
ARTICLE

THE FUNCTION OF ARTICLE V

AZIZ Z. HUQ[†]

What good is Article V? The Constitution's amendment rule renders the text inflexible, countermajoritarian, and insensitive to important contemporary constituencies. Comparative empirical studies, moreover, show that textual rigidity is not only rare in other countries' organic documents, but also highly correlated with constitutional failure. To promote our Constitution's survival and to counteract Article V's "dead hand" effect, commentators argue, Americans have turned to informal amendment through the courts or "super" statutes. Article V, the conventional wisdom goes, is a dead letter.

Against this pervasive skepticism, I propose instead that Article V may have played an important but hitherto unrecognized function in the early Republic. I hypothesize that Article V may have mitigated a "hold-up" dilemma that could have precluded the Constitution's ratification and undermined its stability in the early Republic era. By hindering strategic deployment of textual amendment, Article V-induced rigidity fostered a virtuous circle of investment in new institutions, such as political parties and financial infrastructure. Identification of Article V's potential role in the early Republic leads to a more nuanced view of the Constitution's amendatory regime. In effect, it raises the possibility that we have a

[†] Assistant Professor of Law and Herbert and Marjorie Fried Teaching Scholar, University of Chicago Law School. I am deeply indebted to Anthony Casey, Ros Dixon, Michael Dorf, David Fontana, Tom Ginsburg, Mark Graber, Alison LaCroix, David Law, Sanford Levinson, Miguel Schor, and Mila Versteeg for their terrific and thoughtful comments and criticisms. I'm grateful as well to participants in workshops at the University of Wisconsin Law School and Drake Law School, who gave useful feedback. Mishan Wroe provided her usual research assistance, for which I am exceedingly grateful. I am also pleased to acknowledge the support of the Frank Cicero, Jr. Faculty Fund. Yuri Fuchs, Matthew Klayman, Kaytlin Roholt, and their colleagues at the *University of Pennsylvania Law Review* added substantially through their careful and intelligent editing, and I am indebted to them greatly as a result. All errors, textually entrenched and otherwise, are mine alone.

two-speed Constitution—with Article V—induced rigidity at the inception, supplemented gradually over time by informal judicial or statutory amendment protocols.

INTRODUCTION	1166
I. ARTICLE V IN CONSTITUTIONAL THEORY	1172
A. <i>The Mechanics of Article V</i>	1172
B. <i>The Puzzle of Article V</i>	1176
1. Textual Rigidity and Constitutional Endurance	1176
2. The Informal Amendment Solution	1180
C. <i>The Normative Critique of Article V</i>	1185
II. THE FUNCTION OF ARTICLE V IN THE EARLY REPUBLIC	1191
A. <i>The Constitution as a Long-Term Relational Contract</i>	1192
1. Two Views of Constitutions as Contracts.....	1192
2. The Hold-up Problem in Private Contracting.....	1196
B. <i>The Role of Textual Rigidity in Promoting Constitutional Survival</i>	1204
1. The Preconditions for Constitutional No-Modification Rules.....	1205
2. Textual Rigidity as a Response to the Strategic Threat of Amendment	1209
3. Subconstitutional Investments and the Risk of Exit	1212
4. Subconstitutional Institutions with Lock-In Effects in the Early Republic.....	1215
a. <i>National Political Parties</i>	1215
b. <i>The Bank of the United States</i>	1218
C. <i>Anchoring a Constitution in Cooperative Institutions</i>	1220
III. REVISITING THE PUZZLES OF ARTICLE V	1222
A. <i>The Infrequency of Rigid Constitutions</i>	1222
B. <i>Revisiting and Revising the Normative Critiques of Article V</i>	1227
C. <i>Rethinking “Historical Gloss”</i>	1233
CONCLUSION.....	1235

INTRODUCTION

What good is Article V? The amendment rule crafted in 1787 renders the Constitution “one of the most inflexible” ever written.¹ Commentators

¹ ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 101 (2009); see also WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 49 (2010) (describing the amendment process as

calumnify Article V for making the constitutional text obdurately unresponsive to changing public sentiment.² Other scholars depict the handful of amendments that have passed its gauntlet as excessively nationalist in orientation.³ Worse, empirical studies of constitutions across the globe find that textual rigidity is highly correlated with early constitutional demise. In that light, the longevity of our federal Constitution “defies expectations.”⁴ Article V has thus “become the constitutional provision . . . to hate.”⁵ Scholarly cottage industries have emerged to extol its irrelevance and desuetude. Commentators explain how Americans have seized upon alternative avenues for constitutional change, such as the Supreme Court,⁶ framework statutes,⁷ and populist “constitutional moments.”⁸ The conventional

“intractable”); Rosalind Dixon, *Partial Constitutional Amendments*, 13 U. PA. J. CONST. L. 643, 645-46 (2011) [hereinafter Dixon, *Partial Constitutional Amendments*] (“Article V imposes some of the most onerous hurdles in the world for the ratification of amendments.”); Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 369 tbl.C-1 (1994) (finding the U.S. Constitution to be the most difficult to amend among a group of thirty-two constitutions).

² See, e.g., Rosalind Dixon, *Updating Constitutional Rules*, 2009 SUP. CT. REV. 319, 321 [hereinafter Dixon, *Updating Constitutional Rules*] (“[C]hanges in social circumstances and understandings over time mean that, from a contemporary perspective, a number of core constitutional rules are now no longer optimal.”); Stephen M. Griffin, *The Nominee Is . . . Article V*, 12 CONST. COMMENT. 171, 171-73 (1995) (arguing that the difficulty of amendment “is in some tension with the goals of American constitutionalism”).

³ See, e.g., Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1513 (2010) (“[T]he congressional amendment method has allowed Congress to promote amendments that accord with its own preferences . . .”).

⁴ ELKINS ET AL., *supra* note 1, at 65. See *id.* at 123 (arguing that “particular constitutions will inevitably reveal cases that do not seem to fit” the predictions of comparative analyses of constitutional survival, and that “[t]he United State is potentially one such case.”).

⁵ John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1954 (2003); see also John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1727 (2010) (“Article V is almost universally criticized as being too stringent rather than too permissive.”). For a particularly sharp version of the critique, see Griffin, *supra* note 2 at 172.

⁶ See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 905-06, 911-16 (1996) [hereinafter Strauss, *Common Law*] (arguing for the priority of judicial doctrine over constitutional text). In the same article, Strauss also makes the point that “legislators and even ordinary citizens, in their encounters with the Constitution, act in ways consistent with [a process of incremental constitutional change].” *Id.* at 925; accord David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1505 (2001) [hereinafter Strauss, *Irrelevance*] (“The people rule not through discrete, climactic, political acts like formal constitutional amendments, but in a different way—often simply through the way they run their nonpolitical lives, sometimes combined with sustained political activity spread over a generation or more.”).

⁷ See ESKRIDGE & FEREJOHN, *supra* note 1, at 12-13 (“America enjoys a constitution of statutes supplementing and often supplanting its written Constitution as to the most fundamental features of governance.”); see also William N. Eskridge, Jr. & John Ferejohn, *Super Statutes*, 50

wisdom is that “our system would look the same today if Article V of the Constitution had never been adopted and the Constitution contained no provision for formal amendment.”⁹

This Article questions the consensus view of Article V’s irrelevance. Rather than having always been superfluous, I suggest a different possibility: Article V–induced rigidity may have played an important, if unacknowledged, role in promoting the Constitution’s survival at a key moment in American history—the early decades of the Republic. In the antebellum period, textual rigidity might have mitigated a problem of strategic “hold-up” by key interest groups. Strategic invocation of the amendment power, I suggest, could have precluded the Constitution’s ratification, handicapped the development of essential elements of a functioning polity—such as an effectual financial infrastructure and a set of national political parties—and even precipitated secession. At the same time, the Constitution’s rigidity may have deferred conflict over highly divisive questions, unresolved in the Constitution’s text, until the Union could better withstand the shock of their resolution. Without Article V, therefore, there might today be eulogies rather than encomia for the constitutional text that was adopted in 1787.

By contrast, informal amendments of the sort lauded today provide no solution to the early Republic’s “hold-up” problem. In the first decades of the new Republic, after all, neither the Court nor Congress played the expansive role that judges and legislators do today in crafting workarounds and constraints to nonfunctioning constitutional rules (even if they were extraordinarily creative when developing functional subconstitutional institutions to give life to the document’s larger aspirations). The use of non–Article V mechanisms of constitutional amendment to explain the Constitution’s early survival is therefore anachronistic. Instead, recognition of Article V’s potential stabilizing function in the early Republic should lead

DUKE L.J. 1215, 1218–20 (2001) (introducing the common law framework and its potential for fluidity).

⁸ See, e.g., 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 3–31 (1998) (offering up a theory of “higher lawmaking” to explain extratextual amendments during Reconstruction and the New Deal); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 459 (1994) (“Congress would be obliged to call a convention to propose revisions [to the Constitution] if a majority of American voters so petition; and . . . an amendment or new Constitution could be lawfully ratified by a simple majority of the American electorate.”); see also Bruce Ackerman, *We the People Rise Again*, SLATE: THE HIVE (June 4, 2012, 1:15 PM), <http://hive.slate.com/hive/how-can-we-fix-constitution/article/we-the-people-rise-again> (advocating a popular movement to amend Article V). A variant on this argument relies on legislative action. See Dixon, *Updating Constitutional Rules*, *supra* note 2, at 336–40 (arguing that courts should look sympathetically on legislative efforts to update constitutional rules).

⁹ Strauss, *Irrelevance*, *supra* note 6, at 1459.

to a more nuanced view of the Constitution's amendment regime. In effect, we have a "two-speed" Constitution. On the one hand, Article V-induced rigidity during the early Republic enabled the development of national institutions necessary to anchor the new nation. On the other hand, those very institutions, over time, created flexibility-generating judicial or statutory amendment alternatives in ways that facilitated adaption to changing socioeconomic circumstances and shifting democratic preferences. Both formal rigidity and informal flexibility, on this account, have contributed to constitutional survival, albeit at different times and in different ways.

That a constitution survives, of course, is no guarantee that its institutional contents or substantive direction are optimal in social welfare terms or desirable on alternative normative grounds. Indeed, it is important to note at the outset that my analysis is oriented toward accounting for the brute fact of the Constitution's survival. I do not intend to offer a normative or welfarist claim either to the effect that any specific feature of the federal Constitution is desirable, or that its continued survival in its observed form to the contemporary period is desirable. Most obviously, the Constitution as initially drafted fell far short of democratic and egalitarian ideals because it allowed for a limited franchise and accommodated the peculiar institution of slavery. Similarly, my argument is orthogonal to the oft-made contemporary claim that radical constitutional reform is desirable, say, on democratic grounds.¹⁰ I am concerned with explaining the fact of constitutional survival, and not with justifying the specific contents of that persisting legal document.

The central task of this Article is to identify a potential causal mechanism linking textual rigidity to constitutional survival in the early Republic. At the outset, I should underscore that my limited aim is to identify a plausible causal story, and to present an array of evidence to support that story. Proving conclusively a connection between a specific legal technology and large-scale social and governmental effects demands the application of econometric tools to large-*n* samples, an analysis that lies beyond the remit of my project here. Rather, by developing an empirically supported (if counterintuitive) account of a potential connection between one feature of the original Constitution and historical developments, I hope to unsettle the current consensus on constitutional amendment processes, and to open

¹⁰ For a cogent argument along these lines, see SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 20-24 (2006) [hereinafter LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*].

another front in the debate on the diverse ways in which textual choices embedded in the 1787 Constitution may have influenced American political development. Although what I have to offer here is a possibility theorem rather than a conclusive proof, I develop my account in this Article without using the cumbersome conditional tense. This aura of lexical certainty donned for the sake of expository clarity, however, should not be mistaken for a strong causal claim.

To underwrite my account, I draw on a law-and-economics literature about the design of long-term, relational contracts in private law. Like a constitution, many such contracts between private individuals are necessarily “vague or silent on a number of key features.”¹¹ The theoretical literature in economics identifies strategic breach and opportunistic renegotiation as central impediments to successful contracting. Recently, however, law-and-economics scholars have suggested that a written contract’s internal resistance to change (for example, through what is often termed a no-modification clause) can promote efficient, after-the-fact investments by parties and can thereby increase the likelihood of the contract’s survival.¹²

Mutatis mutandi, I posit that the same dynamic may have unfolded in the U.S. constitutional context during the early Republic. A constitution’s text embodies a deal between powerful national-level interest groups, each of whom can threaten to exit from the deal (most obviously by secession).¹³ The drafters, like parties to a private deal, are unable to detail fully in the text how all conceivable disputes should be resolved.¹⁴ Hence, constitutions are inevitably incomplete.¹⁵ Once ratified, a necessarily incomplete

¹¹ Jean Tirole, *Incomplete Contracts: Where Do We Stand?*, 67 *ECONOMETRICA* 741, 741 (1999).

¹² See, e.g., Christine Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 *J. LEGAL STUD.* 203, 205 (1997) (“Contrary to traditional wisdom, the parties to a contract may be better off if the law enables them to tie their hands, or ties their hands for them, in a way that prevents them from taking advantage of certain ex post profitable modification opportunities.”). I rely on Jolls not for the specific mechanisms she identifies—respecting moral hazard and preference change over time—but for her general insight into the value of contractual rigidity.

¹³ See, e.g., Daniel Sutter, *Enforcing Constitutional Constraints*, 8 *CONST. POL. ECON.* 139, 139-40 (1997) (analyzing constitutions as incomplete contracts); accord Philippe Aghion & Patrick Bolton, *Incomplete Social Contracts*, 1 *J. EUR. ECON. ASS’N* 38, 38-41, 44-45 (2003) (explaining how constitutions are incomplete social contracts).

¹⁴ See Tirole, *infra* note 11, at 741-42 (noting the pervasiveness of contractual incompleteness in political life).

¹⁵ The phrase “incomplete contract” can refer either to (1) obligational incompleteness, where a term (such as price or quantity in the ordinary contracting context) is not included, or (2) insufficient state contingency, where the contractual obligations fail to fully realize the potential gains from trade in all future states of the world. Ian Ayres & Robert Gertner, *Strategic Contractual*

constitution will succeed only if interest groups invest in supplemental national institutions, such as political and financial infrastructure, to anchor the new nation. Inevitably, such investments must be tailored to a given constitution's particulars. But this very specificity creates a serious problem.¹⁶ Parties who make such investments lock themselves in to this particular constitution. They thus make themselves vulnerable to "hold-ups" by other parties, who can try to expropriate a greater share of national wealth via renegotiation of the original deal through the strategic use of textual amendments. A strategic hold-up might involve either changing a rule that is in the text already, or addressing a question the original text left unresolved. Either way, proponents of a strategic amendment hope to exploit the fact that other parties with post-ratification investments will cede some surplus—and hence accept a disfavored amendment—rather than risk constitutional failure and wholesale loss of their constitution-specific investments.¹⁷ The shadow of strategic amendment threats will undermine a constitution's chances of getting off the ground. Post-ratification, it can also engender inefficient underinvestment and conflict.

Textual rigidity is able to mitigate directly these problems by limiting parties' ability to engage in strategic post-ratification hold-ups.¹⁸ To borrow from Albert Hirschman's famous vocabulary of exit, voice, and loyalty, rigidity limits opportunities for voice (that is, amendment) as a way of maintaining loyalty (that is, investment in new national institutions which might be subconstitutional in nature).¹⁹ At the same time, rigidity indirectly reduces the likelihood of outright exit through secession and facilitates "cooperative investment" in new subconstitutional institutions such as

Inefficiency and the Optimal Choice of Legal Rules, 101 YALE L.J. 729, 730 (1992). In this Article, I mean the phrase "incomplete contracting" to refer to insufficient state contingency.

¹⁶ See ELKINS ET AL., *supra* note 1, at 71 (explaining how, in drafting constitutions, "too much detail can exacerbate the problem of uncertain payoffs").

¹⁷ The idea of a "hold-up" in contract law is broader than the sense in which I am using the term. See 1A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 184, at 148-49 (1963) (using the term to refer to a situation in which a party to a contract, through economic duress, forces the other party to agree to a contract modification); see also Steven Shavell, *Contractual Holdup and Legal Intervention*, 36 J. LEGAL STUD. 325, 327-31 (2007) (providing a range of examples of contractual hold-up problems).

¹⁸ This assumes that the Constitution is substantively justified. Of course, there may be a "severe conflict between constitutionality and justice." MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 13 (2006).

¹⁹ To be clear, my argument is distinct from Hirschman's. His book is in large measure a critique of the perverse effects of relying on exit rights, and a description of alternative dynamics, such as one in which "loyalty holds exit at bay and activates voice." ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 78 (1970). The analogies between constitutional commitment and amendment in my argument and loyalty and voice in Hirschman's are suggestive, but hardly exact parallels.

political parties and banks. Such cooperative investments not only enable the realization of welfare gains inherent in the new constitutional order,²⁰ but also anchor parties into the constitutional deal by raising their cost of exit.²¹ In effect, Article V encourages all parties to have “skin in the game.” A positive feedback mechanism thereby arises, as investment induces confidence, which in turn yields more investment; the prospect of exit recedes from sight. The odd fact that the Constitution is famously silent about secession is explained by the fact that Article V itself raises the costs of secession, hence making it unattractive.

The argument proceeds as follows. Part I sets forth the conventional view of Article V, emphasizing the puzzle of our Constitution’s surprising longevity. The heart of my argument is Part II, which posits a causal link between textual inflexibility and constitutional survival. I also furnish here some preliminary evidence to substantiate the possibility that the mechanism operated during the early Republic. Part III then identifies and responds to potential objections, elaborates some consequences of the foregoing analysis, and concludes by pointing toward how the analysis in Part II intimates the existence of a de facto “two-speed” account of the Constitution.

I. ARTICLE V IN CONSTITUTIONAL THEORY

This Part first describes how Article V works and explores the critiques offered by both comparative constitutional scholars and normative constitutional theorists. I also explore why informal mechanisms of constitutional amendment, judicial decisions or super-statutes cannot explain the fact that our Constitution’s longevity “defies expectations.”²²

A. *The Mechanics of Article V*

Article V of the U.S. Constitution provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on

²⁰ See Yeon-Koo Che & Donald B. Hausch, *Cooperative Investments and the Value of Contracting*, 89 AM. ECON. REV. 125, 126 (1999) (defining a cooperative investment as one that “generate[s] a direct benefit for the trading partner”).

²¹ The basic intuition here echoes Ernest Young’s observation that there is “a set of political institutions” that do “most of our constitutive work [(that is, establishing the various instruments through which governance happens)] . . . outside the Constitution itself.” Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 456 (2007).

²² ELKINS ET AL., *supra* note 1, at 65; *see id.* (“There may be good reasons to adopt the Philadelphia model . . . but constitutional endurance is not one of them.”).

the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.²³

Article V thus creates what is basically a two-stage process. The first stage—proposal—is accomplished either by supermajorities in Congress or the several states' legislatures. The second stage—ratification—requires even larger supermajorities of the states acting in either legislatures or conventions.²⁴ Formally, Article V seems to provide alternative channels at each stage. In practice, however, only Congress proposes amendments, and with one exception, only state legislatures do the ratifying.²⁵ The de facto threshold for constitutional amendment, therefore, is a two-thirds supermajority in both chambers of Congress, plus successful votes in seventy-five state houses (assuming one is Nebraska's unicameral chamber).²⁶

²³ U.S. CONST. art. V.

²⁴ The states are permitted to determine their own thresholds for ratification. *See* Dyer v. Blair, 390 F. Supp. 1291, 1306 (N.D. Ill. 1975) (three-judge court) (explaining that the framers intended to leave the determination of the threshold for ratification up to state ratifying assemblies).

²⁵ *See* Michael Stokes Paulsen, *A General Theory of Article V: The Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 734 (1993) (noting that all amendments to date have been congressionally proposed and that no national convention has ever been called); Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 28 CONST. COMMENT. 53, 60 (2012) (making the same observation); *see also* RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 126 (1988) ("For the first and so far only time since the Constitution itself was ratified, Congress in 1933 specified that ratification [of the Twenty-First Amendment] was to be accomplished by state conventions rather than by state legislatures."). One consequence is that uncertainty lingers about how conventions might work. *Compare* William W. Van Alstne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295, 1304-05 (concluding that conventions of limited scope are constitutional), *with* Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 196-200 (1972) (taking the opposite view).

²⁶ One reason for the dominance of the congressional proposal method is its lower transaction costs. *See* Lutz, *supra* note 1, at 360-62 (explaining the author's assignment of index scores to the amendment processes described in Article V, and noting that the congressional proposal method is relatively less difficult on account of its fewer stages).

The Framers included multiple mechanisms in Article V in response to cross-cutting pressures at the Philadelphia Convention.²⁷ Different factions amongst the delegates distrusted either the proposed federal government or the several states.²⁸ Delegates also divided “between the contending republican faiths of the era, often characterized as Whig versus Federalist.”²⁹ Whereas Whigs believed “people shared a capacity and willingness to identify and support the best interests of the community,” Federalists “assumed that people’s interests varied and that government served as an arbiter among them.”³⁰ To allay fears on all sides, the Convention settled on a “compromise” mechanism that allowed either the federal government or state institutions to be bypassed entirely.³¹

Whether Convention members expected the combination of veto gates and voting rules contained in Article V to be especially onerous, though, is unclear. On the one hand, the delegates were keenly aware of their own fallibility. On June 11, 1787, Virginia delegate George Mason cautioned that the “plan now to be formed will certainly be defective,” and so “[a]mendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence.”³² On the other hand, recorded votes belie Mason’s concerns.

²⁷ See DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995*, at 55–60 (1996) (describing the debates surrounding amendment procedures at the Philadelphia Convention). The following account is heavily indebted to Kyvig’s fine historical work.

²⁸ On September 15, 1787, George Mason expressed concern that “[a]s the proposing of amendments is . . . to depend . . . ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.” 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 629 (Max Farrand ed., rev. ed. 1966) [hereinafter *RECORDS*]. Elbridge Gerry, on the contrary, feared an abuse of power over constitutional amendments by the states. See *id.* at 557–58 (noting Gerry’s concern that “two thirds of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the State-Constitutions altogether”). Alexander Hamilton did not share Gerry’s concern, but warned that “[t]he State Legislatures will not apply for alternations but with a view to increase their own powers.” *Id.* at 558; see also KYVIG, *supra* note 27, at 56–57 (summarizing debate between Gerry and Hamilton).

²⁹ KYVIG, *supra* note 27, at 61.

³⁰ *Id.* at 61–62.

³¹ See *id.* at 60 (“Article V evinced the essential compromise struck between the proponents of a strong central government and the advocates of retained state power.”).

³² 1 FARRAND, *supra* note 28, at 202–03; see also AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 286 (2005) [hereinafter *AMAR, AMERICA’S CONSTITUTION*] (describing a concern among the delegates that “an overly stiff amendment mechanism in a governing document ultimately doomed the document to irrelevance by inviting outright repudiation”). On the other hand, Philip Hamburger has argued that “[i]n 1776, it was assumed that a constitution had to be permanent, in the sense of being lasting and even rigid, subject only to alteration by the people.” Philip A. Hamburger, *The Constitution’s Accommodation of Social*

On September 10, for example, the Convention voted to reject a ratification requirement of two-thirds of the states and instead unanimously endorsed a three-fourths voting rule for ratification.³³

During the ensuing ratification debates, partisans for the Constitution's adoption characterized its amendment rule as an optimal one. Article V, wrote Madison in the *Federalist No. 43*, was "stamped with every mark of propriety" and "guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."³⁴ This Madisonian position lingers in some quarters, where Article V is still glossed as "a compromise between two competing policies" and "a sensible mechanism for change."³⁵ Notwithstanding Madison's comments, the new Constitution's amendment rule received comparatively little attention in the floor debates of the several state conventions.³⁶ Only in the Virginia Convention did Patrick Henry's

Change, 88 MICH. L. REV. 239, 263 (1989). On this view, only "perfecting" amendments were envisaged by the Framers. *Id.* at 301. Other historians dispute this view. See, e.g., GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 613 (1969) ("The American governments never pretended . . . to perfection or to the exclusion of future improvements."). Whoever has the better of the historical argument, the "perfecting" understanding of Article V seems squarely at odds with constitutional practice as it developed.

³³ RECORDS, *supra* note 28, at 555. The vote on the motion for a two-thirds voting rule was held first, and was defeated six to five. *Id.*

³⁴ THE FEDERALIST NO. 43, at 284 (James Madison) (Isaac Kramnick ed., 1987). On the other hand, in the final *Federalist* paper, Alexander Hamilton emphasized the ease of amending pursuant to Article V, and contrasted it to the difficulty of "establishing, in the first instance, a complete Constitution." *Id.* NO. 85, at 485 (Alexander Hamilton); see also *id.* NO. 23, at 184–85 (Alexander Hamilton) (explaining that because the "circumstances that endanger the safety of nations are infinite, . . . no constitutional shackles can wisely be imposed" on national security powers, thereby suggesting another exogenous motor of constitutional change); *id.* NO. 37, at 243 (James Madison) (arguing that the Constitution "provide[d] a convenient mode of rectifying . . . errors, as future experience may unfold them").

³⁵ Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 144 (1996); see also *Dillon v. Gloss*, 256 U.S. 368, 374 (1921) ("[A]ll amendments must have the sanction of the people of the United States, the original fountain of power, . . . and . . . ratification by [representative] assemblies in three-fourths of the States shall be taken as a decisive expression of the people's will and be binding on all."). David Kyvig also insists that "in reality the amending process carried out the Founders' intentions." KYVIG, *supra* note 27, at 475. This is a surprising claim given that Kyvig himself lucidly documents the plural, inconsistent and indeed mutually contradictory "intentions" of the various members of the Philadelphia Convention. See *id.* at 42–65.

³⁶ According to Pauline Maier's recent comprehensive study, Article V was either briefly praised (e.g., in Massachusetts) or not a subject of comment (e.g., in New Hampshire, North Carolina, and New York). PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at 191, 220, 371, 419 (2010). Gaps in the documentary record mean that we cannot be certain there is ratification-related debate on Article V yet to be explored.

bleak assessment that “the way to amendments is, in my conception, shut” stimulate some extended debate about amendment protocols.³⁷

Article V, in sum, was a compromise between fundamentally divergent accounts of government and human nature. It passed into final, binding organic law attended by relatively little scrutiny.³⁸ It was certainly not one of the flashpoints of the ratification debates. Its puzzles would instead ripen only in the fullness of time.

B. *The Puzzle of Article V*

Neither Madison nor Patrick Henry possessed the empirical resources to establish whether Article V was, in fact, anomalously rigid or excessively yielding. Only in the last two decades have political scientists and legal scholars developed a stock of comparative knowledge about how constitutions work that permits the benchmarking of Article V against other constitutional amendment rules.³⁹ This section sketches the basic findings of that empirical research to show that Article V is indeed, as Patrick Henry complained, unusually rigid. More importantly, the document’s survival in light of this rigidity has puzzled scholars, who have otherwise observed a strong positive correlation between textual inflexibility and constitutional death. That puzzle furthermore cannot be dissolved by recourse to extra textual modalities of amendment.

1. Textual Rigidity and Constitutional Endurance

From the first major comparative study of why constitutions survive, it has been clear that Article V is an outlier. In 1994, political scientist Donald Lutz published a path-marking study using data sets covering fifty American state and thirty-two national constitutions.⁴⁰ Comparing amendment processes on a single numerical scale, Lutz found that “the U.S. Constitution has the second-most-difficult amendment process.”⁴¹ Lutz’s study analyzed the correlation between amendment rate and constitutional

³⁷ KYVIG, *supra* note 27, at 78.

³⁸ Cf. Melissa Schwartzberg, *The Arbitrariness of Supermajority Rules*, 49 SOC. SCI. INFO. 61, 72 (2010) (identifying a “lack of reasons supporting the supermajoritarian amendment threshold” at the Philadelphia Convention).

³⁹ Indeed, some argue that this area of study is still in its infancy. See David S. Law, *Constitutions* (“[W]e know little about the conditions under which [constitutional text] succeeds, in the sense of either defining actual practice or improving social welfare.”), in *THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* 376, 384 (Peter Cane & Herbert M. Kritzer eds., 2010).

⁴⁰ Lutz, *supra* note 1, at 355.

⁴¹ *Id.* at 362. The most difficult, somewhat worryingly, was the former Yugoslavia.

survival.⁴² It identified a curvilinear relationship between amendment rates and durability, with constitutions tending to survive longest if amended at “moderate” rates.⁴³ Reanalysis of the same data by other scholars, however, suggested that the relationship between amendment rate and durability was “very weak” and “one can have extremely little confidence in the estimated optimal rate of amendment.”⁴⁴ Lutz’s finding might also be explained by missing variables in his regressions. For example, a country exposed to external military or fiscal shocks may as a result both amend its constitution frequently and repeatedly skirt constitutional death.⁴⁵

More recent empirical work avoids these criticisms. The most comprehensive effort along these lines is a study based on data from about 935 constitutional systems operating between 1789 and 2006.⁴⁶ This study finds “strong evidence” that “formally rigid constitutions . . . die more frequently” than flexible ones.⁴⁷ To identify predictors of constitutional endurance, the study’s authors—Elkins, Ginsburg, and Melton—construct a multivariate event-history model. Their model enables calculation of a baseline estimate of constitutional mortality.⁴⁸ It then allows for estimation of the effect of diverse endogenous design and exogenous economic and political

⁴² *Id.* at 360 tbl.2, 362 tbl.5. Both tables divide the sample into eight subsamples based on the rate of a constitution’s formal amendment, and then show the average duration of a constitution in that subsample.

⁴³ *Id.* at 360, 362.

⁴⁴ John Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 *LAW & SOC. INQUIRY* 501, 522 (1997); see also Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective* 96, 105 (Chi. Law Sch. Pub. Law & Legal Theory, Working Paper No. 347, 2011) 96, 105, available at http://ssrn.com/abstract_id=1833634 (noting that “for many existing studies, the number of independent observations is sufficiently small that there is not enough statistical power to pick up the distinct effect of various hurdles to amendment”).

⁴⁵ Ferejohn makes the same point about Lutz’s results, albeit with different examples. Ferejohn, *supra* note 44, at 524 (“[T]here may be other important unmeasured determinants of amendment rates, perhaps the organization of the parties, constitutional traditions, or political culture.”). In addition, any effect of an amendment rule on constitutional survival may be confounded by other constitutional design decisions. See TORSTEN PERSSON & GUIDO TABELLINI, *THE ECONOMIC EFFECTS OF CONSTITUTIONS* 105-12 (2003) (presenting cross-national data on the effects of these design variables). A further problem is that powerful elites may respond to changes in formal institutions by establishing informal regimes that “partially or entirely offset” changes in de jure power. Daron Acemoglu & James A. Robinson, *Persistence of Power, Elites, and Institutions*, 98 *AM. ECON. REV.* 267, 287 (2008) (noting that such offsetting is “broadly consistent with a number of historical examples”).

⁴⁶ See ELKINS ET AL., *supra* note 1, at 48-51 (describing the methodology whereby the dataset was constructed). A constitution is defined as a document or set of documents that is self-identified in its text as a higher law, or that is defined as “the basic pattern of authority by establishing or suspending an executive or legislative branch of government.” *Id.* at 49.

⁴⁷ *Id.* at 82.

⁴⁸ *Id.* at 129.

factors.⁴⁹ To mitigate collinearity problems, the study defines “amendment ease” by regressing amendment rate “on a set of amendment procedure variables as well as on a host of factors that should predict political reform”⁵⁰ This study is presently the gold standard in empirical comparative constitutional analysis.

Consistent with Lutz’s study, Elkins, Ginsburg, and Melton find that the U.S. Constitution “is scored as one of the most inflexible” ever ratified, scoring a 0.04 on a scale from 0 to 1.0.⁵¹ They further conclude that amendment ease is a “strong predictor of longevity,” although its effect is curvilinear, with the easiest-to-amend documents being especially fragile.⁵² In addition to textual flexibility, Elkins, Ginsburg, and Melton conclude that “inclusive provisions,” greater textual scope (that is, more subject-matter coverage), and greater specificity promote a constitution’s survival.⁵³

To explain these results, Elkins, Ginsburg, and Melton offer a general causal model for the life and death of constitutions. They argue that the creation of post-ratification enforcement mechanisms is “key” to constitutional survival.⁵⁴ That is, they emphasize how constitutional designers must focus on providing sufficient “sticks” for enforcers in the basic document to ensure parties do not shade or defect after ratification. My argument, developed in subsequent parts of this Article, will focus less on sticks and more on positive enticements. In that regard, my analytic focus diverges from that of Elkins, Ginsburg, and Melton. They, to be sure, briefly touch on the possibility that “carrots” may matter when they talk of “locking in” a constitution by “establish[ing] increasing streams of political benefits [that] may be better able to withstand external pressures”⁵⁵ But this is not their main focus. But as Part II aims to show, it is also possible that constitutional survival derives from a mechanism that turns less on the prospect of punishing defectors and more on the entanglement of contracting parties in positively productive relationships.

All three of the factors highlighted by the Elkins–Ginsburg–Melton empirical analysis as correlates of constitutional survival make enforcement of constitutional rules easier by increasing the number of stick-wielders. Inclusivity draws into the constitutional bargain a larger number of

⁴⁹ *Id.* at 129–39 (describing the model in detail).

⁵⁰ *Id.* at 101.

⁵¹ *Id.*

⁵² *Id.* at 140.

⁵³ *Id.* at 139, 141.

⁵⁴ *See id.* at 76 (“[A] key factor in the calculus of . . . breach is the ability of other parties to the bargain to enforce the terms of the agreement.”).

⁵⁵ *Id.* at 91.

potential enforcers, whose diverse interests are then reflected in an increasingly specific text.⁵⁶ Flexibility is desirable because the ease of amendment “induces smaller groups to . . . mobilize for constitutional amendment” by giving them a greater “stake in the survival of the document,” which can be amended to expand the bargain and account for emergent interests and problems.⁵⁷ In contrast, a terse, inflexible, and under inclusive constitution is likely to sap the incentives for potential enforcers to organize and act for the collective good.⁵⁸

This model is puzzling when applied to the U.S. context. As Elkins, Ginsburg, and Melton candidly say, “specificity, inclusion, and flexibility” are not virtues possessed by the 1787 Constitution.⁵⁹ To the contrary, our Constitution’s longevity “defies expectations” on this theory because it “embodies many of the elements that . . . should lead to increased mortality rates.”⁶⁰ This puzzle, it should also be noted, resists easy dissolution by ascribing American national success solely to economic and demographic factors. The analysis performed by Elkins, Ginsburg, and Melton controls for a host of such nonlegal factors and still finds text to be a significant influence on constitutional survival. Their work, in other words, is strong counsel against the simple expedient of disregarding textual specifications as epiphenomenal formalisms. To the contrary, the fixed verbal content of constitutional law seems to matter, even if it is not exhaustive of all potential causes of regime survival. Assuming that one takes the U.S. Constitution as having survived until now⁶¹—as both they and I do—it is difficult to reconcile textual rigidity and constitutional survival in the American context.

⁵⁶ *Id.* at 97.

⁵⁷ *Id.* at 89.

⁵⁸ Elkins, Ginsburg, and Melton describe the initial Constitution as having “low” initial levels of inclusion. *Id.* at 163. There is persistent debate on how to gauge the representativeness of the Constitution’s drafting. Compare AMAR, AMERICA’S CONSTITUTION, *supra* note 32, at 18, 64-68 (arguing that ratification involved “the widest imaginable participation rules” at least “in the eighteenth century,” and also underscoring the democratic pedigree of Article I’s franchise rule), with WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION 181 (2007) (noting that “the Framers were, demographically speaking, unrepresentative in the extreme” and “felt the need to conceal their intentions” to overthrow the Articles of Confederation because of this unrepresentativeness).

⁵⁹ ELKINS ET AL., *supra* note 1, at 166.

⁶⁰ *Id.* at 65.

⁶¹ One might alternatively argue that the Constitution failed in 1861, and that the post-Civil-War dispensation is fundamentally a new one. This view is sufficiently unusual today and I do not address it in this Article.

2. The Informal Amendment Solution

But is there a simple solution to this puzzle? To explain the survival of the U.S. Constitution, Elkins, Ginsburg, and Melton contend that Article V has been supplemented with “informal flexibility . . . through [judicial] interpretation and the various bisectional compromises”⁶² They build on other scholars’ proposals that formal “constitutional amendments have not been an important means of changing the constitutional order” in light of alternative, informal means.⁶³ Commentators have thus elaborated Court-centered accounts, which point out that once congressional or executive power swells, it is the judiciary that steps in to legitimate the change.⁶⁴ These accounts point to decisions such as *McCulloch v. Maryland*⁶⁵ and *Crowell v. Benson*⁶⁶ as instances in which the Supreme Court has de facto ratified constitutional transformation.⁶⁷ Alternatively, Congress-centered accounts of constitutional change identify framework “superstatutes” as key vectors of constitutional change that “transform Constitutional baselines,” “create entrenched governance structures and norms,” and guide the development of norms otherwise only ambiguously articulated in the text of the Constitution.⁶⁸ On the other hand, constitutional change can be identified as a series of “transformative moments” at which politically mobilized popular movements change the “higher law” without changing the constitutional text.⁶⁹ Given these informal alternatives to Article V, the mystery of

⁶² *Id.* at 177; see also *id.* at 163 (“Judicial review (as well as evolution of popular understandings) has provided a mechanism for updating the Constitution, thus ensuring that its allegedly timeless principles are applied to modern realities”).

⁶³ Strauss, *Irrelevance*, *supra* note 6, at 1459; cf. Sanford Levinson, *The Political Implications of Amending Clauses*, 13 CONST. COMMENT 107, 109 (1996) [hereinafter Levinson, *Political Implications*] (“[I]t is naive [sic] to identify ‘amendment’ only as formal textual additions (or subtractions).” (emphasis in original)).

⁶⁴ See Strauss, *Irrelevance*, *supra* note 6, at 1467-69 (“[I]t may be that majoritarian acts (or judicial decisions), precisely because they do not require that the ground be prepared so thoroughly, can force the pace of change in a way that supermajoritarian acts cannot.”).

⁶⁵ 17 U.S. 316 (1819).

⁶⁶ 285 U.S. 22 (1932).

⁶⁷ Strauss, *Irrelevance*, *supra* note 6, at 1473 (“[I]t seems fair to say that *Crowell* essentially ratified a *fait accompli*.”).

⁶⁸ ESKRIDGE & FEREJOHN, *supra* note 1, at 6-9; *id.* at 12-13 (“America enjoys a constitution of statutes supplementing . . . its written Constitution as to the most fundamental features of governance”).

⁶⁹ See Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1056-57 (1984) (“[T]wentieth century Americans rejected the higher law handed down by the Supreme Court . . . and insisted that they too had something to contribute”). For an application of this theory to Reconstruction, see BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 142-50 (1991). Critiques of Ackerman’s theory have refined the account of the specific mechanisms involved. See Jack M. Balkin & Sanford Levinson, *Understanding the*

the Constitution's rigidity might seem readily explained. Simply put, it is easy to amend the Constitution—just not through Article V.

But the puzzle is not so quickly solved. Alternative mechanisms that rely on legislative or judicial action⁷⁰ cannot explain constitutional survival, particularly in the early Republic, for three reasons. First, neither judicial benedictions nor landmark statutes can entirely pick up the slack left by Article V–induced rigidity in a way that explains the Constitution's survival because neither is a full substitute for Article V. Judicial and legislative mechanisms are typically channels for adding to, not subtracting from, the constitutional fabric. Neither Congress nor the courts can easily eliminate undesirable constitutional text.⁷¹ Imagine, to use a non-U.S. example, an emergency powers provision that destabilizes governments by vesting presidents with the power to declare unilaterally suspensions of legislative rule.⁷² Neither legislative nor judicial action can do much to resolve the

Constitutional Revolution, 87 VA. L. REV. 1045, 1066 (2001) (emphasizing the importance of “[p]artisan entrenchment through presidential appointments to the judiciary”); James E. Fleming, *We the Unconventional American People*, 65 U. CHI. L. REV. 1513, 1522–27 (1998) (emphasizing the importance of creative acts of judicial review). *But see* David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 40 (1990) (“[T]he bottom line is that if the Constitution is to continue to be the ultimate source that protects individual rights against encroachment by government power and political majorities, then the affirmative words in article V must be understood to negative other conceivable modes of amendment.”).

⁷⁰ For the purposes of this discussion, I treat Ackerman's theory of controversial moments as a form of constitutional change that occurs through legislatures and courts. The populist and political elements of his accounts are orthogonal to my point here.

⁷¹ *See* LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 10, at 160 (“Clever adaptive interpretation is not always possible, however, and Article V has made it next to impossible to achieve such adaption where amendment is thought to be necessity.”). This is not to say it is impossible to eliminate constitutional text through legislative or judicial action. An example may be the treatment of the Republican Form of Government Clause of Article IV. *See* *Luther v. Borden*, 48 U.S. 1 (1849) (finding arguments under that clause nonjusticiable). It might also be argued that the Court once read certain rights clauses so narrowly as to sap them of any real meaning. Until *District of Columbia v. Heller*, 554 U.S. 570 (2008), some might have said as much about the Second Amendment. But it would seem more difficult for the Court to achieve the same elimination effect respecting much-criticized structural provisions, such as apportionment rules for the House and Senate or the Electoral College mechanism. *See* LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 10, at 49–62, 81–97 (developing further criticisms of the Senate and Presidential selection). Congress, however, might be able in some instance to develop workarounds. *See* Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1503 (2009) (describing constitutional workarounds involving the use of other texts).

⁷² A well-known example is Article 48 of the Weimar Constitution. *See* RENÉ BRUNET, THE NEW GERMAN CONSTITUTION 308 (Joseph Gollomb trans., 1922) (permitting the suspension of certain fundamental rights in the event that “public safety and order . . . is materially disturbed or endangered”).

ensuing hazards.⁷³ Thus, the limits on informal amendment at least hint that something more is needed to explain the Constitution's survival.

Second, legislative and judicial mechanisms for constitutional change outside Article V interact with and hinder enforcement mechanisms identified by Elkins, Ginsburg, and Melton. Amending outside Article V increases the cost of specificity-based constitutional enforcement by increasing uncertainty about what is in the Constitution, thereby making it more costly to identify and police violations. Pursuant to a regime in which informal amendment is allowed, violators of an original deal can clothe transgressions in the terminology of extratextual amendment. They can thus seek to obscure self-dealing conduct. Moreover, historical experience suggests that doubt will often arise as to whether a non-Article V constitutional amendment has even worked.⁷⁴ This creates even more uncertainty about the Constitution's content. Finally, the potential for extra-textual amendment undermines potential enforcers' incentives to labor for changes to be memorialized in constitutional text. In all these ways, the availability of extratextual amendment works at cross-purposes to the enforcement mechanism envisaged by Elkins, Ginsburg, and Melton. This suggests that informal amendment mechanisms have complex and partially offsetting effects—undermining some causes of constitutional enforcement while contributing to the regime's durability in other ways.

Finally, and perhaps most importantly for my purposes, the key legislative and judicial contributions to constitutional development come too late to explain the survival of the 1787 Constitution. As Elkins, Ginsburg, and Melton persuasively demonstrate, a constitution is at gravest risk of demise in the very first two decades of its existence.⁷⁵ And yet the leading account of our "republic of statutes" focuses on such enactments as the Sherman Act of 1890, Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Social Security Act of 1935.⁷⁶ With the exception of the Sherman Act, these

⁷³ Could an undesirable provision be remedied simply by being ignored? Although there are provisions of the U.S. Constitution that have fallen into desuetude, it is worth noting the role that courts have played in stymieing their development. *See, e.g.*, *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 129-30 (1912) (treating the Guaranty Clause of Article IV as raising only political questions); *Slaughter-House Cases*, 83 U.S. 36, 74-77 (1873) (narrowly construing the privileges and immunities clause of the Fourteenth Amendment). In practice, it seems that desuetude is enabled by judicial intervention.

⁷⁴ *See* Keith E. Whittington, *From Democratic Dualism to Political Realism: Transforming the Constitution*, 10 CONST. POL. ECON. 405, 411 (1999) (developing this point in reference to Ackerman's account of dualist democracy).

⁷⁵ *See* ELKINS ET AL., *supra* note 1, at 129 (noting that constitutions have a "median survival time" of nineteen years and that their risk of death peaks at age seventeen).

⁷⁶ *See* ESKRIDGE & FEREJOHN, *supra* note 1, 9-24.

key statutory props of the American constitutional order are largely twentieth-century creations.⁷⁷ The temporal distribution of judicial review is also such that it must be rejected as an adequate substitute for Article V at the instant of greatest need.⁷⁸ Judicial review of state or federal statutes was rare prior to the Civil War.⁷⁹ This is not surprising: the federal judiciary developed institutional capacity to hear the volume of cases necessary to play a leading role in constitutional development only after the Civil War,⁸⁰ and analyses of antebellum judicial review furnish scant reason to believe courts were an effective substitute for Article V change. There are two instances in which the Court invalidated federal statutes before the Civil War. In the first instance, the Court struck down an insignificant fragment of the 1789 Judiciary Act based upon a dubious statutory interpretation and an equally doubtful gloss on the Constitution's text.⁸¹ Almost sixty years later, the

⁷⁷ Another possible exception concerns what Eskridge and Ferejohn call the "monetary constitution." *Id.* at 311. But their argument is that "an independent central bank presiding over a national paper currency," which they view as the central and defining element of the monetary constitution, "emerged as a superstatutory framework regime only in fits and starts." *Id.* at 313. Only with the Federal Reserve Act of 1913 did the framework finally distill. *Id.* at 333-39. Thus, even the monetary constitutions fit the temporal pattern they imply in other domains.

⁷⁸ Indeed, the leading argument in favor of "th[e] claim about the irrelevance of the amendment process" is explicitly offered "in the context of a mature democratic society, not a fledgling constitutional order." Strauss, *Irrelevance*, *supra* note 6, at 1460. The mechanism I develop below concerns "how [a constitution] becomes established in the first place" and not "how a constitutional system changes." *Id.* My argument has a distinct domain from Strauss's, and may be seen as complementary rather than in conflict with that account.

⁷⁹ See Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 CALIF. L. REV. 579, 597 (2012) [hereinafter Huq, *Judicial Self-Restraint*] ("[J]udicial activism began in the post-Civil War and Reconstruction period . . ."); see also Mark A. Graber, *The New Fiction: Dred Scott and the Language of Judicial Authority*, 82 CHI.-KENT L. REV. 177, 180-81 (2007) (counting twenty pre-Civil War cases in which the Court imposed constitutional limits on congressional power but finding no "judicial tradition, activist or restrained, . . . at the time when *Dred Scott* was decided"). In recent years, revisionist accounts of judicial review have sought to identify a more robust role for the Court in the early republic. But even self-consciously revisionist accounts marshal only weak evidence of judicial activity on constitutional matters during that period. See Tom S. Clark & Keith E. Whittington, *Ideology, Partisanship, and Judicial Review of Acts of Congress, 1789-2006*, at 22-30 (May 22, 2009) (unpublished manuscript) available at http://papers.ssrn.com/abstract_id=1475660 (graphing trends in judicial review).

⁸⁰ See Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 512 (2002) (arguing that the "understaffed and unpaid" judicial infrastructure headed by justices perennially distracted by the travails of riding circuit in 1800 had "become by century's end a real third branch of government").

⁸¹ See *Marbury v. Madison*, 5 U.S. 137, 178 (1803) ("If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply."). That same year, the Court ducked confrontation with Congress by allowing the legislature to disestablish existing federal courts—starkly illustrating the court's powerlessness in the teeth of political opposition.

Court once again invalidated a federal law, and this time garnered vigorous criticism while failing to check a march to civil war and a concomitant repudiation of the Court's legal reasoning.⁸² Given this antebellum track record of judicial review of federal statutes, it simply cannot be said that federal courts any more than Congress effectively carried the heavy responsibility for ratifying and enabling fundamental change in the early Republic as they arguably do today.

One response to this point would be to insist on the constitutional creativity of early generations of American politicians. Indeed, it is indubitably true that early legislators viewed the Constitution as a central lodestar for their work, as the late David Currie demonstrated in his magisterial history of the Constitution in Congress.⁸³ Moreover, there was no wholesale absence of "unconventional adaptation" and "political innovation" through the political crises of the early Republic.⁸⁴ Nevertheless, the most important constitutional crisis of the early Republic produced a rare constitutional change in the form of the Twelfth Amendment, rather than some extra-textual shift.⁸⁵ Further, Currie's history suggests that fidelity to the Constitution limited, rather than expanded, the options from which conscientious legislators could choose. Path-dependent institutional legacies from the ensuing decisions should thus not be mistaken for conscious efforts at constitutional transformation.⁸⁶ Indeed, I will argue in Part II that much of this institutional back-and-forth should be understood as subconstitutional institutional development that was critically enabled by textual rigidity. It should not, that is, be treated as a species of constitutional transformation that formally demanded a constitutional amendment.⁸⁷

See *Stuart v. Laird*, 5 U.S. 299, 304 (1803) ("It is admitted that Congress have the power to modify, increase or diminish the power of the courts and the judges. But that is a power totally different from the power to destroy the courts . . .").

⁸² That case, of course, is *Dred Scott v. Sandford*, 60 U.S. 363 (1857).

⁸³ *See generally* DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801* (1997). For a specific example of important legislation in the early Congress with constitutional overtones, see the discussion of the removal power in Aziz Z. Huq, *Removal as a Political Question*, 62 *STAN. L. REV.* 1, 10 & n.33 (2013) [hereinafter Huq, *Removal*].

⁸⁴ *See* Joanne B. Freeman, *The Election of 1800: A Study in the Logic of Political Change*, 108 *YALE L.J.* 1959, 1968–69 (1999).

⁸⁵ *See id.* at 1989 ("By threatening to destroy the Union, the crisis of 1800 forced politicians to acknowledge their mutual commitment to [the Constitution].").

⁸⁶ Ongoing work by my colleague Alison LaCroix on the use of federal spending in the early Republic attests to the perceived binding force of the written Constitution, and the perceived need for Article V-mediated change to the text before the deployment of measures universally viewed as desirable.

⁸⁷ It is important to concede though, that the line between constitutional change and subconstitutional institutional development is a contestable one, and I do not claim otherwise.

Only one extant scholarly model of informal constitutional change addresses events during the early Republic. This model focuses on legislated compromises between Northern and Southern states beginning with the 1820 Missouri Compromise and ending with the 1854 Kansas–Nebraska Act. According to the model, each of these federal statutes promoted “sectional balance” by maintaining the equilibrium between slave and free states in the Senate.⁸⁸ Sectional balance legislation, however, was not perceived at the time as amending the Constitution. Rather, it was understood as implementing a principle that had been latent in the Constitution “from the beginning . . . in the projection of an equal number of new free and slave states in the territories in the 1780s.”⁸⁹ Such legislation evinced loyalty to the original deal. The use of sectional balance legislation, therefore, is not evidence of successful amendment, but instead suggests that the rigidity and stability of the original constitutional deal played a role in promoting constitutional survival.

In sum, informal amendment protocols, whether they rely on judicial decisions, framework statutes, or constitutional moments, can provide at best only a partial explanation of the Constitution’s longevity. In particular, they do a poor job of explaining constitutional survival in the parlous antebellum period where the Republic was at its most vulnerable.

C. *The Normative Critique of Article V*

The positive puzzle of Article V has invited a suite of normative objections. If the provision is unusually rigid, then the range of possible amendments will be functionally cabined to only “perfecting” measures⁹⁰ that are relatively inconsequential.⁹¹ As a result, many commentators condemn Article V as “comatose”⁹² and functionally “irrelevan[t].”⁹³ Two further lines

⁸⁸ See Barry R. Weingast, *Designing Constitutional Stability* (arguing that “[a]n additional institution . . . called sectional balance” was needed to provide “a static security for southerners and their property in slaves” (emphasis omitted)), in *DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY: ANALYSIS AND EVIDENCE* 343, 357–58 (Roger D. Congleton & Birgitta Swedenborg eds., 2006) [hereinafter Weingast, *Designing Constitutional Stability*]; ELKINS ET AL., *supra* note 1, at 83 (adopting the sectional balance argument). Weingast’s claim appears to be that these laws in effect *changed* the Constitution by adding a new element to the deal.

⁸⁹ Weingast, *Designing Constitutional Stability*, *supra* note 88, at 357.

⁹⁰ Hamburger, *supra* note 32, at 300–01.

⁹¹ See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1741 (2007) (“A funny thing happened to Americans on the way to the twenty-first century. We have lost our ability to write down our new constitutional commitments in the old-fashioned way.”).

⁹² Robert G. Dixon, Jr., *Article V: The Comatose Article of Our Living Constitution?*, 66 MICH. L. REV. 931, 931 (1968).

of criticism follow. The first focuses on Article V's countermajoritarian effect. The second condemns Article V's distributive consequences.

Consider first the countermajoritarian critique. Many commentators claim that, "from both a historical and comparative perspective . . . Article V makes even the proposal of amendments by Congress too difficult."⁹⁴ Inflexibility interposes the "dead hand"⁹⁵ of past generations and prevents the realization of current preferences.⁹⁶ The countermajoritarian critique focuses on Article V's supermajoritarian character.⁹⁷ By demanding extraordinarily large coalitions at both the proposal and the ratification stages, Article V endows minorities with disproportionate power to block amendment efforts by supermajoritarian coalitions of more than seventy percent of the nation. A blocking minority, moreover, may reflect the interests and beliefs of a bygone political era that no longer commands majoritarian assent and yet is able to maintain disproportionate national influence. Rigidity has immediate costs insofar as it prevents correction of what some

⁹³ Strauss, *Irrelevance*, *supra* note 6, at 1460; *accord* Dixon, *supra* note 92, at 932 (questioning whether Article V has become "little more than a constitutional toy for occasional distraction and amusement").

⁹⁴ Dixon, *Partial Constitutional Amendments*, *supra* note 1, at 655; *accord* LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 10, at 165 ("Article V constitutes an iron cage with regard to changing some of the most important aspects of our political system."); Griffin, *supra* note 2, at 173 ("Perhaps a supermajority of Congress should be sufficient to approve any amendment."); *see also* Stephen Holmes, *Precommitment and the Paradox of Democracy* ("Why should a constitutional framework, ratified two centuries ago, have such enormous power over our lives today?"), in CONSTITUTIONALISM AND DEMOCRACY 195, 195 (Jon Elster & Rune Slagstad eds., 1988) [hereinafter Holmes, *Precommitment*].

⁹⁵ *See* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 609 (2008) ("Th[e] dead hand complaint can be broken into three claims: that it is feasible for the living to depart from arrangements indicated by the Constitution; that our generation participated in little of the process responsible for the text; and that the Constitution is otherwise imperfect for our time."); *see also* McGinnis & Rappaport, *supra* note 5, at 1730 ("[O]ne important claim against following the original Constitution is that it permits the dead hand of the past to control the present.").

⁹⁶ *See* Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251, 251-52 (1996) (developing a two-tiered approach to amendment that would address both democratic and constitutional inflexibility concerns); *see also* Levinson, *Political Implications*, *supra* note 63, at 123 (accepting the justification for entrenchment in some cases, such as the First Amendment, but also arguing that there are "no good reasons to support the formal stasis engendered by Article V" on other questions). It is important to note that constitutional binding is dissimilar to the kind of self-dealing of individuals (with the most famous example being Ulysses tying himself to the mast) inasmuch as the Founding generation and current generations are wholly different entities. *See* JON ELSTER, ULYSSES UNBOUND 92 (2000) [hereinafter ELSTER, ULYSSES UNBOUND] (exploring the "dianalogy between individual and collective self-binding").

⁹⁷ Holmes, *Precommitment*, *supra* note 94, at 195 ("Why should a minority of our fellow citizens be empowered to prevent amendments to the Constitution?").

perceive as unjust or dysfunctional parts of the 1787 Constitution, such as the Senate's apportionment rule, the ill-defined scope of executive power, and the use of life tenure for federal judges.⁹⁸ These concerns have prompted proposals of an extratextual plebiscitary mechanism for fundamental change without supermajoritarian consent.⁹⁹

"Dead hand" criticism need not collapse into wholesale rejection of constitutional entrenchment. Even an ardent majoritarian can in good conscience endorse off-the-rack governance structures reduce the transaction costs of governing by eliminating each successive generation's need to recreate basic democratic frameworks.¹⁰⁰ A majoritarian might hence endorse the 1787 Constitution as an adequate if imperfect "blueprint for democratic governance," in which there is some circulation of elected officeholders and as a framework that both reduces the risk of defection¹⁰¹ and "discourage[s] frivolous attempts to revise the Constitution every time political deadlock occurs."¹⁰² That is, endorsing majoritarianism is not the same as rejecting constitutionalism. Nevertheless, even if some constitutional entrenchment is desirable, Article V may still go too far. After all, many other constitutions operate without its extreme rigidity. It is difficult to see why the United States needs so much more textual rigidity than other countries.

A second line of criticism of Article V identifies a failure to accommodate specific constituencies in the amendment process. Hence, Article V is criticized both as being too friendly to the several states and as evincing

⁹⁸ See LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*, *supra* note 10, at 25-158 (examining these, and other, perceived flaws in the Constitution); accord ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 121-39 (2003) (developing arguments from democratic theory against current political structures).

⁹⁹ See Amar, *Consent of the Governed*, *supra* note 8, at 457 (explaining that citizens have a legal right to amend the Constitution "via a majoritarian and populist mechanism akin to a national referendum, even though that mechanism is not explicitly specified in Article V"); see also Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044 (1988) (arguing for "constitutional amendment by direct appeal to, and ratification by, We the People of the United States").

¹⁰⁰ See STEPHEN HOLMES, *PASSIONS AND CONSTRAINTS: ON THE THEORY OF LIBERAL DEMOCRACY* 163 (1995) (comparing constitutional rules to grammatical rules, which "do not merely restrain a speaker" but also "allow interlocutors to do many things they would not otherwise have been able to do or even have thought of doing").

¹⁰¹ Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 TEX. L. REV. 1985, 1995 (2003); see also Jon Elster, *Intertemporal Choice and Political Thought* ("The purpose of entrenched clauses . . . is to ensure a reasonable degree of stability in the political system and to protect minority rights."), in *CHOICE OVER TIME* 35, 38 (George Loewenstein & Jon Elster eds., 1992) [hereinafter Elster, *Intertemporal Choice*].

¹⁰² HOLMES, *supra* note 100, at 155.

excessive hostility to local interests. On the one hand, Article V is condemned for allocating too large a role to the states qua political entities, in lieu of reflecting the preferences of citizens on a roughly per capita basis.¹⁰³ Given the peculiar political geography of the United States, this means a “large majority [must] dread and sometimes submit to constitutional innovations appealing only to a minority”¹⁰⁴ On the other hand, a different set of critics allege that the national convention mechanism for proposing amendments is so “broken” that Congress maintains an “effective veto” on constitutional change and uses it exclusively to “promote amendments that accord with its own preferences.”¹⁰⁵ Another pro-federalism critique argues that Article V is flawed because it creates agency slack between the national electorate and its various representatives in federal and state governments.¹⁰⁶ On the latter view, Congress’s de facto control over the constitutional amendment process pursuant to Article V may “expand[] the federal government and increas[e] Congress’ ability to extract rents and to redistribute wealth.”¹⁰⁷ On this last view, it would seem that extensions of the franchise achieved by the Fifteenth, Nineteenth, and Twenty-Sixth Amendments are not occasions for celebration, but are to be condemned as efforts to “provide[] a supply of votes to the enacting

¹⁰³ Writing in the early 1960s, Charles Black thus identified and condemned the possibility of a successful constitutional amendment being enacted with the support of a bare forty percent of the nation’s population. See Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 *YALE L.J.* 957, 959-60 (1963) (calculating the leverage that a group of states with relatively sparse populations could wield).

¹⁰⁴ *Id.* at 959.

¹⁰⁵ Rappaport, *supra* note 3, at 1512-13. The relationship between Article V and federalism values is, more generally, an important topic with a long historical trajectory. The leading historian of Article V, Kyvig, for example, argues that the supermajority rules of Article V “reflected the Founders’ vision of federalism” and the appropriate level of deference to states. KYVIG, *supra* note 27, at 471. Subsequent to ratification, the ardent states’ rights advocate John Calhoun then suggested that Article V would protect the South from Northern domination up to the point where secession would be required. See John C. Calhoun, *A Discourse on the Constitution and Government of the United States* (asserting that “the amending power” resides with “the several states, in their original, distinct and sovereign character”), in *A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES* 111, 158 (Richard K. Cralle ed., 1851). On this Calhounian view, Article V itself embodies a vindication of the correct federalism balance.

¹⁰⁶ See Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 *FORDHAM L. REV.* 111, 162 (1993) (“[T]he Framers put the Constitution largely out of the reach of ‘factions’ . . . at the cost of depriving the majority of meaningful control over the content of the Constitution.”).

¹⁰⁷ *Id.* at 115; see also *id.* at 129-30 (arguing that “many of the amendments indirectly facilitated the institutional ability of Congress to serve as a source of rents”).

coalition” and thereby “increase[] the likelihood of redistribution of wealth through government.”¹⁰⁸

Criticism of Article V, however, is not universal. A handful of commentators claim that because the Constitution’s original design is optimal, formal change ought to be as costly as possible.¹⁰⁹ Taking constitutional perfection yet further, a number of commentators with widely divergent methodological and normative premises have proposed that Article V has in fact enabled an effective sorting of good, ratified amendments from undesirable, unratified amendments.¹¹⁰

Neither of these two lines of defense, however, is in my view entirely successful. In brief, both implicitly celebrate the net effect of the original

¹⁰⁸ *Id.* at 143. It is worth flagging that there are important normative objections to the critique described in the text.

¹⁰⁹ See, e.g., Joseph R. Long, *Tinkering with the Constitution*, 24 YALE L.J. 573, 581, 589 (1915) (“The constitution of the United States is justly regarded as the greatest instrument of government ever ordained by man. For more than a century it stood almost unchanged The present mode of amendment assures its stability while permitting natural evolution.”); see also LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 164 (2004) (arguing that “the Article V requirements for the amendment of the Constitution are an attractive part of the pragmatic, justice-seeking quality of our constitutional institutions”); McGinnis & Rappaport, *supra* note 5, at 1720 (“[T]he rules for enacting and amending the United States Constitution are in large measure desirable”). These arguments for the Constitution’s optimality rest on the epistemic benefits of Article V’s supermajoritarian character, *id.* at 1711-13 (invoking Condorcet’s jury theorem), and on the idea that Article V’s obduracy prompted the Framers to take into account the interests of subsequent generations, Sager, *supra*, at 164 (“The obduracy of the Constitution to amendment requires of members of the ratifying generation that they choose for the Constitution principles and provisions not just for themselves but for their children”). Neither of these arguments is persuasive, even putting aside the obvious flaws in the 1787 Constitution. First, it is not clear that the demanding conditions for Condorcetian epistemic advantage, in particular the assumption of uncorrelated errors, were in fact met in 1787. See Christian List & Robert E. Goodin, *Epistemic Democracy: Generalizing the Condorcet Jury Theorem*, 9 J. POL. PHIL. 277, 286 (2001) (assuming in discussing the theorem that “each voter is more likely to choose the correct outcome than any other”). To the contrary, the intensive deliberations around the Constitution undermine any inference that the condition of independent errors was satisfied. See ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 30 (2009) (“[T]he basic reach of the Jury Theorem is not well understood”). In any case, because a 1787 supermajority is numerically smaller than a 2012 majority, Condorcet’s theorem favors the latter and not the former. Second, Sager’s argument in favor of Article V assumes that constitutional rigidity induced members of the founding generation to act in a benevolent way by taking into account the preferences of future generations. But Sager does not explain either how the founding generation could intuit what those preferences would be, or what induces a benevolent—as opposed to a condescending or hostile—view of future generations.

¹¹⁰ This is an argument invoked by scholars at opposite poles of the political spectrum. Compare Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561, 1564 (1998) (arguing that “most of the ratified amendments, by any measure, were desirable revisions”), with McGinnis & Rappaport, *supra* note 5, at 1724-28 (lauding Article V on the basis of some proposed amendments that have failed).

1787 text and later constitutional amendments. But the original Constitution contained explicit protections for the slave trade and awarded representational subsidies based on states' possession of slave populations.¹¹¹ It should go without saying that no one today views those provisions as worthy of celebration. Just like the flawed 1787 baseline, the corpus of subsequent amendments is also of variable quality.¹¹² For example, amendments now hymned for their emancipatory, democracy-promoting consequences may also have had the perverse collateral effect of strengthening other kinds of political exclusion.¹¹³ Other amendments now celebrated for rectifying errors in the 1787 Constitution failed for decades to have meaningful effect on the ground.¹¹⁴ Nor does the historical pattern of failed amendments, in my view, provide strong grounds for Whiggish enthusiasm. Among the failed amendments littering American history are proposals that today would likely be viewed by many—including presumably the commentators who praise Article V's sorting effects—as desirable, including bans on child labor,¹¹⁵ equal rights for women,¹¹⁶ and the full enfranchisement of citizens residing in the District of Columbia.¹¹⁷ A normative defense of Article V grounded in current constitutional perfectionalism, in short, must rest on highly controversial normative and empirical judgments.¹¹⁸ It cannot be sustained without disputable assumptions about the wisdom of the founding generation and the precision of Article V as a sorting device.

Article V, in sum, presents a puzzle. Constitutions tend to survive when they are flexible. Yet our Constitution is among both the world's most rigid and also its oldest. This anomaly calls for explanation. The rigidity of

¹¹¹ See DAVID WALDSTREICHER, *SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* 3, 71-105 (2009) (noting six constitutional clauses that "directly" concern slavery, and five others known by the Framers to have important effects on slavery—all but one of which "protect[ed] slavery").

¹¹² McGinnis & Rappaport, *supra* note 5, at 1697 (taking a mixed view of the Constitution's history and effectiveness).

¹¹³ For example, Section 2 of the Fourteenth Amendment was drafted in a way that confirmed the exclusion of women from the mandatory franchise, and was understood to do so at the time. See Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 *YALE L.J.* 1584, 1612-16 (2012) (discussing the enactment history of Section 2 of the Fourteenth Amendment and noting that it "bitterly disappointed radicals").

¹¹⁴ The mere enactment of the Reconstruction Amendments did not redress the compounding effects of slavery. For a recent account of this history, see DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACKS FROM THE CIVIL WAR TO WORLD WAR II* (2009).

¹¹⁵ J. Res. 13, 36th Cong., 12 Stat. 251 (1861).

¹¹⁶ H.R.J. Res. 208, 92nd Cong., 86 Stat. 1523 (1972).

¹¹⁷ H.R.J. Res. 554, 95th Cong., 92 Stat. 3795 (1978).

¹¹⁸ Cf. Henry Monaghan, *Our Perfect Constitution*, 56 *N.Y.U. L. REV.* 353, 360 (1981) (arguing against claims that the Constitution supplies solutions to all emergent social problems).

Article V generates a host of trenchant normative critiques. To date, however, its defenders have failed to respond to those charges. They have failed to answer Patrick Henry's prescient question: Why so much rigidity?

II. THE FUNCTION OF ARTICLE V IN THE EARLY REPUBLIC

This Part proffers an answer to Part I's puzzle by showing how Article V-induced rigidity could foster constitutional longevity. Drawing on recent economic literature about long-term contracting, this Part identifies two potential beneficial effects from textual inflexibility that promote the survival of the Constitution during the first few decades of its existence. I first advance two claims respecting the function of textual rigidity in a constitution. I then demonstrate that both plausibly characterize the early U.S. context. First, rigidity mitigates a potentially fatal 'hold-up' problem that can preclude constitutional ratification and discourage vital investments in the institutions necessary to implement a new constitution. Second, textual rigidity encourages post-ratification investments that catalyze a virtuous circle, yielding long-term anchoring effects.¹¹⁹ While I cannot conclusively demonstrate the causal significance of either of these mechanisms, I aim here to establish their plausibility against the weight of conventional criticism of Article V.

Although my argument focuses on the first decades of the Constitution's existence, it does not concern the original expectations of the Framers. That is, I do not claim that the Framers envisaged or intended the mechanism limned here. The drafting history of the Constitution, and indeed eighteenth-century political science more generally, evinced scant grasp of the "difficulties encountered in conceptualizing and modeling incomplete contracting"¹²⁰ As Robert Dahl has nicely explained, "realistic and gifted as the [Framers] were, many of their key assumptions proved to be false, and the constitution they created has survived not because of their predictions but in spite of them."¹²¹ My claim thus concerns actual rather than intended effects. To adapt Adam Ferguson's dictum, our Constitution's survival may be "the result of human action, but not the execution of any human design."¹²²

¹¹⁹ To be clear, my claim is about the value of textual rigidity in the early life of a constitution. As Section III.C explains, rigidity is likely less desirable in later periods of constitutional development.

¹²⁰ Tirole, *supra* note 11, at 742.

¹²¹ ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 141 (1956).

¹²² ADAM FERGUSON, AN ESSAY ON THE HISTORY OF CIVIL SOCIETY 119 (Fania Oz-Salzberger ed., 1995).

This Part first explains why it is appropriate to model the Constitution as an incomplete contract. It then introduces relevant concepts and findings from the literature on transaction costs in contracting over incomplete instruments. Finally, the remainder of this Part applies those concepts to the constitutional context. My aim in so doing is not to show a precise fit between private-law mechanisms and public-law dynamics. Rather, the extensive private-law literature serves as a launching point for specification of similar dynamics in the constitutional context. I conclude by offering evidence that the mechanisms described here in fact operated in the early Republican context.

A. *The Constitution as a Long-Term Relational Contract*

There is ample literature analyzing constitutions as contracts.¹²³ Because it yields at least two ways of modeling a constitution as a contract, I begin by clarifying which sort of model this Article will pursue.

1. Two Views of Constitutions as Contracts

First, and most obviously, a constitution can be viewed as a contract between citizens and the state. This version of “constitution as contract” is, of course, familiar from normative political philosophy. For instance, John Locke famously identified the emergence of a “compact” through the agreement of citizens with the aim of “mutual preservation of . . . lives, liberties, and estates.”¹²⁴ The Lockean view produces normative questions about the scope of authority delegated to the state and the rights reserved to

¹²³ See, e.g., ELKINS ET AL., *supra* note 1, at 66-72 (making the analogy and drawing on the existing incomplete contracting literature); Stefan Voigt, *Constitutional Political Economy: Analyzing Formal Institutions at the Most Elementary Level* (explaining the various conceptualizations of the Constitution), in NEW INSTITUTIONAL ECONOMICS: A GUIDEBOOK 363, 367-68 (E. Brousseau & J. Glachant, eds., 2008); Sutter, *supra* note 13, at 139 (noting that “constitutional contracts are no different” from commercial contracts in the enforcement context); see also Aghion & Bolton, *supra* note 13, at 44-45 (discussing the problem of contractual incompleteness as it relates to the social contract). Another line of theoretical work focuses on the problems of “self-enforcing constitutions,” but takes up essentially the same set of concerns and problems. See, e.g., Sonia Mittal & Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability in America’s First Century*, 29 J.L. ECON. & ORG. 278, 279 (2013) (discussing constitutional stability for democracies with self-enforcing constitutions); Yadira González de Lara, Avner Greif & Saumitra Jha, *The Administrative Foundations of Self-Enforcing Constitutions*, 98 AM. ECON. REV. 105, 105 (2008) (describing the rule of law in the West as an example of “equilibria with administrators sufficiently powerful to constrain rules”).

¹²⁴ John Locke, *The Second Treatise: An Essay Concerning the True Original, Extent, and End of Civil Government*, in TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 100, 155 (Ian Shapiro ed., 2003).

the people. It is less useful as a heuristic for understanding constitutional stability because it is not the people per se that pose a threat to constitutional stability. With the rare exception of instances of massive popular unrest, it is not generally the people as an undifferentiated whole that imperil constitutional survive.¹²⁵ Rather, “[o]rdinary people often play a peripheral role in the breakdown of democracy.”¹²⁶ A heterogeneous and geographically diffuse population will rarely be able to challenge the state in the absence of intermediating institutions such as political parties or ethnic or religious organizations.¹²⁷ Hence, I do not pursue this mode of constitutional analysis any further here.

Instead, this Article builds upon the second model of the constitution-as-contract. This second model focuses not on the relationship between the people and the state, but instead on the interactions between the various major interest groups that compete for state power. In this model, a written constitution can be understood as a contract between those diverse powerful parties—be they states (as in the U.S. context), economically powerful interest groups, or even tribes or ethnic groupings—whose cooperation is necessary to establish a long-term cooperative relationship and to enable mutually beneficial cooperative action. Because it focuses explicitly on the most common causes of constitutional death, this model provides the more salient lens for analyzing problems of constitutional survival. As a result, this framework for analyzing constitutional rules and provisions has been employed successfully to explain, for example, the rise of judicial review in certain Asian countries as a form of “insurance” for both “prospective governing parties” and “prospective opposition parties” that alike feared permanent lockout of government after electoral defeat.¹²⁸ My aim is to extend the model to the early American context and to blend it with insights from the literature on incomplete contracting.

¹²⁵ Contra the argument in the text, some political theorists have argued that regimes can be deposed through unmediated popular action. *See, e.g.*, HANNAH ARENDT, *ON REVOLUTION* 48 (1965) (identifying at least the *start* of the 1789 French revolution with a “multitude on their march . . . the multitude of the poor and the downtrodden, who every century had been hidden in darkness and shame”). Another example of a populist revolt, less well recalled today, is the French Commune of 1871; for a concise history, see ALISTAIR HORNE, *THE TERRIBLE YEAR: THE PARIS COMMUNE, 1871* (1971).

¹²⁶ NANCY BERMEO, *ORDINARY PEOPLE IN EXTRAORDINARY TIMES: THE CITIZENRY AND THE BREAKDOWN OF DEMOCRACY* 19-20 (2003).

¹²⁷ This basic collective action problem is identified in MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 34 (1965).

¹²⁸ TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 25 (2003).

In short, this Article conceptualizes the U.S. Constitution as a deal between powerful interest groups rather than as a product of popular sovereignty. I take this approach not because the latter approach is normatively disreputable or irrelevant, but rather because the latter approach does not capture the dynamics most relevant to constitutional demise. In addition, I do not provide a precise algorithm for determining which interest groups are salient to the analysis in the U.S. context. Instead, it suffices to note that organized groups are relevant insofar as their agreement in an original constitutional deal is necessary for an ensuing regime to be resilient against significant shocks. In the American context, for example, these groups obviously included the thirteen states as well as economically powerful interest groups, such as commercial creditors, merchants, and slaveholders.¹²⁹ Despite the absence of textual language respecting secession, states had the de facto power to threaten exit from the Union, as the events of the 1860s amply show.¹³⁰ My focus is on the question of how the Constitution induced stability by encouraging all necessary parties to enter the initial constitutional deal, and then by dissuading them from exiting during the acutely vulnerable first two decades of the early Republic.¹³¹

Viewing the Constitution as a contract reveals two important qualities about the document. First, a constitution qua contract has a long-term, *relational* quality in that it involves not merely an instantaneous exchange (such as one sees on spot markets for commodities), but also the making of durable cooperative interactions by all parties to create a contractual

¹²⁹ See, e.g., CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 19-51 (1913) (cataloguing “economic interests” active in the Founding period, and including slaveholders, creditors, and the “innumerable manufacturing, shipping, trading, and commercial interests”).

¹³⁰ There are expressive reasons not to include a textual right of secession that I do not address here. See MIKHAIL FILIPPOV, PETER C. ORDESHOOK & OLGA SHVETSOVA, DESIGNING FEDERALISM: A THEORY OF SELF-SUSTAINABLE FEDERAL INSTITUTIONS 105 (2004) (“A formally recognized right to secede . . . legitimizes the view that the existing union can be dissolved and recreated on new terms . . .”).

¹³¹ This model glosses over a number of important problems. First, it applies a model of individual precommitment to collectivities (such as states and interest groups) that have diverse degrees of internal organization and formal decisional capacity. Cf. Jon Elster, *Don't Burn Your Bridge Before You Come To It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1758-60 (2003) [hereinafter Elster, *Don't Burn Your Bridge*] (“[I]ndividual and collective decisions use different precommitment devices.”). Second, it ignores the fact that the composition of a state's population changes over time, such that a constitution-as-contract eventually binds a class of persons who were not alive at the point of contracting. See ELSTER, ULYSSES UNBOUND, *supra* note 96, at 98 (discussing the “quasi-constitutional” impact of legislation regarding constitutional conventions). To the extent I am concerned here with the first two generations after the Constitution's ratification, the second problem may be mitigated.

surplus.¹³² Second, the constitution qua contract is *incomplete* in that the contracting parties have not written down contractual solutions to all possible future contingencies.¹³³ Incompleteness exists for several reasons. A threshold reason is the high cost of imagining and resolving all possible contingencies in a single document.¹³⁴ In the constitutional context especially, it is impossible for drafters, who have limited time and political capital, and to anticipate all possible future states of the world, let alone to provide comprehensive and unambiguous governance solutions for them.¹³⁵ Both the “cost of processing and using . . . information” about potential states of the world and “the cost of writing a contingent [contract] clause in a sufficiently clear and unambiguous way that it can be enforced”¹³⁶ ensure that most contracts are in some measure incomplete. Further, even with unlimited time and political capital, bounded rationality would prevent drafters from complete specification within a constitution-as-contract.¹³⁷

¹³² See Melvin A. Eisenberg, *Relational Contracts* (discussing possible definitions of “relational contract”), in GOOD FAITH AND FAULT IN CONTRACT LAW 291, 291-96 (Jack Beatson & Daniel Friedmann eds., 1995); see also Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 860 n.21 (1978) (coining the term “relational contract”).

¹³³ See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 299 (2004) [hereinafter SHAVELL, FOUNDATIONS] (“An aspect of contractual practice . . . is that contracts are significantly incomplete . . . [because they] omit all manner of variables and contingencies that are of potential relevance to contracting parties.”). Tirole argues that “there is unfortunately no clear definition of ‘incomplete contracting’ in the literature,” but assumes a set of restrictions on the standard model of contracts based on unforeseen contingencies, the cost of contract drafting, and the cost of enforcement. Tirole, *supra* note 11, at 743-44.

¹³⁴ See OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 70 (1985) [hereinafter WILLIAMSON, ECONOMIC INSTITUTIONS] (“[F]or long-term contracts executed under conditions of uncertainty, complete presentation is apt to be prohibitively costly if not impossible.”); accord SHAVELL, FOUNDATIONS, *supra* note 133, at 299 (noting the same); Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691, 696 (1986) (hypothesizing “a situation in which it is prohibitively difficult to think about and describe unambiguously in advance how all the potentially relevant aspects of the production allocation should be chosen as a function of the many states of the world”). In addition to the reasons for incompleteness listed above, Shavell also discusses enforcement costs and the impossibility of judicial verification. SHAVELL, FOUNDATIONS, *supra* note 133, at 300. Because those grounds are not relevant to my analysis, I do not address them here.

¹³⁵ WILLIAMSON, ECONOMIC INSTITUTIONS, *supra* note 134, at 70 (“[N]ot all future contingencies for which adaptations are required can be anticipated at the outset.”).

¹³⁶ Oliver Hart & John Moore, *Incomplete Contracts and Renegotiation*, 56 ECONOMETRICA 755, 756 (1988) [hereinafter Hart & Moore, *Incomplete Contracts and Renegotiation*].

¹³⁷ Paul L. Joskow, *Vertical Integration* (“Contracts may be incomplete . . . because of ‘bounded rationality’ that makes it unlikely that the transacting parties can foresee all possible contingencies . . .”), in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS, 319, 322 (Claude Ménard & Mary M. Shirley eds., 2005) [hereinafter Joskow, *Vertical Integration*].

The relational quality and the incompleteness of a constitution-as-contract are intertwined. As the expected duration and complexity of the relations underpinning a constitution increase, the costs of writing down ex ante solutions for all future contingencies rise, if only because the range of contingencies grows as a constitution's expected lifespan increases.¹³⁸ A basic insight of this contracting literature is therefore that there is a "trade-off between rigidity and flexibility" analogous to that which exists in constitutional design between the benefits of specification and the gains from adaption.¹³⁹

2. The Hold-up Problem in Private Contracting

A large law and economics literature about barriers to contracting pursues Ronald Coase's famous question why contracting parties opt to internalize a transaction within a firm rather than using the market.¹⁴⁰ Coase's analysis identified a comparison of the marginal "costs of organizing" production inside and outside the firm as pivotal to this decision.¹⁴¹ When the costs of organizing through market mechanisms are relatively high, it is worth fashioning a long-term and incomplete relational contract—that is, the firm. Coase's insight generated a range of hypotheses about how incomplete, relational contracts can be designed to address problems specific to particular industries and parties.¹⁴² His analysis pointed toward different ways in which contracts could respond to heterogeneous barriers to

¹³⁸ Some commentators go so far as to define relational contracts in terms of their incompleteness. See, e.g., Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1091 (1981) ("A contract is relational to the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations.")

¹³⁹ Compare Oliver Hart & John Moore, *Contracts as Reference Points*, 123 Q.J. ECON. 1, 2 (2008) [hereinafter Hart & Moore, *Contracts as Reference Points*] (discussing the difficulties of using overly specific contracts to combat the problems of incompleteness), with Elster, *Intertemporal Choice*, *supra* note 101, at 43 (identifying the need to find "an optimal balance between stability and rigidity" in constitutional design); accord Ferejohn, *supra* note 44, at 502 ("The issue of constitutional change—indeed the problem of constitutionalism generally—centers on how changeable a people's constitution ought to be.")

¹⁴⁰ See R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 6-7 (1988) (discussing the new concept introduced in his article, *The Nature of the Firm*).

¹⁴¹ See *id.* at 7 (identifying the decision as a comparison of the costs of organizing a firm and the market transaction costs).

¹⁴² See Pierre Garrouste & Stéphane Saussier, *The Theories of the Firm*, in BROUSSEAU & GLACHANT, *supra* note 123, at 23-24 (exploring the "competing theories of the firm" developed after Coase); WILLIAMSON, *ECONOMIC INSTITUTIONS*, *supra* note 134, at 79, fig.3-2 (illustrating the efficient matching of government structures with different types of transactions).

contracting,¹⁴³ including adverse selection problems, information asymmetries,¹⁴⁴ and the need for high-powered rather than low-powered incentives to make a contract succeed.¹⁴⁵

The problem of “hold-ups,”¹⁴⁶ otherwise known as the problem of “post-contractual opportunistic behavior,”¹⁴⁷ has special relevance for understanding the role of textual rigidity in constitutions qua contracts. Hold-up problems can arise whenever parties must make post-contractual investments in assets specific to their relationship.¹⁴⁸ An investment-backed asset is specific when a contracting party’s next-best return from the asset is substantially less than the return from the asset within the context of the contractual relationship.¹⁴⁹ For example, imagine a printing press built with specifications for a particular newspaper that generates a joint annual surplus of \$1.5 million, where the next-best use of the press (for a different publisher with different needs) would yield only \$500,000.¹⁵⁰ Once the press has made its investment, the newspaper can threaten to breach in order to extort a greater share of the jointly produced surplus from the investing party.¹⁵¹ Because the second-best use of the asset pays out much less to the investing party, the latter stands to realize a large loss by walking away from

¹⁴³ For an early survey of barriers to contracting, see Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 AM. ECON. REV. 112, 114-22 (1971) (listing five species of market failures that “involve transaction costs that can be attenuated by substituting internal organization for market exchange”).

¹⁴⁴ See WILLIAMSON, ECONOMIC INSTITUTIONS, *supra* note 134, at 81-83 (discussing the problems of information asymmetry both ex ante and at the contract execution stage).

¹⁴⁵ Garrouste & Saussier, *supra* note 142, at 28.

¹⁴⁶ See SHAVELL, FOUNDATIONS, *supra* note 133, at 298-99 (discussing a range of hold-up problems that result in socially suboptimal behavior); see also Victor P. Goldberg, *Regulation and Administered Contracts*, 7 BELL J. ECON. 426, 439-41 (1976) (describing the hold-up problem as one of providing protection for the “right to be served”).

¹⁴⁷ Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriate Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297, 297-98 (1978).

¹⁴⁸ Joskow, *Vertical Integration*, *supra* note 137, at 322 (concluding that these situations lead to bargaining over ex post quasi-rents). Williamson uses the phrase “asset specificity.” WILLIAMSON, ECONOMIC INSTITUTIONS, *supra* note 134, at 52-56.

¹⁴⁹ See Joskow, *Vertical Integration*, *supra* note 137, at 322 (“[R]elationship-specific investments are investments which, once made, have a value in alternative uses that is less than the value in the use originally intended to support a specific trading relationship.”).

¹⁵⁰ This example is loosely adapted from Klein et al., *supra* note 147, at 298-300.

¹⁵¹ Another way of stating the problem is that “one party to a contract agrees to a proposed modification either because of expected dire consequences should that party not agree to the modification or because the available remedies for breach by the other party are inadequate to deter breach by the other party.” See Daniel A. Graham & Ellen R. Peirce, *Contract Modification: An Economic Analysis of the Hold-Up Game*, 52 LAW & CONTEMP. PROBS. 9, 9 (1989). The potential breaching party, Williamson argues, is distinct from an ordinary contracting party in that she displays “opportunism,” or “self-interest seeking with guile.” WILLIAMSON, ECONOMIC INSTITUTIONS, *supra* note 134, at 47.

the contract. Accordingly, it is rational to accede to renegotiation.¹⁵² Even when the dependency is bilateral, the possibility of hold-up can still lead to haggling that dissipates gains from trade.¹⁵³

The potential for hold-up has both *ex ante* and *ex post* effects. *Ex ante*, a potential investing party will rationally anticipate the possibility of hold-up and so decline to enter into contracts where that risk exists.¹⁵⁴ Otherwise Pareto-superior deals will, as a result, remain unrealized. *Ex post*, parties that do enter deals will dissipate resources on both hold-ups and resistance to hold-ups, resulting in intracontractual disputes and haggling that expend resources without commensurate social gain.¹⁵⁵ Solving the hold-up problem is valuable, therefore, because it enables otherwise Pareto-superior deals to be negotiated and honored in ways that maximize their value.

The relationship-specificity of assets created by post-contractual investment and the consequent specter of a hold-up can be observed across the landscape of private contracting.¹⁵⁶ Consider, for example, a coal-burning power generation facility that benefits from being located at the “mouth” of a mine, but that thereby renders itself vulnerable to hold-up.¹⁵⁷ Or think of an automobile manufacturer that may wish for a subsidiary supplier to invest in specialized manufacturing hardware, and even to co-locate, in order to minimize production costs, only to find that the supplier baulks out of a fear of hold-up.¹⁵⁸ It is even possible to find hold-ups in contracts over

¹⁵² I assume here a one-shot interaction. Repeat-play circumstances may render other strategies rational.

¹⁵³ Joskow, *Vertical Integration*, *supra* note 137, at 327 (finding that these losses from haggling drive the “choice of governance structure”).

¹⁵⁴ See Jolls, *supra* note 12, at 208 (reasoning that the possibility of hold-up will either lead to no contract or to underinvestment).

¹⁵⁵ *Id.* at 207-08 (exploring how hold-ups are “welfare-reducing”); see also Klein et al., *supra* note 147, at 301 (“Even if transactors are risk neutral, the presence of possible opportunistic behavior will entail costs as real resources are devoted to the attempt to improve posttransaction bargaining positions in the event . . . opportunism occurs.”).

¹⁵⁶ See Victor P. Goldberg, *Relational Exchange: Economics and Complex Contracts* (“Much economic activity takes place within long-term, complex, perhaps multiparty contractual (or contract-like) relationships; behavior is, in varying degrees, sheltered from market forces.”), in *READINGS IN THE ECONOMICS OF CONTRACT LAW* 16, 16 (Victor P. Goldberg ed., 1989).

¹⁵⁷ See Paul L. Joskow, *Vertical Integration and Long-Term Contracts: The Case of Coal-burning Electric Generating Plants*, 1 *J.L. ECON. & ORG.* 33, 38 (1985) (identifying that the transaction-specific nature of an investment makes it particularly vulnerable to hold-ups).

¹⁵⁸ See, e.g., Klein et al., *supra* note 147, at 308-10 (discussing the purchase of Fisher Body by General Motors). For an important challenge to the conventional account of this purchase, see Douglas G. Baird, *In Coase's Footsteps*, 70 *U. CHI. L. REV.* 23, 30 (2003) (arguing that “the integration of Fisher and Chevrolet took place *before* acquisition” and that GM’s acquisition of Fisher Body in 1926 was not the main event . . . [and] the acquisition may have had almost no effect on the way in which Chevrolet interacted with Fisher at the plant level”).

human capital. A famous example involves the tough bargaining by actor James Gandolfini over whether he would appear in later seasons of the lucrative HBO series *The Sopranos*, which resulted in the actor roughly doubling his \$400,000 per episode salary—the network being the object of the putative hold-up.¹⁵⁹ As these examples suggest, an investment's specificity can take many forms, from location to physical design or human capital allocations.¹⁶⁰ The hold-up problem may be also especially acute in circumstances in which a post-contract formation investment is cooperative in nature in that it “generate[s] a direct benefit for the trading partner.”¹⁶¹ Such cooperative investments are “critically important in modern manufacturing.”¹⁶² Empirical studies confirm that the hold-up problem is not merely hypothetical, but has significant effects in observed contracting contexts.¹⁶³

Hold-up problems arise in both incomplete and complete contracts, albeit in different ways. Hold-up can arise either when an incomplete contract does not address an unexpected exogenous event that provokes one party to seek renegotiation, or when post-contracting investments expose one party to another's opportunism. With a complete contract, changed circumstances can also lead to hold-up.¹⁶⁴ For instance, Gandolfini's contract was likely complete in the sense that it specified a salary.¹⁶⁵ The latter dispute can hence be described either in terms of an incomplete or a complete contract; it either concerned the breach of a complete contract followed by de novo deal-making (from HBO's perspective), or the modification of an incomplete contract that did not state when modifications were permitted in light of changed circumstances (from Gandolfini's perspective). The problem can accordingly be framed either as one of contractual commitment or gap-filling. For the purposes of this Article, there is little need to distinguish

¹⁵⁹ Shavell, *supra* note 17, at 328.

¹⁶⁰ WILLIAMSON, *ECONOMIC INSTITUTIONS*, *supra* note 134, at 95-96 (delineating the different types as site specificity, physical asset specificity, human asset specificity, and dedicated assets).

¹⁶¹ Che & Hausch, *supra* note 20, at 126; cf. Tirole, *supra* note 11, at 747 (“Roughly speaking, an investment is cooperative if it affects the trading partner's surplus more than the investing party's surplus.”).

¹⁶² Che & Hausch, *supra* note 20, at 127.

¹⁶³ One study of a large naval construction contract found that “overall organization costs represent about 14 percent of the total costs for the components and activities” studied. Scott E. Masten, James W. Meehan, Jr. & Edward A. Snyder, *The Costs of Organization*, 7 J.L. & ECON. 1, 2 (1991).

¹⁶⁴ For an analysis that identifies the need for mechanisms to generate enduring commitments even in the absence of incompleteness, see Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519, 537-38 (1983).

¹⁶⁵ The cases discussed *infra* note 178 might also be characterized as concerning complete contracts.

between these two characterizations, even if the distinction has significance in the private contracting context.¹⁶⁶

There are several ways of mitigating the potential for hold-ups, not all of which translate well into the public-law context. Among the first solutions to be identified in the law and economics literature involved vertical integration. One firm would purchase the other and thereby eliminate the possibility of interfirm hold-up.¹⁶⁷ Arranging deals within the firm, although it mitigates the hold-up problem, is not costless. Rather, it “sacrifices the high-powered incentive advantages of market exchange and, consequently, demands greater investments in monitoring and administration.”¹⁶⁸ Some evidence nevertheless suggests that integration “becomes more likely in the presence of relationship-specific human capital”¹⁶⁹ However promising it may be as a private-law solution, vertical integration cannot be transposed easily to the public-law context. A constitution cannot by mere *ipse dixit* dissolve a diverse and conflictive pool of interest groups into a harmonious whole.

A second possible solution is to draft the contract to include one of the rather complex mechanisms economists have identified that dampen renegotiation.¹⁷⁰ For example, a leading analysis postulates that in some circumstances, mechanisms for verifiable communication between parties

¹⁶⁶ I am grateful to Tony Casey for helpful discussions on this point.

¹⁶⁷ The seminal paper in this literature is Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233, 234 (1979). For development of the idea, see WILLIAMSON, *ECONOMIC INSTITUTIONS*, *supra* note 134, at 90; Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691, 695 (1986) (exploring vertical integration and explaining that “the owner of an asset” is defined as the party with “the right to control all aspects of the asset that have not been explicitly given away by contract”); accord Klein et al., *supra* note 148, at 302-07 (describing long-term contracting as the “primary alternative to vertical integration as a solution to the general problem of opportunistic behavior”). Note that the hold-up problem may be displaced rather than solved by vertical integration because it will sometimes be the case that the purchased firm’s managers have unique knowledge, and can therefore engage in a hold up of the purchasing firm’s management. See *id.* at 302-03 (describing the phenomenon as involving the failure to vertically integrate the employee’s human capital).

¹⁶⁸ Masten et al., *supra* note 163, at 6.

¹⁶⁹ *Id.* at 21.

¹⁷⁰ For a survey of potential solutions in the contract literature, see Philippe Aghion & Patrick Bolton, *An Incomplete Contracts Approach to Financial Contracting*, 59 REV. ECON. STUD. 473, 481-90 (1992); Aaron Edlin & Stefan Reichelstein, *Holdups, Standard Breach Remedies, and Optimal Investment*, 86 AM. ECON. REV. 478, 480-81 (1996); and Richard Holden & Anup Malani, *Contracts Versus Assets and the Boundary of the Firm* (draft Jan, 2012) (on file with author). Maximizing efficiency may also be framed as a question of determining “[t]he optimal ownership structure . . . to minimize the overall loss in surplus due to investment distortions.” Grossman & Hart, *supra* note 167, at 710.

will enable the maintenance of efficient investment levels.¹⁷¹ Like vertical integration, the specific contractual solutions proposed in this line of analysis do not translate easily into the context of constitutions as contract.¹⁷² An exception is the possibility of “offering to the potential cheater a future ‘premium,’ more precisely, a price sufficiently greater than average variable (that is, avoidable) cost to assure a quasi-rent stream that will exceed the potential gain from cheating.”¹⁷³ Examples of the latter mechanism include long-term implicit contracts with particular suppliers and interfirm reciprocity agreements. Both solutions create an enduring stream of benefits, the present-discounted value of which is greater than the benefits from cheating.¹⁷⁴ As explained below, something akin to this mechanism might be discerned in the American constitutional domain, with the public-law context providing easier ways of generating the solution.

The third solution to hold-ups explored in the private-law literature does, however, bear directly on public-law problems. Indeed, this solution may paradoxically be easier to employ in the public-law context than in the original private-law context. This is the possibility of simply declining to enforce any modifications to a contract.¹⁷⁵ For example, after two parties sign a contract that requires relationship-specific investments on the part of party *A*, the court asked to enforce a modification of the contract elicited by party *B* will demur. Instead, it will enforce the terms of the contract as originally drafted. A rule against modification of this kind “assures prospective contract parties that signing a contract is not stepping into a trap,” and thereby enables Pareto-superior deals.¹⁷⁶

In practice, the effect of no-modification clauses under American contract law is unclear. The “pre-existing duty rule” sometimes has the effect of barring certain sorts of modifications. It hence mitigates certain hold-up

¹⁷¹ See Hart & Moore, *Incomplete Contracts and Renegotiation*, *supra* note 136, at 776 (noting that this solution is not available if parties are risk neutral).

¹⁷² Independently, Shavell notes that “[t]he use of such contractually specified mechanisms does not . . . appear to be very important in reality,” although no evidence is supplied on this point. Shavell, *supra* note 17, at 348.

¹⁷³ Klein et al., *supra* note 148, at 304.

¹⁷⁴ *Id.* at 304-05.

¹⁷⁵ See Graham & Peirce, *supra* note 151, at 9-10 (noting the risk of hold-up as a justification for judicial nonenforcement of a contract). For early treatments of the possibility, see Varouj A. Aivazian, Michael J. Trebilcock & Michael Penny, *The Law of Contract of Modifications: The Uncertain Quest for a Bench Mark of Enforceability*, 22 OSGOODE HALL L.J. 173, 175 (1984); Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 529-30 (1981).

¹⁷⁶ *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 927 (7th Cir. 1983) (Posner, J.).

problems.¹⁷⁷ For example, in *Alaska Packers' Ass'n v. Domenico*, a contract law casebook staple, the Ninth Circuit Court of Appeals declined to enforce a salary-increasing modification negotiated by the crew of a fishing vessel in the midst of an Alaska salmon run, at a time at which no substitute crew could possibly be found.¹⁷⁸

In other instances, however, “courts simply ignor[e] the pre-existing duty rule” or find ways to circumvent it.¹⁷⁹ “Freedom of contract” principles are often cited as ground for such refusals.¹⁸⁰ Even more problematic is the fact that “[t]hose who make a contract may unmake it Whenever two men contract, no limitation self-imposed can destroy their power to contract again.”¹⁸¹ In other words, there is a generally available mechanism for rendering no-modification clauses nugatory—by entering into a side-contract that counteracts the precise terms of an existing contract.¹⁸² These difficulties have provoked arguments for adopting a more formal rule in favor of the “enforcement of contractual terms constraining modifications.”¹⁸³

If no-modification clauses resolve a hold-up problem that can arise in private law contracting (both for incomplete and complete contracts), can they be employed to address analogous concerns in the public-law context? An alternative answer is developed in the next Section. But as a threshold matter, notice a key difference between the private and public-law contexts. In the private-law context, courts are unwilling to enforce no-modification clauses and it is hard to prevent parties from contracting around the clause via a new, offsetting contract. But a defining feature of the constitutional

¹⁷⁷ See CORBIN, *supra* note 17, at 105 (“[N]either the performance of duty nor the promise to render a performance already required by duty is a sufficient consideration for a return promise.”). The Uniform Commerce Code allows good faith modifications. U.C.C. §2-209(1) & cmt. 1 (1987).

¹⁷⁸ *Alaska Packers' Ass'n v. Domenico*, 117 F. 99, 101 (9th Cir. 1902); *see also* *Lingenfelder v. Wainwright Brewing Co.*, 15 S.W. 844, 848 (Mo. 1891) (voiding an architect's contract because it was secured through threatening hold-up of a time-sensitive project); *Rose v. Daniels*, 8 R.I. 381, 384 (1866) (voiding an agreement to accept part of a debt for lack of consideration). Other examples of pre-existing duty rules include admiralty rules for salvage, *see Post v. Jones*, 60 U.S. (19 How.) 150, 150 (1856), and utility regulations, *see Goldberg*, *supra* note 156, at 18. Since *Alaska Packers* concerned a fixed term (salary), it might be characterized as a case about enforcement simpliciter. But note that from the crew's perspective, the case concerned an incomplete term—specifically the conditions for modification.

¹⁷⁹ *Graham & Pierce*, *supra* note 151, at 15.

¹⁸⁰ For an exemplary statement of freedom of contracting, *see, e.g.*, *Cont'l Basketball Ass'n, Inc. v. Ellenstein Enters., Inc.*, 669 N.E.2d 134, 139 (Ind. 1996) (noting a “very strong presumption of enforceability of contracts that represent the freely bargained agreement of the parties”).

¹⁸¹ *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378, 381 (N.Y. 1919) (Cardozo, J.).

¹⁸² Jolls observes that it is possible in some contexts to prevent side-contracting. Jolls, *supra* note 12, at 230-31.

¹⁸³ *Id.* at 236.

context is the absence of effective third-party enforcement.¹⁸⁴ Supreme Courts and their ilk, after all, are “a product of constitutional negotiation,” rather than being extrinsic to the constitutional order.¹⁸⁵ It is the parties themselves who must necessarily make the decision whether or not to comply with a constitution, seek amendment, or withdraw. Unlike in the private-law context, no-modification clauses in the public-law context can effectively take an option (modification) off the table. The parties are moved by such a clause from a three-option situation (adhere to the contract, modify, or exit) to a two-option world (adherence or exit). As a consequence, one of the primary defects of no-modification clauses does not carry over from the private-law context to the public-law domain.

It is also worth noting that no-modification clauses in private contracts are perceived as having nontrivial collateral costs. An across-the-board rule of contractual inflexibility might have benefits, but it also impedes otherwise warranted adjustments in light of changed circumstances. As a result, proposals to enforce no-modification rules often incorporate an exception for contractual responses to unanticipated and exogenous changes in circumstances.¹⁸⁶ Some long-term contracts already attempt to draw a distinction between desirable and undesirable modifications. For example, both “prime plus” clauses in loan agreements and “price protection” clauses with *pari passu* effect in supply contracts essentially operate as sorting devices to allow some desirable forms of change while preventing undesirable forms of change that are more likely to be motivated by hold-ups.¹⁸⁷

In sum, an extensive literature concerning private contracting has identified a spectrum of transaction costs that impede the formation or consummate execution of durational contracts. An important strand of that literature identifies the risk of hold-up: the exploitation of parties who have invested in relationship-specific assets that lock them into a contract. Among the solutions offered in the literature is the possibility of no-modification clauses. While there are reasons these are not (yet) common in ordinary contracting, those reasons do not translate well into the public law context.

¹⁸⁴ See Elster, *Don't Burn Your Bridge*, *supra* note 131, at 1759-60 (contrasting the ability of an individual to enlist others in helping them achieve an objective with that of a society).

¹⁸⁵ ELKINS ET AL., *supra* note 1, at 72.

¹⁸⁶ See Jolls, *supra* note 12, at 228-30.

¹⁸⁷ See Klein, *supra* note 148, at 317 (explaining the mechanism and purpose of these clauses).

B. *The Role of Textual Rigidity in Promoting Constitutional Survival*

The foregoing discussion sets the stage for an account of the causal mechanism that may link constitutional rigidity to constitutional survival. Succinctly stated, the mechanism works as follows: in conditions in which cooperative investments are pivotal to the survival of a new constitutional order, a well-crafted constitution might plausibly be written with an onerous amendment rule akin to Article V. This amendatory provision operates much like a no-modification rule in ordinary contracting: it switches the parties' choice set from three options—adhere to the contract, modify, or exit—to two—adherence or exit. This change elicits parties' entrance to the constitution as contract *ex ante*, and then *ex post* renders more likely cooperative investments that otherwise would be put on hold or rationed for fear of hold-ups.

We can take the analysis one step further. Notice that textual rigidity takes the “modify” option off the table but not the “exit” option. Indeed, as in the private law context, it is hard to see how the exit option could be effectively eliminated absent the threat of violence or coercion. And yet, even in the absence of coercion, it is possible that textual rigidity may also mitigate the risk of outright exit from the constitutional order. Rigidity indirectly addresses the risk of exit by eliciting cooperative investments from multiple parties toward the creation of new institutions that are in some fashion tied to the new constitution. That is, these investments are not portable. The costs sunk by those parties into cooperatively produced institutions have the effect of raising the stakes of departure from this new constitutional order. By making exit more costly, rigidity makes it less likely. Threats of defection also become less credible. The overall effect of textual rigidity not only addresses fears of midstream hold-up by opportunistic contracting partners but also elicits an entangling web of mutually beneficial cooperative investments that enmeshes all parties into a specific constitutional regime.

I analyze this causal mechanism in its two stages. First, I look more closely at the link between constitutional rigidity and the hold-up problem. In the course of the argument, I point to evidence that this mechanism operated in the early American republic. Second, I look at the link between entangling institutions and constitutional survival. Again, I offer examples of specific institutions that may have played this role in the decades immediately following ratification, which is when rigidity had its greatest utility.

1. The Preconditions for Constitutional No-Modification Rules

If textual rigidity can mitigate the risk of ex ante failure to enter a Pareto-superior private contract and the risk of ex post underinvestment in the coproduction of goods under the contract, might the same mechanism work at the constitutional level? A threshold step in answering this question is to identify the circumstances under which hold-up is likely to be a problem, and to ascertain whether the U.S. Constitution falls within this class of cases.

The problem of hold-up in a new constitutional context is likely to arise only when two preconditions are met: there is both oligopolistic political competition and a thin national institutional infrastructure. First, constitutions installed in the absence of political competition pose no hold-up concern. Thus, a constitution imposed by dint of external military force,¹⁸⁸ or by a single monopolistic political party,¹⁸⁹ need not be drafted with the risk of hold-up in mind. Second, drafters may rightly be less concerned about hold-up when robust national institutions already exist. This is because the latter vitiates the need for new, post-ratification cooperative investments.¹⁹⁰ Given these possibilities, not every founding father or mother should be worried about the hold-up problem. Indeed, in many constitution-making scenarios, it will be quite likely that one of these preconditions for textual rigidity will not be met. The absence of other rigid, long-lasting constitutions, identified by Ginsburg, Elkins, and Melton, arguably suggests that these two conditions are rarely satisfied simultaneously.¹⁹¹

The period of the drafting and ratification of the U.S. Constitution, however, was characterized by both oligopolistic political competition and a thin national institutional infrastructure. *First*, the coalition in favor of more robust federal action viewed the several states as spoilers of the cooperative enterprise of maintaining independence from European domination and achieving economic prosperity.¹⁹² Prior to the Philadelphia Convention, states had notoriously refused the Confederation Congress's fiscal and

¹⁸⁸ See Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 859 (2005) (citing post-war Japan and Germany as examples).

¹⁸⁹ See ELKINS ET AL., *supra* note 1, at 173-74 (detailing the successful single handed control of Taiwan's constitutional process by the KMT in the 1950s).

¹⁹⁰ The Constitutions of the French Fourth and Fifth Republics likely fall into this class. *Id.* at 170-71.

¹⁹¹ *Id.* at 152.

¹⁹² A concern with hold-up also implies some stable identification of group interest, such as a system of states (as in the U.S. context) or political parties. I focus in this passage on states. I am grateful to Mark Graber for pressing this point.

military requests despite the grave financial strains imposed by the Revolutionary War.¹⁹³ As early as 1782, Rhode Island had signaled that it would decline to ratify a proposed five-percent impost on imported goods.¹⁹⁴ In 1786, New Jersey and New York also indicated their unwillingness to continue contributing to the confederated fisc.¹⁹⁵ Internal divisions in Congress also induced an “inability” on the national legislature’s part “to frame and implement satisfactory foreign policies,” leaving states vulnerable to the maneuvers of greater European powers.¹⁹⁶

A concern with states as potential spoilers was also reflected in the concessions made to states that were implicitly or explicitly threatening exit from the federal project during drafting and ratification. During the Philadelphia Convention, for example, small states resisted any deviation from the Articles of Confederation rule of equal representation for each state.¹⁹⁷ One result of this pressure was the “Great Compromise,” involving different apportionment rules for the House and the Senate.¹⁹⁸ During ratification, the Constitution’s supporters also evinced concern that pivotal states would decline to accede to the new document, imperiling the entire exercise.¹⁹⁹ That these concerns were powerful enough to alter the views of Madison and others on the desirability of a bill of rights suggests that some of the Framers had substantial concerns about defection from the national process.²⁰⁰

The Framers’ obvious concerns about states’ exit from the Constitution creates a puzzle: why did they not expressly bar secession in the text of the

¹⁹³ See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 25 (1996) (noting the fiscal crisis). The problem arose as a result of the depreciation of the Continental currency that was “Weimar-like in its rapidity and completeness.” DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 116 (2003).

¹⁹⁴ See RAKOVE, *supra* note 193, at 25.

¹⁹⁵ *Id.* at 31-32.

¹⁹⁶ See *id.* at 26-27 (discussing Spain’s closure of New Orleans and the lower Mississippi River to Americans in April 1784); see also Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 618 (1999) (“[M]any of the Union’s problems related in one way or another to its inability to present a credible threat of force.”).

¹⁹⁷ See MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 56 (1913) (noting that the Delaware delegation was instructed that state equality was non-negotiable).

¹⁹⁸ *Id.* at 104-05.

¹⁹⁹ This is a dominant theme in the canonical account of ratification offered by Pauline Maier. MAIER, *supra* note 36.

²⁰⁰ Nor would the problem of managing states’ rights end in 1789. Cf. Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 748 (2010) (“The history of ‘Our Federalism’ from 1789 to 1865 (and beyond) is the history of the impact of the centrifugal effects of sectionalism on the emerging American national polity.” (footnote and citation omitted)).

Constitution? Not only was the Constitution silent on that point, but through the antebellum period there was a “lively and inconclusive debate over whether the Constitution permitted states to secede.”²⁰¹ The argument developed in this Part offers a post hoc functional justification for this silence: the Framers did not need to rely on “parchment” prohibitions to attain structural design goals.²⁰² Instead, institutional design might have generated the appropriate incentives and produced a stable equilibrium. Reliance on textual rigidity to deter secession thus coheres with the indirect, structural strategies deployed elsewhere in the Constitution to mitigate systemic risks.

Second, the several states, as of 1787, hardly had the robust national institutions of the kind then observed in Europe. To the contrary, a central aim of the new Constitution was the creation of national institutions backed by cooperative investments that would produce much-needed public goods in greater quantities than the Articles of Confederation. Hence, in describing the impulse for a new constitutional framework James Madison diagnosed a “[w]ant of concert in matters where common interest requires it” in the pre-1787 confederation, a “defect . . . strongly illustrated in the state of our commercial affairs.”²⁰³ He attributed this lacuna to “the perverseness of particular States whose concurrence is necessary.”²⁰⁴ States’ opportunism, Madison suggested, induced a dearth of cooperative investments in national institutions with public-good characteristics.

Consistent with Madison’s concerns, members of the Philadelphia Convention arrived with the shared “recogn[ition] that the actions of individually rational states produced irrational results for the nation as a whole.”²⁰⁵

²⁰¹ David A. Strauss, *The New Textualism in Constitutional Law*, 66 GEO. WASH. L. REV. 1153, 1155 (1998).

²⁰² See THE FEDERALIST NO. 48, at 309 (James Madison) (I. Kramnick ed., 1987) (arguing that the efficacy of “parchment barriers” were overrated in mitigating the “encroaching spirit of power”).

²⁰³ James Madison, *Vices of the Political System of the United States (Apr. 1787)*, in JAMES MADISON: WRITINGS 69, 71 (Jack N. Rakove ed., 1999).

²⁰⁴ *Id.*

²⁰⁵ Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 117 (2010). Recent originalist accounts of the Founding emphasize that the early constitutional framework had a public good character to it. See, e.g., AMAR, AMERICA’S CONSTITUTION, *supra* note 32, at 44-46 (emphasizing the *Federalist Papers*’ focus on common defense and trade goals); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 23 (2010) (noting Congress’s “power to regulate interactions or affairs among the several states” was motivated by collective action problems and spillover effects). However, according to one recent account, subsequent Supreme Court jurisprudence has distinguished between those collective action problems resulting from economic externalities and those flowing from political externalities. Leslie Meltzer Henry & Maxwell L. Stearns, *Commerce Games and the Individual Mandate*, 100 GEO. L.J. 1117, 1121 (2012). I have elsewhere argued against the utility of collective

Recalcitrance of the states, as noted above, had already imperiled the nascent union. During the Revolutionary War, the requisitions system through which the Continental Congress funded military efforts sometimes yielded only thirty-seven percent of the monies sought,²⁰⁶ with compliance dropping to twenty-five percent at the end of hostilities.²⁰⁷ The Confederation's ongoing inability to service foreign and domestic debts also posed a direct risk to sovereignty, since it rendered the national government incapable of responding to great power threats like Spain's closure of the Mississippi River and New Orleans, or to foreign policy irritants, such as the Barbary pirates.²⁰⁸ These failures made the case for new national institutions all the more compelling.

In this context, the Philadelphia Convention drafted a Constitution that, unlike the Articles of Confederation, would elicit cooperative investments from the states to build new national institutions with public-good aspects such as "military defense," "a unified market for goods, capital, and labor,"²⁰⁹ a new system for federal taxation, and a new national financial system.²¹⁰ Mindful of the Articles' failure to elicit these goods, the Convention instructed the Committee of Detail to allow the power "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation."²¹¹ Taking these steps, the Framers anticipated that states would reap benefits that would dwarf their original contributions once the New Union had fostered a wide array of new institutions.

In sum, both preconditions for textual rigidity—oligopolistic political competition and infrastructural fragility—were present in the Founding Era. This distinct (and perhaps rare) combination of circumstances explains why textual rigidity may have been the right approach to the problem of stabilizing the U.S. Constitution.

action models of federalism. See Aziz Z. Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 STAN. L. REV. 217 (2014) (answering the eponymous question in the negative).

²⁰⁶ ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION 12, 14 tbl.1 (1993).

²⁰⁷ PAUL STUDENSKI & HERMAN E. KROOSS, FINANCIAL HISTORY OF THE UNITED STATES 37 (1963). Brown identifies a more general "breakdown of taxation by the states governments." BROWN, *supra* note 206, at 185.

²⁰⁸ BROWN, *supra* note 206, at 17-19.

²⁰⁹ Cooter & Siegel, *supra* note 205, at 140, 149.

²¹⁰ See BROWN, *supra* note 206, at 186 (emphasizing taxing power); STUDENSKI & KROOSS, *supra* note 207, at 39-41 (emphasizing taxing, borrowing, spending, and coinage powers).

²¹¹ RECORDS, *supra* note 28, at 131-32; accord Cooter & Siegel, *supra* note 193, at 123-24 (discussing Convention deliberations on Congress's commerce power).

2. Textual Rigidity as a Response to the Strategic Threat of Amendment

How then did textual rigidity respond to the problems that faced the Constitution's drafters? The mechanism has two elements. First, rigidity promotes constitution-specific investments by reducing the threat of an actor strategically employing the amendment power. Second, those investments, in turn, lock participants into the Constitution and thereby make secession more costly. To invoke Albert Hirschman's terminology again, limiting the strategic use of "voice" conduces to "loyalty," and then the prolonged exercise of "loyalty" raises the cost of exit.²¹² This subsection addresses the mechanism's first element, while the second element is examined in the following subsection.

A strategic request for amendment is one made for the purpose of exploiting other parties' postratification investment in relationship-specific assets. The goal in making such a request is to extract a greater share of the net surplus from a constitution-making endeavor. For example, imagine a Constitution that creates a legislative body whose members are elected in single-member districts.²¹³ Responding to the incentives created by that arrangement, a national-level interest group might invest heavily in local networks of candidates with close connections to the electorate rather than developing a nationally recognized brand. These investments would contribute to the public good of stable political competition, but they might also be vulnerable to the threat of strategic renegotiation. For example, an opposing interest group might press an amendment directing the use of a party-list proportional representation system. In the system described, such an amendment would undermine its competitor's investments, and, if the amendment were easy to achieve, the mere threat of such an amendment would elicit costly bargaining or even preclude investments in party infrastructure *ab initio*.

Other examples of hold-up can be imagined in the trade context. Imagine an interest group that contributes to the national government's investments in banking infrastructure but that also foregoes development of its own monetary institutions. Its investments would be imperiled by an amendment proposing limits on national monetary authority and a redistribution of such authority to the states. In this example, as with the foregoing, the easier the amendment is to achieve, the cheaper strategic invocation of the amendment power becomes.

²¹² Cf. HIRSCHMAN, *supra* note 19, at 120-21 (contrasting the use of voice and exit in firms and governments).

²¹³ In fact, this is the system the U.S. Constitution contemplates for the House of Representatives. U.S. CONST. art. I, § 2, cl. 3.

A strategic request for amendment need not focus on a point already crisply resolved in constitutional text. Provided that other parties have relationship-specific investments in the constitutional order, amendments can be used to redistribute surpluses between parties in the absence of a textual settlement. Consider the example of American slavery. The 1787 Constitution did not expressly prohibit or endorse slavery, although six of its provisions implicitly endorsed and protected the practice.²¹⁴ Arguments for the prohibition of slavery were vociferously pressed in the antebellum period.²¹⁵ It is telling that Congress's response was not to try to settle the matter by constitutional amendment or legislation. Instead, Congress installed a "gag rule," precluding debate on the matter,²¹⁶ and pursued territorial compromises that delayed any final reckoning.²¹⁷ Bracketing the profound moral questions raised by such deferrals, these legislative responses implicitly recognized that slavery presented questions then too divisive for national resolution. In the same light, the rigorosity of Article V and its focus on the slave trade,²¹⁸ can be construed as evidence that the Framers intimated the possibility that slavery could split apart the Union. By making it all but impossible to amend the Constitution with respect to slavery, the Framers delayed any resolution of the slavery question until the Union was sufficiently strong enough to survive that rupture.²¹⁹ Article V thus operated to preserve constitutional ambiguities as much as it protected elements of the constitutional deal set forth in clear text.²²⁰

²¹⁴ See WALDSTREICHER, *supra* note 111, at 101 (noting that the clauses relating to slavery "epitomized" the Constitution's "remarkable combination of precision and vagueness").

²¹⁵ See WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS 65-93* (1996) (describing the social movements behind anti-slavery petitioning).

²¹⁶ DON E. FEHRENBACHER, *SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE* 58 (1981).

²¹⁷ See LOUIS P. MASUR, *THE CIVIL WAR: A CONCISE HISTORY* 11-12 (2011) (examining the specifics of the Compromise of 1850); see also DAVID M. POTTER, *THE IMPENDING CRISIS, 1848-1861*, at 90-120 (1976) (detailing the negotiation of the compromise).

²¹⁸ Article V specifically states "that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article." U.S. CONST. art. V. Article V consequently operated to preserve the provision in Article I, Section 9, which precluded Congress from prohibiting the importation of slaves until 1808. U.S. CONST. art. I, § 9.

²¹⁹ This is a very narrowly defined view of success in constitutional design. Indeed, I cannot emphasize enough that my aim here is neither to endorse nor critique the Framers' approach. The question of how to grapple with slavery under conditions in which the institution has considerable political support, and where secession might have prolonged its evil effects, strikes me as a profoundly difficult one—and one well outside the scope of the current Article.

²²⁰ It is nevertheless debatable whether this balance succeeded on its own terms. The Compromise of 1850, which admitted California as a free state, upset the equilibrium between free and

In each of these examples, Article V operated like a no-modification rule in a private-law contract by effectively switching the parties' choice set from "adhere-modify-exit" to "adhere or exit." This alteration in the parties' options mitigated the risk of strategic amendment by making the expected payoff from such renegotiation much smaller *ex ante*. In this fashion, Article V took largely off the table an option that would have increased the risk of hold-up. The inability of parties to strategically amend both mitigated a reason not to ratify and removed a source of post-ratification inefficiency.

Taking modification off the table has a positive effect on constitutional stability *even assuming that exit remains a substantial possibility*. Parties that would engage in strategic hold-up by seeking constitutional amendment in light of others' asset-specific investments would not simply switch strategies in the face of a no-modification rule and threaten exit (so as to gain the same concessions). Amendment and exit are not fungible because constitutions are not comprised of single rules or even a single-digit number of rules. Rather, they typically bundle plural packages of "enabling rules and constraining rules together as a take-it-or-leave-it package."²²¹ All else being equal, it is likely that some sticks in the bundle benefit a party while other sticks impose undesirable constraints. By exiting, a party loses both the benefits and the burdens of a constitution because exit is an all-or-nothing decision.²²²

By contrast, renegotiation through amendment allows the same party to sort between the sticks of the constitutional bundle, choosing for disapproval only those measures it views as undesirable. As a result, in the ordinary course of events, renegotiation of the constitutional deal through amendment will be a far more attractive vehicle for strategic exploitation than wholesale exit. The former, but not the latter, allows a potential defector to select the parts of the constitutional bargain it finds beneficial. By taking modification off the table, textual rigidity leaves open only the more costly option of exit. At least in some class of cases, an interest group

slave states and did not resolve how slavery would be treated in the territories. To Southern politicians like John Calhoun, the Compromise destroyed "irretrievably the equilibrium between the two sections." MASUR, *supra* note 217, at 12.

²²¹ Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777, 806 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010)). In the United States, federal officials take an oath to defend the *whole* Constitution. See U.S. CONST. Art. VI, cl. 3.

²²² Cf. PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* 33 (2004) (exploring some of the effects of "lumpy" or "winner-take-all" political goods).

willing to game the amendment process will not chance the price of exit. Hence, once modification is off the table, exit does not pick up all the slack.

3. Subconstitutional Investments and the Risk of Exit

There is a second strand linking textual rigidity to constitutional survival. Beyond mitigating hold-up, textual obduracy also dampens the allure of exit. The link between rigidity and the mitigation of exit risk is not direct. It is mediated through subconstitutional institutions—institutions that necessarily emerge as part of the downstream functioning of a constitutional framework, rather than from the text or through amendment.²²³ Such institutions are needed to produce the public goods that justify a constitution's creation, such as peaceful political competition, economic growth, and national security. Two specific examples of such goods include a political party system and a fiscal infrastructure.

Textual rigidity enables the creation of such subconstitutional institutions, because parties to the constitution would not contribute to these institutions without assurances against hold-up. But the new institutional ecosystem also has independent causal effect, because it both fixes those same parties' investments in an asset-specific form and also enmeshes the parties in the constitutional order. If those parties exit the constitution, they will lose the tailored resources, knowledge, and skills they previously invested in the new institutional ecosystem. In this way, institutions enabled by textual rigidity foster tighter lock-in to the underlying constitution and diminish resistance to cooperative investments. This adds up to a virtuous circle—a set of “self-reinforcing processes that make reversals increasingly unattractive.”²²⁴

This virtuous-circle mechanism is grounded on the assumption that constitutions not only establish basic governance frameworks, but also “induce[] the development of economic and political organizations.”²²⁵ A new

²²³ My use of the term “institutions” here is a loose one, and at odds with at least one leading work. According to Douglass North, “[i]nstitutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction.” DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990). By contrast, “[o]rganizations are created to take advantages of th[e] opportunities” institutions create. *Id.* at 7. Here, I often discuss “organizations” in North’s sense of the word, but, at least in this context, I find his terminology potentially confusing. Thus, I use the term “institutions” in its more colloquial sense.

²²⁴ PIERSON, *supra* note 222, at 35. For an interesting example of another self-reinforcing process of political stabiliztion mediated through norms, rather than via third-party enforcement, see the discussion of Russian integration in Estonia in Avner Greif & David D. Laitin, *A Theory of Endogenous Institutional Change*, 98 AM. POL. SCI. REV. 633, 647 (2004).

²²⁵ NORTH, *supra* note 223, at 8.

ecosystem of parties, institutions, and networks is necessary for realizing welfare gains inherent in the incomplete constitutional bargain. In their absence, a new constitutional framework would be a dead letter, and sought-after public goods would never materialize. The necessary institutional ecosystem, however, need not be memorialized in a constitution's text. To the contrary, new parties, institutions, and networks may take an exclusively subconstitutional form, as they have in the United States.

Despite its "subconstitutional" character, in that it is not located in text, a new institutional ecosystem will inevitably develop along a path tailored specifically to a particular constitution's topography. For example, elections create incentives to organize campaigns for political office in specific ways in certain geographic jurisdictions.²²⁶ The fiscal infrastructure of a new constitution will also induce distinctive patterns of investment and commercial activity, not least by restricting or expanding the expected supply of credit. And by resolving public-good problems that impede certain channels of internal commerce and external trade, a newly constituted government may encourage investment in some trading relationships over others.²²⁷

This asset-specific infrastructure for the production of public goods has the effect of making a pivotal party's exit from a constitution less likely. Such infrastructure has value, in large part, because it fits tightly within a particular constitution's text, but would have "far less value under alternative institutional arrangements."²²⁸ For example, a political party would cease to be tailored if fundamental parameters of the voting system were to change, which could occur if local connections were to become more important than national profiles. Trade relationships with another country would cease to have as much value if one's home country were to go to war with that other nation. Currency would become worthless without a central bank that backs it. The asset specificity of cooperative investments raises the exit costs for

²²⁶ See, e.g., William H. Riker, *The Two-Party System and Duverger's Law: An Essay on the History of Political Science*, 76 AM. POL. SCI. REV. 753, 755 (1982) (discussing how "the constitutional definitions of winning [elections] have an effect on the parties thereby generated," such as how plurality voting tends to give rise to a two-party system).

²²⁷ NORTH, *supra* note 223, at 77 ("The kinds of information and knowledge required by the entrepreneur are in good part a consequence of a particular institutional context.")

²²⁸ PIERSON, *supra* note 223, at 149; cf. NORTH, *supra* note 223, at 7 (stating that "lock-in . . . comes from the symbiotic relationship" between a general framework and specific entities that have adapted to that framework). For the point being made in reference to political institutions, see PIERSON, *supra* note 222, at 149 ("Individual politicians, political organizations such as parties, interest groups, and even ordinary citizens will, over time, develop assets that may be specific to a political institution (or set of institutions)."). For the same point being made in reference to commercial institutions, see Daron Acemoglu et al., *The Rise of Europe: Atlantic Trade, Institutional Change, and Economic Growth*, 95 AM. ECON. REV. 546, 562-63 (2005) (discussing how European commercial interests secured institutional reforms between 1500 and 1850).

parties to the constitution who have “invest[ed] in specialized skills, deepened relationships with other individuals and organizations, and developed particular political and social identities.”²²⁹ Over time, that is, the positive network externalities from learning and adapting to a particular political or commercial context²³⁰ and the correlative cost of switching to another institutional framework both grow.²³¹ The expected loss in value of cooperative investments becomes, in effect, a tax upon exit from the constitution. As this exit tax grows over time, parties can be increasingly confident that their investments will not be deployed against them. Confidence thus induces investment, which in turn fosters greater confidence.

While perhaps small at a constitution’s inception, this lock-in effect grows over time through the operation of a positive feedback mechanism.²³² In the long term, that process tends to generate “massive increasing returns” on an initial investment.²³³ Under these conditions, participants in a constitutional system likely develop “[a]daptive expectations . . . because increased prevalence of contracting based on a specific institution will reduce uncertainties about the permanence of that rule.”²³⁴ These expectations then further entrench the constitution,²³⁵ deepening the effect of the virtuous circle mechanism.

²²⁹ PIERSON, *supra* note 223, at 35.

²³⁰ See NORTH, *supra* note 224, at 95 (identifying “significant learning effects for organizations that arise in consequence of the opportunity set provided by [an] institutional framework”); PIERSON, *supra* note 222, at 24 (“Knowledge gained in the operation of complex systems also leads to higher returns from continuing use.”).

²³¹ See Peter Alexis Gourevitch, *The Governance Problem in International Relations* (“Where investments in the specific assets of an institution are high, actors will find the cost of any institutional change that endangers these assets to be quite high; indeed, actors in this situation may be reluctant to run risks of any change at all.”), in STRATEGIC CHOICE AND INTERNATIONAL RELATIONS 137, 144 (David A. Lake & Robert Powell eds., 1999).

²³² See, e.g., Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitments*, 124 HARV. L. REV. 657, 687 (2011) (describing “[s]tructures and processes of political decisionmaking, as well as particular policy outcomes, [that] often reshape politics in ways that increase support for the institutions themselves” as mechanisms of “positive political feedback” (emphasis omitted)).

²³³ NORTH, *supra* note 223, at 95.

²³⁴ *Id.*

²³⁵ Moreover, the sheer complexity of the institutional system, with different rules, exceptions, and standards develop to the advantage of one or another interest group, and grow over time, further increasing systemic stability.

4. Subconstitutional Institutions with Lock-In Effects in the Early Republic

Through the parsimonious text of the 1787 Constitution, the Framers “sought to create a set of political institutions and to empower those institutions to deal creatively with ongoing developments . . . [through means] outside the Constitution” itself.²³⁶ In this subsection, I offer two case studies to support the causal mechanism proposed here—political parties and the national financial infrastructure that coalesced around the Bank of the United States. I focus on institutions that emerged at the beginning of the Republic because it is during the first few decades that textual rigidity was most likely to be useful.²³⁷ My claim here is that both of these subconstitutional institutions can be plausibly understood as having been enabled by textual rigidity. In both cases, I am willing to concede that there is a nonfrivolous argument that the institutional innovation might be viewed as one that demanded a formal amendment, which in practice was unavailable due to Article V. At the same time, Article V stabilized expectations in a way that made possible the practical investments that allowed parties and banks to develop as subconstitutional adaptations, rather than as additions to the 1787 text.

a. *National Political Parties*

Consider first the evolution of the early Republic’s national political party system. This system was tailored to the 1787 constitutional order. It also yielded increasing stability-related returns up through the late 1810s. To be sure, the party system underwent transformation after the War of 1812, and then collapsed in the late 1850s, opening the road to secession and the Civil War.²³⁸ For my limited purposes, it suffices to show that the first party system was the kind of stabilizing cooperative investment enabled by constitutional rigidity, and that it promoted stability in the first two high-risk decades of the early Republic.

The architects of the 1787 Constitution famously “did not believe in political parties as such” and instead “had a keen terror of party spirit and its

²³⁶ Young, *supra* note 21, at 456.

²³⁷ At the same time, I do not mean to imply that these are the only such virtuously entrenching institutions.

²³⁸ For a brief recap of this history, see DEAN MCSWEENEY & JOHN ZVESPER, AMERICAN POLITICAL PARTIES: THE FORMATION, DECLINE, AND REFORM OF THE AMERICAN PARTY SYSTEM 13-21 (1991).

evil consequences.”²³⁹ Early federal candidates believed it dishonorable to campaign actively for office, and so turnout in federal elections tended to be small.²⁴⁰ Yet by September 1792, James Madison could write that national political parties were “natural to most political societies”²⁴¹ and, by the Second Congress, “most officeholders could be identified as Federalists or (Jeffersonian) Republicans.”²⁴² Although these new political formations did not entirely resemble today’s political parties²⁴³ and kept their distance from the more grassroots Democratic-Republican societies of the day,²⁴⁴ they were still characterized by “a comprehensive and common ideology.”²⁴⁵

This two-party system was tightly fitted to the specifics of the 1787 constitutional framework in both etiology and form. At its origin, the party system was “largely a[n] alliance between . . . elites” in the Philadelphia Convention.²⁴⁶ Recent empirical analysis of voting patterns in the Philadelphia Convention demonstrates that, by its close, “the interest constellations within the Convention” as revealed in patterns in voting coalitions “were similar to those that would exist in the newly settled political field,” so that “state [delegate] alignments forecasted the contours of the future party system.”²⁴⁷ Analysis of voting patterns in the 1789 Congress also reveal that early, pre-party-system votes were “highly unstable, shifting, and chaotic” as

²³⁹ RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1789–1840*, at viii (1970); *see also id.* at 52–53 (arguing the Framers relied not on the “mutual checks of political parties,” but on the “classic doctrine of separation of power” as sources of “liberty and stability”); *id.* at 64–73 (discussing *Federalist No. 10* as a tract against parties); *accord* MCSWEENEY & ZVESPER, *supra* note 238, at 41 (discussing Madison’s arguments against factions in *Federalist No. 10* and how they informed his “case for [a] large and economically heterogeneous republic”).

²⁴⁰ GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, 158–60 (2009). Nor was the design that emerged from the Pennsylvania State House in the summer of 1787 friendly to populist democracy. *See* SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 32–33 (2005) (describing the “antidemocratic assumptions” of delegates to the Philadelphia Constitutional Convention).

²⁴¹ WOOD, *supra* note 240, at 161.

²⁴² JOHN H. ALDRICH, *WHY PARTIES? A SECOND LOOK* 79 (2011); *see also* WOOD, *supra* note 240, at 162 (discussing the rise of the (Jeffersonian) Republican Party and the emergence of “consistent voting blocs in the Congress” of 1793).

²⁴³ *See* ALDRICH, *supra* note 243, at 99 (detailing ways in which “these first parties fell far short of the modern political party”).

²⁴⁴ *See* WOOD, *supra* note 240, at 162–64 (describing the growth of these societies and noting that “elite leaders like Jefferson and Madison . . . tended to keep well clear of them”).

²⁴⁵ *Id.* at 172; *see also* WILENTZ, *supra* note 240, at 49 (noting the ideological coherence of the emerging Republican Party in the early 1790s).

²⁴⁶ WOOD, *supra* note 240, at 64.

²⁴⁷ Adam Slez & John Levi Martin, *Political Action and Party Formation in the United States Constitutional Convention*, 72 *AM. SOC. REV.* 42, 43 (2007).

a consequence of cycling-based instability.²⁴⁸ It may thus be that the push toward a two-party system was deepened by the need to mitigate cycling problems in the federal Congress,²⁴⁹ making the national party system a de facto adaptation to the Constitution's democratic mechanisms.

The first party system also had the effect of promoting political stability in the perilous first years of the Republic. Parties did not merely articulate popular concerns, they also "helped simultaneously to channel that discontent back into the system."²⁵⁰ As Larry Kramer notes, "[w]hen disgruntled citizens began murmuring about secession and civil war, party leaders were able to encourage them to turn to the polls"²⁵¹ During the sectional fracas over the Alien and Sedition Acts leaders of the new national parties in the other state legislatures ensured that the Virginia and Kentucky resolutions, which argued for the unconstitutionality of the Alien and Sedition Acts, had a limited destabilizing effect.²⁵² Even in the throes of the partisan crisis of the 1800 election, the party structures dampened proclivities to exit the constitutional order. Hence, Federalist letters and memoirs from the late 1790s evince "a basic predisposition . . . to accept a defeat, fairly administered, even in 1800 before that defeat was a certainty."²⁵³ That is, the Federalist network disseminated the view that electoral defeat was not an occasion for defection from the Constitution. At the same time, parties served as the vehicles for expressing "sectional interests" in a way that did not result in terminal instability.²⁵⁴ Consequently, political parties

²⁴⁸ ALDRICH, *supra* note 243, at 78. The observation that the use of a majority-vote rule by a collectivity to choose between more than two options will yield unstable outcomes absent some kind of agenda control was first made by the Marquis de Condorcet and formalized by Kenneth Arrow. See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 46-60 (2d ed. 1963) (providing general conditions under which the exercise of collective choices through majority-rule voting does not yield stable outcomes).

²⁴⁹ See generally Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 *PUB. CHOICE* 503, 507 (1981) (explaining how "institutional restrictions on the domain of exchange induce stability, not legislative exchange per se" (emphasis omitted)).

²⁵⁰ Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *COLUM. L. REV.* 215, 273 (2000); see also JOSEPH J. ELLIS, *AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC* 9 (2007) ("[The revolutionary generation] created political parties as institutionalized channels for ongoing debate, which eventually permitted dissent to be regarded not as a treasonable act, but as a legitimate voice in an endless argument.").

²⁵¹ Kramer, *supra* note 250, at 273.

²⁵² *Id.* at 275.

²⁵³ HOFSTADTER, *supra* note 239, at 130; see also *id.* at 141 (noting that the Federalist presence in the Senate and the judiciary may have mitigated the sting of a prospective defeat).

²⁵⁴ ELLIS, *supra* note 250, at 186. For evidence that this stabilization effect persists into the Second Party System, see JOHN F. BIBBY, *POLITICS, PARTIES, AND ELECTIONS IN AMERICA* 31 (4th ed. 2000).

locked in powerful interest groups through investments in assets specific to the 1787 Constitution—assets that, over time, delivered political stability at an otherwise uncertain moment for the nation.²⁵⁵

b. *The Bank of the United States*

At first blush, the Bank of the United States seems an unpromising candidate for the positive feedback effects of textual rigidity. The Bank was first established in 1791 over a chorus of constitutional criticisms, and its charter expired twenty years later without immediate renewal.²⁵⁶ The Second Bank, chartered in 1816, saw its renewal legislation vetoed by President Jackson in 1832.²⁵⁷ But both the 1816 and the 1836 dissolutions of the Bank triggered runs on state banks, suspensions of their operation, and national financial crises.²⁵⁸ Rather than suggesting superfluity, these consequences of the Bank's dissolution point to its pivotal role in the new nation's "modern financial system,"²⁵⁹ a system that enabled "history's most successful emerging market, attracting the capital or investors in older nations seeking higher returns."²⁶⁰ The Bank, like national political parties, was thus a post-ratification institutional innovation, created within the new constitutional framework—and one that proved essential to the survival of the new constitutional order. By fostering a robust internal economy, even as frictions with foreign powers limited the growth of external trade,²⁶¹ the Bank locked in states and important interest groups into a growing *American* economy (and therefore the American Constitution) well capable of surviving the financial contractions of 1812 and 1836.

At the time of Bank opened in December 1791, only five other banks existed in the United States.²⁶² The new Bank, Hamilton predicted, would

²⁵⁵ At the same time, the rise of parties likely exacerbated the electoral crisis of 1800. See Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 582-87 (2004) (discussing how the Constitution's electoral system failed to properly function in 1800 upon the emergence of national political parties). This shows how institutions can have complex, even partially offsetting, effects on constitutional survival.

²⁵⁶ The best history of the Bank remains BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 114-43, 197-450 (1957); see also Hugh Rockoff, *Banking and Finance, 1789-1914*, in 2 THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES 645, 646-50 (Stanley L. Engerman & Robert E. Gallman eds., 2000).

²⁵⁷ HAMMOND, *supra* note 256, at 405.

²⁵⁸ STUDENSKI & KROOSS, *supra* note 207, at 19, 110.

²⁵⁹ WOOD, *supra* note 240, at 298.

²⁶⁰ Peter L. Rousseau & Richard Sylla, *Emerging Financial Markets and Early U.S. Growth*, 42 EXPLORATIONS IN ECON. HIST. 1, 20-21 (2005).

²⁶¹ HAMMOND, *supra* note 257, at 148.

²⁶² *Id.* at 128.

increase the money supply through its emission of noninflationary paper currency, lower the cost of government borrowing, and facilitate the payment and collection of taxes.²⁶³ In assuming the debt of the several states, and consequently assuring bondholders of a reliable interest stream, the Bank would “liberate the country’s commercial energy by yoking high finance to national projects.”²⁶⁴

Yet Hamilton failed to predict perhaps the most important policy consequence of creating the Bank. On account of being the largest transactor in the money market, the main government fiscal depository, and a general creditor of other banks, the Bank “automatically exercised a general restraint upon the banking system” and effectively established “central bank control of credit.”²⁶⁵ Apart from competing with local banks, the Bank acted as their “constant regulator” by dint of its collection of balances due from local banks.²⁶⁶ The Bank’s dissolution in 1812 only revealed the Treasury’s “need” for a central bank, “not merely to lend it money but to marshal the banking system” and to maintain a credible currency.²⁶⁷ The Bank’s dissolution not only generated new interstate frictions as banks declined to lend across state lines,²⁶⁸ with the looming British invasion, but also proved near “disastrous for the war effort.”²⁶⁹

The Bank fit both criteria for a subconstitutional institution with lock-in effects. First, it was a costly innovation tightly configured to the specifics of the new Constitution, one that required expenditure of much political capital to establish.²⁷⁰ A more flexible constitutional amendment regime, which would have enabled less costly modifications of the Bank’s structure and simpler defaults on creditors, may have impeded the expenditure of that political capital. The Bank also generated a welfare surplus by providing a fiscal infrastructure for the federal government.²⁷¹ And, despite some

²⁶³ STUDENSKI & KROOSS, *supra* note 207, at 60.

²⁶⁴ WILLIAM HOGELAND, *FOUNDING FINANCE: HOW DEBT, SPECULATION, FORECLOSURES, PROTESTS, AND CRACKDOWNS MADE US A NATION* 161 (2012).

²⁶⁵ HAMMOND, *supra* note 257, at 198-99; *accord* STUDENSKI & KROOSS, *supra* note 207, at 72 (“The Bank had cooperated closely with the Treasury in attempting to stabilize the money market and protect the banking system.”).

²⁶⁶ HAMMOND, *supra* note 257, at 200.

²⁶⁷ *Id.* at 230; *accord* STUDENSKI & KROOSS, *supra* note 207, at 72-73 (describing the “profound repercussions on the economy” of the 1811 refusal to reauthorize).

²⁶⁸ STUDENSKI & KROOSS, *supra* note 207, at 80.

²⁶⁹ WOOD, *supra* note 240, at 673.

²⁷⁰ In particular, debate within the executive branch was fierce. *See* HAMMOND, *supra* note 257, at 114-18 (describing enactment history and debates within the Washington Administration).

²⁷¹ *See id.* at 208 (“The Bank acted as fiscal agent of the Treasury: it effected payments of interest on the public debt, at home and abroad; . . . it moderated the outflow of specie; and it supplied bullion and foreign coins to the Mint.”).

opposition from state banks, its central bank function enabled the growth of state banking.²⁷²

Second, the Bank, had lock-in effects notwithstanding its two dissolutions. Most obviously, the Bank's initial subscriptions induced fiscal investments by key members of the political class.²⁷³ This had the effect of giving a large number of key political actors a stake in the federal government's success.²⁷⁴ More subtly, the Bank grew the supply of national credit,²⁷⁵ and thereby fostered an internal market that tangled together interests across the several states.²⁷⁶ Without the expansion of credit enabled by the First Bank, it is at least arguable that American "society could never have commercialized as rapidly as it did."²⁷⁷ To be sure, not every decision by the Bank was correct and beneficial to the national economy.²⁷⁸ Yet on balance, it seems fair to label the Bank as a rigidity-enabled instrument of entanglement that promoted stabilization in the early Republic.

C. *Anchoring a Constitution in Cooperative Institutions*

This Part has identified two causal mechanisms by which textual rigidity promotes a constitution's survival: (1) by mitigating hold-ups, and (2) by inducing virtuous circles of investment and confidence-accretion. Despite the Framers' inchoate comprehension of a constitutional amendment's dynamic consequences, there is some evidence that Article V in fact had both effects in the key period of the early Republic. These mechanisms

²⁷² *Id.* at 198-99. The Second Bank was instrumental in ending state bank runs and suspensions triggered by the dissolution of the First Bank. *Id.* at 246-47. It is no small irony that those same state banks resented the Bank's enabling constraints and "from the beginning . . . sought to weaken or destroy it." WOOD, *supra* note 240, at 294.

²⁷³ A third of the sitting members of Congress and the state of New York were part of the Bank's first subscription. HAMMOND, *supra* note 257, at 123.

²⁷⁴ *See id.* at 206 (highlighting President Jefferson's concern that that the Bank held America under its "vassalage" through its numerous politician-stockholders).

²⁷⁵ *See* STUDENSKI & KROOSS, *supra* note 207, at 107 ("The Federal government [i.e., the Bank] . . . encouraged the inflationary expansion of state banks by accepting their notes in payment for public lands and by building up their reserves through the deposit of public moneys."); *accord* Rockoff, *supra* note 257, at 647 (commending the First Bank's practices for "helping to eliminate unsound banking").

²⁷⁶ *See* DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at 144 (2007) ("By 1819, economic relations had become strongly interconnected . . .").

²⁷⁷ WOOD, *supra* note 240, at 297. Wood here is referring to the growth of state banks, but my point is that the growth in effective state banking would not have been possible without the central banking function served by the Bank of the United States. *Cf.* HAMMOND, *supra* note 257, at 246-47 (describing how the Second Bank kickstarted the credit system in 1816).

²⁷⁸ *See, e.g.,* HOWE, *supra* note 276, at 142-43 (noting how the Second Bank's 1819 credit contraction deepened a financial crisis).

diverge from the dominant accounts of constitutional survival canvassed in Section I.B., which focus more on a need for “enforcers” drawn from “the opposition” or “the citizenry.”²⁷⁹ On the latter view, the central problem of constitutional rule is defection, and constitutions persist when they succeed in lowering an enforcer’s cost of detecting, preventing, and correcting defections by others.²⁸⁰ This view focuses on the question of how to minimize the costs of enforcement.²⁸¹ It also leads to a concern for how constitutional text can serve as a “focal point” to “narrow[] the range of disagreement[s],” thereby lowering the costs of coordinating opposition to constitutional breaches.²⁸²

By contrast, the mechanisms presented in this Part focus on the incentives that a constitution creates for parties to comply with the document, in the absence of third-party enforcement. This is consistent with private-contracting dynamics, where deals abound even when enforcement fails as a

²⁷⁹ ELKINS ET AL., *supra* note 1, at 76; accord Peter C. Ordeshook, *Constitutional Stability*, 3 CONST. POL. ECON. 137, 143 (1992) (concluding that the “most important problem” in constitutional design is “how such a contract is enforced”).

²⁸⁰ See Mittal & Weingast, *supra* note 123, at 279 (discussing how constitutions may limit the extra-constitutional actions of citizens who feel that changes in public policy threaten their livelihoods); accord Sutter, *supra* note 13, at 139-40 (focusing on limiting defection risk). North and Weingast’s famous account of the 1688 Glorious Revolution in England places its emphasis on a similar theme. Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 817-19 (1989). They argue that the revolutionary settlement created a “self-enforcing” arrangement in which Parliament could check the monarch by vetoing “major changes in polic[y],” while Parliament was itself constrained by its internal collective action costs, the libertarian bent of the governing Whigs, and “a politically independent judiciary.” *Id.* This is in essence a claim about the mutuality of potential constitutional enforcement.

²⁸¹ See ELKINS ET AL., *supra* note 1, at 78-80, 88-90 (developing a theoretical account of constitutional endurance based on the active participation of interest groups in policing a constitutional bargain).

²⁸² Strauss, *Common Law*, *supra* note 6, at 912-13; accord Mittal & Weingast, *supra* note 123, at 284 (“When citizens fail to act in concert . . . leaders can exploit these differences . . .”); Sutter, *supra* note 13, at 145 (describing constitutional enforcement as a public good and identifying free-rider and monitoring problems related to enforcement); see also Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 246 (1997) (arguing that political “pacts” underpinning democracy “create a focal solution that resolves the coordination dilemmas confronting elites and citizens”). Constitutional texts enable coordination because they provide “common knowledge,” which is essential to any form of social cooperation. MICHAEL SUK-YOUNG CHWE, RATIONAL RITUAL: CULTURE, COORDINATION, AND COMMON KNOWLEDGE 7 (2001). “Constitutional focal points” also “define appropriate bounds on governments and rights of citizens” and induce enforcement, provided that citizens believe themselves better off with those rules than without. Weingast, *Designing Constitutional Stability*, *supra* note 88, at 352-53.

result of “the dynamics of interactions” generating “mutually built assets of value to either party.”²⁸³

III. REVISITING THE PUZZLES OF ARTICLE V

This Part reconsiders the positive and normative puzzles identified in Part I in light of Part II’s proposed causal link between textual rigidity and constitutional survival. To begin with, I return to the question of why the U.S. Constitution’s survival seems so anomalous in comparison to foreign constitutions. The first Section of this Part thus reconsiders the question of why rigid constitutions are so rare from a global perspective. Next, I reconsider the normative critiques of Article V. I suggest that accounting for the function of textual rigidity casts these critiques in a fresh light. Finally, I press further on the normative implications of the analysis here by suggesting it illuminates ongoing debates about the legitimacy of both judicial review generally and methods of constitutional interpretation specifically.

A. *The Infrequency of Rigid Constitutions*

If my arguments in Part II respecting the U.S. Constitution have any purchase, they ought to provoke some puzzlement among students of comparative constitutionalism: if rigidity promotes constitutional survival in the manner suggested by Part II, why does comparative epidemiological analysis of constitutional survival suggest that it so often fails?²⁸⁴ That is, why is the United States an outlier? There are two reasons for the dearth of observable successful rigid constitutions beyond U.S. borders. These reasons explain respectively why rigidity will not always be an appropriate design choice and, even when it is warranted, why rigidity still often fails. In tandem, I contend, these reasons plausibly account for the infrequency of textual rigidity in durable constitutions across the world.

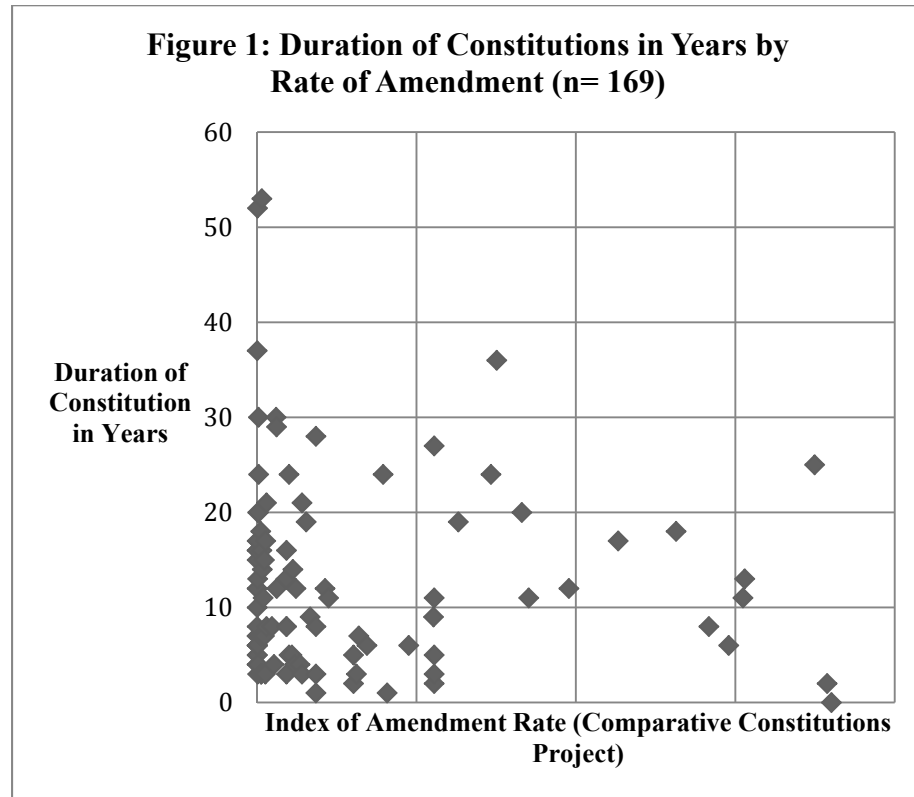
To begin with, it is worth emphasizing again the rarity of rigid constitutions akin to the U.S. Constitution. Figure 1 below plots data for 169 constitutions derived from the Comparative Constitutions Project (CCP)

²⁸³ Éric Brousseau, *Contracts: From Bilateral Sets of Incentives to the Multi-Level Governance of Relations*, in *NEW INSTITUTIONAL ECONOMICS: A GUIDEBOOK* 37, 57 (É. Brousseau & J. Glachant eds., 2008). This is the familiar point from game theory that a cooperative game that is not stable if played only once can be stable in circumstances of repeat play because of the present-discounted value of the stream of expected future benefits. Thierry Pénard, *Game Theory and Institutions*, in *NEW INSTITUTIONAL ECONOMICS*, *supra* at 170-71.

²⁸⁴ See *supra* Section I.A.

database.²⁸⁵ The *y*-axis shows the duration of the constitution.²⁸⁶ The *x*-axis records the rate of amendment as calculated by the CCP. Data for the 169 least-amended documents (up to and including the U.S. Constitution) is presented.²⁸⁷ The resulting scatter plot can be understood as snapshot estimating how likely rigid constitutions are to survive.

Figure 1: Duration in Years of Rigid Constitutions (n=169)



²⁸⁵ COMPARATIVE CONSTITUTION PROJECT, <http://www.comparativeconstitutionsproject.org> (last visited March 22, 2014). I am grateful to Tom Ginsburg for providing this data.

²⁸⁶ Because the publicly available part of the database does not specify duration data for surviving constitutions, the U.S. Constitution does not appear in Figure 1.

²⁸⁷ To this end, I use the “amendment rate” variable in the database. Descriptive statistics for this variable are presented at ELKINS ET AL., *supra* note 1, at 226 tbl.A4.

This data suggests that, at least within the pool of rigid constitutions, the odds of endurance are low. Only two constitutions in the sample proved relatively durable: the Bhutanese Constitution of 1953 (52 years) and the El Salvadorian Constitution of 1886 (53 years). Lifespans akin to that of the U.S. Constitution are relatively rare. No other clear trend emerges immediately from the data. This suggests that much more granular analysis using local information about specific nations' political and institutional circumstances is needed to identify the causal forces at work. The CCP database, however, does not contain that data at present.

The analysis of Part II, nevertheless, points to two reasons why rigid constitutions seem to rarely persist in the fashion of the U.S. Constitution. The first reason for rigidity's infrequency was intimated at the opening of Part II: textual rigidity is a response to the specific contracting problem of hold-up. It is not a general solution to the problems of constitutional survival.²⁸⁸ As previously mentioned, not all constitutional drafters need to be concerned about hold-up. They need not be concerned, for example, if robust national institutions already exist. Hence, constitution-makers in post-Soviet Eastern Europe did not need rigidity they already possessed many necessary state institutions, aside from the potential fiscal and epistemic aid from their western European counterparts.²⁸⁹ Further, there is no reason to focus on hold-up concerns if there is no set of robust political competitors who might readily unsettle the constitutional order. Only when neither robust institutions nor oligopolistic political competition is present does textual rigidity have potential utility. Hence, if there is no large set of cases in which both these factors are absent—as the data in Figure 1 suggests—constitution-makers would be wise to view textual flexibility with skepticism.

The second reason for rigidity's rarity is that textual inflexibility is a risky strategy for producing constitutional stability. Close attention to the mechanisms identified in Part II suggests that the success of a rigid constitution will turn disproportionately on decisions made by the first wave of postenactment interest groups and factions. Interest groups in this period

²⁸⁸ The failure of the Articles of Confederations, which required unanimity for amendments, suggests that rigidity can also induce failure when a constitution fails to provide space for subconstitutional institutions or is poorly designed. Given that both the Articles and the 1787 Constitution are rigid, it is not plausible to ascribe the former's failure solely to its inflexibility. The documents' contents and enactment politics, not merely the amendment processes, mattered greatly.

²⁸⁹ See generally Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447 (1991) (examining the constitution-making enterprise of Post-Soviet Bloc countries through a comparative lens).

have two potential strategies in response to a rigid constitution. First, they can make cooperative investments, which will have increasing welfare returns and will embed interest groups into a specific constitutional framework over time. Second, because rigidity merely mitigates the risk of hold-up and does not eliminate it entirely, risk-averse interest groups confronting a new constitution may also decline to invest entirely. The sharply dichotomous character of this election implies that small changes in behavior and judgment immediately following a constitution's ratification will have large effects on its downstream chances for survival. Because they are highly sensitive to small, early-stage decisions, rigidity-based mechanisms of constitutional survival are likely to have ex ante a "knife-edged" quality. "Everything hinges on a single threshold determination"—to invest or not to invest?—with large, irreversible downstream consequences.²⁹⁰ The chances of success may be finely balanced, with small changes cascading into large differences in long-term payoffs. When a pool of rigid constitutions is observed ex post, it is likely that some cases will fall on either side of the knife's edge.

This knife-edge quality of rigidity-based mechanisms is intertwined with the path-dependent nature of early constitutional development. In path-dependent processes, "large consequences may result from relatively 'small' or contingent events [and] particular courses of action, once introduced, can be virtually impossible to reverse" as a result of feedback mechanisms that entrench certain features of the status quo.²⁹¹ In constitutional development under a rigid amendment rule, "many alternatives are possible at the early stages," with the choice turning on seemingly small decisions, but after those decisions are made, "the path will be 'locked in.'"²⁹² How those early decisions will turn out in any given case is hard to predict. The decision to invest in a new constitution will depend on "random" effects,²⁹³ such as the personalities of relevant political agents, accidents of historical circumstances, and other factors outside the constitutional designers capacity to predict or control. Sometimes, as with the Articles of Confederation, these

²⁹⁰ Adrian Vermeule, *Holmes on Emergencies*, 61 STAN. L. REV. 163, 199 (2008).

²⁹¹ PIERSON, *supra* note 222, at 18-19; *see also* ROBERT JERVIS, SYSTEM EFFECTS: COMPLEXITY IN POLITICAL AND SOCIAL LIFE 155-61 (1997) (discussing positive feedback and path dependence); NORTH, *supra* note 223, at 93-94 (developing the idea of path dependency). Path dependency comes in two flavors: It can arise due to "self-reinforcing sequences" of the kind described in Part II, or it can occur because of a "reactive sequence," which is a "chai[n] of temporally ordered and causally connected events." James Mahoney, *Path Dependence in Historical Sociology*, 29 THEORY & SOC. 507, 508-09 (2000).

²⁹² JERVIS, *supra* note 291, at 156.

²⁹³ PIERSON, *supra* note 222, at 18.

factors will not converge to produce constitutional endurance. This large sensitivity to randomly distributed exogenous stresses—the “importance of contingency”²⁹⁴—gives the appearance that a constitution’s fate rests on a knife’s edge in its early stages.²⁹⁵ Ex ante, survival is hard to predict or guarantee; ex post, the pattern of failures and successes can seem arbitrary.²⁹⁶

The knife-edge quality of path-dependent processes may be compounded in the case of rigidity-induced constitutional stability by a further dynamic. In most cases, the post-enactment game is not binary. Cooperatively produced public goods, such as new political or economic institutions, may require the participation of many actors. As a result, these institutions may be “step goods” that “will be produced only if enough members . . . of the group contribute.”²⁹⁷ Given the “strongly complementary” nature of contributions to step goods,²⁹⁸ potential contributors may not come forward unless they know or expect participation from most, if not all, other potential contributors. For example, each state only wanted to ratify the 1787 Constitution if a sufficient number of other states did the same.²⁹⁹ At the same time, perfect contributory behavior was not needed. Hence, the decisions of North Carolina and Rhode Island not to ratify at first did not undermine the Constitution from going into operation in September

²⁹⁴ JERVIS, *supra* note 291, at 156.

²⁹⁵ See also Drew Fudenberg & David K. Levine, *Continuous Time Limits of Repeated Games with Imperfect Public Monitoring*, 10 REV. ECON. DYNAMICS 173, 174-75 (2007) (describing path-creating effects of knife-edged decisions).

²⁹⁶ Cf. NORTH, *supra* note 223, at 98-99 (“Path dependency . . . is not a story of inevitability in which the past neatly predicts the future.”). Indeed, for these reasons, path-dependent accounts are often parsed as more useful for explaining outliers, such as the U.S. Constitution, than for generating laws covering large sets of cases. See Mahoney, *supra* note 291, at 508 (“Substantive analyses of path-dependent sequences offer explanations for particular outcomes, often ‘deviant outcomes’ or instances of ‘exceptionalism.’”). One example of the importance of contingent and unexpected events in constitutional development concerns the contested 1800 election between Thomas Jefferson and John Adams. When that contest ended in a deadlock between Jefferson and Aaron Burr, the immediate cause was the Framers’ failure to “think through the full ramifications” of the Vice President’s office. Ackerman & Fontana, *supra* note 255, at 555. The impasse would have been worse had not the Framers, perhaps foolishly, entrusted the Chief Justice with counting the contested ballots. *Id.* at 626-29.

²⁹⁷ RUSSELL HARDIN, *COLLECTIVE ACTION* 55-59 (1982); see also THOMAS C. SCHELLING, *MICROMOTIVES AND MACROBEHAVIOR* 213-14 (1978) (giving examples of the collective action problem).

²⁹⁸ Lee Anne Fennell, *Lumpy Goods*, 160 U. PA. L. REV. 1955, 1957 (2012).

²⁹⁹ See, e.g., MAIER, *supra* note 36, at 124 (noting that even after four states had ratified, “the Constitution’s fate and the country’s future” hung in the balance).

1788.³⁰⁰ In cases of common contributions to step goods, the presence or absence of *common expectations* may make the difference between success and failure.³⁰¹ Common beliefs that others will contribute are conducive to a constitution's success, while a momentary and transient failure of political culture might undermine the whole constitutional project.

For all these reasons, constitutional design founded on textual rigidity is not for the faint of heart, even if circumstances are otherwise favorable to the use of rigidity. A rigid constitution's survival partly depends on events beyond a designer's control. After the fact, what may seem to be manifest destiny may better be understood as luck.³⁰²

B. *Revisiting and Revising the Normative Critiques of Article V*

The analysis, to this point, has offered a response to the puzzle of Article V. But recognizing the potential for a causal link between textual rigidity and constitutional survival may also cast new light on the normative critiques of Article V highlighted in Section I.C. Recall that the most forceful of these focus on Article V's countermajoritarian and "dead hand" consequences. However, condemnation of Article V on countermajoritarian grounds seems ironic once the survival-related benefits of rigidity are recognized. After all, a party can only complain about the dead hand's lingering grip if its constitution has actually survived long past its birth. Dead constitutions have no withering hold on democratic choice. In effect, critics who tender the countermajoritarian charge assume a baseline of constitutional survival to launch an attack on the very mechanism that produced such survival. The more appropriate comparison juxtaposes a world after a constitution's death with life under the rigid constitution. In

³⁰⁰ *Id.* at 428-30 (discussing the fact that North Carolina and Rhode Island had failed to ratify the 1787 Constitution on September 13, 1788, when "Congress formally announced that the Constitution had been ratified by the required number of states").

³⁰¹ HARDIN, *supra* note 297, at 58-59; *see also* SCHELLING, *supra* note 297, at 215-16 (noting the roles of both knowledge and expectations). On the other hand, recent work on collective choice has argued that a thin rationality generates sufficient reason to believe that others will contribute. Richard Tuck, for example, argues that "if I am faced with a situation where an accumulation of relatively small contributions eventually leads to the crossing of some threshold which I would welcome, then in general I have a good instrumental reason to make one of the contributions, assuming that enough other ones will be made." RICHARD TUCK, *FREE RIDING* 99, 102-03 (2008). Relevant to the circumstances of the 1787 Constitution, Tuck also argues quite persuasively that eighteenth- and nineteenth- century theorists would have perceived no individual reason to refrain from collaboration in the production of a collective good. *Id.* at 15.

³⁰² *Cf.* JERVIS, *supra* note 291, at 156 ("Looking back after the pattern is established, we may overestimate the degree of determinism involved.").

other words, criticism of Article V as countermajoritarian is at best debatable and at worst resting on a flawed (albeit implicit) baseline.

Yet the analysis developed in this Article also hints at a way of reworking the countermajoritarian critique of Article V. Rather than making an absolute claim about the deleterious consequences of textual rigidity, critics of Article V's vice-like grip might instead focus on the possibility that an optimal constitutional amendment rule is not time-invariant. As the empirical work of Ginsburg, Elkins, and Melton demonstrates, the risk of constitutional death looms largest in the first two decades of a constitution's life cycle and drops off considerably thereafter.³⁰³ This finding suggests the particular value of a design mechanism to dampen the risk of failure in those first two decades. I have argued that, at least in the American context, it is plausible that early-stage mortality risk was mitigated, in important part, by the textual rigidity fostered by Article V.

I have been careful thus far to specify that this justification only applies to an early period in the Constitution's history. Further, I have not claimed that a constitution's adult survival is assured when it survives its tempestuous adolescence. Rather, as constitutions age, they are threatened by different species of risk. In early periods, perhaps the most important risk is that parties will make insufficient investments in the new constitutional order or that they will defect. As Part II argued, constitutional rigidity provides one solution to these risks. But in later periods, the risk of defections or collective action problems will likely have diminished as parties become more entangled in a constitution-specific ecosystem of national institutions. In those later periods, perhaps the most important threat to constitutional survival is likely to emerge from the failure to adapt to changing social, economic, and geopolitical circumstances, or to respond to exogenous shocks such as economic crises, military confrontations, or natural disasters. Further, claims by constituencies originally excluded from the constitutional bargain may become more pressing—the cases of African-Americans and women being obvious examples in the American context—and hence more destabilizing with time.³⁰⁴ All else being equal, the case for adaption in the face of this second variety of risk grows over time. Political

³⁰³ ELKINS ET AL., *supra* note 1, at 131 (noting that mortality risk for constitutions peaks at age seventeen).

³⁰⁴ Schwartzberg, *supra* note 38, at 74-75 (making this point with respect to the Equal Rights Amendment). Schwartzberg's insightful work is a normative critique of supermajority rules. My project, by contrast, is not primarily normative, but concerned with ways in which constitutional design elicits stability in the face of certain distributions of political power and strategic behavior. Whereas she frames the claims of excluded constituencies as a matter of justice, here I treat them descriptively as merely extrinsic constraints on constitutional survival.

status quos at the time of ratification are unlikely to persist. The probability of salient exogenous shocks compounds over time. A constitution will not persist if it cannot adapt to industrialization, geostrategic shocks, or new kinds of security threats. Just as the risk of hold-ups and suboptimal investments diminishes, the cost of constitutional inflexibility rises. Rather than insufficient rigidity, the problem then becomes one of too much inflexibility.

This analysis has consequences for the optimal level of constitutional rigidity. It suggests an optimal constitutional amendment rule (at least in the American constitutional order) may not be static but may instead be temporally sensitive. The constitution would have high barriers to change in the early decades of a nation, followed by an erosion of those barriers as exogenous pressures on the nation-state accumulate. Accordingly, the Framers cannot be faulted for being countermajoritarian. However, they can be criticized for not including a two-speed amendatory process in their Constitution: rigid like Article V for the first few decades to absorb the shocks of adolescence, but malleable thereafter to adapt to new exogenous strains and the shocks of a nation's maturity. It is no response to say that such multi-speed amendment rules are hard to draft. Article V already imposes different barriers to textual amendments that concern the slave trade as well as certain elements of state sovereignty.³⁰⁵ So despite having drafting solutions on hand, the Framers just did not use them.

The problem with Article V, then, is not that it yielded too rigid a constitutional text. The problem is that it yielded too rigid a constitutional text *for too long*. What worked in the early Republic to address the peril of hold-up risks became increasingly dysfunctional in the fluid economic and geopolitical contexts of the late nineteenth, twentieth, and twenty-first centuries.

Nevertheless, it may be that later generations of Americans *did* create a multi-speed amendatory process that addressed the risk of hold-up in the Constitution's early days and also mitigated the risk of failure to adapt. I suggest Americans did this by slowly developing extratextual, and perhaps even extralegal, tools for amending the Constitution through statutes or judicial decisions. These tools were developed to address the risk of non-adaption in later periods after the value of textual rigidity decreased.

³⁰⁵ An interesting parallel can be drawn with syndicated credit facilities, which use a plurality of voting rules for distinct contractual questions in the context of long-term multi-party contracts. See *Leveraged Commentary & Data: A Guide to the U.S. Loan Market*, STANDARD & POOR'S, 20-21 (Sept. 2012), http://www.standardandpoors.com/spf/upload/Ratings_US/2012_Guide_To_US_Loan_Market.pdf (discussing the structure, purpose, and utilization of different voting rules). I am grateful to Tony Casey for discussion on this point.

From this perspective, it is possible to posit two discrete periods in American constitutional development: the first dominated by durability, and the second characterized by fluidity and change. Alternatively, a more nuanced vision of the Constitution could see it as subject to a gradually changing amendment rate evolving solely with the emergence of new extratextual methods of interpretation, super-statutes, and constitutional moments. Whatever view of the Constitution's evolution one takes, the central point I wish to emphasize here is the importance of change in the range of de facto amendment technologies over time, and, consequently, the rate of institutional development.

Viewing American constitutional history in this light yields some reason to cease fretting so much about the legitimacy of judicial review as a channel of constitutional change.³⁰⁶ The Framers may not have perceived the wisdom of a multi-speed amendatory process that distinguished between different moments in the post-ratification period. But successive generations of federal politicians and voters have realized the value of making their constitutional order more fluid as the principal threat to that order evolved. Over time, they have invented, and have come to accept as legitimate, an increasing range of mechanisms for extra-textual constitutional change ranging from bisectional compromises to landmark statutes to judicial review. All are means of adapting the 1787 settlement to new stresses, new challenges, and new realities.³⁰⁷ All are also products of subconstitutional institutions—the network of federal courts and a legislature operating in a robust national public sphere—rendered feasible by Article V—induced rigidity. The increasing plurality and inventiveness observed in the mechanisms of American constitutional change demonstrates that Article V enabled the creation of instruments of constitutional change that could supersede the text's seeming monopoly on such change. Moreover, that increasing heterogeneity of amendment mechanisms illuminates the wisdom of Americans, who, having secured the benefits of rigidity, then felt a need for more fluidity and found ways over time to bring it about notwithstanding the barriers imposed by Article V.

³⁰⁶ Much ink has been spilled expressing anxiety over judicial review. See, e.g., Raoul Berger, *Lawrence Church on the Scope of Judicial Review and Original Intention*, 70 N.C. L. REV. 113, 132-33 (1991) (“‘Cumbersomeness’ affords no dispensation to the judiciary to ignore the Article V reservation of amendment to the people.”). For a more recent, and more subtle, version of the same argument, positing that judicial refusal to overrule incorrect precedent constitutes an illegal entrenchment of constitutional change, see Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 20 (2011).

³⁰⁷ See *supra* subsection I.B.2.

The potentially dire counterfactual to this story of institutional evolution merits emphasis. Had politicians and citizens not grasped the value of extra-textual mechanisms for constitutional change, the failure to adapt to evolving circumstances would likely have destabilized the Constitution. Industrialization, globalization of trade, growing military conflict, and endogenous social change all imposed unanticipated strains on the constitutional order. Hewing mechanistically to the putative originalist rules for issues such as congressional power and executive discretion would likely have invited national calamity and constitutional failure. Broad condemnations of our post-ratification methods of constitutional change hence fail to compare these methods to a plausible benchmark.³⁰⁸ Rather than comparing the present state of affairs against a utopian vision without those extra-textual modalities of constitutional change, critics should instead contrast the observed status quo to a world in which the Constitution has failed due to exogenous economic, military, or geopolitical strains.

On this view, the incremental discovery and adoption of extra-textual complements to Article V should be celebrated, not regretted. In the early Republic, Article V provided a robust means to respond to contested judicial decisions such as *Chisolm v. Georgia*³⁰⁹ and to fix a defective presidential selection mechanism.³¹⁰ In that era, textual rigidity was the more valuable default rule. As the Republic matured, the pressure for fundamental change compounded year by year.³¹¹ At some point, the need for constitutional change outran the ability of national political institutions to provide it through Article V procedures. Had the Supreme Court (abetted by the White House and Congress) not increasingly assumed an assertive role in constitutional affairs after a century of relative quiescence,³¹² it is possible that external pressures would have inflicted considerable damage,

³⁰⁸ This is similar to the failure of critics of Article V's countermajoritarian nature to assess what would have happened without Article V-induced rigidity.

³⁰⁹ 2 U.S. (2 Dall.) 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

³¹⁰ See U.S. CONST. amend. XII (altering the federal system for electing the president and vice president of the United States).

³¹¹ Some commentators have argued that the sheer growth in the number of federal legislators also made it harder to assemble the necessary supermajoritarian coalitions for constitutional change. See, e.g., Dixon, *Partial Constitutional Amendments*, *supra* note 1, at 652-64. This argument is partly in tension with the fact that the Progressive era produced a spate of constitutional amendments in quick succession.

³¹² See Mark A. Graber, *Establishing Judicial Review? Schooner Peggy and the Early Marshall Court*, 51 POL. RES. Q. 221, 224 (1998) (explaining how, in early cases, the Marshall Court sought to "preserve judicial power by asserting its existence, thus establishing precedents for future use, while not actually attempting to challenge executive or legislative authority in any controversial way").

and eventually even a fatal blow, to the Constitution. In this light, the emergence of increasingly robust judicial review simply responded to the increasing need for extra-textual vehicles of constitutional change without which the Constitution might not have survived.³¹³ Similarly, Congress's ability and willingness to fashion statutory schemes that refashioned fundamental elements of the constitutional order can be seen as a necessary form of innovation given Article V's sheer obduracy. Even if not *all* ensuing changes to the constitutional order were welfare-enhancing, it is quite plausible to think that these mechanisms were beneficial in net. Viewed from this perspective, overwriting the 1787 constitution with extra-textual mechanisms of constitutional change through the federal courts seems less a problem, and more a solution, to Article V's failure to specify a generally applicable dual-speed amendment regime.³¹⁴

In short, while not embodied in the Constitution's text, our shifting amendatory regime has created a two-speed Constitution that has provided solutions to different threats to constitutional survival emerging in different periods. Rather than illicit substitutes for Article V, our now commonly deployed mechanisms of extra-textual constitutional change are better understood as both the complements and legacies of Article V. What some have construed as constitutional infidelity³¹⁵ has in fact been part of our Constitution's saving grace.³¹⁶

³¹³ See Huq, *Judicial Self-Restraint*, *supra* note 79, at 586 fig.1 (displaying an increase in the number of laws held unconstitutional, beginning in the mid-nineteenth century). The historical path of judicial engagement depicted in Figure 1 is reflected in the first and last chapter headings of Lucas Powe's history of the Court—"Very Modest Beginnings" and "An Imperial Court." LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE 1789–2008*, at 1, 312 (2009).

³¹⁴ I do not mean here to intimate any Whiggish air of inevitability about this development.

³¹⁵ See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 111 (1999) (focusing on "popular sovereignty" as expressed in the ratification process as the foundation of "originalist jurisprudence, and the Constitution itself"). Sophisticated originalists such as Whittington not only rely on the Founding for legitimacy, but also insist on a notion of "potential sovereignty" whereby accepting and giving effect to prior constitutional decisions preserves the ability of the people to make new higher law in the future. *Id.* at 156. Theories of potential sovereignty, however, fail to account for constitutional obduracy, let alone the possibility—developed in this Article—that such obduracy is itself a precondition to constitutional survival. In this way, originalism may be at war with the factually necessary predicates of continued constitutional survival.

³¹⁶ It is worth noting that the solution adopted in these later periods—extratextual amendment through courts or super statutes—has no precise parallel in the private-contracting literature. The closest parallels I can conjure up—which is quite imprecise and unsatisfying—are the "cramdown" provisions of the Bankruptcy Code, 11 U.S.C. §§ 1129(b), 1325(a) (2012). Under this regime, some parties to a deal can force other parties to accept changes dictated by emergent circumstances. The difference in the constitutional context, of course, is that there are no

C. Rethinking “Historical Gloss”

Just as the analysis presented in this Article might provoke rethinking the merits of judicial review in the abstract, it also might promote reconsideration of some common tools employed in constitutional interpretation. I develop in this final Section a suggestive example. It involves the link between textual rigidity and constitutional survival in relation to the interpretative deployment of what Justice Frankfurter called “a systematic, unbroken executive practice . . . [that] may be treated as a gloss” on the Constitution.³¹⁷ Following Justice Frankfurter’s lead, the Court tends to rely on historical practice in areas like foreign affairs and separation of powers.³¹⁸ Despite the Court’s long usage of historical practice as a gloss on the Constitution’s text, concerns linger about whether interbranch acquiescence, long assumed to be a touchstone for reliance upon historical practice, supplies an appropriate guide of what evidence is salient to constitutional interpretation.³¹⁹

Judicial employment of historical gloss raises a host of important and interesting issues.³²⁰ This Article’s analysis of Article V simply suggests one dimension along which the salience of historical practice might be assessed, a dimension that has received little attention to date. Specifically, it suggests that historical practice ought to matter if it emerged in the first few decades of constitutional history, but perhaps less so otherwise. Institutions and practices established in the immediate wake of ratification played a critical role in stabilizing the Constitution through the virtuous-circle mechanism. Hence, they are plausibly viewed as but-for causes of the Constitution’s

prespecified rules for such changes; an extratextual amendment often results from the application of brute political force, not the application of a legal rule.

³¹⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

³¹⁸ See, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (relying on the “historical glosses” on executive power in Article II with respect to the President’s authority over foreign affairs); *Raines v. Byrd*, 521 U.S. 811, 828-29 (1997) (citing the absence of historical practice as one ground for denying congressional standing); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (citing *Youngstown* in deferring to historical practice surrounding the President’s foreign affairs power); see generally Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984) (analyzing the use of historical practice and custom as extratextual sources of authority).

³¹⁹ See generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012) (offering an account and a partial critique of the historical-gloss method of constitutional interpretation).

³²⁰ See, e.g., Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 81 (2013) (exploring the interactions between interpretive methodological choice and the use of historical gloss).

longevity, and so are entitled to the benefit of the doubt when their constitutional validity is considered.

Consistent with this view, the Supreme Court has viewed both political parties and the central bank as constitutionally authorized creatures. This means not only that our two national political parties are not condemned as the sort of refractory faction denounced by Madison, but also that the Supreme Court affirmatively endorses the two-party system.³²¹ State limitations on the associational rights of third parties with an eye to protecting the two-party system have prompted much criticism.³²² The Court's solicitude for bipartisan competition, however, may be recast as its defending the contribution of the two-party system to the stabilization of the new constitutional order during the early Republic.

Along similar lines, one can argue that Chief Justice Marshall was justified in sustaining the constitutionality of the Bank of the United States in *McCulloch v. Maryland*, despite considerable popular resistance, because "[w]hen all branches of the government have . . . been acting on the existence of this power, nearly thirty years, it would seem almost too late to call it in question, unless its repugnancy with the constitution were plain and manifest."³²³ The Bank, as one of the pivotal anchors of the 1787 constitutional disposition, had earned its legality.³²⁴ Indeed, even Madison, who had earlier condemned the Bank as unconstitutional, recognized as much by 1816.³²⁵ By contrast, this theory of path-dependent institutional development yields no legitimacy for the invocation of historical practices that emerged long after the early Republican period. Hence, the Court's reluctance to attribute significance to post-New Deal congressional use of the

³²¹ See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) (upholding restrictions on "fusion" candidates, and noting that states can enact election regulations that "in practice, favor the traditional two-party system"); *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-96 (1986) (upholding primary qualification requirements for third-party candidates to appear on the general election ballot); *Storer v. Brown*, 415 U.S. 724, 733-34, 736 (1974) (upholding restrictions on independent candidates for office, and affirming that states can take measures to prevent "unrestrained factionalism").

³²² For criticisms in the wake of *Timmons*, see generally Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331 (1997).

³²³ 17 U.S. 316, 323 (1819).

³²⁴ See David A. Strauss, *Not Unwritten, After All?*, 126 HARV. L. REV. 1532, 1538 (2013) (book review) (discussing the way in which the first Bank garnered legitimacy through early practice).

³²⁵ See Rockoff, *supra* note 257, at 648 (noting that, as President, Madison signed the bill that rechartered the Bank of the United States).

legislative veto in a case invalidating the device may be justified by reasons beyond those offered by the Court.³²⁶

The link between textual rigidity and constitutional survival thus points toward a temporally sensitive account of how historical practice should be employed in constitutional interpretation. That approach would be consistent not only with extant case law, but also in accord with James Madison's assertion in the *Federalist Papers* that constitutional meaning would be "liquidated and ascertained" through the initial practice of federal politicians in the early Republic.³²⁷ Those early years of the Republic were indeed pivotal—but not for reasons that Madison predicted or perceived.

CONCLUSION

Article V has long occasioned both embarrassment and evasion. But the textual rigidity it fostered should be celebrated as having been pivotal to the Constitution's survival during the dire, storm-tossed days of the early Republic. Without the benefit of a sophisticated understanding of transaction-cost economics, the Framers chanced on an effective solution to the problem of constitutional hold-ups. Their structural stroke of luck likely deepened the prospect of constitutional survival through the tempestuous first decades of the Constitution's life. Sometimes, it appears, being lucky is as valuable as being wise.

This Article focuses on explaining and defending textual rigidity's function in the early Republic. But the Constitution's survival through to the present day is testimony not merely to the virtues of textual rigidity—which responded solely to early-stage threats to constitutional survival—but also to later institutional innovations by politicians and judges who conjured extratextual complements to Article V. These innovations facilitated adjustment to exogenous shocks and evolving social, economic and political circumstances. The interaction between Article V and these extratextual modalities of constitutional change, I suggest, is more complex than the

³²⁶ See *INS v. Chadha*, 462 U.S. 919, 967-72 (1983) (White, J., dissenting) (noting Congress's historical use of the legislative veto). The *Chadha* Court also cited evidence of presidential nonacquiescence, with eleven presidents "hav[ing] gone on the record at some point to challenge congressional vetoes as unconstitutional." *Id.* at 942 n.13.

³²⁷ THE FEDERALIST NO. 37, at 245 (James Madison) (Isaac Kramnick ed., 1987). The Court has applied this dictum, for example, with respect to removal power questions. See *Myers v. United States*, 272 U.S. 52, 175 (1926) ("[A] contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given to its provisions."). *But see* Huq, *Removal*, *supra* note 83, at 12 & n.48 (questioning *Myers*'s historical account and the decision's larger logic).

stark, binary incompatibility between constitutional fidelity and judicial license that is often posited by scholars. Rather than competitors, Article V and its extratextual analogs are partial complements. As much as it calls for reconsideration of Article V, in sum, my argument in this Article should invite a rethinking of the subtle and ever-shifting relationship between the diverse textual, judicial, and political modes of constitutional change invented across the decades and centuries by our fortunate, ingenuous, and peculiarly long-lived nation.