

## PARTIAL CONSTITUTIONAL AMENDMENTS

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*Thirty years ago, in *Frontiero v. Richardson*, the Supreme Court faced an important question of constitutional interpretation: in cases where the Court is being asked to develop the meaning of the Constitution by common law means and considers democratic constitutional understandings to be relevant, how should it respond to the existence of a parallel proposal to amend the Constitution by means of Article V? The Justices divided sharply on this issue, and since then, neither the Court nor constitutional scholars have addressed this question. This article addresses this gap in the constitutional scholarship by defending the view adopted by Justice Brennan in *Frontiero*—that proposed amendments should carry positive rather than negative significance for the purposes of common law interpretation—and proposing that it should in fact be expended, as one potentially valuable means of responding to what it argues is the undue difficulty of successful constitutional amendment under Article V.*

### INTRODUCTION

Thirty years ago, in *Frontiero v. Richardson*,<sup>1</sup> the Supreme Court faced a novel and important question of constitutional interpretation: in cases where the Court is being asked to develop the meaning of the Constitution by common law means,<sup>2</sup> how should it respond to the existence of a parallel proposal to amend the Constitution by means of Article V, such as the proposed Equal Rights Amendment of 1972 (ERA)?<sup>3</sup>

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<sup>1</sup> 411 U.S. 677, 687–88 (1973). While the same question implicitly presented itself forty years earlier in *United States v. Darby Lumber Co.*, 312 U.S. 100, 116–17 (1941) (dealing with the issue of child labor regulation while a constitutional amendment on point had passed Congress but had yet to be ratified), the Supreme Court in that case in no way averted to or addressed the question.

<sup>2</sup> For the idea of common law constitutional interpretation, see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879–80 (1996) (“The common law approach restrains judges more effectively, is more justifiable in abstract terms than textualism or originalism, and provides a far better account of our practices.”).

<sup>3</sup> For information on the history of the Equal Rights Amendment, which was passed by the House and Senate in 1972 but failed to be ratified by the necessary three-fourths of the states, see generally JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986).

Almost all the Justices in *Frontiero* implicitly agreed that “partial amendments” such as the ERA provided *relevant* information about democratic constitutional understandings.<sup>4</sup> At the same time, they disagreed sharply as to whether such information should be treated as weighing in favor of—or against—a decision to interpret the Constitution in a parallel direction.

Justice Brennan held for four Justices that the ERA provided clear affirmative support for a decision by the Court to apply strict scrutiny to sex-based classifications under the Equal Protection Clause (“the positive view”).<sup>5</sup> Justice Powell, by contrast, held for three Justices that as an amendment not yet ratified by the states, at least for some period, the ERA pointed in exactly the opposite direction—namely, against, rather than in favor, of a decision by the Court to apply any form of heightened scrutiny to classifications based on sex or gender (“the negative view”).<sup>6</sup>

Since *Frontiero*, despite numerous proposed constitutional amendments, there has been no opportunity for the Court itself to revisit this question and no serious attempt by scholars to consider how the Court should go about the task of interpreting the Constitution in the shadow of partially complete, or failed, amendments under Article V.<sup>7</sup> This Article addresses this gap in the constitutional literature, by arguing that the Court should endorse the Brennan position in *Frontiero*—as a means of mitigating what, it argues, is the undue difficulty of Congress using Article V in order to pass actual constitutional amendments.

The disagreement among the Justices in *Frontiero*, the Article suggests, was in essence about the merits of the hurdles Article V creates to Congress influencing the direction of constitutional meaning: on the positive view, endorsed by Justice Brennan, Congress has implicit scope to influence constitutional meaning even without the ability to obtain the support of state legislatures as required by Article V; whereas on the negative view endorsed by Justice Powell, Congress will

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4 411 U.S. at 678, 687–88, 691. Chief Justice Burger and Justices Brennan, Douglas, White, Marshall, Powell, and Blackmun all took this position. The two justices who did not explicitly consider, and thus endorse, this position were Justices Stewart and Rehnquist.

5 See *id.*

6 *Id.* at 692.

7 But for an extremely useful descriptive account of the phenomenon of partial constitutional amendments, see generally Michael J. Lynch, *The Other Amendments: Constitutional Amendments that Failed*, 93 LAW LIBR. J. 303 (2001) (exploring the status of proposed but unratified amendments to the United States Constitution).

have power to engage in successful constitutional “dialogue”<sup>8</sup> with the Court if, and only if, it can achieve both super-majority agreement and ratification by three-quarters of states legislatures (or conventions).

There are two reasons, in turn, to prefer the view of Justice Brennan to that of Justice Powell about the merits of Article V: first, progressive increases in the number of states in the U.S.—or the “denominator” for the purposes of Article V<sup>9</sup>—have meant that Article V’s ratification requirements have effectively become more onerous, over time; and second, by global standards, Article V imposes some of the

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8 For a general description of my preferred account the concept of dialogue, see Rosalind Dixon, *The Supreme Court of Canada, Charter Dialogue, and Deference*, 47 OSGOODE HALL L.J. 235, 239, 272 (2009) [hereinafter Dixon, *The Supreme Court of Canada*] (arguing that dialogue consists of a process of give-and-take between courts and legislatures in the process of constitutional interpretation, according to which courts attempt to promote their preferred reading of constitutional norms in “first look” cases, but defer to any contrary, minimally reasonable legislative judgments in “second look” cases). For different accounts of the idea of dialogue in the U.S. context, see generally NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 238 (2004); LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* (1988); Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1582–83 (2001); Paul R. Dimond, *Provisional Review: An Exploratory Essay on an Alternative Form of Judicial Review*, 12 HASTINGS CONST. L.Q. 201, 201–02 (1985); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 580–81 (1993); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1186, 1198 (1992); Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635, 676–77 (2003); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 3 (2003). For other discussions of dialogue in a comparative context, see also KENT ROACH, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE* 295 (2001); Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn’t Such A Bad Thing After All)*, 35 OSGOODE HALL L.J. 75, 80–81 (1997); Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, *Charter Dialogue Revisited—Or “Much Ado About Metaphors,”* 45 OSGOODE HALL L.J. 1, 7 (2007); Kent Roach, *Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures*, 80 CAN. BAR REV. 481 (2001); Kent Roach, *Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience*, 40 TEX. INT’L L.J. 537 (2005); Kent Roach, *Dialogic Judicial Review and its Critics*, 23 SUP. CT. L. REV. 49 (2004); Kent Roach, *A Dialogue About Principle and a Principled Dialogue: Justice Iacobucci’s Substantive Approach to Dialogue*, 57 U. TORONTO L.J. 449 (2007).

9 Cf. Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules: The Denominator Problem*, in *COMPARATIVE CONSTITUTIONAL DESIGN* (forthcoming 2011) [hereinafter Dixon & Holden, *Constitutional Amendment Rules*] (showing that there is a significant negative relationship between the size of legislative voting bodies and the rate of constitutional amendment in various states, indicating that population increases are likely to increase the difficulty of constitutional amendment).

most onerous hurdles in the world for the ratification of amendments.<sup>10</sup>

Indeed, from both a historical and comparative perspective, the Article argues, there is an argument that even the requirements under Article V governing the proposal of amendments are too onerous. Compared to other countries, there are also few other formal mechanisms available to Congress, outside Article V, by which to influence constitutional meaning. From a democratic perspective, therefore, there is a strong argument that the Court should in fact extend Brennan's approach in *Frontiero* to apply to all amendment proposals that obtain majority support in Congress—i.e., endorse a general principle of partial constitutional amendment.

A proposed amendment would clearly have weakest force, under such a principle, where it enjoyed only majority support in Congress. In cases of actual super-majority support, or support at a state level, it would enjoy increased significance. However, it would have a negative impact on the chance of parallel Court-led constitutional change if, and only if, it was actually actively considered, but rejected, by a majority of either or both houses of Congress.

Because of this, recognition of a principle of partial constitutional amendment would directly increase the ability of both Congress and state legislatures to engage in *successful* parallel dialogue with the Court, by ordinary legislative means. By providing an additional "plus" factor in support of the validity of such legislative attempts at dialogue, in at least some cases, such a principle would inevitably help tip the balance in favor of a decision by the Court to uphold certain legislation as constitutional. The more clearly and broadly the Court recognized such a principle, the more likely it would also be that Congress would in fact pass partial amendments of a kind that could lead to this result.

There are, of course, a number of potential objections to a principle of partial constitutional amendment—most notably that it ignores the text of Article V and that it shifts the role of the Supreme Court too far in a pro-majoritarian direction, thereby undermining the Court's capacity to protect minority rights even in a modest, dialogic spirit; or, that it instead tends to move the Court in a less, ra-

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<sup>10</sup> Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237, 265 tbl. 11 (Sanford Levinson ed., 1995) (demonstrating that in comparison to the constitutions of other countries, the United States Constitution is most difficult to amend).

ther than more, pro-majoritarian direction.<sup>11</sup> On close examination, however, none of these objections seems sufficient to justify the outright rejection of a principle of partial amendment.

The argument proceeds in five parts. Part I analyzes the disagreement among the Justices in *Frontiero* and explains how this disagreement relates to the merits of Article V itself. Part II.A outlines the arguments that the ratification requirements imposed by Article V are too onerous from a historical and comparative perspective, while Part II.B makes similar arguments in relation to the requirements Article V imposes for the congressional proposal of amendments. Part III sets out the core idea of a principle of partial constitutional amendment and explains how it would help reduce the hurdles to Congress (and state legislatures) in successfully influencing the development of constitutional meaning. Part IV considers the three most plausible objections to such a principle and the logical and empirical answers to such objections. Part V concludes by considering the radical nature of such a principle and the actual chances of success for such a principle, given the likely obstacles to its initial adoption by the Court.

#### I. THE RELEVANCE OF PARTIAL AMENDMENTS & THE INFORMATIONAL FUNCTION OF ARTICLE V

The Supreme Court, over time, has shown a clear willingness to consider information about democratic constitutional understandings—or the constitutional understandings of a majority of Americans—in interpreting various provisions of the Constitution.<sup>12</sup>

In the context of the Cruel and Unusual Punishments Clause, the Court has long looked to “evolving standards of decency” among or-

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11 See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF CONSTITUTIONAL REVIEW* (1980) (discussing the arguments for and against constitutional “interpretivism” and “noninterpretivism,” which correlate to commitment to the written constitution and willingness to go beyond the four corners of the document, respectively).

12 On the idea of democratic constitutional understandings, and democratic constitutionalism more generally, see Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020* 25, 27 (Jack M. Balkin & Reva B. Siegel eds., 2009) (defining “democratic constitutionalism” as a term used to express the paradox that constitutional authority depends on *both* its democratic responsiveness *and* its legitimacy as law); Robert C. Post, *The Supreme Court, 2002 Term—Foreward: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4, 8–11 (2003) (arguing that constitutional law and culture are locked in a dialectic relationship, so that constitutional law both arises from and in turn regulates culture); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) (defining democratic constitutionalism as a model by which constitutional rights have historically been established in the context of cultural controversy).

dinary Americans in order to determine whether a punishment violates the Clause.<sup>13</sup> Under the Due Process Clause, it has looked to actual democratic practices and state-level legislative trends in order to ascertain the content of “evolving” American traditions regarding liberty.<sup>14</sup> And in the context of the Equal Protection Clause, it has frequently looked to the attitudes of a wide variety of citizens and organizations regarding norms of equal protection.<sup>15</sup>

In the context of Article V, the Court has treated successful amendments as having exactly this same kind of informational value or relevance. A good example of this involves the Eleventh Amendment and its relationship to the Supreme Court’s decision in *Chisolm v. Georgia*.<sup>16</sup> In *Chisolm*, the Court held that the plaintiff, as a citizen of South Carolina, could file a suit in the original jurisdiction of the Supreme Court against the state of Georgia, as the defendant. The decision met with strong opposition from the states, which in turn led to the rapid enactment of the Eleventh Amendment, providing that “[t]he judicial power of the United States shall not be construed to extend to 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.”<sup>17</sup>

The Supreme Court then responded by overruling *Chisolm*, holding that the Constitution did not in fact permit states to be sued in federal courts by citizens of other states.<sup>18</sup> In taking this position, in

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13 See, e.g., *Roper v. Simmons*, 543 U.S. 551, 561, 578–79 (2005) (forbidding the imposition of the death penalty on minors); *Atkins v. Virginia*, 536 U.S. 304, 312, 321 (2002) (finding that execution of mentally incapacitated individuals is Constitutionally impermissible); *Trop v. Dulles*, 356 U.S. 86, 101, 104 (1958) (plurality opinion) (holding that Congress exceeded war power abilities in passing a statute expatriating a person who had no allegiance to another nation).

14 See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (recognizing that the right to liberty grants a right to engage in consensual sexual activity in the home without government intervention).

15 See, e.g., *Frontiero*, 411 U.S. 677, 687–88 (1973) (Brennan, J.) (holding that classifications based on sex should attract heightened scrutiny; the plurality both noted that over the previous decade “Congress . . . itself [had] manifested an increasing sensitivity to sex-based classifications,” and also suggested that “this conclusion of a coequal branch” was of clear significance for the purposes of interpreting the scope of the guarantee of equal protection under the Fourteenth Amendment).

16 2 U.S. (2 Dall.) 419 (1793).

17 U.S. CONST. amend. XI.

18 See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 77 (1996) (Stevens, J., dissenting) (holding that the Eleventh Amendment barred Congress from granting suits by Indian tribes); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 282 (1985) (Brennan, J., dissenting) (interpreting Eleventh Amendment jurisprudence as removing Article III jurisdiction only in cases where it is based solely on diversity jurisdiction, rather than federal subject matter jurisdiction); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (Marshall, J.)

*Hans v. Louisiana*,<sup>19</sup> the Court also treated the Eleventh Amendment as an important source of *information* about democratic constitutional disagreement, noting that both the general “manner in which [*Chisolm v. Georgia*] was received by the country [and] the adoption of the Eleventh Amendment” provided a reason why the Court was “at liberty to prefer Justice Iredell’s views” in *Chisolm* to those of the majority in *Chisolm*.<sup>20</sup>

In *Frontiero* itself, almost all the Justices likewise agreed that partial amendments such as the ERA provided a valuable source of information about democratic constitutional understandings.<sup>21</sup> There is also good reason for this.

For one, legislation proposed under Article V supplies better information than ordinary legislation (or even ordinary legislative resolutions) about the strength of congressional judgments about constitutional meaning. Given the level of public support for the Constitution, any explicit proposal by Congress to amend the Constitution is likely to carry political costs not present in the case of ordinary legislation.<sup>22</sup> At the very least, this means that, if they take this path, members of Congress must devote additional resources to persuading voters that such legislation is justified (i.e., incur “persuasion costs”).<sup>23</sup> By simply invoking the rubric of formal constitutional amendment, therefore, members of Congress with the strongest views about constitutional meaning can send a credible signal about their type.<sup>24</sup> Given the costs involved in invoking Article V, it will almost

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(adopting a narrow view of the trumping function of the Eleventh Amendment, as inapplicable to defensive writs of error).

19 134 U.S. 1, 18–19 (1890).

20 *Id.* In subsequent cases, the Court has also understood the Eleventh Amendment in exactly this same way. See, e.g., *Seminole Tribe*, 517 U.S. at 54 (1996) (Rehnquist, C.J.) (holding that the Eleventh Amendment in exactly this same way, as standing, as Justice Rehnquist noted in *Seminole Tribe*, not “so much for what it says, but for the presupposition [or particular preferred approach] . . . which it confirms”) (omission in original).

21 See *Frontiero*, 411 U.S. at 687–88, 691–92.

22 Cf. Stephen M. Griffin, *The Nominee Is . . . Article V*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 51 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (arguing that we should make it easier to amend the constitution).

23 On persuasion and bargaining costs, see JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 68 (2d ed. 1967) (“If two or more persons are required to agree on a *single* decision, time and effort of another sort is introduced—that which is required to secure agreement. . . . As unanimity is approached, dramatic increases in expected decision-making costs may be predicted.”).

24 On the logic of this kind of signaling process generally, see, e.g., Michael Spence, *Job Market Signaling*, 87 Q. J. ECON. 355 (1973) (discussing signaling in the context of employment markets).

never be in the interest of legislators with less intense views to express their views in this same form.<sup>25</sup>

Compared to ordinary legislation, Article V proposals also give Congress (and state legislatures) broader scope to express disagreement with courts about constitutional meaning, consistent with respecting commitments to the rule of law.<sup>26</sup> In the case of ordinary legislation, the expression of broad legislative disagreement with a court can often mean directly ignoring the legal force of particular prior court decisions, in a way that raises clear rule of law concerns.<sup>27</sup> Under Article V, by contrast, Congress is able to express a broad *desire* to overrule the Court in a particular area, while still fully respecting the legal force of particular prior precedents.<sup>28</sup>

The hard question in *Frontiero* therefore was not whether the Court should treat the ERA as a relevant source of information about democratic constitutional understandings. Rather, it was whether the Court should treat the ERA as weighing in favor of—or against—a decision by the Court to follow Congress' preferred interpretation of the Equal Protection Clause in the context of classifications based on sex.

Justice Brennan was prepared to treat both ordinary legislation and a proposed amendment such as the ERA as providing affirmative

<sup>25</sup> *Id.*

<sup>26</sup> On different meanings of the rule of law, see Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 5 (1997) (discussing four conceptions of the Rule of Law: historicist, formalist, Legal Process type, and substantive).

<sup>27</sup> This is one potential reason why it may be difficult for Congress to use statutory means in order to abrogate the doctrine of *stare decisis* in particular cases. Cf. Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L. J. 1535, 1538 (2000) (finding that the benefit of such a statute might persuade the court to overrule precedent). The same difficulty also potentially arises in the context of other potential substitutes for constitutional amendment, for example, those substitutes that focus on mechanisms such as jurisdiction stripping or Court packing proposed by many departmentalists. See, e.g., LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 249 (2004) (suggesting that in a departmentalist theory, "Justices can be impeached, the Court's budget can be slashed, the President can ignore its mandates, Congress can strip it of jurisdiction or shrink its size or pack it with new members or give it burdensome new responsibilities or revise its procedures," and that these are all legitimate tools of legislative and executive disagreement); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 14–17 (1999) (detailing how the executive branch can interpret how to faithfully execute the laws how it sees fit despite the holding of the judiciary in a particular case or controversy); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 223, 227 (1994) (arguing that the executive branch has, or should have, the greatest power to interpret the law based on the authors' logical reading of the framers' "fundamental structural premises").

<sup>28</sup> This, of course, is subject to potential strategic effects. Cf. *infra* notes 120–22.

support for a decision by the Court to apply heightened scrutiny to classifications based on sex. Both the ERA, as well as prior legislation such as Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, Brennan suggested, provided clear evidence of “an increasing sensitivity to sex-based classifications” and a view that “classifications based upon sex are inherently invidious” on the part of Congress.<sup>29</sup> Given Congress’ standing as a co-equal branch of government, its attitudes towards classifications based on gender were also “not without significance” to the Court’s own approach, according to Brennan.<sup>30</sup>

Justice Powell, by contrast, held that because the ERA was still pending before the states, it was “prematur[e] and unnecessar[y]” for the Court to apply heightened scrutiny to classifications based on sex.<sup>31</sup> If the ERA were rejected, Powell seemed further to suggest, this would be a “major political decision” which the Court itself should give effect to in resolving the relevant constitutional question.<sup>32</sup>

To a substantial degree, the merits of the two different positions also turn directly on how one views the reasonableness of the ratification requirements established by Article V for successful constitutional amendment. Under Brennan’s approach to proposed amendments, the mere act of Congress proposing an amendment may in some cases be sufficient to tip the balance in favor of a decision by the Court to develop constitutional meaning in the direction favored by Congress,<sup>33</sup> whereas under Powell’s approach, Congress will be able to exert such influence only where it is able to obtain the support of three-quarters of state legislatures.

The more *unreasonable* the requirements for the ratification of proposed amendments under Article V, therefore, the more sense Brennan’s position makes compared to Powell’s. Conversely, the more *reasonable* those requirements are judged to be, the more sense Powell’s approach makes compared to Brennan’s.

## II. ARTICLE V & THE (UNDUE) DIFFICULTY OF CONSTITUTIONAL AMENDMENT

Two factors, this Part argues, support the position taken by Justice Brennan over that of Justice Powell in this context: first, the fact that

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<sup>29</sup> *Frontiero v Richardson*, 411 U.S. 677, 687 (1973).

<sup>30</sup> *Id.* at 687–88.

<sup>31</sup> *Id.* at 692.

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

<sup>33</sup> *See infra* text accompanying note 107.

increases in the number of states over time have made the requirements for the ratification of proposed amendments progressively more difficult to satisfy; and second, the fact that, from a comparative perspective, the requirements for the ratification of amendments in the U.S. are unusually onerous.

*A The (Undue) Difficulty of Ratification*

The size of a voting body, or the number of decision-makers relevant to a decision, has the potential to influence the difficulty of a particular voting rule amendment for two inter-related reasons.

One reason is that decision making will tend to be substantially more costly in larger decision-making bodies than in smaller ones: both the opportunity cost implicit in the time taken to debate and vote on certain proposals and the costs associated with the potential for “hold-up” by some members of a collective decision-making body will tend consistently to increase with the size of a representative decision-making body, such as Congress or state legislatures.<sup>34</sup>

The law of large numbers is another reason why, in larger voting bodies, it can be harder to obtain the super-majority of votes necessary for a successful constitutional amendment.<sup>35</sup> If voter preferences are drawn at least semi-randomly from an overall (hypothetical) distribution of views on questions of amendment, the law of large numbers means that in a large decision-making body it is far less likely, than in a smaller decision-making body that there will be an idiosyncratic draw of preferences so as to create a super-majority in favor of a proposed amendment. This is illustrated by the probability of obtaining a super-majority of “votes” in favor of a proposed amendment by a simple coin toss, where “heads” is treated as a vote in favor of changing the *status quo*, and “tails” as a vote for the *status quo*. For a voting body of, say, 3 or 6, the probability of successful amendment in this context will be 50% and 34%, respectively, whereas for a voting body of 12 or 24, the probability will fall to 19% or 8%.<sup>36</sup>

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<sup>34</sup> See generally Rosalind Dixon & Richard Holden, *Designing Constitutional Amendment Rules—To Scale*, available at <http://faculty.chicagobooth.edu/richard.holden/papers/DH.pdf> [hereinafter Dixon & Holden, *Designing Constitutional Amendment Rules*] (detailing that large legislative bodies will be less likely to amend a constitution because of procedural difficulties as well as the tendency for legislatures to coalesce around a median voter position).

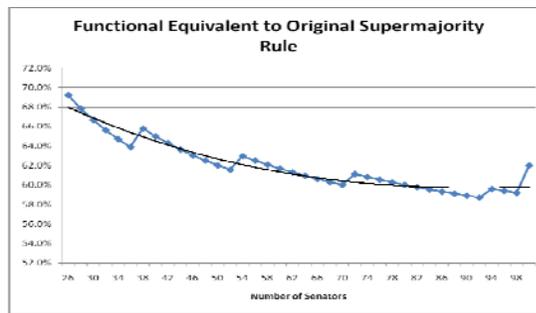
<sup>35</sup> *Id.*

<sup>36</sup> For a voting body with 100 members, the probability of successful amendment falls below 1%. This effect is also quite general and does not depend on the binary nature of outcomes in the “coin flip” setting. It applies even where there is a continuum of voter preferences and policy choices. See Richard Holden, *Supermajority Voting Rules* (Aug. 2, 2009)

Over time, there has, of course, been a clear increase in the number of states in the U.S. In 1789, there were only 13 states, as compared to 50 states from 1967 onwards. All else being equal, this change in the denominator for Article V has implied a directly proportionate increase in the difficulty of ratifying proposed amendments.<sup>37</sup>

On one calculation, if one were to try to adjust for this change in the denominator for Article V, the *functional* equivalent to the 75% super-majority requirement adopted by the framers would in fact now be as low as 62%.<sup>38</sup>

FIGURE 1  
FUNCTIONAL EQUIVALENT OVER TIME TO A 3/4 SUPER-MAJORITY  
VOTING RULE FOR STATE RATIFICATION OF AMENDMENTS (ADJUSTING  
FOR INCREASES IN NUMBER OF STATES)



Under such an adjusted super-majority rule, the ERA itself would also clearly have passed by the time the Court heard *Frontiero*, consi-

(Univ. of Chicago and NBER, Working Paper), available at <http://faculty.chicagobooth.edu/Richard.holden/papers/index.html> [hereinafter Holden, *Supermajority Voting Rules*].

37 One obvious other change over this period has been the rise of political parties: see BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); Daryl J. Levinson & Richard J. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006). However, it is not clear that once political parties developed, there was then any further relevant change in the overall degree of polarization or degree of correlated voting among state legislatures (or even members of Congress, at least until the 1980's). See Dixon & Holden, *Designing Constitutional Amendment Rules*, *supra* note 33, at 20.

38 That is, a 75% super-majority rule for a voting population of 13 is roughly equivalent to 62% voting rule for a population of 50, if one wishes to maintain the same functional trade-off between the advantages of constitutional flexibility and rigidity. Holden, *Super-majority Voting Rules*, *supra* note 35.

dering that by 1979, the amendment had been ratified by 35 (or 70%) states.<sup>39</sup>

From a global perspective, there is also a further argument that Article V imposes ratification requirements that are overly unduly onerous.<sup>40</sup> Global constitutional practices do not, of course, always point to “right” answers from an American perspective. However, in the context of rules governing constitutional amendment, there is little reason to think that the U.S. is in any way truly “exceptional” in its constitutional commitments—or experience.<sup>41</sup> Global norms regarding constitutional amendment, therefore, have an important potential to shed light on the “optimal” difficulty of amendment from an American perspective.<sup>42</sup> These norms also consistently point to the desirability of *less* onerous requirements for the ratification of amendment than apply under Article V.

While many constitutions impose some form of ratification requirement, most do so, for example, in the form of far less demanding national referendum requirements.<sup>43</sup> Among federal systems, Article V also imposes requirements for state-based ratification that are some of the most demanding in the world.<sup>44</sup> The effect of this, Donald Lutz has further found, is to dampen the overall rate of amendment in the U.S. by roughly a factor of three, compared to other federal systems.<sup>45</sup>

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<sup>39</sup> See Memorandum from David C. Huckabee, Specialist, Am. Nat'l Gov't and Fin. Div., to Rep. Carolyn B. Maloney (Aug. 19, 2004), available at <http://maloney.house.gov/documents/olddocs/era/081904crsERAratification.pdf>.

Even if one were to subtract the five who attempted to rescind their ratification during this period under this adjusted requirement, there would also still have been the necessary 62% level of ratification required for the amendment to take effect prior to 1979. This is particularly relevant given that South Carolina purported to rescind its ratification prospectively, if ratification did not occur by this date.

<sup>40</sup> See Lutz, *supra* note 10, at 256 (detailing how the U.S. Constitution is excessively difficult to ratify).

<sup>41</sup> For a more general exploration of the extent of American exceptionalism in a constitutional context, see Stephen Gardbaum, *The Myth and Reality of American Exceptionalism*, 107 MICH. L. REV. 391 (2008).

<sup>42</sup> For the general informational value of foreign experience or design choices in this setting, see, e.g., Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 133–34 (2006) (discussing that contrary to popular notion, the United States routinely consults the decisions of other states in making its laws).

<sup>43</sup> Lutz, *supra* note 10, at 263–65.

<sup>44</sup> *Id.*

<sup>45</sup> When Donald Lutz constructed this measure in 1992, the U.S. was second only to Yugoslavia in terms of difficulty of amendment, and Yugoslavia's constitution is now defunct. It is, of course, possible that since then, a constitution with a more onerous amendment rule has been adopted. Inspection of post-1992 constitutions, however, does not support this conjecture.

*B. The Undue Difficulty of Proposing Amendments*

There is, in fact, an argument from both a historical and comparative perspective that Article V makes even the proposal of amendments by Congress too difficult.

There are important reasons from a democratic perspective for the existence of formal procedures for constitutional amendment in most constitutions. One reason is that changing social circumstances and understandings often mean constitutional “rules” prove, over time, to involve significant “error costs.”<sup>46</sup> Rules of this kind also generally leave limited scope for ordinary forms of interpretive updating by courts.<sup>47</sup> They can also create direct legal barriers to the ability of legislatures to update small “c” constitutional meaning by statutory means.<sup>48</sup> Without the possibility of formal constitutional amendment, therefore, it will often be extremely difficult for a constitutional system to respond to demands to update such rules.<sup>49</sup>

A second reason to allow for constitutional amendment is that constitutional meaning is often subject to reasonable disagreement—disagreement of this kind is not only extremely likely in the context of many open-ended constitutional standards, in a constitutional democracy it is also inherently reasonable, given various interpreters’ different perspectives and the open-textured nature of various constitutional standards.<sup>50</sup> Where reasonable disagreement of this kind exists, as Jeremy Waldron notes, principles of equality further suggest that decisions about interpretation should generally be made by reference to *democratic* constitutional understandings.<sup>51</sup>

However, in the U.S. context at least, the Supreme Court does not always act in a way that is consistent with such understandings, at least

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46 Lutz, *supra* note 10, at 263–65; see also Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, in THE RESEARCH HANDBOOK IN COMPARATIVE CONSTITUTIONAL LAW (Rosalind Dixon & Tom Ginsburg eds.) (forthcoming 2011) (manuscript at 10) (on file with author) (discussing the possibility of risk-aversion by legislatures in supporting proposed amendments if passage is more difficult, due to fear of the difficulty of reversal in the event of error).

47 *Id.*

48 *Id.*

49 Rosalind Dixon, *Updating Constitutional Rules*, in 2009 SUP. CT. REV. 319, 320–21 (Dennis J. Hutchinson et al. eds., 2010) [hereinafter Dixon, *Updating Constitutional Rules*] (discussing the importance of pragmatic considerations relating to the need to respond to changing technologies and social circumstances).

50 See JOHN RAWLS, POLITICAL LIBERALISM 159 (expanded ed. 2005) (finding that there is disagreement among people as to the more exact content and boundaries of constitutional protections, and constitutional consensus is narrow in scope).

51 See JEREMY WALDRON, LAW AND DISAGREEMENT 112–13, 149–63 (1999).

over the short- to medium-term.<sup>52</sup> In at least some cases, it issues opinions that are directly contrary to the reasonable judgments of a majority of Americans about constitutional meaning,<sup>53</sup> or if not directly objectionable to most Americans, that, in their view, unreasonably block the ability of Congress to develop small “c” constitutional norms.<sup>54</sup> Given this, there will be a strong argument, in at least some cases, for allowing Congress to “trump” the Supreme Court’s interpretation of the Constitution via means of formal procedures for constitutional amendment.<sup>55</sup>

In practice, however, Article V imposes sufficiently high hurdles to the proposal of constitutional amendments that in recent years Congress has rarely succeeded in using amendment procedures in order to play either of these roles—but particularly this trumping role.<sup>56</sup>

Take the Supreme Court’s decision in *Texas v. Johnson*,<sup>57</sup> invalidating Texas’ prohibition against flag burning. This was very arguably a

52 For the longer-term pressures on courts to align with majority opinion, see ROBERT A. DAHL, *DEMOCRACY IN THE UNITED STATES: PROMISE AND PERFORMANCE* 154–56 (4th ed. 1981) (discussing situations in which the Court must choose among controversial alternatives of public policy); see also BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 354 (2009) (noting instances in which Justices decided cases consistent with public opinions and social trends).

53 Two potential examples of this kind could be argued to be *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the Due Process Clause implicates the right to abortion) and *Texas v. Johnson*, 491 U.S. 387 (1989) (holding that flag burning is protected as freedom of expression under the First Amendment). For further discussion, see *infra* notes 143–64; see also Michael Klarman, *Why Backlash?* (Aug. 2010) (Univ. of Chicago Public Law & Legal Theory Workshop Working Paper) (analyzing “court decisions that seem to retard the causes they purport to benefit while sometimes also producing larger political consequences”).

54 Examples in this category might be thought to include *Boerne v. Flores*, 521 U.S. 507, 533–36 (1997) (striking down Congress’s attempt to use § 5 of the Fourteenth Amendment to enact the Religious Freedom Restoration Act of 1993) and *United States v. Morrison*, 529 U.S. 598, 627 (2000) (striking down certain core enforcement provisions of the Violence Against Women Act of 1994).

55 Congress is both larger and more internally diverse overall and has members with a stronger incentive to invest in acquiring information about democratic understandings; thus, it will often do better than the Court at both identifying and acting on such understandings. See, e.g., ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* 83, 86 (2009) (“[S]everal stylized facts about legislatures threaten to give them an overwhelming Condorcetian advantage: the sheer numerosity of their members, the diversity of their memberships, and their powerful institutional tools for acquiring information—including the relationship of representation between legislators and constituents . . . . The demands of re-election force legislators to leave the halls of government . . . and to meet constituents.”). On the “trumping” function of constitutional amendments, see Dixon, *supra* note 45.

56 See, e.g., SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

57 491 U.S. 397, 420 (1989).

case in which there was scope for reasonable disagreement about the meaning and application of the First Amendment: the Court was split 5-4 both on this issue of the applicable standard of scrutiny under the Free Speech Clause and the result;<sup>58</sup> and this is an area in which other democratic countries have taken a variety of different approaches.<sup>59</sup> The Court's opinion itself was also quite clearly at odds with national majority opinion, given that in 1990, in response to *Texas v. Johnson* and *United States v. Eichman*,<sup>60</sup> 68% of Americans said they favored an amendment to allow Congress to ban flag burning, while only 27% of Americans said they were opposed to such an amendment.<sup>61</sup> Despite this, there has been no actual proposal by Congress under Article V to overturn *Texas v. Johnson*. Instead, proposed flag burning amendments have consistently failed to pass in the Senate, each time by the narrowest of margins.<sup>62</sup>

Historically, the passage of this kind of 'trumping' amendment was much easier, in large part because both the House and Senate were much smaller in size.<sup>63</sup>

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<sup>58</sup> See *id.* at 420 (Kennedy, J., concurring); *id.* at 421-35 (Rehnquist, J., dissenting); *id.* at 436-39 (Stevens, J., dissenting); see also *Boerne v. Flores*, 521 U.S. 507, 536 (1997) (striking down Congress's attempt to use § 5 of the Fourteenth Amendment to enact the Religious Freedom Restoration Act of 1993, in a 6-3 majority opinion).

<sup>59</sup> Cf. *Hopkinson v Police* (2004) 3 NZLR (HC) 704, 717 (N.Z.) (reading down the *Flags, Emblems, and Names Protection Act 1981*, s. 11(1)(b), so as to apply only to actions "vilifying" rather than showing general "dishonour" to the flag).

<sup>60</sup> 496 U.S. 310 (1990) (holding that a federal law against flag desecration violates free speech under the First Amendment).

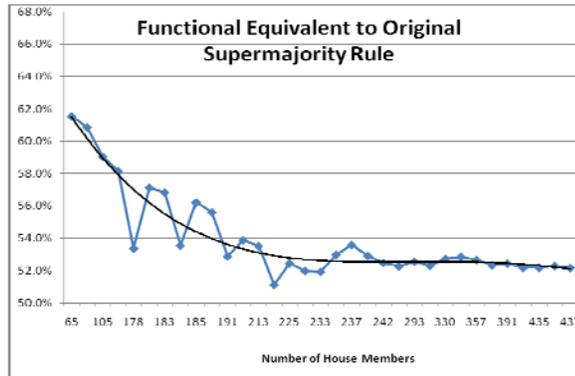
<sup>61</sup> See Heather Mason Kiefer, *Support Cooling for Flag-Burning Amendment*, GALLUP (July 26, 2005), <http://www.gallup.com/poll/17491/Support-Cooling-Flag-Burning-Amendment.aspx> (polling Americans' support for a Constitutional amendment to criminalize flag burning). This gap between the Court and public opinion has also persisted over time. See Joseph Carroll, *Public Support for Constitutional Amendment on Flag Burning*, GALLUP (June 29, 2006), <http://www.gallup.com/poll/23524/public-support-constitutional-amendment-flag-burning.aspx> (comparing national support for a constitutional amendment to ban flag burning in the 1990s with national support at present).

<sup>62</sup> See, e.g., S.J. Res. 12, 109th Cong. (2006) (passing with a 66-34 majority); H.R.J. Res. 10, 109th Cong. (2005) (passing with a 286-130 majority); S.J. Res. 180, 101st Cong. (1989) (reporting unfavorably without amendment); JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES*, 1789-2002 199 (2d ed. 2003) (discussing the 1995 Congressional vote on the proposed amendment, where the House voted 312-120 for the amendment and where the Senate voted 63-36 for the amendment, just short of the two-thirds majority needed); see also S.J. Res. 12, 109th Cong. (2006) (indicating that the Senate voted 66-34 for the Amendment, failing to obtain the required two-thirds majority by one vote); Carl Hulse, *Flag Amendment Narrowly Fails in Senate Vote*, N.Y. TIMES, June 28, 2006, at A1 (discussing the implications of the congressional vote on the proposed flag burning amendment for upcoming elections and national politics).

<sup>63</sup> See Dixon & Holden, *Designing Constitutional Amendment Rules*, *supra* note 33 at 1, 14.

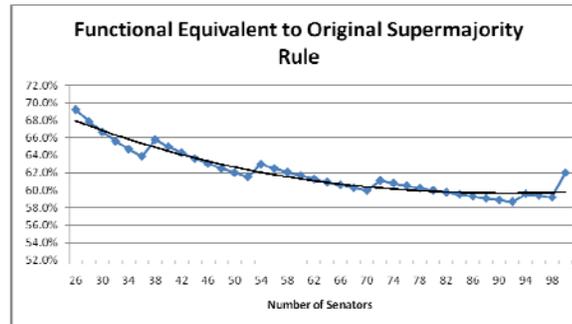
In fact, if one uses the same methodology as in *Figure 1*, on one calculation, the current functional equivalent to the original two-thirds super-majority requirements in Article V for the proposal of constitutional amendments are now as low as 53% for the House, and 62% for the Senate.<sup>64</sup> Under these requirements, a number of failed amendments—including the 2006 Flag Burning amendment—would also again almost certainly have passed.<sup>65</sup>

FIGURES 2, 3:  
FUNCTIONAL EQUIVALENT TO A TWO-THIRDS SUPER-MAJORITY  
MAJORITY VOTING RULE, ADJUSTING FOR INCREASES IN HOUSE AND  
SENATE SIZE (SUBJECT TO INTEGER ROUNDING)



<sup>64</sup> *See id.*

<sup>65</sup> *See* S.J. Res. 12, 109th Cong. (2006) (representing vote of 66-34). All 50 states have passed non-binding resolutions endorsing the *Flag Protection Act* of 1989. *See* 18 U.S.C. § 700 (1989) (“Desecration of the flag of the United States; penalties”); *see also* Andrea Stone, *Flag-Desecration Amendment Needs 1 More Vote*, USA TODAY, June 12, 2006, available at [http://www.usatoday.com/news/washington/2006-06-12-senate-flag-amendment\\_x.htm](http://www.usatoday.com/news/washington/2006-06-12-senate-flag-amendment_x.htm) (discussing the previous failures of the Senate to pass the flag amendment, as well as the likelihood of passage in the future). Forty seven states also continue, even post-*Eichman*, to have flag burning prohibitions on their statute books. *See State Flag Protection Laws*, FIRSTAMENDMENTCENTER.COM, [http://www.firstamendmentcenter.org/speech/flag\\_burning/topic.aspx?topic=flag\\_statelaws](http://www.firstamendmentcenter.org/speech/flag_burning/topic.aspx?topic=flag_statelaws) (last visited Feb. 18, 2011) (listing state laws that prohibit the desecration of the flag or its use for advertising and publicity purposes).



From a comparative perspective, the hurdles Article V imposes in this context are also unusually onerous: in Lutz's estimation, for example, the two-thirds super-majority and bicameral voting requirements in Article V combine to reduce the probability of successful constitutional amendment proposals in the U.S. by more than 50%, compared to countries with less demanding super-majority or double-passage requirements.<sup>66</sup> When these requirements are added to those applicable at the ratification stage, Lutz further finds, the U.S. Constitution is in fact the constitution that is currently the most difficult in the world to amend.<sup>67</sup>

A similar conclusion applies if one looks at the actual rate of constitutional amendment worldwide. Tom Ginsburg and others, for example, show that the predicted amendment rate for all national constitutions, over time, ranges from 0 to 1 amendments per year, with a mean of 0.38 amendments per year.<sup>68</sup> On this scoring, with an annual amendment rate of only 0.04, the U.S. also ranks almost 90% below the mean.<sup>69</sup>

<sup>66</sup> These requirements add 1.6 on Lutz's index of difficulty, and the shift from 0–1 to 1–2 on his index of difficulty reduces the predicted rate of amendments from 5.86 to 2.48 amendments per year. See Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION*, *supra* note 10 at 258–59, 262.

<sup>67</sup> See *id.* at 261 (comparing data on selected national constitutions to analyze comparative difficulty of constitutional amendment).

<sup>68</sup> ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 101 (2009) (comparing actual and imputed amendment rates of various constitutions).

<sup>69</sup> *Id.* Such measures do, of course, suffer from some potential problems—especially the potential for the rate of amendment to reflect different rates of demand for constitutional change in different systems. However, once one accounts for the possibility that such demand is affected by both the age and length of a constitution, it seems unlikely that such differences would be so systematic, across a large pool of countries, that the measure would lose all usefulness.

Unlike in some other countries, there are also few other formal legal mechanisms, besides constitutional amendment, in the U.S. by which Congress (or state legislatures) may seek to override the Court.

In Canada, for example, the hurdles to amending the Canadian *Charter of Rights and Freedoms* (1982) are quite onerous: amendments require the support of two-thirds of provincial legislatures, representing at least 50% of the population, as well as a majority of the Canadian Parliament.<sup>70</sup> Both the national parliament and provincial legislatures, however, also enjoy an additional source of power that allows them to influence the interpretation, or at least application, of the *Charter*. Section 33 of the *Charter*, or the so-called “notwithstanding clause,” allows legislatures at both levels “expressly [to] declare” that legislation “shall operate notwithstanding” key provisions of the *Charter*—in each case, by ordinary majority vote.<sup>71</sup> It can also be invoked both prospectively and retrospectively, in response to a particular court decision.<sup>72</sup> This gives legislatures broad scope to override interpretations of the *Charter* with which they disagree, even without reliance on formal procedures for constitutional amendment. In practice, this power has also meant that the Supreme Court of Canada has tended to show greater deference to ordinary legislative attempts at dialogue in cases in which Section 33 applies, than in other legislative contexts.<sup>73</sup>

In the U.S., by contrast, there are few formal mechanisms outside Article V by which Congress or state legislatures may effectively override a decision of the Supreme Court.<sup>74</sup>

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<sup>70</sup> See Constitution Act, 1982, c. 38, reprinted in Procedure for Amending Constitution of Canada, R.S.C. 1985, app. II, no. 44 (Can.).

<sup>71</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, 1982, c. 11, s. 33(1).

<sup>72</sup> See *Ford v. Canada* (Attorney-General), [1988] 2 S.C.R. 712.

<sup>73</sup> See Dixon, *The Supreme Court of Canada*, *supra* note 8.

<sup>74</sup> Of course, in many cases, especially those involving attempts by Congress to generate or jump-start, rather than trump certain forms of common law constitutional reasoning, congressional legislation may be an effective substitute. See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215 (2001) (discussing the effects of “super-statutes,” which seek to “penetrate public normative and institutional culture in a deep way”). However, there are important exceptions to when this will be the case, including in cases where the Court itself in some way blocks the enactment of such statutes by its own approach to constitutional interpretation. See, e.g., *United States v. Morrison*, 529 U.S. 598, 601–02 (2000) (striking down certain core enforcement provisions of the Violence Against Women Act of 1994—a statute that might otherwise have been a candidate for status as a civil rights super-statute); *Boerne v. Flores*, 521 U.S. 507, 511 (1997) (holding that Congress lacked power under § 5 of the Fourteenth Amendment to enact the Religious Freedom Restoration Act of 1993); see also *supra* note 60.

Consider Congress' power under Article III to enact jurisdiction-stripping legislation "suspending" the effect of certain Court decisions.<sup>75</sup> While the outer bounds on Congress' power under Article III remain uncertain, existing Supreme Court decisions in this area suggest that the Court will hesitate to recognize a power on the part of Congress to deprive *all* courts of jurisdiction over constitutional controversies.<sup>76</sup> Without a comprehensive power of this kind, it will also be extremely difficult for Congress effectively to override a decision of the Court by means of Article III, because lower courts will continue to be bound by the Court's prior decisions in exercising their ongoing jurisdiction in a particular area.

Some scholars point to Section 5 of the Fourteenth Amendment, and the power Congress has "to enforce, by appropriate legislation" the substantive provisions of the Amendment, as an alternative source of override power.<sup>77</sup> On this view, the power to enforce includes the power to prefer a different interpretation of the Amendment than that favored by the Court.<sup>78</sup> The Supreme Court, however, has explicitly rejected this argument, holding that Congress does "not enforce a constitutional right by changing what the right is."<sup>79</sup> Rather, the Court has held, for any use by Congress of its power under Section 5 to be given effect by the Court, it must be "congruent and propor-

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75 See e.g., FRIEDMAN, *supra* note 51; LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). Another key mechanism of override is the potential for executive disobedience, especially in cases where officials are not directly parties to a case. See Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781 (2003). This obviously does not pertain to Congress or state legislatures directly and is also subject to the limitation that, in cases such as *Roe* and *Johnson*, where the legislature is ultimately seeking to enforce criminal punishments, cooperation from the courts is required—and therefore mere executive disobedience is often insufficient to achieve relevant democratic objectives.

76 See, e.g., *Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 261–62 (2d Cir. 1948) (suggesting that Congress cannot invoke its power under Article III to deny any and all judicial remedies for a past constitutional violation (as defined by the Court)); see also *Cary v. Curtis*, 44 U.S. (3 How.) 236, 252 (1845) (upholding the preclusion of all forms of post-deprivation relief in a judicial setting against the Collector of Customs, but emphasizing the importance in this context of the existence of a pre-deprivation remedy). For further discussion see generally RICHARD H. FALLON, JR. & JOHN F. MANNING ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 300–12 (6th ed. 2009).

77 U.S. CONST. amend. XIV.

78 See Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Polio-centric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1945 (2003) (describing the Rehnquist Court's interpretation of Section 5 of the Fourteenth Amendment).

79 *Boerne*, 521 U.S. at 520.

ditional” to remedying or preventing a constitutional injury as defined by the Court itself.<sup>80</sup>

A similar analysis applies to the Senate’s power of “advice and consent” in relation to judicial appointments as a means of trumping particular decisions of the Supreme Court. While such a power has clearly allowed Congress to influence the direction of constitutional meaning, over time,<sup>81</sup> it has also tended to do so over a much longer time period than successful constitutional amendments.<sup>82</sup>

Under Article V, if one excludes the Twenty-seventh Amendment,<sup>83</sup> the average ratification time for successful amendments has been one year, eight months, and seven days, with the longest period for successful ratification being three years, nine months, and four days (for the Twenty-second Amendment establishing a two-term limit for the Presidency), and the shortest three months and ten days (for the Twenty-sixth Amendment, under which 18 became the minimum age which states may prescribe for the right to vote).<sup>84</sup> When it comes to changes in the composition of the Court, by contrast, over the last three decades vacancies have tended to arise on the Court on average only every 3.1 years and the tenure of individual Justices has varied significantly, with the average recent tenure of individual Justices being as high as 26.1 years.<sup>85</sup> Even when Congress and the President are fully aligned in their desire to engage in dialogue with the Court, this can mean that it takes between three to fifteen years for dialogue to succeed via such means—or nearly twice to ten times as long as under Article V.

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80 *Id.*

81 *See, e.g.*, FRIEDMAN, *supra* note 51.

82 *Id.*

83 For the special status of the Twenty-seventh Amendment and its history, see, e.g., Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983) (discussing generally judicial review of the amendment process); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677 (1993) (examining the history and lessons of the twenty-seventh amendment and Article V in general); Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433 (1983) (refuting Professor Dellinger’s argument).

84 *See* DAVID C. HUCKABEE, RATIFICATION OF AMENDMENTS TO THE U.S. CONSTITUTION, CONG. RESEARCH SERV., 97-922, at 1, available at <http://www.au.af.mil/au/awc/awcgate/crs/97-922.pdf>. The Twenty-eventh Amendment is a special case because it took 202 years to ratify, and it is not clear as a result that it is in fact valid, or at least universally understood as such; Dellinger, *supra* note 83. *But see* Tribe, *supra* note 82.

85 *See* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 831 (2006) (highlighting these statistics).

Consider the time taken for Congress successfully to override the decision of the Supreme Court in *Hammer v. Dagenhart*<sup>86</sup> after its initial attempt at Article V override failed.<sup>87</sup> In 1918 in *Hammer*, the Court struck down key provisions of the Child Labor Act (CLA) of 1916, prohibiting the transportation in interstate commerce of products manufactured in factories using child labor, on the basis that the true purpose of the Act was to prevent the use of child labor rather than to regulate the channels of interstate commerce or transportation of goods among the states, and thus it was beyond Congress' power under the Commerce Clause. In 1919, Congress enacted a new CLA imposing an "excise" tax of 10% of net profits on manufacturers using child labor, but two years later, in *Bailey v. Drexel Furniture Co.*,<sup>88</sup> the Court once again struck down the revised CLA as beyond the power of Congress under Article I. Applying an identical approach to that of the Court in *Dagenhart* to a different context (namely, taxation), in *Bailey* the Court held that, because the purpose of the law was to penalize and thereby to discourage or suppress child labor, it was within the sphere exclusively reserved by the Constitution to the states, rather than Congress.<sup>89</sup> Finally, in 1923 in *Adkins v. Children's Hospital*,<sup>90</sup> the Court struck down regulations limiting the working hours of women and children as in violation of the Due Process Clause of the Fourteenth Amendment.<sup>91</sup>

Under Article V, Congress responded within a year of *Adkins* by proposing a constitutional amendment empowering Congress "to limit, regulate, and prohibit the labor of persons under eighteen years of age."<sup>92</sup> The Amendment was also ratified by a majority of states within 10 years.

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<sup>86</sup> *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

<sup>87</sup> Such an example seems particularly instructive, given that, for scholars such as David Strauss, this is one of the leading examples in support of the idea that the difficulty of amendment under Article V is in fact more or less irrelevant to the direction of common law constitutional development in the U.S. today. See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1475 (2001) ("Congress proposed the amendment after the Supreme Court thwarted its repeated efforts to regulate child labor by statute.").

<sup>88</sup> *Bailey v. Drexel Furniture*, 259 U.S. 20 (1922).

<sup>89</sup> *See id.* at 39.

<sup>90</sup> *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

<sup>91</sup> *Id.* at 562.

<sup>92</sup> *See VILE, supra* note 61, at 48 ("Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under 18 years of age. Section 2. The power of the several states is unimpaired by this article except that the operation of state laws shall be suspended to the extent necessary to give effect to legislation enacted by this Congress.").

Absent Article V change, by contrast, it was not until 1941 and the retirement of the Court's most conservative Justices—Justices McReynolds, Sutherland, Van Devanter and Butler—that the Court was willing formally to overrule *Dagenhart* and uphold provisions of the Fair Labor Standards Act guaranteeing certain minimum wage and hour protections for workers as a valid exercise of Congress' power under Article I.<sup>93</sup>

### III. A PRINCIPLE OF PARTIAL CONSTITUTIONAL AMENDMENT

Not only do historical and global comparisons therefore provide support for a decision by the Court to endorse the approach of Justice Brennan over that of Justice Powell in *Frontiero*. They also arguably provide a rationale for the Court to extend Justice Brennan's approach so as to apply to *all* amendment proposals that obtain majority, not just two-thirds super-majority, support in Congress.

Of course, the mere fact that Article V may make constitutional amendment unduly onerous in a present-day domestic context does mean that it should not be considered irrelevant whether a particular proposed amendment enjoys super-majority support in Congress or support among state legislatures (or conventions). On the contrary, there are several reasons for the Court to give greater weight to the views of a super- as opposed to simple-majorities in this context: among other things, there is less danger where super-majority agreements exist on a question of dictatorial forms of social choice, of the kind identified by Kenneth Arrow in the context of his "impossibility theorem."<sup>94</sup> The concern to protect state interests, and particularly the interests of small states, was clearly an important factor in the design not only of Article V itself, but also many other provisions of the Constitution.<sup>95</sup>

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<sup>93</sup> See *United States v. Darby*, 312 U.S. 100, 116–17 (1941), *overruling* *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

<sup>94</sup> See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 2 (1951) (introducing dictatorship as a method of social choice); Andrew Caplin & Barry Nalebuff, *Aggregation and Social Choice: A Mean Voter Theorem*, 59 *ECONOMETRICA* 1 (1991) (explaining how in the social choice, the preferences of the median voter beats any alternative, and that the mean voter's most preferred outcome is unbeatable under the 64%-majority rule).

<sup>95</sup> See, e.g., Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 *U. CHI. L. REV.* 1043, 1044 (1988) [hereinafter Amar, *Philadelphia Revisited*] (arguing that "the unenumerated rights retained by the People are primarily or exclusively individualistic, rather than majoritarian [and] that those rights are primarily or exclusively enforceable through judicial, rather than political, processes"); see also Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *COLUM. L. REV.* 457, 457 (1994) [hereinafter Amar, *Consent of the Governed*] (explaining that citizens have

These concerns, however, can be addressed by way of appropriate constitutional standards, as well as rules.<sup>96</sup> All that is necessary for this to occur is that the Court give varying evidentiary force to proposed amendments, according to the degree of support they receive in both Congress and at a state level.

The key premise of a principle of partial constitutional amendment is that all majority-supported amendment proposals should enjoy *some* form of positive legal significance or serve as some form of “plus” in favor of a decision by the Court to defer to parallel legislative attempts at constitutional dialogue; amendment proposals will have negative significance under such a principle if, and only if, they are actively debated but rejected by a majority of either House on an actual floor vote. At the same time, a proposed amendment will also logically have weakest positive force, under such an approach, where it enjoys only simple majority support in Congress. It will then progressively increase in positive weight, according to level of supermajority support it gained in both the House and Senate and (where relevant) for each state that ratified it, without there being a negating vote by another state to reject ratification or otherwise express disapproval of the proposal.<sup>97</sup> The impact of such a principle on Congress’s power to engage in constitutional dialogue, therefore, will be

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a legal right to amend the Constitution “via majoritarian and populist mechanism akin to a national referendum, even though that mechanism is not explicitly specified in Article V”).

96 On this distinction in constitutional law generally, see, e.g., Kathleen Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

97 Another potentially relevant factor for the Court to consider might also be the degree of executive support for a proposed amendment, by, for example, considering the position of the Solicitor General on proposed amendments. See, e.g., CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 188–92 (1991) (noting the general alignment of Solicitor General and President’s constitutional positions); John O. McGinnis, *Principle Versus Politics: The Solicitor General’s Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 802 (1992) (asserting “[a]s a matter of constitutional law, the Solicitor General is *not* independent from the President” and that he “must project vigorously, albeit respectfully, the President’s distinctive constitutional voice”). Arguably, the Court already does this in a broad range of Constitutional contexts. See Rebecca E. Deen et. al, *The Solicitor General As Amicus 1953–2000: How Influential?*, 87 JUDICATURE 60, 71 (2003) (noting somewhat declining but still high rates of successful intervention, as more *amicus* briefs filed); Karen O’Connor, *The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation*, 66 JUDICATURE 256, 261 (1983) (noting high rates of successful intervention); see also LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 3–7 (1987) (noting the influence the Solicitor General has over what cases the Supreme Court decides to hear and the outcome of those cases); Seth P. Waxman, *Foreword: Does the Solicitor General Matter?*, 53 STAN. L. REV. 1115 (2001) (providing a first-hand account of how and why this is often the case).

directly proportionate to the degree of support a particular amendment proposal enjoys at the national and state level.

By itself, no constitutional “plus” factor will be sufficient to ensure the validity of all attempts by Congress to pass legislation designed to update constitutional rules or trump particular prior Court decisions—there may be so little other support for the validity of a particular legislative measure that a partial amendment cannot save the constitutionality of such legislation.<sup>98</sup> Conversely, the validity of particular legislation may also be sufficiently clear from other constitutional sources that a partial constitutional amendment also lacks any real capacity to affect the Court’s decision—though for the opposite reason—that it simply serves to confirm the validity of law in question. In at least some cases, however, other constitutional arguments are likely to be sufficiently finely balanced that the mere existence (or recognition) of such a plus factor *may* be sufficient to alter the ability of Congress to influence the direction of constitutional meaning, and the stronger such a plus factor is, the more likely it is that this will be the case.<sup>99</sup>

The effect of a principle of partial constitutional amendment will, in this respect, closely resemble the effect of a decision by the Court to recognize foreign and international developments as a relevant source of information in interpreting various provisions of the Constitution: while it may not be decisive in all cases, it will be sufficient in at least some cases to change the result in a particular direction.<sup>100</sup>

Consider various Justices’ approach to foreign and international law in cases such as *Roper v. Simmons*<sup>101</sup> and *Knight v. Florida*.<sup>102</sup> In *Roper*, while a majority of the Court was clearly willing to treat foreign and international law sources as relevant, none of the Justices ultimately treated such sources as decisive in resolving the constitutionality of the death penalty as applied to those who committed murder while still a juvenile. Justice Kennedy, for example, held that because

98 This seems particularly likely in the context of attempts by Congress to update constitutional rules, as opposed to engaging in dialogue about the meaning of constitutional standards, because in this context, the Court tends to give little ultimate weight to evolving democratic understandings about the ‘optimality’ of such rules. See *infra* note 45.

99 Cf. Dixon, *Updating Constitutional Rules*, *supra* note 48, at 334 (asserting only “where there is some real doubt or argument as to constitutional validity, will the constitutional ‘plus’ provided by such a principle potentially be decisive”).

100 Cf. *id.* at 340–41 (drawing the same analogy in the context of an argument in favor of deference to Congressional attempts to off-set the error costs associated with constitutional rules, other than Article V).

101 See 543 U.S. 551, 574–77 (2005) (discussing the role of international law).

102 See 528 U.S. 990 (1999) (Thomas, J., concurring) (discussing the role of international law).

other arguments against the constitutionality of the juvenile death penalty were sufficiently clear, “[t]he opinion of the world community” in this particular context simply served to “provide respected and significant confirmation for [the Court’s own prior] conclusions.”<sup>103</sup> Justice O’Connor, on the other hand, held that because other constitutional sources were sufficiently clear in pointing toward the constitutionality of the juvenile death penalty in the U.S., there was no scope for the international consensus against the juvenile death penalty to play even this kind of “confirmatory role.”<sup>104</sup>

In *Knight*, by contrast, in assessing a challenge to the constitutionality of long delays in the carrying out of the death penalty, Justice Breyer seemed to suggest that foreign constitutional understandings *were* more or less sufficient to tip the balance in favor of a decision to grant certiorari to the petitioners. Because there was both limited support in both domestic legislative trends and lower court decisions for finding such delays unconstitutional *and* strong principled arguments on the other side, Breyer suggested, it was legitimate for the Court—at least at the certiorari stage—to treat foreign constitutional practices as more or less a tie-breaker in favor of the petitioner.<sup>105</sup> The “plus” factor provided by foreign law in this case was therefore sufficient to alter the result—compared both to a situation in which such foreign law sources were treated as irrelevant or having negative, rather than positive, significance.<sup>106</sup>

The clearer the endorsement to a principle of partial constitutional amendment by various members of the Court, the more likely it also is that Congress will in fact rely on Article V in a way that produces this kind of result.

At present, given the difficulty of successfully invoking Article V, there is a clear disincentive to proponents of constitutional change relying on Article V. For any proposed amendment under Article V, the expected persuasion costs can be expected to be moderate to high. At the same time, the expected benefits will be quite low. Particularly if there is partisan disagreement on a constitutional issue, the chances of actual successful amendment will be extremely low.<sup>107</sup>

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103 See *Roper*, 543 U.S. at 578.

104 *Id.* at 604 (O’Connor, J., dissenting).

105 See *Knight*, 528 U.S. at 997 (Breyer, J., dissenting) (“Willingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a ‘decent respect to the opinions of mankind.’”).

106 For this latter view, see *Knight*, 528 U.S. at 990 (Thomas, J., concurring) (explaining why foreign law is irrelevant to the decision in *Knight*).

107 See MANSBRIDGE, *supra* note 3, at 29–35 (discussing the difficulty certain amendments have faced throughout the passage process).

There is also the danger that, rather than improving the chances of persuading the Supreme Court to redirect constitutional meaning, a partial amendment may (on the logic of Justice Powell's approach in *Frontiero*) actually decrease the chances of successful change by parallel common law means.

It is thus not surprising that, in recent decades, there have been only four instances in which even a majority of Congress has voted in favor of proposed amendments under Article V—namely, those involving the ERA itself; the proposed amendment approved by the 95th Congress to give Washington, D.C. statehood; the balanced budget amendment approved by the 97th Congress; and the proposed flag burning amendment approved by a majority of every Congress since 1995.<sup>108</sup>

If the Court, however, were to endorse a principle of partial constitutional amendment, there would be a much greater incentive for proponents of constitutional change to propose amendments and put them to a floor vote in a form that could lead such proposals to obtain ordinary majority, if not super-majority, support.<sup>109</sup> All majority-supported amendment proposals would have a clear chance of exerting a positive influence on the ultimate direction of the Court's approach to constitutional meaning. The act of proposing an amendment would also carry few dangers or costs for legislators beyond the persuasion costs associated with invoking Article V.

One potential consequence of this, of course, could be to reduce the current capacity of Article V to signal the strength of congressional opinion on particular constitutional questions.<sup>110</sup> If members of Congress were to invoke Article V with a view simply to achieving a partial constitutional amendment, for example, the use of Article V would clearly convey limited information about the strength of congressional constitutional understandings. Such a result, however, seems unlikely, given the strength of popular identification with the Constitution and the persuasion costs this implies for any use of Article V.<sup>111</sup>

Even if it were to occur, Article V legislation would still also have the capacity to provide useful information about the breadth of democratic constitutional understandings.<sup>112</sup> The more conscious mem-

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108 See generally VILE, *supra* note 61.

109 See, e.g., *infra* note 132.

110 Cf. *supra* note 24.

111 Rather, it seems much more likely that, in such circumstances Congress would rely on a joint resolution rather than Article V proposal.

112 See *supra* notes 25–27.

bers of Congress were of the potential informational consequences of proposed amendments, the more likely it would also be that they would vote sincerely, rather than strategically, on all proposals under Article V in a way that further increased the reliability of this information.<sup>113</sup>

#### IV. OBJECTIONS & ANSWERS

There are, as noted at the outset, a number of potential independent objections to a principle of partial amendment and, as part of an attempt to develop and defend such a principle, each seems worth exploring in some detail.

##### A. *The Text-Based Objection*

One objection is that such a principle would be inconsistent with the text of Article V, which reads that, when proposed by either two-thirds of both Houses of Congress or by a Convention called by the states and ratified by the legislatures of (or conventions in) three-quarters of the states, an amendment “shall be valid to all Intents and Purposes, *as Part of this Constitution.*” This objection also has special forces if Article V is read against the backdrop of the maxim *expressio*

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113 For amendments proposed prior to the Court endorsing a principle of partial constitutional amendment, this will not necessarily always be the case. There have, however, only been four recent amendments that could possibly qualify for the retrospective application of such a principle: the ERA; the proposed amendment approved by the 95<sup>th</sup> Congress to give Washington, D.C. statehood; the balanced budget amendment approved by the 97<sup>th</sup> Congress; and the proposed flag burning amendment approved by a majority of every Congress since 1995. *See, e.g.*, H.J. Res. 90 (180-163); H.J. Res. 103 (271-153); S.J. Res. 41 (63-37); S.J. Res. 1 (66-34); S.J. Res. 180, 106th Cong. (1989); H.J. Res. 10 (286-130); S.J. Res. 12 (66-34); *The Failed Amendments*, U.S. CONSTITUTION ONLINE (Jan 24, 2010), <http://www.usconstitution.net/constamfail.html>.

Historically, three other proposed amendments that would have been potential partial amendments include the House Size Amendment (Article 1 of the original Bill of Rights, setting a non-retrogression standard for size of the House, once it reached 100 and then 200); the Anti-Title Amendment (seeking to strip those receiving foreign titles of U.S. citizenship); and the Corwin Amendment (seeking to prevent any future amendment giving Congress power over slavery or other “domestic institutions,” which is, of obviously, of limited ongoing relevance given the Thirteenth Amendment). *See Some Proposed Amendments*, U.S. CONSTITUTION ONLINE (Jan. 24, 2010), <http://www.usconstitution.net/constamprop.html>. However, of these, only the ERA and flag burning amendments could plausibly be thought to have any direct implication for common law constitutional interpretation. An analysis of the voting record on flag-burning amendments also shows little evidence of purely strategic, or non-typical ideological voting. *See* Dixon & Holden, *Designing Constitutional Amendment Rules*, *supra* note 33.

*unius est exclusio alterius*, and therefore as prescribing the exclusive mode for amending the Constitution.<sup>114</sup>

As a formal matter, the most straightforward answer to this objection is that a principle of partial amendment does not purport to allow Congress or state legislatures to add to or subtract from the text of the Constitution outside the requirements of Article V. Rather, it allows Congress and state legislatures to use Article V channels in order to provide information to the Court, with a view to influencing the Court's interpretation of existing constitutional text. Because of this, a principle of partial constitutional amendment would also obviously not go all the way to eliminating the hurdles Article V creates to Congress effectively influencing the direction of constitutional meaning.

Where an amendment succeeds under Article V, this automatically has the effect of changing the *text* of the Constitution and not simply supplying information to the Court about democratic constitutional understandings. Changes to the text of the Constitution will also have a capacity to influence constitutional outcomes in a far broader range of circumstances than where amendment processes simply provide information to the Court of this kind.

For one thing, text-based constitutional changes will have a far greater capacity to affect the operation of constitutional rules, as opposed to standards. Where the text of the Constitution is relatively "rule-like, concrete and specific," there is broad consensus in the U.S. that the text must be treated as a form of direct "command" to the Court that cannot be overridden by other constitutional sources.<sup>115</sup> Even the strongest evidence of changing constitutional attitudes toward particular rules will therefore be almost entirely irrelevant to the actual interpretation of those rules.

Text-based constitutional changes will also have a greater capacity to be decisive of how courts actually decide particular cases, even in

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114 See, e.g., Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1241 (1995) (arguing the language in Article V indicates, given the Framers' careful construction, that Article V is the only way to amend the Constitution).

115 See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 305 (2007); see also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 121–23 (1977) (setting out the idea of "enactment force" as opposed to "gravitational force"); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1193–94 (1987) (asserting there is a hierarchy of legal arguments in which "the implicit norms of our constitutional practice accord the foremost authority to arguments from text").

cases involving more open-ended constitutional standards.<sup>116</sup> Take the Citizenship Clause of the Fourteenth Amendment. By the time of the *Slaughterhouse Cases*, there was clearly no doubt in the minds of the Justices that strong democratic support existed for a decision to overrule *Dred Scott*—indeed, the Court explicitly noted that the decision had met with “condemnation [from] some of the ablest statesmen and constitutional lawyers of the country.” But for the text of the Fourteenth Amendment, however, the Court still suggested there might have been some doubt as to whether it should overrule itself in *Dred Scott*. It was only the text of the Amendment that “put at rest” any debate over this question.<sup>117</sup>

At a more general level, when compared to most other approaches to gathering information about democratic values or understandings, a principle of partial constitutional amendment will also do more to advance constitutional values implicit in the text of Article V, such as the commitment to broad public deliberation and state involvement as part of the process of constitutional change.<sup>118</sup>

In public opinion polls, or even popular referenda on constitutional change, for example, there is no obligation for citizens to give reasons when voting on constitutional questions. There is also no guarantee that, when voting in a referendum on a particular constitutional question, citizens will be aware of, or give due consideration to, all relevant arguments and information. There is therefore no guarantee that even the most minimal pre-requisites for deliberative democracy are met—i.e., that citizens approach constitutional questions from a standpoint of mutual respect and reciprocity.<sup>119</sup>

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116 This is particularly true where an amendment is directed toward overriding a particular court decision, because in this context, it will generally be drafted in a quite concrete, specific way. See, e.g., Christopher P. Manfredi, *Institutional Design and the Politics of Constitutional Modification: Understanding Amendment Failure in the United States and Canada*, 31 LAW & SOC'Y REV. 111, 122 (1997).

117 See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1872).

118 See generally Henry Paul Monaghan, *We the People[s]*, *Original Understanding and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996).

119 See RAWLS, *supra* note 49, at 50. A variety of proposals have been made aimed at addressing these concerns. See, e.g., BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* (2004) (suggesting a “deliberation day” experiment as part of attempts to make popular opinion polls more deliberative); Amar, *Consent of the Governed*, *supra* note 94, at 503 (suggesting that voters in a referendum meet in local caucuses and be “electronically and interactively linked” to a national convention). However, these proposals have obvious problems in terms of turn-out and participation, on the one hand, and the potential for group polarization on the other. See, e.g., David Schkade, Cass R. Sunstein & Reid Hastie, *What Happened on Deliberation Day?*, (AEI-Brookings Joint Ctr. for Regulatory Studies, Working Paper 06-19), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=911646](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=911646).

Partial constitutional amendments, by contrast, are necessarily subject to stringent formal requirements of legislative debate and justification. They are thus also more likely to meet substantive requirements governing the preconditions for deliberative democracy.

A similar position applies to the relationship between national opinion polls—and even a national referendum process—and other constitutional values implicit in Article V, such as the principle of respect for state-level constitutional deliberation.<sup>120</sup>

As sources of information about democratic constitutional understandings, such sources provide information that is highly *insensitive* to state-level variation in constitutional values and understandings. The answer given to this objection by leading proponents of mechanisms, such as a national referendum process, is also extremely revealing: Akhil Amar, for example, suggests that the way in which to answer this kind of federalism-based objection is to endorse the vision of federalism advanced by James Wilson, as opposed to James Madison.<sup>121</sup> It is clear, however, that from a historical perspective “Wilson . . . did not represent the thinking of significant numbers of his contemporaries,”<sup>122</sup> and from a contemporary perspective, that Wilson’s approach is directly inconsistent with the approach of a majority of the Court in areas such as pre-emption, “commandeering”<sup>123</sup> and the regulation of inter-state commerce.<sup>124</sup>

Partial constitutional amendments, on the other hand, have the potential to provide the Court with quite detailed information about state-level variation in constitutional understandings. The votes of

120 For the federalism-based commitments implicit in Article V, see Monaghan, *supra* note 117, at 159.

121 See Amar, *Consent of the Governed*, *supra* note 94, at 506–07 (explaining Wilson’s idea of federalism: “the state people [are] clearly subordinate to the national people, just as state constitutions are subordinate to the national Constitution,” as opposed to Madison’s view of federalism: “[o]rdinary government under the Constitution was neither wholly ‘national,’ nor purely ‘federal’ . . . Neither the people of each state nor the people of the nation were wholly sovereign”).

122 Monaghan, *supra* note 117, at 159.

123 See *New York v. United States*, 505 U.S. 144, 161 (1992) (limiting the power of the federal government by holding that “[a]s an initial matter, Congress may not simply ‘commandeer’ the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program”) (alteration in original); see also *Printz v. United States*, 521 U.S. 898, 933 (1997) (reasserting the holding in *New York v. United States*, 505 U.S. 144 (1992)).

124 See *United States v. Lopez*, 514 U.S. 549, 552 (1995) (affirming the holding that “section 922(q) [of the Gun Free School Zone’s Act], in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause”); see also *United States v. Morrison*, 529 U.S. 598, 602 (2000) (limiting Congress’ use of the Commerce Clause further by striking down as unconstitutional the Violence Against Women Act).

individual members of Congress on particular proposed amendments will almost always provide the Court with some information about variation in constitutional understandings by state and region, as well as political party. In the case of actual proposed amendments, the ratifying decisions of state legislatures will also provide a further source of information to the Court about state-level democratic constitutional variation. By varying the level of positive weight given to particular proposed amendments, according to the degree of support they receive at a state level, a principle of partial constitutional amendment also further helps promote the role of state legislatures in the overall process of constitutional change and dialogue.

*B. The Minority Rights Objection*

A second, potential objection to a principle of partial amendment is that it could move the Court too far in a pro-majoritarian direction, and thereby undermine the role the Supreme Court is able to play—at least according to scholars such as John Ely—in protecting the channels of political change and “discrete and insular” or other historically disadvantaged minorities in the political system.<sup>125</sup> Such a concern seems especially salient now, as opposed to in, say, the 1980s or 1990s, given that the most recent attempts to use Article V have tended to focus on the rights of a group (i.e., gays and lesbians) that is, in fact, a clear political as well as historically disadvantaged minority.<sup>126</sup>

There are, however, at least two answers to this objection: first, that a principle of partial constitutional amendment would not apply equally across all areas; and second, there are in any event limits to

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<sup>125</sup> Such an objection is also leveled against proposals for a national referendum as an alternative to Article V. See Amar, *Consent of the Governed*, *supra* note 94, at 457 (“We the People of the United States have a legal right to . . . change our Constitution—via a majoritarian and populist mechanism akin to a national referendum, even though that mechanism is not explicitly specified in Article V.”). It is, of course, also important to note in this context that a prime example in support of this argument could be the Corwin Amendment, at least from the perspective of its potential effect, under a principle of partial constitutional amendment, during the Civil War. See A. Christopher Bryant, *Stopping Time: The Pro-Slavery and “Irrevocable” Thirteenth Amendment*, 26 HARV. J.L. & PUB. POL’Y 501, 504 (2003) (explaining that the Corwin Amendment set forth an argument that Congress could use Article V to limit the Article V power itself).

<sup>126</sup> See *e.g.*, H.R.J. Res. 106, 108th Cong. (2004) (proposing an amendment to the Constitution that marriage “shall consist solely of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman”); H.R.J. Res. 88, 109th Cong. (2006) (re-proposing the Marriage Protection Amendment).

how effective the Supreme Court will be in seeking to advance a particular formal conception of constitutional meaning in the face of widespread substantive democratic disagreement.

Take two recent areas of constitutional controversy involving a refusal by the Court to respond to attempts by Congress or state legislatures to redirect common law constitutional meaning: abortion and flag burning.

In the abortion context, there is a very real argument that in cases such as *Thornburgh*, *Akron* or *Webster*, if the Court had endorsed a principle of partial constitutional amendment, Article V proposals would have encouraged at least some Justices (i.e., Justices Kennedy and O'Connor, possibly Chief Justice Burger, and even Justice Powell)<sup>127</sup> to retreat from the most counter-majoritarian aspects of its decision in *Roe* (namely the holding that the government is prevented prior to viability from imposing any (non-trivial) measure designed to protect fetal life, or discourage a woman from seeking an abortion)<sup>128</sup> and defer to a greater number of legislative attempts to regulate access to abortion.

The Due Process Clause of the Fourteenth Amendment is an area where, implicitly at least, the Court has shown a clear willingness to take into account the nation's "evolving" traditions regarding the recognition of particular liberty interests.<sup>129</sup> Had a principle of partial

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<sup>127</sup> While a party of the majority opinion in *Roe* and *Akron*, Chief Justice Burger dissented in *Thornburgh*. See *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 782–83 (1986) (Burger, C.J., dissenting) (finding that the court had gone beyond the limitations expressed in *Roe* and finding that states should be able to provide women with medical information concerning the risks inherent in the medical procedure of an abortion). While indicating sympathy for attempts to narrow *Roe*, both Justices Kennedy and O'Connor also avoided direct consideration of the issue in *Webster*. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 520–21 (1989) (Rehnquist, C.J., with White, J., Scalia, J. & Kennedy, J., concurring) ("Both appellants and the United States as *amicus curiae* have urged that we overrule our decision in *Roe v. Wade*. The facts of the present case, however, differ from those at issue in *Roe*. . . . This case therefore affords us no occasion to revisit the holding of *Roe*. . . ." (citations omitted)); *id.* at 521 (O'Connor, J., concurring) (holding that there was no need to reconsider *Roe*). Justice Powell was a much firmer supporter of *Roe*, but like the plurality in *Casey*, suggested that the requirements of *stare decisis* were a prime reason for continuing to adhere to this approach. *City of Akron v. Akron Ctr. For Reprod. Health, Inc.*, 462 U.S. 416, 419–20 (1983).

<sup>128</sup> For the view that this, but not necessarily, other parts of *Roe* are counter-majoritarian, see NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE 74 (1996) (noting that many Americans support restrictions on access to abortion services).

<sup>129</sup> *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (considering historical traditions regarding the prohibition of sodomy, and pointing to "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex"). Whatever the Court said in *Casey* itself about its unwillingness to

amendment been recognized by the Court prior to *Casey*, it is also far more likely that opponents of *Roe* would have proposed more moderate “human life amendments,” which aimed to narrow rather than wholly overrule *Roe* and which could thus have gained at least ordinary majority support in Congress.<sup>130</sup>

Had this been true, in cases such as *Akron*, *Thornburgh* or *Webster*, there would then have been much clearer “objective”<sup>131</sup> evidence available to the Court that there was strong democratic disagreement with various aspects of *Roe*. Evidence of this kind would also have been generated in a way that was more consistent with respect for the doctrine of stare decisis than the actual evidence before the Court in these cases regarding democratic “backlash.”<sup>132</sup> For at least some Justices, therefore, it could have provided a much stronger basis for a decision to defer to legislative attempts at dialogue.<sup>133</sup>

A quite different position applies in the context of the constitutional controversy over flag burning and the Supreme Court’s decisions in *Johnson* and *Eichman*. While there would clearly have been the potential for the Court to apply a principle of partial constitutional amendment in a case such as *Eichman*,<sup>134</sup> in practice, it seems

take democratic opposition to *Roe* into account, most commentators suggest that it in fact did so, to at least some degree. See, e.g., DEVINS, *supra* note 127, at 73–74 (noting that many commentators claimed that the Court in *Casey* was more driven by public opinion than constitutional principle; he also presents public opinion data showing peoples support for abortion restrictions); Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318, 1330–32 (2009) (positing that the Court is a product of its times and “[a]ccordingly, the very forces that pushed the Supreme Court to embrace the undue burden test make it extremely unlikely that the Court will disavow *Casey* in favor of pro-choice or pro-life absolutism”).

130 See, e.g., DEVINS, *supra* note 127, at 88–89 (noting the 49–50 vote for the 1981 “Human Life Federalism Amendment”).

131 For the Court itself in *Casey*, the presence of an “objective” medical basis for reconsidering certain elements of the Court’s reasoning in *Roe* also appears to have been crucial to the willingness of the Court to overrule that part of its prior holding in *Roe*, which prevented the state from taking measures designed to protect fetal life prior to viability. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 872 (1992); *Akron*, 462 U.S. at 458 (O’Connor, J., dissenting) (discussing the changes in viability which put the trimester approach on a collision course with itself).

132 See Klarman, *supra* note 52 (stating that *Roe* was one of a few court decisions to slow causes they “purported to benefit” while sometimes producing “larger political consequences”).

133 This seems particularly true in the case of Justice Powell, who was also pivotal in many abortion cases, see Klarman, *supra* note 52 (“Justice Powell, who proved increasingly essential over time to the maintenance of a prochoice [sic] majority on the Court, viscerally resisted state efforts—as he perceived them—to defy *Roe* . . .”).

134 Even as early as 1989, there was clear majority support in both the House and Senate in favor of a constitutional amendment giving Congress explicit authority to pass legislation such as the FPA. See *supra* note 61.

extremely unlikely that recognition of such a principle would have had any effect on the Court's ultimate approach in *Eichman*. The majority in the case held that: "any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment," thereby suggesting that even the strongest evidence of democratic disagreement would have been irrelevant to its ultimate decision.<sup>135</sup>

As to those areas such as abortion, where a principle of partial constitutional amendment could potentially lead to more pro-majoritarian constitutional outcomes, it also seems doubtful that this would in fact change the enjoyment of actual constitutional rights, by most Americans, on the ground.

As scholars such as Gerry Rosenberg and Michael Klarman have shown, there are a number of reasons why, if the Court attempts to protect individual rights in the face of clear opposition from a majority of Americans, it is unlikely to be effective in achieving its aims.<sup>136</sup> One reason is that in a decentralized judicial system such as that of the U.S., many federal district courts and state courts will refuse to give practical effect to such a ruling and will in most cases be able to do so without facing any meaningful prospect of review by the Court itself.<sup>137</sup> Another reason is that the meaningful protection of individual rights will often require active government support or expenditure, which will clearly be lacking if there is broad political opposition to particular constitutional change.<sup>138</sup> A third reason is that, if particular rights are sufficiently unpopular, they will tend to generate a form of counter-mobilization or backlash that not only limits the enjoyment of the particular right in question, but often also the broader political rights and interests of the citizens the Court is concerned to

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135 United States v. Eichman, 496 U.S. 310, 318 (1990).

136 GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 336, 338–41 (1991) ("U.S. courts can *almost never* be effective producers of significant social reform. . . . [T]he data suggest that they may mobilize opponents."); see also MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); Michael J. Klarman, Brown and Lawrence (and Goodridge), 104 MICH. L. REV. 431, 475 (2005) [hereinafter Klarman, Brown and Lawrence (and Goodridge)] (finding that the decisions of *Lawrence* and *Goodridge* produced political backlash and "greater resistance than change accomplished through legislatures"); Klarman, *supra* note 52, at 1 (stating that *Roe* was one of a few "court decision that seem[ed] to retard the causes they purport[ed] to benefit while sometimes also producing larger political consequences").

137 ROSENBERG, *supra* note 135, at 18.

138 *Id.* at 20–21.

protect.<sup>139</sup> Together, these factors all combine to mean that, except in certain limited circumstances, by simply refusing as a formal legal matter to overrule a prior counter-majoritarian or blocking decision, the Court will tend to have limited capacity to increase the actual enjoyment of rights those decisions may promise.

This pattern has also been largely true, as Rosenberg and others have shown, in the context of *Roe* itself.<sup>140</sup> For women seeking an abortion in the years after *Roe*, one clear benefit of *Roe* has been that it has encouraged a large increase in the number of safe, legal abortion providers operating across the country—particularly in a sub-set of states.<sup>141</sup> By creating a constitutional barrier to measures that impose a significant financial hurdle to access (such as, for example, the hospitalization requirements at issue in *Akron*), it also arguably helped keep abortion affordable for large numbers of women.<sup>142</sup> At the same time, the initial opposition to the Court’s reasoning in *Roe*, and the fact that this has only increased in many parts of the country with the growth of the “pro-life” lobby, have meant that, in many instances, *Roe* has been ineffectual in preventing state legislatures from enacting measures such as mandatory counseling and waiting period requirements designed to discourage women from seeking an abortion.<sup>143</sup>

As a result, the ultimate decision by the Court in *Casey* formally to overrule that part of *Roe* that stood in the way of such measures (provided they do not impose an “undue burden” on access to abortion<sup>144</sup>) has also tended to have a limited effect on most women’s ac-

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139 See Klarman, Brown and Lawrence (*and Goodridge*), *supra* note 135, at 482 (stating decisions which outpace “public opinion on issues of social reform . . . mobilize opponents, undercut moderates, and retard the cause they purport to advance”).

140 See, e.g., ROSENBERG, *supra* note 135, at 173–268 (finding that *Roe* did not raise sensitivity to women’s right issues and instead government officials “were actually more hostile after Court action than before it,” and press coverage and public opinion were not responsive to the Court’s actions as well).

141 DEVINS, *supra* note 127, at 140–41; ROSENBERG *supra* note 135, at 196.

142 DEVINS, *supra* note 127, at 140–41; ROSENBERG, *supra* note 135, at 195–201.

143 On the relevant legislation, see, e.g., DEVINS, *supra* note 127, at 61, 66; ROSENBERG *supra* note 135, at 187. On the rise of pro-life political forces as a contributing factor in this context, see, e.g., DEVINS, *supra* note 127, at 62–63 (finding that the pro-life movement grew dramatically after 1978, thus propelling its importance in political campaigns and for single issue voters).

144 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992)–. This aspect of *Casey* is an extremely important qualification to the claim that little would have changed from retreating from the *Casey* framework because of the potential for regulation otherwise to require that abortions be performed in hospitals—which are both unavailable and unnecessarily expensive as abortion providers. See, e.g., ROSENBERG, *supra* note 135, at 189–95; see also *supra* note 147. For other arguments about the potentially far-reaching consequences of a decision more broadly to overrule *Roe*, see also Richard H. Fallon, Jr., *If Roe*

tual level of access to abortion.<sup>145</sup> There is, for example, no evidence that in the wake of *Casey* the states introduced *new* measures designed to discourage access to abortion (i.e., measures not already *de facto* in place prior to 1992) and that these measures significantly increased the cost of abortion for most women. (On most inflation-adjusted measures, the cost of abortion stayed largely stable throughout the 1990s.<sup>146</sup>) While there was a slight decrease in the overall rate of abortion following *Casey*, this change was both small and also evident as a trend well prior to the decision.<sup>147</sup> Thus, even though for many the *Casey* decision may have carried significant symbolic importance, at a more concrete level, it is far less clear that it actually altered the enjoyment of basic reproductive rights for most women.

### C. *The Majoritarian Objection*

A third and quite different possible objection to a principle of partial amendment is that, if it were actually endorsed by a majority of the Court, it could actually lead some Justices to uphold fewer, rather than more, legislative attempts at constitutional dialogue, by virtue of the same kind of negative inference dynamic implicit in Justice Powell's concurrence in *Frontiero*.

Just as it is possible that some Justices might currently decide to treat the failure of a proposed amendment under Article V as evidence of a lack of democratic support for constitutional change in a certain direction, so too it is possible that, if a principle of partial amendment were recognized, these same Justices might decide that a failure by Congress to use Article V as part of the attempt to engage in dialogue should weigh against a subsequent decision to uphold

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*Were Overruled; Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 614 (2007) (“[A]n overruling of *Roe* would not withdraw abortion-related questions from the courts, but instead would present the Court with a new set of morally freighted questions to replace the older set that has now grown familiar.”).

145 For related arguments criticizing the initial breadth of *Roe* in this context, see CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 17–18 (1999) (saying that *Roe* was a wide decision since it was broad in its coverage of abortion issues). But for consideration of what the potential consequences of a broader overruling of *Roe* might have been, see also Fallon, *supra* note 143.

146 See Cynthia C. Harper, Jillian T. Henderson & Philip D. Darney, *Abortion in the United States*, 26 ANNU. REV. PUB. HEALTH 501, 505–06 (2005) (noting that, adjusted for inflation, costs of surgical abortion remained steady until the late nineties, and then began to rise). In 2005, the average cost of an abortion was \$413. See Rachel K. Jones et al., *Abortion in the United States: Incidence and Access to Services, 2005*, 40 PERSP. ON SEXUAL AND REPROD. HEALTH 6, 15 (2008) available at <http://www.guttmacher.org/pubs/journals/4000608.pdf>.

147 *Id.*

that attempt at dialogue. If this were the case, but Congress still declined routinely to invoke Article V, this could then lead to an overall decrease, rather than increase, in the ability of Congress successfully to influence the direction of constitutional meaning.

While such a result is certainly possible, in practice it seems unlikely for at least two reasons. One reason is that in order to endorse a principle of partial constitutional amendment members of the Court must be willing to show a degree of interpretive flexibility, as opposed to rigid adherence to abstract legal formulae, that weighs against any subsequent decision mechanically to apply a presumption of *expressio unius to any aspect of Article V*.<sup>148</sup>

A second reason is that, if the Court were in fact to take such an approach, it is extremely likely that Congress would make quite consistent use of Article V in order to promote constitutional dialogue.

At a state constitutional level, at least, there has tended to be a clear positive correlation between the rate of successful constitutional amendment in a given year and the probability of successful constitutional amendment in the subsequent successive time periods. In a study co-authored with Richard Holden, I have shown, for example, that, for current constitutions at a state level in the United States, there has been a clear and significant positive relationship between the probability of amendment in a given year and the subsequent probability of successful amendment—or between a variable AMEND and lagged AMEND (where the lag was measured up to 20 years).<sup>149</sup> The strength of this relationship is also significant. For example, if a state amends its constitution in a given year, it is 2.8 times more likely than other states to amend it again 2 years later, and 1.9 times more likely to do so 4 years later.<sup>150</sup> There is a strong degree of persistence for this effect, with the odds ratio of amendment still standing at 1.4

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148 For the connection between this kind of more general interpretive flexibility and rejection of a strict application of the *exclusio unius maxim*, see, e.g., *Clinton v. New York*, 524 U.S. 417, 472–73 (1998) (Breyer, J., with O'Connor and Scalia JJ., dissenting) (arguing that the Constitution allows for innovation and a workable government, and the Act in question may come close to violating the limit of constitutionality, but it does not literally violate the Constitution's words); *U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 844–45 (1995) (Kennedy, J., concurring) (rejecting arguments that all legislative actors, rather than simply state voters or legislatures, were precluded from imposing term limits).

149 See, e.g., Dixon & Holden, *Designing Constitutional Amendment Rules*, *supra* note 33, at tbl.5 (presenting data on amendment probability). We found this effect using a logistic regression technique, which is standard as a means of testing for the presence of “streaks” or runs in the occurrence of certain factors.

150 This was after controlling for a range of other covariates, including the formal difficulty of amendment.

after 10 years. These findings are also statistically significant at the 1% level.

At least one plausible explanation for this is that, the more infrequent is the use of formal processes of constitutional amendment, the more such processes come to be regarded by the broader public and academic commentators with suspicion, in a way that then adds even further to the political, as opposed to legal, hurdles to successful constitutional amendment.<sup>151</sup> By reversing the recent non-use of Article V, therefore, a principle of partial amendment would tend to reduce these informal, as opposed to more formal, hurdles to constitutional amendment and thereby increase the prospects of both frequent partial and completed constitutional amendment.

## V. CONCLUSION

To suggest that Article V of the Constitution is too onerous, or that this may have some real consequences for democratic constitutionalism in the U.S., is far from radical. While certainly contested, it is a position advanced by numerous previous scholars, from Donald Lutz to Sandy Levinson.<sup>152</sup> But how radical is it to propose a principle of partial constitutional amendment as a solution to this problem?

In two ways, at least, the idea of the Court's recognizing failed amendments as partial amendments *is* potentially quite radical. From the perspective of the Court, it implies at least one important departure from the current orthodoxy when it comes to the most specific rule-like provisions of the Constitution—namely, that the Court should always interpret such provisions in a wholly static and literal way, without regard to the merits in a particular case of a more dynamic, evolutionary approach to constitutional meaning.<sup>153</sup>

From a more theoretical perspective, endorsement of such a principle also serves to challenge a long-established assumption among constitutional scholars that there is a clear line to be drawn between,

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151 See, e.g., Kathleen M. Sullivan, *Constitutional Amendmentitis*, 23 AM. PROSPECT 20, 25–27 (1995) (arguing against constitutional amendments by legislative bodies because of the possibility of causing tension with the original document and undermining the respect and legitimacy the court now enjoys as an interpreter). For discussion, see also ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* (2009)

152 SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 165–66 (2006) (“Article V constitutes an iron cage with regard to changing some of the most important aspects of our political system.”).

153 See Dixon, *Updating Constitutional Rules*, *supra* note 48, at 321 (suggesting that, “because of concerns about ‘fidelity’ and also institutional capacity, the literal meaning of the text of the Constitution should almost always be controlling”).

on the one hand, forms of constitutional change labeled “amendments” and, on the other, forms of constitutional change which either involve less formal processes of popular or legislative input or leave a less formal legal deposit as an end product.<sup>154</sup>

However, in other ways, a principle of partial constitutional amendment is also far from radical—at least in the changes it implies for actual Supreme Court practice. Even as a theoretical matter, there are limits to the aims of such a principle when it comes to changing the Supreme Court’s approach to legislative attempts at affecting the direction of constitutional meaning. As a mechanism for promoting dialogue, the principle is not intended to provide an exhaustive means by which Congress or state legislatures can influence constitutional meaning. Rather, it seeks to complement existing, more ordinary legislative means by which Congress can achieve this by providing an additional “plus” factor in support of the validity of such attempts at dialogue.<sup>155</sup> A key premise of the principle is also that it will have the capacity to influence constitutional outcomes in only some cases—where a majority of the Court itself is already open to taking democratic constitutional amendment into account and regards other constitutional factors as relatively finely-balanced. At the level of precedent, support for such a principle can also found, beyond Justice Brennan’s own opinion in *Frontiero*, in the approach of the Supreme Court of India to amendments passed under Article 368 of the 1950 Indian Constitution.

Under Article 368, most amendments to the Indian Constitution require the support of only a simple majority of the Lok Sabha, or lower house of the Indian Parliament (provided this number represents no less than two-thirds of the total number of representa-

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154 This distinction has been under attack in recent years, but remains powerful in the constitutional imagination in the United States and elsewhere. See Sanford Levinson, *How Many Times Has the United States Constitution Been Amended?* (A) < 26; (B) 26; (C) 27; (D) > 27: *Accounting for Constitutional Change*, in *RESPONDING TO IMPERFECTION*, *supra* note 10, at 13 (distinguishing between organic changes that come from within the Constitution and amendments which have a distinctive birth process of their own); Lutz, *supra* note 10, at 240 (drawing a distinction between amendment, which is the formal process developed by Americans, and revision, which is a process that uses the legislature or judiciary).

155 Another complementary principle that I have argued that courts should endorse if they wish to engage in forms of judicial review that are both maximally dialogic and democratically sensitive is a principle of “narrow restatement.” See Dixon, *Updating Constitutional Rules*, *supra* note 48, at 345 (“[T]he Court should give some degree of positive force to proposed and failed, as well as successful, constitutional amendments, according to the degree of support they receive in Congress and state legislatures.”).

tives).<sup>156</sup> The flexibility implicit in Article 368 also has frequently been used by Indian governments to entrench, or at least insulate from judicial review, a range of controversial policy objectives, including during the Emergency of the 1970's.<sup>157</sup> Many commentators have therefore suggested that, in contrast to the United States, the formal requirements for constitutional amendment in India have proven substantially too permissive.<sup>158</sup>

The response of the Supreme Court of India to this criticism has been to impose certain additional "implied" hurdles to the legal effectiveness of constitutional amendments under Article 368, which hurdles have the effect that even successful constitutional amendments in India enjoy varying legal force.<sup>159</sup> Most notably, in *Kesavananda Bharati Sripadagalvaru v. State of Kerala*,<sup>160</sup> a decision of a 13-judge bench, the SCI held that that Article 368 could not validly be used to amend the "basic structure" of the Constitution, including the "essence" of fundamental rights guarantees in the Constitution, such as the right to property and judicial review. As a result, the Court refused to give full legal effect to the 1971 Constitution (Twenty-Fifth) Amendment Act, which sought to provide that where the compulsory acquisition of property required Parliament to give to the owner of the property "an amount fixed by law" rather than "compensation," no law could "be called into question in any court on the ground that the amount so fixed or determined [was] not adequate or that the whole or any part of such amount [was] to be given oth-

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156 Subject to certain subject-matter specific exceptions, Article 368(2) provides that in general:

An amendment of this Constitution may be initiated . . . by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, [it shall be presented to the President who shall give his assent to the Bill and thereupon] the Constitution shall stand amended in accordance with the terms of the Bill.

INDIA CONST. art. 368, § 2 (alteration in the original).

157 See, e.g., PARAS DIWAN & PEYUSHI DIWAN, *AMENDING POWERS AND CONSTITUTIONAL AMENDMENTS: FROM FIRST TO THE LATEST AMENDMENT* (2d rev. ed. 1997).

158 *Id.*; see also P.B. Mukharji, *The Indian Constitution: The Debate Continues in Constitutional Amendments—A Study*, 9, 22–23 (Sukumar Biswas ed., 1977) (noting "widespread opinion" in 1977 that the amendment power had been overused by the executive, without adequate legislative checks).

159 See, e.g., Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Constitutional Perspective*, 4 INT'L J. CONST. L. 460, 473, 475 (2006) (discussing how even though the Court acknowledged Parliament's right to make amendments under Article 368 it did not accept the argument that Parliament could do anything it wanted through the amendment power).

160 A.I.R. 1973 S.C. 1461 (India).

erwise than in cash.”<sup>161</sup> In an earlier decision, *I.C. Golaknath v. State of Punjab*,<sup>162</sup> the Court indicated a willingness to give an even lesser degree of force to constitutional amendments, on the basis that amendments were “laws” to which the fundamental rights guarantees in the Constitution applied. On this theory, the Court also held that the Fourth Amendment, the import of which was that “no law . . . shall be called in question in any court on the ground that compensation provided by [it] is inadequate,” had no effect whatsoever on the validity of legislation seeking to promote land reform or to nationalize private property.<sup>163</sup>

Though it is not always fully appreciated even in India, there has also been a striking correlation between the degree to which the SCI has been willing to give partial effect to constitutional amendments and the degree of support particular amendments enjoyed in the Lok Sabha at the time of enactment.<sup>164</sup> The Twenty-fifth Amendment, for example, received 355 out of 518 votes, or 68% super-majority support, in the Lok Sabha and also meaningful support from the opposition as well as the Congress Party.<sup>165</sup> The Fourth Amendment, by contrast, obtained the support of only 302 out of 499 members—or 60%—of the Lok Sabha, at a time when the Congress Party controlled 74% of seats.<sup>166</sup> The different degrees of legislative support the two amendments enjoyed in this context also mapped on quite clearly to the degree of force the SCI was willing to give each amendment. The SCI, therefore, has to a large degree already developed a principle of partial amendment—albeit in inverse form.

One might still ask, of course, whether it is realistic to expect that any Justice would ever endorse such a principle in the abstract, and there can be no definitive answer to this question.<sup>167</sup>

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161 *Id.* at para. 428 (2).

162 A.I.R. 1967 S.C. 1643 (India).

163 U.S. CONT. AMEND. IV.

164 A much more generally noticed feature of this jurisprudence is the degree to which, after initial criticism, it won broad support for helping to restrict the capacity of Prime Minister Indira Gandhi to use Article 368 in order for self-entrenchment purposes. *See, e.g.,* Sujit Choudhry, “He Had a Mandate:” *The South African Constitutional Court and the African National Congress in a Dominant Party Democracy* (Constitutional Law Workshop, Univ. of Chicago Law School, Feb. 11, 2009) (on file with author).

165 *See Kesavananda Bharati Sripadagalvaru v. State of Kerala*, A.I.R. 1973 S.C. 1461, Par. 2089 (India).

166 *See* G. G. MIRCHANDANI, *SUBVERTING THE CONSTITUTION* 24 (1977).

167 I am inclined to rule out the possibility of what Jake Gersen and Adrian Vermeule call “congressional supply” of such a principle because of separation of powers concerns. *But see* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002) (rejecting separation of powers-based arguments); *see also* Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 679–80 (2007)

There are at least two reasons, however, why a Justice *might* be willing in the abstract to endorse such a principle of deference to majoritarian law-making processes, while rejecting it in a more specific context. As Adam Samaha has noted, in an experimental setting, there is strong evidence to suggest that individuals behave differently, depending on the stakes involved in a particular decision, and in particular, that they seem more willing to take risks in low, as opposed to high, stakes settings.<sup>168</sup> Therefore, if abstracting from a particular concrete controversy helps a decision to endorse a principle of deference to legislative constitutional judgments seem “lower risk,” this may have some capacity to encourage a greater willingness on the part of a judge to endorse such a principle.<sup>169</sup>

For some Justices, another reason to endorse a principle of partial amendment could be a desire to take a more pro-active role in advancing their own preferred (first-best) understanding of constitutional meaning in a range of first look cases.<sup>170</sup> Absent some realistic possibility of legislative override under Article V, some Justices may feel, for example, that it is inappropriate to assume too active a role in developing constitutional meaning because, if they err, especially when it comes to judging democratic constitutional understandings, there is little realistic prospect of their reversal, within a reasonable time-frame.<sup>171</sup> The main existing mechanism for avoiding this prob-

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(arguing that deference to administrative agencies should be a voting rule and supports making deference an “aggregate property that arises from the whole set of votes”).

168 See Adam M. Samaha, *Low Stakes and Constitutional Interpretation* (University of Chicago Law School, Public Law and Legal Theory Working Paper No. 318, 2010), available at <http://www.law.uchicago.edu/academics/publiclaw/index.html> (“Some notable studies find that lower stakes are associated with lower levels of risk aversion, or at least greater variance in risk aversion levels.”).

169 Related arguments could also be made that the effect of such abstraction is to create a partial veil of ignorance for relevant justices about the substantive results of particular principles, therefore changing their decision-making behavior in this regard. See, e.g., ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL* 145–46 (2007) (discussing the effect of such veil effects more generally and arguing that institutionalized deference requires the judge “to internalize a legal norm of deference, but it is accompanied by none of the traditional mechanisms law uses to force decision-makers to internalize the consequences of their choices”).

170 On the distinction between first and second look cases, see Dixon, *The Supreme Court of Canada*, *supra* note 8, at 241 (explaining that first look cases are when the Court lacks information about the legislative body’s views of the Constitution on a certain issue, and second look cases are when the Court has direct information from recent legislative actions or debate).

171 See SUNSTEIN *supra* note 144, at 16–19 (arguing that many judicial decisions are minimalist along certain dimensions since they do not touch other possible cases, or their rationale does not extend much further than its holding).

lem—narrow forms of reasoning<sup>172</sup>—is also far from perfect in allowing members of the Court simultaneously to advance their own preferred ideas about constitutional meaning and to promote the reversibility of Court decisions.<sup>173</sup> If a principle of partial amendment was understood to increase opportunities for legislative reversal, while also allowing individual Justices greater freedom in most cases to pursue their own preferred approach to constitutional decision-making, for some Justices it might therefore appear a principle worth endorsing.

In a context where there are such important potential democratic stakes, this is also all that seems necessary in order to make the theoretic project of developing a principle of partial constitutional amendment worthwhile.

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172 *Id.*

173 If adhered to strictly, it inevitably constrains judges to reason “shallowly,” or in a way that avoids direct appeal to ethical or normative constitutional considerations, and for some justices, this will be a serious constraint on their preferred approach to constitutional argument and persuasion. See Dixon, *Updating Constitutional Rules*, *supra* note 48, at 322, 337.