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Claremont Mckenna College

“It’s the Procedure, Stupid!”: Amendment
Procedures and Their Effects on Constitutional
Stability

Submitted to
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and
Professor Aseema Sinha

By
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for
Senior Thesis
Fall-Spring 2020
May 9th 2020

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Introduction:

Constitutions must change. No human can stop time from marching forward, nor the social, economic, cultural, and technological developments associated. As a result, constitutions necessitate mechanisms that allow for their own progress. The amendment procedure of a constitution—the rules that govern what changes can occur—is therefore fundamental to any constitutional system. Importantly, scholars, politicians, and citizens alike fail to take into account the significance of these amendment processes and their effects on the constitutions they govern. While usually treated as a constitutional after-thought, amendment procedures have one of the most pronounced, substantive effects on the permanence of a constitutional order. Amendment procedures not only create the environment in which amendments are passed, but they also inform whether or not constitutional change occurs *outside* the formal amendment process—via things like judicial reinterpretation. As a result, amendment procedures have a relationship with the constitutional stability of a nation—the extent to which the constitution’s principles and institutions are followed. It is the goal of this thesis to highlight this relationship, and reveal the effects amendment processes have on their constitutions.

This thesis posits a procedure-based theory—that amendments are introduced and passed as a result of their amendment process, and when analyzing constitutional developments, it is first fundamental to analyze that nation’s amendment process. Amendment processes are critical to constitutional stability, and should be crafted to promote this end. To elucidate this claim, this thesis challenges the arguments of many of America’s foremost legal scholars and their understanding of amendatory change in America. The modern scholarly consensus often views amendatory change in a vacuum, failing to take into account the ways in which amendment procedure influence amendment. While this at first appears like an intuitive, obvious conclusion,

amendment procedures are rarely discussed in this context. As a result, this thesis hopes to bring procedure to the forefront of the amendatory debate.

To do achieve this end, the first chapter of this thesis focuses on the modern scholarly arguments around the concept of amendment to show how formal amendment—rather than other informal means—is the best way to change a constitution in pursuit of the goal of constitutional stability. With this claim cemented, Chapter 2 focuses on the benefits of making certain constitutional unamendable, and this unamendability’s effects on constitutional stability more generally. Chapter 3 turns our attention to specific amendment processes and their effects, using Eastern Europe as a unique case study to elucidate the relationship between amendment processes and constitutional stability. The analysis found in Chapter 3 informs this thesis’ theory of amendatory change, which posits that amendment procedure effects constitutional stability via four main factors—the institutions involved, the level of difficulty, unamendability, and amendment culture. This theory is then applied to America’s constitution and history to highlight Article V’s effects on America today.

This structured analysis elucidates the importance of amendment, its relationship to amendment procedure, and this process’ effects on constitutional stability. By bringing amendment procedure back into the constitutional discussion, this thesis hopes to reveal how this important piece of the constitutional puzzle has been wrongly discounted and ignored. When scholars try to analyze the causes of a country’s constitutional stability, they must first understand that nation’s amendment procedure and its effects.

Chapter 1: Amendments and Their Effects

Before turning our attention to amendment processes, it is first important to establish the assumptions this thesis uses in its analysis. Namely, that formal amendment is the best avenue for constitutional change, and that amendment processes inform what amendments occur. The first section of this chapter focuses on the original normative justifications behind amendment procedures in America, and why the Founding Fathers felt it fundamental to include Article V. Subsequently, this chapter turns to a discussion of amendatory change more generally, explaining the arguments of those who oppose amendatory change in pursuit of constitutional stability. Many scholars contend that formal amendments ‘trivialize’ the constitution, or undermine its stability, but these claims are erroneous when the benefits of formal amendment are properly understood. To complicate matters further, scholars like Bruce Ackerman and Sanford Levinson contend that formal amendment is ‘superfluous’ and constitutional change regularly happens outside the amendment procedure in America. However, this paper views this informal amendatory change as problematic, as it actually undermines constitutional stability rather than reinforces it. This chapter concludes that formal amendment is the best avenue for constitutional change if the end is constitutional stability. In turn, amendment processes influence formal amendment, and have a pronounced effect on constitutional stability.

Section 1: The Original Justifications

The process of amendatory change is older than the American Constitution. The original normative justifications for formal amendments are the same as those used today. To understand amendments and their effects on a constitutional system, it is first important to understand their original justifications as well as modern empirical and theoretical arguments about them. Through a presentation of historical evidence and contemporary legal theory, a comprehensive picture of amendment will be painted.

The concept of amendment procedure was first developed in English speaking North America and was grounded in the idea of popular sovereignty.¹ In essence, advocates for amendment processes contended that if a constitution depends on the consent of the governed, those who are governed must be able to change that document. The first of these mechanisms was found in the 1776 Pennsylvania Constitution, which allowed for a convention process through which the constitution could be changed, bypassing the legislature.² Interestingly, Pennsylvania's amendment clause specified that this convention would be held every seven years, requiring a supermajority of public support to be ratified.³ When creating processes of this sort, the Founding Fathers had three main normative justifications. Primarily, the Framers of America's constitution understood that humans are imperfect and learn with time. The Framers viewed the new American state as an experiment, and it was necessary for "provision[s] to be made for altering institutions after experience revealed their flaws and unintended

¹ Donald S. Lutz, "Toward a Theory of Constitutional Amendment," *American Political Science Review* 88, no. 2 (1994): pg. 355-370, <https://doi.org/10.2307/2944709>

² Ibid.

³ Akhil Reed Amar, "Popular Sovereignty and Constitutional Amendment," *Responding to Imperfection*, (1995): pg. 89-116, <https://doi.org/10.1515/9781400821631.89>

consequences.”⁴ There were two pieces of this human fallibility argument—circumstances change, and so the document must change with those circumstances, and people learn from experience, coming up with better mechanisms for effective governance. As Alexander Hamilton explained in Federalist #85, “to balance a large state ... on general laws, is a work of [such] great difficulty, that no human genius, however comprehensive” can do this perfectly.⁵ Consequently, the Founding Fathers believed that “experience must guide [our constitutional understanding], time must bring it to perfection.”⁶

The second justification for the amendment process is based on the importance of a deliberative process in the creation of cogent solutions. It was the understanding of America’s founders that the more deliberative a process was, the better the outcomes would be in balancing the interests of all.⁷ As a result, the amendment procedure had to be onerous enough to ensure an extremely majoritarian decision—the Founders did not want their document changed unless the reasoning behind it was incredibly strong.⁸ Finally, the Founding Fathers wanted to cement their constitution as a higher law.⁹ By making the process by which the constitution changes more arduous than regular lawmaking, the distinction between normal legislation and constitutional provisions is made clear.

Many legal scholars—as well as the Founding Fathers themselves—point to the amendment process portion of the Constitution, Article V as the “implementing [of] Jefferson’s

⁴ Akhil Reed Amar, (1995): pg 89

⁵ Publius, “Federalist No. 85: Concluding Remarks,” *The Federalist Papers*

⁶ Ibid.

⁷ Donald S. Lutz, (1994): pg 355

⁸ Ibid.

⁹ Ibid.

formulation of consent by the governed.”¹⁰ However, there is even debate as to what the Framers truly understood the amendment process to amount to. The traditional view of Article V is that it is that it is a ‘government driven’ process. As Maryland’s Daniel Carroll explained at the Philadelphia Convention, their Constitution specifies the “mode” with which the document can be changed “[and] no other mode could pursued.”¹¹ However, James Madison disagreed with his assertion, explaining how “the people were in fact, the fountain of all power, and ... They could alter constitutions as they pleased. It was a principle in the Bills of Rights that first principles may be resorted to.”¹²

For Madison, Maryland’s constitutional amendment procedure specified the way by which “ordinary government could amend the Constitution” but it did not restrict the people from doing so.¹³ To justify his point, Madison contrasted the Maryland constitution with that of states like Virginia, “where no mode of change was pointed out by the [state] constitution.”¹⁴ Even without a formal process, Madison believed the people of Virginia still had a legal right “to alter or abolish at will,” so in his view, the Maryland clause was just an enabling of government to amend the constitution, rather than giving them a monopoly over it.¹⁵ As Framers James Wilson explained, “Constitutions are superior to our legislatures, so the people are superior to our constitution, [though] indeed the superiority... is much greater.”¹⁶

¹⁰ Akhil Reed Amar, (1995): pg 89

¹¹ Ibid.

¹² Ibid. pg 90

¹³ Ibid. pg 91

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

In the 1780s, there was no need to specify the principle of majoritarian rule, it was a generally understood and respected principle. As Akhil Reed Amar argues in *Popular Sovereignty and Constitutional Amendment*, “it literally went without saying” that majority rule was the “clear corollary of [Jefferson’s understanding] of popular sovereignty.”¹⁷ As a result, if the only mechanism for constitutional change was Article V, it would, as Patrick Henry of Virginia put it, “clearly violate first principles.”¹⁸ In this way, the Found Father’s believed that nothing prevents “the *People* themselves ... from exercising their legal right to alter or abolish government.”¹⁹ As a result, whether through a formal process or something outside of it, amendments are the means by which the people take control of their constitutional system.

At this point, it is beneficial to define constitutional stability and its relationship with the original justifications behind Article V. This thesis take constitutional stability to mean the permanence of the constitutional system. For a constitution to endure, its underlying moral principles and the institutions it creates must be ‘respected’ by the populace. Initially, this would lead some to conclude that amendatory change is structurally in tension with constitutional stability. However, as has been expressed earlier, all constitutions must go through some upkeep as society changes dramatically with time. As a result, if the goal of a constitution is its permanence, it must also allow for its own change. This is what creates the relationship between amendments, amendment procedure, and constitutional stability. If a constitution never changes, its institutions and principles will be undermined as they become out-of-step with the times. Amendments are the changes that a populace believes their constitution needs, and the

¹⁷ Akhil Reed Amar, (1995): pg. 100

¹⁸ Ibid.

¹⁹ Ibid.

amendment procedure governs what amendments are proposed and ratified. As a result, amendments facilitate constitutional stability, changing the constitution in ways that promote its permanence.

It would have been impossible for the Founding Fathers to have foreseen the degree of constitutional change that would eventually occur in America. As a result, it is unsurprising that they tried to create a relatively arduous amendment process that would force deliberation and insulate the citizenry from undermining the hard-fought rights they had just been afforded. However, in doing so, the Framers of America's Constitution created a constitutional system with unintended consequences. America has one of the least amended constitutions in the world due to its challenging amendment process. All of the modern literature on the topic of amendment and its effects is coloured by the American amendment procedure and the challenges it creates for citizens trying to use the formal process. As a result, American scholars' apprehension about formal amendment, as well as their preference for the use of judiciary as the mechanism for constitutional change, is a direct consequence of the country's amendment process, rather than a reflection of the inadequacies of formal amendment more generally. As a result, the subsequent section of this chapter takes up the arguments of modern legal literature on the topic, attempting to prove the importance of formal amendment and amendment procedures more generally.

Section 2: The Benefits of Formal Amendment

Consequently, there are a few assumptions that can be made about constitutions on the basis of these original amendment process justifications. The first is that every political system need to be changed at some point. The only constant in life is change—be it changes in a country’s economy, technology, and demographics, or a change in the populace’s values generally. As these changes occur, institutional problems arise as constitutional systems are rarely as forward-looking as citizens would like. When the constitution does not formally change via amendment, the legislative, executive, and judiciary branches usually step in to cumulatively change the constitutional system. The second assumption is that when constitutionally-bound political systems change, so too should the Constitution. As a result, all constitutions require periodic change through some process, and preferably, this process is the formal amendment one. Before justifying this claim, it is first pertinent to take up the arguments against formal amendment.

There are many constitutional scholars who are sceptical as to the actual benefit of formal amendment. This is especially true in America, a country which has rarely turned to formal amendment, but also has the oldest constitution in use today. As a result, it is necessary to consider the normative arguments against amendments, as well as the criticisms against the formalism of the process. In her work, *The (Myth of un)amendability of the US Constitution and the democratic component of constitutionalism*, Professor Vicki Jackson considers many of the arguments against formal amendment that are utilized by contemporary detractors.²⁰ A central issue that the anti-amendment intelligentsia finds with formal amendment is that the addition of

²⁰ Vicki C. Jackson, “The (myth of un)amendability of the US Constitution and the democratic component of constitutionalism,” *International Journal of Constitutional Law*, Volume 13, Issue 3, July (2015): pg 579, <https://doi.org/10.1093/icon/mov050>

new text could “clutter or trivialize the Constitution”, undermining its “unifying force and symbolic significance.”²¹ In America, there is a level of constitutional reverence matched by few other nations. As a result, citizens and scholars who appreciate the rights and entitlements the Constitution already gives them fear that amendment undermine the overall spirit of the Constitution.²² Constitutional veneration is a beneficial thing to democracy, as it results in a citizenry respecting the underlying constitutional principles and system.

With this in mind, it is understandable that scholars would want to protect this reverence by opposing formal amendment from a normative standpoint. In actuality, a proper amount of formal amendments increases, rather than diminishes, constitutional veneration. Obviously, if a constitution were amended too frequently, it could diminish this reverence in the way Jackson identified. However, rarely has this occurred in practice, and in countries across the world, amendments have promoted citizens’ support of their constitutional systems. Constitutional change is a necessity, and as a result, formal amendment allows the populace to involve themselves in constitutional matters. Through this deliberative process, citizens view their constitution more positively, as they played a role in crafting and consenting to the rules that govern them. If all amendatory change happens through the judiciary or other informal means, citizens can come to view their constitution with contempt, as they have new constitutional regulations placed upon them that the citizenry never consented to.

Another argument that Jackson takes up is the idea that, when people try to amend a constitution, it brings to the forefront “fundamental issues about [the] character” of the nation.²³

²¹ Vicki C. Jackson, (2015): pg 579

²² The idea of ‘the spirit of the Constitution’ will be brought back up later, when the questions of eternity clauses and unamendability in the amendment process are taken up.

²³ Vicki C. Jackson, (2015): pg 581

As a consequence, any serious attempt at formal amendment likely puts an incredibly divisive political question on the national agenda. Divisive political questions often hurt “national cohesion,” and even more integrally, “no country can ... [argue] continuously” about the fundamental nature of their nation.²⁴ If there is constant disagreement as to what is integral to a constitution, the whole point of a constitution—to have established rules and norms through which a society is governed—is undermined. As Madison stated in Federalist No. 43, too many amendments may “render [a] constitution ... too mutable.”²⁵

Differently, many critics of amendments are law scholars who to some degree normatively support judicial supremacy in the constitutional scheme. These supremacists fear that amendments which overrule Supreme Court decisions could diminish the legitimacy of the Court. Judicial supremacists contend that for a democracy to function, there must be some ‘settler of constitutional questions’, and the Court is the best institution to serve in this capacity. As a result, citizens must accept Court decisions, as constant disagreement in this regard undermines the rule of law, the role of the Court, and general constitutional stability. This is especially true in contexts where the Court is protecting minority rights. In this way, the “risks of too frequent amendment” may outweigh the benefits of amending at all.²⁶

Another concern, raised by the US Solicitor General Walter Dellinger, was a fear that “frequent amendment [will] threaten minority rights.”²⁷ In his testimony about the proposed flag-destruction statute after the Supreme Court’s decision in *Johnson v Texas*, Dellinger expressed

²⁴ Vicki C. Jackson, (2015): pg 581

²⁵ Publius, “Federalist No. 43: The Same Subject Continued: The Powers Conferred by the Constitution Further Considered,” *The Federalist Papers*

²⁶ Vicki C. Jackson, (2015): pg 591

²⁷ Ibid. pg 592

that he preferred a statutory response to the decision, rather than a constitutional amendment.²⁸ Dellinger feared that the usage of amendment in this context would incentivize special interest groups who want to “leap over constitutional barriers,” undermining both the Constitution and the Supreme Court’s role in it.²⁹ At the same time, Dellinger contended that an amendment in this context could lead to an “addiction” by the populace to amendatory change, an issue he viewed as a threat to the constitutional system.³⁰

Differently, University of Chicago law professor David Strauss, who has argued nineteen cases before the Supreme Court, contends that for countries with a British origin, constitutional interpretation is much more common-law based, rather than purely textual.³¹ As a result, Strauss believes that the American Supreme Court, contrary to popular belief, interprets “the Constitution more or less in line with the ... changes in circumstances, understandings, and majoritarian demands” that would otherwise lead to a successful constitutional amendment.³² Strauss’ claim is supported by some modern empirical analysis, with works like *How Public Opinion Constrains the U.S. Supreme Court* showing that there is a “real, substantively important” effect of public opinion on judicial decision-making.³³ The common-law criticism of amendment is one of the most valid. However, it operates under the assumption that judicial

²⁸ Vicki C. Jackson, (2015): pg 582

²⁹ Ibid.

³⁰ Rosalind Dixon, "Constitutional Amendment Rules: A Comparative Perspective" *University of Chicago Public Law & Legal Theory Working Paper* No. 347, (2011): pg 96-109

³¹ Ibid.

³² Ibid.

³³ Christopher J. Casillas, Peter K. Enns, and Patrick C. Wohlfarth, “How Public Opinion Constrains the U.S. Supreme Court,” *American Journal of Political Science* 55, no. 1 (2010): pp. 74-88, <https://doi.org/10.1111/j.1540-5907.2010.00485.x>

supremacy is one of the most important principles to follow, with little regard for commitments to the ‘consent of the governed’ principle the Founder’s originally based the amendment process on.

Strauss and Dellinger’s criticisms are somewhat unfounded. Dellinger’s fears about minority rights being undermined by formal amendment are prescient, but fail to place amendatory change in the context of the amendment process that governs it. At the least America, with its supermajoritarian voting requirements, protects minority rights from a procedural standpoint. At the same time, most democratic countries have included unamendable provisions that permanently enshrine basic rights within their constitutions.³⁴ As a result, while Dellinger’s claims are somewhat applicable in America, they do not reflect the effect of formal amendment across the world. In turn, Dellinger falls prey to the same issue countless legal scholars do in the context of amendment—they fail to take into account the amendment procedure and its effects on amendatory outcomes.

Differently, Strauss’ contention that the Supreme Court generally rules in line with changing circumstances is not reflective of the effectiveness of that institution in facilitating amendatory change, but instead reveals the failures of Article V in promoting formal amendment. Common-law judicial interpretation is a constitutional reality in countries with a British origin, but it in no way means the most consequential constitutional questions should solely be settled by nine unelected justices. As will be further explained later on in this chapter, an over reliance on the judiciary to foment amendatory change undermines constitutional stability, as citizens become alienated from the Constitution that governs them. While the American Supreme Court has been effective in ensuring that the Constitution keeps up with the times, their increased

³⁴ A deeper discussion of unamendability is found in Chapter 2

activism in this regard is reflective of a fundamental amendatory problem in America, rather than proof that institution should be the sole arbiter of constitutional change.

University of New South Wales Professor Rosalind Dixon presents two more reasons as to why constitutional stability should take pro-tanto priority over amendment. Dixon points to the fact that constitutional democracy creates a system in which political competition is possible. If this system is too flexible, a slim majority that has political control for a certain period of time could “insulate itself against future political competition.”³⁵ One of the main functions of a constitution is to establish the ‘rules of the game’ and ensure that “momentary majorities” are unable to rig the system.³⁶ In this way amendment—and definitely too frequent amendment—could undermine the constitutional order. The other issue Dixon thinks amendments could cause is a deterioration in “constitutional pre-commitment[s]” like the protection of minority rights.³⁷ Citizens of a nation may agree that they should make constitutional commitments at one time, that they in the future, for partisan reasons or “momentary passions” decide to sacrifice.³⁸ Interestingly, these issues are less with formal amendment itself, and are actually with amendment processes more generally. As a result, Dixon’s criticisms in this context reflect the importance of amendment procedures and their effects on amendatory change. If an amendment process is too facile, the issues Dixon raises could arise. However, when an amendment process is properly crafted to allow for the ‘right’ amount of amendment, the problems Dixon identifies

³⁵ Rosalind Dixon, (2011): pg 100

³⁶ Ibid.

³⁷ Ibid.

³⁸ *ibid.*

are nullified. A deeper discussion of amendment processes, and what the ‘right’ amount of amendment is, is found in Chapter 3.

While these criticisms are valid insofar as too many amendments are likely negative to a functioning constitutional democracy, Dixon still believes there are clear benefits to amendment, especially when compared to an over-reliance on the Supreme Court or legislative responses. Dixon grounds her pro-amendment argument in five main justifications. Primarily, Dixon believes that amendment focuses the attention of citizens onto an important constitutional question.³⁹ For an amendment to succeed, proponents must identify the “constitutional principle at stake”, find areas of consensus, and respond to criticisms by opponents.⁴⁰ As a result, a more deliberative, democratic process occurs, something in line with the Founder’s original normative justifications for amendment. Similarly, this inclusive process has a finality to it that Court decisions do not—people often contest judicial decisions questioning the legitimacy of the Court.

For example, during his Supreme Court nomination process, Robert Bork testified that he would overturn *Roe v Wade*, even though the constitutional question of abortion had already been settled in the Court.⁴¹ As there is still no formal abortion amendment today, constitutional scholars and justices can still create reasonable legal arguments as to why the *Roe v Wade* decision should be overturned. Although some things should stay open to debate, it is necessary that most constitutional questions are settled in a conclusive way, as constant debate over what truly amounts to the ‘spirit of the constitution’ is problematic to constitutional stability.⁴²

³⁹ Rosalind Dixon, (2011): pg 101

⁴⁰ Ibid. pg 102

⁴¹ Ibid.

⁴² The reasons as to why constant debate is problematic have already been made earlier in this section.

Another benefit of formal amendment that Jackson points to is that it is an “important check on the judiciary.”⁴³ The vast majority of constitutions in use today give members of the judiciary unlimited tenure, with some going so far as to have no mandatory retirement age.⁴⁴ Justices usually operate within a ‘jurisprudential consensus,’ often binding them to follow decisions they may not agree with.⁴⁵ This is evidenced by American Supreme Court Justice John Paul Stevens support of six different amendments to respond to what he thinks are “lines of judicial decisions ... in need of correction.”⁴⁶ Justice Stevens may think a certain line of decision-making was erroneous, but he would follow it out of respect for the principle of *stare decisis* and other jurisprudential considerations. Without an amendment, justices are bound to past decisions in this way. While countries with regular constitutional court turnover may need less of an amendatory response to judicial decisions than in America, it is still an important tool with which a constitution can be ‘democratized’. A corrective amendment does nothing to undermine the legitimacy of a Supreme Court, but instead protects that Court’s legitimacy by preventing them from having to ‘overrule’ past decisions.

In a similar vein, Jackson believes amendments allow more people to be involved in answering questions as to the fundamental nature of a country, something she thinks is normatively advantageous to democracy.⁴⁷ While the American federal legislature has 535 members, its Court has nine. If the American legislature was active in proposing amendments, the process of constitutional discourse would already be more inclusive than if it was solely

⁴³ Vicki C. Jackson, (2015): pg 593

⁴⁴ Article III empowers the American federal judiciary to an extent that most novel constitution’s avoid.

⁴⁵ Vicki C. Jackson, (2015): pg 593

⁴⁶ Ibid. pg 596

⁴⁷ Ibid.

litigated through the constitutional court system. Amendment processes—even the least arduous ones that require a simple majority in the legislature—are a democratic avenue for constitutional discourse to occur. It is important to note that this argument is in no way contending that all constitutional questions should be put to amendment. Instead Jackson’s points are meant to highlight how the process of amendment is an often overlooked, important means for change.

The final point Jackson makes about amendments is that they seem to “influence jurisprudence in directions similar to those of the amendment[s] [themselves]” even if they fail to pass.⁴⁸ When a constitutional court makes a decisions that isn’t bolstered by “political mobilizations,” the ruling is relatively ‘weak’, while they are strongest “when they harmonize with more broadly held views.”⁴⁹ This is evidenced by the history of the Equal Rights amendment (ERA). First introduced in 1923, the ERA was not sent to the states until 1972.⁵⁰ The political power of social movements in support of the ERA led the Court to change its equal protection jurisprudence before the amendment ever began the ratification process. As a result, by 1972, judicial decisions came close to covering almost everything the Equal Rights amendment sought to accomplish.⁵¹

The most astute readers will begin to see an interesting reality of amendment—its direct relationship with the judicial system. When observed in a vacuum, America’s Supreme Court appears powerful relative to other countries, as it is constantly ruling on consequential matters. However, this Supreme Court is so active because its amendment procedure is in such disuse.

⁴⁸ Vicki C. Jackson, (2015): pg 597

⁴⁹ Ibid. pg 598

⁵⁰ Ibid.

⁵¹ Ibid.

The most valid criticisms of amendment are based in a belief that the Supreme Court should be the arena in which constitutional matters are decided. However, this American understanding is created by the challenges associated with Article V, rather than being truly based on the benefits of judicial supremacy. Importantly, Dixon's arguments in defence of amendment are grounded in its benefits to the Supreme Court as a constitutional institution. Namely, Dixon contends amendments have a finality to them that court decisions do not, allowing debates to be settled. Moreover, Dixon argues that amendments allow citizens to place a check on problematic judicial decisions, and influence jurisprudence more generally. A judicial system is one of the most important institutions in any constitutional order. As a result, if citizens view their judiciary in contempt and feel they have been alienated from the amendatory process, constitutional stability is undermined. This contempt is much less likely to occur in a constitutional system where constitutional questions are regularly settled by amendment. At the same time, as Dixon identified, amendments promote respect for the judiciary as an institution and its role in interpreting the constitution. When justices make rulings with novel amendments as the basis, it adds weight to their decision-making that pure stare-decisis could never afford. As a result, amendatory change through the formal amendment process promotes a functioning judiciary, as well as constitutional stability more generally.

While amendment's relationship with constitutional stability has been revealed, the importance of the formal process has not. Scholars agree that for a constitution to function, it must be able to change, but some contend that using the formal amendment process is unnecessary. As a result, much of the contemporary amendment debate is centred around what truly constitutes a substantive 'constitutional change', and whether formal amendments are really reflective of such changes. In this way, opponents of 'amendment formalism' view the process as

a necessary constitutional function, but largely superfluous. This thesis takes amendment formalism to be a necessary means in promoting the end of constitutional stability. When amendment is regularly informal, happening through other means like judicial reinterpretation, it undermines constitutional stability. As a result, the claims of legal scholars Sanford Levinson and Bruce Ackerman will be presented to highlight the arguments against amendment formalism. Interestingly, Ackerman and Levinson's constitutional understanding is not in contravention with the argument of this thesis. Instead, these scholars views highlight the extent to which America's amendatory perspective is informed by their arduous amendment process, rather than being reflective of a failure of formal amendment itself. Both scholars attempt to identify informal paths of amendatory change used in America, explaining how the formal process has been disregarded. While these informal paths can lead to constitutional development, they are deleterious to constitutional stability when compared with formal amendment.

In his aptly-titled work *How Many times has the US Constitution been Amended?*, Levinson delineates between constitutional interpretation and amendment, with amendment amounting to "genuine [constitutional] transformation."⁵² For Levinson, formal amendment can sometimes lead to no 'genuine transformation' of the constitution, while a judicial decision could, under this definition, amount to constitutional amendment.⁵³ As a result, Levinson believes that a constitutional development's effect is more important than the procedure it goes through. For example, Levinson could argue that based on the Supreme Court's equal protection clause jurisprudence, women are afforded equal rights under the Constitution. As a result, if the

⁵²Sanford Levinson, "Accounting for Constitutional Change (Or, How Many Times Has the United States Constitution Been Amended? (a) <26; (b) 26; (c) >26; (d) all of the above)," *Constitutional Commentary*, Volume 8, Number 2 (Summer 1991): pg 409-431,

⁵³ Sanford Levinson, (1991): pg 411

Equal Rights Amendment had passed in 1970s, it would not have been a ‘genuine transformation’ of the constitution, and while it may have been a formal amendment, it would not truly amount to an ‘amendment’ of the Constitution. This conflicts with the traditional constitutional understanding, espoused by Justices like Felix Frankfurter, who believe that “nothing new can be put into the Constitution except through the amendment process. Nothing old can be taken out with the same process.”⁵⁴

Importantly, this disagreement has raged since America’s founding. When attacking the legitimacy of the First Bank of the United States, President James Madison contended that the constitution was one of “limited and enumerated powers” such that “no power ... not enumerated could be inferred from the general nature of government.”⁵⁵ In promotion of this view, Madison vetoed an 1817 piece of legislation that was focused on internal infrastructure improvements.⁵⁶ Although Madison acknowledged the necessity of these developments, he believed that Congress did not have the power to perform such an action.⁵⁷ As a result, Madison argued that for this legislation to be constitutional, there must be an amendment in relation to national powers.⁵⁸ While Madison’s argument was convincing, it appears that over time, the formalists lost out to those who view many constitutional questions as open-ended. While Levinson does not take a stance as to which process is normatively superior, he believes that the American Constitution is regularly amended without any formal process.⁵⁹

⁵⁴ Sanford Levinson, (1991): pg 415

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid. pg 416

It is important to note that the founding formalists seemed to lose the debate to the functionalists like Levinson. However, this is not due to a failure in the normative strength of Madison's arguments. Instead, it is reflective of the challenges of the Article V amendment process. Had America's amendment process been an easier endeavour, with citizens turning to it rather than the Supreme Court for fundamental constitutional developments, Levinson's argument would not carry weight. As a ramification of the challenges associated with Article V, Levinson's opposition to formal amendment and his contentions about constitutional developments are seemingly valid.

Consequently, there are clear differences between amendatory change and interpretation. Levinson believes that for a political act to be a genuine constitutional interpretation, it must be one of two things—a judicial decision that uses the existing “body of legal materials” as its basis, or a legislative/executive action that is not ‘disallowed by the constitution.’⁶⁰ When a branch of government performs an action that is not one of these two things, but has a “relatively marginal” effect, it could be described as an amendment. The 1934 case *Home Building & Loan Association v Blaisdell* reveals the extent to which a court decision, that purports to be an interpretation, can in practice amount to amendment.

Home Building & Loan Association v Blaisdell considered the question as to whether a Minnesota state law in defence of borrowers violated the Article I Section 10 Contracts Clause.⁶¹ The clause states that “no state shall ... pass any ... law impairing the obligation of contract.”⁶² The court, led by Chief Justice Hughes, decided that this clause meant that states could not pass

⁶⁰ Sanford Levinson, (1991): pg 416

⁶¹ *Home Building & Loan Association v Blaisdell*, 290 U.S. 398 (1934)

⁶² *The Constitution of the United States*, Article I Section 10

laws that “unreasonably impaired contracts” but could pass ones “deemed necessary to important state ends.”⁶³ In defence of his decision, Hughes contended that the economic emergency in the country made the conditions where such a law could be passed.⁶⁴ In dissent, Justice Sutherland explained how the Contracts Clause was specifically included in the Constitution to “forestall [exactly this type of] debtor relief legislation.”⁶⁵ In the face of such criticism, Hughes still concluded that no amendment was necessary, as the justifications for such an action was still ‘found within the Constitution’s enumerated powers.’⁶⁶ Interestingly, Sutherland’s arguments against the constitutionality of this Minnesota law followed the same line of reasoning as Madison’s. However, just as how Madison eventually lost his battle for enumeration, so too did Sutherland.

As a result, the *Home Building & Loan Association v Blaisdell* decision is an example of what Levinson would describe as a political action that doesn’t use existing jurisprudence or isn’t clearly found within the Constitution’s clauses. In this way, this decision is an example of an ‘informal’ amendment. As has been mentioned earlier, it is problematic that the Supreme Court regularly steps in to make such consequential rulings. If America’s amendment process had less stringent requirements, more amendments would be passed and citizens would more regularly turn to amendment as a valid option for constitutional development. In turn, the Court would feel less pressure to rule with ‘enumeration’ as the basis as it did in *Blaisdell*, and the constitutional question as to the legitimacy of such laws would be settled. In turn, citizens today would be

⁶³ Sanford Levinson, (1991): pg 418

⁶⁴ Ibid.

⁶⁵ Ibid. pg 419

⁶⁶ Ibid.

unable to take issue with New Deal legislation had Roosevelt and other advocates pursued amendment, rather than the Supreme Court, as the avenue for constitutional change. When there is a high level of demand for amendatory change—as was seen in the Great Depression—and no opportunity for formal amendment, other institutions have to step in to facilitate the developments or the Constitution will fall out of line with the goals of its citizens. This undermines constitutional stability, as functioning institutions and citizens belief in them is paramount to any constitutional order.

Differently, Levinson argues that many formal amendments are somewhat superfluous, and in practice do not lead to substantive change in the way some informal amendments often do.⁶⁷ For example, in the 1966 case *Harper v Virginia Board of Elections*, a 6-3 majority on the Court ruled that the Virginia poll tax violated the Equal Protection clause of the 14th amendment.⁶⁸ This judicial interpretation amounted to what Levinson would describe as an amendatory change to the Constitution. Interestingly, just two years later, the 24th amendment was finally ratified, banning such poll taxes. As a result, while the 24th amendment had some effect in the ways Vicki Jackson points to, insofar as it ended any further debate about the constitutionality of such taxes, it did not change the Constitution nearly to the degree that *Harper v Virginia Board of Elections* did. This example elucidates Levinson's argument about the differences between amendatory and interpretative changes to the Constitution, and how informal developments could amount to either. *Harper v Virginia Board of Elections* functionally served as a constitutional guarantee of the same goals as the 24th amendment. In turn, Levinson contends that the judicial decision amounted to a 'constitutional amendment' while the formal amendment

⁶⁷ Sanford Levinson, (1991): pg 420

⁶⁸ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966)

did not. With these examples in mind, Levinson's skepticism about there truly being a way to deduce the total number of constitutional amendments appears valid.

Importantly, the fact that one is unable to fully deduce the number of 'real' amendments to the American Constitution is not reflective of the inadequacies of formal amendment. Instead, this reality is reflective of the challenges associated with the Article V amendment process, and alludes to a problematic constitutional environment in America. If America's citizens, politicians, and legal scholars are unable to comprehend their Constitution and the ways it has changed, constitutional stability is undermined. As Professor Vicki Jackson explained, a constitutional society can not regularly disagree about the fundamental structure of their constitution. Citizens need to be in agreement as to what is constitutional, and then operate within those boundaries. It is also a reality that justices and politicians will continue to disagree about what is constitutional, but the level of disparity in their arguments is exacerbated and increased when there is no formal amendment. Without amendment, the 'Overton window' —the range of acceptable policies— widens such that agreement may never be found. When politicians and citizens are unable to find a constitutional consensus, they become alienated from their constitution and the institutions it creates. In turn, a dearth in amendment, and its widening of the Overton window, lead to a deterioration in constitutional stability.

Another opponent of formalism in their understanding of amendatory change is Yale law professor Bruce Ackerman. Somewhat different from Levinson, Ackerman believes there are two 'lawmaking tracks', a normal track where laws are made by the legislature or through executive action, and the higher track, where principles are established by "spokespersons for the people."⁶⁹ As a result, Ackerman believes that American constitutional development is marked

⁶⁹ Bruce Ackerman, "Higher Lawmaking," *Responding to Imperfection*, 1995, pp. 63-88, <https://doi.org/10.1515/9781400821631.63>)

by “rare moments when movements for constitutional transformation earn broad and deep support for their initiatives” rather than a series of 27 amendments.⁷⁰ For these transformations to occur, Ackerman contends that there are periods of ‘constitutional politics’ where an “engaged citizenry” discuss fundamental issues, in between periods of normal politics.⁷¹ For example, in 1860, it was still an open constitutional question as to the legality of slavery, but by 1870, the consensus was that slavery was unconstitutional.⁷² The decade in between these two times amounted to what Ackerman would describe as a period of ‘constitutional politics.’ While there was a few formal amendments during this time, there was a much more integral change in the ‘higher law’ of America.

Before delving further into examples of these periods of constitutional politics and the mechanisms for change they use, it is first important to establish the theoretical basis for Ackerman’s argument. Fundamental to Ackerman is the fact that there is no part of Article V that says the Constitution “may only be amended through the following procedures and in other way”.⁷³ As a result, Ackerman doesn’t want to give the ‘founding amendatory rules’ a monopoly “over the methods of amendment.”⁷⁴ Ackerman believes that this wasn’t an accident by the Founders, as he believes “American’s owe their remarkable constitutional continuity only to their repeated successes in unconventional adaptations of pre-existing institutions at moments of grave crisis.”⁷⁵ This claim is somewhat erroneous, and has been shown in prior sections, there was

⁷⁰ Bruce Ackerman, (1995): pg 64

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid. pg 72

⁷⁴ Ibid.

⁷⁵ Ibid. pg 74

disagreement between the Framers as to what the amendment process would look like in the novel American Constitution, with many wanting to give the “founding amendatory rules” a monopoly. Ackerman’s second claim, that America’s constitutional continuity—‘stability’—was created by institutions adapting to amend the Constitution, is reflective of the failures of the formal amendment process rather than the effectiveness of these institutions in settling constitutional questions. Ackerman falls prey to the same issues of Levinson—while functionally, American institutions have been effective in promoting constitutional stability by informally amending the constitution when there is demand for it, this stability would be better supported through the use of formal amendment.

Interestingly, Ackerman’s conclusions about the passage of the 14th amendment support the arguments in favour of amendment formalism. Ackerman believes the constitutional change associated with the 14th amendment happened in four stages, which Ackerman uses as a framework for the transformations he describes. The first stage of this process was a ‘constitutional impasse’ in 1866.⁷⁶ While the 13th amendment had passed with support of President Andrew Johnson, he was an avowed opponent of the 14th amendment. However, Congress was overwhelmingly Republican, and refused to allow the ‘constitutional conservatives’ to have their way. As is emblematic of this ‘impasse stage’, both branches of government “challenged the very right of their opponent to speak on fundamental matters in the name of We The People.”⁷⁷ Congressional Republicans feared that if they put the amendment to ratification before having decisive support, the 11 states returning to the Union from the

⁷⁶ Bruce Ackerman, (1995):.

⁷⁷ Ibid. pg 75

Confederacy would be able to ‘veto’ such an effort.⁷⁸ As a result, the 1866 mid-term election was centred on the passage of the 14th amendment, with Johnson trying to bolster opposition nationally.⁷⁹ This led to what Ackerman described as the second stage of the transformation process, the electoral mandate stage.

The 1866 election proved to be an emphatic victory for the Republicans, with them seizing an overwhelming majority in both houses of Congress.⁸⁰ Before the election, both Johnson and Congress purported to speak for the citizens of America. However, after the election, Johnson was unable to claim the same political legitimacy he could prior. Johnson continued to oppose the amendment, leading 10 states in opposition. Congress, now with a legitimate justification as to why they are the ‘voice of We The People’, began to undermine the ‘dissenting political institutions’ that opposed the amendment.⁸¹ First, Congress passed the Reconstruction Act, which laid out a series of conditions the Confederate states would have to meet in order to be readmitted to the Union. One of the conditions the Republicans’ ascribed was the ratification of the 14th amendment, exemplifying Ackerman’s understanding of Article V—it may be the only formal amendment process, but it is not the only mechanism to facilitate amendatory change. At the same time, congressional Republicans began the impeachment process against Johnson, as he attempted to make the 14th amendment an issue of the 1868 election.⁸² Johnson understood that if he were to be impeached and convicted by the Senate, it would permanently undermine the

⁷⁸ Bruce Ackerman, (1995): pg 76

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid. pg 80

⁸² Ibid. pg 81

institution of the presidency.⁸³ As a result, before the vote was put to the Senate, Johnson reversed his position on the 14th amendment, reflecting what Ackerman describes as the fourth stage of this constitutional process, the ‘switch in time’.⁸⁴ With Johnson’s backtracking on his previous stance, the 14th amendment was ratified, creating a ‘constitutional consensus’ as to the rights of people of colour in America.

The history of the passage of the 14th amendment reveals each of the four stages Ackerman describes. The first is a constitutional impasse or conflict, where different branches of government disagree about constitutional understanding, leading to a higher lawmaking situation.⁸⁵ The second is the ‘constitutional support’ stage, where those involved in the higher-lawmaking process advocate for their beliefs nationally, usually using an electoral victory as the basis for contending that the public supports their views.⁸⁶ As was evidenced by the process of ratifying the 14th amendment, it is challenging for a branch of government to claim legitimacy after losing an election. This leads to the third stage, where the branches of government begin to challenge the right of others to speak on the constitutional matter, such as when the Republican’s passed the Reconstruction act with its rigid provisions or their impeachment of Johnson.⁸⁷ This leads to the fourth stage, the ‘switch in time’ or moment of ‘constitutional consensus, where those involved in the higher lawmaking process finally agree as to what is best for the country.⁸⁸ If the Reconstruction Republicans had not passed these amendments, and instead relied on the

⁸³ Bruce Ackerman, (1995): pg 81

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid. pg 82

⁸⁷ Bruce Ackerman, (1995): pg 82

⁸⁸ Ibid. pg 84

Court to informally amend the Constitution to ensure the equal rights of black Americans, it is likely that the debate would never be settled. One can easily imagine a modern American arguing that equality of race is found nowhere in the Constitution, and that the Court was erroneous in ruling so. This is reflective of how formal constitutional amendments shrink the Overton window such that reasonable, productive political debate can occur with everyone operating under the same assumptions.

Consequently, Ackerman believes that the Reconstruction Republicans established a mechanism for constitutional change outside of the Article V process which is used to this day in times of higher law making. Ackerman points to President Franklin Delano Roosevelt's use of this higher-lawmaking process as the next most quintessential example. However, President Roosevelt's usage of this same four step mechanism in the New Deal era lead to three very different, fundamental ramifications for amendatory change. The first of these effects was to the executive branch. President Roosevelt ran on a transformative platform, and although he had a wide electoral mandate, he still faced opposition from the Supreme Court.⁸⁹ As a result, Roosevelt brought these constitutional questions to forefront of the 1936 election, formalizing the role of the President as a constitutional thought leader.⁹⁰ In trying to facilitate the changes he ran on in the face of a hostile Court, Roosevelt's attempted to expand the number of justices from 9 to 15, ensuring he had a majority on the Court.⁹¹ This had an unseen consequence, the effect of which has become more pronounced with time—the creation of “transformative judicial

⁸⁹ Bruce Ackerman, (1995): pg 78

⁹⁰ Ibid.

⁹¹ Ibid.

appointments.”⁹² After Roosevelt’s court-packing threat, the Supreme Court of the 1940s “unanimously swept away entire doctrinal structures” like those established in *Lochner v New York* in support of the policies Roosevelt advocated for, an example of what Ackerman would characterize as the ‘switch in time’.⁹³ For Ackerman—and Levinson—these judicial decisions “operate today as the functional equivalent of formal constitutional amendments.”⁹⁴ In this way, by building on the efforts of the Reconstruction Republicans, Roosevelt finalized this new system of ‘higher law-making.’

The history of the New Deal and the ‘Higher Lawmaking’ associated supports the claims made throughout this thesis about the importance of formal amendment. Roosevelt either never considered using the formal amendment process, or felt it too challenging in pursuit of the constitutional developments he wanted. As a result, Roosevelt and his supporters ‘threatened’ the Supreme Court, pressuring it to change its jurisprudence. In doing so, Roosevelt helped to establish the concept of consequential Supreme Court appointments, a constitutionally problematic practice. The trend of politicization of the Supreme Court started by Roosevelt, although with good reason, has led to a deterioration in the public trust of that institution. Citizens of America usually support the Supreme Court’s rulings when they are in line with their own political beliefs, rather than on the grounds of the constitutionality of the decision. In turn, trust in the Supreme Court has deteriorated over time, and this has undermined America’s overall constitutional stability.

⁹² Bruce Ackerman, (1995): pg 79

⁹³ Ibid.

⁹⁴ Ibid. pg 82

Similarly, Ackerman concedes there are some benefits to amendment formalism. Importantly, formalism creates an environment in which all political actors know the ‘game they are playing,’ the rules of that game, and the “constitutional struggle that lies ahead.”⁹⁵ Once an amendment is passed, it is virtually impossible to continue to contest it. As a result, groups are unable to ‘explain away defeat’ by arguing they were unaware of the political competition that was being played.⁹⁶ For example, critics of New Deal jurisprudence continue to question its legitimacy, even though almost all follow it out of respect for *stare decisis* and other jurisprudential considerations.⁹⁷ The formal amendment process gives a predetermined point at which a new amendment will reveal “a clear winner or a clear loser”, showing when the process has ended, an added benefit that transformative judicial opinions do not have.⁹⁸ This is evidenced by the appointments of justices like Robert Bork or Antonin Scalia, both of whom argued against the legitimacy of *Roe v Wade* long after the constitutional matter had arguably been settled. If the formal amendment process had been used, there would be no way for these justices to argue that abortion is unconstitutional.

Even with these benefits, Ackerman identifies two dangers of formalism in the amendment process—the threats of what he calls ‘false positives’ and a ‘false negatives.’⁹⁹ The formal process by which an amendment is passed leads to a normative conclusion by society that the constitutional change was reflective of sustained support for a new solution. However, this is not always the case, as was evidenced by the single-issue politics used to pass the Prohibition

⁹⁵ Bruce Ackerman, (1995): pg 83

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid. pg 84

⁹⁹ Ibid. pg 84

amendment, and the subsequent political reversal that occurred years later. As a result, the passage of an amendment—although challenging due to institutional barriers—may still lead to the understanding that support by the populace for such a change was present when it in fact was not. This erroneous belief in public support caused by amendment is what Ackerman refers to as a false positive. The issue of ‘false negatives’ is even more serious. As Ackerman explains, “by making it hard for a momentary special-interest coalition to impersonate the People, the formalist’s obstacle course may stifle the expression of constitutional movements that, after years of mobilized debate that has penetrated deeply into the consciousness of ordinary citizens, won the sustained support of a decisive and sustained majority.”¹⁰⁰

Ackerman believes that both the Reconstruction Republicans, as well as the New Deal Democrats, were at risk of this false negative threat, and had they tried to facilitate the constitutional change they—and The People—supported through Article V, the amendments wouldn’t have been ratified even though there was the requisite “decisive ... majority.”¹⁰¹ As a result, the difficulty of a formal amendment process may lead to the conclusion that there is no motive for change, when in fact proponents of amendatory change feel they cannot facilitate their goals through the formal mechanism.

The fear of a ‘false negative’ is unfounded when the amendment process is properly crafted such that a moderate amount of amendment is able to occur.¹⁰² In America, with its extremely challenging amendment process, this fear is more valid, but is reflective of the inadequacies of Article V rather than a prescient threat of ‘false negatives.’ If Article V had less stringent

¹⁰⁰ Bruce Ackerman, (1995): pg 85

¹⁰¹ Ibid. pg 86

¹⁰² This concept of amendment rate is taken up in depth in Chapter 3.

requirements, the threat of ‘false negatives’ would be diminished almost completely. The issue of ‘false positives’ is tougher to address, but can again be solved through a properly formulated amendment process. Both of these issues, false positives and negatives, are not related to formal amendment itself, but instead created by the amendment procedure that governs a constitution. As will be shown in Chapter 3, amendment procedures can be built to promote an amount of amendment that supports constitutional stability, avoiding these problems.

Both Ackerman and Levinson present a nuanced picture as to what truly amounts to amendatory change, while revealing the extent to which constitutional efforts by political actors can amount to ‘amendment’ without ever utilizing the formal process. However, neither deny the importance of the formal process. Levinson believes that practically, amendments happen outside the Article V process, while Ackerman fears that Article V is too stringent in its institutional barriers. As a result, a more finely tuned amendment process could allow for the changes both authors describe, and also prevent the threat of false negatives that Ackerman fears. In this way, it seems that the opponents of formalism have less normative criticisms of the process, and instead question Article V’s practical import.

This debate about amendatory change was largely centred around its effects in America. By considering amendment processes from a comparative standpoint, it appears there are a lot more benefits to formalism than Levinson or Ackerman let on. Specifically, in her work *Constitutional Amendment Rules: A comparative perspective* Rosalind Dixon presents a powerful argument as to formal amendment’s positive effects on a constitutional order.

The first and most integral role Dixon believes amendments play is to facilitate a “whole-scale revision” of a constitutional system.¹⁰³ For example, the adoption of the Canadian Charter

¹⁰³ Rosalind Dixon, (2011): pg 96

of Rights and Freedoms in 1982 completely changed Canada's governmental structure as well as the rights afforded to individuals.¹⁰⁴ Changes to this degree have to happen through amendment, as otherwise, their legitimacy could never be proven. In this way, "formal constitutional amendment procedures serve not only to promote the chances of large-scale constitutional change, but also to increase the chances that such change will occur" within the existing constitutional schema.¹⁰⁵ As a result, Dixon believes formal amendment processes serve as the source of what Rawls once called "constitutional transparency."¹⁰⁶ Constitutional stability necessitates trust on the part of its citizens in the constitutional system, and if whole-scale revisions were to occur without using the formal process, it would transparently alienate the citizenry from their institutions.

Besides 'revision', Dixon believes that amendments have two important effects in the context of the Supreme Court. Amendments can be used in a 'generative' way to "jump-start ... new interpretations of the constitution by courts," as well as in a 'trumping' manner, overriding "existing judicial interpretations."¹⁰⁷ Dixon believes this process allows citizens to participate in constitutional discourse directly, reducing the 'agency costs' associated with representative government.¹⁰⁸ Both of these effects promote popular sovereignty, and can facilitate these changes in two ways—amendments can change the textual basis with which judicial interpretation is made, or they can change the public understanding of the constitution more

¹⁰⁴ Rosalind Dixon, (2011): pg 96

¹⁰⁵ Ibid. pg 97

¹⁰⁶ Ibid.

¹⁰⁷ Ibid. pg 98

¹⁰⁸ Agency costs are the losses to agency that occur as you have to convince your representative to act in the manner you would like.

generally. As Professor Vicki Jackson noted, ratified amendments, as well as proposed amendments, affect “[the] court’s willingness to respond to democratic pressures for constitutional change,” serving as a clear expression of the will of The People.¹⁰⁹

Dixon notes that there are differences in the language of trumping and generative amendments. Generative amendments are usually “broad and open-ended” removing jurisprudential restrictions on otherwise unclear standards, while trumping amendments are explicit and concrete, meant to overhaul prior judicial interpretations.¹¹⁰ The history of the 11th amendment elucidates what a trumping amendment looks like in practice.¹¹¹ In the 1793 case *Chisolm v Georgia*, the Court ruled that the plaintiff, a citizen of South Carolina, could file suit against Georgia in the ‘original jurisdiction’ of the Supreme Court.¹¹² The state of Georgia refused to appear in court, stating that there was no standing to sue a sovereign state in federal court. The Court disagreed, arguing that they could in fact hear the case. This decision angered countless defenders of state sovereignty, and prompted the passage of the 11th amendment. Passed a year later, the 11th amendment states that the “judicial power of the United States shall not be construed to extend to a any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state” explicitly rebuking the Court’s decision.¹¹³

The decision was not revisited until 1890, when the Court overturned *Chisolm* in *Hans v Louisiana*, arguing they could revisit the constitutional question due to the “adoption of the 11th

¹⁰⁹ Rosalind Dixon, (2011): pg 99

¹¹⁰ Ibid.

¹¹¹ Ibid. pg 100

¹¹² Ibid.

¹¹³ Ibid. pg 101

amendment.” In *Hans*, the Court held that “due to state sovereign immunity, federal courts do not have jurisdiction over legal actions against a state to recover money damages.”¹¹⁴ The oral arguments in *Hans* included not only arguments about the legal ramifications of the 11th amendment, but also the public sentiment reflected by the passage of the amendment. In this way, textually specific ‘trumping’ amendments reveal to the Court—and the nation more generally—how the public feels about a certain judicial decision, and are effective in influencing the Court’s jurisprudence when it is not in line with The People’s constitutional understanding.¹¹⁵

Differently, Dixon uses the example of the 1967 Indigenous Rights amendments to the Australian Commonwealth Constitution to illustrate the effect of generative amendments. The ‘Indigenous Australians’ amendment package included provisions to include aboriginal Australians in future censuses, as well as empower the federal parliament to legislate in protection of this ethnic group. Specifically, the amendments involved the deletion of Section 127, which specified that in the census, “aboriginal natives shall not be counted.”¹¹⁶ Similarly, the amendments changed Section 51, which establishes the legislative power of federal parliament, removing the specification that the legislature “[has] power to make laws for peace, order and good government ... [for] The people of any race, **other than the aboriginal race in any State.**”¹¹⁷ While these amendments didn’t add any new text to the Australian Constitution,

¹¹⁴ *Hans v. Louisiana*, 134 U.S. 1 (1890)

¹¹⁵ A somewhat complete list of trumping amendments is as follows: The Eleventh Amendment reversed the Court’s opinion in *Chisholm v. Georgia*, 2 U.S. 419 (1793); the Fourteenth Amendment overturned *Dred Scott v. Sandford*, 60 U.S. 393 (1857); the Sixteenth Amendment overturned *Pollock v. Farmers’ Loan & Trust Company*, 158 U.S. 601 (1895); and the Twenty-sixth Amendment modified the result that would have otherwise prevailed in *Oregon v. Mitchell*, 400 U.S. 112 (1970). *Responding to Imperfection* (p. 213). Princeton University Press.

¹¹⁶ *The Constitution of Australia*, The Australian Federal Register

¹¹⁷ *Ibid.*

they were extremely ‘generative’ in the way they effected subsequent constitutional jurisprudence.

An example of this generative effect is found in the 2009 *Wurridjal v Commonwealth of Australia* decision, where the Australian Supreme Court used the 1967 amendments as the basis for their decision.¹¹⁸ The plaintiffs argued that the Australian government had unconstitutionally seized aboriginal land property without providing ‘just terms’ of agreement, a constitutionally guaranteed right.¹¹⁹ While the Australian constitution does not specify what ‘just terms’ constitutes, Constitutional Court Justice Kirby stressed that because the 1967 amendments were meant to make the constitution inclusive of the aboriginal populations, the amendments had “incorporate[d] notions of property as understood by indigenous aboriginals” into the constitution.¹²⁰ Although the amendments did not explicitly pertain to property or its definition, they were generative in creating a new jurisprudential understanding as to the rights of aboriginals and the normative implications for the amendments more generally. Kirby concluded that the “effect of the 1967 amendments was to ensure that the Australian Constitution now speaks with equality to all aboriginal Australians, by observing traditional customs.”¹²¹ In this way, an amendment could solely remove text from a constitution, yet still be generative in changing the lens with which justices view the document they are tasked with interpreting.

Consequently, the trumping and generative effects of amendment identified by Dixon are just two ways in which the formal process promotes constitutional stability. Seemingly, these

¹¹⁸ Rosalind Dixon, (2011): pg 99

¹¹⁹ *The Constitution of Australia*, Section 51 XXXI

¹²⁰ *Ibid.* pg 101

¹²¹ *Ibid.*

amendments have the effect of diminishing the judicial system's role in constitutional development. In actuality, formal amendments of this type strengthen the ability of the judiciary to rule on consequential constitutional matters. When the judiciary can only rely on past jurisprudence with little textual basis, their decisions lack the clout of those made in the context of an amendment. When a constitutional system experiences little to no formal amendment, this problem of judicial illegitimacy is exacerbated, as the judiciary has to step-in to an even greater degree to meet the demand for amendatory change. In turn, amendments actually strengthen the role of the judiciary in constitutional development, rather than diminish it, by affording constitutional courts the ability to rule in transformative ways.

Ackerman and Levinson's arguments as to the informal reality of America's constitutional developments build on, rather than undermine, the claims made in this thesis as to the relationship between amendment, amendment procedure, and constitutional stability. In Levinson's case, the fact that Americans are unable to accurately discern the number of amendments to their constitution is detrimental to constitutional stability, and also reveals how active the American Supreme Court is in informally amending the Constitution. Differently, Ackerman's description of moments of 'higher-lawmaking' is accurate, but Roosevelt's inability to use the formal amendment process to facilitate the constitutional changes he wanted reflects the challenges of the Article V amendment procedure rather than issues with formal amendment itself. In actuality, Roosevelt likely would have much preferred promoting constitutional developments via amendment, but was inhibited by the arduous process. In both contexts, formal amendment promotes constitutional stability more than informal amendment, and while informal amendment happens regularly, it can become problematic.

Consequently, the concept of amendment is as old as the American Constitution. The founders based their arguments in favour of amendment on the principles of the consent of the governed, human fallibility, and the importance of the Constitution as ‘higher law.’ The Framers believed that the Constitution would have to go through a process of formal change, one which had to be arduous enough to prevent a small group from undermining constitutional order. However, as constitutional democracies have developed across the world, there have been many critics of amendatory change, who support judicial supremacy or fear that too frequent amendment will destroy a constitutional system. Fears of too frequent amendment are valid, but at least in America, amendment has happened *too infrequently*. When a constitution is not changed formally but requires updating, informal changes are facilitated by actors outside the amendment process. While scholars like Levinson and Ackerman may view the informal changes as a practical reality, even they concede that often, the best avenue for constitutional change is through the formal system. However, in America, it appears that the Article V may be too arduous, often preventing amendments, creating the ‘false negatives’ that Ackerman fears. With all this in mind, it appears that the issues found in this chapter are less with amendments specifically, and more with the processes that govern them. Consequently, the importance of formal amendment, its relationship with the amendment procedure, and the effect of this procedure on constitutional stability has been established.

Chapter 2: Unamendability and its Relationship to Amendment

Section 1: Unamendability in America:

Amendments amount to formal constitutional change. However, constitutional stability inherently necessitates some things to remain the same. As a result, for formal amendment to

promote constitutional stability, and for the amendment procedure to do the same, there must be some constitutional provisions that cannot be changed. This is where the concept of unamendability comes into play—some provisions of the constitution are immutable, and if they were to change, the entire constitutional order would be upended. As a result, unamendability serves multiple important functions—it highlights the *constitutional identity* of document, adds strength to the amendment process by limiting what can be changed, and gives jurisprudential clout to constitutional courts to rule on the constitutionality of amendments. In turn, unamendable provisions promote constitutional stability, and are an important piece of any amendment process. Through the analysis of unamendable provisions in countries’ constitutions across the world, as well as their effect on the constitutional systems they govern, the relationship between unamendability, amendment procedures, and constitutional stability is elucidated.

While Americans had the first ‘eternity’ clauses placed in their Constitution, these unamendable provisions were not in line with the modern normative understanding. At the time of its creation, the American Constitution had only two unamendable clauses included in Article V. The first was a guarantee on slave importation, which had a built in termination of 20 years.¹²² The second was a provision that no state would be deprived equal suffrage in the Senate.¹²³ Importantly, both of these clauses have clear political calculations baked into them, and the debate at the Constitutional Convention reveals the extent to which the Founding Fathers felt the inclusion of such unamendability was necessary.

¹²² John R. Vile, “The Case against Implicit Limits on the Constitutional Amending Process,” *Responding to Imperfection*, (1995): pg. 191-214 <https://doi.org/10.1515/9781400821631.191>)

¹²³ John R. Vile (1995): pg 191

Article V was one of the last things discussed at the Convention. On September 10th—a mere week before the end of the Convention—the first amendment proposal was made.¹²⁴ Originally, this proposal allowed for the legislatures of 2/3rds of the States to call for a convention. Founding Fathers like Elbridge Gerry, James Madison, and Alexander Hamilton opposed such a process, each for different reasons. While Gerry feared that such a process would “bind the union to innovations that may subvert the state-Constitutions altogether,” Hamilton worried that the States would only use such a process to increase their own powers at the expense of the federal government’s.¹²⁵ Differently, Madison objected to the vagueness of such a provision, suggesting his own mechanism: “The Legislature of the U—S—whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid ... when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof.”¹²⁶ John Rutledge, a delegate from South Carolina, amended Madison’s proposal immediately, including the 20-year slave provision out of fear that the Constitution “might be altered by the States not interested in [slave] property and prejudiced against it.”¹²⁷ While Madison may not have agreed with such a clause, in pursuit of ratification, he conceded.

After Madison’s process was generally agreed upon, many at the Convention began to suggest the addition of provisos that would prevent certain constitutional changes out of fear of

¹²⁴ John R. Vile, (1995): pg 192

¹²⁵ Ibid.

¹²⁶ Ibid. pg 193

¹²⁷ Ibid. pg 194

what future governments would do. Roger Sherman of Connecticut, who in July of that same year had crafted the ‘compromise’ that created the Senate’s state-based representation, feared “that three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate.”¹²⁸ As a result, Sherman suggested a proviso specifying that that “no State should be affected in its internal police, or deprived of its equality in the Senate.”¹²⁹ Madison disagreed completely with such a clause, contending that if it were to be added, every state would “insist on [such constitutional limitations] for their boundaries, exports” and countless other protections.¹³⁰ Eventually, Gouverneur Morris of New York’s amendment, “that no State, without its consent shall be deprived of its equal suffrage in the Senate” was adopted, with Madison blaming its inclusion on “the circulating murmurs of the small States.”¹³¹

With the final part of the Constitution, that which would be unamendable, agreed upon, it was sent to the States for ratification. The debate around the additions of such provisions reveals the extent to which the Founding Fathers were sceptical of such clauses. It was clear that most of the Framers believed the document should be changed as the people see fit, in line with the principle of the consent of the governed. For Madison, the adopted unamendable clauses were politically practical, rather than constitutionally beneficial. As a result, Madison would have preferred the already arduous Article V amendment process to be the only thing that stood in the way of constitutional change. The disagreements between the framers at the Convention reveal

¹²⁸ John R. Vile, (1995): pg 194

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid. pg 195

an important normative consensus—unamendable provisions in a constitutional negotiation invite political calculations and clauses that often serve to defend the interests of certain groups.

This theme of unamendability—its protection of interest groups—is common throughout the world’s constitutions, but is rarely as apparent as it was in America.¹³² As with all parts of a constitution, amendment procedures are the product of a negotiation, but due to their nature of ‘controlling the future,’ the eventually agreed-upon mechanisms often serve as a window with which the disparate goals and principles of a country’s founders can be identified. This expression of founders’ goals is most transparent in the parts of the constitution that are permanently unamendable. While sometimes this interest group pressure leads to the inclusion of the type of clauses found within the American Constitution, in the rest of the world, it has led to the opposite. Regularly, the only thing different interest groups can agree upon when crafting a constitution is uncontroversial democratic principles and rights. As a result, due to the fact that there must unanimity in constitutional creation, unamendable clauses tend to protect the things all citizens can agree upon.

Consequently, unamendable—‘eternity’—clauses in constitutions throughout the world serve as a point of consensus, rather than disagreement, allowing a constitution to have a central, agreed-upon identity. When eternity clauses are transparent in what they are permanently enshrining, debates on the matter are settled, and citizens can use the ideals espoused in those clauses as the basis for constitutional arguments. This argument will be continued later on in the chapter in more detail.

While these two provisions amount to the only explicit limits included in the Constitution, there are still many students of the America’s founding document who contend that

¹³² John R. Vile, (1995): pg 195. The 20 year slave clause is the quintessential example of defending such interests.

there are other ‘implicit constraints’ on the document that prevent certain changes. This idea of informal unamendability was first put forward by John C. Calhoun of South Carolina. Calhoun believed that the States had the right to nullify laws they felt the federal government did not have the power to enact.¹³³ More drastic, Calhoun contended that if a constitutional amendment “radically change[d] the character of the constitution or the nature of the system,” the states had a right to secede.¹³⁴ After the Confederacy’s defeat in the Civil War, Calhoun’s arguments lost support. However, in 1893, legal commentator Thomas Cooley wrote an influential article as to how there were “limitations ... that stand unquestionably as restrictions upon the power to amend.”¹³⁵ To elucidate his understanding, Cooley came up with what he viewed as four examples of ‘unconstitutional’ constitutional amendments. Specifically, Cooley believed that amendments to remove a part of the Union, give States disparate tax rules, establish nobility, or create a monarchy, were all transparent cases of unconstitutional amendments. Cooley argued that the 15 amendments that had come so far were all in “the direction of further extending the democratic principles which underlie our Constitution” and therefore constitutional. For Cooley, the Founding Fathers “stopped short of forbidding such changes as would be inharmonious” because they believed that no political actor would ever attempt to amend the Constitution in such a clear violation of the document’s underlying principles. As a result, “however formal might be the process of adoption ... [the amendments] would just as certainly be declared inadmissible and therefore invalid.”¹³⁶

¹³³ John R. Vile, (1995): pg 196

¹³⁴ Ibid. pg 197

¹³⁵ Ibid.

¹³⁶ Ibid. pg 198

Cooley's contentions have been supported by modern scholars like Walter Murphy and George Wright. Murphy believes that certain provisions of the Constitution are so consequential that they cannot be voided.¹³⁷ Murphy uses the hypothetical of an amendment that allows for clear racial discrimination as the quintessential example of such an unconstitutional amendment.¹³⁸ Such an amendment would have to be invalidated by the Supreme Court, as it "contradict[s] the basic purposes of the whole constitutional system."¹³⁹ Similarly, George Wright argues that "no 'amendment' can be valid if it leaves what it purports to amend as a smoldering, meaningless wreckage; rather, such an 'amendment' can only be enacted as part of a new constitution with which it is organically compatible."¹⁴⁰ If an amendment is so disparate from the original goals of the constitution it is changing, "for reasons of logic rather than morality, the 'amendment' cannot reasonably be regarded as in fact a genuine amendment to the Constitution, but rather as the genesis of a new and separate constitution."¹⁴¹

Murphy's fears of problematic amendment reflect the importance of eternity clauses and unamendable provisions more generally. If minority rights are included in a country's unamendable provisions, constitutional courts can reasonably rule against any amendment that would abrogate these rights. Similarly, if America had an eternity clause in its Constitution that simply outlined "permanent equality under the law," a Court could still rule against the type of racist amendment Murphy takes issue with. However, without any unamendable provisions, the

¹³⁷ John R. Vile, (1995): pg 198

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ R. George Wright, "Could a Constitutional Amendment Be Unconstitutional?" *Loyola University Chicago Law Journal*, Volume 22, Issue 4, (1991): pg 741-764

¹⁴¹ Ibid. pg 764

Court loses jurisprudential clout in invalidating amendments. If the American people were able to utilize the already arduous Article V process and ratify an amendment, what right does the Court have in nullifying it? Formal amendment is one of the most transparent expressions of the will of the people. If a court were to invalidate a formal amendment, it needs serious jurisprudential grounds for doing so. Importantly, only unamendable provisions afford courts this ability. Moreover, these concerns highlight the importance of amendment procedure and its role in facilitating amendments. Any amendment process must be finely tuned to allow for an amount of amendment that promotes constitutional stability without turning the constitution into, as Wright said, a “smoldering, meaningless, wreck.”

Interestingly, constitutional law scholar John R. Vile disagrees with Wright and Murphy completely, from both a practical and normative standpoint. Primarily, Vile believes that it was in no way the Framers intent to include implicit restrictions to the amendment process. The Constitution is already explicit in the limits it places on the amendment procedure, and as the Convention debate reveals, many other restrictions were rejected because they are problematic. The Framers understood that that amendments were necessary piece of the constitutional puzzle, and should be used as such. At the time of the Convention, constitutional jurisprudence was a novel idea, and there was no discussion of unamendability as there were very few constitutions to serve as a reference. As a result, Vile believes it was in no way the intention of the Founders to include any ‘implicit’ limitations on amendment.

Differently, Vile believes that a judicial invalidation of an amendment would be a seizure of power by this branch from the people. Judicial review is accepted on the basis that, if the people will it, they can amend the Constitution. As a result, if this right by the people was stripped, the legitimacy of the Court would be decimated—nine unelected judges should never

decide the rights of the People in perpetuity. Similarly, the Court is often deterred from controversial decisions they think would be quickly amended, as scholars like Vicki Jackson have argued. In this way, to allow the Court to invalidate amendment based on substance would be a clear threat to the founding principle of ‘consent of the governed’ and could undermine the entire constitutional order.¹⁴² For example, the Court ruled in *Dredd Scott* that the Constitution was made by and for whites, such that the rights enshrined within it could not be extended to others. On this same basis, if there were ‘implicit limits’, the Court could invalidate the Civil War amendments, which were in direct contravention of such a decision. The solution to a bad amendment, according to Vile, is another one repealing it.

While Vile’s arguments against implicit limits to amendment are largely valid, his conclusions about the Supreme Court’s role in amendatory change are not. Although not a part of America’s original constitutional history, the role of constitutional courts in ruling on amendments is central to constitutional stability. When there are unnameable provisions of a constitution, it invites the defender of that document, the judiciary, to rule on the legitimacy of future amendments. Obviously, any court is still constrained by public pressure, and would undermine constitutional stability dramatically if it were to rule against a widely-supported amendment, but rarely do controversial amendments receive such support. When there are unamendable provisions in a constitution that outline the fundamental goals, ideals, and/or institutions of that document, citizens are less likely to attempt to undermine those principles via amendment. Moreover, these unamendable provisions afford constitutional courts the ability to rule on amendment, something fundamental to countries that experience a productive rate of formal amendment.

¹⁴² John R. Vile, (1995): pg 198

Consequently, America's unique position as the first modern constitution resulted in it excluding explicit limits to amendments, in defence of future generations. The Founding Fathers were undertaking in an experiment, and to place unnecessary guard rails around such a process would be in their eyes erroneous. While the Framers' logic, as well as Vile's, is understandable, it appears that the crafters of modern constitutions do not completely agree. Instead, the trend in constitutional development across the world has been the inclusion of explicit unamendable provisions, with 40% of the constitutions currently in use having some form of unamendability.¹⁴³ While the American case is foundational in understanding the limits of amendment, an analysis of other country's unamendability and the jurisprudence associated is necessary to fully understand the effects of these 'eternity clauses' and their relationship with constitutional stability.

Section 2: Unamendability across the World

In his comprehensive work *Unconstitutional Constitutional Amendments*, Yaniv Roznai argues that there are few fundamental characteristics of unamendability across the world. The most common of these is unamendable clauses preservative function—that they are meant to cement some core constitutional values within the document. Preservative unamendable clauses reflect some 'amendaphobia' on the part of that constitution's writers—they fear that the amendment process will be used to "abrogate the core values of society."¹⁴⁴ Roznai uses the metaphor of Ulysses and the sirens to illustrate these preservative clauses purpose, as they are meant to prevent the people of a nation from being called in a direction that would lead to their

¹⁴³ Yaniv Roznai, *Unconstitutional Constitutional Amendments the Limits of Amendment Powers*, Oxford: Oxford University Press, (2019): pg 20

¹⁴⁴ Ibid. pg 27

constitutional demise.¹⁴⁵ Interestingly, these unamendable clauses have often been used to entrench the rights of a monarch or family. For example, in the Albania Constitution of 1928, Article 50 states that “the King of the Albanians is his Majesty Zog I, of the illustrious Albanian family of Zogu” and that this Article cannot be amended.¹⁴⁶ Many Arab countries had or still have similar protections for royal families. Nevertheless, the relationship between preservative unamendable clauses and constitutional stability is transparent—they permanently protect the “core values of a society” something fundamental to the functioning of any constitutional system.

With the characteristics of preservative unamendable clauses established, it is beneficial to turn to a case study of the German Constitution, its ‘eternity clause’, the jurisprudence associated, and its effect on constitutional stability. The German Constitutional Court has established a jurisprudential basis to rule on ‘unconstitutional’ amendments, and its history provides an illustrative example as to unamendability and its effects.

The history of Germany’s sixty-year-old Basic Law is an interesting one, with its normative roots being based in the failings of the Weimar Constitution. The Weimar Constitution had no ‘material limits’ on constitutional amendments.¹⁴⁷ Its amendment portion—Article 76—enabled the constitution’s amendment through the standard legislative process.¹⁴⁸ The argument for such an easy amendment process was based in the fact that the Reichstag was viewed as both the legislature, and the constitution-making body. German politicians and theorists of the time

¹⁴⁵ Yaniv Roznai, (2019): pg 27

¹⁴⁶ Ibid. pg 29

¹⁴⁷ Monika Polzin, "Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law," *International Journal of Constitutional Law* 14, no. 2 (2016): , doi:10.1093/icon/mow035.

¹⁴⁸ Ibid.

contended that the American Constitution was explicit in differentiating between legislative and ‘constituent’ power, while the Weimar Constitution was not.¹⁴⁹ The contrast between the two constitutions was often cited as the justification behind the Reichstag’s ability to make constitutional amendments.¹⁵⁰

This line of thinking was the mainstream understanding until the theorist Carl Schmitt presented a new train of thought. Schmitt argued that there were “material limits on constitutional amendments”, as “constitutional legislation ... can substitute for individual or multiple [clauses] ... only under the presupposition that the identity and continuity of the constitution as an entirety is preserved.”¹⁵¹ Although vague, Schmitt used the example of worker’s councils replacing democratic elections as the means with which representatives were chosen.¹⁵² If the constitution was amended in such a manner, it would go against the *constitutional identity* of the document, and is therefore illegitimate in the constitutional order.¹⁵³ For Schmitt, the fundamental values and principles of the constitution were the ‘true constitution,’ while the provisions that dealt with less consequential things were the ‘constitutional laws’.¹⁵⁴ As a result, Schmitt believed that the Reichstag could only amend these ‘constitutional laws’.¹⁵⁵

¹⁴⁹ Monika Polzin, (2016)

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

While this idea of *constitutional identity* was not the basis of the creation of Article 79.3, it eventually served as the rationale behind numerous German Constitutional Court decisions. Interestingly, the reasoning behind the eternity clause was even simpler. At the meeting of the Bonn Parliamentary Council in the months leading to the Basic Law's adoption, future Minister of Justice Thomas Dehler argued that the inclusion of such a clause was necessary to "destroy a revolution's mask of legitimacy."¹⁵⁶ Years earlier, the Nazis had seized power utilizing the Weimar Constitution's emergency powers. Under this new constitution, Dehler hoped an abridgement of the constitution to the extent that Hitler pursued would be viewed as a transparent attack on the constitutional order.

Dehler's aims in preventing revolutionaries from gaining legitimacy reveal the necessity of including an eternity clause in any constitution. Moreover, Dehler's argument is supported by modern empirical evidence from authors like Ginsburg and Huq. In their work *How to Save a Constitutional Democracy*, the authors delineate between two ways democracies fail, authoritarian collapse and democratic erosion. While authoritarian collapse is easy to identify—as it is when a democracy collapses "completely and rapidly"—democratic erosion is much more sinister, involving "a process of incremental ... decay in ... competitive elections, liberal rights to speech and association, and the rule of law."¹⁵⁷ With this in mind, one of the central tools that the authors identify as a means with which erosion occurs is the "the use of constitutional amendments to alter basic governance arrangements."¹⁵⁸ In the world today, democratic erosion is responsible for the transition of nations like Hungary, Turkey, and Poland into illiberal

¹⁵⁶ Ibid.

¹⁵⁷ Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (Chicago: University of Chicago Press, 2018). Chapter 4

¹⁵⁸ Tom Ginsburg and Aziz Z. Huq, (2018): Chapter 4

democracies.¹⁵⁹ Using Freedom House’s index as the basis for their statistical analysis, Ginsburg and Huq concluded that since 1972, only seven democracies have experienced ‘collapses’ while over 56 have experienced erosion.¹⁶⁰ Moreover, almost all of the nations that experienced a collapse first had some form of erosion. As a result, Dehler’s argument seems increasingly rational—by including a provision that protects the underlying *constitutional identity*, those who would seek to erode the constitutional order through constitutional mechanisms are delegitimized.

At the same time, as the prior chapter has argued, a productive amount of formal amendment promotes constitutional stability. However, if there are no unamendable provisions, and the amendment process is structured in a problematic manner, amendments that undermine constitutional stability can be passed. In this context, it is transparent as to the benefits of unamendable provisions in promoting constitutional stability by allowing for a constitutional court to rule against amendments that undermine the constitutional order. For an amendment process to effectively promote constitutional stability, it must allow for regular amendment, but it must also ensure these amendments do not abrogate the constitutional order.

With the normative justifications behind Germany’s unamendability established, it is now pertinent to focus on its effects on German constitutional jurisprudence. For German political theorists, there is an inextricable link between the concept of *constitutional identity* and the eternity clause. The “core of the constitution” is the document’s identity, and the clauses protected under Article 79.3 are what represent this “identity of the constitution.”¹⁶¹ The

¹⁵⁹ Monika Polzin (2016):

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

delineation between the clauses protected under Article 79.3 and those outside of it serve as the legal framework with which the German Constitutional Court has separated *constituent power* from *constituted power*.¹⁶² The ability of the legislature or court in changing the constitution—as wielders of the *constituted power*—is bound by Article 79.3. Meanwhile, the *constituent power*, the capacity of the ‘German people’ to upend the constitutional order, can never be bound.¹⁶³ However, what an exercise of *constituent power* looks like is unclear, but in Schmitt’s eyes, it involved some governmental overthrow or revolution. Building on Schmitt’s beliefs, this idea was first articulated in modern German legal thought by Constitutional Court Judge Brun-Otto Bryde in 1982, when he argued that “constitutional amendments must preserve the identity and continuity of the constitution as a whole.”¹⁶⁴ Only the people, through some extra-constitutional mechanism, can effect the *constitutional identity*, as it is insulated by Article 79.3.

While the concept of *constitutional identity* had been around for quite some time, it wasn’t cemented into German constitutional law until 2009, with the *Lisbon* case.¹⁶⁵ The case examined the constitutionality of the Treaty of Lisbon, an agreement that amended the foundational treaties of the European Union. The decision by the German Constitutional Court articulated many ideas, using Article 79.3 as the grounds. Specifically, the Court concluded that the *constitutional identity* of the Basic Law is codified by Article 79.3.¹⁶⁶ In line with this thinking, any encroachment upon this article was “an encroachment upon the constituent power

¹⁶² Ibid.

¹⁶³ In line with Madison’s and Amar’s arguments about the People’s ability to change the document as they see fit, outside the formal process.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Monika Polzin (2016)

of the people.”¹⁶⁷ Even though the amendment clause gives the legislature some *constituted power* in changing the constitution, the Court contended that there is “no constitutional body” that has the power to change the general “constitutional principles which are essential ... to Article 79.3 of the Basic Law.”¹⁶⁸ Consequently, the Court argued that only through “declared will of the German people” could the constitutional state was abandoned.¹⁶⁹ And with no clear manner by which there could be an expression of the “declared will of the German people,” the Court effectually made Article 79.3 the basis with which amendments could be ruled unconstitutional.

Constitutional identity and its protection through an eternity clause have proven to be beneficial to constitutional jurisprudence in Germany, but Article 79.3 has not yet been used as a means with which a constitutional amendment has been ruled illegitimate. However, the Constitutional Court has managed to use Article 79.3 to lay the legal framework such that a future populist who seizes control over some democratic institutions in Germany would, unlike Hitler, have their “revolution’s mask of legitimacy [destroyed].”¹⁷⁰

Differently, the Colombian Supreme Court used this same idea of *constitutional identity* to prevent amendments it viewed as deleterious to the overall constitutional system, attempting to promote constitutional stability. While the Colombian example reveals a modern, practical implementation of what scholar John R. Vile feared—a Court invalidating amendments on implicit grounds, it proved vital to the country’s constitutional order.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

The Colombian Constitution of 1991 has a rigid structure based on having a one-term president.¹⁷¹ The President has the ability to appoint individuals to the Central Bank, the Judicial Council, and the Constitutional Court.¹⁷² As a result, if a President manages to have more than one-term, they would be able to effectively undermine the *constitutional identity* of the document—the underlying goals and principles of the constitution would be subverted if these institutions were co-opted by loyalists of one President. In 2005, Alvaro Uribe, a popular reformer had finished his first term.¹⁷³ Riding high in the polls, Uribe and his allies in Congress submitted and passed a constitutional amendment to allow him to run for another term.¹⁷⁴ In Colombia, constitutional amendments can be passed by Congress, a Constituent Assembly, or a referendum.¹⁷⁵ While the Constitutional Court is allowed to review these amendments, they can only review them “for errors of procedure in their formation.”¹⁷⁶ With no eternity clause or constitutional jurisprudence related to amendments, the Court was limited in preventing such an amendment. When a case was brought against the term-limit extension, the Court upheld the amendment as constitutional, but did contend that there was such a thing as an unconstitutional amendment—there were both substantive and procedural limits to what could be changed within the constitution.¹⁷⁷

¹⁷¹ Tom Ginsburg and Aziz Z. Huq, (2018): Chapter 6

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Yaniv Roznai, *Unconstitutional Constitutional Amendments* (Oxford University Press, 2019): Pg 65

¹⁷⁶ Ibid. Articles 241 and 379 of the 1991 Colombian Constitution.

¹⁷⁷ Yaniv Roznai (2019): pg 65

In 2010, at the end of his second term, Uribe tried once again to pass an amendment to seek a third term. However, this time, the Court “invalidated a law that called for a referendum on a constitutional amendment that would allow the president to run for a third term of office.”¹⁷⁸ The Court argued that the amendment “violate[d] a basic principle of democracy” as it would compromise the democratic institutions necessary to keep the constitutional order intact.¹⁷⁹ After a few weeks of uncertainty, Uribe accepted the decision. In this context, the Court was lucky Uribe accepted the decision, as his actions had the guise of legitimacy that Dehler wanted to prevent. Had Uribe disagreed with the Court, he likely would have been successful in gaining a third-term, essentially destroying the Colombian Constitution’s identity.

The Colombian example highlights how, without an eternity clause, a nation’s constitutional court is pressed in justifying why an amendment that undermines *constitutional identity* is illegitimate. If Colombia had an eternity clause in the mold of Germany’s, the Court would have felt more comfortable ruling against the term-limit extension the first time, as they would have valid constitutional and jurisprudential justifications behind their decision. In this way, eternity clauses, and their effectiveness in identifying *constitutional identity*, can prove advantageous to any modern constitutional court when ruling on amendments. Similarly, the Colombian example highlights how an eternity clause would be beneficial in settling the legal debate that rages around implicit constitutional limits in America. If the American Constitution had an explicit clause like Germany’s Article 79.3, scholars like Wright and Murphy would have the textual grounds with which to base their arguments about amendatory limits. America may be a unique case because of its extremely low rate of amendment, but the German and Colombian

¹⁷⁸ Ibid. pg 67

¹⁷⁹ Ibid.

examples highlight how unamendable provisions play an important role in allowing constitutional courts to rule on amendments, promoting constitutional stability by protecting that document's underlying *identity*.

The goal of this section was to highlight the ways in which amendment processes can be inherently limited as a feature of their construction. These limitations are normatively positive, and have a clear effect on constitutional jurisprudence—eternity clauses empower judges to more effectively play a role in the amendment process. Constitutions that include such eternity clauses invite their Supreme Courts to invalidate amendments that come into conflict with these 'permanent' sections of the constitution. This is reflected in the extent to which constitutional courts across the world have played an active role in debating the constitutionality of their country's amendments. In contrast, a nation like America, with only its Senate-apportionment eternity clause, has had its Court play a much smaller role in any discussion of amendment. While this is somewhat a consequence of America's generally arduous amendment process, it is also a ramification of having no eternity clause that helps to elucidate America's underlying *constitutional identity*. Interestingly, even if a country has no eternity clauses, constitutional courts can insert themselves into the amendment process as was witnessed in Colombia. With Colombia being the quintessential example, constitutional courts rarely insert themselves in any amendment process as it is the time at which democratic values are at their strongest—amendment processes more than any other electoral mechanism involve the entire populace of a country.¹⁸⁰ However, when courts do involve themselves in amendment processes, it is usually

¹⁸⁰ This is not always the case, as some amendment processes are extremely political elite-based, where the general population does not play a role in amending their constitution, they just play a role in electing their politicians. This type of example, and its effects, will be found in the next section.

because they feel the amendment upends the constitutional order to a degree that undermines the values within the constitution more generally.

In summary, unnameable provisions are fundamental to any amendment procedure, and when properly crafted, promote constitutional stability. Not only do unamendable provisions permanently enshrine some values, ideals, or institutions within a constitution, but they also empower the constitutional court to invalidate amendments that would undermine constitutional stability. As the prior chapter had emphasized that the Supreme Court should not play as active a role in ‘informally amending’ the constitution, it was the goal of this chapter to highlight the proper avenue for judicial involvement in the amendment process. When an amendment process is crafted in a manner that promotes constitutional stability, with unamendable provisions and a populace comfortable with amendment, the ‘right’ amount of constitutional change is able to occur.

With the normative arguments around amendment established, and the effects of eternity clauses on constitutional amendment processes elucidated, it is now time to turn our attention to amendment processes and their effects on constitutional stability. While amendment processes are just one piece of the overall constitutional puzzle, they influence the future of any constitution while informing the present. In turn, amendment processes provide a window into the philosophy of a country, their style of government, and the things that can be changed moving forward. As will be seen in the next chapter, not all amendment processes are created equal, and some promote constitutional stability better than others.

Chapter 3: Amendment Processes and their Effects

Amendment processes have an effect on the constitutional stability of the nations they govern, and it is the goal of this section to illustrate this relationship. However, before attention can be given to this endeavour, it is first important to establish and define the terms being analyzed. Amendment processes are the sections of a constitution that govern the ways in which that document can be amended. As will be shown in this section, there is a wide variety of ways to structure amendment procedures. However, one thing all amendment processes have in common is that they were created in pursuit of ensuring the permanence of the constitution they are a part of. The Founding Fathers of America may have been the first to create this mechanism for change, but the concept is now understood as a constitutional necessity. As was shown in Chapters 1 and 2, constitutional upkeep is important—constitutions must change with time and context. This is where the relationship between amendment processes and constitutional stability comes into play. In this paper ‘constitutional stability’ refers to the permanence of the underlying values and institutions found within a constitution. In no way is ‘constitutional stability’ meant to imply a lack of amendment. Instead, as this section will argue, all constitutions *must* change over time, and those that don’t—those with an extremely low rate of amendment—undermine constitutional stability, as institutions begin to break down and citizens come to view their constitution with low regard. At the same time, if a constitution changes too quickly and dramatically, it can undermine these democratic institutions in a different, but equally problematic way.

Consequently, it is the goal of this section to illustrate the relationship between amendment processes and constitutional stability, revealing the effects of different amendment

processes on the countries they govern. Specifically, this section will analyze a few case studies, most notably the constitutional amendment processes of America, its states, and Eastern Europe. This analysis informs this thesis' theory of amendatory change, which identifies four amendment process factors—the institutions involved, the level of difficulty, unamendability, and amendment culture—as consequential in effecting constitutional stability. Once this theory is outlined, it is then applied to America's Article V process and historical developments, highlighting its applicability and import.

Section 1: Toward a Theory of Constitutional Amendment

Analysis of amendment processes is a relatively novel endeavour in the world of legal research, with Donald Lutz' 1994 *Toward a Theory of Constitutional Amendment* serving as the first formative work in this regard. As Lutz explains, the American amendment process was the first to institutionalize constitutional change and was based on the three important premises outlined in Chapter 1 —“the imperfect but educable” nature of humans, the “importance of a deliberative process”, and the “distinction between normal legislation and constitutional provisions.”¹⁸¹

These premises reveal the extent to which the Founding Fathers valued democracy, an informed citizenry, and the constitution they created. However, based on these premises, the amendment procedure cannot be too easy or too hard. If the American Constitution was too easy to amend, there would not be a large enough distinction between normal legislation and constitutional matters. At the same time, another implication of an easy amendment process was

¹⁸¹ Donald S. Lutz, “Toward a Theory of Constitutional Amendment,” *American Political Science Review* 88, no. 2 (1994): pp. 355-370, <https://doi.org/10.2307/2944709>

that deliberative discussion of crafting amendments would be cut short. Differently, the Founding Fathers feared that a too-arduous amendment process would make their constitution static, disabling it from rectifying past mistakes or adjusting to new situations.¹⁸² As was described in Chapter 1, formal amendment is not the only way to change a constitution. Legislative revision and judicial interpretation are two common mechanisms through which governments are able to promote constitutional development. However, these three means of change reflect decreasing levels of popular participation. As a result, the formal amendment process is the one most in line with the Founding Fathers goals in creating America's foundational document. In this way, amendment processes are often inherently 'democratic', involving the populace in the discussion of governmental structure to a degree not witnessed otherwise. Using the formal amendment process, rather than other avenues of constitutional revision, lends itself to constitutional stability and legitimacy.¹⁸³

Consequently, America's Founding Fathers created the first amendment process in the world, one which many countries have attempted to emulate and improve upon. In 1994, only 4% of the world's national constitutions lacked an amendment process, reflecting a global understanding of the importance of this type of constitutional provision.¹⁸⁴ This reality informed a few of Donald Lutz' assumptions about amendment processes more generally. Integral to Lutz' eventual analysis, his first assumption is that every constitutional system needs to be changed at some point.¹⁸⁵ This necessity of change is a result of developments in demography, economics morality, or even previously unseen institutional problems. When there are situations that

¹⁸² Donald S. Lutz, (1994): pg 356

¹⁸³ This point will be revisited later in this chapter.

¹⁸⁴ Ibid.

¹⁸⁵ Donald S. Lutz, (1994): pg 358

necessitate constitutional update, often the legislature, executive, and judiciary of a country cumulatively make these changes when there is no formal amendment. Lutz' second assumption is that in a constitutional political system, changes to that system must be reflected in that country's constitution, while Lutz' third assumption, based on the prior two, is that all constitutions require regular, periodic change through some process.¹⁸⁶

Lutz' assumptions inform his eventual metric for analysis, amendment rate. The amendment rate of any country is the average number of formal amendments passed per year after the constitution came into effect.¹⁸⁷ As Lutz argues, amendments are a normatively positive good, as they mean the constitution is being taken 'seriously'. As a result, a country should pursue an amendment rate that is 'moderate'—people change their constitution when the context necessitates it. If the amendment rate is too slow—which for Lutz means the amendment process is too challenging—then extraconstitutional means will often be used to change the constitution.¹⁸⁸ This amendment rate has a direct relationship with constitutional 'failure'—times when a constitution was replaced with a completely new constitutional order. Lutz argues that this type of failure happens as a result of a large shift in a nation's values and institutions, an insufficiency on the part of the constitution to keep up with the times, or a high level of constitutional revision such that the document is no longer the same.¹⁸⁹ Importantly, Lutz

¹⁸⁶ Donald S. Lutz, (1994): pg 358

¹⁸⁷ Ibid.

¹⁸⁸ The extra-constitutional means referred to here are legislative revision and judicial review, as was explained in the introduction.

¹⁸⁹ Donald S. Lutz, (1994): pg 359

believes that a moderate rate of amendment would prevent these issues from occurring, such that countries with this effective level of change have longer lasting constitutional systems.¹⁹⁰

At first Lutz' argument may seem simplistic, arguing that the failure of a country's constitutional system is based integrally on its amendment process. However, analysis of the normative problems of associated with too high or too low amendment rate helps to support Lutz' claim. When the amendment rate of a country is too low, there are necessary systemic changes that are either not occurring, or are occurring through other means like judicial revision. When a country regularly fails to use its amendment process for this constitutional upkeep, it leads to a level of skepticism on the part of the populace that the country is failing to meet its commitments to popular sovereignty. Public opinion polls about the Supreme Court in America reflect this reality, as citizens views have become increasingly negative, and America is a country with one of the lowest amendment rates in the world.¹⁹¹ Moreover, the degree to which American citizens feel alienated from constitutional discourse as a result of the Supreme Court's constant interventions also supports the arguments behind the issues of a too slow amendment rate. Building on this, Lutz believes that countries with a low amendment rate and a high level of judicial review rely on their justices having a 'living constitutionalist' tendency, or else their constitutions will never be changed at all.¹⁹²

In contrast, a too high amendment is associated with another whole host of problems. A primary issue with too many amendments is that the constitution in question is likely no longer —or at least to a lesser degree—viewed as higher law.¹⁹³ The more frequently a country uses

¹⁹⁰ Donald S. Lutz, (1994): pg 359

¹⁹¹ Ibid.

¹⁹² Ibid. pg 362

¹⁹³ Donald S. Lutz, (1994): pg 363

amendments, the less delineated normal legislation and constitutional matters are. At the same time, when there are lots of amendments in this way, it has appeared empirically that this is because the legislature of a country dominates the formal constitutional amendment process.¹⁹⁴

To support his normative claims about amendment processes, Lutz analyzed amendment patterns within America's state constitutions. While the national American constitution has one of the lowest amendment rates in the world, the state constitutions are regularly updated and deal with a bevy of issues. State constitutions have had to address rapid urbanization, special interests, changing responsibilities, as well as tyranny from their legislatures. As a result, the state constitutions serve as an interesting tool through which Lutz develops his argument.

From 1798-1991, the American Constitution was amended 26 times over 202 years—an amendment rate of 0.13 per year—while the state constitutions were amended 5845 times, over 94 years, with around 117 amendments per state—an amendment rate of 1.23.¹⁹⁵ This reality reveals one of Lutz more interesting conclusions, there is a direct, statistically significant relationship between the length of a constitution and its rate of amendment.¹⁹⁶ As the state constitutions deal with much more governmental functions than the federal one, they are longer and in turn are amended more often. Lutz controlled for variables like geographical size, population, per capita income, and many other factors, but the relationship remained—the longer the document, the more it was amended.¹⁹⁷ 63% of state-level amendments were related to things like local government structure, state debt, and other local issues.¹⁹⁸ However, even with those

¹⁹⁴ Donald S. Lutz, (1994): pg 363

¹⁹⁵ Ibid.

¹⁹⁶ Ibid. pg 365

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

excluded, the rate of amendment at the state level was 0.47, almost 3.5 times higher than the federal amendment rate.¹⁹⁹ If the goal of a constitution is to last, the least-permanent state constitutions had the highest amendment rates, while the longest-lasting ones had a ‘moderate’ amendment rate.²⁰⁰

Lutz state-level analysis led to many more interesting conclusions. At the state level, there are differences in who can initiate an amendment—the state legislature, initiative referendums, constitutional conventions, or commissions—but almost all of the amendments that eventually passed were initiated in the legislature.²⁰¹ States that had initiative processes often had amendments that seemed beneficial theoretically but had critical issues from a practical standpoint.²⁰² Lutz believes that in some states, the initiative process made introducing amendments too easy, while the harder it was for the legislature to propose amendments, the less there were.²⁰³ It is important to note that there is a huge level of variety in these state constitution’s amendment processes, especially in their guidelines around the legislature. Some states require multiple sessions of legislators to vote on the amendment, while others require varying degrees of supermajority.²⁰⁴ These differences in amendment process have a direct effect on amendment rate, and in turn inform constitutional stability. Lutz found that larger the required legislative majority in passing the amendment, the lower the amendment rate. However, requiring a legislature to pass a proposed amendment twice did not actually increase the

¹⁹⁹ Donald S. Lutz, (1994): pg 363

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid. pg 366

²⁰⁴ Ibid.

difficulty of the amendment process, as long as it was a simple majority that was required.²⁰⁵ As a result, the way to make an amendment process most challenging would be to “require the approval of two consecutive legislatures using a two-thirds majority each time” as was found in a minority of states.²⁰⁶ Interestingly, Lutz concluded that having a popular referendum to approve a legislature-initiated amendment is just as challenging as having the legislature approve their own amendment.

Based on his analysis of constitutions across the world and within America, Lutz had four main conclusions. The first was that the amendment rate of a country can be explained by the length of their constitution and the difficulty of their amendment process.²⁰⁷ Lutz’ second observation was that a country can adjust these variables and have a predictable effect on their amendment rate.²⁰⁸ Third, Lutz found that amendment rate has a direct relationship with constitutional replacement, and the more moderate the rate of amendment, the longer a constitution lasts.²⁰⁹ In this context, ‘moderate’ referred to a relatively average rate of amendment in comparison with the other countries analyzed—such as the state level average of 0.47. The countries that had relatively high or low rates of amendment were more likely to completely replace their constitution, reflecting an deterioration in constitutional stability. Lutz final point was that at a certain point, making the amendment process more difficult does not

²⁰⁵ Donald S. Lutz, (1994): pg 366

²⁰⁶ Ibid. pg 367

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

decrease the rate of amendment—its better to avoid an extreme process and have a relatively short document.²¹⁰

Lutz statistical analysis of America's state constitutions and their amendment processes supported his conclusions about their effect. Amendment processes, with their varying level of difficulty, allow a country or state to have a certain amendment rate. This rate of amendment is integral to a country's constitutional order, and if this rate is too high or low, it can undermine the constitutional stability of that nation. When the amendment rate is too low or high, citizens begin to question their constitution and come to view it in contempt—this is why constitutional systems break down. As a result, it is fundamental that a constitution's amendment process promote a moderate amendment rate, as this allows for constitutional stability.

While Lutz arguments remain largely valid to this day, some modern scholars have disagreed with his assessment. In their work, *Does the constitutional amendment rule matter at all?* Tom Ginsburg and James Melton paint a different picture of the effects of amendment processes in creating a certain amendment rate. While Ginsburg and Melton agree that “it might be advisable to draft constitutions that have more flexible amendment provisions so as to allow for more formal change” they disagree with Lutz about the extent to which an amendment process solely informs amendment rate.²¹¹ Ginsburg et al instead argue that the forces of supply and demand govern constitutional amendment rate, and the amendment process is just one part of this scheme. On the demand side, Ginsburg et al believe that the degree to which the constitution is out of sync with society and the rate of social change inform the extent to which a

²¹⁰ Donald S. Lutz, (1994): pg 368

²¹¹ T. Ginsburg and J. Melton, “Does the Constitutional Amendment Rule Matter at All?: Amendment Cultures and the Challenges of Measuring Amendment Difficulty,” *International Journal of Constitutional Law* 13, no. 3 (January 2015): pp. 686-713, <https://doi.org/10.1093/icon/mov041>

country's citizenry and institutions 'demand' constitutional revision.²¹² On the supply side, Ginsburg views the formal structure of the amendment process as one variable, but the 'amendment culture' of a nation as the other integral factor that informs the rate of amendment.²¹³ While all these elements influence the rate of amendment, Ginsburg et al view a nation's 'amendment culture' as most formative.

For Ginsburg, amendment culture is the set of attitudes a citizenry holds in regards to the concept of amendatory change.²¹⁴ This amendment culture is independent of the issue that is actually being addressed by any given amendment. At the same time, amendment culture is separate from the other contextual and societal factors that are creating the demand for amendatory change. Instead, amendment culture is the "baseline level of resistance to formal constitutional change" in a society.²¹⁵ As this baseline goes up, the "viscosity" of the amendment process decreases, meaning that there is less amendatory change.²¹⁶ Ginsburg believes that a nation's amendment culture is informed in a variety of ways. One example is found in countries like New Zealand, and Israel, which have a high degree of amendatory change. In these countries, the 'barriers' to constitutional change are political rather than institutional.²¹⁷ Israel has a relatively easy amendment process, and has no eternity clauses.²¹⁸ As a result, it is only "cultural barrier[s]" that prevent a "complete revision of the rules" where partisan interests can

²¹² T. Ginsburg and J. Melton, (2015) pg 687

²¹³ Ibid.

²¹⁴ Ibid. pg 688

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid. pg 689

²¹⁸ Ibid.

take control of the constitution.²¹⁹ In a country like Israel, the amendment culture creates a larger ‘supply’ for amendatory change, as the citizens are comfortable with and understand the importance amendments, yet would still oppose amendments that undermine the overall constitutional order. In contrast, in a country like America, there are arduous institutional boundaries that often prevent amendment. In turn, the populace of America has an amendment culture that further ‘decreases the supply’ of amendatory change—Americans view their constitution as a sacred text, giving the entire document a level of normative significance that other countries don’t. Due to this reverence and seeming infallibility of the American Constitution, the American people have an amendment culture that reduces their level of amendment. While amendment cultures can change with time, this is usually only in contexts where a country is going through a period of huge upheaval, as was evidenced by the pro-amendment culture found in America after the Civil War.

Ginsburg eventually uses statistical analysis to conclude that there is a significant relationship between amendment culture and amendment rate, with amendment culture having a large effect. In contrast, Ginsburg’s data-set—which assessed constitutions in use across the world—revealed that amendment processes themselves had a much more minute effect in this context.²²⁰ Ginsburg concludes that “[amendment processes] are not the primary determinant of amendment rates” and that “amendment culture exists and is important” in this context.²²¹

²¹⁹ T. Ginsburg and J. Melton, (2015) pg 690

²²⁰ Ibid.

²²¹ Ibid. 692

However, Ginsburg acknowledges that “amendment culture is shaped by [amendment processes.]”²²²

While Ginsburg’s analysis and conclusions seemingly invalidate Lutz’, they actually build on and support them. Lutz and Ginsburg agree about the demand side factors, but Lutz fails to account for amendment culture and its effects. However, even Ginsburg acknowledges that amendment culture is largely informed by the amendment process that governs that country’s constitution, as well as any unamendable provisions within the constitution. As a result, amendment processes are still most consequential in informing a constitution’s rate of amendment, as the level of difficulty associated, the institutions involved, and its unamendability create the amendment culture of that nation. For example, America’s constitution, with its extremely arduous amendment rate, created a culture that viewed the document with a high level of reverence. In contrast, Germany’s constitution, with its easier amendment process and eternity clauses, facilitated an amendment culture that was pro-amendatory change. In this way, Ginsburg’s work helps to highlight just how large of an effect formal amendment processes have on the rate of amendment and the constitutional stability of nations more generally. Amendment processes inform amendment culture, amendment processes and culture create the rate of amendatory change, and the amendment rate has a direct effect on constitutional stability.

Moreover, amendment processes—including unamendable provisions—influence the substance of amendments. The difficulty of an amendment process informs the content of amendments as political actors will only promote those they think can be ratified. In a country with extreme supermajoritarian requirements like America, the only amendments that are ever proposed are those that are seemingly unanimous. Differently, in a country like New Zealand

²²²T. Ginsburg and J. Melton, (2015) pg 700

with its relatively easy amendment process, citizens are more comfortable promoting amendments that require debate. At the same time, eternity clauses exclude whole facets of subject matter from ever being debated, influencing the substance of amendments greatly. Consequently, amendment procedures not only facilitate a certain amendment culture and amendment rate, which effect constitutional stability, but they also regulate the content of amendments. As some amendments can undermine constitutional stability and others can reinforce it, this effect is important and will be analyzed in greater detail later on. However, what can be concluded based off of the prior analysis is that amendment procedures have an important and direct relationship with constitutional stability.

Section 2: Amendment Processes Across the World

The goal of the prior part of this chapter was to establish the relationship between amendment processes and constitutional stability. As a result, this portion will now look to analyze various constitutional amendment processes across the world, deducing some of their normative and empirical effects. In doing so, this paper seeks to reveal how some amendment processes are better than others in pursuit of the goal of constitutional stability.

Generally, scholars group ‘amendment strategies’ into four main categories. The first are amendment processes that are based in legislative supremacy. In these countries, the legislature can amend the constitution via a vote. Countries with legislative supremacy over the amendment process usually view their constitution as more of a code-of-law rather than a higher-

document.²²³ At the same time, these documents are usually long and regularly updated.²²⁴ The quintessential example is New Zealand. Like many other common-wealth countries, New Zealand has no single constitutional document, and instead has a myriad of documents that together amount to their constitution. As a result of their amendment procedure, the amendment culture in New Zealand is one that is comfortable with amendment. In turn, New Zealand has one of the highest rates of amendment in the world, but not to a problematic degree.²²⁵ As this thesis has argued, New Zealand may be a functioning democracy, but it faces the same threats any country with too high an amendment rate would. New Zealanders have a very low level of constitutional reverence, and only have political barriers to problematic constitutional change. As a result, New Zealand may face future threats to their constitutional order. However, as is evidenced by the case of New Zealand, too high an amendment rate can be less troublesome than too low of one.

Another facet of these ‘legislative supremacist’ amendment processes is intervening election provisions. Many constitutions, like that of Finland and other Scandinavian countries, require that legislatures must vote on an amendment twice. In Finland, one legislature introduces an amendment, and the subsequent legislature must vote in favour of this amendment with a 2/3rds majority.²²⁶ Normatively, countries with these mechanisms value more deliberation in regards to constitutional amendment, and draw a bigger distinction between normal legislation and constitutional matters. Importantly, the citizens of these countries can influence the

²²³ Donald S. Lutz, (1994): pg 368

²²⁴ Ibid.

²²⁵ Ibid. pg 365

²²⁶ *Constitution of Finland*, Sections 34 and 73

amendment process via the election. In this way, these intervening election procedures allow for a level of involvement that the purely legislative supremacist processes do not. Ginsburg's analysis revealed that the intervening election clauses lead to a lower amendment rate, but likely in a positive way—the amendment rate of countries with this type of mechanism can be described as 'moderate,' promoting permanence.

Already, the relationship between amendment procedure and amendment culture is clear. In countries like Finland with a legislative, intervening election procedure, the populace has an opportunity to play a role in constitutional matters, using their vote as a means to voice their stance on a given amendment. As a result, the amendment culture in Finland would be one that is conducive to amendatory change—the citizenry supports and understands the necessity of amendment. At the same time, as a result of the legislature being the only avenue with which constitutional change can occur, citizens don't have a problematic penchant for amendment—the Finnish people usually don't even play a role in promoting these amendments in the first place.

Another form of amendment procedure is described as the 'multiple path' mechanism. In these countries, the constitution can be amended via different means with differing difficulty. For example, amendments may require a legislative majority, a president or other political actor to call for a referendum, or a number of subnational governments to approve of an amendment. For example, Serbia's constitution allows amendments to be proposed "by at least on third of deputies in the National assembly, by the president of the republic, by the government, or by petition of at least 150,000 voters."²²⁷ While the amendments still must be ratified through other

²²⁷ *Constitution of the Republic of Serbia*, Section IX

constitutional mechanisms, the enabling of different avenues of proposal has helped Serbia to have an active amendment culture and a beneficial amendment rate.²²⁸

The third common amendment mechanism found within country and state constitutions is to require a referendum. In Lutz' study, he found that countries with a referendum had, on average, 1/20th of the amendment rate of those with legislative supremacy mechanisms.²²⁹ As has been expressed repeatedly, this likely means these countries have a 'too low' rate of amendment, and this rate undermines their constitutional stability.

The final common amendment process is that which has 'substantive variation' — depending on the subject matter the amendment pertains to, it has differing degrees of difficulty. To return to the Serbian Constitution, proposed amendments have different means of ratification, with standard amendments needing a 2/3rds majority vote in the assembly, while those pertaining to the preamble, constitutional principles, and freedoms requiring a simple majority vote via referendum.²³⁰ This type of procedure is somewhat uncommon, but helps to establish a constitution's identity in the same way unamendable clauses do. In turn, this procedure creates an amendment culture that is open to change on less consequential matters, while understanding the gravity of amendments that go through the more arduous process.

In *Constitutional Amendment Rules: A Comparative Perspective* Professor Rosalind Dixon sought to build on Lutz' analysis, using modern statistical tools to deduce the relationships between amendment rate and the aforementioned amendment procedures, revealing their empirical effect. While Lutz found a clear negative correlation between "the difficulty of

²²⁸ Donald S. Lutz, (1994): pg 365

²²⁹ Ibid. pg 365

²³⁰ *Constitution of the Republic of Serbia*, Section IX

amendment and the actual amendment rate” his data-set failed to effectively differentiate between procedures to the degree that Dixon’s did.²³¹ As a result, Dixon’s work highlights the actual ‘difficulty’ associated with different amendment procedures. Most fundamental, Dixon discovered that supermajority legislative requirements reduced the rate of amendment more than any other factor.²³² Interestingly, Dixon also found that there was a statistically significant, positive relationship between popular initiative and the overall rate of amendment.²³³ This conclusion supports Ginsburg concept of amendment culture and the relationship it has to amendment procedure. When a country’s citizens are able to propose their own amendments, they are supportive of amendatory change such that it occurs more frequently. At the same time Dixon also discovered that the double-passage and single-subject requirements did not have a statistically significant relationship with amendment rate.²³⁴ While this reality may be a result of some sections of a constitution being regularly amended while others are not, it reveals a failure of the normative goal of some constitutional framers in creating content-specific amendment procedures.

One of the most important facets of Dixon’s work was her discovery amendatory ‘path dependence.’ If a country amended their constitution in a given year, they were 2.8 times more likely to amend it two years later, and 1.8 times more likely to do so again four years after that.²³⁵ The ‘path dependence’ Dixon identified supports Ginsburg’s conclusions about

²³¹ Rosalind Dixon, “Constitutional Amendment Rules,” *Comparative Constitutional Design*, n.d., (2015): pp. 195-218, <https://doi.org/10.1017/cbo9781139105712.011>)

²³² Rosalind Dixon, (2015) pg 200

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

amendment culture. Countries with a culture that is supportive of amendatory change regularly experience it. The normative reasoning behind this is simple, the more a citizenry amends their constitution, the more legitimacy they think amendatory change has. The inverse is also true, as is evidenced by the amendment culture in America and the dearth in amendments found in its Constitution. Dixon's empirical work helped to identify the actual, rather than normative, difficulty associated with amendment procedures across the world. While Dixon's goal was not to deduce whether these procedures effected constitutional stability, her work lends itself to the analytical goal of this paper, helping to give empirical weight to the claims that follow.

This chapter has established the relationship between amendment procedure and constitutional stability, as well as the high level of variation across the world in regards to amendment procedure more generally. At the same time, this chapter highlighted the common empirical conclusions in the amendment procedure field. The implication of these conclusions is that a country's amendment procedure is a factor that effects constitutional stability, and that some country's have better mechanisms than others in pursuit of this end. Consequently, the rest of this thesis focuses on amendment procedures across the world, analyzing their direct effects on constitutional stability to try and help elucidate this relationship. Specifically, this paper will analyze the unique case of Eastern Europe after the Cold War, comparing the normative goals behind these constitutions' amendment procedures with their effects on constitutional stability in the region today. Eastern Europe is a unique case for analysis as the post-Soviet countries had none of their own democratic history to turn to as a basis for the creation of their amendment procedures. As a result, these processes were made with the specific goal of constitutional stability, and the successes and failures of many of these countries helps to reveal which of these constitutional mechanisms was most effective in promoting this end. This chapter has defined

key terms like *constitutional identity*, *democratic stability*, *amendment rate*, and *amendment culture*. These terms will be used in the subsequent section to help support the claims made about Eastern European democracy and the constitutional amendment processes that govern it.

Section 2: Amendment Procedures in Eastern Europe

After the fall of the Soviet Union, the top legal minds of the world descended on Eastern Europe to help craft the constitutions that would eventually come to govern these nascent nations. Interestingly, scholars like Cass Sunstein made normative claims as to the best structure of these constitutions, especially in regards to things like amendment procedures. As a result, the goal of this portion of the chapter is to outline the constitutional history of Eastern Europe as well as the views of Sunstein on the effectiveness of their amendment structures. Interestingly, two countries, Bulgaria and Hungary, adopted completely disparate amendment procedures. Bulgaria utilized a relatively stringent amendment process that promoted a moderate rate of amendment, as well as amendments that substantively supported the constitutional order. As a result, Bulgaria's amendment procedure serves as the quintessential Eastern European example of a process that encourages constitutional stability. In contrast, Hungary's amendment process was overly facile, fostering a problematic amendment culture, too high a rate of amendment, and amendments that substantively undermined constitutional stability. While the effects of these Eastern European countries' amendment procedures cannot be completely generalized to all other contexts, they highlight the important effect of amendment processes on constitutional stability. Hungary and Bulgaria seemingly should be on the same constitutional path, yet

Hungary has undermined stability, while Bulgaria has promoted it. This reality is at least in part a consequence of their different amendment procedures.

Before delving further into the history of Eastern Europe, it is first pertinent to clarify central terms and the frame of this analysis. Sunstein's formative paper *The Politics of Constitutional Revision in Eastern Europe*, describes the theoretical underpinnings behind the constitutional design of Eastern European democracies.²³⁶ Interestingly, Sunstein made claims as to what amendment procedure would be best given the unique history of these countries. In this regard, the end Sunstein's pursues is constitutional stability, as is this paper. Constitutional stability in this context refers to the permanence of a constitutional order—citizens must have respect for the document's institutions and values, the government must have respect for these same principles, and the government must be made up of these institutions. The modern political term *democratic backsliding* encapsulates the ways in which democracies fail in this regard—by comparing the degree to which these nations have experienced this de-democratization, the relative level of constitutional stability can be deduced. However, almost all nations experience some form of democratic backsliding at some point or another, so how can this undermining of constitutional stability be associated with amendment procedures? To try and tease out the relationship between amendment procedures and their effect on constitutional stability, this section analyzes the amendments passed in Bulgaria and Hungary after their founding, deducing which ones normatively lead to democratic backsliding. While one cannot afford all blame or praise to an amendment procedure in promoting a constitutional order, by analyzing countries with a similar geography and constitutional history, the differences in their development associated with amendment procedure—if any—can be revealed.

²³⁶ Stephen Holmes and Cass R. Sunstein, "Twelve. The Politics of Constitutional Revision in Eastern Europe," *Responding to Imperfection*, 1995, pp. 275-306, <https://doi.org/10.1515/9781400821631.275>

Amendment procedures are integral to a constitution because they allow for the revision of the laws *that govern the laws*. This was especially pertinent in Eastern Europe after the Cold War, as these countries had no constitutional history, and would likely need to update their constitutions to deal with issues they hadn't foreseen when writing them. As a result, when scholars were debating what these constitutions should look like, many placed a greater emphasis on amendment process than in other constitution-making circumstances. As Sunstein explained, this amending power could end up "color[ing] the political process as a whole."²³⁷ Sunstein had a concrete view that there was a best procedure in this context, based on the unique history of Eastern Europe. Specifically, Sunstein argued that there must be "relatively lax conditions for amendment," the "unamendable provisions [must be kept] to a minimal core of basic rights and institutions," the "process [should] be monopolized by parliament," and there should be no "obligatory recourse to popular referenda."²³⁸

Sunstein's beliefs about this type of process were based in his view that the Eastern European constitutions must allow for swift "channeled adjustments" in the face of "changing circumstances, without undermining the already weak legitimacy of democratically accountable assemblies."²³⁹ Sunstein believed that the citizens of Eastern Europe had a weak understanding of democratic principles, and to complicate the amendment process by allowing for referendum or other means of amendment could hurt the already suspect newly-elected democratic governments. At the same time, these nations had no judiciaries that could serve as a check on this amending power. As a result, Sunstein acknowledges that in a more 'democratic' context, a

²³⁷ Stephen Holmes and Cass R. Sunstein, (1995): pg 278

²³⁸ Ibid.

²³⁹ Ibid.

sharper split “between constitutional law and ordinary law would be preferable” but because of the “peculiar conditions of Eastern Europe” the amendment procedure must be structured this way.²⁴⁰

Importantly, Sunstein believed that the Eastern European legislatures needed a relatively easy amendment procedure as undemocratic leaders can benefit from stringent ones.²⁴¹ If amendments are difficult, especially in a context where democracy has been thrust upon the nation by foreign powers, the legislature has an excuse as to why they haven’t given in to the constitutional demands of the electorate. Similarly, in these contexts, the courts “will gain prestige because [they] can pose as the guardian of the ark of the covenant.”²⁴² Flexible constitutional interpretation “diminishes the pressure for frequent amendment” which leads to an overemphasis on the importance of the constitutional court.²⁴³ While this may not be problematic in a country like America, with its unique, lengthy judicial history, it could definitely lead to issues in Eastern Europe. Sunstein’s conclusion was that “stringent amending formulas will allow parliaments faced with large social problems to deflect social disapprobation and to escape democratic accountability in difficult times.”²⁴⁴

Sunstein’s arguments are pertinent to take up, as he pursued the same goal as this thesis— a presentation of the effect of amendment procedures on constitutional stability. However, Sunstein’s arguments are wholly theoretical and were made decades ago. As a result, the accuracy of the claims made throughout this thesis as well as Sunstein’s can be tested through the

²⁴⁰ Stephen Holmes and Cass R. Sunstein, (1995): pg 280

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid. pg 281

analysis of these Eastern European countries and their constitutional development since becoming democracies. While Sunstein's views are quite contrary to those of this thesis, his understanding of the consequential effect of amendment procedures, is not. As a result, Sunstein's work is a great complement to this chapter, allowing for scholarly debate with another author.

With Sunstein's normative claims about what amendment procedure would be best in Eastern Europe established, it is now integral to explain the unprecedented constitutional history of Eastern Europe. By 1991, the communist system had collapsed in Albania, Bulgaria, Czechoslovakia, Hungary, Estonia, Latvia, Lithuania, Poland, Romania, Russia, and the Ukraine.²⁴⁵ Interestingly, the first act of these new regimes was constitutional amendment. Almost all of these countries' governments removed the clauses that "stipulat[ed] the leading role of the Communist Party."²⁴⁶As Sunstein describes, the greatest "political transformation of this century was decorated by, or embodied in, constitutional amendments."²⁴⁷ The new Eastern European leaders used the amendment power strategically "to ... promote social change"—instead of overthrowing the old order it was "simply negotiated and codified away."²⁴⁸ This effort on the part of democratic forces in these countries was meant to symbolize how these actors preferred a non-revolutionary mechanism for political change.²⁴⁹ As a result of this effort, "future transformation" would be "legal, public and nonviolent."²⁵⁰

²⁴⁵ Stephen Holmes and Cass R. Sunstein, (1995): pg 284

²⁴⁶ Ibid.

²⁴⁷ Ibid.

²⁴⁸ Ibid. pg 285

²⁴⁹ Ibid.

²⁵⁰ Ibid.

While the Eastern Europeans used amendatory change to help establish their countries, they “lack[ed] a firm constitutional tradition.”²⁵¹ As a result, the difference between constitutional matters — what Ackerman referred to as Higher Lawmaking — and legal matters was obscured. Unlike the citizens of America, the denizens of Eastern Europe had no experience with constitutional law serving as the ‘guard rails’ for ordinary law. This obfuscation is extremely problematic. If the citizens of Eastern Europe did not ‘respect’ and follow their constitutions, their constitutional orders would lack stability. This reality was caused by a few factors, namely that Eastern Europe had no “myth of the framers.”²⁵² The Eastern European political leaders of the 1990s were the same as those who had made the constitution a few years earlier.²⁵³ As a result, there was no opportunity for the level of reverence seen in America, or across the world more generally.

At the same time, the constitutional bargains between political actors at the time of these countries’ establishment were based on faulty information. For example, the powers of the presidency in Poland and Hungary were limited, based on a false assumption as to who would eventually occupy the position.²⁵⁴ When Arpad Goncz, the leader of Hungary’s Liberal opposition, became president, he was restricted constitutionally by constraints his own party created when they had believed his rival, Imre Pozsgay, was going to be elected.²⁵⁵ In this context, it is understandable why liberal leaders would want to amend their constitutions

²⁵¹ Stephen Holmes and Cass R. Sunstein, (1995): pg 287

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Ibid. pg 288

immediately, as it is hard to respect the terms of deals that were made for strategic reasons that no longer provide any benefit.

Moreover, as is a necessity of any constitution, it must change with circumstance. At the time of their constitutional creation, Eastern Europe was experiencing a level of tumult it had never seen prior, and it would be impossible for those countries leaders—or Sunstein for that matter—to have the foresight to deduce what would be the perfect democratic system for these countries. To complicate matters further, the newly-elected legislatures of these countries had “weak legitimacy and internal fragmentation.”²⁵⁶ Prior to the fall of the Soviet Union, the parties of Eastern Europe were united against the old regime. However, now with control over their own countries, these legislatures were marked by shifting alliances with no clear party in charge—in this situation, it is challenging to “create a constitutional framework that earns general respect.”²⁵⁷

Consequently, the only certainty these constitutional framers had was future instability. The combination of the aforementioned historical factors and an uncertain future lead to a question as to what is the “optimal balance of constitutional rigidity and flexibility in such circumstances.”²⁵⁸ Unlike Sunstein, the vast majority of Western observers criticized the idea of allowing for a flexible amendment procedure in Eastern Europe. Generally, these observers contended that there would be no delineation between constitutional politics and ordinary politics. Instead, if these countries were governed by stringent constitutional arrangements that protected liberal rights, democratic processes, and economic prosperity, they would be insulated

²⁵⁶ Stephen Holmes and Cass R. Sunstein, (1995): pg 288

²⁵⁷ Ibid.

²⁵⁸ Ibid. pg 290

from future democratic backsliding.²⁵⁹ Most of these Westerners believed that because these circumstances were changing so quickly, it could be more beneficial to have a stable constitution, promoting democracy in the long-term.

To place Sunstein and the Western constitutional scholars in the terms this paper has been using thus far, Sunstein believed that the Eastern European countries, due to their unique history, would require a relatively high amendment rate in their first years. Sunstein believed that these circumstances created a high demand for amendatory change, yet this demand would only be met if there was a facile amendment procedure. At the same time, as has been explained, amendment processes have a direct effect on the amendment culture of any nation. If the amendment process was too rigid, the Eastern European citizenry would come to understand amendatory change as a normatively negative thing as it is sometimes viewed in America. If there was no positive amendment culture in Eastern Europe, as well as an arduous amendment process, the demand for amendatory change would have to be achieved by other institutions. However, at this time, the Eastern European countries had no real functioning judiciaries and weak, unreliable legislatures. As a result, it would be unlikely that the changes necessary to keep their constitutions functioning would occur from institutions outside the formal amendment procedure. When there is a high demand for amendment as a result of social, political, and economic factors, but no amendatory change occurs, the constitutional systems break down. Citizens come to view their constitutions with contempt, as well as the democratic institutions they create. Differently, the Western scholars believed that a high-level of amendment would lead to a whole-sale revision of Eastern Europe's new constitutional order, leading to the type of democratic backsliding

²⁵⁹ Stephen Holmes and Cass R. Sunstein, (1995): pg 290

witnessed elsewhere. The debate was centred around which amendment process was the lesser evil.

Before turning our attention to the actual amendment procedures that were enacted, it is first important to analyze the effects of the ‘parliamentization’ of constitution making. As Sunstein, and his critics, identified, the issues associated with parliamentary control over the amendment process cannot be overstated. When the legislatures have completed control over the amendment procedure, it can lead to “legislative deadlocks, interest group pressures, short-term goal prioritization, and myopic bargains,” all of which contribute to substantively problematic amendments.²⁶⁰ However, in Sunstein’s view, the benefits of such a system outweigh the detriments. The countries of Eastern Europe still had to answer fundamental political questions as to what their democratic systems would look like—would they be unicameral or bicameral? Would these systems have proportional representation or single member districts? With no satisfying answer, Sunstein argued it is favourable to allow citizens and representatives to debate, learn about, and respond to these constitutional conundrums without undermining the one, somewhat functioning institution they have—the legislature.

Before it is possible to analyze the effects of these amendment procedures as well as the accuracy of Sunstein’s normative claims, it is now pertinent to outline and explain the amendment formulas adopted across Eastern Europe. While these procedures had many commonalities, there were also pronounced differences in the amendment mechanisms each country adopted. After a survey of trends within the Eastern European amendment procedures more generally, the formulas of Bulgaria and Hungary will be analyzed in detail. Uniquely, these two countries have disparate amending formulas, with Hungary adopting a scheme similar to the

²⁶⁰ Stephen Holmes and Cass R. Sunstein, (1995): pg 290

one Sunstein advocated for, while Bulgaria created one of the most stringent amending formulas in the region. As a result, these two countries will be used as case studies, with the amendments passed to this day serving as the metric for analysis. By looking at the amendments these nations have passed, and their effects on constitutional stability, the relationship between these two variables can be shown, and Sunstein's claims can be supported or invalidated.

Interestingly, as was covered in Chapter 2, three Eastern European countries included 'unamendable' provisions within their constitution—Romania, Ukraine, and the Czech Republic—which would assumedly help establish a *constitutional identity*. The Constitution of Romania prohibits amendments from changing the “national, unitary, and indivisible character of the Romanian state, the Republican form of government, territorial integrity, independence of the judiciary, [and] political pluralism.”²⁶¹ In a more pithy manner, the Constitution of the Czech Republic stipulates that “any changes in the essential requirements for a democratic state governed by rule of law are impermissible.”²⁶² It would be a normative conclusion of this paper that these countries have relatively stronger judiciaries than those who do not have these same unamendable clauses, as their justices are able to invalidate amendments on the grounds that they infringe upon *constitutional identity*. At the same time, this unamendability would seemingly lead to an amendment culture that is supportive of amendments, except those that infringe upon the *constitutional identity* outlined in these clauses. As was explained in Chapter 2, these unamendable provisions strengthen the role of the judiciary in the amendment process, enabling them to have the jurisprudential clout to invalidate amendments. As a result, it is a normative

²⁶¹ *Constitution of Romania*, Article 148 Section 1

²⁶² *Constitution of Czech Republic*, Article 9 Section 2

claim of this paper that countries with unamendable provisions related to their amendment procedure experience a greater degree of constitutional stability.

In regards to the question of “who wields the amending power,” it seems there were four main answers adopted by the Eastern European countries. A few countries granted exclusive amending power to their legislatures—the Hungarian Parliament, the Polish Sejm, and the Czech Parliament.²⁶³ Some countries, most notably Macedonia, granted the legislature the power to amend, but also give access to other institutions.²⁶⁴ The Constitution of Macedonia specifies that only the Assembly can ratify amendments, but the President, government, 30 members of the assembly, or a petition of 150,000 Macedonians can lead to an amendment proposal.²⁶⁵ Uniquely, the Constitution of Romania gives no institution unilateral amendment power. As a result of Romania’s amendment formula, the legislature is unable to approve amendments, and instead proposed amendments must be voted on via referenda.²⁶⁶ The inclusion of the referendum mechanism is what led Sunstein to conclude that Romania has “the weakest parliament in Eastern Europe.”²⁶⁷ Differently, many of these countries gave their legislatures the ability to amend, but did not make it exclusive. Countries like the Ukraine, Slovakia, and Latvia allowed for popular referendums on amendments in certain contexts, as well as public petitions.²⁶⁸ In

²⁶³ Stephen Holmes and Cass R. Sunstein, (1995): pg 291

²⁶⁴ *Constitution of Macedonia*, Articles 68, 130, and 131

²⁶⁵ Ibid.

²⁶⁶ *Constitution of Romania*, Articles 150, 151, and 152

²⁶⁷ Stephen Holmes and Cass R. Sunstein, (1995): pg 292

²⁶⁸ Ibid.

some of these countries, the inclusion of the populace in voting on amendments is dependent on a decision from their President or their legislature, as is seen in Croatia and Slovenia.²⁶⁹

Importantly, allowing more institutions to play a role in the amendment process promotes constitutional stability. By forcing different constitutionally-created institutions to deliberate with each other in the creation of amendments, it ensures that none of these institutions is undermined by any given amendment. In turn, the constitutional balance of power remains intact, promoting stability. In contrast, when one institution—like the legislature—has complete control over the amendment process, the amendments will likely empower that institution, or at the least not undermine it. As a result, when one institution wields the power of amendment, amendments are more likely to substantively undermine other constitutional institutions. This effect has been seen in countries like Hungary, where its legislature wields sole amendatory power and other democratic institutions have been undermined.²⁷⁰

Differently, referendums often have a pronounced muting effect on amendment rate. When countries must use a national referendum to pass amendment, it makes nuanced constitutional questions public political debates. While this ensures a higher level of deliberation, this discussion is often distilled into what citizens can digest and is passed on that basis, rather than on the grounds of the substance of the amendment itself. For example, had Bulgaria included a referendum mechanism within its amendment procedure, its EU-based reforms to its judiciary may not have been able to be passed. The political talking points against the amendments—that the EU is seizing power through unelected judges—would be too potent when the counter-argument is a nuanced point about how the judiciary should be structured. As a

²⁶⁹ Stephen Holmes and Cass R. Sunstein, (1995): pg 292

²⁷⁰ This claim will be supported later on in this chapter.

result, national referendums not only have an empirical effect, negative relationship with amendment rate—as Lutz and others identified—but they also effect the substance of amendments in a way that could undermine constitutional stability. While citizens should be involved in constitutional discussions, sometimes amendments need to be ‘in the weeds’—especially in the context of institutional upkeep in Eastern Europe—and are tough to comprehend for the average person. When a country is small and old, like Switzerland, national referendums can have a positive effect insofar as they involve the whole populace in promoting constitutional stability, and the amendments require less institutional nuance. However, in most contexts, national referendum mechanisms within amendment procedures undermine constitutional stability.

Another feature of the Eastern European amendment procedures was time constraints. The Constitution of Estonia requires that any amendment proposal must go through three separate reading periods each a month a part.²⁷¹ Similarly, the Constitution of Latvia necessitates that three separate ballots occur for each amendment.²⁷² The goal of these constraints are clear—the Eastern European constitutional crafters wanted to ensure that before any amendment passed, there was a deliberative process. Interestingly, time constraints provide a potent institutional safeguard against substantively problematic amendments. If a hostile legislature is trying to seize constitutional control via amendatory change, time constraints afford the opposition an opportunity to rally against the amendment. Even if it only provides an extra month, week, or day, deliberation in the context of amendment is important, as is allowing for criticisms of an amendment’s design. As a result, time constraints promote constitutional stability, albeit in an

²⁷¹ *Constitution of Estonia*, Article 178

²⁷² *Constitution of Latvia*, Chapter V Sections 76-79

obfuscated manner, by affording the opposition to any amendment an opportunity to argue against it. If an amendment is really beneficial to constitutional stability, it will pass, even if it must be voted on multiple times on different days. In contrast, problematic amendments that undermine constitutional stability will be less likely to pass.

Interestingly, the Hungarian amendment procedure is exemplar insofar as it follows the principles Sunstein advocated for. The legislature of Hungary has exclusive power over constitutional revision, although there are some procedural constraints. Hungary's constitution begins with a "declaration of temporariness," a constitutional acknowledgement that foreshadows its eventual developments.²⁷³ The creators of the Hungarian constitution understood the context in which they were forming a government, and agreed with Sunstein in the necessity of amendatory change moving forward. Article 24 Section 3 of the Constitution of Hungary specifies that for amendments to be valid, they must receive an "affirmative vote of two-thirds of the Members of Parliament."²⁷⁴ However, unlike some of the other constitutions described prior, the Hungarian parliament is the sole wielder of amendatory power. As a result, the Hungarian parliament can "unilaterally revise the constitution" and ensure that "no amendment [is] ... enacted without [their] approval."²⁷⁵ While Sunstein would laud this amendment procedure for understanding the unique situation Eastern European democracies are in, it fails to take into account the possible negative ramifications associated with such concentrated power.

²⁷³ *Constitution of Hungary*

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

Differently, the Bulgarian National Assembly has the power to amend their constitution on their own, but the procedure is quite arduous. As Sections 153, 154, 155 of the Bulgarian Constitution outline, “constitutional amendment[s] ... require a majority of 3/4ths of the votes all members of the National Assembly on three ballots on three different days.”²⁷⁶ At the same time, “amendment bills [are] debated by the National Assembly not earlier than one month and not later than three months from the date on which it is introduced.”²⁷⁷ Bulgaria had the most stringent amendment procedure in all of Eastern Europe at the time of its founding, leading to Sunstein’s conclusion that it is the most “fully entrenched.”²⁷⁸

The pronounced differences between the amendment procedures in Bulgaria and Hungary is a direct ramification of their post-Cold War contexts. In Bulgaria, the post-communist elites had wrested control earlier and more effectively than in Hungary, such that they were trying to protect the democratic institutions and principles they had already fought hard to inculcate in their country.²⁷⁹ The Founders of Bulgaria had the most to gain by purporting to be the “fathers of a liberal political order” and the most to lose if their new constitution “permit[ted the] confiscation of ill-gotten gains and the prosecution for crimes committed under the old system.”²⁸⁰ ²⁸¹ While leaders of the Bulgarian revolution—like the 1st President Zhelyu Zhelev—were confident in the gains they had made so far, they feared they could lose all of their

²⁷⁶ *Constitution of Bulgaria*

²⁷⁷ *Ibid.*

²⁷⁸ Stephen Holmes and Cass R. Sunstein, (1995): pg 293

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.* pg 294

²⁸¹ *Ibid.*

progress in the first election of 1992.²⁸² In this context, it is unsurprising that Zhelyu Zhelev and his supporters tried to enshrine within their constitution permanent democratic values and an inflexible amendment process.²⁸³

Differently, the post-Soviet political landscape of Hungary was marked by a dearth of leadership. Hungary had a myriad of populist, centre-right, and liberal parties vying for control, with no clear leader. As a result, these parties negotiated a constitutional amendment process that would enable future change once they had seized control.²⁸⁴

To return to the analysis of these amendment procedures, based on the arguments expressed in the prior chapters, there are a few normative claims that can be made about Hungary and Bulgaria's procedures and their predicted effects on constitutional stability. Interestingly, these claims can then be tested against the amendments that have been passed since these countries were founded, teasing out the ways in which the differences in these mechanisms has led to or prevented democratic backsliding.

Based on Bulgaria's amendment formula, it would be assumed that they would have a relatively low to moderate amendment rate. As has been shown, when the amendment rate is too low, it can lead to problems like an over-reliance on the judiciary. However, Bulgaria had no functioning judiciary when it was first created, so it would appear that Bulgaria would likely either work to strengthen its constitutional court via amendment, or would have to use its arduous amendment process regularly to promote amendatory change. If neither of these things occurred, and there was still a high-level of demand for constitutional adaptation, Bulgaria would

²⁸² Stephen Holmes and Cass R. Sunstein, (1995): pg 295

²⁸³ Ibid.

²⁸⁴ Ibid.

have a populace that views its constitutional institutions with contempt. At the same time, Bulgaria's arduous amendment procedure leads to the promotion of an amendment culture that is less supportive of amendatory change than that of Hungary's. It would follow that by now, Bulgaria would have amended its constitution less than Hungary, or at least in less dramatic ways.

In contrast, the relative ease of Hungary's amendment procedure, and as well as its reliance on the legislature as the sole arbiter of amendatory change, would lead to a higher amendment rate than in Bulgaria, as well as a culture more prone to amendment as a solution to constitutional disagreement. The 'supply' of amendatory change would be greater in Hungary, but the demand—the changing circumstances that necessitate amendment—would be the same in both countries due to their similar history, geography, and political culture. As a result, it would seem normatively that the legislature of Hungary may become addicted to constitutional amendment, and so too could its citizens. If this were to occur, Hungary would eventually begin to pass amendments that undermine the democratic institutions that govern it.

Consequently, the similarities between Hungary and Bulgaria, and the differences in their amendment procedures, allow them to be an effective case study to analyze the claims made in this thesis. The comparison of the amendments these countries have passed elucidates the effects of these amendments on constitutional stability, as well as the effects of these amendment processes on constitutional stability.

Uniquely, Hungary continued to use its 1949 Constitution until 2010, drastically changing the document in 1990 as the country transitioned to democracy and capitalism.²⁸⁵

²⁸⁵ Nóra Chronowski et al., "Hungary: Constitutional (R)Evolution or Regression?," *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, 2019, pp. 1439-1488, https://doi.org/10.1007/978-94-6265-273-6_31)

Interestingly, the much of the amendments passed at the beginning of Hungary's democratic history were the type that Sunstein lauded. The nascent democrats of Hungary were changing and negotiating the 'rules of the game.' For example, in 1997, a popular amendment helped to develop and streamline the judicial system of the country, enabling Hungary to eventually join the EU.²⁸⁶ The Hungarian people became trusting of their democratically-elected representatives and comfortable with idea of amendatory change. At the same time, politicians began to see and understand their relatively lax amendment process, identifying that it was ripe for exploitation. The right-wing populist Viktor Orbán, who had been pertinent in Hungarian political life since 1988, was eventually elected as Prime Minister in a landslide in 2010.²⁸⁷ Orbán, whose coalition had 263 of the 386 seats in the Hungarian Parliament, quickly went about creating a package of constitutional amendments that would amount to the new nation of Hungary's first constitution.²⁸⁸ Orbán, who safely held a 2/3rds majority, filled this new constitution with problematic provisions that undermined liberal values.²⁸⁹ Learning from his successes, Orbán did not stop there. Orbán, who has remained in power since 2010 and won re-election in 2018, has facilitated the passage of eight amendments in this ten year period, all of which have been criticized by international human rights groups and domestic NGOs.²⁹⁰

²⁸⁶ Nóra Chronowski et al, (2019): pg 1445

²⁸⁷ Ibid. Orbán briefly served as Prime Minister from 1998-2002 as well, but this term did not involve the same level of amendatory change.

²⁸⁸ Ibid.

²⁸⁹ Ibid. pg 1448

²⁹⁰ Ibid.

The quintessential example of Hungary's parliament undermining democratic values and institutions via amendatory change came from the amendment package passed in 2013.²⁹¹ The amendments were passed on a party line vote, with just Orbán's coalition voting in favour.²⁹² One of the most problematic amendments curtailed the powers of the constitutional court, one of the only institutions present in Hungary that was still defending liberal values from Orbán.²⁹³ The amendment—Article 37 (4) of the Hungarian Fundamental Law—prevented the Court from being able to refer to rulings made prior to 2010.²⁹⁴ At the same time, the amendment removed the ability of the court to substantively review amendments to the constitution.²⁹⁵ In turn, Hungary's Constitutional Court could no longer attempt to protect the *constitutional identity* of the country, such that future amendments and laws were likely to undermine democratic procedures, goals, and institutions. The amendment package also gave preference to traditional relationships, specifying that marriage is between a man and women.²⁹⁶ In regards to freedom of speech, the amendments enabled the government to limit speech to prevent hate speech, and also restricted election campaign broadcast to state media.²⁹⁷

The amendments were a direct response to a series of the rulings by the Hungarian Constitutional Court. Orbán had repeatedly tried to pass laws that were viewed as infringing upon the *constitutional identity* of Hungary, such as an amendment that allowed the parliament to

²⁹¹ Nóra Chronowski et al, (2019): pg 1450

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Ibid. pg 1451

²⁹⁵ Ibid.

²⁹⁶ Ibid.

²⁹⁷ Ibid. pg 1453

decide which religious organizations can be deemed churches.²⁹⁸ The Court had done its job in trying to protect liberal, democratic values, yet “instead of respecting those rulings, the government ... reintroduced the same laws through amendments to the constitution itself and ended the court’s power to review substantive changes to the constitution.”²⁹⁹ The laws related to state media, and marriage had also been struck down by the Court. However, as a result of the facile amendment procedure in Hungary that Sunstein lauded, it was easier for Orban to pass these undemocratic laws as constitutional amendments rather than as ordinary legislation. At the same time, the amendment culture in Hungary was one that was supportive of amendatory change, but unlike New Zealand or other countries with ‘political barriers’ to complete constitutional revision, the citizens of Hungary had no constitutional or democratic history to serve as a guide with which to oppose such amendments. Similarly, the amendments in this context did not require a public referendum, so even if they were opposed by a majority of the public—Orban only won 43% of the vote in 2010—there was no opportunity for recourse.³⁰⁰

Interestingly, this amendment package was not the end, and Hungary went on to amend their constitution six more times since 2010.³⁰¹ All of these amendments have served to substantively undermine institutions hostile to Orban.³⁰² In this context, it is unsurprising that Hungary passed a law to give Orban dictatorial powers to suspend parliament and rule by decree

²⁹⁸ Nóra Chronowski et al, (2019): pg 1460.

²⁹⁹ Ibid.

³⁰⁰ Ibid. pg 1462

³⁰¹ Ibid.

³⁰² Ibid.

in the wake of the COVID-19 outbreak.³⁰³ With no judiciary to stand in its way, and no clauses protecting constitutional identity, Orbán has been able to destroy Hungary's constitutional stability via formal amendment. As a result, Hungary is arguably no longer a democracy, but instead a functioning constitutional autocracy. Hungary is the poster-child for democratic backsliding, with its lax amendment procedure serving to exacerbate its problems. While it is clear democratic stability has been undermined completely in Hungary, it is less transparent that all of these problems are caused by their amending formula. It would be erroneous to claim Hungary is in the place it is in today solely because of amendatory change.

However, the Hungarian example highlights how a problematic amendment procedure can exacerbate existing problems, allowing for political actors to use constitutional means to undermine democracy. While Bulgaria has experienced similar issues to Hungary—media capture, corruption, xenophobia and economic instability to name a few—its democracy has not collapsed to the same degree at least in part because of their amendment procedure and the protections it affords to democratic and liberal values. Similarly, the amendment procedure of Hungary created an amendment culture in that nation that was too supportive of amendment, too reliant on it as a means for political change. Hungary's amendment process was easy and regularly used at the country's founding, prompting a constitutional understanding on the part of the populace that amendatory change was normatively positive. With an easy amendment process, and an amendment culture overly-supportive of constitutional change, there wasn't the level of public opposition necessary to prevent Orbán's amendments from coming to fruition.

Differently, due to its constitution having no unamendable provisions, the Hungarian Judiciary was unable to prevent the passage of 'unconstitutional' constitutional amendments.

³⁰³ Lili Bayer, "Hungary's Viktor Orbán Wins Vote to Rule by Decree," POLITICO (POLITICO, March 31, 2020), <https://www.politico.eu/article/hungary-viktor-orban-rule-by-decree/>

Had there been any eternity clauses included in Hungary's constitution, it is possible that the Hungarian Constitutional Court would have had the jurisprudential clout to prevent some of Orban's more egregious amendments on the basis that they were unconstitutional—as has been seen in Germany and Columbia. Consequently, the dearth in unamendability in the Hungarian constitution is just another feature of its amendment procedure that resulted in constitutional stability being undermined.

Similarly, Bulgaria, like most Eastern European countries, has experienced democratic backsliding over the past decades. For example, in 2019, Bulgaria was ranked 111th out of 180 countries in media freedom by Reporters without Borders.³⁰⁴ This is the lowest score of any country in Europe, excluding Belarus and Russia.³⁰⁵ While media freedom is just one metric, it reflects how Bulgaria has experienced some level of democratic backsliding. At the same time, the Bulgarian government has been active in trying to stifle what it views as problematic liberal values. For example, the Deputy Prime Minister Krasimir Karakachanov called for a ban on the Bulgarian Helsinki Committee (BHC), the largest human rights organization in Bulgaria.³⁰⁶ Karakachanov accused the BHC of “exerting direct and indirect pressure on Bulgarian magistrates and conducting anti-constitutional, illegal, immoral, and openly anti-Bulgarian activities.”³⁰⁷ However, the Bulgarian government has been unable to amend the constitution in the way Orban has, even though there is a similar level of disregard for democratic values. The

³⁰⁴ “2020 World Press Freedom Index: Reporters Without Borders,” RSF, accessed May 9, 2020, <https://rsf.org/en/ranking>)

³⁰⁵ Ibid.

³⁰⁶ Dimitrina Petrova, “Being BOLD in Difficult Times: Bulgarians Organizing for Liberal Democracy,” OpenGlobalRights, April 3, 2020, <https://www.openglobalrights.org/being-bold-in-difficult-times-bulgarians-organizing-for-democracy/>)

³⁰⁷ Ibid.

reason why this is the case is clear—Bulgaria has an amendment procedure that more effectively promotes constitutional stability.

Bulgaria not only has a lower amendment rate than Hungary—it has amended the constitution four times—but its amendments are also different in substance. All three of the amendment packages passed in Bulgaria strengthened the role of the judiciary and promoted the democratic goals of the Bulgarian Constitution.³⁰⁸ For example, the most recent amendment, passed in 2015, amended the Supreme Judicial Council such that it was divided into two separate parts, one that oversees justices, and one that manages prosecutors and investigators.³⁰⁹ This amendment also strengthened the powers of the Judicial Council’s inspectorate, which investigates the activities of the country’s judicial bodies to prevent corruption.³¹⁰ Just as Hungary was hamstringing their justice system, Bulgaria was strengthening theirs. As Bulgaria had the most stringent amendment formula, any amendment required large cross-party support. As a result, the amendments are technocratic, practical, and promote the end of constitutional stability. While one could attribute this to enlightened Bulgarian politicians, it is much more a ramification of the procedural constraints of the amendment process. As has been shown, political actors in Bulgaria can be just as problematic as those in Hungary.

At the same time, the Bulgarian amendment procedure has inculcated an amendment culture beneficial to constitutional stability. Legislative and public debate about constitutional amendments in Bulgaria is centred on its benefits to the constitutional order, rather than political

³⁰⁸ Evgeni Tanchev and Martin Belov, “The Bulgarian Constitutional Order, Supranational Constitutionalism and European Governance,” *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, 2019, pp. 1097-1138, https://doi.org/10.1007/978-94-6265-273-6_23)

³⁰⁹ Ibid. pg 1101

³¹⁰ Ibid.

motivations. The more arduous amendment process showed Bulgaria's citizens that amendatory change is not a solution to everything, and when it must occur it is for consequential, stability-promoting reasons. This is in direct contrast with Hungarian's populace, who, as a result of Orban's use of the constitution's undemanding amendment procedure to promote political change, view constitutional and legal matters as virtually the same. In this context, it is unsurprising that Bulgarian's are sceptical of amendatory change unless necessary, while Hungarians turn to amendment first.

Another pertinent feature of Bulgaria's constitution is its two track amendment procedure. Changes to the key constitutional provisions outlined in Article 158 require a more onerous amendment procedure than 'normal' amendments do. Article 158 covers everything from the amendment procedure itself to human rights, and amendments to it require the establishment of a separate, 'Grand National Assembly'.³¹¹ The Grand National Assembly is a separate, elected body with 400 representatives, rather than the usual 240 members of the Bulgarian National Assembly.³¹² This separate body must then vote on these amendments with a 2/3rds majority, in three readings, on three separate days.³¹³ However, this Grand National Assembly has never been used. Instead, the Bulgarian Constitutional Court has ruled multiple times—Decisions No.3 2003, No. 3 2004, and No.5 2005—on which track amendments must go through to be passed.³¹⁴

Effectively, the Bulgarian Constitutional Court rules whether an amendment needs to be passed via the arduous, never-used process, or the more facile one. As a result, the Bulgarian

³¹¹ Evgeni Tanchev and Martin Belov, (2019): pg 1110

³¹² Ibid.

³¹³ Ibid.

³¹⁴ Ibid. pg 1114

Constitutional Court has the jurisprudential clout to rule on the nature of amendments, and if some undermine the constitutional order, the Court is within its right to rule that the Grand National Assembly must be used. As the Grand National Assembly procedure has never been used, this type of ruling effectively invalidates an amendment. When the Court has this role in amendatory change, it ensures amendments won't substantively undermine this democratic institution. In turn, it is unsurprising that Bulgaria's amendments have strengthened its Constitutional Court while Hungary's has undermined theirs. As the number of constitutional institutions that play a role in the amendment process grows, the better this process is at protecting the balance of power. This is just another manner in which Bulgaria's amendment procedure promotes constitutional stability more effectively than Hungary's.

Consequently, Sunstein's normative claims about the superiority of lax amendment procedures in Eastern Europe have been proven wrong if their superiority was based in their promotion of a functioning democracy. Amendment procedures are a means for constitutional change, and cannot receive complete responsibility for the actions of Orbán, Hungary's government, or Bulgaria's. However, the fact these countries have such similar histories, governmental structures, geography, culture, and economies reflects the extent to which the amendment formulas have at least played some role in promoting or undermining the constitutional stability seen in these nations today. Bulgaria isn't perfect and its democracy isn't stable. However, Bulgaria's amendment procedure promoted constitutional stability while Hungary's undermined it.

In the 2010-2020 period, Hungary passed eight constitutional amendments, resulting in the relatively high amendment rate of 0.8.³¹⁵ In contrast, Bulgaria passed one amendment in that

³¹⁵ Nóra Chronowski et al, (2019): pg 1464

same period, resulting in the low amendment rate of 0.1.³¹⁶ Both countries experience the challenges associated with too high or too low a rate of amendment. Hungary's citizens don't view their constitution as higher law, and are instead comfortable with Orbán gaining the power of a dictator. Differently, the citizens of Bulgaria are likely sceptical of their constitutional order, as the judiciary regularly has to step in to meet the amendatory demand that the constitution cannot. The amendment culture of Hungary is one prone to, and in favour of amendment, while Bulgaria's amendment culture provides further insulation to its constitution, preventing problematic amendatory change. Bulgaria has issues in regards to its constitutional stability, but its amendment procedure, and the amendment culture it created, have promoted this end. In contrast, Hungary's has done the opposite.

The unique constitutional history of Eastern Europe, and the developments seen in Hungary and Bulgaria, help to support the claims made throughout this thesis about the effects of amendment processes on constitutional stability. There is no one-size-fits-all answer as to how an amendment procedure should function, but the arguments made in this chapter help to illustrate the importance of these mechanisms. Amendment procedures should not serve as a constitutional after-thought, and any constitutional or political scholar must take into account their effect on the systems they govern.

³¹⁶ Evgeni Tanchev and Martin Belov, (2019): pg 1120

Section 3: The Theory of Amendatory Change

Consequently, amendment procedures have a clear observable effect on constitutional stability. When crafting a constitution, the amendment procedure should be tailored to promote this end. As was revealed in Chapters 2 and 3, there are some empirical and normative ways to promote constitutional stability through an amendment process. Primarily, unamendable provisions promote constitutional stability by ensuring some parts of the constitution are never changed. Equally, unamendable provisions empower constitutional courts to play a role in the amendment process, ruling on the constitutionality of amendments. These eternity clauses also have a direct effect on a country's amendment culture, influencing what 'type' of amendments the populace is comfortable with. In these three ways, unamendable provisions have a pronounced effect on the substance of amendments such that the amendments are more likely to promote constitutional stability. At the same time, unamendable provisions moderate the rate of amendment, ensuring there is not too much of it. Unamendable provisions also enable another institution, the judiciary, to play a role in amendment. As was seen in Bulgaria, Hungary, and many other countries, unamendability promotes constitutional stability by enabling more institutions to play a role in amendatory change, further insulating the constitutional balance of power. While some of the other amendatory mechanisms cannot be applied universally, unamendable provisions are beneficial to any constitution that has the goal of permanence.

Differently, amendment processes should not include the opportunity for a public referendum. Public referendums have an effect on both the process and substance of amendment. Constitutional matters regularly warrant nuance, and referendums necessitate politically palatable, easy-to-understand arguments. As a result, referendums are structurally in tension with

the goal of promoting constitutional stability. Referendums disempower courts from playing a role in the amendment process, and often actually serve to undermine that institution. When an amendment has the clout of being democratically supported by the majority of the nation, no matter how problematic the content is constitutionally, a court would be hard-pressed to rule against it. At the same time, referendums mute the substance of amendments, as citizens rarely truly comprehend the changes they are supporting. Referendums also have an effect on amendment culture, inculcating an understanding on the part of the populace that consequential political—rather than constitutional—matters should be put to amendment. When there is no delineation between constitutional matters and regular lawmaking, constitutional stability is undermined. For a constitution to function, it must be viewed by the populace as higher law. Referendums turn amendatory change into just another regular electoral process.

In these ways amendment processes effectively promote constitutional stability when they have unamendable provisions, and no opportunity for referendum. While these procedures can be applied to almost any constitution, other ‘moderating’ mechanisms should be chosen on a context-specific basis. As was seen in Eastern Europe, these countries that had little democratic history required a more restrictive amendment procedure to ensure that their new constitutional values were protected. In contrast, a country with a rich democratic history like America requires a more facile process to promote constitutional stability. As was shown in this chapter, there are many mechanisms that reduce or increase the difficulty associated with the passage of amendment. When crafting a constitution, framers should take into account their country’s unique history and use the procedural tools at their disposal to involve institutions and allow for a level of difficulty that promotes a beneficial amendment culture.

To summarize this ‘theory of amendatory change’, amendments are introduced and passed as a result of the amendment process that governs them. When scholars attempt to analyze constitutional developments, it is first fundamental to understand a country’s amendment procedure and its effects. The ways in which amendment processes influence the passage and substance of amendments can be distilled into four mechanisms—the institutions involved, the level of difficulty associated, unamendable provisions, and the amendment culture these factors create. The more constitutional institutions there are involved in an amendment process, the better protected the balance of power is. In turn, involving more institutions promotes constitutional stability. Differently, the level of difficulty influences a nation’s rate of amendment and the substance of those amendments. While every nation is different, this process cannot be too challenging or too easy, as constitutional stability is undermined. As was explained in Chapters 2 and 3, unamendable provisions protect the most fundamental parts of a constitution and allow the judiciary to play a potent role in the formulation of amendment, promoting constitutional stability in a pertinent way. Finally, all of these factors influence a nation’s amendment culture, and the amendment process must be carefully tailored to promote an amendment culture supportive of constitutional stability.

To further cement the conclusions made throughout this chapter, it is beneficial to apply this theory of amendatory change to America’s constitutional history. Interestingly, when America is analyzed through the lens of these four factors—the institutions involved, the level of difficulty, unamendability, and amendment culture—it appears that its amendment procedure undermines constitutional stability. As a result, some of the political problems witnessed in America today are at least in part a ramification of the amendment procedure that governs its

constitution. The applicability of the normative claims of this theory are even more transparent when they are tested against America's historical developments.

From an institutional standpoint, America's amendment procedure is somewhat unique, with its emphasis on the state legislatures. For an amendment to be proposed, it must either go through one of two avenues—2/3rds of the Federal legislature must vote to send it for ratification, or the Congress, at the request of 2/3rds of the states, can call a 'national constitutional convention.'³¹⁷ As the national convention process has never been used, the federal legislature essentially holds control over the subject matter of amendments in America. However, because the federal legislature does not have the power to ratify these amendments, it means that this institution is unable to use amendatory change to empower itself, something that promotes constitutional stability. However, due to the fact that the state legislatures hold complete control over ratification, the subject matter of amendments and the number of amendments are diminished.

When two institutions with such disparate interests control both sides of the amendment process—proposal and ratification—it means that this process will be rarely used. An amendment would have to be so palatable, uncontroversial, and transparently beneficial to be passed, as otherwise these institutions would not propose or ratify this amendment in pursuit of their own interests. Practically, state governments hold a veto power over amendment, and therefore the substance of amendments will tend to be tailored towards their interests. This normative understanding is supported by the history of amendment in America. For example, the 1978 District of Columbia Voting Rights amendment was proposed and passed by the federal legislature, but still required ratification by the states. However, only 16 states ratified the

³¹⁷ *The Constitution of the United States of America*, Article V

proposal.³¹⁸ As bipartisan state legislatures supported the amendment, the amendment's eventual failure is not reflective of a partisan calculation, but instead reveals how these state legislatures pursued their own institutional interests. The addition of another state to America would seemingly disempower every senator by a small margin and limit the amount of support the federal government provides to every other state. As a result, it is unsurprising that this amendment was not ratified, as the state legislatures hold control over the process. Consequently, the institutional make-up of America's amendment process has a notable effect, that amendments cannot infringe upon the powers of the states or they will not be passed at all. At the same time, based on the institutions involved and the devolution of amendatory powers, America is not likely to use its amendment process, as it is extremely arduous independent of super-majoritarian constraints.

It is important to note that this is no way meant to question the original motivations of the Framers in crafting the amendment process. America's founders had no history to base their amendment procedure on, and tried to craft one that would protect deliberation, consent of the governed, and the principles of federalism. As a result, the American amendment procedure is somewhat effective in pursuit of these goals. However, if the amendment procedure were to be redesigned today in pursuit of the goal of constitutional stability, its current institutional make-up would be a detrimental structure.

Independent of the challenges associated with the institutions involved in Article V, this procedure also has strict super-majoritarian requirements. While this type of restraint is found in

³¹⁸ Joseph L. Rauh et al., "D.C. Voting Rights: What Went Wrong?The Amendment Died Last Week. Now, Says a Longtime Advocate, Statehood Is the Only Game in Town.," *The Washington Post* (WP Company, August 25, 1985), <https://www.washingtonpost.com/archive/opinions/1985/08/25/dc-voting-rights-what-went-wrongthe-amendment-died-last-week-now-says-a-longtime-advocate-statehood-is-the-only-game-in-town/29a08136-93eb-4951-a854-6162bad4222e/>

many constitutions, only America's has this interesting combination of supermajorities in the federal legislature and the states. When coupled with the difficulties of countervailing institutions controlling the process, the Article V procedure appears to be one of the most arduous in use today. As a result of this level of difficulty, America has a low rate of amendment and all of the issues associated. Countries with an extremely challenging amendment process are unable to meet the demand for amendatory change formally, and other institutions have to step in to facilitate constitutional development. Usually, this means that the judiciary regularly makes consequential rulings as to the constitutionality of certain concepts that otherwise would be settled via formal amendment. When this occurs, citizens are alienated from their constitution and the deliberative process associated with formal amendment. If the judiciary does this repeatedly, it undermines constitutional stability, as the whole order is called into question and the constitutional court is viewed with contempt.

These normative observations are once again confirmed by the history of America. America has one of the most active judiciaries in the world, but unlike the Constitutional Court of Germany for example, they have minimal amendatory basis for these rulings—the decisions are usually based on constitutional construction rather than a novel addition to the constitution. At the same time, public perception of America's judiciary has been deteriorating over time. For a constitutional system to remain intact, the institutions it creates must be functioning and respected. When the judiciary regularly has to step in as the final constitutional arbiter with no formal amendatory basis, they are viewed as an undemocratic, unelected institution by the populace. In these ways, the level of difficulty associated with America's amendment process not only diminishes the amount of formal amendment, but also the constitutional stability of the system overall. In this context, it is unsurprising that the scholars identified in Chapter 1 are

unable to truly ‘count’ the number of amendments to the American constitution. If the goal is to promote constitutional stability, this obfuscation is problematic and amendatory change should go through the formal process.

While America has one of the most arduous amendment processes, it has virtually no unamendable provisions. As was explained in Chapter 2, there is only the senate apportionment clause, which places an unnecessary emphasis on the role of the states. As a result, there is no part of the American constitution that can be identified as its *constitutional identity*—while some may point to the Preamble, or the Bill of Rights, these provisions have not functioned as unamendable underlying constitutional principles. As a result, Americans view their entire constitution with reverence, rather than a certain portion. The entire American constitution is ‘over-valued’ and improvements to it are ‘under-valued’. At the same time, the Supreme Court has no jurisprudential basis to invalidate unconstitutional amendments. While the difficulty of the process has prevented the Supreme Court from having to rule in this manner, future political actors could use amendment as an avenue for unconstitutional, problematic change, and unamendable provisions would help to prevent that from happening.

In these ways, America’s constitutional system would be better insulated if there were eternity clauses empowering the Court to rule on the constitutionality of amendment. For example, the 18th amendment—the prohibition of alcohol—was reflective of a ‘momentary passion’ on the part of the American populace and was repealed by the 21st amendment a decade later. If there were unamendable provisions within the American Constitution protecting basic rights or principles of freedom, the Supreme Court would have had the jurisprudential basis to invalidate such an amendment. While it is impossible to say if the Court would have actually done so, at the least, the history of the 18th amendment reflects an opportunity for the court to

have exercised this power. In the future, there may be an amendment that destroys America's constitutional order. However, the final protection against such an amendment, unamendable provisions, are not a part of the Article V process. This reality is a serious threat to constitutional stability.

Finally, all three of these amendatory mechanisms inform the fourth factor, amendment culture. The level of difficulty associated with the amendment process, as well as the institutions involved, create an amendment culture that is extremely reluctant to use formal amendment as the means for constitutional change. This is reflected in the scholarly arguments against amendment presented in Chapter 1—American citizens feel amendatory change is superfluous and unnecessary. However, as has been shown in Chapters 2 and 3, formal amendment is necessary to promote constitutional stability. As a result, the amendment culture in America undermines the constitutional order, as necessary constitutional developments do not go through the formal process. This problematic culture is further exacerbated by the effect of unamendability on American's constitutional understanding. As no specific provisions within the American Constitution reflect its *constitutional identity*, citizens view the entire document with reverence and are against changing it in any way. In turn, America's amendment culture serves as the last, most consequential barrier to amendment. If the citizens of America view formal amendment as detrimental, they will never use it as an avenue for change. As a result, it is unsurprising that America has one of the least amended constitutions in the world today.

Consequently, based on this theory's four factors, it normatively follows that America's amendment procedure undermines its constitutional stability. America has had one of the longest lasting, least-amended constitutional orders, but the threats to stability it is experiencing today may be a ramification of its amendment procedure. When constitutional questions are settled by

judicial decision rather than formal amendment, they lack finality and permanence. As a result, America's Overton window—the range of policies acceptable to the mainstream population—has been stretched too far. A large swath of the population cannot be operating under the assumption that *Roe V Wade* is unconstitutional, while another portion of the population thinks the opposite. When citizens have such disparate understandings of what their constitution protects, the constitutional order is threatened as stability requires a common comprehension of constitutional principles.

At the same time, America has had to rely on its judiciary for constitutional upkeep. While this has worked in the short time since FDR's presidency, it has resulted in a politicization of, and over-reliance on, the judiciary. In turn, citizens have come to view the Supreme Court with contempt, especially when they don't agree with the Court's ruling. This is a serious problem for constitutional stability, as institutions must be respected and Court's rulings followed. Moreover, American's lack a unifying constitutional identity outlined by an eternity clause. Without it, not only does the judiciary lack the ability to rule on the constitutionality of amendments, but it also further swells the Overton window, as no-one truly knows America's most formative constitutional provisions. Some may claim it is the 2nd Amendment, while others may claim its Article I. Ultimately, if America had an amendment process more finely attuned to the goal of constitutional stability, taking into account these four factors in its creation, the procedure may have served to promote, rather than undermine, constitutional stability. However, it seems America's current political divides have been exacerbated by its amendment process.

Conclusion:

This thesis has sought to bring amendment processes to the forefront of constitutional discussion, highlighting the fundamental ways in which these procedures influence a nation's constitutional development. Amendment procedures not only facilitate the passage of amendments, but they also inform the substance of amendments. At the same time, the amendment procedure has a direct effect on what amendments *are not passed*. In turn, amendment procedures have a strong relationship with constitutional stability, and can work to promote or undermine it. When trying to understand why a certain constitutional system has succeeded or failed, scholars must first take into account the amendment process' role in these developments. Moreover, when trying to comprehend why some amendments receive support and others do not, the emphasis must once again be placed on the procedure's effect in this context. The permanence of a constitutional order is influenced by countless factors, many out of citizens control. However, one of the most consequential factors, amendment procedure, has been misunderstood. While many consider them unimportant, in actuality, amendment processes have one of the most pronounced effects on constitutional stability, and should be viewed with respect as a result. Amendment procedures, by governing what can change within a constitution, are the most pertinent piece of the constitutional puzzle.

Moreover, when analyzing amendment procedures and their effects, this thesis' theory of amendatory change should be applied. By looking at the four mechanisms through which amendment procedures influences the number and substance of amendments—the institutions involved, the level of difficulty, unamendability, and amendment culture—important normative conclusions can be drawn as to the functioning of a constitutional order. This is reflected by Chapter 3's analysis of Bulgaria, Hungary, and America. While all constitutional developments

are not directly caused by the amendment procedure, the amendment procedure informs the substance of any constitutional change. By viewing constitutional systems through this lens, the effects of amendment procedure on constitutional stability can be properly understood.

Ultimately, countless factors affect constitutional stability and amendment procedure is just one of them. However, amendment procedures have a powerful effect, and unlike other constitutional factors, they are regularly forgotten. By placing procedure in the centre of the discussion, this thesis hopes to help politicians, scholars, and citizens alike better understand their constitutional systems. To address the threats modern democracies face, citizens must understand where these threats come from. Sometimes, the threat is not external or caused by a political actor, but it is instead the amendment procedure itself. When people fail to comprehend this reality, they blame the ills of their amendment procedure on democratic government. In turn, constitutional stability is undermined in the ways seen in America today. To ensure the permanence of democratic constitutional orders across the world, citizens must understand that sometimes, “it’s the procedure, stupid!”³¹⁹

³¹⁹ If it was unclear, this is a reference to James Carville’s famous phrase from the 1992 Election season. https://en.wikipedia.org/wiki/It%27s_the_economy,_stupid

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