

The World's Most Difficult Constitution to Amend?

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America's frozen constitution could well be the world's most difficult to amend. Far from being a badge of honor, the distinction of topping the global charts on constitutional rigidity is cause for alarm. Ancient and virtually impervious to amendment, the United States Constitution has withstood all modern efforts to renovate its outdated architecture on elections, federalism, rights, and beyond. In the last half-century alone, democratic reformers have proposed thousands of amendments to make the Constitution more equal, more inclusive, and more just. But each proposal has failed, few ever making it beyond the point of initiation. The current dynamics of American constitutional politics suggest no reason to expect anything different in the near- to mid-term. What does this mean for the future of democracy in the United States? In this Essay, I examine the sources of amendment difficulty in the United States and I explain why all proposals to amend the Constitution are for now doomed to failure. I close by tracing an alternative path proposed in the founding era that could have saved the Constitution from its present state of unamendability.

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INTRODUCTION—DEAD ON ARRIVAL

There is no shortage of proposals to amend the United States Constitution. Amendment suggestions come from all corners: presidents, legislators, judges, and academics.¹ Some of their reforms would change how leaders are selected,² others would entrench rights not presently protected in the constitutional text,³ and still others would rebalance federal powers.⁴ These proposals may or may not be worth implementing. But all of them are dead on arrival—unlikely to be

1. See, e.g., Steven Levitsky, *The Third Founding: The Rise of Multiracial Democracy and the Authoritarian Reaction Against It*, 110 CALIF. L. REV. 1991, 2002 (2022) (concluding that the United States Constitution must be amended to protect democracy); JOHN PAUL STEVENS, HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION (2014); JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–2015 (4th ed. 2015); Ann Bartow, *An Equal Rights Amendment to Make Women Human*, 78 TENN. L. REV. 839 (2011); Jeffrey D. Clements, “*But It Will Happen*”: A Constitutional Amendment to Secure Political Equality in Election Spending and Representation, 13 HARV. L. & POL’Y REV. 373 (2019); Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America’s Structural Democracy Deficit*, 3 ELECTION L.J. 559 (2004); Sarah Isgur, *It’s Time to Amend the Constitution*, POLITICO (Jan. 8, 2022), <https://www.politico.com/news/magazine/2022/01/08/scalia-was-right-make-amending-the-constitution-easier-526780> [<https://perma.cc/T8ZJ-RA7G>]; Fredreka Schouten, *President Obama Wants to Reverse Citizens United*, USA TODAY (Feb. 9, 2015), <https://www.usatoday.com/story/news/politics/onpolitics/2015/02/09/president-obama-wants-to-reverse-citizens-united/81582308/> [<https://perma.cc/YF8S-QS2U>]; David Stout, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES (Feb. 24, 2004), <https://www.nytimes.com/2004/02/24/politics/bush-backs-ban-in-constitution-on-gay-marriage.html> [<https://perma.cc/C3YL-WCLV>]. For an outstanding overview of amendment history in the United States, see generally JOHN F. KOWAL & WILFRED U. CODRINGTON III, THE PEOPLE’S CONSTITUTION: 200 YEARS, 27 AMENDMENTS, AND THE PROMISE OF A MORE PERFECT UNION (2021).

2. See, e.g., H.R.J. Res. 14, 117th Cong. (2021) (proposing an amendment to create direct elections for president and vice president).

3. See, e.g., H.R.J. Res. 23, 117th Cong. (2021) (proposing an amendment extending the right to vote to citizens sixteen years of age or older).

4. See, e.g., Randy E. Barnett, *The Case for the Repeal Amendment*, 78 TENN. L. REV. 813 (2011) (proposing an amendment to confer greater powers on states).

approved by either two-thirds of Congress or three-quarters of the states, as required by the rules of constitutional amendment in the Constitution.⁵

Attempts to amend the U.S. Constitution must confront two main obstacles. First, the supermajority approvals required for an amendment create a formidable labyrinth that is hard to navigate. Second, the current dynamics of constitutional politics have thwarted coordination between the national and state governments, and between the two national political parties. These factors have frozen the Constitution, making it virtually impossible today for any constitutional amendment proposal to be ratified.

Far from being a badge of honor, the distinction of topping the global charts on constitutional rigidity is cause for alarm. Ancient and essentially impervious to amendment, the Constitution has withstood all modern efforts to renovate its outdated architecture on elections, federalism, rights, and beyond. In the last half-century alone, democratic reformers have proposed thousands of amendments to make the Constitution more equal, more inclusive, and more just. But each proposal has failed, few ever making it beyond the point of initiation. It did not have to be this way. The country could have gone down another path two centuries ago—a path that could have saved the Constitution from its present state of unamendability.

In this Essay, I explain the sources of America's amendment difficulty, I compare the difficulty of amending the U.S. Constitution with constitutions abroad, and ultimately suggest that the Constitution may be the world's most difficult to amend. I close by considering the road not taken, and how it could have helped the Constitution avoid its constructive unamendability.

I.

AMENDING THE UNITED STATES CONSTITUTION

There have been roughly 12,000 attempts to amend the United States Constitution since its creation 235 years ago.⁶ Of those thousands of amendment proposals, only 27 have become official—an extraordinarily low rate of success drifting near 0.002%. The pace of amendment has decelerated quite considerably over time, as is especially clear if we divide the lifespan of the Constitution into three thirds. Fifteen amendments were ratified in the first third,⁷ seven in the

5. U.S. CONST., art. V.

6. This count reflects only proposals introduced in Congress. See *Measures Proposed to Amend the Constitution*, U.S. SENATE, <https://www.senate.gov/legislative/MeasuresProposedToAmendTheConstitution.htm> [https://perma.cc/MR62-38X8] (last visited Nov. 3, 2022). The number rises higher if we include proposals to amend the United States Constitution initiated in the various state legislatures.

7. See U.S. CONST. amend. XV (1870); *id.* amend. XIV (1868); *id.* amend. XIII (1865); *id.* amend. XII (1804); *id.* amend. XI (1795); *id.* amend. X (1791); *id.* amend. IX (1791); *id.* amend. VIII (1791); *id.* amend. VII (1791); *id.* amend. VI (1791); *id.* amend. V (1791); *id.* amend. IV (1791); *id.* amend. III (1791); *id.* amend. II (1791); *id.* amend. I (1791).

second,⁸ and only five in the third.⁹ It has now been thirty years since the Constitution was last amended,¹⁰ and fifty years since an amendment has been proposed and ratified within the same generation.¹¹ The difficulty of amending the Constitution becomes even more apparent when comparing amendment activity in the United States with global patterns in constitutional reform.

A. *Rankings of Constitutional Rigidity*

Scholars have tried for years to quantify the relative difficulty of amending national constitutions. The leading, though outdated, study of amendment difficulty pointed to an enduring truth about the United States Constitution: it is one of the world's most difficult to amend.¹² In this analysis of constitutional rigidity, Donald Lutz created an index of amendment difficulty to rank thirty-two national constitutions.¹³ The easiest constitution to amend, by his calculation, was the Constitution of New Zealand, which is amendable by a simple legislative majority in the country's unicameral legislature.¹⁴ At the other end of the scale, Lutz ranked the United States Constitution as the hardest to amend, harder even than the Japanese Constitution which has not once been amended since its coming into force in 1947.¹⁵

Other rankings of amendment difficulty have likewise situated the U.S. Constitution at the high end of constitutional rigidity. In her own study of thirty-nine constitutions, Astrid Lorenz ranked the Belgian Constitution as the most rigid, followed by a tie between the U.S. and Bolivian Constitutions, closely trailed by the Dutch Constitution, and then a tie among Australia, Denmark, and Japan.¹⁶ Arend Lijphart offered his own cross-national evaluation of constitutional rigidity, and concluded that seven constitutions rank equally at the head of the class for amendment difficulty: Argentina, Australia, Canada, Germany, Japan, Korea, Switzerland, and the United States.¹⁷

8. See U.S. CONST. amend. XXII (1951); *id.* amend. XXI (1933); *id.* amend. XX (1933); *id.* amend. XIX (1920); *id.* amend. XVIII (1919); *id.* amend. XVII (1913); *id.* amend. XVI (1913).

9. See U.S. CONST. amend. XXVII (1992); *id.* amend. XXVI (1971); *id.* amend. XXV (1967); *id.* amend. XXIV (1964); *id.* amend. XXIII (1961).

10. See U.S. CONST. amend. XXVII (1992).

11. See U.S. CONST. amend. XXVI (1971).

12. See DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN (2006) [hereinafter LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN]. The book draws from his earlier study of amendment difficulty published over a decade earlier. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355 (1994).

13. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN, *supra* note 12, at 170.

14. *Id.*

15. *Id.*

16. See Astrid Lorenz, *How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives*, 17 J. THEORETICAL POL. 341, 360-361 (2005).

17. See AREND LIJPHART, PATTERNS OF DEMOCRACY 208 (2d ed. 2012).

The most recent major study of amendment difficulty argued that “amendment culture” is a better way to understand differences in amendment rates across jurisdictions.¹⁸ Tom Ginsburg and James Melton explained that “amendment culture” may be measured as the rate of amendment under the immediate-past constitution.¹⁹ On this measure, the culture of constitutional amendment in the United States is fossilized because America’s first constitution—the Articles of Confederation—was not amended even once.²⁰

These studies have all converged on a similar finding: the U.S. Constitution is difficult to amend. But these studies did not reflect the full measure of constitutional rigidity in either the United States or elsewhere. With the exception of the Ginsburg-Melton analysis, these studies drew their conclusions either exclusively or largely from a purely textual analysis of the codified rules of constitutional amendment. This is quite simply too narrow an approach to really understand just how easy or difficult it is to amend a constitution. We must instead look beyond the four corners of the text to determine the actual measure of a constitution’s amendment difficulty or flexibility.²¹

B. Beyond the Constitutional Text

American history opens a window onto an essential teaching: the constitutional text alone cannot reflect the full measure of a constitution’s amendment difficulty. Although today the U.S. Constitution seems virtually impossible to amend, this view has not held steady over time. Indeed, the Constitution was once thought to be *too easy* to amend, even though the supermajorities needed for an amendment have not changed since the founding.

One hundred years ago, the Constitution was amended four times in a span of less than a decade. This burst of amendment activity occurred during the Progressive Era,²² a period of intense social activism and institutional reform from the 1890s through the 1910s. The rapid succession of successful amendments caused observers to wonder whether the hyper-amendability of the Constitution risked making it as easily amendable as an ordinary statute.²³ The political response at the time was perhaps an over-correction: congresspersons introduced an amendment to amend Article V to make the Constitution even

18. Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT’L J. CONST. L. 686 (2015).

19. *Id.* at 708.

20. *Id.* at 704.

21. See RICHARD ALBERT, *CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS* 101–05 (2019).

22. See U.S. CONST., amend. XIX (1920); *id.* amend. XVIII (1919); *id.* amend. XVII (1913); *id.* amend. XVI (1913).

23. See William L. Marbury, *The Limitations upon the Amendment Power*, 33 HARV. L. REV. 223, 223 (1919).

more difficult to amend.²⁴ Those efforts failed. But the dynamics of constitutional politics in the Progressive Era highlight a crucial fact about constitutional reform in the United States: the ease of formal amendment then, and its impossibility today, reveal that amendment difficulty under Article V is variable across time. The factors that exacerbate or alleviate amendment difficulty include the configuration of congressional power at a given moment, the consolidation and disintegration of legislative majorities within and across states, and the evolution of constitutional norms and political practices as a result of the dialogic interactions among executives, legislators, judges, and the people.

One critical source of amendment difficulty is the variable degree of partisan division. The higher the partisan division, the harder amendment will be, given that a successful amendment requires supermajority agreement in and among legislatures that are not ordinarily represented by a single political party. It follows that the likelihood of amendment rises when political parties are willing to cooperate, with or without partisan divisions between them. Conversely, the higher the concentration of legislative power within a single party, the easier amendment becomes assuming the dominant party is open to pushing through an amendment on its own without opposition support.

An additional source of amendment difficulty is what Vicki Jackson has described as “the myth” of the impossibility of amendment. The impression that the Constitution is difficult to amend risks becoming “self-fulfilling,” as Jackson has argued, and may in turn “contribute to increasing the difficulty of formal amendment.”²⁵ Scholars today commonly regard amendment as difficult if not impossible. Bruce Ackerman has described the rules of amendment as a “formidable obstacle course,”²⁶ Jack Balkin has called them “almost insurmountable,”²⁷ and Sanford Levinson has pointed to Article V as “the Constitution’s most truly egregious feature,”²⁸ one that “makes amendment extraordinarily difficult if not functionally impossible”²⁹ and “brings us all too close to the Lockean dream (or nightmare) of changeless stasis.”³⁰ The impossibility thesis is potent, powerful, and ubiquitous.

24. See Justin Miller, *Amendment of the Federal Constitution: Should it be Made More Difficult?*, 10 MINN. L. REV. 185 (1926) (describing proposal with “the very definite purpose of making the amending process more difficult than it is at the present time”).

25. Vicki C. Jackson, *The (Myth of Un)amendability of the US Constitution and the Democratic Component of Constitutionalism*, 13 INT’L J. CONST. L. 575, 602 (2015).

26. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1077 (2004).

27. Jack M. Balkin, *Sanford Levinson’s Second Thoughts About Our Constitutional Faith*, 48 TULSA L. REV. 169, 171 (2012).

28. Sanford Levinson, *Meliorism v. “Bomb-Throwing” as Techniques of Reform*, 48 TULSA L. REV. 477, 491 (2013).

29. Sanford Levinson, *Still Complacent After All These Years: Some Ruminations on the Continuing Need for a “New Political Science”*, 89 B.U. L. REV. 409, 422 (2009).

30. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 21 (2006).

Still another source of amendment difficulty is the non-use of Article V. The drought of amendments over the past three decades may have generated an expectation that the Constitution should change by means other than formal alteration. The conventional path to constitutional change may therefore have been rerouted from Article V to other avenues, including courts where judges can update the constitution by interpretation,³¹ legislatures where lawmakers can enact constitution-level super-statutes,³² and the White House where executives can shape and reshape the practices and norms underlying the Constitution.³³ These now-standard modalities of constitutional change have displaced Article V as the most common methods of constitutional change, and this may be yet an additional factor in the present difficulty of constitutional reform.

II.

THE UNITED STATES CONSTITUTION IN THE WORLD

The virtual impossibility of amending the U.S. Constitution raises striking contrasts and continuities with other constitutions. Domestically, the U.S. Constitution and state constitutions differ dramatically in their rigidity: the average annual amendment rate for state constitutions is five times higher than the rate for the U.S. Constitution.³⁴ Looking abroad reveals dozens of hyper-rigid constitutions that are similar to the U.S. Constitution in their resistance to constitutional amendment. But there is one substantial difference between those foreign constitutions and the U.S. Constitution: many of those foreign constitutions were designed to be unamendable—impervious to amendment—whereas the U.S. Constitution was not.

A. *An Unamendable Constitution*

Constitution-makers around the world have occasionally made certain rules unamendable. An unamendable rule is a special type of constitutional rule: it appears in the constitutional text but cannot lawfully be amended using the constitution's amendment procedures, even where large supermajorities may wish to do so.³⁵ The French Constitution, for instance, makes republicanism unamendable: “The republican form of government shall not be the object of any amendment.”³⁶ The Brazilian Constitution makes federalism unamendable: “No

31. See EDWARD SCHNEIER, *CRAFTING CONSTITUTIONAL DEMOCRACIES: THE POLITICS OF INSTITUTIONAL DESIGN* 225–26 (2006).

32. See William N. Eskridge Jr. & John A. Ferejohn, *Super-Statutes*, 50 *DUKE L.J.* 1215, 1269 (2001) (contextualizing the passage of the Civil Rights Act of 1964 in relation to constitutional amendment difficulty).

33. STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 30 (2013).

34. See Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 *U. CHI. L. REV.* 1641, 1674–75 (2014).

35. See Richard Albert, *Constitutional Handcuffs*, 42 *ARIZ. ST. L.J.* 663, 665–66 (2010).

36. 1958 CONST., art. 89 (Fr.).

proposed constitutional amendment shall be considered that is aimed at abolishing . . . the federalist form of the National Government.”³⁷ And the Turkish Constitution makes the national anthem and flag unamendable: both “shall not be amended, nor shall their amendment be proposed.”³⁸ Similar examples abound. The Constitution of Bosnia and Herzegovina makes unamendable the requirement that the country remain or become party to specific international human rights agreements.³⁹ Theocracy is unamendable in Algeria and Iran⁴⁰ unitarism is unamendable in Indonesia and Kazakhstan,⁴¹ monarchism is unamendable in Jordan and Kuwait,⁴² political pluralism is unamendable in Portugal and Romania,⁴³ and presidential term limits are unamendable in El Salvador and Guatemala.⁴⁴ This is just a partial list of the great diversity of unamendable rules around the world.

Each of these unamendable rules was intended to endure unchanged and unaltered for the duration of the life of the constitution in which they are codified. In contrast, the U.S. Constitution contains two *temporarily* unamendable rules. Both became fully amendable after a designated period of years that elapsed one generation after the writing of the Constitution. They are referenced in the text of Article V: “Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article.”⁴⁵ These two rules—the first and fourth clauses of Article I, Section 9—were unamendable from the moment of the coming-into-force of the Constitution in 1789 until the year 1808. The first authorized states to move and import enslaved persons, and the second guaranteed census-based taxation.⁴⁶ These two temporarily unamendable rules were core pillars in the Constitution’s infrastructure of slavery, including the Three-Fifths Clause, the Fugitive Slave Clause, and the Equal Suffrage Clause.⁴⁷

37. CONSTITUIÇÃO FEDERAL, art. 60, § 4(I) (Braz.).

38. TÜRKIYE CUMHURİYETİ ANAYASASI, arts. 3, 4 (Turk.).

39. USTAV BOSNE I HERCEGOVINE, art. II(7) (Bosn. & Herz.).

40. CONSTITUTION DE LA RÉPUBLIQUE ALGÉRIENNE DÉMOCRATIQUE ET POPULAIRE, art. 234(3) (Alg.); ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1989, art. 177 (Iran).

41. UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA TAHUN 1945, art. 37, § 5; QAZAQSTAN RESPUBLIKASYNYŇ KONSTITUTSIASY, art. 91(2) (Kaz.).

42. THE CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, art. 126 (Jordan); *see* CONSTITUTION OF THE STATE OF KUWAIT, arts. 175, 176 (Kuwait).

43. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA, art. 288(i) (Port.); CONSTITUTIA ROMANIEI, art. 152 (Rom.).

44. CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR, arts. 154, 248 (El Sal.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA, arts. 187, 281 (Guat.).

45. U.S. CONST., art. V.

46. *Id.* at art. I, § 9, cl. 1; *id.* art. I, § 9, cl. 4.

47. *See* Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT’L L. 1, 4 (2018).

Sometimes entire constitutions can be designed to be formally unamendable for as long as they endure. For instance, the Fundamental Constitutions of Carolina, written by John Locke, were designed to be “perpetually established” with no fixed-term duration.⁴⁸ The preamble communicates the intention of those committing themselves and their posterity to the permanence of its rules: “We the Lords and Proprietors of the province aforesaid, have agreed to this following Form of Government, to be perpetually established amongst us, unto which we do oblige ourselves, our Heirs and Successors, in the most binding ways that can be devised.”⁴⁹ The text emphasizes its intended unamendability in the very last article, stressing its “sacred and unalterable form”: “These Fundamental Constitutions, in number a hundred and twenty, and every part thereof, shall be and remain the sacred and unalterable Form and Rule of Government of Carolina forever.”⁵⁰

There are many reasons why constitution-makers might choose to codify formally unamendable rules. They might wish to preserve something unique about the polity, to give reassurance to one or more negotiating parties, to reconcile previously warring factions, to transform the state, to manage crises, to settle open questions, or to express public values.⁵¹

B. An American Form of Unamendability

Today the entire U.S. Constitution is unamendable. But not in the same way that the entirety of the Fundamental Constitutions of Carolina were made unamendable, nor in the same way that any single rule in a given constitution is designed to be unamendable. The unamendability today of the U.S. Constitution traces its roots more to its present political operation than to its original design. This is a crucial distinction in the *form* that unamendability takes in the U.S. Constitution in comparison to constitutions abroad.

I have a term for this peculiar form of unamendability in the United States: *constructive unamendability*. The U.S. Constitution is *constructively unamendable*. Constructive unamendability arises where a given constitutional rule—or in this case, an entire constitution—is freely amendable in theory but unamendable in practice.

Constructive unamendability does not spring from intentional constitutional design to create an unamendable constitution. It develops instead over time as political dynamics conspire to make it impossible to satisfy the conditions required for an amendment. This form of unamendability contrasts with the more conventional form of codified unamendability, for example the

48. See THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA, Mar. 1, 1669, pmbl.

49. *Id.*

50. *Id.* at art. 120.

51. ALBERT, *supra* note 21, at 140–49 (enumerating and explaining the reasons why constitutional designers codify unamendable rules).

unamendable rule against violating human dignity in Germany, which reflects an intentional design choice made by the authors of that higher law.⁵²

Nor does constructive unamendability emerge from a constitutional culture against constitutional amendment. The United States does not have an aversion to constitutional reform, as exists in Canada, for instance. This Canadian phenomenon derives from amendment fatigue and decades of costly and dramatic amendment failures.⁵³ Rather, the constructive unamendability of the U.S. Constitution has developed over time from the combination of deep political divisions and high legislative barriers that make amendment today completely unthinkable.

Constructive unamendability and codified unamendability are simultaneously similar and different. They are similar in *function* insofar as both constructive and codified unamendability yield the same result: in both cases the legal path to amendment is blocked because it is legally impermissible to amend a codified unamendable rule and it is practically impossible to amend a constructively unamendable rule. Yet these two forms of unamendability are quite different in form: one is a codified legal prohibition against amendment while the other is an uncoded political reality that thwarts amendment.

Another difference between them involves their duration. Codified unamendability endures for as long as the constitution remains in force. In contrast, constructive unamendability is not necessarily a permanent feature of a given constitutional rule or of an entire constitution. A constitution can be freely amendable in one era yet constructively unamendable in another. The U.S. Constitution itself proves this later point: in the Progressive Era, the Constitution was thought too easy to amend, but now, a century later, it has become much too hard to amend.⁵⁴ The point here is that political circumstances may evolve in ways that alleviate or exacerbate the degree of amendment difficulty of a single constitutional rule or of an entire constitution, making either at one time freely amendable and at another fully frozen—all while the formal amendment rules codified in the constitution remain unchanged.⁵⁵

There are several sources of constructive unamendability in the United States. We have already discussed some sources of amendment difficulty,

52. See GERMANY BASIC LAW, arts. 1(1), 79(3) [<https://perma.cc/DA5A-3LSK>].

53. See Richard Albert, *Quasi-Constitutional Amendments*, 65 BUFF. L. REV. 739, 756–58 (2017).

54. See *supra* text accompanying notes 21–22.

55. This may also be a point of similarity. Political circumstances might likewise change in the context of a codified unamendable rule: perhaps the passage of time and new societal circumstances might lead political actors to no longer recognize the validity of a codified unamendable rule, resulting in its informal repeal despite its continued codification in the constitutional text. For more on this possibility, see generally Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMP. L. 641 (2014) (introducing, theorizing, and illustrating the concept of constitutional desuetude).

including the variability of partisan divisions, the myth of unamendability, and the non-use of Article V.⁵⁶ There are others worth identifying.

A major source of constructive unamendability in the United States is the architecture of American federalism. When the constitutional structures of federalism converge with the variable dynamics of multilevel political agreement and disagreement, the result can be devastating constitutional paralysis. The U.S. Constitution's amendment procedures give veto power to constitutional players in both levels of government: the national legislature can withhold its agreement, just as a cohort of thirteen states can block any amendment proposal, since Article V requires approval from thirty-eight out of fifty states to ratify any amendment. The likelihood of amendment defeat rises in periods of political division, though not because of the lack of consensus alone. It is because of how partisan divisions complicate efforts to coordinate decision-making across levels of government.⁵⁷ The point is not unique to American federalism: all federations are susceptible to constitutional stasis given that any federation is a complex state that consists of multiple substate entities, often each with its own sometimes competing interests.⁵⁸

The evolution of federalism is another factor in the constructive unamendability of the U.S. Constitution. The proliferation of states—from thirteen at the coming-into-force of the Constitution to fifty since 1967—has increased the difficulty of amendment by a substantial degree. To put it in numbers, it is much harder to secure the agreement of three-quarters of the states now than it was two centuries ago. Rosalind Dixon has quantified just how much more difficult it is today to rally the approval of thirty-eight out of fifty states than it was to assemble the approval of ten out of thirteen states in 1789: “If one were to try to adjust for this change in the denominator for Article V, the *functional* equivalent to the 75% super-majority requirement adopted by the framers would in fact now be as low as 62%.”⁵⁹ In other words, if we were to calculate the functional equivalent of three-quarters of 13 states in the year 1789 in proportion to the fifty states that today comprise the United States, the answer would be 31 states—much lower than the 38 states needed today to ratify an amendment under Article V. Dixon has therefore concluded that “all else being equal, this change in the denominator for Article V has implied a directly proportionate increase in the difficulty of ratifying proposed amendments.”⁶⁰

56. See *supra* Section I.B.

57. See DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995* 426 (1996).

58. See Nicholas Aroney, *Constituent Power and the Constituent States: Towards a Theory of the Amendment of Federal Constitutions*, 17 *JUS POLITICUM* 5, 6–7 (2017).

59. Rosalind Dixon, *Partial Constitutional Amendments*, 13 *U. PA. J. CONST. L.* 643, 653 (2011).

60. *Id.*

There is an additional factor that reinforces the Constitution's constructive unamendability: it is what James Madison labelled the "veneration" of the Constitution.⁶¹ Madison encouraged more than just respect for the Constitution; he wanted Americans to revere the document because this would, in his view, generate a stable regime reinforced by a long-enduring constitutional text.⁶² Madison moreover wished to keep the Constitution as close to the original as possible because frequent amendment might have suggested that the Constitution was a flawed document full of errors and defects.⁶³ Who would revere a new constitution that was more often under revision than not? Surely that would not inspire confidence, thought Madison.

The passage of time has revealed an answer to the question Madison's theory raises for us today: does constitutional veneration actually lead to fewer constitutional amendments? Scholars have shown that an American's reverence for the U.S. Constitution makes her less likely to support an amendment to it because she associates amendment with undermining both the Constitution and its authors.⁶⁴ Constitutional veneration is an extraordinarily powerful force behind the constructive unamendability of the U.S. Constitution.

III.

DEMOCRACY AND UNAMENDABILITY IN THE UNITED STATES

The impossibility of major constitutional reform in the United States entails serious consequences for democracy in America. The most worrisome is that the constitutional reforms many see as most urgent are completely off the table because they cannot be achieved by either formal or informal amendment. The question therefore presents itself: how can America improve its democratic procedures and outcomes if not through the conventional avenues of Article V that are presently foreclosed?

A. *The Democratic Critique*

In 2006, Sanford Levinson published an acclaimed book making the case that, in his view, the U.S. Constitution is undemocratic.⁶⁵ From the congressional lawmaking process to the expanding powers of the President, and from the selection and tenure of Supreme Court justices to the structure of the U.S. Senate

61. THE FEDERALIST NO. 49, at 340 (James Madison) (Jacob E. Cooke ed., 1961).

62. *Id.*

63. *Id.*

64. See James R. Zink & Christopher T. Dawes, *The Dead Hand of the Past? Toward an Understanding of "Constitutional Veneration,"* 38 POL. BEHAVIOR 535, 556 (2016).

65. See generally LEVINSON, *supra* note 28 (arguing that a new constitutional convention should be convened to give Americans the opportunity to address the undemocratic features of the U.S. Constitution).

and beyond, Levinson diagnosed the structural constitutional problems he regards as ailing democracy in America.

There is much in the Constitution that is susceptible to change by judicial interpretation and reinterpretation. Accordingly, in recent generations, the most common path to constitutional reform has been through the courts, not by constitutional amendment. For example, the legal death of the separate-but-equal regime in the United States did not occur by a constitutional amendment but rather at the hands of a Supreme Court opinion that interpreted the Constitution's Equal Protection Clause in a new way.⁶⁶ These kinds of reforms by judicial interpretation were not Levinson's principal focus in his book. He was instead interested in exposing the urgency of reforming what he identified as the "hard-wired" parts of the Constitution.⁶⁷ These are constitutional structures that cannot be changed, within the existing constitutional order, in any way but by constitutional amendment using the procedures in Article V.

As Levinson explained in his book, judicial re-interpretation is simply not a plausible path to reform those hard-wired pillars of the Constitution—like the design of the U.S. Senate or the term of Supreme Court judges—because they are not codified in open-textured language that invites reasonable disagreement about their plain meaning. Hard-wired constitutional rules therefore differ from rights protections, for example. Two well-informed observers acting in good faith could reasonably disagree whether the Constitution's protection for "due process" applies in a given case. Just as they might also reasonably disagree whether a given type of expressive conduct violates the First Amendment's guarantee of freedom of speech. Likewise, the same informed observers might differently situate the line separating congressional authority under the Commerce Clause from the rights of states to regulate matters historically left to them under the Tenth Amendment. In cases like these, parties can appear in court to litigate a resolution to their sincere interpretative disagreements.

But when it comes to what Levinson defines as the hard-wired rules in the Constitution, litigation cannot help. These hard-wired rules are unchangeable by judicial interpretation and re-interpretation. They are, as Levinson wrote, trapped in the "iron cage" of Article V.⁶⁸ For example, as Levinson illustrated, "one cannot, as a practical matter, litigate the obvious inequality attached to Wyoming's having the same voting power in the Senate as California."⁶⁹ Calling the Senate "illegitimate," Levinson argued that the guarantee of equality in state representation "should appall most Americans" and that "[i]t is impossible to

66. Compare *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896) (holding that separate-but-equal does not violate the Fourteenth Amendment), with *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (reversing *Plessy* and holding that separate-but-equal violates the Fourteenth Amendment).

67. LEVINSON, *supra* note 28, at 108.

68. *Id.* at 160.

69. *Id.* at 23.

describe the Senate as a remotely majoritarian institution.”⁷⁰ Other structural features of deep concern for Levinson included the Electoral College,⁷¹ the lame duck presidency,⁷² and bicameralism itself,⁷³ each undemocratic and also effectively unamendable, according to him.

Levinson used the distinction between the juridically re-interpretable parts of the Constitution and its juridically-unreachable hard-wired components to drive home a key point: Americans might well wish to change one, some, or all of the hard-wired parts of their Constitution, but these hard-wired rules are permanent fixtures in the Constitution for now and the foreseeable future. The bottom line for Levinson was that all of these hard-wired institutions are “undemocratic” and unfortunately unchangeable because constitutional amendment is an unrealistic expectation for the moment. As Levinson explained in his provocative book, America’s amendment impossibility will have deep reverberations on democratic outcomes both in the near-term and beyond: “[T]he deviation from democratic legitimacy has significant consequences for the actual output of our political system and, therefore, the likelihood that it will effectively confront the problems facing the majority of Americans.”⁷⁴

B. The Meta-Democratic Critique

Levinson’s democratic critique opened the door to a meta-democratic critique. The democratic critique is the frontal criticism of what is lacking about democracy in America. This critique highlights those features of the Constitution thought to be undemocratic. An alternative would more squarely focus on the impossibility of amendment via Article V. This is the meta-democratic critique: it is oriented principally towards the unamendability of the U.S. Constitution and suggests that Americans should be concerned by that fact of constitutional life just as equally as, or even more than, the Constitution’s specific shortcomings in the democratic outcomes it delivers.

On this theory, unamendability raises a serious problem for democratic constitutionalism. It denies the basic democratic right of participation that constitutional amendment commonly entails in a constitutional democracy. In some democratic countries, amendment requires a national popular vote, which involves the people in the exercise of direct democracy. But even where amendment in a democratic state does not require a referendum or any similar form of direct popular participation, the people are nonetheless given a mediated voice in amendments made through their representatives, who act in the name of the people and are at least in theory accountable to them. In either case, an

70. *Id.* at 49.

71. *Id.* at 81–97.

72. *Id.* at 98–101.

73. *Id.* at 29–38.

74. *Id.* at 49.

unamendable constitution withholds from both the people and their representatives the fundamental right of political participation to engage in one's own self-definition, self-expression, and self-government. It is the most important constitutional right there can be.

Writing two centuries ago, William Cobbett offered his own perspective on which right stands above all others, and he also explained why. There was no doubt in his mind:

Our rights in society are numerous; the right of enjoying life and property; the right of exerting our mental and physical power in an innocent manner; but the great right of all, and without which, there is in fact no right, *is the right of taking part in the making of the laws by which we are governed*. This right is founded on that law of nature already spoken of; it springs out of the very principle of civil society, for what compact, what agreement, what common assent, can possibly be imagined, by which men would give up all the rights of nature, all the free enjoyment of their bodies and their minds, in order to subject themselves to rules and laws, in the making of which they should have nothing to say, and which should be enforced upon them without their assent. The great right, therefore, of every man, the right of rights, is the right of having a share in the making of the laws, to which the good of the whole makes it his duty to submit.⁷⁵

For Cobbett, then, the most important right—what he called “the right of rights”—was the right to political participation. As Cobbett acknowledged, there would be no other right without it. In Cobbett's view, the right to political participation is the condition precedent for all rights because it inheres in the basic nature of civil society. It is at once an individual right and a collective right, and it is a vehicle for persons to voice their preferences and then to aggregate them as members of a community.

Cobbett was not writing on a blank slate. This right of rights—the right to political participation—has a long intellectual lineage with noteworthy constitutional origins. Cobbett was drawing from an older tradition of thought and practice, memorialized in higher law as early as 1789 when the National Assembly of France approved *La déclaration des droits de l'homme et du citoyen*. Known as the *Declaration of the Rights of Man and the Citizen*, this pivotal text in modern constitutionalism made clear that “[l]aw is the expression of the general will” and moreover that “[e]very citizen has a right to participate personally, or through his representative, in its foundation.”⁷⁶

75. MEMOIRS OF THE LATE WILLIAM COBBETT, ESQ. 305 (Robert Huish ed., 1836).

76. *Declaration of the Rights of Man - 1789*, AVALON PROJECT, https://avalon.law.yale.edu/18th_century/rightsof.asp (last visited Nov. 3, 2022) [<https://perma.cc/L4LT-AMMR>].

At its core, the right to political participation is the democratic right to chart one's own future as an individual and also as part of a mature society. This umbrella right includes the right to vote, the right to run for office, the right to form a political party, the right to free and fair elections, and other key rights that help democracy take root and ultimately thrive.

Central to the right to political participation is the right to amend one's own constitution. An unamendable constitution extinguishes this fundamental right.

CONCLUSION—THE JEFFERSONIAN PATH NOT TAKEN

Today the U.S. Constitution is unamendable, but it could have avoided this fate. In the early years of the Constitution, Americans had at their disposal an intriguing option that would have generated frequent and regular opportunities for both discrete and sweeping constitutional reforms. They chose a different path, however, and some Americans may now regret the eighteenth-century decision that has left the country with its frozen eighteenth-century constitution. The path not chosen was to engage in periodic reassessments of the Constitution and to create opportunities for low- and high-stakes constitutional reform. The source of the proposal was Thomas Jefferson.

Although Madison saw constitutional veneration as a virtue, Jefferson considered it a vice. Jefferson worried that a deep feeling of veneration would make Americans reluctant to revise their Constitution, even in the case of sensible constitutional amendments that time and experience might reveal were necessary. Veneration, thought Jefferson, reinforced the view that the Constitution was a sacred jewel to be kept as close as possible to its original form. Jefferson explained the problem in this way: "Some men look at constitutions with sanctimonious reverence, [and] deem them like the arc of the covenant, too sacred to be touched. [T]hey ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment."⁷⁷

Jefferson wanted something different for the new U.S. Constitution. He rejected the thoughtless admiration of the Founders' creation because it would make amendment unlikely. Yet he also disfavored the pathologies of a frequently amended constitution. Here is what he wrote at the time: "I am certainly not an advocate for frequent [and] untried changes in laws and constitutions . . . [B]ut I know also that laws and institutions must go hand in hand with the progress of the human mind."⁷⁸ Constitutional veneration would risk discouraging constitutional change, even when reform was necessary. Jefferson made this

77. *Proposals to Revise the Virginia Constitution: I. Thomas Jefferson to "Henry Tompkinson"* (Samuel Kercheval), 12 July 1816, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002> (last visited Nov. 3, 2022) [<https://perma.cc/GUH4-TU4H>].

78. *Id.*

point quite powerfully when he wrote that “we might as well require a man to wear still the coat which fitted him when a boy [and ask] civilised [sic] society to remain ever under the regimen of their barbarous ancestors.”⁷⁹

Jefferson therefore foresaw the risk that Madison did not—a risk that has become reality today: the current political culture of constitutional veneration makes it hard to amend the Constitution, and even harder to replace it. No wonder, then, that scholars like Levinson believe the country is stuck with a constitution that is suboptimal, not suited to the moment, and frozen in the past.

The misgivings that some have today about the Constitution could perhaps have been avoided had Jefferson won the battle of ideas early in the life of the new republic. He proposed an ingenious solution to forestall the ills of constitutional veneration, and in turn to avoid the condition of constructive unamendability that persists today despite many calling for constitutional change. Jefferson suggested periodically rewriting the Constitution to give every generation the opportunity to update it according to its own needs, its own preferences, and its own values. Here is Jefferson outlining his proposal:

[L]et us provide in our constitution for its revision at stated periods. (every generation) Each generation is as independent as the one preceding It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness; consequently, to accommodate to the circumstances in which it finds itself, that received from its predecessors; and it is for the peace and good of mankind, that a solemn opportunity of doing this every nineteen or twenty years, should be provided by the constitution; so that it may be handed on, with periodical repairs, from generation to generation, to the end of time, if anything human can so long endure.⁸⁰

Jefferson did not prevail. Far from being rewritten every generation, the Constitution has retained its basic structure for 235 years, just as Madison had hoped when he suggested that America would benefit from instilling a culture of constitutional veneration in the soul of the people.

But perhaps Jefferson had the right idea. Perhaps all constitutions, including the U.S. Constitution, should be preprogrammed to require their rewriting periodically—or at least to require the convening of periodic conventions of the people to consider their rewriting—in order to ensure that the text represents the current values of the time and reflects the vision the people have for themselves. Rewriting constitutions periodically could narrow the inevitable gulf that grows over time between the constitution as written and the constitution as lived. And rewriting constitutions periodically would vest the people of the present with something more closely approximating an effective and practicable power of self-government than what they generally enjoy.

79. *Id.*

80. *Id.*

The Jeffersonian model is no longer an option for the U.S. Constitution today. This Jeffersonian innovation may nonetheless be useful for countries writing new constitutions, hoping to avoid enacting a constitution that might later contend for the title of the world's most difficult constitution to amend.