding emphasized the public good character of the sought-after constitutional framework. *See* AMAR, AMERICA'S CONSTITUTION, *supra* note 32, at 44–46 (emphasizing the Federalist Papers' focus on common defense and trade goals); Jack Balkin, *Commerce*, 109 MICH. L. REV. 1, 23 (2010) ("Congress also has the power to regulate interactions or affairs among the several states. This would include activities that are mingled among the states or affect more than one state, because they cross state borders, because they produce collective action problems among the states, or because they involve activity in one state that has spillover effects in other states."). On one recent account, however, the subsequent Supreme Court jurisprudence has distinguished collective action problems that result from economic externalities and those flowing from political externalities. Leslie Meltzer Henry & Maxwell L. Stearns, *Commerce Games the Individual Mandate*, 100 GEO. L.J. 1117, 1121 (2012).
[203] ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION 12 (1993).
[204] PAUL STUDENSKI & HERMAN E. KROOSS, FINANCIAL HISTORY OF THE UNITED STATES 37–38 (1963). Brown identifies a more general "breakdown of taxation by the states governments." BROWN, *supra* note 203, at 185.
[205] BROWN, *supra* note 203, at 17–19.

In this context, the Philadelphia Convention drafted a constitution that, unlike the Articles of Confederation, would elicit cooperative investments from the states to build new national institutions with a public-good aspect such as "military defense," "a unified market for goods, capital, and labor,"[206] a new system for federal taxation, a new national military capacity, and a new national financial system.[207] Mindful of the Articles' failure to elicit these goods, the Convention instructed the Committee of Detail to allow the power "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation."[208] Taking these steps, the Framers anticipated that states would reap benefits an order of magnitude larger than their original contributions through the fostering a wide array of new institutions.

In sum, both preconditions for textual rigidity—oligopolistic political competition and infrastructural fragility—were present at the U.S. Founding. This distinct and perhaps rare combination of circumstances explains why textual rigidity may have been the right approach to the problem of stabilizing the U.S. Constitution.

2. Textual Rigidity as a Response to the Strategic Threat of Amendment

How then did textual rigidity respond to the drafting problems that faced the Constitution's drafters? The mechanism has two elements. First, rigidity promotes constitution-specific investments by reducing the threat of specific employment of the amendment power. Second, those investments in turn locked in participants to the Constitution by making secession more costly. To invoke Albert Hirschman's terminology again, limiting the strategic use of 'voice' conduces to 'loyalty,' and then the prolonged exercise of 'loyalty' raises the cost of exit.[209] This section addresses the mechanism's first element, while the second element is examined in the following section

A strategic request for amendment is one made for the purpose of exploiting other parties' postratification investment in relationship-specific assets in order to extract a greater share of the net surplus from constitution-making. For example, imagine a Constitution that creates a single-member electoral system.[210] Responding to the incentives created by that arrangement, a national-level interest group might invest heavily in local networks of candidates with close connections to the electorate, rather than developing a nationally recognized brand. These investments contribute to the public good of stable political competition, but may be vulnerable to the threat of strategic renegotiation. For example, an opposing interest group might press an amendment directing the use of a party-list proportional representation system, which

---

[206] Cooter & Siegel, *supra* note 202, at 140, 149–50.

[207] *See* STUDENSKI & KROOSS, *supra* note 204, at 39–41 (emphasizing taxing, borrowing, spending, and coinage powers); BROWN, *supra* note 203, at 186 (emphasizing taxing power). Pure public goods public goods are (1) nonrivalrous, such that one person's enjoyment does not detract from another's, and (2) nonexcludable, such that excluding individuals from enjoying the benefits generated by the goods is infeasible or uneconomical. Military defense is a quintessential example.

[208] 2 FARRAND, *supra* note 28, at 131–32; *accord* Cooter & Siegel, *supra* note 191, at 123–24 (discussing Convention deliberations on congressional powers).

[209] *Cf.* HIRSCHMAN, *supra* note 19, at 120–21 (contrasting the use of voice and exit in firms and governments).

[210] *See* U.S. CONST. Art. I, §2, cl. 3.

would undermine its competitor's investments. If amendment was easy to achieve, even the mere threat of such an amendment might elicit costly bargaining or even preclude investments in party infrastructure ab initio. Other examples of hold-up can be imagined in the trade context. Imagine, for example, an interest group that contributes to the national government's investments in banking infrastructure but foregoes development of its own monetary institutions. Its investments are imperiled by an amendment proposing limits on national monetary authority and a redistribution of such authority to the states. In both examples, the easier amendment is, the cheaper strategic invocation of the amendment power becomes.

A strategic request for amendment need not focus on a point already crisply resolved in constitutional text. Provided that other parties have relationship-specific investments in the constitutional order, amendments can be invoked strategically to redistribute surpluses between parties even in the absence of a textual settlement. Consider the example of American slavery. The Constitution did not expressly prohibit or endorse slavery, although six of its provisions implicitly endorsed and protected the practice.[211] Arguments for the prohibition of slavery were vociferously pressed in the antebellum period.[212] It is telling that Congress's response was not to try to settle the matter by constitutional amendment or legislation, but instead to install a "gag rule," precluding debate on the matter[213] and to pursue territorial compromises that delayed any final reckoning.[214] Bracketing the profound moral questions raised by such deferrals—e.g. the question whether preservation of the Constitution warranted a deferment of (or even a failure to) slavery's resolution—these legislative responses can be understood as a recognition that slavery presented questions then too divisive for resolution. In the same light, the rigor of Article V, and in particular the singling out in Article V of the slave trade for an especially onerous and restrictive amendment rule, can be construed as evidence that the Framers intimated the possibility that slavery could be used as a wedge to split apart the Union. By making it all but impossible to amend the Constitution in respect to slavery, the Framers delayed any reckoning with that institution until the Union had gained sufficiently in strength to survive that rupture.[215] Article V thus operated to preserve constitutional ambiguities as much as it protected elements of the constitutional deal that had been set forth in clear text.[216]

In each of these examples, Article V operated akin to a no-modification rule in a private-law contract by effectively switched the parties' choice set from 'adhere-modify-exit' to 'adhere or exit.' This alteration in the parties' options mitigated the risk of strategic requests for amendment by making the expected payoff from such renegotiation ex ante much smaller. In this

---

[211] *See* WALDENSTEICHER, *supra* note 110, at 71–105.

[212] *See* WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY: JOHN QUINCY ADAMS AND THE GREAT BATTLE IN THE UNITED STATES CONGRESS 65–93 (1995) (describing social movements behind anti-slavery petitioning).

[213] DON E. FEHRENBACHER, SLAVERY, LAW, & POLITICS 58 (1981).

[214] LOUIS P. MASUR; THE CIVIL WAR: A CONCISE HISTORY 11–12 (2012); *see also* DAVID M. POTTER, THE IMPENDING CRISIS 1848-1861, at 90–120 (1976) (detailing the negotiation of the compromise).

[215] This is a very narrowly-defined view of constitutional success. Indeed, I cannot emphasize enough that my aim here is not to endorse the Framers' approach, or to critique it. The question of how to grapple with slavery under conditions in which the institution has considerable political support, and where secession might have prolonged its evil effects, strikes me as a profoundly difficult one—one well outside the scope of the current Article.

[216] It is nevertheless at least debatable whether sectional balance succeeded on its own terms. Rather, the 1850 compromise, which admitted California as a free state, upset the balance between free and slave states, and did not resolve how slavery would thereafter be treated in the territories. To Southern politicians like John Calhoun, the Compromise destroyed "irretrievably the equilibrium between the two sections." MASUR, *supra* note 214, at 12.

fashion, Article V took an option (seeking strategic amendments) that would have increased the risk of hold-up largely off the table. Doing so both mitigated a reason not to ratify and removed a source of post-ratification inefficiency.

Taking modification off the table has a positive effect on constitutional stability *even assuming exit remains a substantial possibility*—although I will argue in a moment that textual rigidity mitigates the risk of exit through another mechanism. Parties that would engage in strategic hold-ups by seeking constitutional amendment in light of others' asset-specific investments cannot simply switch strategies in the face of a no-modification rule to threaten exit so as to gain the same concessions. Amendment and exit are not fungible because constitutions do not comprise single or even a single-digit number of rules. Rather, they typically bundle plural packages of enabling rules and constraining rules together as a take-it-or-leave-it package.[217] All else being equal, it is likely that some sticks of the bundle benefit a party while other sticks in the bundle impose undesirable constraints. By exiting, a party loses both the benefits and the burdens of a constitution because exit is an all-or-nothing decision.[218] By contrast, renegotiation through amendment allows the same party to sort between the sticks of the constitutional bundle, choosing for disapprobation only those measures it views as undesirable. As a result, in the ordinary course of events, renegotiation of the constitutional deal through amendment will be a far more attractive vehicle for strategic exploitation than wholesale exit. The former, but not the latter, allows a potential defector to select the parts of the constitutional bargain it finds beneficial. By taking modification off the table, textual rigidity leaves open only the more costly option of exit.[219] At least in some class of cases, an interest group willing to game the amendment process will not chance the price of exit. Hence, once modification is off the table, exit does not pick up all the slack.

3. Subconstitutional Investments and the Risk of Exit

There is a second causal strand linking textual rigidity to constitutional survival. Beyond mitigating hold-up, textual obduracy also dampens the allure of exit. The link between rigidity and the mitigation of exit risk is not direct. It is mediated through subconstitutional institutions—*i.e.*, institutions not formally required by the text or reflected via textual amendment but instead that necessarily emerge as part of the downstream functioning of a constitutional framework.[220] Such institutions are needed to produce public goods, such as peaceful political competition, economic growth, and national security, which justify a constitution's creation. Two examples—both developed below—include a political party system and a fiscal infrastructure.

---

[217] *See* Aziz Z. Huq, *Binding the Executive (by Law or Politics)*, 61 U. CHI. L. REV. 777, 806–07 (2012). In the United States, federal officials take an oath to defend the *whole* Constitution. *See* U.S. CONST. Art. VI, §3.

[218] *Cf.* PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 33 (2004) (exploring some of the effects of "'lumpy' or 'winner-takes-all'" political goods).

[219] Notice, however, that this binary choice can, through a different mechanism, accelerate exit.

[220] My usage of the term "institutions" here is a loose one, and at odds with one leading work. According to Douglass North, "[i]nstitution are the rule of the game in a society or, more formally, are the humanly devices constraints that shape human interaction." DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990). By contrast, "[o]rganizations are created to take advantages of th[e] opportunities" created by institutions. *Id*. at 7. In North's locution, I will often be discussing "organizations" below. But at least in this context, I find his terminology potentially confusing, and thus use the term "institutions" in its loose, more demotic sense.

Textual rigidity enables the creation of such subconstitutional institutions since parties to the constitution would not contribute to create such institutions without assurances against hold ups. But the new institutional ecosystem is also independently causally efficacious because it entangles those same parties in the constitutional order by fixing their investments in an asset-specific form. If those parties exit the constitution, they lose the tailored resources, knowledge, and skills invested in the new institutional ecosystem. In this way, institutions enabled by textual rigidity fostered greater lock-in to the underlying constitution and diminished resistance to cooperative investments. This adds up to a virtuous circle—a set of "self-reinforcing processes that [make] reversals increasingly unattractive."[221]

This virtuous circle mechanism is grounded on the assumption that constitutions not only establish basic governance frameworks but also "induc[e] the development of economic and political organizations."[222] A new ecosystem of parties, institutions, and networks is necessary for realizing welfare gains immanent in the incomplete constitutional bargain. In its absence, a new constitutional framework would be a dead letter, and the public goods that government is typically tasked with producing would never materialize. The necessary institutional ecosystem, however, need not be memorialized in constitutional text. To the contrary, new parties, institutions, and networks may take an exclusively subconstitutional form, as indeed they have in the United States. Despite its 'subconstitutional' character—in the sense of being located underneath the text of a constitution and not in that text—a new institutional ecosystem will inevitably develop along a path tailored specifically to a particular constitution's topography. Elections, for example, create incentives to organize in specific ways in anticipation of campaigns for political office in certain geographic jurisdictions.[223] The fiscal infrastructure of a new constitution will also induce certain patterns of investment and commercial activity, not least by restricting or expanding the expected supply of credit. And by resolving public-good problems that impede certain channels of internal commerce and external trade, a newly constituted government may encourage investment in some trading relationships rather than others.[224]

This asset-specific infrastructure for the production of public goods has the effect of making exit from a constitution by a pivotal party less likely. It has value in large part because it fits tightly a particular constitution's text, but has "far less value under alternative institutional arrangements."[225] For example, a political party ceases to be tailored if fundamental parameters

---

[221] PIERSON, *supra* note 218, at 35. For an interesting example of another self-reinforcing process of political stabilitization mediated through norms, rather than via third-party enforcement, see the discussion of Russian integration into Estonia in Avner Greif & David Laitin, *A Theory of Endogenous Institutional Change*, 98 AM. POL. SCI. REV. 633, 647 (2004).

[222] NORTH, *supra* note 220, at 8.

[223] *See, e.g.*, William H. Riker, *The Two-Party System and Duverger's Law: An Essay on the History of Political Science*, 76 AM. POL. SCI. REV. 753 (1982).

[224] NORTH, *supra* note 220, at 77 ("The kinds of information and knowledge required by the entrepreneur are in good part a consequence of a particular institutional context.").

[225] *Cf.* NORTH, *supra* note 220, at 7 (stating that "lock-in … comes from the symbiotic relationship" between a general framework and specific entities that have adapted to that framework). For the point being made in reference to political institutions, *see* PIERSON, *supra* note 218, at 149 ("Individual politicians, political organizations such as parties, interest groups, and even ordinary citizens will, over time, develop assets that are specific to a political institution (or set of institutions)."). For the same point being made in reference to commercial institutions, *see*

of the voting system change, say making local linkages more important than national profiles. Trade relationships with a country cease to have as much value if one's country goes to war with it. Currency becomes worthless without the central bank that backs it. The asset specificity of cooperative investments raises the cost of exit for parties to the constitution who have "invest[ed] in specialized skills, deepen[ed] relationships with other officials and organizations, and develop[ed] particular political and social identities."[226] Over time, that is, the positive network externalities from learning and adaption to a particular political or commercial context[227] and the correlative cost of switching to another institutional framework both grow.[228] The expected loss in value of cooperative investments becomes in effect a tax upon exit from the constitution. As this tax on exit enlarges over time, parties can be increasingly confident that their investments will not be turned against them. Confidence thus induces investment, which in turn fosters greater confidence.

While perhaps small at inception, this locking-in effect grows over time through the operation of a positive feedback mechanism.[229] In the long term, that process tends to generate "massive increasing returns" on an initial investment.[230] Under these conditions, participants in a constitutional system likely develop "[a]daptive expectations … because increased prevalence of contracting based on a specific institution will reduce the uncertainties about the permanence of the rule."[231] These expectations then further entrench the constitution,[232] deepening the effect of the virtuous circle mechanism.

4. Subconstitutional Institutions with Lock-In Effects in the Early Republic

Are there example "of political institutions" enabled by the parsimonious text of the 1787 Constitution "to deal creatively with ongoing developments … outside the Constitution"?[233] In this section, I offer two case studies—political parties and the national financial infrastructure that coalesced around the Bank of the United States. At the same time, I do not mean to imply that these are the only such virtuously entrenching institutions. I focus on institutions that emerged at the beginning of the Republic because it is during the first few decades that textual rigidity was most likely to be useful. My claim here is that both subconstitutional institutions are

---

Daron Acemoglu et al., *The Rise of Europe: Atlantic Trade, Institutional Change, and Economic Growth*, 95 AM. ECON. REV. 546 (2006).

[226] NORTH, *supra* note 220, at 7.

[227] *Id*. (identifying "significant learning effects for organizations that arise in consequence of the opportunity set provided by [an] institutional framework"); PIERSON, *supra* note 218, at 24.

[228] Peter Alexis Gourevitch, *The Governance Problem in International Relations*, *in* STRATEGIC CHOICE AND INTERNATIONAL RELATIONS 137, 144–45 (D. Lake & R. Powell, eds. 2000) ("Where investments in the specific assets of an institution are high, actors will find the cost of any institutional change that endangers those assets to be quite high; indeed actors in this situation may be reluctant to run risks of any change at all ….").

[229] *See, e.g.*, Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitments*, 124 HARV. L. REV. 657, 687 (2011) (identifying "positive political feedback" in instances in which "[s]tructures and processes of political decisionmaking, as well as particular policy outcomes, often reshape politics in ways that increase support for the institutions themselves").

[230] NORTH, *supra* note 220, at 95.

[231] *Id*.

[232] Moreover, the sheer complexity of the institutional system, with different rules, exceptions, and standards developing to the betterment of one or another interest group, will grow over time, further increasing systemic stability.

[233] Young, *supra* note 21, at 456 (answering this question in the affirmative).

plausibly understood as having been enabled by textual rigidity. In both cases, I am willing to concede that there is a nonfrivolous argument that the institutional novation might be viewed as one that demanded a formal amendment, which in practice was unavailable due to Article V. At the same time, that same provision of the Constitution stabilized expectations in a way that made possible the practical investments that allowed parties and banks to develop as plausible subconstitutional adaptions, rather than additions to the 1787 text.

a. National political parties

Consider first the evolution of the early Republic's national political party system. This system was tailored to the 1787 constitutional dispensation. It also yielded increasing stability-related returns up through the late 1810s. To be sure, the party system underwent transformation after the war of 1812, and then collapsed in the late 1850s, opening the road to secession and the Civil War.[234] For my limited purposes, it suffices to show that the first party system was the kind of stabilizing cooperative investment enabled by constitutional rigidity, and that it promoted stability in the first two high-risk decades of the early Republic.

The architects of the 1787 Constitution famously "did not believe in political parties as such" and instead "had a keen terror of party spirit and its evil consequences."[235] Early federal candidates believed it dishonorable to campaign actively for office, and so turnout in federal elections tended to be small.[236] Yet by September 1792, James Madison could write that national political parties were "natural"[237] and by the second Congress "most officeholders could be identified as Federalists or (Jeffersonian) Republicans."[238] While these new political formations did not entirely resemble today's political parties[239] and kept their distance from the more grassroots Democratic-Republic societies of the day,[240] they still were characterized by "a comprehensive and common ideology."[241]

This two-party system was tightly fitted to the specifics of the 1787 constitutional framework in etiology and form. At its origin, the party system was "largely a[n] alliance between … elites" in the Philadelphia Convention.[242] Recent empirical analysis of voting

---

[234] For a brief recap of this history, *see* DEAN MCSWEENEY & JOHN ZVESPER, AMERICAN POLITICAL PARTIES: THE FORMATION, DECLINE, AND REFORM OF THE AMERICAN PARTY SYSTEM 13–21 (1991).

[235] RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1789-1840, x, 52–53 (1969) (arguing that those constitutional designers relied not on the "mutual checks of political parties' but on the "classic doctrine of separation of power" as sources of "liberty and stability"); *id*. at 64–73 (discussing the Federalist 10 as a tract against parties); *accord* JOHN H. ALDRICH, WHY PARTIES? A SECOND LOOK 71 (2011); MCSWEENEY & ZVESPER, *supra* note 234, at 41.

[236] GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 158–60 (2009) [hereinafter WOOD, EMPIRE OF LIBERTY]. Nor was the design that emerged from the Pennsylvania state house in the summer of 1787 broadly friendly to populist democracy. *See* SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: FROM JEFFERSON TO LINCOLN 32–33 (2005) (describing "antidemocratic" themes in the Philadelphia deliberations).

[237] WOOD, EMPIRE OF LIBERTY, *supra* note 236, at 161.

[238] ALDRICH, *supra* note 235, at 79; WOOD, EMPIRE OF LIBERTY, *supra* note 236, at 162.

[239] ALDRICH, *supra* note 235, at 99.

[240] WOOD, EMPIRE OF LIBERTY, *supra* note 236, at 162–63 (describing the growth of the societies and noting that "elite leaders like Jefferson and Madison … tended to keep well clear of them").

[241] *Id*. at 173; *see also* WILENTZ, *supra* note 236, at 40–43.

[242] WOOD, EMPIRE OF LIBERTY, *supra* note 236, at 64.

patterns in the Philadelphia Convention demonstrates that by its close "the interest constellations within the Convention" as revealed in patterns in voting coalitions "were similar to those in the newly settled political field" so that "state [delegate] alignments forecas[t] the contours of the future party system."[243] Analysis of voting patterns in the 1789 Congress also reveal that early, pre-party votes were "shifting" and "chaotic" as a consequence of cycling-based instability.[244] It may thus be that the push toward a duopolistic party system was deepened by the need to mitigate cycling problems in the federal Congress,[245] making the national party system a de facto adaption to the Constitution's choice of democratic mechanisms.

The first party system also had the effect of promoting political stability in the perilous first years of the Republic. Parties did not merely articulate popular concerns, they also "helped simultaneously to channel that discontent back into the system."[246] "When disgruntled citizens began murmuring about secession and civil war, party leaders were able to encourage them to turn to the polls…"[247] During the sectional fracas over the Alien and Sedition Acts, for example, leaders of the new national parties in state legislatures ensured that the alarums of the Virginia and Kentucky resolutions produced no more amplitudinous destabilizing echo.[248] Even in the throes of the partisan crisis of the 1800 election, the party structures dampened proclivities to exit the constitutional order. Hence, Federalist letters and memoirs of the late 1790s evince "a basic predisposition … to accept a defeat, fairly administered, even in 1800 before that defeat was a certainty."[249] That is, it was the Federalist network that disseminated the view that electoral defeat was not an occasion for defection from the Constitution. At the same time, parties served as the vehicles for expressing "sectional interests" in a way that did not result in terminal instability.[250] Political parties, in short, locked in powerful interest groups through investments in assets specific to the 1787 Constitution, assets that, over time, delivered political stability at an otherwise perilous moment.[251]

---

[243] Adam Slez & John Levi Martin, *Political Action and Party Formation in the United States Constitutional Convention*, 72 AM. SOC. REV. 42, 43, 58–59 (2007) (reporting data in fig. 5).

[244] ALDRICH, *supra* note 235, at 77–78. The observation that the use of a majority-vote rule by a collectivity to choose between more than two options will yield unstable outcomes absent some kind of agenda control was first made by the Marquis de Condorcet and formalized by Kenneth Arrow. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed.1963) (providing general conditions under which the exercise of collective choices through majority-rule voting does not yield stable outcomes).

[245] *See generally*, Kenneth A. Shepsle & Barry R. Weingast, *Structure–induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503. 507 (1981) (explaining how "institutional restrictions on the domain of exchange induce stability, not legislative exchange per se" (emphasis in original omitted)).

[246] Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 272–73 (2000); *see also* JOSEPH J. ELLIS, AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC 9 (2007) ("[The revolutionary generation] created political parties as institutionalized channels for ongoing debate, which eventually permitted dissent to be regarded not as a treasonable act, but as a legitimate voice in an endless argument.").

[247] Kramer, *supra* note 246, at 273.

[248] *Id*. at 275.

[249] HOFSTADTER, *supra* note 235, at 130; *id*. at 141 (noting that the Federalist presence in the Senate and the judiciary may have mitigated the string of prospective defeat).

[250] ELLIS, *supra* note 246, at 186. For evidence that this stabilization effect persists into the second party system, *see* JOHN F. BIBBY, POLITICS, PARTIES AND ELECTIONS IN AMERICA 31 (4th ed. 2000) (attributing the "lack of sectionalism in American politics … to the skills of Democratic and Whig politicians").

[251] At the same time, the rise of parties likely exacerbated the electoral crisis of 1800. *See* Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself Into the Presidency*, 94 VA. L. REV. 551, 568–71 (2004). This shows how institutions can have complex, even partially offsetting, effects on constitutional survival.

b. The Bank of the United States

At first blush, the Bank of the United States seems an unpromising candidate for positive feedback effects. Established first in 1791 despite a chorus of constitutional criticisms, the Bank's charter expired twenty years later and was not immediately renewed. The Second Bank, chartered in 1816, then saw renewal legislation vetoed by President Jackson in 1832.[252] But both the 1816 and the 1836 dissolutions of the bank triggered runs on state banks, suspensions of their operation, and national financial crises.[253] Rather than suggesting superfluity, such consequences of dissolution point to the Bank's pivotal role in the new nation's "modern financial system,"[254] a system that enabled "history's most successful emerging market, attracting the capital or investors in older nations seeking higher returns."[255] The Bank, like national political parties, was thus a post-ratification institutional novation, created within the new constitutional framework—and one that proved essential to the new dispensation's survival. By fostering a robust internal economy, even as frictions with foreign powers limited the growth of external trade,[256] the Bank in effect locked in states and important interest groups into a growing *American* economy—and therefore the American Constitution—that could survive financial contractions in 1812 and 1836.

At the time of Bank's creation in 1791, only five other banks existed in the United States.[257] The new Bank, Hamilton predicted, would increase the money supply through its emission of noninflationary paper currency, lower the cost of government borrowing, and facilitate the payment and collection of taxes.[258] By assuming the debt of the several states, it and then assuting bondholders of a reliable interest stream, the Bank would "liberate the country's commercial energy by yoking high finance to national projects."[259] Yet Hamilton failed to predict perhaps its most important policy consequence: On account of being the largest transactor in the money market, the main government fiscal depository, and a general creditor of other banks, the Bank "automatically exercised a general restraint upon the banking system" and effectively established "central bank control of credit."[260] As well as a competitor to local banks, the Bank acted as their "constant regulator" by dint of its collection of balances due from local banks.[261] The bank's dissolution in 1812 only revealed the Treasury's "need" for a central bank "not merely to lend it money but to marshal the banking system" and to maintain a credible

---

[252] The best history of the Bank remains BRAY HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 114–43, 197–450 (1957); *see also* Hugh Rockoff, *Banking and Finance 1789–1914*, in 2 THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES 645, 646–50 (Stanley L. Engerman & Robert E. Gallman, eds. 2000) (summarizing relevant history).
[253] STUDENSKI & KROOSS, *supra* note 204, at 19, 110.
[254] WOOD, EMPIRE OF LIBERTY, *supra* note 236, at 298.
[255] Peter L. Rousseau & Richard Sylla, *Emerging Financial Markets and Early U.S. Credit Growth*, 42 EXPLORATIONS IN ECON. HIST. 1, 20–21 (2005).
[256] HAMMOND, *supra* note 252, at 148.
[257] *Id*. at 128.
[258] STUDENSKI & KROOSS, *supra* note 204, at 60.
[259] WILLIAM HEGLAND, FOUNDING FINANCE: HOW DEBT: SPECIULATION, FORECLOSURES, PROTESTS, AND CRACKDOWNS MADE US A NATION 161 (2012).
[260] HAMMOND, *supra* note 252, at 198–99; *accord* STUDENSKI & KROOSS, *supra* note 204, at 72 ("The Bank had cooperated closely with the Treasury in attempting to stabilize the money market and protect the banking system.").
[261] *Id*. at 200.

currency.[262] In addition to generating new interstate frictions as banks declined to lend across state lines,[263] in the teeth of looming British invasion, dissolution proved near "disastrous for the war effort."[264]

The Bank fits both prerequisites for a subconstitutional institution with lock-in effects. First, it was a costly innovation tightly configured to the specifics of the new Constitution, one that required expenditure of much political capital to secure passage.[265] A more flexible constitutional amendment regime, which would have enabled less costly modifications of the bank's structure and simpler defaults on creditors, may have impeded the expenditure of that political capital. The Bank also yielded a welfare surplus by providing a fiscal infrastructure for the federal government.[266] And, despite some opposition from state banks, its central bank function enabled the growth of state banking.[267]

Second, the Bank, despite dissolutions in 1811 and 1836, had lock-in effects. Most obviously, the Bank's initial subscriptions induced fiscal investments by key members of the political class.[268] This had the direct effect of giving a large number of key political actors a (literal) stake in the federal government's success.[269] More subtly, the Bank grew the supply of national credit,[270] and thereby fostered an internal market that entangled together interests across the several states.[271] Without the expansion of credit enabled by the First Bank, it is at least arguable that American "society could never have commercialized as rapidly as it did."[272] To be sure, not every decision by the Bank was correct.[273] Yet on balance, it seems fair to label the

---

[262] *Id*. at 230; *accord* STUDENSKI & KROOSS, *supra* note 204, at 71–72 (describing the "profound repercussions on the economy" of the 1811 refusal to reauthorize).
[263] STUDENSKI & KROOSS, *supra* note 204, at 80.
[264] WOOD, EMPIRE OF LIBERTY, *supra* note 236, at 673.
[265] In particular, debate within the executive was fierce. HAMMOND, *supra* note 252, at 114–18 (describing enactment history and debates within the Washington Administration).
[266] *Id*. at 208 ("The Bank acted as fiscal agent of the Treasury; it effected payments of interest on the public debt, at home and abroad; it received subscriptions to new issues of government securities; it effected payment of the salaries of government officials … ; it moderated the outflow of specie; and it supplied bullion and foreign coin to the Mint.").
[267] *Id*. at 198–99. The Second Bank, indeed, was instrumental in ending state bank runs and suspensions triggered by the dissolution of the first Bank. *Id*. at 246–47. It is no small irony that those same state banks resented the Bank's enabling constraints and "from the beginning … sought to destroy or weaken it." WOOD, EMPIRE OF LIBERTY, *supra* note 236, at 294.
[268] Among the subscribers to the Bank's first subscription were more than a third of the sitting members of Congress and the state of New Hampshire. HAMMOND, *supra* note 252, at 123.
[269] *Id*. at 206.
[270] *See* STUDENSKI & KROOSS, *supra* note 204, at 107 ("The Federal government [*i.e.*, the Bank] encouraged the expansion of state banks by accepting their notes in payment for public lands and by building up their reserves through the deposit of paper money."); *accord* Rockoff, *supra* note 252, at 647.
[271] *See* DAVID WALKER HOWE, WHAT GOD HATH WROUGHT: THE TRANSFORMATION OF AMERICA, 1813-1848, 144 (2007) ("By 1819, economic relations had become strongly interconnected ….").
[272] WOOD, EMPIRE OF LIBERTY, *supra* note 236, at 297. Wood here is referring to the growth of state banks, but my point is that the growth in effective state banking would not have been possible without the central banking function played by the Bank of the United States. *Cf.* HAMMOND, *supra* note 252, at 246–47 (describing how second bank kick-started credit system in 1816). Of course, at some point, the number of state banks becomes excessive and potentially inflationary in effect.
[273] *See, e.g.*, HOWE, *supra* note 271, at 142–43 (noting how the Second Bank's 1819 credit contraction deepened a financial crisis).

Bank as a rigidity-enabled instrument of entanglement—and hence stabilization—in the early Republic.

C. Anchoring a Constitution in Cooperative Institutions

This Part has identified two causal pathways mechanisms by which textual rigidity promotes a constitution's survival—by mitigating hold-ups and by inducing virtuous circles of investment and confidence-accretion. Notwithstanding the Framers' inchoate understanding of amendment dynamics, there is some evidence that Article V had both effects in the key period of the early Republic. These mechanisms diverge from dominant accounts of constitutional survival canvassed in Part I.B, which are more focused on a need for "enforcers" drawn from "the opposition" or "the citizenry."[274] On the latter view, the central problem of constitutional rule is defection, and constitutions persist when they succeed in lowering the cost to enforcers of detecting, preventing, and correcting defections by others.[275] This view focuses attention on the question of how to minimize the costs of enforcement.[276] It also leads to a concern for how constitutional text can serve as a "focal point" to "narrow the range of disagreements" thereby lowering the costs of coordinating opposition to constitutional breaches.[277]

By contrast, the mechanisms presented in this Part turn on the inducements that a constitution creates for parties to comply, even absent third-party enforcement. This is consistent

---

[274] ELKINS et al., ENDURANCE, *supra* note 1, at 76; *accord* Peter C. Ordeshook, *Constitutional Stability*, 3 CONST. POL. ECON. 137, 143 (1992) (concluding that the "most important problem" in constitutional design is "how such a contract is enforced").

[275] Mittal & Weingast, *supra* note 123, at 5; *accord* Sutter, *supra* note 13, at 140 (focusing on defection risk). North and Weingast's famous account of the 1688 Glorious Revolution in England places its same emphasis on a similar theme. They argue that the revolutionary settlement created a "self-enforcing" arrangement in which the parliament could check the monarch by vetoing "major changes in policy," while parliament was constrained by its internal collective action costs, the libertarian bent of the governing Whigs, and "a politically independent judiciary." Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 817–19 (1989). This is in essence a claim about the mutuality of potential constitutional enforcement.

[276] ELKINS et al., ENDURANCE, *supra* note 1, at 78–80, 88–90 (developing a theoretical account of constitutional endurance based on the ability based on the active participation of interest groups in policing a constitutional bargain).

[277] Strauss, *Common Law Constitutional Interpretation*, *supra* note 6, at 912–13; *accord* Mittal & Weingast, *supra* note 123, at 7 ("When citizens fail to act in concert … leaders can exploit these differences …."); Sutter, *supra* note 13, at 145 (describing constitutional enforcement as a public good, and identifying free-rider and monitoring problems related to enforcement); Weingast, *Designing Constitutional Stability*, *supra* note 87, at 348–49 (discussing "the coordination problem underlying democratic stability" and extending the point to the constitutional context); Ordeshook, *supra* note 274, at 147 (identifying the need for coordinating mechanisms in a constitution); *see also* Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 246 (1997) (arguing that political "pacts" underpinning democracy "create a focal solution that resolves the coordination dilemmas confronting elites and citizens"). Constitutional text enable coordination between they provide "common knowledge," which is essential to any form of social cooperation. MICHAEL SUK-YOUNG CHWE, RATIONAL RITUAL: CULTURE, COORDINATION, AND COMMON KNOWLEDGE 7, 14 (2001). Constitutional focal points also "define appropriate bounds on governments and rights of citizens" and induce enforcement provided that citizens believe themselves better off with those rules than without. Weingast, *Designing Constitutional Stability*, *supra* note 87, at 352–53. For an elaboration of the point that parties must see themselves better off inside than out of a constitutional order, see Mittal & Weingast, *supra* note 123, at 8.

with private contracting dynamics, where deals abound even absent enforcement as a result of "the dynamics of interactions" generating "mutually built assets of value to either party."[278]

III. Revisiting the Puzzles of Article V

This Part reconsiders the positive and normative puzzles identified in Part I in light of Part II's proposed causal link between textual rigidity and constitutional survival. To begin with, I return to the question of why the U.S. Constitution's survival seems so anomalous in comparison to other nations' experiences. The first section of this Part thus reconsiders the question why rigid constitutions are so rare in a global perspective. Next, I focus on the normative critiques of Article V. Accounting for the function of textual rigidity, I suggest, casts these critiques in a fresh light. Finally, I press further on the normative implications of the analysis by suggesting that they also illuminate ongoing debates about legitimacy of both judicial review in general and also specific methods of constitutional intepretation.

A. The Infrequency of Rigid Constitutions

If my arguments in Part II respecting the U.S. Constitution have any purchase, they ought to provoke a new puzzlement: If rigidity does indeed conduce to constitutional survival in the manner suggested by Part II, why does comparative epidemiological analysis of constitutional survival suggest that it so often fails?[279] That is, why is the United States an outlier? There are two reasons for the dearth of observable successful rigid constitutions beyond U.S. borders. They explain respectively why rigidity will not always be an appropriate design choice and, even when it is warranted, why rigidity still often fails. In tandem, I contend, these reasons account for the infrequency of textual rigidity in durable constitutions.

To begin with, it is worth illustrating the rarity of the U.S. Constitution. Figure I plots data for 169 constitutions derived from the Comparative Constitutions Project (CCP) database.[280] The y-axis shows the duration of the constitution. (The publicly available part of the database does not specify duration data for surviving constitutions; hence the U.S. Constitution does not appear). The x-axis records the rate of amendment as calculated by the CCP. Data for the 169 least amended documents (up to and including the U.S. Constitution) is presented.[281] The resulting scatter plot can be understood as snapshot estimating how likely infrequently amended constitutions are to survive.

---

[278] Éric Brousseau, *Contracts: From Bilateral Sets of Incentives to the Multi-Level Governance of Relationships*, *in* BROUSSEAU & GLACHANT, *supra* note 123, at 37, 57. This is the familiar point from game theory that a cooperative game that is not stable if played only once can be stable in circumstances of repeat play because of the present-discounted value of the stream of expected future benefits. *See* Thiéry Penard, *Game Theory and Institutions*, *in* BROUSSEAU & GLACHANT, *supra* note 123, at 170–71.

[279] *See infra* Part I.A.

[280] Data obtained from http://www.comparativeconstitutionsproject.org/. I am grateful to Tom Ginburg for providing this data.

[281] To this end, I use the "amendment rate" variable in the Comparative Constitiutions Project database. Descriptive statistics for this variable are presented at ELKINS et al., ENDURANCE, *supra* note 1, at 226 (Table A.4).

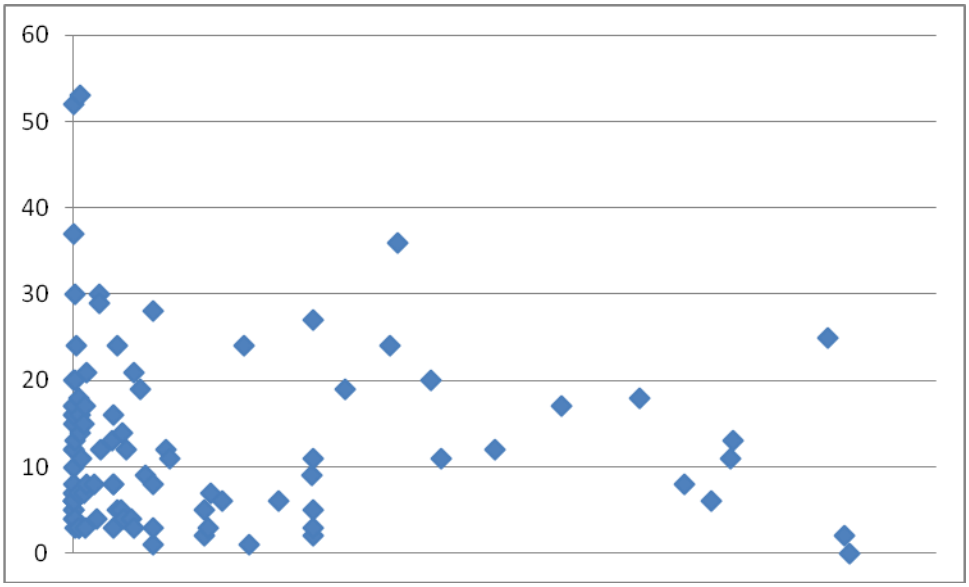


Figure 1: Duration in Years of Rigid Constitutions (n=169)

This data suggests that, at least within the pool of rigid constitutions, the odds of endurance are typically low. Only two constitutions in the sample proved relatively durable: the Bhutanese Constitution of 1953 (52 years) and the El Salvadorian Constitution of 1886 (53 years). Lifespans akin to that of the U.S. Constitution are relatively rare. No other clear secular trend emerges, however, from the data. This suggesting that much more granular analysis using local information about specific nations' political and institutional circumstances would be needed to identify causal forces at work. The CCP database does not contain that data.

The analysis of Part II, nevertheless, points towards two reasons why rigid constitutions seem to rarely persist in the fashion of the U.S. Constitution. The first reason for rigidity's infrequency was intimated at the opening of Part II: Textual rigidity is a response to one specific contracting problem of hold-up. It is not a general solution to the problems of constitutional survival. But, as discussed, not all constitutional drafters need to be concerned about hold-up. They need not be concerned, for example, if robust national institutions already exist. Hence, constitutional makers in Eastern Europe after the fall of the Berlin Wall would not have needed to attend to my argument because they already possessed many necessary state institutions, even aside from the potential for fiscal and epistemic aid from western European counterparts.[282] And they should focus away from hold-up concerns if there is no set of robust political competitors who might readily unsettle the constitutional order.[283] Only when neither robust institutions nor oligopolistic political competition is present does textual rigidity have potential utility. Hence, if there are no large set of cases in which both these factors are indeed absent—as the data in

[282] *See generally* Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 477 (1991).
[283] The failure of the Articles of Confederations, which required unanimity for amendments, suggests that rigidity can also induce failure when a constitution fails to provide space for subconstitutional institutions or is otherwise poorly designed. Given that both the Articles and also the 1787 Constitution are rigid, it is not plausible to ascribe that the former's failure solely to its inflexibility. That is, it is *not* that the Articles of Confederation miscalculated the amendment rule and the 1787 Constitution got matters just right—the documents' contents and enactment politics also mattered greatly.

Figure 1 suggests—constitution makers would be wise to view textual flexibility with skepticism.

The second reason for rigidity's rarity is that textual inflexibility is a risky strategy for producing constitutional stability. Close attention to the mechanisms identified in Part II suggests the success of a rigid constitution will turn disproportionately on decisions made by the first post-enactment generations of interest-groups and factions. Interest groups in that period have two potential strategies in response to a rigid constitution. First, they can make cooperative investments, which will have increasing welfare returns and will over time embed interest groups into a specific constitutional framework.[284] Second, because rigidity merely mitigates the risk of hold-up, and does not eliminate it entirely, risk-averse interest groups confronting a new constitution may also decline entirely to invest. The sharply dichotomous character of this election implies that small changes in behavior and judgment in the early days after a constitution's ratification will have large effects on the chances of a constitution's survival. Because they are highly sensitive to small, early-stage decisions, rigidity-based mechanisms of constitutional survival are likely to have ex ante a "knife-edged" quality: "Everything hinges on a single threshold determination"—to invest or not to invest?—with large, irreversible downstream consequences.[285] The chances of success may be finely balanced, with small changes cascading into large differences in long-term pay-offs. When a pool of rigid constitutions is observed ex post, it is likely that some cases fall on either side of the knife's edge, such that the pool will contain failures as well as successes.

This knife-edge quality of rigidity-based mechanisms is intertwined with path-dependent nature of early constitutional development. In path dependent processes, "large consequences may result from relatively 'small' or contingent events [and] particular courses of action, once introduced, can be virtually impossible to reverse" as a result of feedback mechanisms that entrench certain features of the status quo.[286] In constitutional development under a rigid amendment rule, "[m]any paths are possible at the early stages," with the choice turning on seemingly small decisions; but after those decisions are made, "the path will be 'locked in.'"[287] How those early decisions will turn out in any given case is hard to predict. The decision to invest or not under a new constitution will depend on what in effect are "random" effects,[288] such as the personalities of relevant political agents, accidents of historical circumstances, and other factors outside the constitutional designers capacity to predict, let alone control. Sometimes, as with the Articles of Confederation, those factors will not converge to produce constitutional endurance. This large sensitivity to randomly distributed exogenous stresses—the "importance of

[284] *Cf.* PIERSON, *supra* note 218, at 21 (noting that a core feature of path dependent systems is that "each step in a particular decision makes it more difficult to reverse course).
[285] Adrian Vermeule, *Holmes on Emergencies*, 61 STAN. L. REV. 163, 199 (2008).
[286] PIERSON, *supra* note 218, at 18–19; *see also* NORTH, *supra* note 220, at 93–94 (developing the idea of path dependency); *see also* ROBERT JERVIS, SYSTEM EFFECTS: COMPLEXITY IN POLITICAL AND SOCIAL LIFE 155–61 (1997). Path dependency comes in two flavors: It can arise due to "self-reinforcing sequences" of the kind described in Part II, or it can occur because of a "reactive sequence," which is a "chai[n] of temporally ordered and causally connected events." James Mahoney, *Path dependence in historical sociology*, 29 THEORY & SOC. 507, 508–09 (2000).
[287] JERVIS, *supra* note 286, at 156.
[288] PIERSON, *supra* note 218, at 18.

contingency"[289]—gives the appearance that a constitution's fate rests on a knife's edge in its early stages.[290] Ex ante, survival is hard to predict or guarantee; ex post, the pattern of failures and successes can seem arbitrary.[291]

The knife-edge quality of path dependent processes may be compounded in the case of rigidity-induced constitutional stability by a further dynamic. In most cases, the post-enactment game is not binary. Cooperatively-produced public goods, such as new political or economic institutions, may require the participation of many. These institutions, as a result, may be "step goods" that "will be produced only if enough members … of the group contribute."[292] Given the "strongly complementary" nature of contributions to step goods,[293] potential contributors may not come forward unless they know or expect that most, if not all, other potential contributors will participate. In the context of the 1787 Constitution, for example, each state wanted to join the new constitution provided a sufficient number of others joined.[294] At the same time, perfect contribution was not needed: Hence, the decisions of North Carolina and Rhode Island not to ratify at first did not undermine the Constitution's September 1788 activation.[295] In cases of common contributions to step goods, the presence or absence of *common expectations* may make the difference between success and failure.[296] Common beliefs that others will contribute

---

[289] JERVIS, *supra* note 286, at 156.

[290] *See also* Drew Fudenberg & David K. Levine, *Continuous Time Limits of Repeated Games with Imperfect Public Monitoring*, 10 REV. ECON. DYNAMICS 173, 174–75 (2007) (describing path-creating effects of knife-edged decisions).

[291] *Cf.* NORTH, *supra* note 220, at 98–99 ("Path dependency … is not a story of inevitability in which the past neatly predicts the future."). Indeed, these reasons, path dependent accounts are often parsed as more useful for explaining outliers, such as the U.S. Constitution, than for generating covering laws for large sets of cases. *See* Mahoney, *supra* note 286, at 508 ("Substantive analyses of path-dependent sequences offer explanations for particular outcomes, often 'deviant outcomes' or instances of 'exceptionalism.'"). One example of the importance of contingent and unexpected events in constitutional development concerns the contested 1800 election between Thomas Jefferson and John Adams. When that contest ended in a dead-lock between Jefferson and Aaron Burr, the immediate cause was the Framers' failure to "think through the full ramifications" of the Vice President's office. Ackerman & Fontana, *supra* note 251, at 555; *id*. at 560–67. The impasse would have been worse had not the Framers, perhaps foolishly entrusted the Chief Justice with counting contested ballots. *Id*. at 626–29 (noting that John Marshall, under this regime, would have been responsible for the count). Only another technical error in miscounting ballots may have saved the nation. *Id*. at 592.

[292] RUSSELL HARDIN, COLLECTIVE ACTION 55–59 (1982); *see also* THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 213–14 (1978) (describing problem).

[293] Lee Anne Fennell, *Lumpy Goods*, 160 U. PA. L. REV. 1955, 1956 (2012).

[294] *See, e.g.*, MAIER, *supra* note 36, at 124 (noting that even after four states had ratified, "the Constitution's fate and the country's future" hung in the balance).

[295] *Id*. at 428–30 (discussing the fact that North Carolina and Rhode Island had failed to ratify the 1787 Constitution on September 13, 1788, when "Congress formally announced that the Constitution had been ratified by the required number of states").

[296] HARDIN, *supra* note 292, at 58–59; SCHELLING, *supra* note 292, at 215–16 (noting roles of both knowledge and expectations). On the other hand, recent work on collective choice has argued that a thin rationality generates sufficient reason to believe that others will contribute. Richard Tuck, for example, argues that "if I am faced with a situation where an accumulation of relatively small contributions eventually leads to the crossing of some threshold which I would welcome, then in general I have a good instrumental reason to make one of the contributions, assuming that enough others will be made." RICHARD TUCK, FREE RIDING 99, 102–03 (2008). Relevant to the circumstances of the 1787 Constitution, Tuck also argues—quite persuasively—that eighteenth and nineteenth century theorists would have perceived no individual reason to refrain from collaboration in production in a collective good. *Id*. at 15.

conduce to a constitution's success, while a momentary and transient failure of political culture might undermine the whole constitutional project.

For all these reasons, constitutional design founded on textual rigidity is not for the faint of heart, even if circumstances otherwise conduce to the employment of rigidity. A rigid constitution's survival partly depends on contingent events beyond a designer's control. After the fact, what may seem manifest destiny may better be understood as a species of luck.[297]

B. Revisiting and Revising the Normative Critiques of Article V

The analysis to this point has offered a response to the positive puzzle of Article V. But recognizing a causal link between textual rigidity and constitutional survival may also cast light on the normative critiques of Article V showcased in Part I.C. Recall that the most forceful of these focus on Article V's countermajoritarian and "dead hand" consequences. Condemnation of Article V on countermajoritarian grounds, though, takes on a paradoxical cast once the survival-related benefits of rigidity are recognized. One can, after all, complain about the dead hand's lingering grip only if one's constitution has in fact survived long past its birth. Dead constitutions have no withering hold on democratic choice. In effect, critics who tender the countermajoritian charge assume a baseline of constitutional survival to launch an attack on the very mechanism that produced such survival. The more appropriate comparison juxtaposes a world after a constitution's death with life under the rigid constitution. Criticism of Article V as countermajoritarian, in other words, is at best debatable and at worst rests on a flawed (if implicit) normative baseline.

Yet the analysis developed in this Article also hints at a way of reworking the countermajoritarian critique of Article V. Rather than making an absolute claim about the deleterious consequences of textual rigidity, critics of Article V's vice-like grip might instead focus on the possibility that an optimal constitutional amendment rule is not time invariant. As the empirical work of Ginsburg, Elkins, and Melton demonstrates, the risk of constitutional death looms largest in the first two decades of a constitution's life cycle, and thereafter drops off considerably.[298] This finding suggests the value of a design mechanism to dampen the risk of failure will be great in those first two decades. I have argued that, at least in the American context, it is plausible to contend that early-stage mortality risk was mitigated in important part by the textual rigidity fostered by Article V.

Notice though that I have been careful to specify that this justification only applies to an early period in the Constitution's history. And I have further been careful not to claim that merely because a constitution survives its perilous adolescence its survival is assured. Rather, as constitutions age they are threatened by a different risk. In early periods, perhaps the most important risk is that parties will make insufficient investments in the new constitutional order or will even defect. As Part II argued, rigidity provides one solution to these risks. But in later periods, the risk of defection or a failure of national institutions for want of buy-in will likely

---

[297] *Cf.* JERVIS, *supra* note 286, at 156 ("Looking back at a pattern, we may overestimate the degree of determinism involved.").

[298] ELKINS et al., ENDURANCE, *supra* note 1, at 120 (noting that mortality risk for constitutions peaks at age seventeen).

have diminished as parties become more entangled in a constitution-specific ecosystem of national institutions. In those later periods, perhaps the most important threat to constitutional survival is likely to emerge from the failure to adapt to changing social, economic, and geostrategic circumstances, or to respond to exogenous shocks such as economic crises, military confrontations, or natural disasters. Further, claims by constituencies originally excluded from the constitutional bargain may become more pressing—the cases of African-Americans and women are obvious examples from the American context—and hence more destabilizing with time.[299] All else being equal, the case for adaption in the face of this second variety of risk grows over time. Political status quos at the time of ratification are unlikely to persist. The probability of salient exogenous shocks compounds over time. A constitution that cannot adapt to industrialization, geostrategic shocks, or new kinds of security threats is not a constitution that will long persist. Just as the risk of hold-ups and suboptimal investments diminishes, so the cost of constitutional inflexibility rises. Rather than insufficient rigidity, the problem then becomes one of too much inflexibility.

This analysis has consequences for the optimal level of constitutional rigidity. It suggests an optimal constitutional amendment rule (at least in the American constitutional order) may well not be static but may instead be temporally sensitive. The constitution should be characterized by high barriers to change in the early decades of a nation, followed by a sharp decline in those barriers as exogenous pressures on the nation-state accumulate. Accordingly, the Framers can be faulted not for being countermajoritarian, but for not including a two-speed amendatory process in their Constitution: rigid like Article V for the first few decades to absorb the shocks of adolescence, but then switching to the malleable thereafter so as to adapt to new exogenous strains and shocks of a nation's maturity. Note that it is no response to say that multi-speed amendment rules are hard to draft. Article V already imposes differentially higher barriers to textual amendments that concern either the slave trade or certain elements of state sovereignty.[300] So the Framers had on hand drafting solutions. They just did not use them.

The problem with Article V, then, is not that it yields too rigid a constitutional text. The problem is rather that it has yielded too rigid a constitution *for too long*. What worked in the early Republic to address the peril of hold-up became increasingly dysfunctional in the fluid economic and geopolitical contexts of the late nineteenth, twentieth, and twenty-first centuries.

Nevertheless, it may be that Americans *did* create a multi-speed amendatory process that addressed the risk of hold-up in the Constitution's early days, but also addressed the risk of failing to adapt to exogenous shocks in later periods. Americans did this, I suggest, by slowly developing extratextual tools for amendment of the Constitution through statutes or via judicial

---

[299] Schwartzberg, *supra* note 38, at 74–75 (making this point in respect to the Equal Rights Amendment). Schwartzberg's insightful work is a normative critique of supermajority rules. My project, by contrast, is not normative, but concerned with ways in which constitutional design elicits stability in the teeth of certain distributions of political power and strategic behavior. Whereas she frames the claims of excluded constituencies as a matter of justice, I treat them here merely descriptively as extrinsic constraints on constitutional survival.

[300] An interesting parallel can be drawn with syndicated credit facilities, which use a plurality of voting rules for distinct contractual questions in the context of long-term multi-party contracts. *See* Steven Miller, *A Syndicated Loan Primer* 21 (Sept. 2006), available at http://snde.rutgers.edu/Rutgers/Econ394/Unit3/sp_syndicated_loan_primer.pdf (discussing use of different voting rules).

decisions. These tools came to be to address the risk of non-adaption in later periods after textual rigidity had ceased to be of large value. From this perspective, it is possible to posit two discrete periods in American constitutional development: the first dominated by durability, and the second characterized by fluidity and change. Alternatively, the urge toward rigid periodization might be resisted in favor of a more nuanced vision of a constitution subject to a gradually changing amendment rate—i.e., one that evolved solely with the emergence of new extratextual methods of interpretation such as judicial review, super-statutes, and constitutional moments. Whether one adopts the position that our Constitution had a two-speech history, or cast constitutional rigidity as a continuous variable subject to incremental change, the central point I wish to emphasize here is the sheer fact of change over time in the de facto amendment role, and, consequently, the rate of institutional development.

Viewing American constitutional history in this light yields some reason to cease fretting so much about the legitimacy of judicial review as a channel of constitutional change.[301] The Framers may not have perceived the wisdom of a multi-speed amendatory process that distinguished between different moments in the post-ratification period. But successive generations of federal politicians and voters have intuited the value of ratcheting up the quantum of fluidity in their constitutional order as the principal threat to that order evolved. Over time, they have invented, and come to accept as legitimate, an increasing range of mechanisms for extra-textual constitutional change, ranging from bisectional compromises to landmark statutes to judicial review. All are means to adapt the 1787 settlement to new stresses, new challenges, and new realities.[302] All are also products of subconstitutional institutions—e.g., the network of federal courts and a legislature operating in a robust national public sphere—that were rendered feasible by Article V-induced rigidity. The increasing plurality and inventiveness observed in any comprehensive study of the mechanisms of American constitutional change, that is, demonstrates that Article V enabled the creation of instruments of constitutional change that could supersede the text's monopoly on constitutional change. That increasing heterogeneity of amendment mechanisms, moreover, illuminates the wisdom of Americans over time, who, having secured the benefits of Article V-induced rigidity, then felt a need for more fluidity in the constitutional order and found ways to bring it about notwithstanding the barriers imposed by Article V itself.

The potentially dire counterfactual to this story of institutional evolution merits emphasis. Had politicians and citizens not grasped the value of extra-textual mechanisms for inducing constitutional change, the risk of constitutional death due to the failure to adapt to evolving circumstances would likely have destabilized the Constitution. Industrialization, globalization of trade, growing military conflict, and endogenous social change all imposed unanticipated strains on the constitutional order. Hewing literal-mindedly to the putative originalist rules, say, for congressional power and executive discretion would likely have invited national calamity and constitutional failure. Just as the naked claim that Article V is countermajoritarian fails to

---

[301] For examples of worries about judicial review, *see, e.g.*, Raoul Berger, *Lawrence Church on the Scope of Judicial Review and Original Intention*, 70 N.C. L. REV. 113, 132-33 (1991) ("Cumbersomeness affords no dispensation to the judiciary to ignore the Article V reservation of amendment to the people." (quotation marks omitted)). For a more recent, and more subtle, version is the same argument, arguing that a judicial refusal to overrule earlier incorrect precedent constitutes an illegal entrenchment of constitutional change, *see* Jonathan Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 20 (2011).

[302] *See*, *supra* Part I.B.2 (canvassing modes of extratextual amendment).

account for the appropriate baseline comparator, so broad condemnations of post-ratification, extra-textual technologies of constitutional change are also implausible in the absence of a plausible benchmark. Rather than comparing the present state of affairs against a utopian vision without those extra-textual modalities of constitutional change, critics should contrast the observed status quo to a world in which the Constitution has failed due to exogenous economic, military, or geopolitical strains.

On this view, the incremental discovery and adoption of extra-textual complements to Article V should be celebrated and not regretted. In the early Republic, Article V provided a robust means to respond to contested judicial decision such as *Chisolm v. Georgia*[303] and to fix a defective presidential selection mechanism.[304] In that era, textual rigidity was the more valuable default rule. As the Republic matured, the pressure for fundamental change compounded from year by year.[305] At some point, the need for constitutional change outran the ability of national political institutions to provide it through Article V procedures. Had the Court (abetted by the White House and Congress) not increasingly assumed an assertive role in constitutional affairs after a century of relative quiescence,[306] it is possible that external pressures would have inflicted considerable damage, eventually even a fatal blow, to the Constitution. In that light, the emergence of increasingly robust judicial review simply responded to the increasing need for extra-textual vehicles of constitutional change without which the Constitution may well not have survived.[307] Similarly, Congress's ability and willingness to fashion statutory schemes that refashioned fundamental elements of the constitutional order can be seen as a necessary form of innovation given the fact of Article V's sheer obduracy. Even if not *all* ensuing changes to the constitutional order were welfare-enhancing, it is quite plausible to think that in net these mechanisms were beneficial. Viewed from this perspective, the overwriting of the 1787 constitution with novel and extra-textual mechanisms for constitutional change through the federal courts seems less a problem and more a solution to the more important design flaw in the text of Article V—it's failure to specify a generally applicable dual-speed amendment regime.[308]

In short, ours is (at least) a two-speed Constitution. Its shifting amendatory regime, while not embodied in text, may have provided solutions to quite different threats to constitutional survival (*i.e.*, the hold-up problem and the failure-to-adapt problem) in the different periods in which those threats obtained. Rather than illicit substitutes for Article V, now common mechanisms of extra-textual constitutional change are better understood as Article V's

---

[303] 2 U.S. (2 Dall.) 419 (1793), superseded by U.S. Const. amend. XI.

[304] *See* U.S. Const. amend. XII.

[305] Some commentators have argued that the growth in the sheer number of federal legislators also made it harder to assemble the necessary supermajoritarian coalitions for constitutional change. Dixon, *Partial Constitutional Amendments*, *supra* note 1, at 651–64. This argument is at least in tension with the fact that the Progressive era featured a spate of constitutional amendments in quick succession.

[306] Mark A. Graber, *Establishing Judicial Review?* Schooner Peggy *and the Early Marshall Court*, 51 POL. RES. Q. 221, 224 (1998) (explaining how Marshall would "preserve judicial power by asserting its existence, thus establishing precedents for future use, while not actually attempting to challenge executive or legislative authority in any controversial way").

[307] *See* Huq, *Judicial Self-Restraint*, *supra* note 77, at 586 (fig. 1). The arc is reflected in the first and last chapter headings of Lucas Powe's history of the Court—"Very Modest Beginnings" and "An Imperial Court." LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE 1789-2008, at 1, 312 (2009).

[308] I do not mean here to intimate any Whiggish air of inevitability about this development.

complements—and its legacies. What some have construed as constitutional infidelity,[309] in other words, in fact has been part of our Constitution's saving grace.[310]

C. Rethinking "Historical Gloss"

Just as the analysis presented in this Article might provoke rethinking of the merits of judicial review in the abstract, it also might promote a reconsideration of some of the retail tools employed within constitutional interpretation. I develop in this final section a suggestive example. It involves the link between textual rigidity and constitutional survival in relation to the interpretative deployment of what Justice Frankfurter called "systemic, unbroken executive practice … as a gloss" on the Constitution.[311] Following Justice Frankfurter's lead, the Court tends to rely on historical practice especially in foreign affairs and separation of powers cases.[312] Despite the Court's long usage of historical practice as a gloss on constitutional text, concerns linger about whether interbranch acquiescence, long assumed to be a touchstone for reliance upon historical practice, indeed supplies the appropriate guide of what evidence is salient to constitutional interpretation.[313]

Judicial employment of historical gloss raises a host of important and interesting issues.[314] This Article's analysis of Article V simply suggests one dimension along which the salience of historical practice might be assessed, a dimension that to date has received little attention. Specifically, it suggests that historical practice ought to matter if it emerged in the first

---

[309] *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 111 (1999) (focusing on "popular sovereign" as expressed in the ratification process as the basis of constitutional obligation). Sophisticated originalists such as Whittington rely not only on the Founding as a font of popular legitimimation, but also insist on a notion of "potential sovereignty" whereby the Constitution is binding today before it preserves te ability of the people in the future to make new higher law. *Id.* at 129, 156 ("By maintaining the principle that constitutional meaning is determined by its authors, originalism provides the basis for future constitutional deliberation by the people. Present and future generations can only expect their own constitutional will to be effectuated if they are willing to give effect to prior such expressions."). Theories of potential sovereignty, however, fail to account for the fact of constitutional obduracy, let alone the possibility—developed in this Article—that such obduracy is itself a precondition to constitutional survival. In this way, originalism may be at war with the factually necessary predicates of contined constitutional survival.

[310] It is worth noting that the solution adopted in these later periods—extratextual amendment through courts or superstatutes—has no precise parallel in the private contracting literature. The closest parallel I can conjure—and it is quite imprecise and unsatisfying—is the cramdown provisions of the Bankruptcy Code, 11 U.S.C. §1325(a)(5)(B)(ii), by which some parties to a deal can force other parties to accept changes dictated by emergent circumstances. The difference in the constitutional context, of course, is that there are no prespecified rules for such change, and that an extratextual amendment is often the result of brute political force being applied, not the application of a legal rule.

[311] *Youngstown Sheet & Steel Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

[312] For foreign affairs cases, *see, e.g., Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (relying on "historical glosses" on executive power); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (citing Youngstown). For separation of powers cases, see *Raines v. Byrd*, 521 U.S. 811, 828 (1997) (citing the absence of historical practice as one ground for denying congressional standing); Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984).

[313] *See generally* Curtis Bradley & Trevor Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 441 (2012) (offering an account and a partial critique of the use of historical gloss).

[314] *Id.*; *see also* Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 81 (2013), http://www.harvardlawreview.org/media/pdf/forvol126_lacroix.pdf (exploring interaction of interpretive methodological choice and the use of historical gloss).

few decades of constitutional history, but perhaps less so otherwise. Institutions and practices established in the immediate wake of ratification played a role in stabilizing the Constitution through the virtuous-circle mechanism. Hence, they are plausibly viewed as but-for causes of the Constitution's longevity, entitled to positive presumptions of constitutional validity.

Consistent with this view, the Supreme Court has viewed both parties and the central bank as constitutionally authorized. This not only means, for example, that outr two national political parties are not condemned in the jurisprudence as a species of refractory faction that Madison would have condemned. It also entails that the Supreme Court has suggested that electoral regulations limiting third-party competition at the polls are valid in light of the state's legitimate interest in protecting the two-party system.[315] The consequences of state limitations on the associational rights of third parties with an eye to protecting incumbent parties for democratic contestation have prompted much criticism of that doctrine.[316] The Court's solicitude for bipartisan competition, however, may be recast as defending its contribution during the early Republic to the stabilization of the new constitutional order.

Along similar lines, it can be argued that Chief Justice Marshall was justified in sustaining the constitutionality of the Bank of the United States in *M'Culloch v. Maryland* despite considerable popular resistance by saying that "all branches of the government have … been acting on the existence of this power, nearly thirty years, it would seem almost too late to call it in question, unless its repugnancy with the constitution were plain and manifest."[317] The Bank, as one of the pivotal anchors of the 1787 constitutional disposition, had earned its legality.[318] Indeed, even its early for Madison recognized as much by 1816.[319] In contrast, this theory of path dependent institutional development provides no support for the legtimating invocation of historical practices that emerged long after the early Republican period. Hence, the Court's reluctant to attribute significance to post-New Deal congressional use of the legislative veto in a case invalidating such devices may have a justification beyond the reasons offered by the Court.[320]

The link between textual rigidity and constitutional survival thus points toward a temporally sensitive account of how historical practice should be employed in constitutional

---

[315] *See, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 353-54, 367 (1997) (upholding restrictions on "fusion" candidates, and noting that states can enact election regulations that "in practice, favor the traditional two-party system"); *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-96 (1986) (upholding primary qualification requirements for third party candidates to appear on the general election ballot); *Storer v. Brown*, 415 U.S. 724, 729-30, 736 (1974) (upholding restrictions on independent candidates for office, and affirming that states can take measures to prevent "unrestrained factionalism").

[316] For criticisms in the wake of *Timmons*, see Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331 (1997).

[317] *M'Culloch v. Maryland*, 17 U.S. 316, 323 (1819).

[318] *See* David A. Strauss, *Not Unwritten, After All?*, 126 HARV. L. REV. 1532, 1538 (2013) (discussing the way in which the first Bank garnered legitimacy through early practice).

[319] *See* James Madison, *On the Grant of the Charter of 1816* (Apr. 4-5, 1816), *reprinted in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE THE BANK OF THE UNITED STATES 707, 713 (M. St. Clair Clarke & D.A. Hall eds., 1832).

[320] *See INS v. Chadha*, 462 U.S. 919, 967 (1983) (White, J., dissenting) (noting historical practice). The Court there also cited evidence of presidential nonacquiesence. *Id.* at 942 n.13.

interpretation. That approach would be consistent not only with extant case law, but also in harmony with James Madison's assertion in the *Federalist Papers* that constitutional meaning would be "liquidated and ascertained" through the initial practice of federal politicians in the early Republic.[321] Those early years of the Republic were indeed pivotal—but not for reasons that Madison predicted or perceived.

Conclusion

Article V has long occasioned embarrassment and evasion. But the textual rigidity it fostered should be celebrated as having been pivotal to the Constitution's survival during the parlous, storm-tossed days of the early Republic. Without the benefit of a sophisticated understanding of transaction-cost economics, the Framers chanced on an effective solution to the problem of constitutional hold-ups, which likely deepened the prospect of constitutional survival through the tempestuous first decades of the Constitution's life. Sometimes, it appears, being lucky is as valuable as being wise.

This Article has focused on explaining and defending textual rigidity's function in the early Republic. But the fact of the Constitution's survival through to the present day is testimony not merely to the virtues of textual rigidity—which responded solely to early-stage threats to constitution survival—but also to later institutional innovations by politicians and judges in conjuring extra-textual complements to Article V. These facilitated adjustment to exogenous shocks and evolving social, economic and political circumstances. The interaction between Article V and these extra-textual modalities of constitutional change, I have suggested, is more complex than the stark, binary incompatibility between constitutional fidelity and judicial license that is often posited. Rather than competitors, Article V and its extra-textual analogs are partial complements. As much as it calls for reconsideration of Article V, in sum, this Article invites a rethinking of the subtle and ever-shifting relationship between the diverse textual, judicial, and political modes of constitutional change invented across the decades and centuries by our fortunate, ingenuous, and oddly long-lived nation.

[321] THE FEDERALIST NO. 37, at 245 (J. Madison) (I. Kramnick, ed. 1987). The Court has applied this dictum, for example, in respect to removal power questions. *See Myers v. United States*, 272 U.S. 52, 175 (1926) ("[A] contemporaneous legislative exposition of the Constitution, when the founders of our government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given to its provisions."). *But see* Huq. *Removal*, *supra* note 82, at 12 & n.48 (questioning *Myers*'s historical account and logic).

Readers with comments may address them to:

Professor Aziz Z. Huq
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
huq@uchicago.edu

The University of Chicago Law School
Public Law and Legal Theory Working Paper Series

For a listing of papers 1–400 please go to http://www.law.uchicago.edu/publications/papers/publiclaw.

401. Gary Becker, François Ewald, and Bernard Harcourt, "Becker on Ewald on Foucault on Becker" American Neoliberalism and Michel Foucauilt's 1979 *Birth of Biopolitics* Lectures, September 2012
402. M. Todd Henderson, Voice versus Exit in Health Care Policy, October 2012
403. Aziz Z. Huq, Enforcing (but Not Defending) "Unconstitutional" Laws, October 2012
404. Lee Anne Fennell, Resource Access Costs, October 2012
405. Brian Leiter, Legal Realisms, Old and New, October 2012
406. Tom Ginsburg, Daniel Lnasberg-Rodriguez, and Mila Versteeg, When to Overthrow Your Government: The Right to Resist in the World's Constitutions, November 2012
407. Brian Leiter and Alex Langlinais, The Methodology of Legal Philosophy, November 2012
408. Alison L. LaCroix, The Lawyer's Library in the Early American Republic, November 2012
409. Alison L. LaCroix, Eavesdropping on the Vox Populi, November 2012
410. Alison L. LaCroix, On Being "Bound Thereby," November 2012
411. Alison L. LaCroix, What If Madison had Won? Imagining a Constitution World of Legislative Supremacy, November 2012
412. Jonathan S. Masur and Eric A. Posner, Unemployment and Regulatory Policy, December 2012
413. Alison LaCroix, Historical Gloss: A Primer, January 2013
414. Jennifer Nou, Agency Self-Insulation under Presidential Review, January 2013
415. Aziz Z. Huq, Removal as a Political Question, February 2013
416. Adam B. Cox and Thomas J. Miles, Policing Immigration, February 2013
417. Anup Malani and Jonathan S. Masur, Raising the Stakes in Patent Cases, February 2013
418. Ariel Porat and Lior Strahilevits, Personalizing Default Rules and Disclosure with Big Data, February 2013
419. Douglas G. Baird and Anthony J. Casey, Bankruptcy Step Zero, February 2013
420. Alison L. LaCroix, The Interbellum Constitution and the Spending Power, March 2013
421. Lior Jacob Strahilevitz, Toward a Positive Theory of Privacy Law, March 2013
422. Eric A. Posner and Adrian Vermeule, Inside or Outside the System? March 2013
423. Nicholas G. Stephanopoulos, The Consequences of Consequentialist Criteria, March 2013
424. Aziz Z. Huq, The Social Production of National Security, March 2013
425. Aziz Z. Huq, Federalism, Liberty, and Risk in *NIFB v. Sebelius*, April 2013
426. Lee Anne Fennell, Property in Housing, April 2013
427. Lee Anne Fennell, Crowdsourcing Land Use, April 2013
428. William H. J. Hubbard, An Empiritcal Study of the Effect of *Shady Grove v. Allstate* on Forum Shopping in the New York Courts, May 2013
429. Daniel Abebe and Aziz Z. Huq, Foreign Affairs Federalism: A Revisionist Approach, May 2013
430. Albert W. Alschuler, *Lafler* and *Frye*: Two Small Band-Aids for a Festering Wound, June 2013
431. Tom Ginsburg, Jonathan S. Masur, and Richard H. McAdams, Libertarian Paternalism, Path Dependence, and Temporary Law, June 2013
432. Aziz Z. Huq, Tiers of Scrutiny in Enumerated Powers Jurisprudence, June 2013

433. Bernard Harcourt, Beccaria's *On Crimes and Punishments:* A Mirror of the History of the Foundations of Modern Criminal Law, July 2013
434. Zachary Elkins, Tom Ginsburg, and Beth Simmons, Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice, July 2013
435. Christopher Buccafusco and Jonathan S. Masur, Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law, July 2013
436. Rosalind Dixon and Tom Ginsburg, The South African Constitutional Court and Socio-Economic Rights as 'Insurance Swaps', August 2013
437. Bernard E. Harcourt, The Collapse of the Harm Principle Redux: On Same-Sex Marriage, the Supreme Court's Opinion in *United States v. Windsor*, John Stuart Mill's essay *On Liberty* (1859), and H.L.A. Hart's Modern Harm Principle, August 2013
438. Brian Leiter, Nietzsche against the Philosophical Canon, April 2013
439. Sital Kalantry, Women in Prison in Argentina: Causes, Conditions, and Consequences, May 2013
440. Becker and Foucault on Crime and Punishment, A Conversation with Gary Becker, François Ewald, and Bernard Harcourt: The Second Session, September 2013
441. Daniel Abebe, One Voice or Many? The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs, September 2013
442. Brian Leiter, Why Legal Positivism (Again)? September 2013
443. Nicholas Stephanopoulos, Elections and Alignment, September 2013
444. Elizabeth Chorvat, Taxation and Liquidity: Evidence from Retirement Savings, September 2013
445. Elizabeth Chorvat, Looking Through' Corporate Expatriations for Buried Intangibles, September 2013
446. William H. J. Hubbard, A Theory of Pleading, Litigation, and Settlement, November 2013
447. Tom Ginsburg, Nick Foti, and Daniel Rockmore, "We the Peoples": The Global Origins of Constitutional Preambles, March 2014
448. Lee Anne Fennell and Eduardo M. Peñalver, Exactions Creep, December 2013
449. Lee Anne Fennell, Forcings, December 2013
450. Jose Antonio Cheibub, Zachary Elkins, and Tom Ginsburg, Beyond Presidentialism and Parliamentarism, December 2013
451. Nicholas Stephanopoulos, The South after Shelby County, October 2013
452. Lisa Bernstein, Trade Usage in the Courts: The Flawed Conceptual and Evidentiary Basis of Article 2's Incorporation Strategy, November 2013
453. Tom Ginsburg, Political Constraints on International Courts, December 2013
454. Roger Allan Ford, Patent Invalidity versus Noninfringement, December 2013
455. M. Todd Henderson and William H.J. Hubbard, Do Judges Follow the Law? An Empirical Test of Congressional Control over Judicial Behavior, January 2014
456. Aziz Z. Huq, Does the Logic of Collective Action Explain Federalism Doctrine? January 2014
457. Alison L. LaCroix, The Shadow Powers of Article I, January 2014
458. Eric A. Posner and Alan O. Sykes, Voting Rules in International Organizations, January 2014
459. John Rappaport, Second-Order Regulation of Law Enforcement, February 2014
460. Nuno Garoupa and Tom Ginsburg, Judicial Roles in Nonjudicial Functions, February 2014
461. Aziz Huq, Standing for the Structural Constitution, February 2014
462. Jennifer Nou, Sub-regulating Elections, February 2014
463. Albert W. Alschuler, Terrible Tools for Prosecutors: Notes on Senator Leahy's Proposal to "Fix" Skilling v. United States, February 2014

464. Aziz Z. Huq, Libertarian Separation of Powers, February 2014
465. Brian Leiter, Preface to the Paperback Edition of Why Tolerate Religion? February 2014
466. Jonathan S. Masur and Lisa Larrimore Ouellette, Deference Mistakes, March 2014
467. Eric A. Posner, Martii Koskenniemi on Human Rights: An Empirical Perspective, March 2014
468. Tom Ginsburg and Alberto Simpser, Introduction, chapter 1 of *Constitutions in Authoritarian Regimes*, April 2014
469. Aziz Z. Huq, Habeas and the Roberts Court, April 2014
470. Aziz Z. Huq, The Function of Article V, April 2014
471. Aziz Z. Huq, Coasean Bargaining over the Structural Constitution, April 2014