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## Amendment Creep

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# AMENDMENT CREEP

Jonathan L. Marshfield\*

*To most lawyers and judges, constitutional amendment rules are nothing more than the technical guidelines for changing a constitution's text. But amendment rules contain a great deal of substance that can be relevant to deciding myriad constitutional issues. Indeed, judges have explicitly drawn on amendment rules when deciding issues as far afield as immigration, criminal procedure, free speech, and education policy. The Supreme Court, for example, has reasoned that, because Article V of the U.S. Constitution places no substantive limitations on formal amendment, the First Amendment must protect even the most revolutionary political viewpoints. At the state level, courts have cited flexible amendment rules in state constitutions to support judicial restraint. Although largely unnoticed by scholars, amendment rules may be creeping into other areas of constitutional law.*

*This Article provides the first systematic investigation and assessment of “amendment creep”—the phenomenon where judges explicitly draw on amendment rules to interpret constitutional provisions unrelated to formal amendment. The Article concludes that federal and state amendment rules contain constitutional substance that can assist judges and lawyers in resolving many diverse constitutional disputes. Based on an extensive review of relevant Supreme Court and state high court opinions, the Article constructs a typology of amendment-based arguments. The Article concludes that amendment creep is an extension of a familiar form of constitutional reasoning known as structuralism, and that it may have several normative benefits for constitutional adjudication—such as promoting overall constitutional coherence and ensuring that judges give appropriate consideration to the democratic values that amendment rules embed in the constitutional framework.*

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#### INTRODUCTION

There is an underappreciated source of constitutional meaning creeping into U.S. constitutional law. In Justice Scalia’s recent dissent in *Obergefell v. Hodges*, he suggested that the Court wrongly interpreted the Fourteenth Amendment to guarantee same-sex couples the right to marry because the majority’s interpretation was so revolutionary that it effectively rendered meaningless Article V’s procedures for formal amendment.<sup>1</sup> Although perfunctory, Justice Scalia’s reliance on Article V to support his interpretation

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1. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2628 (2015) (Scalia, J., dissenting). Justice Scalia argued in dissent that the majority opinion was a “threat to American democracy.” *Id.* at 2626. He agreed with the majority’s conclusion that “[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of

of the Fourteenth Amendment illustrates a broader interpretive phenomenon whereby judges explicitly draw on formal amendment rules to shed light on the meaning of other constitutional provisions.<sup>2</sup> Indeed, judges of all interpretive persuasions have cited Article V and state amendment rules when addressing issues as wide-ranging as immigration,<sup>3</sup> criminal procedure,<sup>4</sup> free speech,<sup>5</sup> and education policy.<sup>6</sup> Contrary to conventional

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freedom in all of its dimensions.” *Id.* at 2628 (quoting the majority opinion). He argued, however, that this was precisely why the founding generation included procedures for formal amendment of the Constitution in Article V. *Id.* According to Justice Scalia, the existence of formal amendment procedures is evidence that the Constitution does not authorize the Court to make significant changes in constitutional law through judicial interpretation of the text. *Id.* at 2628–29. Justice Scalia inferred from Article V that significant changes to individual rights protections should occur through either formal constitutional amendment or nonconstitutional legislation—but not through judicial review. *See id.* at 2628 (stating that explicit changes in individual rights should occur through formal constitutional amendment or “the never-ending process of legislation”). For an overview of the reasoning and opinions in *Obergefell*, see generally Donald H. J. Hermann, *Extending the Fundamental Right of Marriage to Same-Sex Couples: The United States Supreme Court Decision in Obergefell v. Hodges*, 49 IND. L. REV. 367 (2016).

2. My focus in this Article is not whether the substance of amendments to a constitution affects how courts interpret other constitutional provisions. *See, e.g.*, Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259 (2001) (arguing that the Reconstruction Amendments to the federal Constitution should inform how judges interpret pre-Civil War provisions of the Constitution). My focus is whether the “procedural” provisions in a constitution that explain how the text can be amended may inform judicial interpretation of other constitutional provisions. For examples of this interpretative technique, see *Oregon v. Mitchell*, 400 U.S. 112, 205 (1970) (Harlan, J., concurring in part and dissenting in part) (relying on Article V to interpret Congress’s Fourteenth Amendment implementation authority); *Reid v. Covert*, 354 U.S. 1, 17 (1957) (plurality opinion) (citing Article V as support for the interpretation of the supremacy clause in Article VI); and *Reliable Consultants, Inc. v. Earle*, 538 F.3d 355, 363 (5th Cir. 2008) (dissenting from denial of rehearing *en banc*) (relying on Article V to assess a substantive due process claim under the Fourteenth Amendment).

3. *E.g.*, *Schneiderman v. United States*, 320 U.S. 118, 121 n.2, 137–38 (1943) (relying heavily on Article V to evaluate whether a petitioner for naturalization met the statutory requirement of showing that he “behaved as a man . . . attached to the principles of the Constitution of the United States”).

4. *E.g.*, *Baldwin v. New York*, 399 U.S. 66, 75 (1970) (Black, J., concurring) (citing Article V as support for an interpretation of the Sixth Amendment right to jury trial); *Minnesota v. Hamm*, 423 N.W.2d 379, 382–83 (Minn. 1988) (relying on state constitutional amendment rules when interpreting a state constitutional guarantee to a twelve-person jury), *superseded by constitutional amendment as stated in* *Danforth v. State*, 761 N.W.2d 493 (Minn. 2009); *State v. Samora*, 307 P.3d 328, 331–32 (N.M. 2013) (relying on New Mexico’s amendment procedures in deciding whether jurors had a constitutional right to a Spanish translator).

5. *E.g.*, *Whitehill v. Elkins*, 389 U.S. 54, 57 (1967) (relying on Article V to interpret the First Amendment).

6. *E.g.*, *Brown v. Bd. of Educ.*, 863 So. 2d 73, 90 (Ala. 2003) (Moore, C.J., concurring in the result) (relying on state amendment procedures to decide a case regarding an education-funding scheme); *Sherman v. Atlanta Indep. Sch. Sys.*, 744 S.E.2d 26, 32–33 (Ga. 2013) (relying on the state constitutional process of amendment to interpret a provision of the state constitution regulating public education financing).

thought,<sup>7</sup> these cases suggest that amendment rules do much more than provide the technical guidelines for formal amendment. Amendment rules, it seems, are creeping into judicial interpretations of other areas of constitutional law.

Surprisingly, this technique of using amendment rules to help interpret substantive constitutional provisions has gone largely unnoticed and, as a result, is vastly understudied.<sup>8</sup> To be sure, much has been written about the relationship between formal and informal methods of constitutional change,<sup>9</sup> but until now no one has undertaken a systemic study of how U.S. judges explicitly draw on a constitution's formal amendment rules when interpreting other constitutional provisions, or whether this interpretative methodology is normatively desirable.<sup>10</sup> This Article addresses that void by providing the first description and assessment of what I call "amendment creep."

Consider two examples: one from the United States Supreme Court, and one from state constitutional law. In *Whitehill v. Elkins*, the Supreme Court considered whether Maryland violated the First Amendment by requiring teachers at the University of Maryland to certify that they were not members of a "subversive" group advocating "alteration of[ ] the constitutional form

7. E.g., Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules: The Denominator Problem*, in *COMPARATIVE CONSTITUTIONAL DESIGN* 195, 195 (Tom Ginsburg ed., 2012) (describing the most immediate function of amendment rules as establishing democratic procedures for changing constitutional text); see also *Dillon v. Gloss*, 256 U.S. 368, 374–76 (1921) (interpreting Article V's procedural requirements for amendment).

8. Scholars have noted possible relationships between constitutional interpretation and constitutional amendment. E.g., WILLIAM F. HARRIS II, *THE INTERPRETABLE CONSTITUTION* 164–68 (1993). This scholarship, however, focuses mostly on formal amendment as support for the idea that textualism or originalism is the preferred approach to constitutional interpretation. E.g., JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* 81–99 (2013). My project here is much broader. I investigate how courts have used amendment rules to interpret other portions of a constitution regardless of interpretative philosophy. I am interested in the empirical phenomenon of "amendment creep," not whether amendment rules tend to support any particular interpretive philosophy.

9. E.g., 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 15–27 (1998) (arguing that constitutional change can occur through "constitutional moments" of institutional conflict without any formal change to constitutional text); DONALD S. LUTZ, *PRINCIPLES OF CONSTITUTIONAL DESIGN* 178–79 (2006) (empirically investigating the relationship between formal and informal amendment); Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 *DRAKE L. REV.* 925, 926–27 (2007) (discussing the complex relationship between formal constitutional amendment and informal amendment through judicial interpretation); Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, in *RESPONDING TO IMPERFECTION* 37, 54 (Sanford Levinson ed., 1995) (explaining that binding constitutional rules can be changed informally); Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 *COLUM. L. REV.* 606, 616–18 (2008).

10. *But cf.* Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, 59 *MCGILL L.J.* 225, 265–80 (2013) (describing how the German Constitutional Court has drawn on Germany's formal amendment rules in deciding certain constitutional cases).

of government of the United States, or of the State of Maryland.”<sup>11</sup> In holding that the oath was unconstitutional, the Court reasoned that the Constitution implicitly forbids the government from discriminating against people who “might wish to [peacefully] ‘alter’ our form of government” because the Constitution itself outlines a procedure whereby any conceivable changes can be made to the Constitution.<sup>12</sup> In other words, the Court inferred that the Constitution protects freedom of expression regarding radical political change because Article V places “no restraint” whatsoever on the kind of constitutional amendments that are permissible.<sup>13</sup>

In *Maso v. State Taxation and Revenue Department, Motor Vehicle Division*, a Spanish-speaking man living in New Mexico lost his driving privileges because he failed to respond timely to a written notice that was in English.<sup>14</sup> He appealed, arguing that the English-only notice violated his due process rights under the New Mexico Constitution.<sup>15</sup> The New Mexico Supreme Court held that an English-only notification satisfied the federal Constitution.<sup>16</sup> The Court noted, however, that New Mexico’s due process clause can provide broader protections if the party claiming those protections can “provide reasons for interpreting the state provision differently from the federal provision.”<sup>17</sup> As it turns out, New Mexico’s amendment rules are unique in that they require all proposed constitutional amendments to be published in both Spanish and English.<sup>18</sup> They also establish more difficult amendment procedures for any proposed amendments affecting other protections for Spanish-speaking residents.<sup>19</sup> In *Maso*, these provisions clearly

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11. 389 U.S. 54, 55–57 (1967) (emphasis omitted) (holding that the complex statutory scheme underlying the oath must be evaluated as a whole); see also *Whitehill v. Elkins*, 258 F. Supp. 589, 592 (D. Md. 1966) (clearly stating the constitutional challenges raised by the plaintiff), *rev’d*, 389 U.S. 54 (1967).

12. *Whitehill*, 389 U.S. at 57.

13. See *id.* (“For the Constitution prescribes the method of ‘alteration’ by the amending process in Article V; and while the *procedure* for amending it is restricted, there is no restraint on the kind of amendment that may be offered.” (emphasis added)).

14. 96 P.3d 286, 287–88 (N.M. 2004).

15. *Maso*, 96 P.3d at 288.

16. *Id.* at 289–90.

17. *Id.* at 288 (quoting *State v. Gomez*, 932 P.2d 1, ¶ 23 (N.M. 1997)).

18. N.M. CONST. art. XIX, § 1 (stating that the secretary of state “shall . . . provide notice of the content and purpose of legislatively approved constitutional amendments in both English and Spanish to inform electors about the amendments in the time and manner provided by law”).

19. *Id.* (establishing higher thresholds for amendments that would affect the rights of Spanish-speaking residents to serve on juries and the constitutional requirement that public school teachers learn Spanish). The New Mexico Constitution is the only state constitution that explicitly insulates Spanish-language provisions from ordinary amendment procedures. See *infra* note 278 (listing all subject-matter restrictions on formal amendment in current state constitutions). Eight state constitutions, however, place subject-matter restrictions or limitations on formal amendment regarding a variety of issues, such as freedom of religion (e.g., Massachusetts) and any changes to the state bill of rights (e.g., Mississippi). See *infra* text accompanying notes 275–276.

supported an argument that New Mexico has a unique constitutional commitment to protecting its Spanish-speaking residents.<sup>20</sup>

*Whitehill* and *Maso* illustrate how amendment rules can shed light on constitutional meaning. But they are just the tip of the amendment-creep iceberg. Indeed, amendment rules can assist judges in resolving many other constitutional disputes. Because amendment rules express how a nation or state aspires to modify and maintain its fundamental law, they can provide a window into the “broad norms and basic commitments” underlying the constitutional text.<sup>21</sup> As such, they are a particularly valuable source of constitutional meaning on a variety of constitutional issues.<sup>22</sup> It is not surprising, therefore, that judges have looked to amendment rules to clarify ambiguous constitutional provisions or answer questions that the text does not explicitly address.

In this Article, I argue that using amendment rules to interpret other constitutional provisions is consistent with a familiar form of constitutional argumentation known as structuralism. Pursuant to the structural method, judges ascertain constitutional meaning by drawing inferences from a constitution’s overall structure and the relationships between institutions created by the constitution.<sup>23</sup> The structural method plays a significant role in

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20. The New Mexico Supreme Court held that Mr. Maso was procedurally barred from arguing that the New Mexico Constitution should be interpreted differently than the federal Constitution because he did not raise that issue below and because the only support he offered was disputed demographic data. *Maso*, 96 P.3d at 288–89. However, in a later case, the New Mexico Supreme Court acknowledged that New Mexico’s amendment rules evince New Mexico’s unique commitment to equality for Spanish-speaking residents. See *State v. Samora*, 307 P.3d 328, 331 (N.M. 2013) (noting that the right of Spanish-speaking residents to serve on juries is unique and “enshrined in our state Constitution as one of the few provisions that can be amended only by a supermajority of both legislators and voters”). Based on the ruling in *Samora*, it seems quite likely that the New Mexico Supreme Court would have entertained the argument that New Mexico’s amendment rules demonstrate a unique state commitment to Spanish-speaking residents that is not paralleled in the federal Constitution. *Maso* illustrates just how important it can be for lawyers and judges to consult amendment rules when involved in constitutional adjudication.

21. See Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in *RESPONDING TO IMPERFECTION*, *supra* note 9, at 275, 276–80 (explaining that, because amendment rules frame the power to change fundamental law, they “can help us answer some old and fundamental questions”).

22. See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *COLUM. L. REV.* 457, 461 (1994) (describing amendment rules as having “unsurpassed importance” because they “define the conditions under which all other constitutional norms may be legally displaced”); Holmes & Sunstein, *supra* note 21, at 276–78 (noting that amendment rules can reveal information about how society resolves fundamental issues, such as the proper balance between majoritarian preferences and minority protections and overall constitutional legitimacy).

23. The structural method was most famously described by Charles L. Black, Jr., in his book *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). See Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 *GEO. L.J.* 833, 834–35 (2004) (describing the structural method).

many constitutional cases.<sup>24</sup> It was the cornerstone of Chief Justice Marshall's argument in *McCulloch v. Maryland* for why Maryland could not tax the federal Bank of the United States.<sup>25</sup> It was also crucial to Chief Justice Roberts's recent opinion holding that the Affordable Care Act's individual mandate exceeded Congress's authority under the Necessary and Proper Clause.<sup>26</sup> In each instance, the Court drew on familiar (but broad) structural concepts, such as federalism, democracy, and the separation of powers, to resolve disputes regarding constitutional meaning.<sup>27</sup>

Amendment creep follows in this same tradition of structural interpretation. When examined through the lens of structural argument, amendment rules often support compelling institutional and substantive inferences. For example, amendment rules that single out certain subjects for more arduous amendment procedures might indicate a "hierarchy" of constitutional values, which can help judges resolve conflicts between competing constitutional norms.<sup>28</sup> Article V, for instance, makes equal suffrage in the Senate effectively impossible to change through formal amendment.<sup>29</sup>

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24. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 74–92 (1982) (describing structuralism and providing a summary of various important Supreme Court opinions that have used structural analysis).

25. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428–29 (1819) (making the famous structural argument that the power to tax must be coextensive with representation, which therefore prohibits state taxation on federal agencies); see also SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* 121–23 (2007) (describing the structural arguments in *McCulloch*).

26. See *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2586–89 (2012) (opinion of Roberts, C.J.) (using a structural argument to decide the application of the necessary and proper clause); see also John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 39–42 (2014) (describing the structural argument in *NFIB*).

27. See Manning, *supra* note 26, at 42 (describing the structural arguments in both *McCulloch* and *NFIB*).

28. See Albert, *supra* note 10, at 244–47 (discussing how formal amendment rules can suggest a hierarchy of constitutional values). Amendment rules in national constitutions around the world are often structured around subject-matter triggers (or restrictions) that can suggest a very clear hierarchy of constitutional values. See *id.* at 247–48 (discussing subject-matter triggers and restrictions in the constitutions of Canada, South Africa, Ghana, Nigeria, India, Cuba, Afghanistan, Brazil, Ukraine, Cameroon, and Portugal). Obviously, subject-specific amendment rules do not always indicate a hierarchy of constitutional values. See Richard Albert, *The Unamendable Core of the United States Constitution*, in *COMPARATIVE PERSPECTIVES ON THE FUNDAMENTAL FREEDOM OF EXPRESSION* 13, 25–27 (Andras Koltay ed., 2015). They can, for example, reflect bargain formation. *Id.* at 15–16; see *infra* Section II.A (discussing these issues further). Nevertheless, amendment creep appears to be an international phenomenon. See Albert, *supra* note 10, at 269–80 (describing the German Constitutional Court's use of amendment rules in resolving various constitutional cases unrelated to amendment procedure).

29. See U.S. CONST. art. V (allowing amendments, "[p]rovided that . . . no State, without its Consent, shall be deprived of its equal Suffrage in the Senate"); see also Lynn A. Baker, *Federalism: The Argument from Article V*, 13 GA. ST. U. L. REV. 923, 947–49 (1996) (demonstrating empirically that smaller states benefit from equal representation in the Senate and are therefore unlikely to ever approve amendments depriving them of that benefit).



This deep entrenchment of equal state representation suggests that the Constitution's core includes strong federalism principles that cannot be completely displaced by a national popular movement.<sup>30</sup>

State constitutions are far more colorful than the federal Constitution in this regard. Several state constitutions identify certain subjects that are either unamendable or subject to more arduous or deliberative amendment processes.<sup>31</sup> Massachusetts, for example, prohibits any amendment by initiative "that relates to religion, religious practices or religious institutions."<sup>32</sup> Although overlooked by many lawyers and judges, these state-specific amendment rules can provide a particularly valuable window into a state's constitutional priorities and the raw material for compelling structural arguments regarding constitutional meaning.

In addition to suggesting particular constitutional priorities, amendment rules can also help resolve institutional disputes between different levels and branches of government.<sup>33</sup> For example, several Supreme Court justices have used Article V to construct institutional arguments in favor of judicial restraint.<sup>34</sup> The basic logic of the argument is that the Constitution identifies Article V as the preferred process for constitutional change, and

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30. See Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 146 (1996) (explaining that this understanding of Article V is historically accurate, because Article V's design was part of a plan to build the equality of states "into the foundations of the system" and ensure that it could not be bypassed by amendment (quoting THORNTON ANDERSON, *CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS* 160 (1993))). *Contra* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044 (1988) (arguing that a popular majority can amend the Constitution outside of Article V's procedures).

31. As explained in more detail below, at least twenty-five states include subject-matter triggers or limitations that determine the appropriate process for certain proposed amendments. See G. Alan Tarr & Robert F. Williams, *Foreword: Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1119–20 (2005) (describing subject-matter triggers and limitations in state constitutional amendment rules); *infra* Section IV.A (describing state amendment rules).

32. MASS. CONST. amend art. XLVIII, pt. II, § 2; see also Dina E. Conlin, Note, *The Ballot Initiative in Massachusetts: The Fallacy of Direct Democracy*, 37 SUFFOLK U. L. REV. 1087, 1091–92 (2004) (discussing Massachusetts's amendment rules).

33. By "institutional dispute," I simply mean a dispute regarding the scope of authority of any branch, official, or level of government. See generally BARBER & FLEMING, *supra* note 25, at 120 (describing "constitutional structures" in this way).

34. See, e.g., *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1961 (2015) (Thomas, J., dissenting) (arguing that "the Federal Government[']s . . . authority is carefully defined by the Constitution, and, except through Article V's amendment process, that document does not permit individuals to bestow additional power upon the Government"); *McDonald v. City of Chicago*, 561 U.S. 742, 793–94 (2010) (Scalia, J., concurring) (arguing that Article V gives the task of "deciding . . . new rights" to "the people" and not courts (emphasis omitted)); *Ullmann v. United States*, 350 U.S. 422, 427–28 (1956) (arguing that, if the Fifth Amendment privilege against self-incrimination has become "outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion" (quoting *Maffie v. United States*, 209 F.2d 225, 227 (1st Cir. 1954))).

the Court should therefore reject constitutional rulings that bypass Article V and effectively change the Constitution from the bench.<sup>35</sup> In other words, justices use Article V to suggest an implicit limitation on judicial review.<sup>36</sup> Although this argument has been largely unsuccessful in carrying a majority on the Supreme Court—probably because formal amendment is very difficult under Article V<sup>37</sup>—it has been successful at the state level.<sup>38</sup> In fact, state judges often seem receptive to the idea that their authority to effectuate constitutional change is restricted by the existence of flexible amendment rules in state constitutions.<sup>39</sup>

Obviously, structural argument of any kind can be misused, and the structural method has inherent limitations.<sup>40</sup> Making arguments from context and drawing inferences from vague structural relationships can be a dubious exercise.<sup>41</sup> When untethered to other forms of constitutional argument like arguments from text, history, and doctrine, structuralism can quickly become indeterminate and capable of manipulation.<sup>42</sup> Amendment-based structural reasoning is certainly not a panacea for all the practical and theoretical problems that plague the quest for constitutional meaning. To the extent judges and lawyers engage in structural argument, however, they should pay close attention to amendment rules as an especially valuable and

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35. Justice Harlan articulated the most sophisticated version of this argument. See *Oregon v. Mitchell*, 400 U.S. 112, 202–03 (1970) (Harlan, J., concurring in part and dissenting in part), *superseded by constitutional amendment*, U.S. CONST. amend. XXVI; see also *infra* Section III.B.1 (discussing Justice Harlan’s opinion in detail).

36. See *McDonald*, 561 U.S. at 793–94 (Scalia, J., concurring) (arguing that judicial review does not authorize courts to “decid[e] what new rights to protect” because Article V gives that power to the people). For scholarly discussion and support for this argument, see MCGINNIS & RAPPAPORT, *supra* note 8, at 81–90.

37. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–10 (1932) (Brandeis, J., dissenting) (stating that constitutional interpretations are “practically impossible” to change through Article V amendments), *overruled in part by Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938).

38. See, e.g., *State ex rel. Apt v. Mitchell*, 399 P.2d 556, 559 (Kan. 1965) (reflecting that a majority of the court rejected the proposed change in constitutional doctrine because “[t]his court has no power to engraft amendments to our state constitution”).

39. See, e.g., *Ex parte Melof*, 735 So. 2d 1172, 1188–89 (Ala. 1999) (Houston, J., concurring specially) (arguing that the judiciary did not have the power to infer equal protection guarantees from a state constitution that did not contain an explicit equal protection provision because “recognition of the exclusive right of the people to change their own constitution is inherent in the amendment procedure”); *Hill v. State*, 659 So. 2d 547, 554 (Miss. 1995) (Lee, P.J., dissenting) (“If the people of Mississippi wish to provide convicted capital murderers with such a constitutional right, then the citizens of this State, and not this Court, should amend our constitution through the democratic process *as has been done on many occasions.*” (emphasis added)); *McFarland v. Barron*, 164 N.W.2d 607, 615 (S.D. 1969) (Biegelmeier, P.J., dissenting) (arguing that the court should reject the proposed interpretation of the state constitution because the constitution could easily be amended to make the requested change).

40. See *Dorf*, *supra* note 23, at 838–44 (discussing limitations of the structural method).

41. See *id.* (describing the “open-endedness” of the structural method).

42. See *id.* at 841 (explaining that even Charles Black believed that “decisions reached via the structural method should be examined for consistency with text, doctrine, and so forth”).

rich source of information. Indeed, amendment rules are unique in the constitutional structure because they establish an ordered process for the people to exercise their sovereign right to change the government.<sup>43</sup> As such, they express fundamental substantive and institutional preferences for how a society wishes to manage constitutional change.<sup>44</sup>

This Article has five parts: Part I provides a brief background on the structural method of constitutional argument. Part II argues that, when viewed through the lens of structural argument, amendment rules are an especially valuable source of constitutional information. In Parts III and IV, the Article systematizes the phenomenon of “amendment creep” within the United States by constructing a typology of judicial arguments from Article V’s amendment rules and amendment rules in state constitutions. The Article concludes in Part V by suggesting that amendment-based structural arguments are normatively valuable for a number of reasons.

### I. STRUCTURALISM AND CONSTITUTIONAL MEANING

Judges and lawyers ascertain constitutional meaning using various forms of constitutional argument, such as text, history, and doctrine.<sup>45</sup> One widely recognized source of constitutional meaning is reasoning from the overall structure of a constitution and its institutions.<sup>46</sup> This modality of constitutional interpretation, known as “structuralism,” is particularly relevant to how amendment rules might contribute to constitutional meaning. In this Part, I describe two strands of structuralism: institutional structuralism and interpretative holism.<sup>47</sup> It is not my purpose here to enter into the tired normative debate regarding the best method of constitutional interpretation.<sup>48</sup> I take as my starting point that structuralism is a recognized form of constitutional construction used by lawyers and judges.<sup>49</sup> In the Parts that

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43. See Holmes & Sunstein, *supra* note 21, at 276 (observing that “the amending power trenches upon core issues of democracy and sovereignty”).

44. See *id.* at 277 (“A theory of the amending power must probe the difficult relationship between constitutional limits on power and the limbo-inhabiting power to revise these limits.”).

45. See generally PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 11–22 (1991) (explaining that judges and lawyers use at least six “modalities” of constitutional argument to prove that a constitutional proposition is true: historical, textual, structural, doctrinal, ethical, and prudential).

46. See *id.* at 14–16 (describing structuralism); see also BOBBITT, *supra* note 24, at 74 (“Structural arguments are inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures.”).

47. See Dorf, *supra* note 23, at 834–38 (making this distinction).

48. Cf. BOBBITT, *supra* note 24, at 3 (describing the utility of various methods of interpretation in the judicial review debate as consuming “more discussion and more analysis than any other issue in constitutional law”). In this Part, I describe the core features of a structural approach to constitutional meaning. It is not my purpose to argue that structuralism is the best approach to constitutional interpretation, or even that it is relevant for all constitutional disputes.

49. Structuralism is only one of several “modalities” of constitutional argument that judges and lawyers recognize as legitimate. See *id.* at 7 (describing the structural argument as

follow, I argue that the nature of structural argumentation invites consideration of formal amendment rules as a particularly important, but often overlooked, source of constitutional meaning.

#### A. *Institutional Relationships and Constitutional Meaning*

“Institutional” structuralism maintains that one legitimate technique for ascertaining constitutional meaning is examining the overall institutional structure created by a constitution.<sup>50</sup> Specifically, structuralism holds that judges can resolve disputes regarding constitutional meaning by drawing inferences from the relationships between the institutions created by the relevant constitution—such as the legislature, the presidency, federalism, democracy, and citizenship.<sup>51</sup> Typically, this is done by testing a proposed constitutional rule to see whether it conflicts or complies with an uncontroversial structural principle.<sup>52</sup> This version of structuralism applies most directly to disputes regarding the authority of government institutions, but it can also be relevant to disputes regarding individual rights.<sup>53</sup> A few examples are helpful to understand this approach to constitutional meaning.

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“an archetype” of constitutional reasoning); *id.* at 3–8 (describing six modalities of constitutional argument that make up “a legal grammar that we all share”).

50. See BOBBITT, *supra* note 45, at 12 (defining structural constitutional analysis as “inferring rules from the relationships that the Constitution mandates among the structures it sets up”); see also Dorf, *supra* note 23, at 834–38 (distinguishing institutional structuralism from interpretive holism). Charles L. Black, Jr. was the most notable proponent of an institutional approach to constitutional adjudication. See *id.* at 833.

51. See BLACK, *supra* note 23, at 7 (describing structuralism as a “method of inference from the structures and relationships created by the constitution in all its parts or in some principal part”); Dorf, *supra* note 23, at 833 (describing Black’s structuralism as “a method of constitutional interpretation in which the reader draws inferences from the relationship among the structures of government—such as Congress, the Presidency, and the states”); see also BARBER & FLEMING, *supra* note 25, at 117 (“[T]he structuralist looks to the overall constitutional arrangement of offices, powers, and relationships . . . includ[ing] federalism, separation of powers, and democracy.” (emphases omitted)).

52. As Phillip Bobbitt has noted, structural arguments often follow a straightforward logic:

[F]irst, an uncontroversial statement about a constitutional structure is introduced [for example, . . . the right to vote for a member of Congress is provided for in the Constitution]; second, a relationship is inferred from this structure [that this right, for example, gives rise to the federal power to protect it and is not dependent on state protection]; third, a factual assertion about the world is made [that, if unprotected, the structure of federal representation would be at the mercy of local violence]. Finally, a conclusion is drawn that provides the rule . . .

BOBBITT, *supra* note 45, at 16 (alteration in original).

53. BARBER & FLEMING, *supra* note 25, at 117–18 (describing structuralism in institutional and rights disputes); Casey L. Westover, *Structural Interpretation and The New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy*, 88 MARQ. L. REV. 693, 700–04, 707–15 (2005) (discussing structural arguments in institutional cases, such as *Marbury v. Madison* and *McCulloch v. Maryland*, and rights cases, such as *Griswold v. Connecticut*).

The classic example of structural constitutional interpretation is Chief Justice Marshall's opinion in *McCulloch v. Maryland*.<sup>54</sup> *McCulloch* involved two issues: first, whether Congress had the power to create a federal bank, and, second, whether Maryland could tax that federal bank.<sup>55</sup> After concluding that Congress could create a federal bank,<sup>56</sup> Chief Justice Marshall relied heavily on a structural argument to support his conclusion that the Constitution prohibited Maryland from taxing the bank.<sup>57</sup> According to Chief Justice Marshall, the Constitution did not permit Maryland to tax federal agencies because such a power would conflict with the constitutional relationships between citizens, the states, and the federal government.<sup>58</sup> Specifically, Chief Justice Marshall argued that the Constitution permitted Maryland to tax its own citizens only because Maryland citizens were represented in their state legislature.<sup>59</sup> The United States government, however, represented all Americans, most of whom were not represented in the Maryland legislature.<sup>60</sup> Thus, Chief Justice Marshall inferred from the Constitution's institutional arrangements that Maryland could not tax the federal government because such a tax would indirectly burden unrepresented Americans in other states.<sup>61</sup>

The Supreme Court's recent decision in *National Federation of Independent Business v. Sebelius* (*NFIB*) provides a contemporary example of structural constitutional interpretation.<sup>62</sup> *NFIB* involved a challenge to the "individual mandate" portion of the Affordable Care Act.<sup>63</sup> The mandate requires all individuals in the United States to have "minimum essential" health insurance.<sup>64</sup> A majority of the Court held that the mandate exceeded

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54. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428–29 (1819); see also BLACK, *supra* note 23, at 13–15 (providing the most famous exposition of the structural arguments in *McCulloch*); BOBBITT, *supra* note 24, at 78–79 (noting that Chief Justice Marshall's arguments in *McCulloch* were primarily structural).

55. See *McCulloch*, 17 U.S. (4 Wheat.) at 322, 326.

56. See *id.* at 405–25 (resolving the first issue mostly by reference to the "prudential" form of argumentation).

57. See *id.* at 425–37 (resolving the second issue through structural argumentation).

58. See *id.* at 428.

59. *Id.*

60. See *id.*

61. See *id.* at 428–29; see also BOBBITT, *supra* note 45, at 15 (describing Chief Justice Marshall's argument). See BARBER & FLEMING, *supra* note 25, at 122–23, for criticism of Chief Justice Marshall's structural argument, noting that Chief Justice Marshall's argument is not the only way to resolve the case using structural argument, and, in fact, Chief Justice Marshall's argument is dependent on moral belief in John Locke's political theory.

62. *Nat'l Fed'n of Indep. Bus. v. Sebelius* (*NFIB*), 132 S. Ct. 2566, 2585–89 (2012) (opinion of Roberts, C.J.) (using a structural argument to decide an application of the necessary and proper clause); see also Manning, *supra* note 26, at 39–42 (describing the structural argument in *NFIB*); *id.* at 34–39 (describing another contemporary example of structural argument in *Printz v. United States*, 521 U.S. 898 (1977)).

63. *NFIB*, 132 S. Ct. at 2580–81.

64. *Id.* at 2644 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (quoting 26 U.S.C. § 5000A(a) (2012)).

Congress's powers under the Commerce Clause and Necessary and Proper Clause,<sup>65</sup> but a different majority held that the mandate was nevertheless constitutional as a federal tax.<sup>66</sup> In concluding that the mandate exceeded the Necessary and Proper clause, Chief Justice Roberts relied primarily on a structural argument regarding the proper distribution of power between Congress and the states.<sup>67</sup> He interpreted the Necessary and Proper clause by drawing inferences from the relationship between the federal government and the states.<sup>68</sup> He reasoned that allowing Congress to regulate inaction by citizens would expand the scope of federal authority too far and unconstitutionally encroach on state authority.<sup>69</sup> Chief Justice Roberts therefore rejected the government's interpretation and concluded that the mandate exceeded Congress's authority under the Necessary and Proper Clause.<sup>70</sup>

Structural arguments can also inform decisions affecting individual rights, especially rights related to free and equal political participation.<sup>71</sup> For example, Charles Black famously argued that the Constitution likely forbids states from restricting certain forms of citizen speech, even without reference to the First Amendment.<sup>72</sup> Black argued that implicit in the Constitution's system of democratically elected congressional representatives is the right of citizens to communicate with their federal representatives and fellow citizens regarding federal politics.<sup>73</sup> Based on this institutional inference,

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65. *Id.* at 2585–93 (opinion of Roberts, C.J.); *id.* at 2644–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (holding that the mandate exceeded Congress's power under the Necessary and Proper Clause).

66. *Id.* at 2594–2600 (opinion of Roberts, C.J.) (finding the mandate constitutional as a tax); *see also* Manning, *supra* note 26, at 39–42 (describing different majority opinions).

67. *See NFIB*, 132 S. Ct. at 2585–93 (opinion of Roberts, C.J.).

68. *See id.* (opinion of Roberts, C.J.); *see also* Manning, *supra* note 26, at 41 (describing the structural argument).

69. *NFIB*, 132 S. Ct. at 2585–93 (opinion of Roberts, C.J.). The logic of the Court's argument can be summarized as follows: (1) the Constitution clearly envisions a federal structure where there are some limits on Congress's regulatory power; (2) holding that it is "proper" for Congress to regulate inaction by citizens would expand Congress's authority to such an extent that state authority would be effectively lost; and (3) therefore, Congress may not regulate citizen inaction. *Id.*

70. *Id.* at 2592–93.

71. The most famous structural argument related to democratic rights was developed by John Hart Ely in *DEMOCRACY AND DISTRUST* 73–101 (1980). *See BARBER & FLEMING, supra* note 25, at 129–32 (describing Ely's argument). Ely argues that, because the Constitution is structured around a representative democracy, its design implies certain basic individual rights to participate fairly in the democratic process. *See ELY, supra*, at 73–80. Although Ely used structural reasoning, he also made a more substantive claim regarding the scope of legitimate protections flowing from the Constitution. *See BARBER & FLEMING, supra* note 25, at 129–32 (describing Ely's argument). According to Ely, the Constitution is intended to protect only those rights necessary to ensure the proper functioning of representative democracy. *Id.*

72. BLACK, *supra* note 23, at 33–51; *see also* Dorf, *supra* note 23, at 837–38 (explaining Black's argument).

73. *See id.* at 838.

Black concluded that the Constitution implicitly prohibits states from restricting political speech, even without the addition of the First Amendment's more explicit protection of speech.<sup>74</sup>

The Supreme Court similarly relied on structuralism to define the scope of federal power in the early case of *Ex parte Yarbrough*.<sup>75</sup> The case involved an appeal by several criminal defendants who were convicted in federal court for intimidating an African American man from voting in a Congressional election.<sup>76</sup> The defendants argued that the federal statute under which they were convicted was unconstitutional because the Constitution did not explicitly authorize Congress to enact such a law.<sup>77</sup> In rejecting this argument, the Court reasoned that because the federal government was a republic comprised of elected representatives, "it must have the power to protect the elections on which its existence depends from violence and corruption."<sup>78</sup> Thus, the Court concluded that the federal statute was constitutional, even without any explicit authorization, because Congress's authority was implicit in the constitutional structure.<sup>79</sup>

Structuralism is not without flaws and limitations. It is often criticized for being too indeterminate and untethered to constitutional text, doctrine, or history.<sup>80</sup> Professor Laurence Tribe, for example, has argued that structuralism can result in "free-form" argumentation that shifts constitutional

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74. *See id.*

75. *See* BOBBITT, *supra* note 45, at 15–16.

76. *Ex parte Yarbrough*, 110 U.S. 651, 657 (1884); *cf.* BOBBITT, *supra* note 45, at 15–16 (discussing the structural argument in *Yarbrough*).

77. *Yarbrough*, 110 U.S. at 658.

78. *Id.*

79. Further examples of the Court's use of the structural method abound. *See* BOBBITT, *supra* note 45, at 16 n.14 (providing an additional example of the structural method using *National League of Cities v. Usery*, 426 U.S. 833 (1976)); Westover, *supra* note 53, at 699–715 (describing various Supreme Court examples). Moreover, structural reasoning is not limited to federal constitutional interpretation. State courts have a rich history of using structural arguments when interpreting state constitutions. *See* ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* 878–84 (5th ed. 2015). The most obvious examples come from state court opinions addressing the authority of municipalities. *See id.* These cases require courts to determine the proper role of local government relative to state government, which invariably prompts invocations of structural arguments regarding the proper distribution of power between state and local government. For example, in *Adler v. Deegan*, 167 N.E. 705, 713 (N.Y. 1929) (Cardozo, J., concurring), the New York Court of Appeals considered whether the New York Constitution (which prohibited the state legislature from passing laws related to the "property, affairs or government of cities") prevented the legislature from enacting legislation that regulated the design and construction of housing within New York City. In concluding that the statute was constitutional, Judge Cardozo reasoned that, although some issues were "city affairs only" (such as "the laying out of parks, the building of recreation piers, the institution of public concerts"), the state legislature retained plenary legislative authority, while local governments could legislate only in areas of local concern. *Id.* Thus, because the construction and design of housing in New York City implicated both state and local concerns, the state legislature had authority to regulate the issue, even though it also touched on issues of local concern. *Id.*

80. *See, e.g.*, BARBER & FLEMING, *supra* note 25, at 129–32 (criticizing the structural method as indeterminate and dependent on moral or philosophical judgment); Dorf, *supra*

disputes to a degree of generality where any result is justifiable.<sup>81</sup> Indeed, structuralism often cuts both ways in a constitutional dispute. In *McCulloch*, for example, Maryland advanced its own structural argument regarding Congress's authority to create a national bank.<sup>82</sup> According to Maryland, the Constitution's federal structure implied that Congress could regulate "only when absolutely necessary" to advance limited "national objectives."<sup>83</sup> And, according to Maryland, a bank was not necessary to achieve any legitimate national objectives.<sup>84</sup>

The primary response to criticisms that the structural method is indeterminate is to emphasize that structuralism operates alongside other forms of constitutional argumentation. Charles Black, for example, emphasized that structuralism does not "supplant" other methods of constitutional interpretation.<sup>85</sup> Rather, "decisions reached via the structural method should be examined for consistency with text, doctrine, and so forth."<sup>86</sup> When integrated with other forms of constitutional interpretation, structuralism presumably becomes less open-ended and more useful for identifying constitutional meaning.<sup>87</sup>

The literature illustrating and debating structuralism's limitations is vast. It is not necessary to rehash it here. My purpose is only to note that, subject to these limitations, one legitimate form of constitutional argumentation is to draw inferences from constitutional institutions. This general point is important because, as I explain below, a constitution's amendment rules can give rise to important institutional inferences relevant to myriad constitutional issues.

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note 23, at 838–44 (discussing limitations of the structural method); Manning, *supra* note 26, at 31–32 (discussing specific problems with trends in structural reasoning).

81. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1227 (1995). For further discussion of the indeterminacy objection, see BOBBITT, *supra* note 24, at 84–85 ("Structural arguments are sometimes accused of being indeterminate because while we can all agree on the presence of the various structures, we fall to bickering when called upon to decide whether a particular result is necessarily inferred from their relationships.")

82. BARBER & FLEMING, *supra* note 25, at 123.

83. *Id.*

84. See *id.* at 121–23. The "open-endedness" of the structural method is also illustrated by the Supreme Court's rulings during the *Lochner* era. See Dorf, *supra* note 23, at 838.

85. Dorf, *supra* note 23, at 841 (describing Black's position on this issue); see also BLACK, *supra* note 23, at 31 ("There is . . . a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text.")

86. Dorf, *supra* note 23, at 841 (summarizing Black's view). Black also noted, however, that structuralism is often no less open-ended than other forms of constitutional argumentation. See *id.* at 840–41.

87. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (arguing that all modalities of constitutional argument should be integrated).



## B. “Interpretative Holism”

“Structuralism” is also used to describe a form of constitutional interpretation where judges ascertain constitutional meaning by looking to the overall structure of the constitution itself.<sup>88</sup> This approach is not necessarily concerned with the relative arrangement of government institutions, but rather the context of a particular provision within the constitutional document as a whole.<sup>89</sup> This strand of structuralism (often called “interpretative holism”) is grounded in the common sense maxim that “words are to be interpreted in accordance with their context.”<sup>90</sup> This approach to constitutional meaning can incorporate basic canons of construction, but it is broader than these textualist rules.

By emphasizing constitutional context in the interpretive process, interpretive holism encourages judges to find evidence of constitutional meaning by examining a constitution’s “patterns and premises, layout and logic, assumptions and animating principles.”<sup>91</sup> By looking at “the document holistically,” judges may be able to identify “overarching” substantive “themes” that can shed light on issues that the text does not explicitly address and help to resolve textual ambiguities.<sup>92</sup>

Judges can use interpretive holism in various ways depending on the circumstances and the provision at issue.<sup>93</sup> Sometimes, this method of interpretation involves drawing inferences from the precise location of a provision within a constitution<sup>94</sup> or from the use of major divisions within the document itself.<sup>95</sup> The federal Constitution, for example, does not include a provision explicitly prohibiting one branch of government from exercising the powers of another branch, but the Court has nevertheless inferred a general separation of powers principle based on the document’s division into separate articles for each major branch.<sup>96</sup> Interpretive holism might also

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88. See Jackson, *supra* note 2 (describing a holistic approach to structuralism); see also Dorf, *supra* note 23, at 841 (clearly distinguishing between institutional structuralism and holistic interpretation).

89. See Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 696 (2002) (referring to this as “locational textualism”). See generally Mehrdad Payandeh, *Constitutional Aesthetics: Appending Amendments to the United States Constitution*, 25 B.Y.U. J. PUB. L. 87, 121 (2011) (listing various labels and descriptions of this interpretative approach).

90. See Dorf, *supra* note 23, at 835.

91. Laurence H. Tribe, Comment, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 110 n.3 (1999).

92. Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 30 (2000) (“For example, the phrases ‘separation of powers’ and ‘checks and balances’ appear nowhere in the Constitution, but these organizing concepts are part of the document, read holistically.”).

93. See Jackson, *supra* note 2, at 1281 n.95 (explaining different uses).

94. See Amar, *supra* note 89, at 697–98 (describing this interpretative technique).

95. See Amar, *supra* note 92, at 30.

96. See *id.* (“Each of the three great departments—legislative, executive, judicial—is given its own separate article, introduced by a separate vesting clause. To read these three

involve drawing inferences from the repeated use of the same (or similar) phrases in various places throughout a constitution.<sup>97</sup> In any event, there are various contextual techniques emanating from a holistic methodology that courts utilize and recognize.<sup>98</sup>

Aside from these contextual techniques, the most powerful (and controversial) aspect of holistic interpretation might be the ability to identify substantive values beneath a constitution's text.<sup>99</sup> In *Printz v. United States*, for example, the Court considered whether Congress could require local officials to execute federal law.<sup>100</sup> Following a lengthy historical discussion, the majority opinion used structural analysis to answer that question.<sup>101</sup> The Court argued that “[i]t is incontestible that the Constitution established a system of ‘dual sovereignty’” because there are allusions to state sovereignty throughout the “Constitution’s text.”<sup>102</sup> Specifically, the Court identified the following:

[T]he prohibition on any involuntary reduction or combination of a State’s territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the “Citizens” of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which “presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights.”<sup>103</sup>

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vesting clauses as an ensemble (as their conspicuously parallel language and parallel placement would seem to invite) is to see a plain statement of separated powers.”); Westover, *supra* note 53, at 705 (describing the Supreme Court’s analysis in *Bowsher v. Synar*, 478 U.S. 714 (1986), as using holistic interpretation to build the federal doctrine of separation of powers).

97. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (describing and defending this interpretative technique).

98. Vicki Jackson has argued that chronology is also an important contextual factor because later amendments have fundamentally altered the Constitution’s emphasis as a whole. See Jackson, *supra* note 2, at 1261–62 (“I sketch . . . a form of holistic, structural interpretation [that is] attentive to temporal vectors of analysis that help reconcile constitutionalism with democracy—by which I mean looking at older parts of the Constitution through the lens of more recent amendments in understanding what the Constitution as a whole has become.”).

99. See Westover, *supra* note 53, at 707–15 (describing how Justice Douglas’s “penumbra” analysis in *Griswold v. Connecticut*, 381 U.S. 479 (1965), was a form of holistic analysis and surveying the many criticisms of that analysis).

100. 521 U.S. 898 (1997).

101. *Printz*, 521 U.S. at 918 (“We turn next to consideration of the structure of the Constitution, to see if we can discern among its ‘essential postulate[s],’ a principle that controls the present cases.” (alteration in original) (citation omitted) (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1932))).

102. *Id.* at 918–19 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)).

103. *Id.* at 919 (alteration in original) (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 414–15 (1938)).

Reading these provisions as a whole, the Court concluded that the Constitution “contemplates that a State’s government will represent and remain accountable to its own citizens,” and Congress cannot therefore commandeer state officials to do the nation’s work.<sup>104</sup>

*Printz* is just one example of the Court using a holistic reading of the Constitution to identify deeper constitutional values.<sup>105</sup> This interpretive technique is not uncommon, although it can be controversial because of its subtextual nature. My purpose here is not to evaluate holistic interpretation from a normative perspective. My point is only that holistic techniques are a recognized form of constitutional argument, which can involve drawing inferences from the structure, organization, and even chronology of the document as a whole. As explained below, formal amendment rules are a particularly valuable source of constitutional meaning because of their unique function in the constitutional structure.

## II. AMENDMENT RULES AND CONSTITUTIONAL MEANING

Amendment rules have “unsurpassed importance” because they “define the conditions under which all other constitutional norms may be legally displaced.”<sup>106</sup> Thus, as I have argued elsewhere,<sup>107</sup> amendment rules are “at the core of constitutionalism” because they separate constitutional law from ordinary legislation,<sup>108</sup> establish manageable processes for popular involvement in constitutional change,<sup>109</sup> and provide a check on government actors.<sup>110</sup> In this Part, I argue that, when viewed through the lens of structural argument, amendment rules can be a particularly valuable source of constitutional meaning. Specifically, I suggest that amendment rules can inform

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104. *Id.* at 920.

105. There are other examples of structural analysis in rights cases. The most well-known example of this form of constitutional argumentation is Justice Douglas’s opinion in *Griswold v. Connecticut*. See Westover, *supra* note 53, at 707–15. In *Griswold*, Justice Douglas located an individual right to privacy in the Fourteenth Amendment’s Due Process Clause. 381 U.S. 479, 484 (1965). In reaching this conclusion, Justice Douglas reasoned that various provisions within the Constitution—such as the right of association in the First Amendment, the Third Amendment right against quartering soldiers, the Fourth Amendment right against unlawful searches, and the Fifth Amendment right against self-incrimination—“create a zone of privacy.” *Griswold*, 381 U.S. at 484. Justice Douglas then concluded that the zone of privacy emanating from the Constitution prohibited Connecticut from denying a person access to contraception. *Id.*

106. Amar, *supra* note 22, at 461; see Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 913–14 (2014) (discussing the function and importance of amendment rules); Dixon & Holden, *supra* note 7, at 195 (same).

107. Jonathan L. Marshfield, *Decentralizing the Amendment Power*, 19 LEWIS & CLARK L. REV. 963, 968 (2015).

108. *Id.*; see ANDRÁS SAJÓ, *LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM* 39–40 (Cent. European Univ. Press trans., 1999) (explaining the role of amendment rules in ensuring that constitutions operate as higher law).

109. See Dixon & Holden, *supra* note 7, at 195–97.

110. Albert, *supra* note 106, at 913–14.

structural arguments by providing insight into substantive constitutional priorities as well as a constitution's overall institutional design.<sup>111</sup>

#### A. Amendment Rules and Substantive Values

Most scholars recognize that constitutions are animated by “broad norms and basic commitments” that exist underneath the enforceable rules created by a constitution.<sup>112</sup> These sublegal principles are “the foundation of any constitutional regime” because they can provide guidance to political actors when resolving uncertain constitutional issues.<sup>113</sup> Judges, for example, draw on constitutional values when evaluating various suggested interpretations of a constitutional provision.<sup>114</sup>

An important (but often overlooked) function of constitutional amendment rules is their ability to “express” or signal constitutional values.<sup>115</sup> This can happen in at least two ways: First, as Richard Albert has explained, “escalating amendment thresholds” for specific subjects can indicate a “rank-ordering” of constitutional priorities.<sup>116</sup> This conclusion is based on the reasonable assumption that constitutional designers may choose to make more important constitutional values harder to amend (or even declare them to be unamendable).<sup>117</sup> Variation in the difficulty of amendment is used as a signaling device to indicate to political actors which constitutional values should be prioritized.

Sanford Levinson has argued that Article V operates in this way because it “varies the difficulty of the amendment process with the perceived importance of given issues.”<sup>118</sup> Article V's deep entrenchment of equal state representation in the Senate suggests that federalism is an especially important value in the federal constitutional structure because it is subject to more

111. This is not an exhaustive list. Amendment rules can give rise to myriad structural inferences, but these two forms of amendment-based structural reasoning are especially pertinent and illustrative of how amendment rules can inform constitutional meaning.

112. See Holmes & Sunstein, *supra* note 21, at 276–80.

113. Albert, *supra* note 10, at 239.

114. See *id.* (“Constitutional values are the equivalent of a trump card in constitutional adjudication . . .”).

115. *Id.* at 236–37; see also Holmes & Sunstein, *supra* note 21, at 279 (“[The amending power] helps explain how various framers conceived the relationship between procedure and substance, for instance, or the distinction between the core and the periphery of the constitutional order.”).

116. Albert, *supra* note 10, at 245–47.

117. *Id.* at 247. This is only one of many inferences that can be drawn from a hierarchy of entrenchment. *Id.* at 247, 251 (explaining that escalating amendment thresholds do not always indicate a hierarchy of priorities); see also Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 ARK. L. REV. 217, 237 (2016) (explaining that escalating amendment rules and unamendable provisions can be products of bargain formation).

118. Sanford Levinson, *The Political Implications of Amending Clauses*, 13 CONST. COMMENT. 107, 122 (1996) (describing Article V's amendment process).

arduous amendment procedures.<sup>119</sup> From a comparative perspective, there is compelling evidence that escalating amendment thresholds in the Canadian and South African constitutions were intended to establish a clear “hierarchy” of constitutional values.<sup>120</sup>

Of course, there may be other explanations for variation in the difficulty of amendment procedures.<sup>121</sup> Difficulty in the amendment process might reflect political compromise and not constitutional significance.<sup>122</sup> That is, constitutional designers may use escalating amendment procedures to secure a hard-fought political compromise on a destabilizing issue without intending to elevate that issue’s constitutional significance over other, uncontested constitutional priorities.<sup>123</sup> For example, Article V made the importation and census-based taxation clauses of Article I unamendable until 1808.<sup>124</sup> This reflected the hard-fought compromise between slave states and free states regarding federal power over the slave trade.<sup>125</sup> The founders made those clauses temporarily unamendable because each side feared that the other would use the amendment process to undo the compromise, not because the clauses necessarily expressed an elevated constitutional priority.<sup>126</sup>

In any event, escalating amendment rules can sometimes provide insight into a hierarchy of constitutional values. This, of course, can be valuable information for a judge or lawyer engaged in a dispute regarding constitutional meaning.<sup>127</sup> When faced with a choice between two competing claims for constitutional meaning, amendment rules might help a judge assess those claims by favoring the claim that is most consistent with a constitution’s hierarchy of priorities.<sup>128</sup>

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119. See *id.* Article V’s reference to the Importation Clause and census-based taxation clauses also reinforce the idea that federalism was at least a historically important value. See Albert, *supra* note 10, at 228–29.

120. See Albert, *supra* note 10, at 247–51 (discussing constitutional values and escalating entrenchment in the constitutions of Canada, South Africa, Ghana, Nigeria, and India).

121. See Albert, *supra* note 28, at 15 (describing various explanations for variation in amendment procedures and unamendable provisions).

122. See *id.*; see also Albert, *supra* note 117 (manuscript at 14) (on file with Michigan Law Review) (explaining “bargain-formation” as an explanation for unamendable provisions).

123. See Albert, *supra* note 28, at 15.

124. See U.S. CONST. art. 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 . . .”).

125. See RICHARD B. BERNSTEIN WITH JEROME AGEL, *AMENDING AMERICA* 27 (1993) (explaining the history of Article V and its reference to the importation and taxation clauses).

126. See *id.* at 19, 27 (discussing John Rutledge as a Southern spokesperson who advocated for this change to Article V during the Philadelphia Constitutional Convention).

127. See Albert, *supra* note 10, at 239, 269–80 (describing how the German Constitutional Court has used Germany’s formal amendment rules in constitutional adjudication).

128. Of course, amendment rules are only one potential source of evidence regarding a hierarchy of priorities. See *id.* at 240–44 (explaining that constitutional theory, constitutional interpretation, and a constitution’s preamble can all be sources of a constitution’s hierarchy of values). Moreover, I do not mean to oversimplify constitutional adjudication by suggesting

But amendment rules may incorporate constitutional values even without escalating amendment thresholds. The general structure of the amendment process can reveal a great deal about a society's political process priorities.<sup>129</sup> Some amendment procedures, for example, require amendments to be published in several specific languages or require specific groups to ratify amendments or both.<sup>130</sup> These requirements suggest a strong commitment to political inclusion for certain linguistic or minority groups. Other amendment rules are obviously designed to elevate public deliberation over the aggregation of individual preferences because they require proposed amendments to be ratified by successive, separately elected legislatures rather than by a public referendum.<sup>131</sup> And, as noted above, amendment rules that impose no substantive limitations on the amendment process might suggest that a society values freedom of expression regarding even the most revolutionary political ideas.<sup>132</sup> Although these sorts of amendment procedures do not provide a clear "rank-ordering" of constitutional values, they do hint at a society's deep commitments because they express how a society intends to maintain and update its fundamental law.<sup>133</sup>

To be sure, inferring constitutional values from amendment rules can be an uncertain exercise, and not all amendment rules provide meaningful

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that a hierarchy of constitutional priorities derived from amendment rules will make adjudication formulaic, determinate, and unequivocally legitimate. Sound constitutional reasoning implicates myriad concerns besides amendment-based structural reasoning, or structural reasoning of any kind, for that matter. See Jackson, *supra* note 2, at 1287 (arguing that structural arguments must invariably give way "to the primary goal of a constitution, which is to provide a stable framework for a just and workable government").

129. See Holmes & Sunstein, *supra* note 21, at 277–79 ("The form taken by the amending power, in other words, sheds light on the variety of theories underlying different liberal democracies.").

130. See, e.g., N.M. CONST. art. XIX, § 1 ("The secretary of state shall also make reasonable efforts to provide notice of the content and purpose of legislatively approved constitutional amendments in indigenous languages and to minority language groups to inform electors about the amendments."); see also Marshfield, *supra* note 107, at 967 (surveying the world's constitutions for amendment rules that require inclusion of subnational groups in the amendment process and finding that approximately one-third of all national constitutions have amendment rules that include subnational groups in some way).

131. See, e.g., DEL. CONST. art. XVI, § 1; NETH. CONST. ch. 8, arts. 137–38; see also Bjørn Erik Rasch & Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, in DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY 319, 331 (Roger D. Congleton & Birgitta Swedenborg eds., 2006) (discussing the deliberative values inherent in the Netherlands' amendment rules).

132. See *Whitehill v. Elkins*, 389 U.S. 54, 57 (1967) (relying on Article V to interpret the First Amendment as protecting the right to advocate wholesale alteration of the U.S. government); Holmes & Sunstein, *supra* note 21, at 278 ("The amending power, as it exists in some Western liberal-democratic constitutions, implies that the basic framework of political life can be wholly changed, as long as a proper procedural benediction is secured.").

133. See generally Holmes & Sunstein, *supra* note 21, at 277–79 (discussing the connection and tension between constitutional values and amendment procedures).

insight into a society's deep commitments.<sup>134</sup> Moreover, even when amendment rules display clear constitutional values, those values can be hard to define and utilize because they are often stated "at a high level of generality" and without any clear ordering of priority.<sup>135</sup> Nevertheless, many amendment rules include discernable substantive values, which can make them an important source of constitutional meaning for judges and lawyers engaged in structural argument.

### B. *Amendment Rules and Institutional Arrangements*

Aside from signaling substantive constitutional values, amendment rules may also inform judges regarding relationships between constitutional institutions. Amendment rules are unique in the constitutional structure because they establish a democratic process for changing a society's fundamental law.<sup>136</sup> They create an ordered procedure for the people to exercise their sovereign right to change the law that establishes and limits government institutions.<sup>137</sup> As such, they express institutional preferences for how a society wishes to manage constitutional change,<sup>138</sup> as well as how accountable to majorities a constitutional democracy aims to be.<sup>139</sup>

For example, constitutional provisions that are unamendable or very difficult to amend may suggest a preference for informal amendment through judicial interpretation, as opposed to formal amendment through democratic processes.<sup>140</sup> Indeed, the "predictable" consequence of making

134. See Albert, *supra* note 10, at 229 (noting that some amendment rules might not reveal much about a constitution's priorities).

135. See *id.* at 240 (explaining that constitutional values are inherently contestable).

136. See Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, in *RESPONDING TO IMPERFECTION*, *supra* note 9, at 89–90, 111 (arguing that amendment rules are tied to popular sovereignty but cannot limit popular sovereignty).

137. See *id.* at 91 ("The Constitution is supreme law, and the legal rules it establishes for its own amendment are of unsurpassed importance, for these rules define the conditions under which all other constitutional norms may be legally displaced.").

138. See Holmes & Sunstein, *supra* note 21, at 279 ("Every functioning liberal democracy depends on a variety of techniques for introducing flexibility into the constitutional framework. The two usual methods are, first, amendment and, second, judicial interpretation in the light of evolving circumstances and social norms. There are intriguing interaction or mutual compensation effects of constitutional amendment and constitutional interpretation, and these can help us understand better the relationship between the judiciary and the political branches." (footnotes omitted)).

139. See *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1115–16 (5th Cir. 1997) (Garza, J., concurring specially) (explaining that Article V was intended to protect the Constitution from "contemporary, majority viewpoints"); see also Holmes & Sunstein, *supra* note 21, at 277 ("[T]he procedural obstacles to easy constitutional amendment form the core of the counter-majoritarian dilemma.").

140. See MELISSA SCHWARTZBERG, *DEMOCRACY AND LEGAL CHANGE* 184 (2007) (explaining the relationship between amendment difficulty and institutional channeling of constitutional change); see also Holmes & Sunstein, *supra* note 21, at 279–80 (explaining many nuanced, institutional effects that amendment difficulty can have on constitutional regimes); *id.* at 278 ("[A] stringent amending formula . . . might seem to suggest a bias for liberalism against democracy."). Of course, difficulty in the amendment process might simply suggest

provisions difficult to amend is to “grant[ ] the judiciary the power to interpret the meaning”<sup>141</sup> and “legitimate scope of mutability” of those provisions.<sup>142</sup> In other words, the judiciary may infer from rigid amendment procedures that the people intended constitutional changes to occur, at least to some extent, through judicial review rather than democratic processes.<sup>143</sup> As discussed in more detail below, the United States Supreme Court has explicitly adopted a pragmatic version of this reasoning in its *stare decisis* jurisprudence.<sup>144</sup>

On the other hand, amendment rules that establish few barriers to formal amendment may suggest a preference for constitutional change to occur primarily through democratic processes and formal amendment of the constitution’s text.<sup>145</sup> This preference is implicit in the fact that the amendment rules make formal amendment through democratic processes very easy to achieve, and because flexible amendment procedures ensure that government officials remain accountable to popular constitutional preferences.<sup>146</sup> If amendment rules suggest a preference for constitutional change to occur through formal amendment, then judges may be justified in exercising restraint when interpreting easily amended constitutional provisions.<sup>147</sup> There is evidence that the desire for judicial restraint motivated populist reforms

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that the constitution was designed to have few amendments of any kind (formal or informal). See Sanford Levinson, *Introduction: Imperfection and Amendability*, in *RESPONDING TO IMPERFECTION*, *supra* note 9, at 3, 4 (quoting and discussing the 1669 Fundamental Constitutions of Carolina, which declared, “these fundamental constitutions shall be and remain the sacred and unalterable form and rule of government . . . forever”). But this inference seems weak because it ignores the pressures for constitutional rules to change over time. See Marshfield, *supra* note 107, at 972–77 (explaining various reasons that constitutional rules experience pressure to change over time). Indeed, even where constitutional drafters have intended to make constitutional rules static and immune from formal amendment, the result has been judicial “updating” of those rules over time, and not constitutional stagnation, which usually corresponds with constitutional failure. See SCHWARTZBERG, *supra*, at 184 (explaining that attempts to stagnate constitutional rules are effective only at transferring the locus of constitutional change to the judiciary).

141. Albert, *supra* note 10, at 269.

142. See SCHWARTZBERG, *supra* note 140, at 184.

143. See Albert, *supra* note 10, at 270 (explaining that the German Constitutional Court has inferred great authority to interpret and change the meaning of an unamendable provision in the German Constitution); see also Holmes & Sunstein, *supra* note 21, at 279 (explaining that the judiciary can “benefit from a stringent amending procedure,” because it will gain “prestige” by “pos[ing] as the guardian of the ark of the covenant”).

144. See *infra* Section III.B.3 (explaining that the Court has explicitly stated that one reason it will change its own constitutional rulings is because amendment under Article V is “practically impossible”).

145. See Holmes & Sunstein, *supra* note 21, at 278 (“The very existence of an amending formula . . . might suggest a bias for democratic procedure over moral substance.”).

146. See AREND LIJPHART, *PATTERNS OF DEMOCRACY* 218–25 (2d ed. 2012) (exploring the relationship between amendment rigidity and judicial review generally).

147. See G. ALAN TARR, *WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES* 177–78 (2012) (“[I]f a more popular constitutionalism operates . . . , then political energies are more likely to be devoted to the substance of the law.”).



to amendment rules in state constitutions during the Progressive Era.<sup>148</sup> And, as discussed in more detail below, state judges frequently rely on the existence of accessible amendment procedures to support their rejection of transformative constitutional rulings.<sup>149</sup>

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148. Records from various state constitutional conventions demonstrate that delegates sometimes modified state amendment rules to be more flexible specifically to ensure that state judges were not spearheading constitutional change. See JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 37 (2006) (quoting a Progressive Era debate at the Kentucky Constitutional Convention: “Experience teaches that when Constitutions are too difficult to amend, they will be changed in spite of written restrictions” (quoting 2 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE KENTUCKY CONSTITUTIONAL CONVENTION 1659 (1890))); *id.* at 49 (noting that amendment procedures were changed to be easier to amend in part because judges were “creating novel interpretations . . . to overturn popular legislation”); *id.* at 50–51 (“Delegates also expected that the mere presence of a more flexible amendment procedure would influence judicial behavior by permitting well-intentioned judges to play a reduced role in updating constitutional provisions. The idea was that certain judges had taken an active role in constitutional interpretation in part as a consequence of the rigidity of the constitutional amendment process. These judges believed, understandably, that they alone were in a position to perform the necessary updating of constitutional doctrines.”); John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 1025–28 (2007) (noting that courts understood easy amendment to impact their role and that they deferred to amendments and assumed a more restrained role). One Progressive Era scholar has been quoted as saying:

[I]nasmuch as the constitutions of the states are, comparatively speaking, rather easy of amendment, it has frequently happened that subsequent to a decision of a state court that an act of the state legislature is unconstitutional, the state constitution has been so changed as to remove all objections to the passage of the statute from the point of view of the state constitution. The natural result is that the limitations of the state constitutions as interpreted by the state courts are not serious permanent obstacles to social reform, either in the matter of labor legislation, or, indeed, in any other matter in which change is desired.

*Id.* at 1024 (quoting FRANK J. GOODNOW, *SOCIAL REFORMS AND THE CONSTITUTION* 30 (1911)).

149. See *infra* Section IV.B.1 (explaining that state judges commonly cite to ease of amendment as a basis for rejecting transformative constitutional rulings); see also LUTZ, *supra* note 9, at 167–68 (2006) (summarizing amendment procedures from around the world and finding that amendment rigidity generally corresponds with informal amendment by the judiciary). But see Michael Besso, *Constitutional Amendment Procedures and the Informal Political Construction of Constitutions*, 67 J. POL. 69, 75 (2005) (explaining that informal political construction of constitutions takes place in states regardless of the “relative ease of state constitutional amendment”). Amendment rules can also provide insight into other institutional doctrines besides judicial review. Article V, for example, is slightly unusual from a comparative perspective because it does not provide any opportunity for a public referendum regarding amendments. See LUTZ, *supra* note 9, at 167–68; see also Albert, *supra* note 106, at 947–48 (noting that the U.S. Constitution is the only one that “entrenches the exceptional multi-track framework”). Instead, amendments are ratified by a supermajority of state legislatures or state conventions. See U.S. CONST. art. V. This process, which favors smaller states at the expense of democratic values, suggests that federalism is at the Constitution’s core. See Baker, *supra* note 29, at 947–58 (explaining how Article V benefits smaller states). See generally Holmes & Sunstein, *supra* note 21, at 280 (making the connection between amendment rules and institutional relationships by noting that “[s]tringent amending formulas will allow parliaments faced with large social problems to deflect social disapprobation and to escape democratic accountability in difficult times”).

Again, reasoning from amendment rules to general constitutional principles can be dubious and indeterminate when the practice is detached from other interpretive techniques. Amendment-based arguments can often cut both ways.<sup>150</sup> Amendment rules that make a provision very difficult to amend, for example, might signal that those provisions should remain relatively static and unchanged by any institution, including the judiciary. Conversely, amendment rules that make provisions very easy to amend could signal that the judiciary can experiment with progressive constructions, because the people can easily correct any errors through amendment.<sup>151</sup>

However, indeterminacy is inherent to some degree in any form of structural analysis. As Charles Black recognized, structural arguments cannot be deployed in isolation.<sup>152</sup> They must be “examined for consistency with text, doctrine, and so forth.”<sup>153</sup> Amendment-based argument is not a superior or more determinate form of constitutional reasoning that can supplant all other forms of constitutional analysis. It is, however, highly relevant to institutional relationships. Indeed, other than provisions specially addressing judicial authority, amendment rules are among the most relevant provisions for resolving disputes about the appropriate scope of judicial review because they establish and define the only constitutional institution that provides a check on the judiciary—the amendment power. Thus, to the extent constitutional disputes turn on the appropriate scope of judicial review, amendment rules would seem to be a critical source of constitutional meaning.

### III. AMENDMENT CREEP IN FEDERAL CONSTITUTIONAL INTERPRETATION

The prior Parts of this Article have focused on the theoretical possibility of using amendment rules to further structural interpretation. I have argued that amendment rules can, in theory, contain important substantive and institutional information that judges can use—consistent with the structural method—when resolving constitutional disputes unrelated to formal amendment. In this Part, I explore the amendment-based arguments that courts have actually made when interpreting provisions of the federal Constitution. I begin by briefly describing the Article V amendment process. I

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150. See Holmes & Sunstein, *supra* note 21, at 279 (“The free availability of amendment may have a range of diverse effects on the courts.”); see also *Ex parte Lewis*, 219 S.W.3d 335, 374–75 (Tex. Crim. App. 2007) (Cochran, J., concurring) (noting that arguments from ease of amendment can support both judicial restraint and judicial activism).

151. See Holmes & Sunstein, *supra* note 21, at 279 (“If it is easy to amend the Constitution, the stakes of constitutional decision are lowered, [which] . . . may embolden the court.”); see also A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 939 (1976) (“At least one state judge has cited the ease of amending state constitutions as a justification for an activist position.”).

152. See BLACK, *supra* note 23, at 31.

153. Dorf, *supra* note 23, at 841.

then systematize the phenomenon of amendment creep in federal constitutional interpretation by constructing a typology of recognized judicial arguments based on Article V's amendment rules. These arguments can generally be grouped into three categories: First, several justices have relied on Article V to construct institutional arguments regarding the appropriate judicial role in deciding constitutional cases. Second, the Supreme Court has occasionally relied on substantive policies implicit in Article V's amendment procedures as support for their rulings regarding the freedom of association and expression. Finally, the Supreme Court has relied on Article V's deep entrenchment of federalism principles to justify rulings prohibiting federal commandeering of state officials and limiting Congress's implementation authority under the Fourteenth Amendment.

#### A. *The Article V Amendment Process*

Article V provides two basic paths for amendment.<sup>154</sup> First, amendments can be proposed by Congress and then sent to state legislatures (or state conventions) for ratification.<sup>155</sup> Amendments must then be passed by two-thirds of the representatives in both the House and the Senate to be sent to the states, and three-fourths of the states must ratify proposed amendments.<sup>156</sup> The second pathway for amendment is state-originated.<sup>157</sup> Two-

154. Article V provides in its entirety:

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

U.S. CONST. art. V. For a helpful summary of the history behind Article V, see DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995*, at 20–65 (1996), and Monaghan, *supra* note 30, at 126–31 (describing Article V's design and history).

155. U.S. CONST. art. V; *see also* Monaghan, *supra* note 30, at 125–26 (describing Article V's amendment procedures).

156. For a helpful discussion of the procedures for ratification and the Supreme Court's opinions regarding ratification procedures, see JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* 157–73 (1992). Congress may impose reasonable time limitations on ratification, but it does not have to. *See* *Dillon v. Gloss*, 256 U.S. 368 (1921) (holding that Congress has the authority to impose reasonable time limits on ratification). In fact, the Twenty-Seventh Amendment was finally ratified almost 200 years after it was initially proposed. *See* Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 *YALE L.J.* 677, 764–89 (1993) (explaining the ratification of the Twenty-Seventh Amendment).

157. *See* U.S. CONST. art. V (“[O]r, on the Application of the Legislatures of two thirds of the several States . . .”).

thirds of the state legislatures can call a convention for the purpose of proposing amendments, each of which must then be ratified by three-fourths of the states.<sup>158</sup> These processes apply to amendments addressing any subject, with one exception: “[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”<sup>159</sup>

There are two features of Article V that are important for present purposes. First, Article V is very general in its application.<sup>160</sup> Many modern national constitutions contain amendment rules with subject-matter triggers that set out different amendment rules for different subjects, and some even make certain subjects or provisions categorically unamendable.<sup>161</sup> Germany’s Basic Law, for example, famously declares that its human dignity and rights clauses are unamendable.<sup>162</sup> Other amendment rules establish different amendment processes or thresholds for particular subjects.<sup>163</sup> Canada’s amendment rules, for example, include five different amendment tracks based on subject.<sup>164</sup> As noted above, these subject-matter triggers are significant because they may provide insight into a society’s constitutional

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158. *Id.*; see also James Kenneth Rogers, Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL’Y 1005, 1014–15 (2007) (describing the convention process).

159. U.S. CONST. art. V. Article V also contains a clause making certain provisions temporarily unamendable. See Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1040–42 (2014) (explaining the history behind the temporal inability to amend the census-based taxation provision and importation provision). Moreover, from time to time, some have argued that there are implicit substantive limitations on Article V amendments. See VILE, *supra* note 156, at 157–73 (summarizing various arguments by litigants before the Supreme Court and in the academy suggesting limitations on Article V amendments); see also Albert, *supra* note 28, at 14, 24–27 (arguing that free speech rights are implicitly unamendable under Article V).

160. See U.S. CONST. amend. V; cf. Albert, *supra* note 106, at 947–48 (describing the U.S. amendment procedure in a comparative context).

161. See Albert, *supra* note 159, at 1037–38 (placing Article V in a comparative context); Albert, *supra* note 106, at 936–56 (describing amendment procedures in contemporary democracies around the world and identifying various national constitutions that embed subject-matter triggers into their amendment rules).

162. See GRUNDGESETZ [GG] [BASIC LAW], art. 1 § 1, *translation at* [http://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0015](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0015) [<https://perma.cc/A6QU-J6WU>] (“Human dignity shall be inviolable.”); *id.* art. 79 § 3 (making the human dignity provision unamendable); see also Albert, *supra* note 10, at 265–66 (discussing the provision).

163. See Albert, *supra* note 106, at 942–46 (describing the constitutions of India, South Africa, Botswana, Malta, Mauritius, Canada, Chile, Estonia, and Spain as having this structure); *infra* Section IV.A (providing the results from an exhaustive study of subject-matter triggers in state constitutional amendment rules and finding that at least eight states currently have subject-matter triggers of some kind in their amendment rules).

164. See Albert, *supra* note 106, at 944–45 (describing Canada’s amendment procedures); Albert, *supra* note 10, 247–51 (describing constitutional values implicit in Canada’s amendment rules).

values.<sup>165</sup> Article V, in contrast, contains only one narrow subject-matter trigger: equal suffrage in the Senate.<sup>166</sup>

The second relevant feature of Article V is its exacting requirements for amendment.<sup>167</sup> It appears that the drafters of Article V believed that its procedures struck an appropriate balance between constitutional stability and flexibility.<sup>168</sup> Madison famously declared that Article V was “stamped with every mark of propriety” because “[i]t guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.”<sup>169</sup> The debates in Philadelphia also suggest that the drafters intended Article V to provide a more accessible amendment process than existed in the Articles of Confederation, which were universally agreed to be too hard to amend.<sup>170</sup>

Despite the Founders’ intentions, the contemporary reality is that Article V makes amendment of the federal Constitution nearly impossible.<sup>171</sup> Between 1789 and 2004, there have been over 11,000 amendments introduced in Congress, and only thirty-three have been approved by Congress.<sup>172</sup>

165. See *supra* Section II.A; see also Albert, *supra* note 106, at 960–64 (describing how amendment rules can express constitutional values).

166. See U.S. CONST. art. V; Albert, *supra* note 106, at 947–48.

167. See LUTZ, *supra* note 9, at 170 (creating an index of amendment difficulty for the world’s constitutions and finding that the U.S. Constitution is the most difficult to amend); Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1675 (2014) (finding that the U.S. Constitution is one of the least frequently revised in the world).

168. See BERNSTEIN, *supra* note 125, at 14–31 (recounting Article V’s history and noting that it was intended to be more flexible than the Articles of Confederation, but rigid enough to provide stability and constancy).

169. THE FEDERALIST NO. 43, at 284 (James Madison) (Isaac Kramnick ed., 1987).

170. To be sure, some in the Founding Era believed that the Federal Constitution should be more mutable. Thomas Jefferson was the most outspoken proponent of procedures that would make the federal Constitution more responsive to the living generation. See Zachary Elkins et al., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 12–33 (2009) (describing the famous debate between Jefferson and Madison regarding constitutional flexibility); KENNETH P. MILLER, *DIRECT DEMOCRACY AND THE COURTS* 157 (2009) (same). Madison’s vision nevertheless prevailed at the federal level. See BERNSTEIN, *supra* note 125, at 15 (finding that the goal of Article V was to make the Constitution easier to amend than the Articles of Confederation, but hard enough that it could only be used when the polity had reached consensus).

171. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 160 (2006) (stating that Article V “works to make practically impossible needed changes in our polity”); *id.* at 165 (“Article V constitutes an iron cage with regard to changing some of the most important aspects of our political system.”); Albert, *supra* note 159, at 1042 (“Constructive unamendability is [a] . . . unique design feature of Article V.”). This is in part because of the inclusion of so many new states since the founding; an occurrence that the founders may not have fully appreciated. By increasing the overall number of states, the ratification process under Article V has become more difficult. See generally Dixon & Holden, *supra* note 7, at 195–96 (discussing how the size of a decisionmaking body can increase the difficulty of reaching agreement).

172. MILLER, *supra* note 170, at 157; Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691, 692 (1996) (providing data regarding proposed and approved amendments).

Of those thirty-three, only twenty-seven have been ratified by the states.<sup>173</sup> Moreover, amendments are becoming less frequent and less substantively significant over time.<sup>174</sup> Indeed, meaningful formal amendment under Article V is now perceived to be so unlikely that some have concluded that Article V is “irrelevant”<sup>175</sup> and perhaps even “desuetude.”<sup>176</sup> As explained below, courts have reasoned from the difficulty of amendment under Article V when deciding certain constitutional disputes.<sup>177</sup>

### B. *Article V and Institutional Arguments Regarding Judicial Review*

Supreme Court justices have explicitly relied on Article V to build several institutional arguments regarding the appropriate scope of judicial review. This Section catalogues and evaluates the Court’s arguments related to Article V and judicial review in order to begin systematizing the Court’s existing practice of using amendment rules in constitutional interpretation.

#### 1. The Inference of Judicial Restraint

The most common amendment-based argument from Article V in Supreme Court opinions relates to judicial restraint. At various points in time, justices arguing for judicial restraint in constitutional issues have relied on Article V.<sup>178</sup> The core of the argument is that the mere possibility of formal

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173. See Harry L. Witte, *Rights, Revolution, and the Paradox of Constitutionalism: The Processes of Constitutional Change in Pennsylvania*, 3 WIDENER J. PUB. L. 383, 396 (1993). Even this number is somewhat misleading, because several of the amendments were adopted in groups. *Id.* The Bill of Rights, for example, added ten amendments to the Constitution in essentially one amendment event. *Id.* Likewise, the Reconstruction Amendments added three more amendments at once. *Id.* It is more accurate, therefore, to think of the Constitution as having been amended on sixteen different occasions. *Id.*

174. Albert, *supra* note 159, at 1045–46 (explaining that the frequency of content of Article V amendments has changed and become insignificant).

175. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1458–60 (2001).

176. See Albert, *supra* note 159, at 1031–32 (introducing an argument that Article V may be at risk of amendment by desuetude).

177. See *infra* Section III.B.3.

178. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 793–94 (2010) (Scalia, J., concurring) (“Why the people are not up to the task of deciding what new rights to protect, even though it is they who are authorized to make changes, see U.S. Const., Art. V, is never explained.”); *Baldwin v. New York*, 399 U.S. 66, 75 (1970) (Black, J., concurring); *Ullmann v. United States*, 350 U.S. 422, 428 (1956) (“Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.”); *Maxwell v. Dow*, 176 U.S. 581, 617 (1900) (Harlan, J., dissenting) (“If some of the guarantees of life, liberty and property which at the time of the adoption of the National Constitution were regarded as fundamental and as absolutely essential to the enjoyment of freedom, have in the judgment of some ceased to be of practical value, it is for the people of the United States so to declare by an amendment of that instrument.”); see also *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1132 (7th Cir. 1990) (Manion, J., dissenting).

amendment through Article V implies that the Court should avoid introducing constitutional changes through judicial interpretation.<sup>179</sup> Because Article V provides explicit procedures for changing the constitutional text, constitutional change should occur through those procedures, and not through transformative judicial rulings that effectively amend the Constitution without following Article V's procedures.<sup>180</sup> In other words, the mere existence of procedures for formal amendment suggests an institutional preference for how, at least some constitutional changes should be made, and—consequently—it also suggests implicit limitations on the scope of judicial review.<sup>181</sup>

Members of the Court have developed this argument in varying degrees of complexity. Justices who favor an originalist or textualist approach often tack Article V onto dissenting or concurring opinions that characterize the majority as effectively amending the Constitution by “judicial mutilation” of the text.<sup>182</sup> Those uses of Article V often fail to address some of the significant issues raised by this argument, such as whether Article V should be understood as the only legitimate means of constitutional change, and

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179. This argument is made most frequently by justices espousing a textualist or originalist approach to constitutional interpretation. See MCGINNIS & RAPPAPORT, *supra* note 8, at 81–90; Monaghan, *supra* note 30, at 126; see also Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1066–70 (1984) (explaining that the historical belief that the Constitution could be changed only by formal amendment began to unravel starting in the 1860s); Harry Pratt Judson, *The Essentials of a Written Constitution*, in IV THE DECENNIAL PUBLICATIONS OF THE UNIVERSITY OF CHICAGO 311, 330 (1903); Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1747 (2015) (explaining how constitutional theories of interpretation have changed over time).

180. See, for example, *McPherson v. Blacker*, 146 U.S. 1, 36 (1892), where the court stated:

Still less can we recognize the doctrine, that because the Constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arising in their time, it may, therefore, be wrenched from the subjects expressly embraced within it, and amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made.

181. For theoretical commentary on this point, see HARRIS, *supra* note 8, at 165–68 (explaining implications of the formal amendment for judicial review).

182. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2628 (2015) (Scalia, J., dissenting); *McDonald*, 561 U.S. at 793–94 (Scalia, J., concurring) (“The subjective nature of Justice Stevens’ standard is also apparent from his claim that it is the courts’ prerogative—indeed their *duty*—to update the Due Process Clause so that it encompasses new freedoms the Framers were too narrow-minded to imagine. Courts, he proclaims, must ‘do justice to [the Clause’s] urgent call and its open texture’ by exercising the ‘interpretive discretion the latter embodies.’ (Why the *people* are not up to the task of deciding what new rights to protect, even though it is *they* who are authorized to make changes, see U.S. Const., Art. V, is never explained.)” (alteration in original) (citations omitted)); *Baldwin*, 399 U.S. at 75 (Black, J., concurring) (“Such constitutional adjudication . . . amounts in every case to little more than judicial mutilation of our written Constitution. . . . Until [the] language is changed by the constitutionally prescribed method of amendment, I cannot agree [with] this Court . . . .”); see also *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1115–16 (5th Cir. 1997) (Garza, J., concurring) (discussing the relationship between the “power to amend the Constitution” and the judiciary’s role in developing substantive due process protections).

whether a judicial ruling is sufficiently “transformative” to encroach on Article V.<sup>183</sup>

In *Oregon v. Mitchell*, however, Justice Harlan gave a particularly astute formulation of the argument that Article V calls for judicial restraint.<sup>184</sup> *Mitchell* involved a constitutional challenge by several states to Congress’s authority to set voting requirements.<sup>185</sup> The States argued that Congress lacked authority to set state voting requirements.<sup>186</sup> The government relied principally on Section Five of the Fourteenth Amendment as the basis for Congress’s authority to regulate state voting requirements.<sup>187</sup> After an extensive review of the history surrounding the adoption of the Fourteenth Amendment,<sup>188</sup> Justice Harlan concluded first that Section Five was clearly not intended to deprive the States of their authority to set voting requirements, and, consequently, that such a change in constitutional structure could be made only by amendment through Article V.<sup>189</sup> Justice Harlan explained:

It must be recognized, of course, that the amending process is not the only way in which constitutional understanding alters with time. The judiciary has long been entrusted with the task of applying the Constitution in changing circumstances, and as conditions change the Constitution in a sense changes as well. But when the Court gives the language of the Constitution an unforeseen application, it does so, whether explicitly or implicitly, in the name of some underlying purpose of the Framers. This is necessarily so; the federal judiciary, which by express constitutional provision is appointed for life, and therefore cannot be held responsible by the electorate, has no inherent general authority to establish the norms for the rest of society. It is limited to elaboration and application of the precepts ordained in the Constitution by the political representatives of the people. When the Court disregards the express intent and understanding of the

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183. Justice Scalia has also emphasized that formal amendment and judicial review are not the only ways to limit legislative action. See *Obergefell*, 135 S. Ct. at 2628 (Scalia, J., dissenting). According to Justice Scalia, the “People” can “creat[e] additional liberties” through the “never-ending process of legislation.” *Id.* Although Justice Scalia emphasized that changes to individual rights need not be constitutional, he nevertheless seemed to maintain that the existence of Article V means that significant *constitutional* changes to individual rights should be achieved through formal amendment rather than judicial review. See *id.* (stating that explicit changes in individual rights should occur through formal constitutional amendment or “the never-ending process of legislation”).

184. 400 U.S. 112, 201–03 (1970) (Harlan, J., concurring in part and dissenting in part).

185. *Mitchell*, 400 U.S. at 117–18 (Black, J., announcing the judgment of the Court). Pursuant to the Voting Rights Act, Congress had imposed various voting requirements on the states. *Id.* The 1970 amendments to the Voting Rights Act set the voting age at eighteen for all elections, abolished literacy and similar requirements for five years, and barred state residency requirements in presidential elections. *Id.*

186. *Id.* at 117.

187. See *id.* at 117–19.

188. See *id.* at 152–55 (Harlan, J., concurring in part and dissenting in part).

189. See *id.* at 201, 209.



Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect.<sup>190</sup>

Justice Harlan's position hints at a nuanced theory regarding the relationship between Article V and the Court's role. According to Justice Harlan, Article V does not categorically prevent the judiciary from adapting constitutional norms to changed circumstances.<sup>191</sup> The Court must, however, have some evidence that the Framers intended the Court to assume this role.<sup>192</sup> The Framers' intent need not be explicit. It may, for example, be implied from the choice of broad, conceptual language that necessarily requires judicial interpretation and adaptation.<sup>193</sup> But Justice Harlan believed that constitutional changes clearly at odds with the Framers' intent must occur through Article V. According to Justice Harlan, if the Court makes changes that conflict with the Framers' intentions, it has assumed a role that was to be exercised only through the amendment procedures enumerated in Article V.<sup>194</sup>

Justice Harlan's articulation of this argument does not solve many of its difficulties. For one thing, it assumes the functionality of Article V. As many scholars have noted, Article V's procedures for amendment are themselves outdated and ill-suited to contemporary political circumstances.<sup>195</sup> Indeed, it is now practically impossible to amend the Constitution. Thus, it seems disingenuous to suggest that any significant amount of constitutional change should occur through Article V.<sup>196</sup> In reality, there are pressures for constitutional change that Article V seems unable to address.<sup>197</sup> Additionally, it is unclear why Article V should be understood as the exclusive means for

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190. *Id.* at 202–03 (emphasis added).

191. *Id.* at 202; see also *McPherson v. Blacker*, 146 U.S. 1, 33–35 (making a similar observation).

192. In this respect, Justice Harlan's position is inevitably tied to an originalist theory of some variety.

193. This may have been what Harlan was referring to when he referenced the Framers' "underlying purpose." *Mitchell*, 400 U.S. at 202–03 (endorsing the idea that the court can "give[ ] the language of the Constitution an unforeseen application" so long as that application is "explicitly or implicitly, in the name of some underlying purpose of the Framers"); see also *Duncan v. Louisiana*, 391 U.S. 145, 174–76 (1968) (Harlan, J., dissenting) (criticizing a purely historical interpretation of the Fourteenth Amendment).

194. See *Mitchell*, 400 U.S. at 203; see also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837–38 (1995) (hinting at an alternative theory of Article V's exclusive jurisdiction; namely, that "important changes in the electoral process" should occur "through the amendment procedures set forth in Article V").

195. See LEVINSON, *supra* note 171, at 160–61 (arguing that Article V is outdated); *supra* notes 167–177 and accompanying text.

196. *But see Reid v. Covert*, 354 U.S. 1, 14 n.27 (1957) (plurality opinion) ("It may be said that it is difficult to amend the Constitution. . . . But if the necessity for alteration becomes pressing, or if the public demand becomes strong enough, the Constitution can and has been promptly amended.").

197. See LEVINSON, *supra* note 171, at 160–61.

changing any constitutional issues.<sup>198</sup> Article V was clearly intended to provide for flexibility and ordered constitutional evolution, but there is a dearth of historical evidence suggesting that Article V was intended to be the only method of constitutional change for all or even some issues.<sup>199</sup> In any event, like Justice Harlan, other justices have relied on perceptions about the proper function of Article V within the constitutional structure to build arguments for judicial restraint, and these arguments seem to follow a classic structural logic.

## 2. The Inference of Judicial Power to Oversee Congress and the President

In several opinions, justices have also constructed institutional arguments from Article V to support judicial review of federal legislation and executive action.<sup>200</sup> This argument is a corollary of the argument for judicial restraint. That is, if Article V implies that at least some changes should occur exclusively through formal amendment, then attempts by Congress or the president to change the Constitution outside of Article V are illegitimate and should be invalidated by the Court.<sup>201</sup>

In *Reid v. Covert*, for example, the Court considered the scope of the treaty power, which is exercised jointly by the executive and the Senate.<sup>202</sup> Pursuant to treaties with Great Britain and Japan, two civilian American citizens were tried abroad before a court martial for crimes they committed outside the United States.<sup>203</sup> The trials complied with the treaties, but did

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198. See generally Albert, *supra* note 159, at 1030–32 (explaining that this perception was common early in American history, but it has given way to a recognition that constitutional change occurs informally as well as through formal amendment).

199. But see BERNSTEIN, *supra* note 125, at 29 (discussing some historical evidence that Article V was intended only for structural changes and not fundamental normative changes).

200. See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (“If there is to be a new procedure in which the President will play a different role in determining the final text of what may ‘become a law,’ such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution.”); *Reid*, 354 U.S. at 17 (plurality opinion) (“In effect, such construction would permit [presidential] amendment of that document in a manner not sanctioned by Article V.”). In ruling that Congress did not have power to enact provisions of the Religious Freedom Restoration Act, Justice Kennedy wrote for the Court: “Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.” *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997).

201. Obviously, this argument hinges on the holding in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). Thus, although related to the argument from Article V regarding judicial restraint, the effect of this argument is, in some sense, the opposite, because it serves to legitimize judicial invalidation of congressional and presidential acts. Indeed, Justice Harlan argued that judicial review is implicit in the constitutional structure and that Article V provides strong support for judicial review of actions taken by Congress and the president. *Oregon v. Mitchell*, 400 U.S. 112, 204–05 (1970) (Harlan, J., concurring in part and dissenting in part).

202. 354 U.S. 1 (plurality opinion).

203. *Reid*, 354 U.S. at 3–5.

not comply with basic protections enshrined in the Bill of Rights.<sup>204</sup> The government argued that the trials were lawful because the Supremacy Clause states that treaties “shall be the supreme Law of the Land.”<sup>205</sup> The Court rejected this argument, in part, because it would effectively permit the president and the Senate to amend the Constitution outside of Article V. The Court stated:

It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe [the Supremacy Clause] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.<sup>206</sup>

Justice Harlan made an even stronger argument from Article V in support of judicial review. In *Oregon v. Mitchell*, after discussing Article V’s implicit limitations on the judiciary, Justice Harlan emphasized that Article V also restrains Congress.<sup>207</sup> More importantly, Justice Harlan argued that, because Congress is designed to be democratically responsive, it is particularly important that the Court, which is insulated from the electorate, monitor Congress’s constitutional compliance.<sup>208</sup> In support of this vision of judicial review, Justice Harlan relied on the structure of Article V’s amendment procedures. According to Justice Harlan, Article V’s supermajority and state-ratification requirements prove that ordinary “political restraints” are insufficient to control Congress when constitutional issues are at play.<sup>209</sup> Thus, in various contexts, the Court has built structural arguments from

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204. See *id.* at 15–17.

205. See *id.* at 15–16 (quoting U.S. CONST. art. VI, cl. 2).

206. See *id.* at 17 (footnote omitted).

207. See 400 U.S. 112, 204 (1970) (Harlan, J., concurring in part and dissenting in part) (“As the Court is not justified in substituting its own views of wise policy for the commands of the Constitution, still less is it justified in allowing Congress to disregard those commands as the Court understands them.”).

208. See *Mitchell*, 400 U.S. at 204–05. In *Mitchell*, Justice Harlan stated:

The reason for this goes beyond Marshall’s assertion that: “It is emphatically the province and duty of the judicial department to say what the law is.” It inheres in the structure of the constitutional system itself. Congress is subject to none of the institutional restraints imposed on judicial decisionmaking; it is controlled only by the political process.

*Id.* (footnote omitted) (citation omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

209. See *id.* at 205 (referencing Article V’s amendment rules and concluding: “To allow a simple majority of Congress to have final say on matters of constitutional interpretation is therefore fundamentally out of keeping with the constitutional structure”).

Article V to support its review of the constitutionality of congressional and presidential action.<sup>210</sup>

### 3. The Practical Need for Informal Judicial “Amendment”

On various occasions, the Court has suggested that its role in deciding constitutional cases is affected by the practical difficulty of formal amendment to the Constitution through Article V. This has occurred most prominently in the Court’s doctrine of stare decisis, where the Court has clearly articulated an institutional argument rooted in the practical *difficulty associated with* amending the Constitution through Article V. This Section first discusses the concept of informal amendment through judicial review and then explores the logic of the Court’s arguments from Article V in the context of stare decisis.

Many scholars have argued that the difficulty of amending the Constitution through Article V has effectively rerouted constitutional change to other institutions, including judicial review by the Supreme Court.<sup>211</sup> Although there are many subtle variations to this argument, the basic logic is rather straightforward.<sup>212</sup> Changing circumstances and evolving social norms make regular constitutional change necessary.<sup>213</sup> Because Article V is “too cumbersome and erratic to serve as the sole vehicle for constitutional development

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210. The Court has also referenced Article V as a basis for reviewing the constitutionality of state action. In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), the Court invalidated an amendment to the Arkansas Constitution that set congressional terms limits. *See id.* at 837–38. In reaching this conclusion, the Court held that the Arkansas amendment was effectively an impermissible attempt by an “individual State” to amend the Federal Constitution outside of the “amendment procedures set forth in Article V.” *Id.*; *see also infra* notes 262–265 and accompanying text (discussing *Thornton*).

211. For an early expression of this idea, see Paul J. Scheips, *The Significance and Adoption of Article V of the Constitution*, 26 NOTRE DAME L. REV. 46, 66 (1950). *See also* Ackerman, *supra* note 179, at 1065–70, which discusses informal amendment. Of course, there are other theories that may explain the trajectory of judicial review by the court. *See generally* Stephen Gardbaum, *Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale?)*, 62 AM. J. COMP. L. 613 (2014) (explaining various historical and political reasons for the expansion of judicial review in foreign countries with similar governmental structures as in the United States, unrelated to the difficulty of formal amendment).

212. *See* LUTZ, *supra* note 9, at 153–63 (stating the logic of the argument and testing it empirically).

213. *Id.* at 153–54 (“Every political system needs to be modified over time as a result of some combination of [factors].”). Madison believed that procedures for amendment of the federal Constitution were necessary because “useful alterations will be suggested by experience.” *See* THE FEDERALIST, *supra* note 169, at 284–85; *accord* ELKINS ET AL., *supra* note 170, at 81–83 (writing that amendment procedures “allow[ ] the constitution to adjust to the emergence of new social and political forces”); VILE, *supra* note 156, at 79 (“It is wise, therefore, in every government, and especially in a republic, to provide means for altering, and improving the fabric of government, as time and experience, or the new phases of human affairs, may render proper . . .” (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 599 (Melville M. Bigelow ed., 5th ed. 1994))).

in a complex and rapidly changing society,<sup>214</sup> political actors find alternatives for effectuating necessary constitutional change. These “informal” methods of constitutional change are complex and push constitutional change “off the books.”<sup>215</sup> Informal amendment can occur, therefore, when the Court issues a “transformative” ruling that “self-consciously repudiate[s] preexisting doctrinal premises and announce[s] new principles that redefine the American people’s constitutional identity,”<sup>216</sup> and other branches effectively ratify that ruling “through acquiesce or approval.”<sup>217</sup>

These theories of “informal amendment” probe at the relationship between Article V and the Court’s interpretation of the Constitution in both descriptive and normative ways. Descriptively, they attempt to explain why the Court has sometimes engaged in “creative” interpretation of the constitutional text.<sup>218</sup> Normatively, they suggest that the difficulty of formal amendment justifies these “creative” interpretations because necessary constitutional change could not otherwise occur, and there are benefits to informal amendment processes.<sup>219</sup>

What is striking about these scholarly theories is that the Court has been very reluctant to acknowledge them. That is, despite rulings that have effectuated significant changes in constitutional norms, the Court has generally not relied on the difficulty of formal amendment to justify its own “transformative” rulings.<sup>220</sup> Whatever influence the ability (or inability) to amend through Article V had on these rulings, it is below the surface of the Court’s opinions. In fact, the tone of the Court’s stated justifications is to show continuity with past constitutional norms, not transformation.<sup>221</sup> Thus,

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214. Albert, *supra* note 159, at 1052 (quoting W. Lawrence Church, *History and the Constitutional Role of Courts*, 1990 WIS. L. REV. 1071, 1078).

215. See Stephen M. Griffin, *The Nominee Is . . . Article V*, 12 CONST. COMMENT. 171, 172 (1995). As Richard Albert has noted, “[n]o single branch of government can make an informal amendment on its own; other branches or institutions must either participate directly or acquiesce.” Albert, *supra* note 159, at 1053.

216. Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1173 (1988).

217. Albert, *supra* note 159, at 1053.

218. E.g., Strauss, *supra* note 175, at 1458–59, 1462–64 (arguing that Article V cannot accommodate needed changes, which explains informal amendment). See generally LUTZ, *supra* note 9, at 157 (demonstrating empirically that “[t]he more important the role of the judiciary in constitutional revision, the less likely the judiciary is to use theories of strict construction”).

219. See, e.g., Gerken, *supra* note 9, at 928 (“[T]here are many things we might like about the process of informal constitutional amendment—including the fact that it helps ensure the ongoing contestability of constitutional law . . .”).

220. Consider some of the most “transformative” rulings from the Court, such as *Brown v. Board of Education*, 347 U.S. 483 (1954), supplemented by 349 U.S. 294 (1955), and *Roe v. Wade*, 410 U.S. 113 (1973). Nowhere in these transformative opinions does the court suggest that Article V’s dysfunction justifies its rulings.

221. See, e.g., *Roe*, 410 U.S. at 157–58 (arguing from history, practice, and precedent that the word “person” as used in the Fourteenth Amendment does not include the “unborn”); *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965) (arguing that the right to contraception is grounded in other recognized constitutional provisions and precedents).

although these rulings might, in fact, be examples of meaningful informal amendment, they are not examples of explicit amendment-based arguments.

There is one exception, however: the Court has explicitly cited the difficulty of formal amendment through Article V to justify overruling its own constitutional precedents more freely than its own statutory precedents.<sup>222</sup> Indeed, the Court has explicitly developed the doctrine of *stare decisis* in constitutional cases around its belief that Article V makes the Constitution extraordinarily difficult to amend.<sup>223</sup> This argument was famously set out by Justice Brandeis in his dissent in *Burnet v. Coronado Oil & Gas*:

*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is *practically impossible*, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function. . . . In cases involving the Federal Constitution the position of this Court is unlike that of the highest court of England, where the policy of *stare decisis* was formulated and is strictly applied to all classes of cases. Parliament is free to correct any judicial error; and the remedy may be promptly invoked.<sup>224</sup>

Justice Brandeis's primary concern seems to be correction of judicial error through constitutional amendment. However, in a subsequent opinion, Justice Douglas hinted at the need for judicial updating of constitutional norms as another rationale for flexibility in applying *stare decisis*.<sup>225</sup> Taken together, the logic of this amendment-based argument is clear: the Court must be willing to overturn its own constitutional rulings when it becomes evident that those rulings are in error or have become outdated *because* Article V makes it "practically impossible" for constitutional rulings to be corrected or updated through formal amendment.<sup>226</sup>

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222. See Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 704–05 (1999) (describing this doctrine in detail).

223. See *id.* at 703–04 (identifying this logic as one of two justifications the court has given for its constitutional *stare decisis* jurisprudence).

224. 285 U.S. 393, 406–10 (1932) (Brandeis, J., dissenting) (emphasis added) (citations omitted); see also Lee, *supra* note 222, at 718–30 (discussing earlier articulations of this rationale).

225. See *New York v. United States*, 326 U.S. 572, 590–91 (1946) (Douglas, J., dissenting). In his dissent, Justice Douglas stated:

[T]hroughout the history of the Court *stare decisis* has had only a limited application in the field of constitutional law. And it is a wise policy which largely restricts it to those areas of the law where correction can be had by legislation. Otherwise the Constitution loses the flexibility necessary if it is to serve the needs of successive generations.

*Id.*

226. See Lee, *supra* note 222, at 727–30.

The Court has explicitly followed this reasoning in subsequent cases overruling constitutional precedents.<sup>227</sup> In *Agostini v. Felton*,<sup>228</sup> for example, the Court overruled its prior decisions in *Aguilar v. Felton*<sup>229</sup> and *School District of Grand Rapids v. Ball*,<sup>230</sup> which, together, held that the establishment clause “prohibited federal funding of a program providing remedial education to sectarian schools on a neutral basis with other schools.”<sup>231</sup> In overruling those prior constitutional decisions, Justice O’Connor stated that stare decisis “is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.”<sup>232</sup>

Thus, the Court’s doctrine of constitutional stare decisis provides another example of amendment creep. The Court has firmly embedded Article V’s stringent amendment requirements and record of use to craft a doctrine that is responsive to the realities of the constitutional structure.

### C. Article V and Freedom of Expression and Association

In a few cases, the Court has relied on Article V to demonstrate that the Constitution as a whole is not inimical to views that would support changing or even revolutionizing government.<sup>233</sup> As the argument goes, because Article V does not place any limitations on the substance of changes to the

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227. See *id.* (finding that “despite its questionable historical pedigree, Brandeis’ approach has been unquestionably adopted by the modern Court,” and collecting examples).

228. 521 U.S. 203 (1997).

229. 473 U.S. 402 (1985).

230. 473 U.S. 373 (1985).

231. Lee, *supra* note 222, at 730 (describing *Agostini*).

232. *Agostini*, 521 U.S. at 235.

233. I found two Supreme Court cases explicitly adopting this logic and several lower court cases. See *Whitehill v. Elkins*, 389 U.S. 54, 57 (1967) (interpreting the First Amendment by reference to Article V); *Schneiderman v. United States*, 320 U.S. 118, 136–39 (1943) (drawing on Article V and the First Amendment to interpret an immigration statute in a manner consistent with the Constitution); see also *Frankfeld v. United States*, 198 F.2d 679, 685–86 (4th Cir. 1952) (following the logic of the Second Circuit in *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), in applying the First Amendment and Article V); *United States v. Dennis*, 183 F.2d 201, 206 (2d Cir. 1950) (“If the defendants had in fact so confined their teaching and advocacy, the First Amendment would indubitably protect them, for it protects all utterances, individual or concerted, seeking constitutional changes, however revolutionary, by the processes which the Constitution provides. Any amendment to the Constitution passed in conformity with Article V is as valid as though it had been originally incorporated in it; the only exception being that no state shall be denied ‘its equal Suffrage in the Senate.’), *aff’d*, 341 U.S. 494 (1951); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117, 126 (S.D.N.Y. 1969) (“Since those who authored Rule 9406 were quite as aware as we are that the First Amendment lies at the very heart of our ‘form of government,’ we should not lightly suppose they had any idea that applicants should be refused admission to the bar for exercising their constitutionally guaranteed rights to freedom of speech, peaceable assembly and petition for redress of grievances. Since they were likewise entirely aware that the Constitution contains Article V, providing for amendment, we will similarly not suppose they intended admission to be refused to applicants who advocate amendment, even very radical amendment, by lawful means.”). For general academic commentary on this issue, see Jeff

Constitution, Article V supports the notion that the Constitution protects contrarian views about government. Justice Douglas stated the argument this way:

If the Federal Constitution is our guide, a person who might wish to “alter” our form of government may not be cast into the outer darkness. For the Constitution prescribes the method of “alteration” by the amending process in Article V; and . . . there is no restraint on the kind of amendment that may be offered.<sup>234</sup>

*Schneiderman v. United States* provides a particularly clear example of the Court drawing on Article V to interpret the First Amendment.<sup>235</sup> In *Schneiderman*, the government sought to revoke the petitioner’s certificate of citizenship based on an allegedly illegal procurement of his naturalization.<sup>236</sup> The naturalization statute in force at the time required the petitioner to demonstrate that he had resided continuously within the United States for five years and, during that time, had “behaved as a man of good moral character, attached to the principles of the Constitution of the United States”<sup>237</sup> The government claimed that the petitioner illegally procured his certificate of citizenship because he did not disclose to the naturalization court that he was an active member of the Workers (Communist) Party of America and the Young Workers (Communist) League of America.<sup>238</sup> The government asserted that those groups espoused “sweeping changes in the Constitution,” and, therefore, the petitioner could not demonstrate that he was in fact “attached” to the Constitution.<sup>239</sup>

In addressing the government’s claim that the petitioner had rejected the Constitution, the Court acknowledged that the petitioner had, in fact, espoused views that were “distasteful to most” Americans and “call[ed] for considerable change in our present form of government and society.”<sup>240</sup> However, the Court concluded that the petitioner could, nevertheless, demonstrate a commitment to the Constitution, because:

The constitutional fathers, fresh from a revolution, did not forge a political strait-jacket for the generations to come. Instead they wrote Article V and the First Amendment . . . Article V contains procedural provisions for constitutional change by amendment without any present limitation whatsoever except that no State may be deprived of equal representation in the Senate without its consent. This provision and the many important and far-reaching changes made in the Constitution since 1787 refute the idea

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Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1084–86 (1991) (discussing implicit limitations on amendment through Article V).

234. *Whitehill*, 389 U.S. at 57.

235. *Schneiderman*, 320 U.S. at 136–39.

236. *Id.* at 120–21.

237. *Id.* at 133 (quoting Act of June 29, 1906, § 4 (codified at 8 U.S.C. § 382 (2012))).

238. *Id.* at 121–22.

239. *Id.* at 135.

240. *Id.* at 136.



that attachment to any particular provision or provisions is essential, or that one who advocates radical changes is necessarily not attached to the Constitution.<sup>241</sup>

This argument illustrates some of the substance that plausibly may be implied from Article V. Specifically, Article V implies robust First Amendment protection of political speech. To be sure, there are limits to the substance that courts can infer from Article V. As noted above, Article V is relatively generic when compared to state amendment rules and other national constitutions around the world.<sup>242</sup> But these cases nevertheless illustrate the power and possibilities of structural arguments from amendment rules.<sup>243</sup>

#### D. Article V and Federalism

Perhaps the most obvious institutional argument emanating from Article V relates to federalism.<sup>244</sup> Article V deeply entrenches equal representation in the Senate for all states regardless of population size.<sup>245</sup> It also requires all amendments to be ratified by three-fourths of the states, and it permits the states to bypass Congress and call a convention to propose amendments.<sup>246</sup> These provisions clearly suggest that federalism is an integral aspect of the constitutional structure.<sup>247</sup>

On its face, the equal-suffrage trigger suggests a strong preference for maintaining decentralization. By providing each state with equal representation in the Senate, the Constitution aims to ensure that national policies will not overrun state authority.<sup>248</sup> And the Senate operates as a veto chamber for

241. *Id.* at 137 (footnote omitted) (citation omitted). The Court continued:

As Justice Holmes said, “Surely it cannot show lack of attachment to the principles of the Constitution that . . . [one] thinks it can be improved.” Criticism of, and the sincerity of desires to improve, the Constitution should not be judged by conformity to prevailing thought because, “if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate.

*Id.* at 138 (alteration in original) (citations omitted).

242. *See supra* Section III.A.

243. *See generally* Albert, *supra* note 28, at 31 (arguing that free speech protections are effectively unamendable through Article V because free speech is inseparable from representative democracy); Rosen, *supra* note 233, at 1084–86 (discussing literature suggesting that Article V contains an implicit prohibition on changes to free speech).

244. *See* Levinson, *supra* note 118, at 122 (discussing federalism values as inherent and obvious in Article V’s structure).

245. *See* U.S. CONST. art. V.

246. *Id.*

247. *See* Albert, *supra* note 10, at 228–29 (explaining that Article V demonstrates that “federalism is an historically important constitutional value in the United States”).

248. *See* Monaghan, *supra* note 30, at 143–46 (discussing the federalism considerations that were central to Article V’s design); *see also* VILE, *supra* note 156, at 38–39 (describing federalism’s role in the design of Article V).

subnational interests.<sup>249</sup> By making suffrage in the Senate constructively impossible to amend,<sup>250</sup> Article V suggests that federalism is an important constitutional value.<sup>251</sup>

The history behind Article V and the equal-suffrage requirement confirms the connection between Article V and federalism.<sup>252</sup> Equal suffrage in the Senate, and its insulation from amendment in Article V, were crucial issues in obtaining the Constitution's ratification.<sup>253</sup> The states were protective of their individual sovereignty and skeptical of creating a national government with the ability to consolidate power at the center.<sup>254</sup> This was especially true for the Southern slave states, which feared a federal government that would establish a national prohibition on slavery.<sup>255</sup> Article V's equal-suffrage "trigger" was therefore intended to ensure that future representatives could not use the amendment power to alter this vertical power arrangement between the states and the federal government.<sup>256</sup>

Surprisingly, despite Article V's expression of federalism principles, judges have only occasionally relied on Article V when deciding federalism disputes.<sup>257</sup> The infrequent use of Article V to help resolve federalism disputes may be explained in part by the fact that the Constitution contains many other provisions clearly reinforcing its federal structure.<sup>258</sup> In any event, on a few occasions, the Supreme Court has explicitly relied on Article V to support its resolution of federalism disputes.

249. See Baker, *supra* note 29, at 946–58 (describing the theoretical and actual role of the Senate in making federal policy and the connection to Article V amendment processes).

250. See Albert, *supra* note 159, at 1044 (explaining that the equal suffrage clause is constructively unamendable).

251. See BERNSTEIN, *supra* note 125, at 28 (explaining the significance of federalism based on Article V and evidence from the *Federalist Papers*). The equal suffrage clause is not the only evidence of federalism's priority in the constitutional structure. Article V is also relatively unique, in that it allows the states to bypass Congress and amend the Constitution by calling a convention. See Marshfield, *supra* note 107, at 985–86 (explaining the significance of this process from a federalism standpoint).

252. See generally BERNSTEIN, *supra* note 125, at 14–22 (describing this history generally).

253. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 201–03 (Max Farrand ed., 1911) (quoting Connecticut delegate Roger Sherman as saying that “[t]he smaller States would never agree to the plan on any other principle [than an equality of suffrage in this branch]” (second alteration in original)).

254. See Monaghan, *supra* note 30, at 145.

255. *Id.*

256. *Id.*

257. The two prominent examples from the Supreme Court are *Printz v. United States*, 521 U.S. 898, 919 (1997) (referencing Article V as a basis for protecting state officials from commandeering by the federal government), and *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997) (ruling that Congress encroached on state authority when enacting the Religious Freedom Restoration Act in part because Article V implies some limits on congressional power).

258. See *Printz*, 521 U.S. at 919 (explaining that the federal system of dual sovereignty is “reflected throughout the Constitution’s text” and listing “only a few examples,” including Article V).

In *Printz v. United States*, various state and local officials challenged provisions of the federal Brady Handgun Violence Prevention Act that required them to conduct background checks on prospective handgun purchasers and provide related information to federal authorities.<sup>259</sup> The officials argued that it was unconstitutional for the federal government to compel state and local officials into federal service.<sup>260</sup> The Court agreed and, in support of its ruling, cited Article V as evidence that the states retain “a residuary and inviolable sovereignty” that prevents the federal government from enlisting state officials.<sup>261</sup>

The Court has also invoked Article V to invalidate state actions that intrude on federal power. In *U.S. Term Limits, Inc. v. Thornton*, the Court considered the constitutionality of an amendment to the Arkansas Constitution that placed term limits on Arkansas’s congressional representatives.<sup>262</sup> The Court held that the amendment was unconstitutional because it violated the Qualifications Clauses of the federal Constitution<sup>263</sup> and impermissibly assumed powers that the Constitution reserved to the federal government.<sup>264</sup> In reaching this conclusion, the Court explained that “allowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework,” and that Article V implies that “[a]ny such change must come not by legislation

259. *Id.* at 902.

260. *Id.* at 905.

261. *Id.* at 918–19 (quoting THE FEDERALIST, *supra* note 169, No. 39 (James Madison)). *City of Boerne* provides a subtler use of Article V to resolve a federalism dispute. 521 U.S. at 529. That case involved a challenge to Congress’s authority under the Fourteenth Amendment to enact the Religious Freedom Restoration Act. *City of Boerne*, 521 U.S. at 512. In answering that question, the court considered whether the Fourteenth Amendment authorized Congress to expand against the states the substantive rights contained in Section 1 of the Fourteenth Amendment, or whether the Fourteenth Amendment simply authorizes Congress to enact remedial legislation without expanding substantive rights. *Id.* at 527. The court concluded that the Fourteenth Amendment authorizes only remedial legislation, because the alternative conclusion would effectively remove any limits on congressional power over the states, which would “effectively circumvent the difficult and detailed amendment process contained in Article V.” *Id.* at 529. It should be noted that *City of Boerne* could also be viewed as another example of how the court has used Article V to justify judicial review of congressional action. See *supra* Section III.B.2.

262. 514 U.S. 779, 783–84 (1995). Amendment 73 to the Arkansas Constitution was adopted in November 1992, and it stated:

The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials.

*Thornton*, 514 U.S. at 783–84 (quoting ARK. CONST. amend. LXXIII, pmbl.).

263. *Id.* at 782–83 (citing U.S. CONST. art I, § 2, cl. 2; 3, cl. 3).

264. *Id.* at 836–37.

adopted . . . by an individual state, but rather . . . through the amendment procedures set forth in Article V.”<sup>265</sup>

Although courts have infrequently relied on Article V to resolve federalism disputes, these cases nevertheless illustrate how Article V can inform structural analysis.<sup>266</sup>

#### IV. AMENDMENT CREEP IN STATE CONSTITUTIONAL INTERPRETATION

Article V is relatively generic when compared to amendment rules in state constitutions. It is common for state amendment rules to contain alternative processes for amendment and even multiple subject-matter limitations or triggers regarding amendment. Consequently, state constitutional amendment rules provide a much more intricate, but promising, source of amendment-based structural arguments. In this Part, I provide a general summary of state amendment rules. Then, I systemize state amendment creep by providing a typology of recognized and potential amendment-based arguments from state amendment rules.

##### A. State Constitutional Amendment Processes

Amendment rules in state constitutions are very different from their federal counterpart in structure and frequency of use.<sup>267</sup> There is great variety in how state amendment rules are structured.<sup>268</sup> In general, however, state constitutions can be amended by one or more of the following processes: “(1) voter adoption of legislatively-referred proposals, (2) voter adoption of citizen-initiated proposals, (3) voter adoption of commission-referred proposals, or (4) through constitutional conventions.”<sup>269</sup>

Moreover, state amendment rules often include many procedural requirements that hint at the respective constitution’s political process priorities. Delaware, for example, does not allow for amendment by citizen initiative, nor does it require amendments to be ratified by popular referendum.<sup>270</sup> Instead, amendments can be made by a two-thirds vote of the state

265. *Id.* at 837.

266. See VILE, *supra* note 156, at 158–67 (discussing failed attempts to argue that Article V includes implicit limitations on any changes to state power without unanimous state consent); Selden Bacon, *How the Tenth Amendment Affected the Fifth Article of the Constitution*, 16 V.A.L. REV. 771, 776–77 (1930) (same).

267. See generally TARR, *supra* note 147, at 23–27 (explaining the distinctive nature of state constitutional amendment).

268. Tarr & Williams, *supra* note 31, at 1077–1102 (describing state amendment rules and emphasizing many nuances and great variety).

269. Teresa Stanton Collett, *Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments*, 41 LOY. U. CHI. L.J. 327, 334–35 (2010) (footnotes omitted).

270. DEL. CONST. art. XVI, § 1 (“Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives . . . and if . . . such proposed amendment or amendments shall upon yeah and nay vote be agreed to by two thirds of all the members elected to each House, the same shall thereupon become part of the Constitution.”).

legislature in two successive legislative sessions.<sup>271</sup> And, as mentioned above, New Mexico requires constitutional amendments to be published in Spanish.<sup>272</sup>

State amendment rules are also characterized by a variety of subject-matter triggers.<sup>273</sup> In Massachusetts, for example, the public may propose amendments through the initiative process on any issue except “excluded matters.”<sup>274</sup> Excluded matters include, among other things, any “measure that relates to religion, religious practices or religious institutions,” “recall or compensation of judges,” and various rights provisions contained in the Massachusetts Bill of Rights.<sup>275</sup> Similarly, the Mississippi Constitution lists four issues that cannot be addressed in an amendment by public initiative: (1) changes to the Bill of Rights; (2) any amendment relating to the “Mississippi Public Employees’ Retirement System;” (3) the right to unionize; and (4) changes to the provision limiting the use of the public initiative.<sup>276</sup> The Illinois Constitution requires all amendments to be proposed by the legislature and then ratified by a public referendum.<sup>277</sup> The only exception is for amendments related to the “structural and procedural subjects” of the legislature, which can be proposed by public initiative.<sup>278</sup>

In addition to subject-matter triggers, state constitutions also have a tradition of declaring certain provisions unamendable.<sup>279</sup> The Alabama Constitution, for example, states that “[r]epresentation in the legislature shall be based upon population, and such basis of representation shall not be

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271. *Id.*

272. N.M. CONST. art. XIX, § 1.

273. See Cody Hoesly, Comment, *Reforming Direct Democracy: Lessons from Oregon*, 93 CALIF. L. REV. 1191, 1236 (2005) (surveying subject-matter restrictions).

274. MASS. CONST. amend. art. XLVIII, pt. 2.

275. *Id.* amend. art. XLVIII, pt. 2, § 2; see also Conlin, *supra* note 32, at 1091–92 (explaining the scope of the excluded matters under Article XLVIII).

276. MISS. CONST. art. XV § 273(5).

277. ILL. CONST. art. XIV, § 2(a).

278. *Id.* art. XIV, § 3. Based on my review of amendment rules in all fifty states, there are at least eight states that contain subject-matter triggers of some kind in their amendment rules. These subject-matter triggers can be systematized into five general patterns: (1) the constitution generally allows for amendments through citizen initiative, but identifies specific subjects that may not be amended by initiative (Massachusetts, MASS. CONST. amend. art. XLVIII, pt. 2; Mississippi, MISS. CONST. art. XV §273(5)); (2) the constitution generally requires amendments through legislative proposal and public referendum, but it identifies certain subjects that may be amended by initiative (Illinois, ILL. CONST. art. XIV); (3) the constitution requires all amendments to be proposed by the legislature and ratified by public referendum, but it requires higher majorities for amendments addressing certain subjects (New Mexico, N.M. CONST. art. XIX, § 1); (4) the constitution requires compliance with additional procedural requirements for amendments addressing certain subjects (Louisiana, LA. CONST. art. XIII, § 1); and (5) the constitution authorizes amendments affecting only certain local jurisdictions, but it requires majorities from the affected local jurisdictions to approve those amendments (Alabama, ALA. CONST. amend. 555; Louisiana, LA. CONST. art. XIII, § 1(C)).

279. See Yaniv Roznai, *Unamendability and the Genetic Code of the Constitution*, 27 EUROPEAN REV. PUB. L. 775 (2015).

changed by constitutional amendments.”<sup>280</sup> The California Constitution provides that “[n]o amendment to the Constitution . . . that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect.”<sup>281</sup> Several states also single out specific individual rights as “inviolable,”<sup>282</sup> but it is unclear where this language makes those provisions unamendable.<sup>283</sup>

Additionally, state constitutional amendment rules often include a distinction between the procedures for amendment and the procedures for constitutional revision.<sup>284</sup> Amendment generally refers to ad hoc changes to the existing constitutional text that do not “substantially alter the substance and integrity of the state Constitution as a document of independent force and effect.”<sup>285</sup> Revision, on the other hand, generally refers to substantial quantitative or qualitative “changes in the nature of [the] basic governmental plan.”<sup>286</sup> The distinction between amendment and revision is significant because amendment rules generally require constitutional revision to occur through the more arduous process of a constitutional convention.<sup>287</sup> Moreover, the distinction between revision and amendment has resulted in a body of law that ranks constitutional priorities to determine which provisions (or collection of provisions) affect a constitution’s core, and which are more peripheral.<sup>288</sup>

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280. ALA. CONST. art. XVII, § 284. *But see* Tarr & Williams, *supra* note 31, at 1119 (explaining that the provision was originally intended to only temporarily make the clause unamendable).

281. CAL. CONST. art. II, § 12.

282. *E.g.*, FLA. CONST. art. I, § 22 (“The right of trial by jury shall be secure to all and remain inviolate.”); KAN. CONST. Bill of Rights, § 11 (“The liberty of the press shall be inviolate . . .”); N.M. CONST. art. II, § 5 (“The rights, privileges and immunities, civil, political and religious guaranteed to the people of New Mexico by the Treaty of Guadalupe Hidalgo shall be preserved inviolate.”); *cf.* N.C. CONST. art. I, § 6 (“The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other.”).

283. *See, e.g.*, *Op. of the Justices*, 81 So. 2d 881, 883–84 (Ala. 1955) (holding that inviolate provisions in the Alabama Constitution were amendable).

284. *See* Gerald Benjamin, *Constitutional Amendment and Revision*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 177–78 (G. Alan Tarr & Robert F. Williams eds., 2006) (noting that twenty-three states have amendment-revision distinctions). *See generally* Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1521–24 (2009).

285. *See* *Raven v. Deukmejian*, 801 P.2d 1077, 1087 (Cal. 1990) (in bank).

286. *See* *Legislature v. Eu*, 816 P.2d 1309, 1316 (Cal. 1991) (in bank) (quoting *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal.3d 208, 223 (1978)).

287. *See* Benjamin, *supra* note 284, at 178; *see also* Tarr & Williams, *supra* note 31, at 1081–82 (surveying these requirements); Michael G. Colantuono, Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CALIF. L. REV. 1473, 1478 (1987) (discussing a “non-revision requirement,” which some courts invoke to limit the substance of constitutional amendment proposals).

288. *See, e.g.*, *State v. Manley*, 441 So. 2d 864, 873–74 (Ala. 1983); *Bess v. Ulmer*, 985 P.2d 979, 988–89 (Alaska 1999) (holding that reapportioning legislative districts, even though that power was specifically assigned to the executive, was not a revision); *Strauss v. Horton*, 207

Finally, state constitutions are characterized by frequent amendment.<sup>289</sup> The states have adopted 7,481 amendments to their current constitutions, and voters have considered and rejected an additional 3,888 amendments.<sup>290</sup> Although amendment rates vary, even the Vermont Constitution, which is amended the least frequently, is amended, on average, at least once every four years.<sup>291</sup> As one commentator observed, state constitutional amendment is a “beehive” of political activity,<sup>292</sup> and another commentator has described state constitutional law as characterized by “amendomania.”<sup>293</sup> Significantly, it is rather common for state constitutional amendments to respond to state court constitutional rulings.<sup>294</sup> Thus, as compared to Article V, state constitutional amendment processes are significantly more accessible and responsive to popular constitutional preferences.<sup>295</sup>

It is important to emphasize that amendment rules and practices vary greatly from state to state and are often influenced by jurisdiction-specific factors. As others have noted, “no catalogue of the mechanisms for state constitutional change can fully capture the richness or the variety of the approaches that have been used.”<sup>296</sup> For present purposes, it is sufficient to highlight that state constitutional amendment rules contain substance that can inform the meaning of other constitutional provisions.

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P.3d 48, 90–110 (Cal. 2009) (holding that changes to the meaning of “equal protection” under the state constitution was an amendment, and not a revision), *abrogated by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *Eu*, 816 P.2d at 1316–20 (holding that an amendment setting a budget limitation was not a revision); *People v. Frierson*, 599 P.2d 587, 613–14 (Cal. 1979) (determining that an amendment reinstating the death penalty was not a revision), *sub nom* *Frierson v. Calderon*, 968 F. Supp. 497 (C.D. Cal. 2004), *rev’d in part sub nom* *Frierson v. Woodford*, 463 F.3d 982 (9th Cir. 2006); *McFadden v. Jordan*, 196 P.2d 787, 799 (Cal. 1948); *Op. of the Justices*, 264 A.2d 342, 344–46 (Del. 1970); *Adams v. Gunter*, 238 So. 2d 824, 830–32 (Fla. 1970) (opining that an amendment to create a unicameral legislature is a revision); *Rivera-Cruz v. Gray*, 104 So. 2d 501, 502–05 (Fla. 1958); *Martinez v. Kulongoski*, 185 P.3d 498, 502–05 (Or. Ct. App. 2008) (finding that a marriage amendment was not a revision under the Oregon Constitution).

289. See John Dinan, *State Constitutional Developments in 2014*, in 47 COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 3, 11–12 tbl.1.1 (2015) (listing the number of amendments for all extant state constitutions); Versteeg & Zackin, *supra* note 167, at 1669–77 (quantifying the amendment rates for state constitutions).

290. Dinan, *supra* note 289, 11–12 tbl.1.1.

291. See *id.* This is a simple average. Vermont adopted its current constitution in 1793 and has amended it fifty-four times, which equates to an annual amendment rate of 0.244. See *id.*

292. See John Kincaid, *State Constitutions in the Federal System*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 1988, at 14.

293. See Donald E. Wilkes, Jr., *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223, 233 (1984).

294. See John Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, 76 ALB. L. REV. 2105, 2113–18 (2013) (discussing amendments overturning court rulings).

295. See *id.*

296. Tarr & Williams, *supra* note 31, at 1077.

B. *State Amendment and Institutional Arguments Regarding  
Judicial Review*

1. *Frequent State Amendment and an Inference of Judicial Restraint*

Like the Supreme Court, state courts have also made amendment-based arguments in support of judicial restraint.<sup>297</sup> Those arguments often follow a logic similar to the arguments articulated by members of the Supreme Court. That is, because a state constitution contains procedures for formal amendment, judges should avoid rulings that effectively amend the constitution outside the procedures for formal amendment. The core of this argument is that including procedures for formal amendment in state constitutions implies that state courts should defer to democratic processes for at least some constitutional changes.

Several state judges and courts have added extra “punch” to the argument for judicial restraint by highlighting that state constitutions are amended easily.<sup>298</sup> Because the amendment of the Constitution is “practically impossible,” the Supreme Court is the only institution at the federal level with a realistic opportunity to update and revise constitutional norms.<sup>299</sup> State courts, on the other hand, exist alongside an amendment power that is truly accessible to the citizenry. Thus, some state court opinions have discussed that it is particularly appropriate for state judges to exercise restraint in adopting “transformative” constitutional rulings because constitutional change can genuinely occur through formal amendment.<sup>300</sup>

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297. See, e.g., *Kansas ex rel. Apt v. Mitchell*, 399 P.2d 556, 559 (Kan. 1965) (holding that “[t]his court has no power to engraft amendments to our state constitution” and citing the provision for amendment as support for limited judicial authority); *Minnesota v. Hamm*, 423 N.W.2d 379, 381 (Minn. 1988) (enforcing the constitution’s literal terms “[a]bsent a constitutional amendment”), *superseded by constitutional amendment*, MINN. CONST. art. I, § 4; *Cooper v. Poston*, 483 S.E.2d 750, 751 (S.C. 1997) (holding that “the legislature cannot abrogate the constitutional right to a jury trial by simply designating a civil action as non-jury [because] [a]mendments to the S.C. Constitution may be made only after approval by the electorate” and citing to amendment rules as support for limited judicial role); *Medlock v. 1985 Ford F-150 Pick Up*, 417 S.E.2d 85, 87 n.3 (S.C. 1992) (“The General Assembly possesses the authority to propose a constitutional amendment which, if adopted by the electorate, would abolish the right to a jury trial in forfeiture proceedings. S.C. CONST. art. XVI, § 1.”).

298. This argument has been adopted in some variety in the following states: Kansas, Minnesota, and South Carolina. See, e.g., cases cited *supra* note 297.

299. See *supra* Section III.B.3 (discussing this logic in the Supreme Court’s stare decisis jurisprudence).

300. See, e.g., *Sherman v. Atlanta Indep. Sch. Sys.*, 744 S.E.2d 26, 32–33 (Ga. 2013) (“The same process [of amendment] has been followed in this State on numerous occasions; it is indeed an essential aspect of our republican form of government, in which the people, not the judges, have ultimate control over the law under which they live.”); *Hill v. State*, 659 So. 2d 547, 554 (Miss. 1995) (Lee, J., dissenting) (opinion denying rehearing) (“If the people of Mississippi wish to provide convicted capital murderers with such a constitutional right, then the citizens of this State, and not this Court, should amend our constitution through the democratic process as has been done on many occasions.”); *McFarland v. Barron*, 164 N.W.2d 607, 615 (S.D. 1969) (Biegelmeier, P.J., dissenting) (“Reasons for liberal and broad interpretations of the national constitution are not persuasive as to our state constitution. The people have



Arguments for judicial restraint rooted in ease of amendment seem to be based on an inference about institutional design. Because a constitution contains flexible amendment rules that the people use regularly, courts should interpret the constitution as expressing an institutional preference for constitutional change to occur through the amendment power rather than informal judicial decisionmaking.<sup>301</sup> Although the history of amendment design in some states supports this conclusion,<sup>302</sup> the argument has obvious limits. For one thing, ease of amendment alone does not require the inference that other forms of constitutional change are discouraged. A constitution could aim to facilitate both formal and informal constitutional change by creating opportunities for judicial and popular constitutional outputs.<sup>303</sup> Indeed, some state judges have expressly rejected the notion that the ease of formal amendment should affect how judges understand their role when interpreting a constitutional provision.<sup>304</sup>

Additionally, the argument for judicial restraint based on ease of amendment raises an interesting problem regarding variable entrenchment in state constitutional amendment rules. As noted above, some states have amendment rules that single out certain substantive issues as unamendable<sup>305</sup> or more difficult to amend.<sup>306</sup> Constitutions that contain elevated

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amended it . . . when they deemed it necessary or desirable . . . . These actions confirm the observations made in the constitutional convention debates . . . *that our constitution was easily amended.*” (emphasis added)); *Ex parte Lewis*, 219 S.W.3d 335, 375 n.14 (Tex. Crim. App. 2007) (Cochran, J., concurring) (“If a state’s citizens perceive the need for expanded constitutional protection beyond that found in the federal constitution, they—the citizens—can amend their constitution to provide those protections.”).

301. As noted above, several states seem to have made their amendment rules more flexible for exactly this reason. *See sources cited supra* note 148.

302. *See supra* note 148 (explaining that amendment rules in Kentucky and various other states were designed with this institutional preference in mind).

303. *See Gerken, supra* note 9, at 934–43 (explaining the design rationales for favoring informal amendment).

304. For example, in *Commonwealth v. O’Neal*, the Supreme Judicial Court of Massachusetts considered the constitutionality of the death penalty under the Massachusetts Constitution. *See* 339 N.E.2d 676, 677 (Mass. 1975). A key issue dividing the court was whether it was appropriate for the justices to consider the possibility that the citizens of Massachusetts may overturn the court’s ruling by amending the constitution. *See O’Neal*, 339 N.E.2d at 691–93 (Tauro, C.J., concurring). At the time, 61 percent of Massachusetts voters had recently indicated their support for the death penalty, and the Massachusetts Constitution could be amended by a public initiative approved by a simple majority of voters. *See MASS. CONST.* art. XLVII; *O’Neal*, 339 N.E.2d at 708 n.1 (Reardon, J., dissenting). Chief Justice Tauro rejected the notion that it was appropriate for judges to consider the possibility of responsive amendments. *See id.* at 691–93 (Tauro, C.J., concurring). According to Chief Justice Tauro, judges must “interpret the Constitution to the best of [their] personal abilities and judgment,” regardless of possible amendments. *Id.* at 692.

305. *See, e.g., ALA. CONST.* art. XVIII, § 284 (“Representation in the Legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendments.”).

306. *See Tarr & Williams, supra* note 31, at 1119 (“Other states require a distinctive mode of constitutional change for a particular issue.”).

protections for specific subject areas create the possibility that some substantive issues carry less (or no) potential for amendment, which could suggest the opposite institutional inference (i.e., greater judicial authority to interpret and adapt the provision).<sup>307</sup> In other words, if a particular provision is singled out as more difficult to amend, that may suggest an institutional preference for change on that issue to occur through judicial decisionmaking rather than through popular amendment.<sup>308</sup> Thus, to the extent state judges explicitly acknowledge ease of amendment in their interpretative methodology, they may need to account for variable entrenchment of constitutional provisions.

In any event, this amendment-based argument is a frequent refrain in state constitutional jurisprudence. Interestingly, although this argument for judicial restraint has been very unsuccessful at the Supreme Court regarding Article V, it seems to be very powerful before state high courts. Whereas the argument almost always appears in dissents in Supreme Court opinions, it is frequently used by majorities in state court opinions to justify their rejection of “transformative” constitutional arguments.

## 2. Frequent State Amendment as a Basis of Judicial Activism

As scholars and at least one state court judge have recognized, ease of amendment can “cut[ ] both ways” regarding the judicial role.<sup>309</sup> Several scholars have suggested that, because state constitutions are easy to amend, state judges should be more willing than federal judges to break new constitutional ground.<sup>310</sup> These scholars suggest that, because state constitutional rulings are easy to “correct” or modify by constitutional amendment, state

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307. See Albert, *supra* note 10, at 264–80 (explaining how this has occurred in Germany regarding an unamendable provision).

308. See SCHWARTZBERG, *supra* note 140, at 184 (“[W]hen constitutional provisions are made unamendable and constitutional courts have final authority over the interpretation of such provisions, entrenchment does not actually inhibit alterations,” but rather “shifts the locus of change—and the power to determine the legitimate scope of mutability—away from legislatures and toward the court”).

309. *Ex parte Lewis*, 219 S.W.3d 335, 374 n.14 (Tex. Crim. App. 2007) (Cochran, J., concurring) (citing various scholars advocating for state judicial activism because of ease of amendment and commenting that “[t]his argument, however, cuts both ways”).

310. Howard, *supra* note 151, at 939–40; Conor O’Mahony, *If a Constitution is Easy to Amend, Can Judges Be Less Restrained? Rights, Social Change, and Proposition 8*, 27 HARV. HUM. RTS. J. 191, 241–42 (2014); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1453 (1999) (“[T]heir greater accountability might render state judges more willing to read state constitutional guarantees expansively.”); Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 288–89 (1994); see also Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 358 (2011) (“It is possible that the political accountability of state judges (and the amendability of state constitutions) might encourage them to read state constitutions more expansively, knowing that their rulings can always be ‘corrected’ by a democratic majority.” (emphasis omitted)).

judges should feel less constrained in deciding constitutional issues.<sup>311</sup> This is especially true, as the argument goes, for rulings that would expand constitutional rights because any counter-majoritarian problem created by a court ruling can easily be “corrected” by constitutional amendment, which is not the case at the federal level.<sup>312</sup>

Despite scholarly enthusiasm for arguments that rely on ease of amendment to support judicial activism, courts have been reluctant to explicitly rely on amendability in this way. Although various courts have referenced ease of amendment in arguing for judicial *restraint*, I was able to identify only one opinion where a state judge explicitly relied on ease of amendment to build an argument for an expansive constitutional ruling.<sup>313</sup>

In *Commonwealth v. O’Neal*, the Massachusetts Supreme Judicial Court ruled that executing a prisoner convicted of rape and murder violated the state constitution’s prohibition on cruel and usual punishment.<sup>314</sup> In support of that ruling, Justice Hennessey relied on indicia of contemporary perceptions regarding the use of capital punishment and concluded that the people of Massachusetts disapproved of the death penalty.<sup>315</sup> He then added:

[I]f the present will of the people of the Commonwealth is that capital punishment should be permitted in some or all cases of murder in the first degree, procedures for amendment of the State Constitution *which are relatively speedy*, but still require time for reasonable reflection, are available to accomplish that end.<sup>316</sup>

The gist of this argument seems to be that court’s ruling was justified even if the court was wrong *because* the people have a realistic opportunity to correct the court’s ruling through amendment.<sup>317</sup>

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311. *E.g.*, O’Mahony, *supra* note 310, at 242.

312. *Id.* at 241–42.

313. *Commonwealth v. O’Neal*, 339 N.E.2d 676, 694 (Mass. 1975) (Hennessey, J., concurring).

314. *Id.* at 677.

315. *Id.* at 694. Specifically, Justice Hennessey argued:

Between 1947 and 1972 . . . no person was executed in this Commonwealth. During that same period I take notice that the death sentences of twenty-five persons were commuted or reduced by executive action. During this time span seven different Governors served. There is the best of reasons to believe that the Constitution of the Commonwealth, a viable document, does not now permit capital punishment in rape-murder cases.

*Id.*

316. *Id.* (emphasis added).

317. This argument is interesting because it seems to acknowledge possible error on the court’s behalf. The court’s logic seems to be as follows: although we might be wrong regarding the people’s constitutional preferences, we are justified in erring on the side of overprotecting minority interests, because the majority has a real opportunity to respond through constitutional amendment. Incidentally, the people of Massachusetts amended the constitution in 1982 to read, “No provision of the Constitution . . . shall be construed as prohibiting the imposition of the punishment of death.” See Alan Rogers, “Success—At Long Last”: *The Abolition of the Death Penalty in Massachusetts, 1928–1984*, 22 B.C. THIRD WORLD L.J. 281, 352–53

Courts' limited reliance on ease of amendment to support judicial activism does not mean that ease of amendment has not impacted state court decisions. In fact, citizens frequently adopt constitutional amendments in response to state court rulings,<sup>318</sup> and there is evidence that state judges are affected by the politicization of state constitutional issues.<sup>319</sup> Despite these practical realities, however, for better or worse, this argument is not yet well recognized in existing state constitutional jurisprudence.

### C. *State Amendment Rules and Substantive Constitutional Priorities*

At first glance, state constitutional amendment rules would seem to provide more fertile ground for amendment-based arguments than the federal Constitution. Several states have constitutional amendment rules that establish some kind of subject-matter limitation on amendments. These subject-matter limitations can suggest substantive values that might inform judicial interpretation of other constitutional provisions. Surprisingly, however, few state courts have drawn substantive inferences from constitutional amendment rules. This Section analyzes the few opinions that have explicitly used amendment rules in this way and explores various substantive arguments suggested by state constitutional amendment rules that judges and litigants might utilize in the future.

#### 1. Variable Amendment and State Constitutional Priorities

There are eight states that organize their amendment rules around subject-matter “triggers.”<sup>320</sup> These subject-matter triggers can suggest a “hierarchy of constitutional values” that might inform judicial resolution of other constitutional disputes.<sup>321</sup> As Richard Albert has observed, “escalating tiers of formal entrenchment may signal constitutional designers’ intent to match the level of formal amendment difficulty to the significance of the role the designated [constitutional] provision occupies.”<sup>322</sup> Thus, if a court is faced with competing constitutional values, it might benefit from the “hierarchy” of constitutional values expressed in the constitution’s formal amendment rules.

New Mexico’s amendment rules provide the clearest example of a hierarchy of constitutional values captured in amendment rules.<sup>323</sup> In general,

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(2002) (quoting MASS. CONST., art. 26 (amended 1982)); *see also* Commonwealth v. Colon-Cruz, 470 N.E.2d 116, 117 (Mass. 1984) (holding the death penalty unconstitutional).

318. *See* Kenneth P. Miller, *Defining Rights in the States: Judicial Activism and Popular Response*, 76 ALB. L. REV. 2061, 2063–64 (2013) (explaining citizens’ reactions to state court decisionmaking).

319. *See* MILLER, *supra* note 170, at 214–15 (discussing anecdotal evidence from state judges about the impact of politics on judicial decisionmaking).

320. *See supra* note 278.

321. *See supra* Section II.A.

322. Albert, *supra* note 10, at 250.

323. *See* N.M. CONST. art. XIX, § 1.

amendments to the New Mexico Constitution must be approved by a majority of both houses in the legislature and a majority of the electors voting on the amendment in a general election.<sup>324</sup> However, amendments affecting education and the rights of Spanish-speaking residents must be approved by three-quarters of the legislature and the electorate.<sup>325</sup> These higher thresholds suggest a deep commitment to retaining stable constitutional protection regarding those issues.

Consider how New Mexico's amendment-rule triggers that deeply entrenched education policy and the rights of Spanish-speakers might be relevant to a state judge or litigant in New Mexico considering competing constitutional norms. In *State v. Samora*, the New Mexico Supreme Court considered whether a trial court constitutionally dismissed a juror who could not understand English.<sup>326</sup> The trial court reasoned that dismissing the juror was not a substantial error.<sup>327</sup> In overruling the trial court's decision, the Supreme Court noted that the New Mexico Constitution provides that the right to serve on a jury "shall never be restricted, abridged or impaired on account of . . . inability to speak, read or write the English or Spanish languages."<sup>328</sup> The court emphasized that "[t]his unique right" is "enshrined in our state Constitution as one of the few provisions that can be amended only by a supermajority of both legislators and voters."<sup>329</sup> The court therefore concluded that state judges have an affirmative obligation to "make every reasonable effort" to accommodate language barriers, including the use of an interpreter and even postponement for a reasonable time "if the continuance will be effective in securing an interpreter."<sup>330</sup> Thus, the court relied on the deep entrenchment of the protection for Spanish-speaking residents in resolving the conflict between the criminal defendant's right to a speedy trial and the Spanish-speaking juror's right to participate.

Although *Samora* is a powerful example of how courts can rely on amendment-based arguments to resolve constitutional conflicts, constitutional priorities are not always clear from amendment rules. New Mexico's

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324. *Id.*; see also CHUCK SMITH, THE NEW MEXICO STATE CONSTITUTION 175–79 (2011) (describing New Mexico's amendment rules).

325. N.M. CONST. art. XIX, § 1 ("No amendment shall restrict the rights created by Sections One and Three of Article VII hereof, on elective franchise, and Sections Eight and Ten of Article XII hereof, on education, unless it be proposed by vote of three-fourths of the members elected to each house and be ratified by a vote of the people of this state in an election at which at least three-fourths of the electors voting on the amendment vote in favor of that amendment."). The New Mexico Constitution also provides that these amendments must be approved by two-thirds of the voters in each county, but the New Mexico Supreme Court has ruled that this requirement violates the equal protection clause. *State ex rel. Witt v. State Canvassing Bd.*, 437 P.2d 143, 144 (N.M. 1968) (holding that the requirement of approval by two-thirds of the voters from each county was an equal protection violation).

326. 307 P.3d 328, 330 (N.M. 2013).

327. *Samora*, 307 P.3d at 330.

328. *Id.* at 331 (alteration in original) (quoting N.M. CONST. art. VII, § 3).

329. *Id.* (emphasis added).

330. *Id.* at 332 (quoting *State v. Rico*, 52 P.3d 942, 946 (N.M. 2002)).

amendment rules suggest a clear hierarchy of priorities because they impose higher voting thresholds for certain subjects. But most subject-matter triggers in state constitutional amendment rules operate slightly differently. In Mississippi and Massachusetts, for example, the amendment rules identify certain subjects that may not be changed by public initiative, but they do not impose higher voting thresholds or add additional decisionmakers to the process.<sup>331</sup> Conversely, the Illinois Constitution allows for only one issue (modification of the legislative article) to be amended by public initiative, but it does not impose any heightened voting requirements.<sup>332</sup>

Do these rules suggest a hierarchy of constitutional values? They may, if one assumes that amendment by public initiative is categorically easier than amendment by legislative proposal and referendum.<sup>333</sup> However, these subject-matter triggers do not necessarily reflect a ranking of constitutional values. They may instead reflect a design choice regarding the best institution to resolve certain issues. Excluding certain subjects from public initiatives may reflect a preference for representative lawmaking on issues that might especially benefit from deliberation.<sup>334</sup> There is evidence that this was the intent behind the Massachusetts subject-matter triggers for religious amendments and amendments relating to judicial independence.<sup>335</sup> Conversely, allowing amendment on certain subjects by public initiative might reflect a preference for direct democracy on those issues rather than a hierarchy of values.<sup>336</sup> There is evidence that this was the intent behind the Illinois

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331. MASS. CONST. art. XLVIII, § 2; MISS. CONST. art. XV, § 273.

332. ILL. CONST. art. XIV, § 2.

333. The empirical evidence on this issue is unclear. In some states, such as California, the initiative seems much easier to use than the legislative referral method. A recent survey of successful amendments between 2005 and 2015 in initiative states, however, found that just over 91% of amendments in those states occurred through the legislative-referral method, and only 7.5% occurred via the initiative, and less than 1% occurred through constitutional commissions. See Jonathan L. Marshfield, *Improving Amendment*, 69 ARK. L. REV. 477, 448–49 (2016).

334. One can imagine, for example, that constitutional designers might see value in subjecting changes to a constitution's bill of rights to the virtues of representative deliberation and eliminating the risks posed by direct democracy. Financial matters might also benefit from deliberation by representatives who have better access to all relevant information. See *Jones v. Bates*, 127 F.3d 839, 859 (9th Cir. 1997) (explaining the general benefits to representative lawmaking).

335. Russell Patrick Plato, Note, *Selective Entrenchment Against State Constitutional Change: Subject Matter Restrictions and the Threat of Differential Amenability*, 82 N.Y.U. L. REV. 1470, 1477 (2007).

336. Illinois rules are illustrative here, because they allow amendment by public initiative only regarding the structure of the legislature. See ILL. CONST. art. XIV, § 3. This choice seems intended to facilitate representative accountability and counteract legislative self-interest. See Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331 (2007). Obviously, direct democracy has benefits in reducing agency costs and promoting representative accountability.

subject-matter trigger.<sup>337</sup>

This ambiguity in subject-matter triggers may explain why it is relatively uncommon for state courts to infer a hierarchy of constitutional values from amendment rules, even those with subject-matter triggers. Nevertheless, arguments related to subject-matter triggers remain viable and important tools that judges and lawyers should utilize in ascertaining constitutional meaning.

## 2. Unamendable Provisions and State Constitutional Values

Amendment rules can also suggest constitutional values by making certain provisions unamendable. Unamendable provisions can suggest constitutional values for the same reasons that variable amendability can suggest a hierarchy of constitutional values: constitutional designers presumably wish to make only the most important constitutional values unamendable.<sup>338</sup> Thus, an unamendable provision may signal to a court that the provision is an especially important constitutional value.

As noted above, unamendable provisions are uncommon in contemporary state constitutions.<sup>339</sup> Nevertheless, there is a history of unamendability in state constitutions. The 1669 Fundamental Constitutions of Carolina, which John Locke drafted, famously declared that “these fundamental constitutions shall be and remain the sacred and unalterable form and rule of government . . . forever.”<sup>340</sup> The Delaware Constitution of 1776 also prohibited amendments “to the declaration of rights, the articles establishing the [S]tate’s name, the bicameral legislature, the legislature’s power over its own officers and members, the ban on slave importation, and the establishment of any one religious sect.”<sup>341</sup>

Currently, only Alabama and California contain unamendable provisions.<sup>342</sup> The Alabama Constitution states that “[r]epresentation in the

337. Stephanie Rae Williams, Note, *Voter Initiatives in Illinois: Where Are We After Chicago Bar Association v. State Board of Elections?*, 22 LOY. U. CHI. L.J. 1119, 1122–24 (1991) (quoting a convention delegate as saying that the provision was chosen to operate in areas where direct democracy “would be most needed because of the vested interest of the legislature in its own makeup”).

338. See *supra* Section II.B (discussing this and other explanations for unamendable provisions).

339. See *supra* Sections IV.A, IV.B. They are more common in national constitutions around the world. See LUTZ, *supra* note 9, at 170 (showing the amendment difficulty of the world’s constitutions); Albert, *supra* note 117, at 13 (“Over 50 percent of all new constitutions [around the world] entrench a formally unamendable provision.”).

340. Levinson, *supra* note 140, at 4 (alteration in original) (quoting John Locke, *The Fundamental Constitutions of Carolina*, in 1 THE STATUTES AT LARGE OF SOUTH CAROLINA 43, 56 (Thomas Cooper ed., 1836)).

341. Roznai, *supra* note 279, at 785; see DEL. CONST. of 1776, arts. I, II, V, XXVI, XXIX, XXX.

342. But see *supra* note 282 (listing several state constitutional provisions declaring certain rights and principles to be “inviolable”). The “unamendable” provision of Alabama’s constitution, however, has been held by the Alabama Supreme Court to be “dominant,” but *not* unamendable. Op. of the Justices, 81 So. 2d 881, 883–85 (Ala. 1955).

Legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendments.”<sup>343</sup> The California Constitution provides that “[n]o amendment to the Constitution . . . that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect.”<sup>344</sup>

In Alabama, courts have referred to this portion of Alabama’s amendment rules as the “dominant provision of the Alabama Constitution on the subject of representation in the Legislature,”<sup>345</sup> and they have relied on it as support for striking down legislation that would affect representation in the legislature.<sup>346</sup> Although no California case seems to have drawn any substantive inferences from the California provision, it remains a viable basis for inferring state constitutional values, such as a strong distaste for nepotism and a concern about the misuse of the public initiative.<sup>347</sup>

### 3. The Revision-Amendment Distinction and State Constitutional Priorities

As described earlier, the distinction between revision and amendment in state constitutional amendment rules has resulted in a body of case law addressing whether a proposed constitutional change “cuts to the core” of a state constitution.<sup>348</sup> This body of law provides insight into a state’s constitutional priorities. If a state considers a particular change to be so substantial that it is a revision requiring a constitutional convention, this signals that the subject at issue is likely a core constitutional value of great significance. These core values may be relevant to courts resolving claims between competing constitutional norms.

A case from California illustrates how the revision-amendment distinction might give rise to a hierarchy of constitutional values relevant to constitutional adjudication. In *Raven v. Deukmejian*, the California Supreme Court considered whether criminal procedure amendments to the state constitution were impermissible constitutional revisions.<sup>349</sup> The amendments

343. ALA. CONST. art. XVII, § 284.

344. CAL. CONST. art. II, § 12.

345. *Sims v. Frink*, 208 F. Supp. 431, 438 (M.D. Ala. 1962) (per curiam). *But see Op. of the Justices*, 81 So. 2d at 883–85 (holding that an unamendable provision was “dominant,” but, nevertheless, finding it to be amendable).

346. *See Frink*, 208 F. Supp. at 437–38.

347. *See Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247, 1263 (Cal. 1989) (stating that the provision was “enacted to prevent the initiative from being used to confer special privilege or advantage on specific persons or organizations”).

348. This is particularly true for challenges to amendments based on their qualitative impact on the constitution rather than their quantitative impact. *See Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1284–89 (Cal. 1978) (“[E]ven a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision . . .”).

349. 801 P.2d 1077, 1079 (Cal. 1990).



were designed to scale back the rights of criminal defendants and ensure that the California Supreme Court did not grant constitutional rights to criminal defendants beyond those required by the United States Constitution.<sup>350</sup> Several of the amendments at issue made substantive changes to rules regarding, among other things, post-indictment preliminary hearings, joinder of cases, and use of hearsay.<sup>351</sup> A key amendment, however, also stated that California courts could not construe the state constitution as granting criminal defendants greater rights than those afforded by analogous provisions of the United States Constitution.<sup>352</sup> The court held that this last change was an impermissible constitutional revision because it “would vest all judicial interpretive power, as to fundamental criminal defense rights, in the United States Supreme Court.”<sup>353</sup> According to the court, this reallocation of judicial power was a substantial alteration to the “preexisting constitutional scheme” because it “would substantially alter the substance and integrity of the state Constitution as a document of independent force and effect.”<sup>354</sup> Thus, although the court upheld the other changes as valid amendments, it struck down the provision attempting to tether the California Constitution to the United States Supreme Court’s rulings.<sup>355</sup>

*Raven* hints at a hierarchy of constitutional values in California that may be relevant to judicial resolution of other disputes. Indeed, *Raven* seems to turn on a deep commitment to state independence in California, especially independence from the federal government.<sup>356</sup> What transformed the amendment in *Raven* into an impermissible revision was the fact that the amendment effectively delegated authority to interpret the state constitution to the federal government.<sup>357</sup> According to the court, this sort of change

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350. *Raven*, 801 P.2d at 1080. The preamble to the amendments provided: “[The people] hereby find that the rights of crime victims are too often ignored by our courts and by our State Legislature, that the death penalty is a deterrent to murder, and that comprehensive reforms are needed in order to restore balance and fairness to our criminal justice system.” *Id.* The amendments then contained a series of changes to the constitution’s text regarding a variety of criminal procedure issues. *See id.* at 1080–82.

351. *Id.* at 1081; *see also* *Strauss v. Horton*, 207 P.3d 48, 93–94 (Cal. 2009) (discussing *Raven*).

352. *See Raven*, 801 P.2d at 1086 (discussing Crime Victims Justice Reform Act, Initiative Measure Prop. 115 (approved June 5, 1990) (codified at CAL. CONST. art. I, §§ 14, 24, 29, 30), *declared unconstitutional* by *People v. Sanders*, 797 P.2d 561, 589 (Cal. 1990)).

353. *Id.* at 1087.

354. *Id.* at 1087, 1089.

355. *Id.*; *see also* *Bess v. Ulmer*, 985 P.2d 979, 987–88 (Alaska 1999) (reaching the same conclusion regarding a nearly identical attempted amendment to the Alaska Constitution).

356. *Raven*, 801 P.2d at 1088–89 (“It is one thing voluntarily to defer to high court decisions, but quite another to *mandate* the state courts’ blind obedience thereto, despite ‘independent state interests[ ]’ . . . that might lead [state] courts to construe similar state constitutional language differently from the federal approach.”).

357. *Id.* at 1087.

struck at the core of California's Constitution and could be effectuated only by a constitutional convention.<sup>358</sup>

California's constitutional commitment to resist unnecessary federal encroachment could have applications in other contexts as well. For one thing, it should embolden litigants to urge California judges to interpret the California Constitution, especially its rights provisions, in light of California's unique tradition, history, and values.<sup>359</sup> In contrast to California's commitment to independent constitutional review, some states have held that, when the federal Constitution contains provisions analogous to a disputed state constitutional provision, state judges should defer to any interpretations given by the United States Supreme Court.<sup>360</sup> This sort of lockstep interpretive methodology directly contradicts California's commitment to state judicial independence. Indeed, *Raven* suggests that California judges have an affirmative obligation to engage in independent interpretation of the California Constitution.<sup>361</sup> *Raven's* reliance on impermissible revision to support independent judicial review presents a tool that litigants and judges should utilize in approaching state constitutional issues in California.

#### 4. Other Substantive Inferences

Finally, state constitutional amendment rules are eclectic in their structure and terms.<sup>362</sup> This creates the possibility that they may provide a sound basis for miscellaneous substantive arguments even without a clear hierarchy of amendment difficulty. In New Mexico, for example, the state constitution requires the secretary of state to publish all proposed amendments in both English and Spanish.<sup>363</sup> This requirement, which is unique among the states, suggests that New Mexico values political inclusion of Spanish-speaking

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358. *Id.* at 1085–86 (finding that a constitutional convention would be necessary, because the measure amounted “to a constitutional revision beyond the scope of the initiative process”).

359. See generally Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41 (2006) (discussing various approaches to state constitutional interpretation).

360. See TARR, *supra* note 147, at 180–82 (describing this approach to state constitutional interpretation); Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1502–20 (2005) (describing state decisions lock-stepping state constitutional provisions to federal standards).

361. *Raven*, 801 P.2d at 1087–89.

362. See generally TARR, *supra* note 147, at 6–28 (discussing the differing state approaches to constitutional amendment).

363. N.M. CONST. art. XIX, § 1 (stating that the secretary of state “shall . . . provide notice of the content and purpose of legislatively approved constitutional amendments in both English and Spanish to inform electors about the amendments in the time and manner provided by law”).

residents and recognizes that the government has an obligation, at some level, to communicate with residents in both Spanish and English.<sup>364</sup>

This amendment-based argument may have application in other contexts, too. Consider, for example, *Maso v. State Taxation and Revenue Department, Motor Vehicle Division*.<sup>365</sup> In that case, the defendant was cited for driving under the influence of alcohol.<sup>366</sup> At the time of his citation, the officer served him with a “notice of revocation” in English stating that his driving license would be revoked in twenty-one days if he did not submit a written request for a hearing within ten days.<sup>367</sup> The defendant could not read or speak English, and he failed to timely submit the hearing request.<sup>368</sup> When he finally obtained an attorney, the state denied his request for a hearing as untimely.<sup>369</sup> He then sued, claiming that the state violated the due process clause under the New Mexico Constitution by serving him with the notice only in English.<sup>370</sup>

Relying on precedent from various courts of appeals, the court found that the federal Due Process Clause was satisfied with an English-only notification.<sup>371</sup> The court noted, however, that the New Mexico Constitution can provide broader protections if the party claiming those protections can “provide reasons for interpreting the state provision differently from the federal provision.”<sup>372</sup> Because the defendant had not presented any reasons in the trial court to support interpreting the New Mexico Constitution differently, the New Mexico Supreme Court denied his due process claim.<sup>373</sup>

The petitioner in *Maso*, however, may have satisfied his burden if he had reviewed the amendment rules for New Mexico’s constitution.<sup>374</sup> New Mexico’s amendment rules establish a strong policy in favor of Spanish notifications by the government. Indeed, not only do the amendment rules require all proposed amendments to be published in Spanish and English, but they also deeply entrench constitutional provisions requiring all public school teachers to learn Spanish, and effectively require the government to provide

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364. See *State v. Samora*, 307 P.3d 328, 331 (N.M. 2013) (finding that the protection of non-English speakers’ rights “has been part of [New Mexico’s] judicial history since [its] territorial days”).

365. 96 P.3d 286 (N.M. 2004).

366. *Maso*, 96 P.3d at 287.

367. *Id.*

368. *Id.*

369. See *id.* at 287–88.

370. See *id.* at 288–89. Although *Maso* did not raise a federal constitutional claim per se, the Supreme Court of New Mexico typically addresses state constitutional claims under the Federal Constitution, as well. See *id.* at 289 n.1.

371. *Id.* at 289–91.

372. *Id.* at 288.

373. *Id.* at 288–89.

374. This suggestion sets aside, for argument’s sake, the procedural bars facing the petitioner because he did not raise his state constitutional claim at the trial court. See *id.* at 288–89.

interpreters for Spanish-speaking jurors.<sup>375</sup> Obviously, the federal Constitution does not contain any of these protections for Spanish-speaking citizens. Thus, the defendant in *Maso* could have constructed a strong (or, at the very least, plausible) argument from New Mexico's amendment rules for why the court should interpret New Mexico's due process clause to require notification in both English and Spanish.

#### V. A BRIEF COMMENT ON THE NORMATIVE IMPLICATIONS OF AMENDMENT CREEP

Despite the fact that some courts have relied on amendment rules to interpret other constitutional provisions, one may question whether the use of amendment rules to inform constitutional meaning is normatively desirable. Perhaps there is no good reason for judges and lawyers to venture into amendment rules when looking for guidance regarding other constitutional provisions. Perhaps the inherent indeterminacy offsets any marginal interpretive benefits that a judge or lawyer might gain from studying amendment rules. One might also be concerned that the practice of using amendment rules to inform constitutional interpretation could elevate certain constitutional values at the expense of other important priorities.<sup>376</sup>

It is not my purpose here to conduct a full normative defense of using amendment rules to ascertain constitutional meaning. It is worth noting, however, two important reasons why judges and lawyers should take amendment rules more seriously when engaging in structural analysis.

First, like most well-crafted structural arguments, amendment-based arguments can promote overall constitutional coherence by ensuring that provisions are not interpreted in isolation from other relevant provisions and institutions. Constitutional coherence is a normatively desirable goal in and of itself because it can promote determinacy and legitimacy in constitutional meaning.<sup>377</sup> As Michael Dorf has explained, holistic interpretation stems from the normative "premise that the meaning of the constitutional text is not exhausted by whatever concepts an isolated phrase connotes to the reader; further guidance can often be gleaned from the balance of the constitutional text."<sup>378</sup> Holistic interpretation can, in turn, promote a constitution's legitimacy by avoiding conflicting interpretations and internal conflicts within a constitutional text.<sup>379</sup>

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375. See N.M. CONST. art. VII, § 3; *id.* art. XII, § 8; *id.* art. XIX, § 1.

376. Here, I have in mind the concern that amendment rules could blur the distinction between popular lawmaking and the judicial role. For example, those who believe that the judiciary should operate primarily as an objective mediator between the people and minorities might find reliance on amendment rules to be normatively undesirable if amendment rules elevate majoritarian processes for constitutional change.

377. See Jackson, *supra* note 2, at 1287.

378. Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 953 (2002).

379. To be sure, constitutional coherence is "only one of several values that a constitution as law should aspire to." Jackson, *supra* note 2, at 1287. Constitutions also seek to "establish[ ] justice" and "sustain[ ] democracy." *Id.*

Notwithstanding these virtues of a holistic approach to constitutional meaning, judges and lawyers frequently overlook amendment rules when engaging in structural analyses. Judges and lawyers seem to assume that amendment rules are relevant only to lay out the technical procedures for amendment. In fact, as demonstrated *above*, amendment rules provide a rich source of constitutional information on a variety of subjects. Thus, for the sake of broader constitutional coherence, using amendment rules to interpret a constitution holistically would seem to be normatively desirable.

Second, and more specifically, increased attention to amendment rules can help ensure that democratic values receive appropriate consideration in the interpretive process. Judges rarely consider the details of the amendment power when marking out the boundaries of judicial review. Failure to consider the amendment process in evaluating judicial authority is problematic because the amendment power is the only direct check on judicial review. Amendment rules provide insight into how the people wish to remain involved in the evolution of constitutional law and, consequently, what role the judiciary should play in the process of constitutional change. Amendment rules will sometimes fail to provide clarity regarding the scope of judicial authority in a particular case, but they are surely an important place to look when considering the proper balance between judicial authority and democratic lawmaking processes. Judicial rulings that effectuate significant changes in constitutional meaning implicate the amendment power and the people's right to determine the meaning of their fundamental law. Amendment-based structural arguments are normatively desirable, therefore, because they protect popular sovereignty by ensuring that constitutional changes occur through authorized institutions.

But there is another side to using amendment rules in the interpretive process that can benefit courts. When faced with transformative constitutional cases, courts often worry about the "legitimacy" of their rulings. Their concerns stem, in part, from the so-called "counter-majoritarian difficulty," where courts invalidate laws approved by a majority to protect affected minorities.<sup>380</sup> Amendment rules are relevant to this concern. If one accepts that the judiciary's authority to render counter-majoritarian rulings stems in part from a popular delegation of authority to the judiciary through the constitution,<sup>381</sup> then amendment rules become relevant to understanding the terms of that delegation. Amendment rules can indicate how much control over constitutional change the people wish to retain, and, consequently, how much authority they wish to delegate to the judiciary. Thus, amendment rules can provide courts with a concrete source of counter-majoritarian authority that is itself grounded in popular sovereignty principles.

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380. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (2d ed. 1986).

381. This is by no means a settled issue of constitutional theory. See generally Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998) (tracing the historical popular and political responses to the counter-majoritarian difficulty).

Consider, for example, the amendment rules for the Massachusetts Constitution.<sup>382</sup> In crafting those amendment rules, the people of Massachusetts identified certain “excluded matters” that may not be addressed through popular initiative amendments.<sup>383</sup> The “excluded matters” include any “measure that relates to . . . the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts.”<sup>384</sup> Those limitations on formal amendment seem to indicate a deep commitment to judicial independence from popular, majoritarian politics.<sup>385</sup> This is a distinctive commitment not shared by many states that, instead, have popularly elected judges and liberal recall procedures.<sup>386</sup> Thus, Massachusetts’s amendment rules provide a concrete and specific foundation upon which courts might anchor counter-majoritarian rulings. Anchoring judicial authority in specific constitutional provisions in this way would seem to be an improvement on vague and idealized separation of powers platitudes because those provisions are more directly tied to an expression of popular sovereignty.<sup>387</sup>

#### CONCLUSION

Amendment rules do much more than provide the technical guidelines for changing a constitution’s text. In fact, they can contain meaningful and useful substance relevant to other constitutional issues. More often than not, however, courts and lawyers overlook amendment rules when engaging in structural, constitutional analysis.<sup>388</sup> My aim in this Article is to draw attention to amendment rules as a source of constitutional meaning by sketching some of the arguments that courts have already derived from amendment

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382. See *supra* notes 274–275 and accompanying text (describing and discussing Massachusetts’s amendment rules).

383. MASS. CONST. amend. 48, § 2.

384. *Id.*

385. See, e.g., *Commonwealth v. O’Neal*, 339 N.E.2d 676, 692 (Mass. 1975) (Tauro, C.J., concurring) (explaining that the Supreme Judicial Court of Massachusetts must remain independent of popular sentiment because, “[i]f we succumb to contemporary public opinion[,] we lose that requisite independence and impartiality demanded of us and fail totally in our purpose”).

386. See TARR, *supra* note 147, at 70 (noting that “nine states select[ ] state supreme court justices via partisan elections, thirteen in nonpartisan elections, and fifteen through a system of merit selection in which justices run in retention elections after their initial appointment”); *id.* at 4, 56–65 (discussing procedures in several states for the recall of state judges and specific judicial decisions).

387. See *O’Neal*, 339 N.E.2d at 692 (arguing in very general and theoretical terms that “[o]ppressed, disfavored or unpopular minorities would be the victims of any loss of judicial independence,” and that “minorities rely on the independence of the courts to secure their constitutional rights against incursions of the majority”).

388. Although I have identified various cases where courts have relied on amendment rules to interpret other constitutional provisions, these cases admittedly remain the exception, rather than the norm.

rules and suggesting a few arguments that seem strongly supported by existing amendment provisions.<sup>389</sup> Amendment-based reasoning will certainly not solve many of the problems inherent in constitutional adjudication, but broader recognition of amendment-based arguments would likely promote constitutional coherence and legitimacy. My hope is that lawyers and judges will pay greater attention to amendment rules and the structural inferences that they support when they engage in constitutional adjudication.

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389. This Article does not purport to present an exhaustive list of amendment-based arguments. There are surely other ways that amendment rules can shed light on constitutional meaning. Further inquiry is necessary to fully understand the potential and limits of amendment-based constitutional argument.