

2004

# Constitutional Amendments and the Constitutional Common Law

Adrian Vermeule

Follow this and additional works at: [https://chicagounbound.uchicago.edu/  
public\\_law\\_and\\_legal\\_theory](https://chicagounbound.uchicago.edu/public_law_and_legal_theory)

 Part of the [Law Commons](#)

Chicago Unbound includes both works in progress and final versions of articles. Please be aware that a more recent version of this article may be available on Chicago Unbound, SSRN or elsewhere.

---

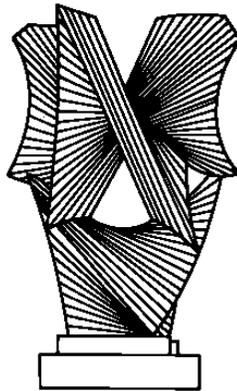
## Recommended Citation

Adrian Vermeule, "Constitutional Amendments and the Constitutional Common Law" (University of Chicago Public Law & Legal Theory Working Paper No. 73, 2004).

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](mailto:unbound@law.uchicago.edu).

# CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 73



## CONSTITUTIONAL AMENDMENTS AND THE CONSTITUTIONAL COMMON LAW

*Adrian Vermeule*

THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

September 2004

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:  
[http://ssrn.com/abstract\\_id=590341](http://ssrn.com/abstract_id=590341)

## CONSTITUTIONAL AMENDMENTS AND THE CONSTITUTIONAL COMMON LAW

Adrian Vermeule\*

Constitutions obsolesce rapidly, and must be updated over time to reflect changes in the polity's circumstances and citizens' values. What institution or process should be entrusted with the authority to do the updating? If periodic wholesale replacement of the constitution is infeasible, the plausible choices are the constitutional amendment process set out in Article V,<sup>1</sup> flexible interpretation by judges under the banner of constitutional common law,<sup>2</sup> or some mix of the two. Here I explore the question by comparing the relative merits of formal amendments and the constitutional common law as means of constitutional updating. I attempt to dispel some prominent arguments that unjustifiably privilege constitutional common law over the amendment process, and also attempt to sketch the empirical conditions under which either process proves superior to the other.

To structure the discussion, I advance two subsidiary theses about constitutional amendment.<sup>3</sup> The first is that constitutional amendments can and do change constitutional law, including the law in action as well as the formal constitutional text. The second is that there is no good general reason to prefer common-law updating to the amendment

---

\* Professor of Law, The University of Chicago. Thanks to Beth Garrett, Jacob Levy, John Manning, Eric Posner, Geof Stone, Lior Strahilevitz, Cass Sunstein, and participants at a University of Chicago faculty workshop for helpful comments. Special thanks to David Strauss for providing both detailed comments and a model of collegiality in the face of disagreement. Justin Rubin and Carli Spina provided excellent research assistance, and the Russell J. Parsons Fund provided generous support.

<sup>1</sup> See U.S. Const. Art. V (establishing rules for enacting formal amendments to the constitutional text).

<sup>2</sup> I do not use "constitutional common law" in Henry Monaghan's sense of constitutionally inspired doctrine that might be overridden by legislation. See Henry Paul Monaghan, *The Supreme Court, 1974 Term--Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). Rather, I use the term to denote constitutional rules, not defeasible by ordinary legislation, that are elaborated by judges through precedent-based reasoning. See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996)[hereinafter Strauss, *Common Law*]. So constitutional common law is short for something like "judge-made constitutional law" or "common-law constitutional exegesis." Moreover, Parts I and II equate constitutional common law with judge-made law, temporarily bracketing questions about whether constitutional change outside Article V is primarily driven by judges or by nonjudicial actors. Part III examines the issue in detail.

<sup>3</sup> For simplicity, I shall reserve the term "amendment" to mean "formal constitutional amendment through the Article V process." I shall describe other changes to constitutional rules, especially through judicial interpretation, as "constitutional common law," "constitutional change" or "constitutional updating." On the semantic problems surrounding "amendment," see Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change*, in *RESPONDING TO IMPERFECTION* (Sanford Levinson, ed. 1995).

process; to the contrary, an evenhanded institutional comparison suggests that each process shows to best advantage under particular conditions, and in particular domains.

These theses sound banal, but each has been denied in important recent work. As to the first thesis, David Strauss has argued that constitutional amendments are “irrelevant” because an amendment is neither a necessary nor a sufficient condition for legal change. The second thesis contradicts a standard academic view that I shall call *the generic case against constitutional amendment*. On this view, there are good general reasons to reject, or to indulge a presumption against, any proposed amendment. Among these reasons are the following claims: it is bad to “tamper” with the Constitution; the Constitution should not be “cluttered up” with amendments that will “trivialize” its majesty; constitutional amendments are “divisive” or “polarizing”; constitutional amendments may have bad unanticipated consequences; and constitutional amendments diminish the coherence of the constitutional text or of judicially-developed constitutional doctrine. Something like this view has become the conventional wisdom in the legal academy, following explicit arguments by Kathleen Sullivan and others.

My critical aims are to question the view that amendments are irrelevant, contra Strauss, and to question the widespread view that amendments are generically or presumptively suspect. The two positions I critique jointly privilege constitutional updating by judges, the first by suggesting that constitutional amendment is generically futile, the second by suggesting that constitutional amendment is generically harmful. The implicit alternative is a practice that entrusts all constitutional change to common-law constitutionalism—that is, to an ongoing constitutional convention whose delegates are all judges (and hence all lawyers).

As against those views, I will attempt an evenhanded institutional comparison of the amendment process and common-law constitutionalism, as alternative means of constitutional updating. I consider the strengths and weaknesses of each process: relative to common-law constitutionalism, the amendment process is less focused on the facts of particular cases (both for good and ill); puts less weight on the views of past judges (both for good and ill); allows for the participation of decisionmakers from a broader range of professions and backgrounds (both for good and ill); produces more enduring

constitutional settlements, albeit at higher initial cost; and trades the benefits of flexibility for the benefits of rigidity. By identifying these variables, I hope to make some tentative progress towards identifying the empirical conditions under which, or the domain in which, either process is most likely to produce valuable constitutional change.

The discussion is organized as follows. Part I critiques Strauss' thesis that constitutional amendments are systematically irrelevant. First, even if constitutional amendments are neither necessary nor sufficient to produce legal change, they may nonetheless be *causally efficacious* in producing legal change. Strauss has overlooked that the causal force of amendments is probabilistic: even if an amendment neither guarantees a desired legal change nor is indispensable to it, the amendment may nonetheless make the change more likely than it would have been in the amendment's absence. Second, the irrelevance view slips imperceptibly from the denial that any particular amendment is relevant to the denial that the total set of amendments is relevant. But if the reason that particular amendments are irrelevant is that other amendments would have been interpreted to produce the same effect—and this is the form of Strauss' argument in many cases --- then the irrelevance claim cannot hold true of all amendments at once. Even if every particular constitutional amendment can be shown to be irrelevant through a seriatim procedure, we cannot generalize the conclusion that all constitutional amendments might be irrelevant simultaneously.

In Part II, the core of the paper, I argue that the generic case against constitutional amendment fails. The generic case rests on a nirvana fallacy that implicitly contrasts a jaundiced view of the amendment process with a romanticized view of constitutional common law. The real alternative to constitutional amendment is flexible judicial interpretation that updates the Constitution over time—a practice that can also be seen as tampering with or trivializing the Constitution, that is at least as polarizing or divisive as constitutional amendment, that equally risks bad unintended consequences, and so on. Moreover, a public norm of the kind embodied in the generic case against amendment would produce either a suboptimal rate of constitutional amendments, or an optimal rate at excessive cost. The generic case can be reconstructed as a weak presumption, but in that form it loses its distinctive force.

Once we have dispelled the nirvana fallacy underlying the generic case against amendment, constitutional updating is seen to pose a comparative institutional question. Part III compares constitutional amendment, on the one hand, and constitutional common law, on the other, as institutional alternatives for managing the inevitable updating of constitutional law over time. Under what circumstances might one process or the other prove superior? What institutional considerations, or variables, determine their relative performance? I suggest that amendments show to best advantage, relative to common-law constitutionalism, where the constitutional changes in question involve large value choices as opposed to technical improvements in the law, where constitutional change must be systemic and simultaneous rather than piecemeal, and where irreversible change is more valuable than reversible change. A brief conclusion follows.

### **I. The Relevance of Constitutional Amendments**

The irrelevance thesis holds as follows:

[S]ubject to only a few qualifications, 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. . . .<sup>4</sup>

The basic thesis is an extended counterfactual: in the absence of an amendment mechanism, the constitutional order would look roughly the same as it actually does today. (An important qualification to the thesis is that it does not apply to the original or “unamended” Constitution or to the Bill of Rights; I return to this domain-restriction on the thesis in I.B.). For want of historical expertise, I shall not attempt to engage the irrelevance thesis to the extent that it happens to incorporate historical claims about how actual amendments actually worked out, rather than counterfactual claims about the “relevance” of the formal amendment process. I will instead confine myself to some comments on the conceptual foundations of the irrelevance thesis.

In Section A, I examine some problems that inhere in the counterfactual character of the thesis. Counterfactual claims are not the same as causal claims. The irrelevance thesis makes a general counterfactual claim, but the thesis must not be interpreted to make, nor can it support, a general causal claim. The critical point is that constitutional

---

<sup>4</sup> David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. LAW REV. 1457, 1459 (2001)[hereinafter Strauss, *Irrelevance*].

amendments may be causally efficacious in producing legal change, even if (as the irrelevance thesis claims) they are neither necessary nor sufficient for producing legal change. In Section B, I examine some conceptual problems that inhere in the application of the irrelevance thesis to the interaction between and among different constitutional provisions. Here the main burden of the discussion is that, in many cases, the thesis establishes the irrelevance of particular amendments only by pointing to other amendments which would otherwise have subsumed the functions of the irrelevant amendment. This mode of analysis might work for any particular amendment, but it cannot be generalized across a whole set of amendments simultaneously.

The overall conclusion is not that the irrelevance thesis is wrong. If its conceptual foundations are infirm, much of the structure erected on those foundations retains great value. Construed in its best light—as a series of retail-level historical claims about particular amendments—Strauss’ thesis makes an important contribution to constitutional legal history. But nothing more ambitious follows. In particular, we cannot, in my view, subscribe to any more general claim that amendments are intrinsically inefficacious.

#### A. Counterfactuals, Causation and Constitutional Amendment

The irrelevance thesis, although striking, says less than the casual reader might assume. There is a fundamental ambiguity in the claim that the formal amendment process is “irrelevant.” Rightly understood, the thesis claims only that amendments are neither necessary nor sufficient for legal change; but the thesis is easily confused with a very different and far more ambitious claim, to the effect that amendments do not *cause* legal change. The slippage between these two claims gives the irrelevance thesis a hard rhetorical punch, but the first claim does not entail the second, or so I shall argue.

The subsidiary propositions of the irrelevance thesis are these:

[The irrelevance thesis may be proved by] establishing four propositions. First—a relatively familiar point—sometimes matters addressed by the Constitution change even though the text of the Constitution is unchanged. Second, and more dramatically, some constitutional changes occur even though amendments that would have brought about those very changes are explicitly rejected. Third, when amendments are adopted, they often do no more than ratify changes that have already taken place in society without the help of an amendment. The changes produce the amendment, rather than the other way around. Fourth, when amendments are adopted even though society has not changed, the amendments

are systematically evaded. They end up having little effect until society catches up with the ambitions of the amendment.<sup>5</sup>

We may compress the “four propositions” of the passage quoted above into two claims, as follows:

(~ N) amendments are not a necessary condition for change; and

(~ S) amendments are not a sufficient condition for change.

The first and second propositions in the quoted passage are variants on (~ N), while the fourth proposition asserts (~ S). The third proposition is ambiguous; I shall return to it below.

In my view the basic counterfactual thesis, and its two subsidiary propositions, are entirely compatible with the following:

(C) amendments cause legal change.

The crucial point is that (C) may hold even if both (~ N) and (~ S) are established. In general, *causal claims cannot be straightforwardly reduced to counterfactual claims*.<sup>6</sup> The claim that (i) “A caused B” does not entail the claims that (ii) “A is a (counterfactually) necessary condition for B, so that if A had not occurred, B would not have occurred” or that (iii) “A is a sufficient condition for B, so that if B did not occur, A must not have occurred.” So denying claims (ii) and (iii), separately or together, does not establish that claim (i) is wrong, as I shall illustrate below.

The point is, I hope, a material as well as a logical one. The tempting assumption that (~ N) and (~ S) jointly entail denial of (C) is responsible for much of the rhetorical punch of the irrelevance thesis. But even if amendments are neither necessary nor

---

<sup>5</sup> *Id.* at 1459.

<sup>6</sup> See William K. Goosens, *Causal Chains and Counterfactuals*, 76 THE JOURNAL OF PHILOSOPHY 489-90 (1979). The best-known attempt to explain causation in counterfactual terms is David Lewis, *Causation*, 70 THE JOURNAL OF PHILOSOPHY 556 (1973). Lewis, however, claims only that a relationship of “causal dependence” (B is “causally dependent” upon A) is explicable in terms of counterfactual necessitation (if A had not occurred, B would not have occurred). The relationship of causal dependence is not equivalent to, nor is it intended to capture, causation in the standard sense of “direct causation.” See Daniel M. Hausman, *Causation and Counterfactual Dependence Reconsidered*, 30 NOÛS 55 (1996).

sufficient for legal change, it does not follow that amendments are causally inefficacious. Stripped of that invalid implication, the irrelevance thesis is less arresting.

Before exploring that issue, there is a threshold exegetical question. Some passages in Strauss' paper might be taken to assert that (C) does not hold in some particular cases. The third proposition quoted above (especially "the changes produce the amendment, rather than the other way around") might be construed to deny (C), but the thrust of the passage and of the whole paper is just to advance the claims ( $\sim N$ ) and ( $\sim S$ ). Of course, we might establish that (C) is false, in particular cases, through independent historical investigation; we might discover, for example, that the Twenty-Seventh Amendment<sup>7</sup> has changed nothing except the constitutions reprinted in the back of constitutional-law textbooks. The detailed historical discussion that makes up the bulk of Strauss' article might be read in this light; although the particular accounts are impressively argued I cannot judge their historical merits. What I do question is the conceptual link between the retail historical arguments and the wholesale counterfactual thesis; the former do not follow from the latter. In any event, establishing the counterfactual thesis is clearly the main project of Strauss' paper. And the burden of the discussion here is that even if the counterfactual thesis is established, amendments may be and frequently are relevant in a straightforward sense.

#### Necessary conditions and preemptive causation

Let us begin with necessary conditions. Granting that if A had not occurred, B would have occurred in any event, can we nonetheless say that A caused B?<sup>8</sup> Yes,

---

<sup>7</sup> U.S. CONST. AMEND. XXVII. ("No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.")

<sup>8</sup> Two caveats are necessary. First, I am denying the validity of an inference from "it is not the case that if A had not occurred, B would not have occurred" to "A did not cause B." Denying that a given amendment (or the whole set of amendments) was counterfactually necessary for a given change in the law (or a whole set of changes in the law) does not entitle us to infer that the amendment (or set of amendments) did not *cause* the change in the law, because of the possibility of preempted causation, explained in the text. The inference whose validity is thus denied should not be confused with the converse inference, from "A did not cause B" to "it is not the case that if A had not occurred, B would not have occurred." This inference is valid. See LEO KATZ, *BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW* 235 (1987). But this is not the form of the irrelevance argument. Second, I am ignoring the philosophical complexities that arise from David Lewis' argument that whenever two events stand in a causal relationship but not a relationship of counterfactual necessity, there must at least be a chain of events, standing in counterfactually necessary relations one to another, that link the two events. See David Lewis, *Causation*,

because of the possibility that *actual causes may preempt counterfactual causes*.<sup>9</sup> In A's absence, some third factor C might have produced B in any event; yet in A's presence, so to speak, it is A rather than C that brings about B. The hypotheticals are familiar. Able and Charlie shoot at Baker, who is felled by Able's bullet, but who would have been felled by Charlie's bullet had Able not fired. Whatever we say about Charlie's causal role, it seems clear that Able caused Baker's death in a straightforward sense.

Although this sort of casuistic example seems abstruse, in the case of constitutional amendments the idea of preemptive causation applies straightforwardly. An amendment might very well cause legal change even if similar changes would have occurred in the amendment's absence. Many of Strauss' most striking claims and examples, it turns out, are of this sort. Consider the following passages, all of which seem to acknowledge (explicitly or implicitly) that the relevant amendment *actually brought about* the relevant legal change, but all of which argue for irrelevance by appealing from facts to counterfactuals:

- The Thirteenth Amendment's only practical effect was to abolish slavery in the border states. Even without the Amendment, however, "in any event, Congress very likely would have outlawed it, and the Supreme Court might have upheld Congress' action."<sup>10</sup>
- "In view of [the Court's later decision in] Harper [v. Virginia Board of Elections], the net effect of the Twenty-Fourth Amendment was, at most, to abolish the poll tax in federal elections, in a few states, two years before it would have been abolished across the board anyway."<sup>11</sup>
- "It is difficult to believe that the Supreme Court would have ruled differently in Brown [v. Board of Education] if the Fourteenth Amendment had not been adopted . . .

---

in CAUSATION AND CONDITIONALS 180 (Oxford 1975); KATZ at 235. Suffice it to say that it would require a thorough overhaul of the irrelevance thesis to incorporate this complex view.

<sup>9</sup> Goosens, *supra* note 6, at 489; JON ELSTER, NUTS AND BOLTS FOR SOCIAL SCIENCES 4, 6 (1990). For examples, see KATZ *supra* note 8, at 233.

<sup>10</sup> Strauss, *Irrelevance*, *supra* note 4, at 1480.

<sup>11</sup> *Id.* at 1481.

. . . It seems more likely that the Court . . . would have identified some other text in the Constitution as the formal basis for the claim of equality.”<sup>12</sup>

- “The lack of resistance to the Twenty-Sixth Amendment suggests that inevitably most of the states, and probably all of them, would have changed their laws [respecting voting age] within a relatively short time.”<sup>13</sup>
- Although “the amendment process [that produced the Nineteenth Amendment] nationalized the women’s suffrage debate, and that may have been crucial,” “[o]n the other hand, . . . a state-by-state campaign for women’s suffrage might also have succeeded.”<sup>14</sup>

One wonders why this sort of appeal from facts to counterfactuals should be permitted, however. A criminal defendant cannot excuse his acknowledged deed of homicide by showing that the victim would soon have died from other causes.<sup>15</sup> How then can a *causal* sense of irrelevance be established by showing that some other legal instrument or institutions would have produced the effect that was, in fact, produced by a constitutional amendment? To be sure, what counts as a “cause” differs in different settings, partially because of differences in normative considerations. Causal attributions in the criminal setting are very different than casual attributions in the setting of constitutional amendments. But this is a point about how causation should be defined, including preemptive causation; it assumes, rather than denying, that causal claims cannot be reduced to counterfactual claims.

Some of the quoted passages include an explicit or implicit suggestion that, because of or in addition to the phenomenon of preemptive causation, the relevant amendments did not “matter” very much or at all.<sup>16</sup> This claim is only ambiguously connected to the thesis that constitutional amendments are irrelevant. The ambiguity can be brought out by an analogy to the standard distinction between statistical significance, on the one hand, and economic significance, on the other. A correlation may be

---

<sup>12</sup> *Id.* at 1485.

<sup>13</sup> *Id.* at 1489.

<sup>14</sup> *Id.* at 1502.

<sup>15</sup> LEO KATZ, *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW* 167-68 (1996).

<sup>16</sup> Strauss, *Irrelevance*, *supra* note 4, at 1462-64, 1478.

statistically robust, and even capture a real causal relationship, without at all being important in a broader sense. So too the claim that a given amendment did not matter equivocates between saying that the amendment was epiphenomenal, a dependent product of underlying causes rather than an independent causal force, and saying that the legal changes the amendment did cause were small-bore. In general, the claim that “X does not [or does] matter for Y” is riven with ambiguity. It might mean, variously, that Y would occur even in X’s absence, that X is not significantly correlated with Y in a statistical sense, that X is significantly correlated with Y but has no causal effect on Y, or that X has a causal effect on Y that is not important in some broader perspective.

As I mentioned above, we may interpret some of Strauss’ retail examples as making claims of the last sort, which would mean that Strauss has garnished the central counterfactual thesis with some causal arguments. Because the causal claims are incidental to the irrelevance thesis, however, Strauss’ criteria of “importance” are unclear; where they can be discerned, they seem dubious. To isolate the issue in the examples above, put aside the possibility of preemptive causation and imagine a counterfactual world in which, today, a few border states still permitted slavery, in which a few (other) states still denied women the vote, and so on. In that counterfactual world, the (in turn counterfactual) failure of the Thirteenth and Nineteenth amendments would matter very much indeed.

#### Sufficient conditions and joint causation

The analysis can easily be extended to include sufficient conditions. Granting that A is not a sufficient condition for B, so that even if A occurs, B might not occur, can we nonetheless say that A is a cause of B? In the easiest case, of course, A might still be a necessary condition for B. But we need to grant the premises of the irrelevance thesis, among which is the claim that A is not a necessary condition for B either; the irrelevance thesis asserts ( $\sim$ S) *and* ( $\sim$ N). Still, A might cause B even if A is neither necessary nor sufficient to bring about B. Able and Charlie shoot at Baker. Simultaneously, Delta pushes Baker closer to Able than to Charlie; as a result, Able’s shot reaches and kills Baker before Charlie’s shot, even though Baker would have been killed by Charlie’s bullet had Able not fired, and even though (let us suppose) had Delta not acted, Charlie

rather than Able would have been the one to kill Baker. Able's action, by itself, is neither necessary nor sufficient to kill Baker, yet it caused Baker's death.

The constitutional-law parallel to this sort of case arises in the frequent situation in which (1) a constitutional amendment is adopted in order to produce a legal change; (2) the change would have been accomplished in some other way absent the amendment (although perhaps less speedily or efficiently); and (3) the enactment of the amendment is not by itself sufficient to produce the change. Usually condition (3) holds because the cooperation of legal actors not part of the amendment process—most prominently the judges—is needed to implement amendments. So amendments are typically merely one of a set of conditions that are *jointly* sufficient to produce legal change. Yet it would be odd to deny that amendments, even given their insufficiency taken in isolation, nonetheless (help to) bring about legal change.

In the case of the Fourteenth Amendment, for example, we may grant both that the Amendment was not by itself sufficient to produce change in the legal status of race, given the unwillingness of federal officials to implement the Amendment's equality guarantees until the 1950s; and that, absent the Amendment, federal judges might later have reached similar outcomes under some other constitutional provision. Still, when the judges did become willing to implement the Amendment, they in fact implemented *that* provision, and not some other one—if only for the very good practical reason that it is easiest to explain or justify an egalitarian ruling by pointing to a legal provision that contains a guarantee of “equal protection of the laws,” as opposed to, say, a guarantee of a “republican form of government,” or a prohibition on “titles of nobility.”<sup>17</sup> In this straightforward sense, the Amendment helped to bring about legal change.

#### Necessity, sufficiency, and probability

The largest point here is that Strauss's focus on necessary and sufficient conditions is misplaced, due to the probabilistic character of causation. Some cause C that is neither necessary nor sufficient for producing some effect E may nonetheless make E more likely, perhaps far more likely, than it would have been in C's absence. Having

---

<sup>17</sup> Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 TULANE L. REV. 247, 260-62 (2002).

Babe Ruth on the team was neither necessary nor sufficient for the 1927 Yankees to win the World Series—they might have won anyway, and they might not have won even with Ruth—but it certainly helped. The same point holds as against the idea that amendments are often futile or irrelevant because amendment drafters cannot foresee all later questions, and cannot control all decisions of later interpreters. Of course initial drafters cannot settle all relevant questions; of course subsequent enforcement is partly, but only partly, at the mercy of subsequent generations; of course hostile judges may interpret the amendment grudgingly. But these possibilities do not make amendments systematically meaningless. Rather, passage of an amendment systematically tends to push later outcomes in the directions desired by the amendment's proponents.

Strauss has one terrific example, the Reconstruction Amendments, in which subsequent generations of judges and other officials nullified amendments for a time through grudging interpretation and sheer defiance. But even in that example, the amendments lay around waiting to be picked up and used by yet later generations, as they actually were; and most other amendments have been implemented straightforwardly. There is no reason to think that the Reconstruction example is broadly representative of amendments in general.

### B. Irrelevance and Generalization

I now put aside the issue of counterfactual relevance *versus* factual causation, to focus on some problems of generalization that inhere in the irrelevance thesis. These problems arise when a claim that might hold true of any particular amendment is incautiously assumed to be generalizable to all amendments simultaneously. In some cases, the generalization does not hold *even if* the constituent claims are each plausible, taken one by one. So I will assume, contrary to I.A., that showing any particular amendment to have been counterfactually irrelevant suffices to show it to have been causally irrelevant as well. Still, however, there is a separate problem: it does not follow that all amendments can be *simultaneously* irrelevant in either sense.

To elicit the problem, consider the argument that the protracted struggles over the rejected Equal Rights Amendment, which would have constitutionalized a guarantee of gender equality, were irrelevant. “Today, it is difficult to identify any respect in which

constitutional law is different from what it would have been if the ERA [the Equal Rights Amendment] had been adopted.”<sup>18</sup> The reason given for this, however, is that the Supreme Court subsequently read a strong presumption against gender-based law into the Fourteenth Amendment’s Equal Protection Clause. The ERA was irrelevant because the work it would otherwise have done was picked up by (the Court’s reading of) a different constitutional amendment.

If that is so, however, then we have established that the ERA was or would have been irrelevant only because there was some *other* amendment in the picture that picked up the slack, and which must therefore have itself been relevant. To be sure, the Court’s decision so to interpret equal protection was necessary for this story; but it is equally true that the Court felt it necessary to find some text, somewhere in the picture, into which gender equality could be read. Absent the text providing for “equal protection,” the Court might have used some third text altogether—say, the Privileges and Immunities Clause—but then *that* text would have been relevant in turn.

The underlying problem may be illustrated schematically by imagining a set of, say, twenty-six constitutional amendments. For any amendment A in the set, we might argue that A’s functions would have been subsumed by some other member of the set, say B; B’s functions would have been subsumed by C; and so on, the final claim being that the only amendment not yet shown to be irrelevant, Z, would in turn have been subsumed by A. Arguing piecemeal in this way, we can then proceed to examine each amendment seriatim and show that it is irrelevant. What results is a series of individually plausible arguments that any *particular* amendment is irrelevant; but the series cannot be generalized to claim that the whole *set* of amendments is irrelevant simultaneously. To show that any given amendment is irrelevant through the seriatim procedure, we cannot help but posit that some other amendment in the set is relevant, although the identity of the relevant amendment changes at each step in the argument. In the limiting case of a set of amendments with only two members, we can imagine an argument that, say, the due process clause is irrelevant (at least in its substantive aspect) because the Court would have generated the same results out of the Ninth Amendment—conjoined with an

---

<sup>18</sup> Strauss, *Irrelevance*, *supra* note 4, at 1476-77.

argument that the Ninth Amendment is irrelevant because the Court would have generated the same results out of due process.

The irrelevance argument takes a similar form in many cases, although the structure of the argument is often tacit rather than explicit. Here are some examples:

- [As previously described,] the ERA was irrelevant because its content was subsumed in the equal protection clause of the Fourteenth Amendment.<sup>19</sup>
- In similar vein, had the Nineteenth Amendment not been enacted, “the nation’s commitment to women’s suffrage would have been just as profound . . . an influence on the interpretation of the Equal Protection Clause.”<sup>20</sup>
- An omitted provision of the Twenty-Fourth Amendment, which would have abolished poll taxes in state elections, was “adopted” by the Court through interpretation of the Equal Protection Clause.<sup>21</sup>
- Absent the Fourteenth Amendment, the effects of the Equal Protection Clause on state-sponsored segregation would have been achieved through interpretation of the Due Process Clause of the Fifth Amendment, the Guaranty Clause of Article I, or some other text.<sup>22</sup>
- The proposed Child Labor Amendment was irrelevant because the Supreme Court expanded the Commerce Clause to achieve the same results.<sup>23</sup>

It is important to be clear, however, that in some of these cases there is a restriction on the irrelevance thesis that avoids the transparently invalid position I have illustrated above. The independent limitation is that the irrelevance thesis does not apply to either (1) the bill of Rights, defined as the first twelve amendments or (2) the text of the original constitution. This limitation saves any irrelevance claim in which an amendment *within* the irrelevant set is placed there on the ground that its functions would have been subsumed by a Bill of Rights amendment, or a provision of the “unamended” Constitution, that lies *outside* the irrelevant set. So this restriction clearly saves the last

---

<sup>19</sup> *Id.* at 1476-78.

<sup>20</sup> *Id.* at 1504.

<sup>21</sup> *Id.* at 1481-82.

<sup>22</sup> *Id.* at 1484-86.

<sup>23</sup> *Id.* at 1475-76.

two cases on the list above. In the first three cases, however, the irrelevance thesis is arguing, piecemeal, that some constitutional amendments in the irrelevant set are irrelevant because of their subsumption in other amendments in the irrelevant set, which are then claimed, in turn, to be irrelevant. It seems that something here must give.

We might attempt to save the first three cases as well, on the following grounds. The generalization problem I have indicated only arises when the chain of irrelevance circles back on itself. So long as there is some (one) constitutional amendment stipulated to be relevant, and so long as the chain of irrelevance can eventually be grounded in that amendment, the problem is obviated. We can, for example, argue that the Nineteenth Amendment is irrelevant because of (counterfactual) subsumption in the Fourteenth Amendment, and then say that the latter is irrelevant because of (counterfactual) subsumption in the Fifth Amendment's Due Process Clause, which itself, by virtue of the domain-restriction on the irrelevance thesis, lies outside the irrelevant set.

I am not sure how much this saves, however. It seems rather to concede than to rebut the point that not all amendments can be simultaneously irrelevant; it avoids, rather than solving, the generalization problem. (This is not true if the grounding provision is part of the "unamended Constitution," rather than one of the later amendments, but I shall shortly suggest that there is no such thing as the "unamended Constitution"—that all constitutional provisions are amendments of one sort or another). The restriction on the domain of the irrelevance thesis, moreover, can be questioned on the ground of arbitrariness. Having some amendments outside the set claimed to be irrelevant avoids the generalization problem (so long as all irrelevance claims can be linked to a chain eventually grounded in an amendment outside the set), but the price for this is a thesis that is *necessarily* truncated, and in potentially unjustifiable ways.

The domain-restriction on the irrelevance thesis is justified by a claim that the text of the original Constitution, and the first twelve amendments, are products of a "fledgling constitutional order" rather than a "mature democratic society."<sup>24</sup> In the fledgling phase constitutional texts serve important functions, while in the mature phase nontextual processes of change dominate. This is, in my view, a clear expression of a questionable

---

<sup>24</sup> Strauss, *Irrelevance*, *supra* note 4, at 1460.

picture of constitutions and constitutional change. To say, as Holmes did,<sup>25</sup> or to imply through metaphors, as this argument does, that a constitution is or is like an “organism” that has a “fledgling stage” and a “mature stage,” is to fall into the trap of misleading biological analogy. It is like the nineteenth century debate about whether the individual or the family is the social analogue of the cell.<sup>26</sup> The proper response in the latter case is that the metaphor has swallowed the problem, and the proper response to this justification for restricting the irrelevance thesis is to say that constitutions just do not have any biologically-programmed stages of birth, growth and maturation.

Strauss’ position rests on substance as well as metaphor. Strauss is suggesting that, over time, societies develop institutionalized patterns of trust and cooperation that enable them to change the Constitution informally. Formal processes are more important in new constitutional polities, in part because constitutional text supplies focal points for coordinating collective behavior. In ongoing polities, however, formal constitutional text and formal processes of constitutional change become less important, as ties of trust and cooperation among citizens become increasingly robust.

This is a possible view of the general trajectory of the relationship between written constitutions and political development. But it is a very optimistic view, and one that does not particularly resonate with American history. There is no general reason to think that trust, or affective ties, or tacit cooperation (not founded on formal lawmaking rules and processes) all generally increase over time in liberal democratic polities. Exogenous trends or shocks, changing political alliances, and increasing polarization within hostile economic or social camps may all reduce informal political cooperation in later periods. In the American case, the nation was quite plausibly more divided, more riven with mutual mistrust between or among competing views or factions, in 1860, 1932, 1974, and 2000 than it was in 1791 or 1804 (the date of the Twelfth Amendment, the latest amendment Strauss excludes from the scope of his thesis). So even given Strauss’ premises, there is no real reason to think that formal lawmaking processes were systematically more valuable or necessary during the period in which the first twelve

---

<sup>25</sup> *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

<sup>26</sup> ELSTER, *supra* note 8, 73-75.

amendments were enacted than they were in later periods, when in Strauss' view all amendments were irrelevant.

Here is a different picture of the whole matter. An "original" constitution is just a *package* of amendments simultaneously adopted on a blank slate, and what we call "amendments" are simply modifications of the initial package. At some point a new polity adopts a new constitution; at various later points amendments occur, with complex relationships between formal legal change and political, economic and social change; the polity changes more or less drastically at various points and over time, both in formal legal ways and in informal ways; eventually we face questions about whether the sequence of retail changes has cumulated to a wholesale change in the polity itself (as in the puzzle of the Ship of Theseus, whose planks were all replaced, one by one). There is no particular reason to think that we can cut into the sequence of changes at some particular point, such that before that point formal constitutional texts "matter" (or matter more than informal processes) while after that point formal constitutional texts do not "matter" (or matter less than informal processes). So there is no particular reason, in our own polity, to distinguish between the original-Constitution-plus-the-first-twelve-amendments, on the one hand, and later amendments, on the other. The irrelevance thesis avoids the generalization problem only by adopting a domain-restriction that lacks adequate justification.

\*\*\*\*\*

I close by emphasizing the limits of this critique. Even if the counterfactual irrelevance thesis is conceptually infirm, a series of causal irrelevance theses, each addressing a particular amendment, would not be. We might decompose the wholesale irrelevance thesis into a series of retail-level claims that particular amendments did not, in fact, efficaciously cause legal change (sidestepping the critique offered in I.A.), combined with the stipulation that no generalization about amendments as a class is possible (sidestepping the critique offered in I.B.). In this domesticated version the irrelevance thesis would be shorn of its most arresting implications, but it would retain its impressive core of hard-won historical argumentation.

## II. The Generic Case Against Constitutional Amendment

I shall introduce the generic case against constitutional amendment with the following passage, from an essay by Kathleen Sullivan:

[R]ecent Congresses have been stricken with amendment fever. More constitutional amendment proposals have been taken seriously now than at any other recent time. Some have even come close to passing. . . . Many of these amendment are bad ideas. But they are dangerous apart from their individual merits. [The Constitution] should be amended sparingly, not used as a chip in short-run political games. This was clearly the view of the framers, who made the Constitution extraordinarily difficult to amend.<sup>27</sup>

The remainder of the essay elaborates this thesis. Americans have traditionally been reluctant to amend the Constitution, for good reasons. First, it is “a bad idea to politicize the Constitution,” because “the more a Constitution is politicized, the less it operates as a fundamental charter of government.”<sup>28</sup> We should particularly beware of amendments that “impose a controversial social policy,” such as the Eighteenth Amendment (repealed by the Twenty-First).<sup>29</sup> “Amendments that embody a specific and debatable social or economic policy allow one generation to tie the hands of another, entrenching approaches that ought to be revisable in the crucible of ordinary politics.”<sup>30</sup> Second, “writing short-term policy goals into the Constitution . . . nearly always turn[s] out to have bad and unintended structural consequences,” in part because “amendments are passed piecemeal. The framers had to think about how the entire thing fit together.”<sup>31</sup> Third, a “danger lurking in constitutional amendments is that of mutiny against the authority of the Supreme Court. . . . [The Court’s] legitimacy is salutary, for it enables the court to settle or at least defuse society’s most ideologically charged disputes.”<sup>32</sup>

This argument is the clearest statement of a view that I take to be widespread both within and without the legal academy.<sup>33</sup> In the academic and popular commentaries that

---

<sup>27</sup> Kathleen M. Sullivan, *What's Wrong with Constitutional Amendments*, in GREAT AND EXTRAORDINARY OCCASIONS: DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE 39 (1999)(emphasis added)[hereinafter Sullivan, *Constitutional Amendments*].

<sup>28</sup> *Id.* at 41.

<sup>29</sup> *Id.* at 41.

<sup>30</sup> *Id.* at 41.

<sup>31</sup> *Id.* at 42.

<sup>32</sup> *Id.* at 42.

<sup>33</sup> *See, e.g.*, GREAT AND EXTRAORDINARY OCCASIONS: GUIDELINES FOR CONSTITUTIONAL CHANGE 3 (1999) (questioning “the wisdom of engaging in constitutional change, even to advance popular and

track Sullivan’s argument, the verbal formulas vary—sometimes the injunction is against “tampering” with the Constitution, sometimes the emphasis is on the “divisiveness” of constitutional amendments, sometimes the core point is that only “structural” amendments or amendments expanding “individual rights” are permissible—but the common intellectual premise is something like Sullivan’s idea: there is a generic class of reasons to believe that the amendment process is systematically or presumptively suspect.

I will claim, however, that the generic case against amendment rests on the nirvana fallacy: generic arguments typically fail to compare amendments with the institutional alternatives for producing constitutional change, principally constitutional common law. The alternative to constitutional amendment is not, as generic arguments often imply, a stable subconstitutional order; the alternative is continual judicial updating of the Constitution through flexible common-law constitutionalism. That practice fares no better, and in many cases worse, on the margins of institutional performance the generic case takes to be valuable.

Section A examines some ambiguities in the generic case against constitutional amendment, attempting a charitable reconstruction of the position before proceeding to the business of critique. Section B considers a series of generic arguments. In each case, the infirmity in the argument is some version of the nirvana fallacy; in each case the main alternative to formal constitutional amendment, constitutional updating by judges, is equally susceptible to the concerns that underpin the generic arguments.

Section C turns to a different critique of the generic case. When internalized by political actors, the generic case produces a presumptive public norm against amending the Constitution, one that acts as a drag on formal constitutional change. If the Article V rules produce the optimal rate of constitutional change, however, then this norm amounts to a form of pernicious double-counting. Political actors should indulge no general reluctance to amend the Constitution; instead they should simply let the Article V rules weed out some fraction of proposals. On the other hand, if the Article V rules are too lax and allow too frequent amendment, the best response would be to amend Article V itself

---

legitimate policy outcomes”)[hereinafter GUIDELINES]; Naftali Bendavid, *Group Aims to Stem Those Who Would Amend*, CHICAGO TRIBUNE, June 18, 1997, at A3.

to increase the cost of enacting amendments, rather than to encourage a fluctuating and uncertain norm that presumes against or disfavors constitutional amendment.

#### A. An Ambiguity

There is a threshold ambiguity concerning the *weight* of the generic case against constitutional amendment. Should it be understood to support rejection of proposals for constitutional amendment, or a (mere) presumption against constitutional amendment? The strongest version of the generic case suggests that all amendment proposals should be rejected. Although this view is absurd on the level of theory, it is commonly encountered in practice, as in the following remarkable statement of a Massachusetts legislator: “I’ve always been philosophically averse to amending the State Constitution—it doesn’t matter what the issue is.”<sup>34</sup> If “averse” here means “opposed,” rather than “reluctant,” this is merely the hypertrophy of the common attitude that “tampering” with the Constitution is objectionable in itself.

More plausible, and also very common, is a weaker version, in which the generic case against constitutional amendment merely supports some sort of presumption against constitutional amendment. The notion of “presumption” here is ambiguous in its turn. Sometimes this is a sort of free-floating substantive rule of thumb to the effect that the Constitution should not be amended “too often,” or only (in Madison’s words) on “great and extraordinary occasions.” In other arguments, however, the presumption takes on a procedural cast, akin to the rule that parties adversely affected by agency action must exhaust administrative remedies before invoking judicial review. Analogously, constitutional amendment should be a last resort, to occur only if subconstitutional processes have proven somehow incapable of solving a problem.

In what follows I shall take it as understood that each of the generic arguments against amendment can be expressed in stronger or weaker versions, by means of stronger or weaker presumptions. The tradeoff inherent in the generic case against amendment is that generic arguments become more plausible as they are implemented by weaker presumptions, but the price for increased plausibility is diminished bite. In the limiting case, generic arguments would become most plausible if reduced to simple

---

<sup>34</sup> Pam Belluck & Katie Zezima, *Gays’ Victory Leaves Massachusetts Lawmakers Hesitant*, NY TIMES, November 20, 2003, at A29.

tiebreakers. This sort of pallid version of the generic case does not, however, capture the force with which such arguments are typically advanced.

### B. The Generic Arguments

Here I shall list the most prominent generic arguments against constitutional amendment, and offer remarks upon each of them in turn. Each of these arguments is unsuccessful, and for similar reasons. Each of them, in different ways, rests on some version of the nirvana fallacy; each of them assumes, arbitrarily, that the objections that can be lodged against the proposed amendment do not also apply to the alternative process of common-law constitutionalism.

#### Amendments “politicize the Constitution”

An initial reaction is that any slogan of this sort is puzzling in the extreme. In *any* sense that “political” might be given here, the Constitution is already political, or politicized, and it always has been. As a constitution, what else could it possibly be? Whatever else it does, the Constitution sets ground rules that govern a political association, that are politically determined, and that have political consequences.

The picture that animates this argument is a distinction between law, the sphere of constitutional rules, and politics, the sphere of action within the constitutional rules. On this picture, “[l]osers in the short run yield to the winners out of respect for the constitutional framework set up for the long run. This makes the peaceful conduct of ordinary politics possible.”<sup>35</sup> But this is illusory, a false alternative. The alternative to formal constitutional amendment is not the placid subconstitutional state of affairs implicitly presupposed here—perhaps the jousting of interest groups for legislative benefits. The concrete alternative to constitutional amendment is judicially-developed constitutional law, which itself changes over time in response to political, social and cultural shifts, and which itself produces *constitutional* winners and losers (not merely losers and winners of the “ordinary” sort). During the decades-long political struggle over the content of constitutional abortion law that has succeeded *Roe v. Wade*, a struggle waged simultaneously in legislatures, agencies and courts, and at all levels of government, proposals have been advanced at various points to amend the Constitution’s

---

<sup>35</sup> Sullivan, *Constitutional Amendments*, *supra* note 27, at 41.

text to enforce one or another view of the matter. Whatever else might be said about such proposals, it is hard to see anything meaningful in the injunction not to “politicize” the Constitution by enacting them, given the background of constitutional politics—emphatically including judicial politics—against which the proposals have arisen.

#### Amendments “clutter up” the Constitution

Another idea is that amendments, at least detailed as opposed to general amendments, are objectionable because they “clutter up” the Constitution with highly specific rules—causing the Constitution, in John Marshall’s words, to “partake of the prolixity of a legal code.” Here again the nirvana illusion is at work. The real alternative to a prolix formal constitutional code promulgated by the amendment process is a prolix *informal* constitutional code promulgated by judges. Whatever may be said about the value of the latter, it is not “the intelligible Constitution”<sup>36</sup> of general principles that the objection seems to contemplate. Consider the notoriously intricate and code-like character of judicially-developed free speech law, or the tangled underbrush of Fourth Amendment search-and-seizure law. Part of the reason these bodies of law are so highly reticulated is that the underlying texts (“the freedom of speech,” “unreasonable searches and seizures”) are so skimpy. The judges have had to fill in their content, but would not have had to do so had those texts been more expansive and detailed, as other amendments are. A complex society will produce complex constitutional law; the only real question is whether it is good to outsource constitutional complexity from the amendment process to the adjudicative process.

#### Amendments are divisive or polarizing

This is among the most popular of popular arguments against amendment; and it has gained new prominence in the debate over same-sex marriage.<sup>37</sup> Most charitably construed, the objection here is not to amendment proposals that are actually enacted. Article V’s stringent supermajority requirements ensure that successful amendments tend to embody a broad consensus—far more so than many judicial decisions that change

---

<sup>36</sup> JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT’S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND* (1992).

<sup>37</sup> See, e.g., Andrew Sullivan, *Bush and Marriage: A Middle Way?*, available at [http://www.andrewsullivan.com/main\\_article.php?artnum=20031210](http://www.andrewsullivan.com/main_article.php?artnum=20031210).

constitutional rules. (I discuss these points at length in Part III). Rather, the claim often seems to be that the decision to formally *propose* an amendment itself has objectionable effects on public discourse or the polity at large.

Although I cannot fully defend the claim here, I believe as a general matter that injunctions not to put “polarizing” or “divisive” issues on the public agenda have repressive political and social effects.<sup>38</sup> They are typically deployed by winners, or insiders, or those privileged by the status quo, to exclude from the public agenda claims of injustice on the part of the disadvantaged. This is a broad assertion, but consider that labor movements and civil rights movements and feminist movements have often been met with similar arguments.<sup>39</sup> Here the injunction not to “divide” or “polarize” shades into the injunction not to “politicize.” Losers or outsiders, relative to some status quo ante, want precisely to politicize, to bring political decisionmaking to bear in order to disrupt preexisting political and legal allocations that would remain entrenched absent public action, and that are (at least in the outsiders’ view) unjust.<sup>40</sup>

In the setting of constitutional amendments, this picture re-emphasizes the point I made above about the generic claim that amendments “politicize” the Constitution. To say that losers or outsiders in the constitutional status quo ante, meaning the status quo established by judge-made constitutional law, should not propose “divisive” or “polarizing” amendments, is to choke off the one of the principal avenues of constitutional change. Formal amendment is not the only such channel, of course. Status quo losers can participate in presidential or senatorial politics, with the hope of influencing the selection of judges, in order to overturn the judge-made status quo. But that course of action will itself lead to charges of politicization, or polarization, or divisiveness. Shifting the forum in which the constitutional status quo is challenged does not eliminate the fact of the challenge itself.

---

<sup>38</sup> A similar point holds against the claim that constitutional “gag rules” can benefit the polity by taking controversial issues off the table. See STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* (1995). The problem is that constitutional gag rules take issues off the table only by *resolving* them one way or the other; gag rules are never neutral.

<sup>39</sup> See, e.g., Bruce Miroff, *Presidential Leverage over Social Movements: the Johnson White House and Civil Rights*, 43 *THE JOURNAL OF POLITICS* 2 (1981); Nicol C. Rae, *Class and Culture: American Political Cleavages in the Twentieth Century*, 45 *THE WESTERN POLITICAL QUARTERLY* 629, 638 (1992).

<sup>40</sup> Ian Shapiro, *Elements of Democratic Justice*, 24 *POLITICAL THEORY* 579 (1996).

So the nirvana illusion here is the same as in (1) above. Judge-made constitutional law is itself inherently and inescapably divisive or polarizing; and it remains so whether the status quo losers attempt to change it ex post, through litigation seeking a change of course, or ex ante, through influence over judicial selection (that may subsequently produce overrulings). When judges decided that there was a constitutional right to burn the American flag, or to own slaves, the decisions sharply divided Americans who believed the courts were right from those who believed them wrong. A proposal by the latter group to amend the Constitution, over the objections of the former group, adds no additional divisiveness.

Amendments represent a “mutiny” against the Supreme Court

The “mutiny” metaphor here is Sullivan’s, and it is striking. What if the Supreme Court is Captain Bligh, and we are all Fletcher Christian, to be condemned as mutineers no matter how grievous the provocation? Here is the argument behind the metaphor:

We have lasted two centuries with only twenty-seven amendments because the Supreme Court has been given enough interpretive latitude to adapt the basic charter to changing times. Our high court enjoys a respect and legitimacy uncommon elsewhere in the world. The legitimacy is salutary, for it enables the Court to settle or at least defuse society’s most ideologically charged disputes.<sup>41</sup>

One of the premises here is an argument about the supply and demand of constitutional change. Changing circumstances produce demand for changing constitutional law. The supply of new constitutional law is limited; although many institutions participate in its creation, the two most prominent sources are the amendment process, on the one hand, and judge-made constitutional law on the other. Those two sources are at least partial substitutes: judicial updating reduces the demand for constitutional amendment, all else equal, just as the Hughes Court’s switch in time may have pre-empted various New Deal reform proposals.

The basic intuition about comparative statics is sensible, and it is broadly confirmed by empirical work in political science.<sup>42</sup> But it does not at all support the conclusion offered in the remainder of the passage. We may reconstruct the argument as

---

<sup>41</sup> Sullivan, *Constitutional Amendments*, *supra* note 27, at 42.

<sup>42</sup> Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237 (Sanford Levinson, ed., 1995).

follows: (i) judicial updating of the Constitution is at least a partial substitute for formal amendments; (ii) formal amendments reduce judicial legitimacy; (iii) maximizing judicial legitimacy is good for the polity as a whole. Of these, only (i) is explicit; and there is a further assumption, which I will not question, that “legitimacy” is to be interpreted in a purely sociological sense—as something like the Supreme Court’s standing in opinion polls over time. Even if (i) is correct, and I believe that it is, the current state of the evidence gives us little reason to subscribe to (ii). There is no reason to assume, a priori, or to believe, empirically, that the use of the amendment process tends to undermine the judiciary’s legitimacy. (I also bracket the large question raised in (iii), whether maximizing the Court’s legitimacy is good for the larger polity).

Premise (ii) embodies the nirvana illusion that afflicts generic arguments against amendment. Here the illusion takes the form of the unjustified belief that the Court’s (sociological) legitimacy is necessarily at a maximum so long as no outside agitators produce amendments that intrude upon judicially-managed change. On this assumption, the Court’s public standing is diminished whenever the amendment process produces outcomes that differ from those the Court would independently choose—perhaps because the amendment effects a visible public rebuke to the judiciary. Behind this assumption doubtless lurks some sort of picture in which amendments enacted to overturn particular Supreme Court decisions (such as the 11<sup>th</sup> and 16<sup>th</sup>) reduce the Court’s public standing.

There is another side to the ledger, however. Premise (i) holds that the lower the rate of amendment, the more updating that the Court must supply; and the need to update constitutional law can itself damage the Court’s public standing in straightforward ways. Overrulings, switches in time, creative and novel interpretation, all the tools that judges use to change the course of constitutional adjudication, themselves may draw down the Court’s political capital by fracturing the legalistic façade of constitutional interpretation. An equally plausible causal hypothesis, then, is that increasing the rate of amendments might *increase* the Court’s sociological legitimacy by reducing the need for judicial self-correction. In particular cases, legitimacy-granting publics might react poorly to judicial flip-flops, while viewing formal amendments that overturn judicial decisions as the proper legal channel for change—the very use of which assumes that the judges have done their job well, not poorly. This is rankly speculative, but the point is that (ii) is

rankly speculative as well. It is hard to know about any of this in the abstract; but we cannot simply assume (ii), in the faith that a world without (nonjudicial) amendments is the best of all possible worlds to inhabit.

Amendments have bad unintended consequences

Amendments undermine the coherence of constitutional doctrine

I will consider these arguments jointly, for reasons that will become apparent. It is of course an admissible argument against a proposed amendment that the proposal will have some particular bad consequences. The argument from bad unintended consequences however, is different on two counts. First, the bad consequences are precisely those *not* foreseen<sup>43</sup> at the time of debating and voting on the proposal. This is the key feature that makes this a generic argument. The difference is between a caution not to cross the street lest one be hit by *that* oncoming car, and a caution not to leave the house lest something bad occur. Second, the unforeseen bad consequences are sometimes said to be “structural.” As Sullivan puts it:

A second reason to resist writing short-term policy goals into the Constitution is that they nearly always turn out to have bad and unintended structural consequences. This is in part because amendments are passed piecemeal. In contrast, the Constitution was drafted as a whole at Philadelphia. The framers had to think about how the entire thing fit together.<sup>44</sup>

Below I take up the separate idea that “short-term policy goals” should not be written into the Constitution. Here I shall focus on the other main features of the argument in the passage above: (i) the concern with bad and unintended structural consequences, a concern that is underwritten by (ii) a concern that amendments produce piecemeal and incoherent, as opposed to globally coherent, constitutional law, and by (iii) an assumption that legal coherence is always or generally desirable.

I shall not question (iii) here, although there is much to be said in praise of incoherence in law, especially in constitutional law. Good coherence is better than incoherence, but bad coherence is worse than incoherence; coherence raises the stakes of constitutional decisionmaking by propagating either good or bad decisions through the

---

<sup>43</sup> I will treat unforeseen and unintended as synonymous, ignoring the case of effects that are foreseen but not intended, as in the casuistic doctrine of “double effect.”

<sup>44</sup> Sullivan, *Constitutional Amendments*, *supra* note 27, at 42.

legal system. Nor shall I question the dubious historical premise of the argument—that the framers designed a coherent constitutional scheme, as opposed to aggregating competing values and preferences, through horse-trading, into a patchwork document. Those issues aside, the rationale offered in (ii) exemplifies the nirvana illusion that underpins the generic case against amendments. The comparison between the framers’ globally coherent design, on the one hand, and piecemeal amendment on the other is not the right comparison to make. The principal substitute for formal amendment is not formal constitutional conventions, but judicial updating of constitutional law through flexible interpretation. The question, then, is whether piecemeal amendment produces greater incoherence than piecemeal judicial updating, carried out in particular litigated cases, by judicial institutions whose agenda is partly set by outside actors.

There is little reason to believe the latter process more conducive to coherence than the former, and much evidence to suggest that judicial decisionmaking produces a great deal of doctrinal incoherence. We should disavow any implicit picture of judge-made constitutional law as an intricately crafted web of principles whose extension and weight has been reciprocally adjusted. Precisely because judicial updating requires overrulings, reinterpretations, and other breaks in the web of prior doctrine, a system that relies on judicial updating to supply constitutional change—the system that the generic case tends to produce—generates internal pressures towards incoherent doctrine. Constitutional adjudication in America, let us recall, has produced both *Plessy v. Ferguson* and *Brown v. Board*, both *Lochner v. New York* and *West Coast Hotel v. Parrish*, both *Myers v. United States* and *Humphrey’s Executor*, both *Dennis v. United States* and *Brandenburg v. Ohio*, both *Wickard v. Filburn* and *Lopez v. United States*, both *Bowers v. Hardwick* and *Lawrence v. Texas*. Whatever else can be said about this judicial work-product, and whatever other justifications can be given for judge-made constitutional law, deep inner coherence does not seem either a plausible description of the terrain or even a plausible regulative ideal for the system.

The collective authorship of “Great and Extraordinary Occasions,” a set of “Guidelines for Constitutional Change,”<sup>45</sup> advance a related argument from coherence.

---

<sup>45</sup> GUIDELINES, *supra* note 33.

The argument is best illustrated with the example of the proposed amendment that would have stripped free speech protection from the act of burning the American flag. The guideline authors object that the amendment would have been “[in]consistent with related constitutional doctrine that the amendment leaves intact.”<sup>46</sup> The problem arises “when framers of amendments focus narrowly on specific outcomes without also thinking more broadly about general legal principles.”<sup>47</sup> The Court’s decision to label flag burning protected speech was derived from established background principles of judge-made free speech law, while a flag desecration amendment would merely have overturned a particular judicial outcome.

Here the nirvana illusion is twofold; the argument underestimates the capacity of specific positive enactments to generate broader principles in the future, and overestimates the principled, as opposed to specific, character of the background free speech doctrine, and constitutional doctrine generally. As to the first point, an argument emphasized by James Landis in the statutory setting, as against defenders of the common-law status quo, was that new statutes may themselves generate new principles when interpreted over time, in part by judges sympathetic to the aims of the new enactment.<sup>48</sup> So too in the constitutional setting. It is easy to imagine future courts generalizing new principles from a flag desecration amendment, principles emphasizing the authority—the right, if you will—of enduring majorities to mark out as fundamental a limited class of symbols or ideals or aspirations, and to grant those symbols immunity from the ordinary hurly-burly of free speech in an open society. The precise contour of such principles is not now apparent, but that is also true whenever courts embark on the development of new lines of constitutional doctrine. In both cases, coherentists should expect a process of mutual adjustment to occur, as new principles elbow their way into the constitutional arena and force old principles to reconcile themselves to a new, narrowed scope.

As to the second point, free speech law cannot usefully be described as a coherent web of principles that yield particular decisions. The principles that do exist underdetermine the outcomes of many cases; after all, four Justices thought that statutes

---

<sup>46</sup> *Id.* at 17.

<sup>47</sup> *Id.* at 18.

<sup>48</sup> See James McCauley Landis, *Statutes and Sources of Law*, HARVARD LEGAL ESSAYS 213 (1934).

banning flag-burning were consistent with the central free speech injunction of content neutrality, and it requires a *great* deal of confidence to declare them not only wrong, but trivially or obviously wrong.<sup>49</sup> Thus much free speech law takes the form of rules, not principles—rules that in many cases have a narrow scope, highly specific content, and that are derived from background principles only with the help of supplemental empirical and institutional premises.<sup>50</sup> Even if a flag desecration amendment generated no broader principles, it would not have represented the intrusion of a particular outcome into a web of principle. It would merely have changed the content of one or a few highly specific rules previously established by judges.

Perhaps the concern with bad unintended consequences can be justified on other grounds even if the coherence rationale fails. An incoherent state of constitutional doctrine is just one type of bad unintended consequence that amendments might produce. Even if the particular concern is not that amendments will produce incoherent constitutional law, still we might hold a generic concern about the bad unforeseen (and possibly “structural”) consequences of constitutional amendment. Indeed, the general concern may work better shorn of any connection to coherence. After all, a standard public-policy response to uncertainty about the risks of action is to counsel decisionmakers to proceed through small steps or piecemeal reform,<sup>51</sup> as opposed to more ambitious global action. Whether or not the counsel is a sound one,<sup>52</sup> it sits uneasily with a preference for coherence, which condemns piecemeal tinkering.

Yet the nirvana illusion occurs on this more general level as well. Here the illusion takes two related forms. The first is the belief that constitutional amendments represent risky action, while the steady-state of judge-made constitutional doctrine represents safe inaction. This is a trivial mistake, akin to the crudest defenses of the so-

---

<sup>49</sup> *But see* Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. LAW REV. 124 (1992).

<sup>50</sup> Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. LAW REV. 1765 (2004).

<sup>51</sup> CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3-6 (1999); KARL POPPER, THE POVERTY OF HISTORICISM 67 (1957).

<sup>52</sup> ROBERT E. GOODIN, POLITICAL THEORY & PUBLIC POLICY 28-34 (1982); Jon Elster, *Consequences of Constitutional Choice: Reflections on Tocqueville*, in CONSTITUTIONALISM AND DEMOCRACY 82 (Jon Elster & Rune Slagstad eds., 1988).

called “precautionary principle” in environmental law,<sup>53</sup> or of the Hippocratic injunction to “do no harm.” Inaction may produce the medically worst outcome of all, and the status quo may itself contain dangerous environmental risks. Likewise, a persistent judicial refusal to update obsolete constitutional law can itself produce large political, social and economic harms; this is a possible account of the mistakes of the *Lochner* Court.

In a second version, the alternative to formal amendment is not judicial “inaction,” but affirmative judicial action to update obsolete doctrine. Here the nirvana illusion is the failure to recognize that judicial updating, as a substitute for formal amendment, can itself produce bad and unforeseen structural consequences. To the extent, for example, that *Morrison v. Olson* rested on a decision to adapt the law of executive power to the era of the imperial presidency,<sup>54</sup> the decision is widely thought to have tampered with the deep structure of government in disastrous ways—although this may not strictly count as an unforeseen consequence, given Justice Scalia’s dissent.

I conclude that there is no way to leverage a concern for disrupting coherence, or a broader concern for unforeseen consequences more generally, into a generic caution about constitutional amendment. Anything that people or institutions do or fail to do may result in bad unforeseen consequences. Statutes may produce them, but so may the failure to enact statutory reforms; judicial decisions may produce them, but so may judicial “inaction”; and so too for constitutional amendments. The worry about perverse consequences suggests nothing in particular; it yields paralysis, not safety.

#### Amendments should not encode “mere social policies”

This argument comes in several versions, depending on what the antonym of a “social policy” is taken to be. Sometimes, as in Sullivan, the contrast is between “controversial” or “short-term” social policies, on the one hand, and “structural amendments to tie our hands against short-term sentiments,” on the other. A more detailed version appears in the “Guidelines for Constitutional Change” and elsewhere.<sup>55</sup> There constitutional amendments are divided into three categories: (i) amendments that expand individual

---

<sup>53</sup> Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PENN. L. REV. 1003 (2003).

<sup>54</sup> Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 174-76 (1994); cf. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. LAW REV. 1, 104 (1994). There are many historical controversies here. I mean only to offer an account of what the Justices in the majority may have believed themselves to be doing,

rights; (ii) amendments that reform governmental structure; and (iii) all other amendments. Of these, amendments in categories (i) and (ii) are praiseworthy, while amendments in category (iii) are at least presumptively bad.

Although these positions are distinct, their extensional overlap is very great. On either view, the paradigm of the sort of social policy that should not be encoded in the Constitution is the 18<sup>th</sup> Amendment, the prohibition amendment, repealed by the 21<sup>st</sup>. The prohibition amendment has been taken to result from a passing sociopolitical frenzy, a sort of collective akrasia. The prohibition analogy has been invoked to condemn the gamut of amendment proposals, from the balanced budget and term limits amendments to flag desecration and same-sex marriage.

The idea that “social policies” should not be encoded in the Constitution, and the accompanying prohibition analogy, are in my view both largely vacuous. What produces such widespread agreement on the injunction against constitutionalizing “mere” social policy is that no one ever seeks to violate it. No serious constitutional movement ever describes itself as seeking to encode a mere social policy in the Constitution, as opposed to a structural or rights-protecting or otherwise more fundamental sort of policy or legal rule. Any constitutional movement that becomes nationally prominent features at least a core of leaders and activists who describe themselves as engaged in structural or fundamental reform. Thus Stephen Presser can say, quite rightly in my view, that the “social policy” criticism of the flag desecration amendment missed the main argument of the amendment’s proponents:

[O]ne person’s narrowness is another person’s entirety, at least where constitutional amendments are concerned. Most academics and intellectuals regard the flag as a mere piece of colored cloth, but the eighty percent of Americans who favor the amendment regard it as a unique symbol and physical expression of the self-sacrifice of loved ones who served their country. They believe that protecting the flag from desecration—as the Supreme Court no longer permits—is fundamental to national honor, and that a nation in which nothing is officially sacred is a nation in danger of moral collapse.<sup>56</sup>

---

<sup>55</sup> GUIDELINES, *supra* note 33, at ---; Cass R. Sunstein, President Versus Precedent: Bush’s reckless bid for an amendment defies an Oval Office tradition, *LA TIMES*, February 26, 2004, at B13.

<sup>56</sup> Stephen B. Presser, *Constitutional Amendments: Dangerous Threat or Democracy in Action?* 5 *TEXAS REVIEW OF LAW AND POLITICS* 209, 221 (2000).

Those who approved of the flag desecration amendment should find Presser's argument devastating as against the social policy objection. Those who opposed the amendment will think that Presser's argument rests on a category mistake. Abolition was fundamental, the civil rights movement was fundamental, reproductive choice is fundamental, but protecting the flag from desecration is not. Given their shared major premise and different minor premises, both sides are right; the debate is purely over the application of a principle held in common by all concerned. It is not that anyone disputes the injunction against constitutionalizing mere social policy; it is that no one takes *their* cherished amendment to violate the principle.

I said that the injunction against encoding social policies in the Constitution was largely vacuous, not wholly so. The injunction might rule out a small class of low-level policies; let us have no amendments to constitutionalize the earned income tax credit! The point, however, is that there are no serious or influential constitutional movements organized for the purpose of putting policies like that in the Constitution anyway. The prohibitionists, of course, did not see themselves as advocating a constitutionalized social policy, in the disparaging sense. They saw temperance as the token of an essential moral and spiritual and socially progressive crusade. If we now see things differently, that gives us no help at all for the future, because we cannot now guess which of our own crusades that we now cherish as fundamental will be dismissed as akratic frenzies in the hindsight of later generations. The owl of Minerva flies at dusk, which means that the injunction against encoding social policies bites only where and when it is not needed. When it is needed, it does not bite.

Similar points hold against the claim that all previous amendments can be categorized as either

- (1) expanding individual rights or
- (2) improving government structure.

The historical premise that no amendments have limited individual rights is very dubious.<sup>57</sup> A major purpose of the 13<sup>th</sup> Amendment was to contract an individual right:

---

<sup>57</sup> In addition to the 13<sup>th</sup> Amendment, discussed in text, there are scattered constitutional provisions that directly restrict individual rights. *See, e.g.*, U.S. Const. Amdt. XIV, §3 (establishing lustration rules and

the substantive due process right to own slaves, identified by the Court in *Scott v. Sanford*. Section 1 of the amendment reallocated the right to control the slaves' labor from the slaveowners to the slaves themselves, a classic taking from A to give to B—which is why the fourth section of the 14<sup>th</sup> Amendment later specified that no compensation would be due to the slaveowners.

But let us suppose the historical premise true, or largely so. The hard question is what normative significance this has. Why should those categories, into which previous amendments happened to fall, be taken as exclusive? Why should not other types of amendments be added as circumstances change? In particular, we might imagine a category of amendments that

- (3) restrict judicially-identified individual rights in order to protect collectively-held symbols or values or aspirations.

Is there a generic argument against (3)? Burkeans may believe or hope that there is some immanent logic underlying our amendment practices, a logic that might justify taking categories (1) and (2) as exhausting the set of permissible amendments. Perhaps; it is never clear what to make of Burkean claims of this sort, which by their nature resist any request to explain the theory that might justify the immanent principle.

Another possibility, however, is that our ability to sort the previous twenty-seven amendments into categories (1) and (2) is sheer curve-fitting; it is an artifact of the small number of amendments, in turn an artifact of the stringency of Article V's supermajority requirements. The list of approved amendments turns out to be exquisitely sensitive to small changes in the Article V rules. Had Article V, for example, required the approval of only a majority of states, the Constitution would contain, *inter alia*, the 1924 Child Labor

---

civil disabilities for former confederates). Congress and state legislatures had previously attempted to impose similar rules by statute, but the Supreme Court invalidated the laws on civil-libertarian grounds. *See Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866) (invalidating, on bill of attainder and ex post facto grounds, a federal statute that excluded former rebels from the Supreme Court bar); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) (invalidating a state disqualification and loyalty-oath provision as an ex post facto law). Less directly, some provisions that improve governmental structure might be understood to do so precisely by restricting individual rights. Consider the 22d Amendment, which imposes a two-term limit on the Presidency, and thus harms individuals who would otherwise have the “right,” guaranteed by the Qualification Clauses of Article II, to stand for election to a third presidential term. *Compare* U.S. Const. Amdt. XXII with Art. II, §1, cl. 5.

amendment.<sup>58</sup> That amendment would have been a category (3) amendment in spades: it was opposed not only on the predictable ground of federalism, but on the ground that (in the words of its chief opponent) it was “a highly socialistic measure—an assault against individual liberty,”<sup>59</sup> presumably the joint liberty of parents and employers to bind children to labor contracts.

Amendments debase the symbolic currency of constitutionalism

It is hard to find explicit statements of the view I want to address here, although I believe it to be implicit in the thinking of many, especially those who on other grounds hold the view that amendments are largely devoid of material significance for constitutional law—a close cousin of the irrelevance thesis discussed in Part I, or an interpretation of it. So, on this implicit view, amendments are essentially constitutional symbols, akin to national holidays, and too many amendments (and perhaps too frequent a rate of amendment) would debase the symbolic currency of constitutionalism, just as making every day a national holiday would mean no holidays at all.

I will assume here, contra Part I, that the most robust versions of the irrelevance thesis are correct. Even on that premise, the symbolic-currency argument rests on the same nirvana illusion we have seen throughout. Constitutional processes other than amendment—most dramatically, judicial decisions that identify or create “new” constitutional rights through interpretation of vague texts like due process or equal protection—themselves may debase, at the margin, the symbolic currency of rights. Before and after federal and state judges and local officials moved to protect gay rights and to increase opportunities for same-sex marriage, proponents drew an analogy between the gay rights movement and the civil rights movement. The analogy has been publicly disputed by some African-Americans,<sup>60</sup> fearing that the analogy devalues the moral credit that has accrued to civil rights groups by virtue of African-American history. The debasement problem arises because any pluralist democracy contains multiple

---

<sup>58</sup> See Stephen Griffin, *The Nominee is . . . Article V*, 12 CONST. COMM. 171 (1995). The amendment was ratified by twenty-eight states. See RICHARD B. BERNSTEIN, WITH JEROME AGEL, *AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?* 180 (1993)

<sup>59</sup> DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995* 259 (1996).

<sup>60</sup> Dawn Turner Trice, *Blacks' opposition to gay civil rights ignores history*, CHICAGO TRIBUNE, March 29, 2004, B1.

groups that compete for claims on the public conscience, for a pot of moral currency that is not infinitely expandable. Suppressing one margin of symbolic competition, for symbolic constitutional amendments perhaps, will only exacerbate competition on other margins, say judicial constitutionalism.

To say that judge-made constitutional law is also subject to the debasing effect of cumulative symbolism is not a critique of the irrelevance thesis. That thesis is compatible with the view—although it does not itself *entail* the view—that judge-made constitutional law is often irrelevant in precisely the same sense,<sup>61</sup> that *both* formal amendments *and* judicial decisions are often or usually no more than superstructural froth. The only point I wish to make is that the irrelevance thesis, even if established, would neither commit us to nor justify the further, independent view that constitutional amendments uniquely or distinctively threaten to debase the symbolic currency of constitutionalism, as compared to judge-made constitutional doctrine.

Amendments should not nationalize questions best left to the states

Here the nirvana illusion is the failure to recognize that federalism arguments apply to federal constitutional decisions by judges just as much as they do to amendments. Every Supreme Court decision that puts some forms of government action off-limits to all states, and perhaps to the federal government as well, nationalizes the relevant question.<sup>62</sup> When the flag desecration amendment was proposed it would have been silly to say that amendments should not nationalize questions best left to the states; the Court's flag-burning decisions had already done that. The only question was whether those decisions should be left undisturbed, or whether the issue should be remitted to the discretion of states and the federal government. Although the federal government might in turn have prohibited flag-burning nationwide, as it had previously tried to do, that shows only that federal statutes are yet another instrument that might be objectionable on the ground that they commit questions to the wrong level of government.

\*\*\*\*\*

---

<sup>61</sup> A view that finds support in GERRY ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 10-36 (1991); MICHAEL I. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

<sup>62</sup> Some forms of “constitutional” law bind the states but not the federal government. The dormant commerce “clause” is an example.

I conclude that the generic case against constitutional amendment fails. There is no basis for global or presumptive skepticism of the amendment process as a means of constitutional change. The standard attempts to identify deficiencies in the amendment process fail to compare the institutional alternatives: they identify features that are common to both the amendment process and the alternative institutional process of constitutional common law.

### C. Voting Rules, Public Norms, and Article V

In this section I will attempt to clarify the relationship between the generic case and the formal supermajoritarian voting rules governing constitutional amendment. Most charitably understood, the generic case proposes a norm of public action that increases the inertial burden facing amendment proponents, over and above the inertial burden that already exists by virtue of Article V's requirement of voting supermajorities in Congress and the states. Yet if the Article V rules already produce the optimal rate of constitutional change, this supplemental norm represents a form of pernicious double-counting, producing an excessively low rate of amendment. If Article V is too lax, permitting more change than is optimal, a public norm that disfavors amendments is not the best response. Better would simply be an amendment to change the Article V rules themselves to make amendments more difficult.

What is the optimal pace of constitutional change? A familiar view is that constitutional change would occur too quickly in a legal regime that authorized constitutional amendment by a simple majority vote of the national legislative body. This view does not or need not rest on the essentialist argument that supermajoritarian amendment processes are definitional of constitutionalism. Not a few liberal democracies with written constitutions permit or have permitted national parliaments to amend the constitution by simple majorities;<sup>63</sup> in such regimes the constitution functions as a special type of higher-order statute. Instead the view is a strictly consequentialist one. It is desirable, the argument runs, that the pace of constitutional change be slower than the pace of change of ordinary law. Supermajority requirements for amendment build in a status quo bias of a healthy sort, allowing the constitution to serve as a precommitment

---

<sup>63</sup> See, e.g., AUS. CONST. Art. 44 §1; N.Z. CONST. (Constitution Act 1986) Part 3 §15.1.

device against ill-advised constitutional change. To be sure, this sort of justification for supermajoritarian amendment requirements is famously controversial. The notion of a constitutional precommitment is conceptually obscure and normatively dubious, because of the dead hand problem,<sup>64</sup> because there is no agent external to society that can enforce the precommitment,<sup>65</sup> and because of subsequent disagreement over what the terms of the prior precommitment were.<sup>66</sup>

In this section, however, I propose to bracket these large questions in favor of a narrower point. I will assume that some independent theory specifies the optimal rate of constitutional change, and that in light of that theory it is desirable to build in a status quo bias through supermajority voting requirements for amendment. Even given these premises, the generic case against amendment is exposed to an objection of the following form.

When internalized by political actors, the generic case against amendment becomes a public norm that places a kind of drag on the enactment of amendments. It is hard to see how such a norm could be beneficial. Either the formal voting rule for amendment captures the optimal rate of change or it does not. Suppose first that it does. In that case, any additional public norm that causes constitutional decisionmakers to filter out amendments that they would otherwise favor will result in a suboptimal rate of amendment; the Constitution will be amended too rarely. On the assumption that the formal supermajoritarian voting rule is optimal, to supplement the status quo bias built into the voting rule by an internalized public norm disfavoring amendment is a form of pernicious double-counting.

To elicit the issue here, consider the following argument of Sullivan's: "[The Constitution] should be amended sparingly, not used as a chip in short-run political games. *This was clearly the view of the framers, who made the Constitution extraordinarily difficult to amend.*"<sup>67</sup> But this is puzzling, as the following analogy may

---

<sup>64</sup> Louis W. Hensler III, *The Recurring Constitutional Convention: Therapy for a Democratic Constitutional Republic Paralyzed by Hypocrisy*, 7 TEX. REV. L. & POL. 263, 290-300 (2003).

<sup>65</sup> JON ELSTER, ULYSSES UNBOUND 157 (2000).

<sup>66</sup> Jeremy Waldron, *Precommitment and Disagreement*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 284-85 (Lawrence Alexander, ed., 2001).

<sup>67</sup> Sullivan, *Constitutional Amendments*, *supra* note 27, at 39-40.

help to illustrate. A legislature must decide a quotidian issue governed by simple majority voting. In this legislature, as in many others (although not the Senate), a slight status quo bias is built into majority rule by a supplemental rule that a tie vote defeats a bill. A legislator argues against the proposed bill as follows: “We should approach this proposal with a presumption against amending the code of laws. After all, the framers of our legislative rules built a status quo bias right into our voting rule itself.” But *if* the background voting rule already captures the right amount of status quo bias, then the legislators should just decide whether they think the proposal is good or bad, “on the merits,” and let the voting rule take care of the rest. Sullivan is quite right that the framers wanted the Constitution to be difficult to amend. But if the formal supermajority requirements of Article V already create as much difficulty as the framers desired, then the addition of a normative presumption against amendment would push the level of difficulty past the optimum.

Suppose then that the formal voting rule for amendment is too lax—that it permits a supraoptimal rate of constitutional change, as specified by our background theory. The generic case might then be defended as an informal norm of public action that supplements the voting rule, topping it up to the optimum. Against this view, however, there are two objections. The first is that the Article V supermajority voting rules for amendment are already, in global perspective, radical outliers. Very few constitutional democracies make their constitutional amendment process as difficult as our own.<sup>68</sup> Perhaps other democracies’ rules are themselves *far* too lax, or perhaps their rules are optimal in their circumstances while our rules are optimal in our circumstances. The more natural suspicion, however, is just that our constitution is too difficult to amend. At the very least it is extremely difficult to believe that Article V is itself too lax, as the defense of the generic case we are now considering must suppose.

There is also a second objection. If the voting rule is too lax and needs to be topped up, the better course might simply be to amend Article V to increase the requisite supermajorities—say,  $\frac{3}{4}$  of each house of Congress followed by  $\frac{5}{6}$  of the states. This is a claim about rules and standards. If our background theory specifies the optimum with

---

<sup>68</sup> Lutz, *supra* note 42, at 260.

some precision, then an adjustment to the voting rule can hit the optimum more accurately than can an informal norm of public action. Such norms are high-variance standards: although everyone may say that there is a “presumption” against amendments, we have seen that this is an ill-defined metaphor drawn from the rules of evidence, and different people may, predictably will, mean different things by it, and what they mean will fluctuate over time. At one extreme lies the mere tiebreaking presumption that is almost always overcome, at the other lies the high-irrebuttable presumption advanced by the Massachusetts legislator who proclaimed himself averse to all constitutional amendments. There is no reason to be confident that a fluctuating, high-variance public norm of this sort will usually or even predictably produce the right amount of supplemental drag on the amendment process, as specified by our background theory. Where it does do so, the success will be but a lucky coincidence.

The second objection is incomplete, for the following reason. As against the variance costs of an informal norm, we must consider that the social costs of generating such a norm are plausibly lower than the costs of amending the amendment rules. Generating a norm of this sort through public argument may well be easier than amending Article V through public action. This is a curious way to save the generic case against amendment, however. It rests upon two premises that are in some tension with each other: on the one hand that Article V is too lax, and so needs to be topped up with a supplemental norm, on the other hand that Article V is so stringent as to exclude the alternative course of amending the voting rules themselves. This is not quite a contradiction, but the two premises do not leave much space through which the generic case might slip.

### **III. Constitutional Updating: An Institutional Comparison**

So far, then, I have suggested that constitutional amendments are neither systematically irrelevant nor generically suspect. Those suggestions are both negative or critical. Here I turn to constructive analysis, attempting to elaborate an affirmative view of constitutional amendment. The crucial question, on this view, is a comparative evaluation of institutional processes. The Constitution must be updated over time; which institution (or set or mix of institutions) shall be entrusted with the task? Section A clarifies the questions, and considers the objection that nothing useful can be said about

the institutional comparison unless we specify some substantive theory of what a good constitution would contain. Section B examines the strengths and weaknesses of the amendment process, on the one hand, and common-law constitutionalism on the other. Section C sketches the empirical conditions under which one process or the other might prove superior.

#### A. Preliminaries

We want to conduct a comparative, and evenhanded, evaluation of the institutional processes that engage in constitutional updating over time. We might approach this choice at the level of constitutional design, asking how an optimal amendment process would look, given other features of the Constitution, and so on. That is a worthy project, but not the one I pursue here. I will take the current Article V rules as fixed. Instead I assume that the constitutional rules and political constraints, even taken together, leave some freedom of action or play within the system. Political actors may choose to steer more or less constitutional change, and varying types of constitutional problems, through the Article V process, on the one hand, or the processes of constitutional common law, on the other. We are interested in the normative question which choice they should make, under what circumstances.

Taking the constitutional rules as given, I will address three preliminary questions. The first question is what, precisely, the institutional alternatives should be taken to be. I will assume away the Jeffersonian possibility of periodic constitutional conventions sitting to draft the whole constitution anew. The formal Article V amendment process is one means of constitutional updating, but the alternative of common-law constitutionalism is harder to define with precision.

On one view, constitutional change outside of Article V is *not* primarily constitutional common law, if constitutional common law is taken to mean judge-made law.<sup>69</sup> (Equivalently, we may say that constitutional common law is the sole alternative to Article V, but then simply define constitutional common law to include constitutional change by nonjudicial actors.) On this picture, most constitutional change outside of

---

<sup>69</sup> Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 37 (1995).

Article V is initiated by nonjudicial actors, and perhaps completed by those actors as well; judges often simply acquiesce in structural innovations produced by legislative and executive actors, innovations that are so large-scale as to change the constitutional order. Consider, for example, the large role played by nonjudicial actors in the rise of the administrative state and the development of presidential power in the 20<sup>th</sup> century.

This picture is doubtless a valuable corrective to an exclusive focus on judge-made constitutional law. But we should also be careful not to understate the leading role of judges in producing or at least ratifying non-Article V constitutional change. Here the distinction between constitutional rights and constitutional structure is useful. As far as rights are concerned, few deny the leading role of the federal judiciary in constitutional updating. As Dennis Mueller puts it, “The U.S. Constitution contains broad definitions of rights, and the task of amending their definitions to reflect changes in the country’s economic, social and political characteristics has been largely carried out by the Supreme Court.”<sup>70</sup>

As for structure, it is more plausible to say that large-scale change occurs outside the judiciary, that the judges simply get out of the way of it, and that the outcomes are the same as those that would have occurred had the judges simply gotten out of the business of constitutional review altogether. But getting out of the way, as the judges did after the New Deal, required capacious interpretation of the national government’s powers—which was itself just another type of judicial updating. It is illusory to think that structural innovations can achieve constitutional status through silent judicial acquiescence. Many such innovations have developed over generations, and seemingly become entrenched, only to be rejected by the judges when the issue was squarely posed. Consider the legislative veto, which became a ubiquitous feature of federal law between World War I and 1983, when the Supreme Court invalidated all such provisions at a stroke.<sup>71</sup> Many thought the legislative veto was an entrenched nonjudicial structural change, a fait accompli that the judges would have to ratify; but the judges didn’t think so.

---

<sup>70</sup> DENNIS C. MUELLER, *CONSTITUTIONAL DEMOCRACY* 223 (1996).

<sup>71</sup> *INS v. Chadha*, 462 U.S. 919 (1983).

## Constitutional Amendments

The lesson of the legislative-veto episode is that structural changes developed by the political branches are always constitutionally insecure until the judges put an affirmative stamp of approval on them; judicial acquiescence in the sense of inaction will not do. In that sense, there is no such thing as nonjudicial constitutional change outside the Article V process. Unless and until change has been ratified by a formal amendment, there is always a residual risk of judicial invalidation. Despite the New Deal's transformation of American public law, the absence of a New Deal Amendment means that the Court can flirt with retro-restrictive interpretations of the Commerce Clause, and radical law professors can seriously urge the judges to reinstate the pre-1937 "Constitution in Exile."

So the two institutional processes for updating that I will compare here are the Article V process, on the one hand, and judge-made constitutional law, on the other. A second preliminary question is in what sense these processes are alternatives. After all, under the current rules, judicial updating of constitutional doctrine is always potentially available, and occurs continuously. And even well-motivated political actors may resort to proposing and securing amendments when they believe that common-law constitutionalism has produced a bad outcome. Amendments are unlikely ever to be the exclusive means of constitutional updating, given the judges' current authority to engage in judicial review. But all this is compatible with the assumption that amendments and judicial updating are at least partial substitutes, that political actors can affect the relative mix of amendments and judicial updating, and that the mix might be better or worse as it contains more or less change produced by one institutional process or the other, and as certain types of problems are channeled through one process or the other.

Third, by what criteria are we to evaluate the institutional alternatives? A wholly substantive view would hold that it is impossible to say anything useful about an institutional comparison without a fully-specified account of what rules a good constitution would contain. On this view, what we want to know is which institutional process will tend overall to produce better constitutional law; and we cannot answer that question without knowing what better constitutional law would look like.

I do not believe this, nor do I believe that anyone else really believes it either. Here as elsewhere, it is often not only reasonable but inescapable to consider institutional issues without a fully specified theory of the good constitution. Theoretical approaches might converge, from different starting-points, to an overlapping consensus<sup>72</sup> or incompletely-theorized agreement<sup>73</sup> on mid-level institutional ideas. The emphasis is on the conditions under which decisions are made, not on the results of decisionmaking; disagreement about the outputs of some decisionmaking process can be bracketed in favor of a focus on the inputs to that process. The relevant variables are ground-level features of the alternative institutional processes that can be evaluated without recourse to a comprehensive account of constitutionalism.

#### B. Institutions and Updating

Let us turn to a comparison of institutional processes. I suggest that the Article V process takes a relatively abstract perspective, detached from the facts of particular cases; is relatively free from the influence of past judicial decisions; incorporates a relatively wider range of professions and perspectives; produces more enduring constitutional settlements, at higher up-front cost; and emphasizes the benefits of rigidity over the benefits of flexibility. All of these differences produce both costs and benefits that vary across different domains; neither process is better universally, or in the abstract. After identifying the structural tradeoffs, III.C. sketches some empirical conditions under which either process shows to best advantage.

##### Abstraction and information

A structural constraint on common-law constitutionalism is that decisions about constitutional updating are made in the setting of particular, litigated cases and controversies. By virtue of the prohibition on advisory opinions in the Article III courts, judges deciding constitutional cases have before them flesh-and-blood parties whose particular circumstances are often arresting or dramatic, and who often come to exemplify various claims for or against constitutional change. This focus on the particular case is sometimes said, and often assumed, to improve the quality of judicial decisions.

---

<sup>72</sup> JOHN RAWLS, A THEORY OF JUSTICE 387 (1971).

<sup>73</sup> CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35-38 (1996).

The concrete setting of litigated cases, on this view, provides judges with information that legislators or amendment drafters lack. The contrast is just a matter of degree, of course. Participants in the amendment process may draw upon vivid anecdotes, while courts may, within limits, frame their deliberations in more or less abstract ways. But matters of degree are important. The case-or-controversy requirement in courts creates an insistent structural pressure towards focus on the concrete, a pressure that has no obvious analogue in the amendment process.

There is a cost to the focus on particulars, however. Abstraction may for many reasons represent a virtue, and information a vice. It is not the case that decisions made with more information are always superior to decisions made with less information. For one thing, the information that comes from the presence of particular parties may produce a kind of inferential error: boundedly rational judges may err by assuming that the parties at bar exemplify the average or modal case within some larger class, whereas the parties may in fact represent atypical outliers in one or another respect. Consider, as a possible example, the majority opinion in *INS v. Chadha*. As Justice White noted in dissent, the *Chadha* majority invalidated “an entire class of statutes based on . . . a somewhat atypical and more-readily indictable exemplar of the class.”<sup>74</sup>

The presence of flesh-and-blood parties may also induce a sort of cognitive failure on the judges’ part. One mechanism here is salience, a heuristic that causes decisionmakers to overweight the importance of vivid, concrete foreground information and to underweight the importance of abstract, aggregated background information.<sup>75</sup> A risk is that judicial updating will be distorted, in various ways, because judges overreact to the parties before them, perhaps by underestimating the relatively abstract social benefits that result from governmental infliction of vivid social harms on those parties. A valid concern about the Supreme Court’s constitutional jurisprudence restricting the death

---

<sup>74</sup> *INS*, 462 U.S. at 974 (White, J. dissenting).

<sup>75</sup> See Scott Plous, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 125-26, 178-80 (1993) (discussing the salience heuristic and the closely related heuristics of vividness and availability). Cf. Robert M. Reyes, William C. Thompson & Gordon H. Bower, *Judgmental Biases Resulting from Differing Availabilities of Arguments*, 39 J. PERSONALITY & SOC. PSYCHOL. 2, 5-12 (1980) (demonstrating that vivid, concrete information exerts greater influence on mock jury deliberations than abstract, pallid information). Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL LAW REV. 777 (2001) (discussing the impact of cognitive illusions on judges).

penalty, for example, is that the Court systematically underestimates the (demonstrably large) deterrence benefits of the death penalty. The penalty's costs fall upon actual parties, while the benefits accrue to statistical persons not before the court—the 8-18 people whose murders are deterred by each execution.<sup>76</sup>

That the amendment process is less tightly focused on highly salient particulars is in part a good. Federal and state legislators considering amendments may draw upon the particulars of prior judicial decisions, but also possess a broader range of data produced by legislative factfinding and the submissions of competing interest groups. Although *amici*, expert witnesses and judicial notice of “legislative” facts allow the adjudicative process to partially compensate for the structurally superior factfinding capacities of legislatures, common-law adjudication is in the end lashed to a particular set of facts in a way the amendment process is not. Most importantly, abstraction produces a kind of neutrality or impartiality. Participants in the amendment process enjoy a broader, systemic perspective, one that ranges simultaneously over sets of cases and that sees the costs in one part of the system that are necessary to produce benefits in another part. That enlarged perspective plausibly improves the ability of constitutional amenders, relative to that of constitutional judges, to make the large-scale tradeoffs, influenced by implicit or explicit cost-benefit analysis, that are indispensable to systemic constitutional policymaking.

#### Precedent and path-dependence

An important advantage of common-law constitutional adjudication is the discipline provided by precedent, and by the related common-law emphasis on analogical reasoning. Precedent and analogical reasoning conserve on the costs of information, encourage consistency over time, and ensure a kind of Burkean epistemic humility that dampens sudden or radical shifts in policy.<sup>77</sup>

These points, however, capture only one side of the ledger. Precedent, and the constraint that new decisions be related analogically to old decisions, effect a partial

---

<sup>76</sup> Hashem Dezhbakhsh, Paul H. Rubin, & Joanna Shepard, *Does Capital Punishment have a Deterrent Effect? New Evidence from Post-moratorium Panel Data*, AMERICAN LAW AND ECONOMICS REVIEW (forthcoming, available at [http://userwww.service.emory.edu/~cozden/Dezhbakhsh\\_01\\_01\\_paper.pdf](http://userwww.service.emory.edu/~cozden/Dezhbakhsh_01_01_paper.pdf)).

<sup>77</sup> CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996); Strauss, *Common Law*, *supra* note 2.

transfer of authority from today's judges to yesterday's judges. As against claims of ancestral wisdom, Bentham emphasized that prior generations necessarily possess less information than current generations. If the problem is that changing circumstances make constitutional updating necessary, it is not obvious why it is good that current judges should be bound either by the specific holdings or by the intellectual premises and assumptions of the past. Weak theories of precedent may build in an escape hatch for changed circumstances, but the escape hatch in turn weakens the whole structure, diluting the decisionmaking benefits said to flow from precedent.

Another cost of precedent is path dependence. Path dependence is an ambiguous term, but a simple interpretation in the judicial setting is that the order in which decisions arise is an important constraint on the decisions that may be made. Judges who would, acting on a blank slate, choose the constitutional rule that is best for the polity in the changed circumstances, may be barred from reaching the rule, even though they would have reached it had the cases arisen in a different order. Precedent has the effect of making some optimal rules inaccessible to current decisionmakers. When technological change threatened to render the rigid trimester framework of *Roe v. Wade* obsolete, the Supreme Court faced the prospect, in *Pennsylvania v. Casey*, that precedent would block a decision revising constitutional abortion law in appropriate ways, even though a decisive fraction of the Justices would have chosen the revised rule in a case of first impression.<sup>78</sup> The joint opinion in *Casey* resorted to intellectual dishonesty, proclaiming adherence to precedent while discarding the trimester framework that previous cases has taken to be the core of *Roe*'s holding.<sup>79</sup> The lesson of *Casey* is sometimes taken to be that precedent imposes no real constraint, but absent precedent the Justices would have had no need to write a mendacious, and widely ridiculed, opinion.

The institutions that participate in the process of formal amendment, principally federal and state legislatures, are not subject to these pathologies. The drafters of constitutional amendments may write on a blank slate, drawing upon society's best current information and deliberation about values, while ignoring precedent constraints that prevent courts from implementing current learning even if they possess it. The

---

<sup>78</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

<sup>79</sup> *Id.* at 833-34.

contrast is overdrawn, because legislatures deliberating about constitutional amendments use precedent in an informal way. But precisely because the practice of legislative precedent is relatively less formalized than the practice of judicial precedent, legislative practice may capture most of the decisional benefits of formal precedent while minimizing its costs. Legislatures may draw upon their past decisions purely to conserve on decisionmaking costs, while shrugging off precedential constraints whenever legislators' best current information clearly suggests that the constitutional rules should be changed.

### Professionalism and participation

Whatever else is true of common-law constitutional adjudication, it is clear that essentially all the participants in it are lawyers. Nonlawyers participate only indirectly, as expert witnesses or amici; their participation is always refracted through the agency of lawyers. It is striking that *no member of another profession has ever been appointed to the Supreme Court*, although no positive law prohibits such an appointment. The benefits that flow from the dominant role of lawyers in common-law constitutionalism are obvious: a kind of expertise, and technical legal competence.

What are the costs? Let us first dispose of a bad answer. Bentham in the 19<sup>th</sup> century, and 20<sup>th</sup> century theorists of various democratic and populist stripes, drew upon this sort of contrast to emphasize the elitist, exclusionary character of common-law adjudication. A principal evil of common-law constitutionalism, on a Benthamite view, is that Judge & Co. develop a set of practices that are elitist, jargon-ridden, and (consequently) opaque or unintelligible to the citizens affected. I do not believe, however, that this sort of point supports a general impeachment of common-law constitutionalism. Although much common-law constitutionalism undeniably savors of guild exclusivity, the indictment is fatally noncomparative. Constitutional amendment currently takes place in a world of highly professionalized legislatures, at least at the federal level and increasingly in many states. The choice between constitutional updating through adjudication, on the one hand, or through the formal amendment process, on the other, is not primarily a choice between guild constitutionalism and popular or direct

constitutionalism. It is a choice between institutional processes dominated by different sets of professional and socioeconomic elites.

What is true is that the range of participating professions is far greater in the formal amendment process. Within Congress, only 40% of legislators are lawyers, and a potpourri of other backgrounds, skills, and experiences are represented.<sup>80</sup> The principal *comparative* cost of common-law constitutionalism, in this respect, is not that it is elitist, but that it draws upon a remarkably narrow band of professional skills. We need no very elevated account of legislative deliberation to believe that a broader range of represented skills, interests and backgrounds conduces to better policy, including better constitutional policy.

Suppose we adopt a minimalist account of deliberation as talk or discussion, to be valued primarily as a means of exchanging information, of supplying causal and instrumental arguments that take preferences as given, or of providing grounds for justifying decision to constituents or other interested publics.<sup>81</sup> Still it is plausible that a broader representation of professions and backgrounds in a deliberating group will produce better discussion, in this low-level sense, than will a group composed solely of lawyers. This might not be so for the ordinary business of law; even the sample of hard constitutional cases that comes before the Supreme Court is dominated by technical lawyer's fare. Constitutional updating, however, is sometimes a matter of large-scale value choice, as to which it is hardly clear that the lawyer's characteristic technical competence is particularly relevant or helpful. I return to this point below.

#### Decision costs and benefits

We must account for the costs of decisionmaking as well as the quality of decisions. A simple view would be that the formal amendment process is too costly to serve as the principal means, or even as an important means, of constitutional updating, just as periodic constitutional conventions are too costly to be practical.

---

<sup>80</sup> The percentage of state legislators who are lawyers has fallen in recent years and hovers around 10% in many states. *See, e.g.,* Randall T. Shepard, *Making Good Law Requires More Lawyers*, 35 IND. L. REV. 1111 (2002).

<sup>81</sup> James D. Fearon, *Deliberation as Discussion*, in DELIBERATIVE DEMOCRACY 44 (Jon Elster ed., 1998).

Dennis Mueller denies this view. He suggests instead that the decision costs of the formal amendment process are decision benefits:

The U.S. Constitution contains broad definitions of rights, and the task of amending their definitions to reflect changes in the country's economic, social and political characteristics has been largely carried out by the Supreme Court. While this method of updating the Constitution's definition of rights has helped to prevent them from becoming hopelessly out of date, it has failed to build the kind of support for the new definitions of rights that would exist if they had arisen from a wider consensual agreement in the society. The bitter debates and clashes among citizens over civil rights, criminal rights and abortion illustrate this point. . . . Although [alternative procedures for constitutional amendment] may appear to involve greater decision-making costs, they have the potential for building consensus over the newly formulated definitions of rights.<sup>82</sup>

On this view, it is an illusion that constitutional common law incurs lower decision costs in the long run, even if a given change may be more easily implemented through adjudication in the short run. Although at any given time it is less costly to persuade five Justices to adopt a proposed constitutional change than to obtain a formal amendment to the same effect, the former mode of change incurs higher decision costs over time, because common-law constitutionalism allows greater conflict in subsequent periods.

A benefit of formal amendments, then, is to more effectively discourage subsequent efforts by constitutional losers to overturn adverse constitutional change. Precisely because the formal amendment process is more costly to invoke, formal amendments are more enduring than are judicial decisions that update constitutional rules;<sup>83</sup> so losers in the amendment process will less frequently attempt to overturn or destabilize the new rules, in subsequent periods, than will losers in the process of common-law constitutionalism. This point does not necessarily suppose that dissenters from a given amendment come to agree with the enacting supermajority's judgment, only that they accept the new equilibrium *faute de mieux*.

Obviously more work might be done to specify these intuitions, but it is at least plausible to think that the simplest view, on which formal amendments incur

---

<sup>82</sup> Mueller, *supra* note 70, at 223.

<sup>83</sup> See Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 *FORDHAM L. REV.* 111 (1993).

decisionmaking costs that exceed their other benefits, is untenably crude. The overall picture, rather, is a tradeoff along the following lines. Relative to common-law constitutionalism, the Article V process requires a higher initial investment to secure constitutional change. If Mueller is right, however, constitutional settlements produced by the Article V process will tend to be more enduring over time than is judicial updating, which can be unsettled and refought at lower cost in subsequent periods.

Flexibility and commitment

Finally, and related to the last point, we may contrast amendments and common-law constitutionalism in terms of the costs and benefits of flexibility. Judicial updating is less costly to reverse in subsequent periods; the common-law process thus enjoys a kind of flexibility that is beneficial where the costs of a mistaken but irreversible change would be very high. Flexibility is of course an ambiguous virtue, however. In some domains, costly precommitments enable policies and social bargains that would not be possible under more flexible rules. In those settings, it is a good and not a bad that the products of the Article V process are costlier to undo in later periods.

C. Relative Superiority: Some Variables

If there are structural tradeoffs between the Article V process and common-law constitutionalism, it does not follow that the comparison is always a wash. In some domains the costs of one process may reach a zenith while the benefits reach a nadir, and vice-versa in other domains. Here I offer some conjectures about the relevant variables—about the conditions under which one process or the other shows to best advantage.

Value choice versus technical improvements

We have seen that lawyers' expertise dominates the process of common law constitutionalism. That expertise appears in its best light where constitutional rules of a relatively technical character must be adjusted over time. In settings of this sort the updating is itself relatively uncontroversial, although perhaps technically tricky; judges can accomplish the change at low cost; and it is not worth incurring the higher up-front costs of the formal amendment process, because it is unlikely that any disaffected group or large-scale social movement will attempt to unsettle the new, updated rules in future periods.

An example involves one of the great success stories of 19<sup>th</sup> and 20<sup>th</sup>-century constitutional adjudication, the so-called dormant or negative commerce clause. The problems in the area involve the reciprocal adjustment of competing state interests in a framework where all states benefit, in the long run, from national free trade; in which there is substantial consensus on the values to be promoted; and in which the judges have spent most of their time sorting out low-level questions about what rules can best be used to identify various de facto trade barriers. Many of these are technical lawyers' questions par excellence—if state regulation imposes differential burdens on out-of-staters, should evidence of protectionist motive on the part of state officials be admitted?—and it is very hard to imagine that an amendment or series of amendments would have produced a better body of law, overall, than has the Court. The comparison is slightly inapposite here; dormant commerce law is also constitutional “common law” in the sense that the rules may be changed by statute as well as by amendment, and Congress has occasionally intervened. But the point is that judicial updating and development has been by far the dominant means of updating, and has plausibly worked best of all.

A very different problem arises when constitutional rules fall hopelessly out of step with large-scale changes in public values. It is not at all obvious that lawyers, as a professional class, enjoy any superior capacity to identify those values; as John Hart Ely remarked, lawyers' values are likely to have the smell of the lamp about them. This is just the downside of lawyer's technical expertise. Specialization and professionalization always introduces a kind of distortion, a narrowness or likemindedness in beliefs and commitments.

Judges' political insulation gives them some distance from current electoral politics, which might help them to sort passing political frenzies from deep changes in public values (although I shall question that premise shortly). But insulation frees judges to do anything they want, within broad limits, and there is no guarantee that what they do will correspond to *any* account of what makes for good constitutional updating. Even more importantly, judges pay a very large price for insulation, in the form of reduced information about what actual people desire and believe. What the electoral constraint does for federal and state legislators is to force them into closer contact with a broader range of views, professions, and social classes than most judges encounter. It is hard to

say, in the abstract, how these considerations wash out, but there is no general reason at all to be confident that common-law adjudication can update constitutional rules in ways that track enduring changes in public values.

The crucial point here is comparative. Because the costs of constitutional change through judicial updating are much lower than the costs of amendment, common-law constitutionalism is more responsive to passing public moods, both for good and for ill. The stringency of the Article V requirements tends to ensure, by and large, that formal amendments pass only if they embody some sort of large-scale public consensus on new rules of the constitutional game. It will not do to focus only on the amendments that might represent the product of a passing political frenzy, such as the Prohibition Amendment. Such cases are few and far between, whereas common-law constitutionalism is rife with examples in which the judges have bowed to political winds. Consider the Supreme Court's deferential attitude towards the excesses of anticommunism in the 1950s, and its near-invariable deference to the political branches in wartime.<sup>84</sup>

#### Systemic change versus piecemeal change

I have suggested that actors in the amendment process have relatively greater capacity to take a systemwide perspective. Where circumstances require structural change in the polity, the systemic perspective is at a premium, and the relative virtues of the amendment process are indispensable. It is unimaginable, in my view, that the basic readjustment of power between federal and state governments embodied in the Reconstruction amendments could have emerged from a process of common-law constitutionalism; nor would it have been desirable for it to do so. The polity-wide scale of the necessary changes demanded that they be considered, if not all at once, then at least in much larger decisional chunks than a case-by-case process of decisionmaking could provide. The Reconstruction Congresses saw a wide range of political actors, representing a wide range of skills, information and interests, deliberate and bargain over large packages of rules simultaneously, reciprocally adjusting the choices made on different margins.

---

<sup>84</sup> See Lee Epstein et al., *The Effect of War on the Supreme Court* (forthcoming NYU LAW REVIEW 2005)

The incremental character of common-law constitutionalism, by contrast, shows to best advantage where a series of piecemeal changes and small steps are in order.<sup>85</sup> Consider the Supreme Court's relatively successful efforts, moving cautiously, to update free speech and 4<sup>th</sup> amendment privacy rules in light of 20<sup>th</sup>-century changes in the technology of information, such as the widespread use of telephones. This sort of adjustment of rules and principles to slowly changing technical circumstances puts common-law constitutionalism in its best light. Under circumstances of this sort it will rarely be obvious, at any particular point, that the large up-front costs of the Article V process are worth incurring to make small adjustments. Conversely, the relative flexibility of the common-law process is a benefit in this sort of setting, where it is useful to be able to undo or reverse a failed adjustment at low cost in later periods.

Irreversible and reversible change

It follows from these considerations that common-law constitutionalism performs poorly where the benefits of rigid constitutional commitments are high, and the benefits of flexibility in future periods are low; and vice-versa. Where it is desirable that new constitutional rules be tentative and reversible, because of a rapidly changing environment or because mistaken rules will have very high costs, common-law constitutionalism shows to advantage. Where it is desirable that new constitutional rules be irreversible or very costly to reverse, the amendment process is superior, just because amendments are much harder to destabilize in future periods. This is the case where, for example, the entrenchment of constitutional property rights serves as a costly signal that encourages investment,<sup>86</sup> or where it is desirable to commit *ex ante* to political ground rules that will have important and contentious distributive effects when applied *ex post*. An example in the latter category involves the presidential succession rules, adjusted most recently by the 25<sup>th</sup> Amendment.

Of course amendments will have to be interpreted by judges *ex post* as well, so the contrast is again just a matter of degree. But, to repeat an earlier point, the need for judicial interpretation does not make amendments otiose or meaningless. Amendments

---

<sup>85</sup> See CASS R. SUNSTEIN, *ONE CASE AT A TIME* (1999).

<sup>86</sup> Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUDIES 83 (2002).

can and often do sharply constrain interpretation within certain boundaries,<sup>87</sup> and can function as political and legal rallying points for groups and interests skirmishing in the courts in later periods. The need for later judicial interpretation gives amendments an added degree of flexibility, but as a comparative matter they are certainly less flexible (for good and for ill) than a common-law constitutional decision with identical content.

First best and second best: a cautionary note

The variables I have outlined here are strictly first-best considerations. Where applicable, they give a fully-informed and well-motivated decisionmaker good reason to channel constitutional change through either the amendment process or the processes of common-law constitutionalism. It is a different question whether particular decisionmakers, with their distinctive roles, cognitive limitations and institutional capacities, should be charged with directly implementing these considerations. That is a second-best question about the decision-rules that institutional actors, with particular roles and abilities, should use to implement first-best considerations.<sup>88</sup> I do not take up those further implementing questions here, beyond noting the important possibility that particular second-best decisionmakers would not do best by directly applying the first-best considerations I have sketched.

**Conclusion**

To identify the empirical conditions under which the amendment process or common-law constitutional updating proves superior is the beginning of a full institutional analysis, not the end of it. The variables need to be filled in with actual values, which requires empirical work. The contribution I attempt to make here is just to pose the right comparative institutional questions. The two theses critiqued in Parts I and II both attempt to privilege common-law updating over amendment, by claiming that amendment is either generally futile or generally bad. In particular, the generic case

---

<sup>87</sup> The Article V process, it has been argued, implies that judges should adopt a textualist approach to constitutional interpretation. See John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004).

<sup>88</sup> See Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

## Constitutional Amendments

against constitutional amendment rests on a systematic nirvana fallacy, or failure of institutional comparison. It is a prejudice that must be cleared away in order to bring the right questions into view.

Readers with comments may address them to:

Professor Adrian Vermeule  
University of Chicago Law School  
1111 East 60th Street  
Chicago, IL 60637  
[a-vermeule@uchicago.edu](mailto:a-vermeule@uchicago.edu)

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

1. Cass R. Sunstein and Edna Ullmann-Margalit, Second-Order Decisions (November 1999; *Ethics*, v. 110, no. 1).
2. Joseph Isenbergh, Impeachment and Presidential Immunity from Judicial Process (November 1999; forthcoming *Yale Law and Policy Review* v.18 #1).
3. Cass R. Sunstein, Is the Clean Air Act Unconstitutional? (August 1999; *Michigan Law Review* #3).
4. Elizabeth Garrett, The Law and Economics of “Informed Voter” Ballot Notations (November 1999, *University of Virginia Law Review*, v. 85).
5. David A. Strauss, Do Constitutional Amendments Matter? (November 1999)
6. Cass R. Sunstein, Standing for Animals (November 1999)
7. Cass R. Sunstein, Culture and Government Money: A Guide for the Perplexed (April 2000).
8. Emily Buss, Without Peers? The Blind Spot in the Debate over How to Allocate Educational Control between Parent and State (April 2000).
9. David A. Strauss, Common Law, Common Ground, and Jefferson’s Principle (June 2000).
10. Curtis A. Bradley and Jack L. Goldsmith, Treaties, Human Rights, and Conditional Consent (May 2000; *Pennsylvania Law Review* v. 149).
11. Mary Ann Case, Lessons for the Future of Affirmative Action from the Past of the Religion Clauses? (May 2001, *Supreme Court Review*, 2000)
12. Cass R. Sunstein, Social and Economic Rights? Lessons from South Africa (May, 2000).
13. Jill Elaine Hasday, Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations
14. Elizabeth Garrett, Institutional Lessons from the 2000 Presidential Election (May 2001).
15. Richard A. Epstein, The Allocation of the Commons: Parking and Stopping on the Commons (August 2001).
16. Jack Goldsmith, The Internet and the Legitimacy of Remote Cross-Border Searches (October 2001).
17. Adrian Vermeule, Does Commerce Clause Review Have Perverse Effects? (October 2001).
18. Cass R. Sunstein, Of Artificial Intelligence and Legal Reasoning (November 2001).
19. Elizabeth Garrett, The Future of Campaign Finance Reform Laws in the Courts and in Congress, The William J. Brennan Lecture in Constitutional Law (December 2001).
20. Julie Roin, Taxation without Coordination (March 2002).
21. Geoffrey R. Stone, Above the Law: Research Methods, Ethics, and the Law of Privilege (March 2002; forthcoming *J. Sociological Methodology* 2002).
22. Cass R. Sunstein, Is There a Constitutional Right to Clone? (March 2002).
23. Emily Buss, Parental Rights (May 2002, forthcoming *Virginia Law Review*).
24. David A. Strauss, Must Like Cases Be Treated Alike? (May 2002).
25. David A. Strauss, The Common Law Genius of the Warren Court (May 2002).
26. Jack Goldsmith and Ryan Goodman, U.S. Civil Litigation and International Terrorism (June 2002).
27. Jack Goldsmith and Cass R. Sunstein, Military Tribunals and Legal Culture: What a Difference Sixty Years Makes (June 2002).
28. Cass R. Sunstein and Adrian Vermeule, Interpretation and Institutions (July 2002).
29. Elizabeth Garrett, Is the Party Over? The Court and the Political Process (August 2002).
30. Cass R. Sunstein, The Rights of Animals: A Very Short Primer (August 2002).

## Constitutional Amendments

31. Joseph Isenbergh, *Activists Vote Twice* (November 2002).
32. Julie Roin, *Truth in Government: Beyond the Tax Expenditure Budget* (November 2002).
33. Cass R. Sunstein, *Hazardous Heuristics* (November 2002).
34. Cass R. Sunstein, *Conformity and Dissent* (November 2002).
35. Jill Elaine Hasday, *The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education* (December 2002).
36. Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?* (January 2003).
37. Adrian Vermeule, *Mead in the Trenches* (January 2003).
38. Cass R. Sunstein, *Beyond the Precautionary Principle* (January 2003).
39. Adrian Vermeule, *The Constitutional Law of Congressional Procedure* (February 2003).
40. Eric A. Posner and Adrian Vermeule, *Transitional Justice as Ordinary Justice* (March 2003).
41. Emily Buss, *Children's Associational Rights? Why Less Is More* (March 2003)
42. Emily Buss, *The Speech Enhancing Effect of Internet Regulation* (March 2003)
43. Cass R. Sunstein and Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron* (May 2003)
44. Elizabeth Garrett, *Legislating Chevron* (April 2003)
45. Eric A. Posner, *Transfer Regulations and Cost-Effectiveness Analysis* (April 2003)
46. Mary Ann Case, *Developing a Taste for Not Being Discriminated Against* (May 2003)
47. Saul Levmore and Kyle Logue, *Insuring against Terrorism—and Crime* (June 2003)
48. Eric Posner and Adrian Vermeule, *Accommodating Emergencies* (September 2003)
49. Adrian Vermeule, *The Judiciary Is a They, Not an It: Two Fallacies of Interpretive Theory* (September 2003)
50. Cass R. Sunstein, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation* (September 2003)
51. Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally* (November 2003)
52. Jenia Iontcheva, *Nationalizing International Criminal Law: The International Criminal Court As a Roving Mixed Court* (January 2004)
53. Lior Jacob Strahilevitz, *The Right to Destroy* (January 2004)
54. Adrian Vermeule, *Submajority Rules (in Legislatures and Elsewhere)* (January 2004)
55. Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism* (January 2004)
56. Catharine A. MacKinnon, *Directions in Sexual Harrassment Law: Afterword* (January 2004)
57. Cass R. Sunstein, *Black on Brown* (February 2004)
58. Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence* (February 2004)
59. Bernard E. Harcourt, *You Are Entering a Gay- and Lesbian-Free Zone: On the Radical Dissents of Justice Scalia and Other (Post-) Queers* (February 2004)
60. Adrian Vermeule, *Selection Effects in Constitutional Law* (March 2004)
61. Derek Jinks and David Sloss, *Is the President Bound by the Geneva Conventions?* (July 2004)
62. Derek Jinks and Ryan Goodman, *How to Influence States: Socialization and International Human Rights Law* (March 2004)
63. Eric A. Posner and Alan O. Sykes, *Optimal War and Jus Ad Bellum* (April 2004)
64. Derek Jinks, *Protective Parity and the Law of War* (April 2004)
65. Derek Jinks, *The Declining Significance of POW Status* (April 2004)

## Constitutional Amendments

66. Bernard E. Harcourt, Unconstitutional Police Searches and Collective Responsibility (June 2004)
67. Bernard E. Harcourt, On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars {A Call to Historians} (June 2004)
68. Jide Nzelibe, The Uniqueness of Foreign Affairs (July 2004)
69. Derek Jinks, Disaggregating “War” (July 2004)
70. Jill Elaine Hasday, Mitigation and the Americans with Disabilities Act (August 2004)
71. Eric A. Posner and Cass R. Sunstein, Dollars and Death (August 2004)
72. Cass R. Sunstein, Group Judgments: Deliberation, Statistical Means, and Information Markets (August 2004)
73. Adrian Vermeule, Constitutional Amendments and the Constitutional Common Law (September 2004)