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Tiered Constitutional Design

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Abstract

Scholarship has posited two models of constitutionalism. One is short, abstract, and rigid, like the United States Constitution. The other is lengthy, detailed, and flexible, like the constitutions found in many U.S. states and in many other countries around the world. This Article argues that there is a descriptively common and normatively attractive third model: tiered constitutional design. A tiered design aims to combine the virtues of rigidity and flexibility by creating different rules of constitutional amendment for different parts of the constitution. Most provisions are made fairly easy to change, but certain articles or principles are given higher levels of entrenchment. A tiered design can potentially preserve space for needed updates to the constitutional text, a virtue of flexible design, while also providing stability for the core of the constitution and protection against antidemocratic forms of constitutional change, a benefit of rigid forms of constitutionalism as demonstrated by Article V of the U.S. Constitution. Drawing on numerous examples of tiered designs including U.S. states like California and countries as diverse as Canada, Ecuador, India, and Ghana, this Article offers a critical analysis of the architecture of tiered designs and explores how they work in practice. While finding unsurprisingly that enforcement is often imperfect, this Article concludes that judicial and popular enforcement of tiered designs does show promise in helping to combat the wave of antidemocratic constitutional projects that is threatening to engulf much of the world.

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Introduction

Recent events across much of the world have raised fresh questions about the fragility of democratic constitutionalism, not only in the global south but also in countries long thought immune to democratic backsliding. Intellectuals fear that countries in North America and Western Europe might be susceptible to the same forces that have recently undermined democracy in parts of Latin America and Eastern Europe.[1] Academic work has highlighted the myriad ways in which political actors can carry out projects that will perpetuate their

[1] *See, e.g.*, Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, Vox (Feb. 21, 2017, 8:30 AM), http://www.vox.com/the-big-idea/2017/2/21/14664568/lose-constitutional-democracy-autocracy-trump-authoritarian [https://perma.cc/H5TJ-TH65].

own power and weaken institutions designed to check it.[2] Because formal constitutional amendment or replacement has played a role in many of these experiences, scholarship has focused in large part on the design of these tools.

Scholars contrast two broad models of constitutionalism.[3] The first is short, abstract, and rigid, like the United States Constitution. The second is longer, more detailed, and flexible, like the constitutions found in much of the rest of the world and in most U.S. states. In protecting against abusive use of the formal tools of constitutional change to erode democracy, it would seem that the rigid model would have great advantages because it inhibits use of constitutional amendment mechanisms by short-term majorities without near-consensus support. Article V of the U.S. Constitution, for example, is thought by some scholars to make the U.S. Constitution one of the most difficult in the world to amend.[4] Aziz Huq suggests that the high degree of entrenchment created by Article V played a key role in promoting the Constitution's survival during the early decades of the Republic,[5] while others have praised it for ensuring a high degree of constitutional stability thereafter.[6]

At the same time, the rigid model of constitutionalism found in the U.S. Constitution has significant drawbacks that have seemingly led most other countries to eschew the model.[7] Rigid constitutionalism

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2 *See, e.g.*, Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007); David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013); Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673 (2015).

3 *See, e.g.*, ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009); Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641 (2014) [hereinafter Versteeg & Zackin, *American Constitutional Exceptionalism*]; Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV. 657 (2016) [hereinafter Versteeg & Zackin, *Constitutions Unentrenched*].

4 *See* Rosalind Dixon, *Partial Constitutional Amendments*, 13 U. PA. J. CONST. L. 643, 645–46 (2011); Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT'L J. CONST. L. 686, 686 (2015); Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 362 (1994).

5 *See* Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165, 1168 (2014).

6 *See, e.g.*, LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES 164 (2004); Jos. R. Long, *Tinkering with the Constitution*, 24 YALE L.J. 573, 581, 587 (1915).

7 A number of scholars have criticized Article V for the extent of the "dead hand" problem it creates. *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 165 (2006); Dixon, *supra* note 4, at 655; Stephen M. Griffin, *The Nominee Is . . . Article V*, 12 CONST. COMMENT. 171, 173 (1995); John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1730 (2010); Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 609 (2008).

may inhibit current majorities from carrying out needed updates of the constitutional text; it may also prevent democratic forces from gaining input into constitutionalism.[8] In the United States, experience suggests ways around these problems by empowering judges and politicians to carry out constitutional changes without formal amendment.[9] But in newer democracies, rigid constitutionalism may lead politicians to attack judges in order to get favorable rulings; it may also lead them to scrap their existing constitutions altogether because of frustration with the existing text.[10] Where constitutions are very long and detailed, as is the case in most of the world and in most U.S. states, rigidity may make it intolerably difficult to pass even technical corrections to the constitutional text. Scholars have argued that this has led most other jurisdictions to opt for flexible tools of constitutional change, despite this leaving those countries open to the destabilizing and antidemocratic effect of easy constitutional amendment.[11]

This Article argues that there is a third way. In fact, it is a common but underappreciated constitutional design. Constitutional designers can and do seek to combine the virtues of flexible and rigid constitutionalism in a model that we call tiered constitutional design. Under tiered constitutionalism, the default rule of constitutional amendment is a flexible one. However, certain provisions of the constitution or forms of change are placed on a higher tier and thus made more difficult to change. Theoretically, tiering can combine the best of both forms of constitutionalism. Because most provisions can be changed easily, the constitution can be updated as needs arise. At the same time, enhanced protection of a core set of provisions may help defend against particularly destabilizing forms of constitutional change.

Article V of the U.S. Constitution surprisingly contains a germ of this idea. It gives special protection to the provision giving equal rep-

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8 *See* Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, *in* COMPARATIVE CONSTITUTIONAL LAW 96, 97–98 (Tom Ginsburg & Rosalind Dixon eds., 2011).

9 *See, e.g.*, 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6 (paperback ed. 1993) (exploring change in United States history through "constitutional moments" that sometimes do and sometimes do not include amendments to the formal constitutional text).

10 *See* ELKINS, GINSBURG & MELTON, supra note 3, at 101 (arguing that overly rigid amendment rules can incentivize constitutional replacement); Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 COLUM. J. TRANSNAT'L L. 285, 307 (2015) (noting that inability to overrule constitutional decisions can lead politicians in new democracies to pressure constitutional courts).

11 *See* Versteeg & Zackin, *Constitutions Unentrenched*, *supra* note 3, at 659 (finding that most comparative constitutions and constitutions in U.S. states are both far longer and far more flexible than the U.S. Constitution).

resentation to each state in the Senate. This provision can only be changed with the approval of each state that would have its representation reduced.[12] Around the world and in the U.S. states, however, the idea of tiering is much more developed and sophisticated. Constitutions use several different techniques to achieve a tiered design. Some contain "eternity clauses," making certain provisions impossible to change. Others include several procedures for constitutional change and state, or imply, that the more demanding path must be used for changes affecting certain constitutional provisions or principles. Constitutions use a number of procedural devices—including higher supermajorities and additional procedural requirements like referendums—to make constitutional change on this higher tier more difficult. This Article brings together evidence and practice of tiering from many constitutions, including from U.S. states like California and national constitutions from countries as diverse as Canada, India, Ecuador, and Ghana.

Little scholarship has focused on tiered amendment procedure, and the limited work to treat the subject has viewed it primarily as a tool of "expressive constitutionalism," a means by which a democratic polity may express its most fundamental values in the text of a written constitution.[13] While not discounting this function, this Article emphasizes tiering's practical purpose in accommodating the competing advantages of flexibility and rigidity in constitutional amendment design. In other words, a tiered constitutional design not only plays an expressive purpose; it is also meant to be used in order to defend democracy and protect against certain destabilizing forms of constitutional change. This point highlights a number of ways in which many tiered amendment clauses found in comparative constitutional law may fall short in practice—they may be either overinclusive or underinclusive from the standpoint of protecting basic democratic institutions, they may be written in ways that make it easy for would-be autocrats to evade them, or the procedural requirements of higher tiers might be insufficient to actually deter destabilizing forms of change.

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12 U.S. CONST. art. V; *see, e.g.*, FRANCES E. LEE & BRUCE I. OPPENHEIMER, SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION 1 (1999); Huq, *supra* note 5, at 1173.

13 *See, e.g.*, Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663 (2010) [hereinafter Albert, *Constitutional Handcuffs*]; Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, 59 MCGILL L.J. 225 (2013) [hereinafter Albert, *Expressive Function*]; Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913 (2014) [hereinafter Albert, *Structure*]; Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251 (1996).

Tiered amendment procedures are an important special case of a more general phenomenon. They represent one way in which constitutions can form hybrids between the lengthy, detailed, and flexible model of constitutionalism and the rigid framework model. Other approaches include mixing abstract and more specific constitutional language or creating systems whereby some but not all constitutional provisions may be suspended or subject to legislative override.[14] This Article does not explore these other modes of tiering in any detail, save to note the relationship between tiered approaches to language and formal amendment: often in a tiered constitution, provisions that enjoy a high degree of formal entrenchment will also tend to be more abstract and general, while more flexible provisions will also be more detailed.

The rest of this Article is organized as follows. Part I briefly gives examples of tiered constitutional designs in order to demonstrate that these designs are ubiquitous and to provide a sense of their structure. Parts II and III explain the virtues of flexible and rigid constitutional designs, respectively, arguing that each form of constitutional amendment rule has both significant advantages and disadvantages. Part IV suggests that an attractive solution to this dilemma, theoretically far better than simply choosing an average level of amendment difficulty, is a tiered constitutional design. Part V considers in detail the architecture of these clauses, highlighting and offering insight into a range of questions faced by constitutional designers. These questions include which provisions to place on the higher tier, whether to protect this tier through more rule-like or standard-like language, whether to rely on constitutional designers ex ante or judges ex post to define the tiers, how many tiers to have, and which procedures should be used to protect constitutional change on the higher tiers. Part VI considers experiences with actually enforcing these clauses against destabilizing or antidemocratic forms of change. These experiences suggest that enforcement is extremely challenging—especially under common conditions of democratic fragility—but not impossible and that popular forms of enforcement by civil society and political actors may play a key role in addition to enforcement by the courts. The Article concludes by arguing that although there is a large gap between ideal theories of constitutional design and the real-world challenges of constitutional drafting in this area, tiered designs do show promise in

14 Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 33 (U.K.).

acting as a speed bump or deterrent against destabilizing or antidemocratic forms of constitutional change.

I. The Ubiquity of Tiered Constitutional Designs

The tiering of constitutional amendment rules is a common feature of constitutional design in many countries around the world. Even the U.S. Constitution provides some version of constitutional tiering. Article V of the U.S. Constitution explicitly creates a multitrack approach to formal constitutional amendment. For most provisions, it requires that amendments obtain the support of two-thirds of both houses of Congress (or state conventions) and then three-quarters of state legislatures.[15] But as already noted, an amendment to the Equal Suffrage Clause of the Constitution, giving every state two Senators, effectively requires the consent of every state.[16] Additionally, prior to 1808, Article V also prevented any amendment to certain provisions regarding slavery.[17]

Some scholars, including Akhil Amar, suggest further that Article V creates an implied form of tiering; by setting out the requirements for constitutional amendment by representative actors, the text of Article V does not exclude the possibility of formal constitutional change by the people by way of some more direct "majoritarian and populist mechanism" akin to a national referendum.[18] Other proponents of a nonexclusive view of Article V, such as Bruce Ackerman, could equally be understood to argue that the United States adopts a tiered approach to constitutional change: one track governed by Article V, and another, more informal track governed by the requirements of heightened public deliberation and sustained popular participation.[19]

At the state level, a number of constitutions create a more explicit form of multitrack approach towards formal constitutional change. Many state constitutions, for example, create a distinction between a constitutional "amendment" and a constitutional "revision," with the latter representing a more fundamental form of constitutional change.[20] A leading example is the state constitution of California.[21]

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15 U.S. Const. art. V.

16 *See id.*

17 *Id.*

18 Akhil Reed Amar, America's Constitution 295 (2005) [hereinafter Amar, America's Constitution]; Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457, 457, 459 (1994) [hereinafter Amar, *Consent of the Governed*].

19 *See* Ackerman, *supra* note 9.

20 *See* Gerald Benjamin, *Constitutional Amendment and Revision*, *in* 3 State Constitu-

An amendment may be placed on the ballot by either a two-thirds vote in the California state legislature or signatures equal to eight percent of the votes cast in the last gubernatorial election, while a revision requires the approval of two-thirds of the legislature to be placed on the ballot.[22] In other words, in California, the major significance of the amendment/revision distinction is that an amendment can be carried out through popular initiative bypassing the state legislature entirely, but a revision may not be since it requires a prior vote of the state legislature.

When one reads the U.S. Constitution together with the state constitutions as a single system, the United States is arguably home to another form of tiering. At the state level, the requirements for formal constitutional amendment vary from highly flexible to only moderately difficult—most constitutions impose either an ordinary majority requirement or a relatively weak supermajority requirement (such as sixty percent, two-thirds, or seventy percent) for the legislative passage of proposed amendments.[23] For constitutional rights in particular, where the U.S. Constitution creates a floor but not a ceiling, these dynamics create something like a tiered design.[24] Changes to state constitutional standards can be made through relatively undemanding processes, but those that seek to alter the "core" federal floor must meet the demanding standards of Article V.

Take the right to equality, or equal protection of the laws. The flexibility of state constitutions has allowed state legislatures and popular movements broad freedom to redefine the scope and content of

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TIONS FOR THE TWENTY-FIRST CENTURY 177, 178 (G. Alan Tarr & Robert F. Williams eds., 2006) (finding the distinction to be specifically referenced in twenty-three state constitutions).

21 *See* CAL. CONST. art. XVIII.

22 *See* JOSEPH R. GRODIN, DARIEN SHANSKE & MICHAEL B. SALERNO, THE CALIFORNIA STATE CONSTITUTION 467 (2d ed. 2016); Ernest L. Graves, *The Guarantee Clause in California: State Constitutional Limits on Initiatives Changing the California Constitution*, 31 LOY. L.A. L. REV. 1305, 1316 (1998); Ray L. Ngo, *The Elephant in the Room: A Critique of California's Constitutional Amendment Process That Gave Birth to the Baby Elephant (Proposition 8) and a Call for Its Reform*, 33 T. JEFFERSON L. REV. 235, 240 (2011); Jeremy Zeitlin, *Whose Constitution Is It Anyway? The Executives' Discretion to Defend Initiatives Amending the California Constitution*, 39 HASTINGS CONST. L.Q. 327, 334 (2011).

23 *See* Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules: The Denominator Problem*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 195, 199–201 (Tom Ginsburg ed., 1st paperback ed. 2014); John Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 LAW & SOC. INQUIRY 501, 521–26 (1997).

24 This point, for example, was at the core of Justice Brennan's argument that state courts should adopt expansive interpretations of state constitutional rights in the face of retrenchment in rights interpretation at the federal constitutional level. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

commitments to equality in a variety of contexts, including, most notably, in lesbian, gay, bisexual, and transgender rights. In recent years, a variety of state legislatures and other actors have adopted or proposed amendments seeking to prohibit the recognition of same-sex marriage.[25] However, in *Obergefell v. Hodges*,[26] the U.S. Supreme Court held that state constitutional amendments seeking to limit recognition of same-sex relationships were invalid because they failed to provide equal protection of the law.[27] Before same-sex marriage was a federal constitutional right, it was part of the lower tier of constitutional issues that could be dealt with through the flexible procedures found in state constitutions.[28] But after the Court constitutionalized the issue, it placed it on a higher, "core" tier and in effect held that changes (absent Supreme Court reinterpretation) would require a federal amendment using the procedures found in Article V.

A large number of constitutions worldwide adopt a tiered approach of this kind to formal constitutional change. The Canadian Constitution Act of 1982,[29] for example, creates five tiers of entrenchment.[30] The default amendment procedure requires resolutions from the House of Commons and the Senate, as well as the approval of two-thirds of the provinces (aggregately representing at least half of the total national population).[31] The second amendment procedure, which requires agreement of both houses of Parliament as well as all provincial legislatures, applies to five broad topics that are specially protected: the monarchy and its representation in Canada, provincial representation in the House of Commons, the use of English and French, the composition of the Supreme Court, and the formal amendment procedures.[32] The third procedure requires resolutions from both houses of Parliament and from the legislature of any affected provinces for amendments applying to some but not all provinces, including the alteration of boundaries between provinces or the

25 *See, e.g.*, Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471, 472 n.7 (2012).

26 135 S. Ct. 2584 (2015).

27 *Id.* For a discussion on the issue of how far *Oberfegell* goes in depriving these amendments of effect beyond the question of formal same-sex marriage recognition, see Mark P. Strasser, *The Right to Marry and State Marriage Amendments: Implications for Future Families*, 45 STETSON L. REV. 309 (2016).

28 *See, e.g.*, Tribe & Matz, *supra* note 25.

29 Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 38(1) (U.K.).

30 *Id.*

31 *Id.*

32 *Id.* art. 41.

use of English or French within a province.[33] The fourth procedure authorizes the national Parliament to formally amend the Constitution by passing a law, but it applies only to matters relating to the executive government or the houses of Parliament and excludes questions concerning executive government and the national legislature that are expressly keyed to higher amendment thresholds.[34] The fifth procedure authorizes provincial legislatures to formally amend their own constitutions by passing a law and applies to all provincial matters except those specifically assigned higher amendment thresholds.[35]

In India, most amendments to the Constitution require the support of a majority of all members and a two-thirds supermajority of those members "present and voting" in both houses of Parliament.[36] However, the Constitution also establishes an additional requirement of ratification by a majority of state legislatures for amendments affecting representation of the states in Parliament and provisions concerning the election of the President, executive and legislative power, the union judiciary, high courts in union territories and the states, and the lists of federal, state, and concurrent responsibilities found in the Constitution's Seventh Schedule.[37] As explained in more detail below, the Indian Supreme Court in effect created an additional judge-made tier through its "basic structure" doctrine through which certain fundamental constitutional changes cannot be carried out through any formal process of constitutional change, at least short of wholesale constitutional replacement.[38]

In Africa, the Ghanaian Constitution has a two-tier hierarchy that establishes a very high threshold of agreement for amending certain provisions, including the Constitution's protections for fundamental rights and freedoms; changes to these articles require a proposal in Parliament and consultation with the Council of State, followed by a referendum with at least forty percent popular participation and three-quarters of voters approving, ratification by Parliament, and assent from the President.[39] By contrast, the amendment of all other

33 *Id.* art. 43.

34 *Id.* art. 44.

35 *Id.* art. 45.

36 *See* INDIA CONST. art. 368, § 2.

37 *Id.*

38 *See, e.g.*, Bharati v. Kerala, (1973) 4 SCC 225, 406, 797 (India) (deriving the concept that constitutional amendments may not violate certain fundamental principles of the constitutional order).

39 *See* GHANA CONST. art. 290 (referring to these specially protected provisions as "entrenched provisions").

provisions does not require a popular vote but instead merely a proposal in Parliament, consultation with the Council of State, two successive votes of two-thirds approval in Parliament, and the President's assent.[40] The Nigerian Constitution has a similar two-tier hierarchy. At the higher threshold—applying to provisions concerning fundamental rights, the creation of new subnational units, adjustments to territorial boundaries, and the formal amendment rules—a formal amendment requires four-fifths approval in both houses of the national legislature, as well as two-thirds approval from all subnational legislatures.[41] At the lower threshold, which applies to other provisions, amendment requires two-thirds approval in both houses of the national legislature and two-thirds approval among subnational legislatures.[42]

In Latin America, Ecuador and other Andean countries, including Venezuela and Bolivia, are interesting examples of multitrack constitutional designs that identify tiers primarily with standard-like language denoting the effect of a given change, rather than through identification of particular parts or provisions of the constitution. In Ecuador, the default procedure of constitutional amendment can be carried out either by a referendum or by passage by two-thirds of the National Assembly.[43] However, the more demanding route of a "partial" reform must be used to "alter the fundamental structure or the nature and constituent elements of the State";[44] this route requires a referendum in addition to passage by a majority of the Congress.[45] Finally, the most demanding route of a constituent assembly must be used if changes constitute a restriction "on constitutional rights and guarantees or chang[e] the procedure for amending the Constitution."[46] Venezuela has a similar three-track design,[47] while Bolivia has a two-track system that distinguishes a "total reform" by constituent

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40 *Id.* art. 291.

41 *See* CONSTITUTION OF NIGERIA (1999), § 9(3).

42 *See id.* § 9(2).

43 *See* CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [ECUADOR CONST.] 2008, art. 441, *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., Maria del Carmen Gress & J.J. Ruchti trans., HeinOnline 2016).

44 *Id.* arts. 441–442.

45 *Id.* art. 442.

46 *Id.* arts. 441–442, 444. Furthermore, the Constitutional Court is given the authority and duty to rule on which procedural route is appropriate in any given case. *Id.* art. 443.

47 *See* CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [VENEZUELA CONST.] 1999, arts. 340–349, *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., Ministry of Commc'n & Info. of Venez. & Jefri J. Ruchti trans., HeinOnline 2010) (distinguishing between amendment, constitutional reform, and a constituent assembly).

assembly from a "partial reform" that cannot be used to "affect[the Constitution's] fundamental premises, affect[] rights, duties and guarantees, or the supremacy and reform of the Constitution."[48]

While the foregoing examples involve constitutions that lay out distinct tracks of constitutional reform, many constitutions around the world also contain express "eternity clauses" that purport to render certain provisions of the constitution impossible to amend.[49] These include, for example, the relationship between church and state,[50] a given set of territorial boundaries,[51] term limits,[52] or other basic values of the state.[53] The remainder of this Article refers to many other examples drawn from comparative constitutionalism in order to illustrate the architecture and functioning of different models of tiered designs. However, these examples should be sufficient to show that tiered constitutionalism is an important aspect of constitutional design. The next few Parts aim to show how tiered constitutionalism

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48 *See* CONSTITUCIÓN POLÍTICA DEL ESTADO [CONSTITUTION] 2009, art. 411 (Bol.), *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., Embassy of Bol., Wash., D.C. trans., HeinOnline 2011).

49 For an overview of the concept of an eternity clause, see Albert, *Constitutional Handcuffs*, *supra* note 13, at 678–85.

50 *See, e.g.*, CONSTITUTION DE LA REPUBLIQUE ALGERIENNE DEMORATIQUE ET POPULAIRE 1989, art. 212 (Alg.), *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., Maria del Carmen Gress & J.J. Ruchti trans., HeinOnline 2016) (amendment may not alter "Islam, as the religion of the state"); QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1980 art. 177 (same); CONSTITUTION DE LA REPUBLIQUE DU BENIN 1990, art. 156, *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., Jefri J. Ruchti trans., HeinOnline 2011) (protecting "secularity" of the State); CONSTITUTION DU BURUNDI 2005, art. 299 (same); CONSTITUTION OF THE REPUBLIC OF TAJIKISTAN 1994, art. 100 (same); CONSTITUTION OF THE REPUBLIC OF TURKEY 1982, art. 4 (same); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [PORTUGAL CONST.], 7th rev., 2005, art. 288(c) (separation between church and state unalterable).

51 *See, e.g.*, CONSTITUTION OF THE 4TH REPUBLIC 1991, art. 165 (Burk. Faso); CONSTITUTION DE L'UNION DES COMOROS [COMOROS CONST.] 2001, art. 42; CONSTITUTION OF THE REPUBLIC OF DJIBOUTI 1992, art. 92; FUNDAMENTAL LAW OF THE REPUBLIC OF EQUATORIAL GUINEA 1982, art. 134; CONSTITUTION OF THE 4TH REPUBLIC 2010, art. 163 (Madag.).

52 *See, e.g.*, CONSTITUTION OF THE CENTRAL AFRICAN REPUBLIC [C.A.R.] 2016, art. 153; CONSTITUTION OF EL SALVADOR 1983, art. 248; CONSTITUTION OF THE ISLAMIC REPUBLIC OF MAURITANIA 1991, art. 99.

53 *See, e.g.*, CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 60(4) (Braz.), *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., Keith S. Rosenn trans. & ann., HeinOnline 2017) ("No proposed constitutional amendment shall be considered that is aimed at abolishing the following: the federalist form of the National Government; direct, secret, universal and periodic suffrage; separation of powers; individual rights and guarantees.") (subdivision designations omitted); GRUNDGESETZ [GG] [BASIC LAW] art. 79(3) (Ger.), *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html [https://perma.cc/2VRN-UN9A] (prohibiting amendments dealing with the federal nature of the state or certain basic principles including human dignity).

might respond to the competing benefits and drawbacks of fully flexible and fully rigid systems of constitutional change.

II. The Virtues of Constitutional Flexibility

The formal rules governing processes of constitutional amendment are deeply important in any constitutional system: in nondemocracies, they can often affect the scope for civil society to pursue incremental forms of legal and political change or for authoritarian governments to adopt legal and political changes that advance their own interests. Formal amendment procedures, however, arguably play a particularly important role in guaranteeing the legitimacy of a democratic constitution. Constitutional systems that are fairly flexible in allowing formal constitutional change create several advantages.

A. Updating Constitutional Texts

If democratic constitutions do not provide mechanisms for their alteration, they suffer from an obvious internal legitimacy problem. They impose restraints on the actions of current democratic majorities, in the name of past majorities, without any mechanism by which current majorities may "consent" to constraints of this kind.[54] Without some form of mechanism for constitutional change, it will also be impossible to tell whether a lack of change is in fact a product of current support for constitutional requirements or instead the product of the legal impossibility of change. Without the possibility of constitutional change, therefore, any democratic constitution will suffer from a serious form of the "dead hand" problem, or the problem of ongoing democratic legitimacy.[55]

This Article does not of course suggest that the need for constitutional updating is equivalent across all types of constitutions. Where texts are longer and more detailed and specific, for example, it may be that more frequent changes need to be made because such provisions may be more likely to become outdated and also more difficult to change through other informal means, such as judicial interpretation.[56] Simply, all constitutions will require updating to some degree over time. Further, since most constitutions are now fairly long and de-

54 *See, e.g.*, Amar, *Consent of the Governed*, *supra* note 18.

55 *See, e.g.*, Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 Geo. Wash. L. Rev. 1119, 1120–23 (1998); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 Geo. Wash. L. Rev. 1127, 1131 (1998); Lawrence G. Sager, *The Dead Hand and Constitutional Amendment*, 19 Harv. J.L. & Pub. Pol'y 275, 276 (1996); Samaha, *supra* note 7, at 618.

56 *See* Dixon, *supra* note 8, at 106 (explaining a correlation between the length of a constitution and its frequency of amendment).

tailed, the importance of updating may be high with respect to these constitutions.[57]

Of course, formal processes of constitutional amendment are not the *only* means by which constitutional change may occur.[58] Constitutional change can also occur informally, for example, through executive, legislative, or judicial interpretation. This Article highlights some of those mechanisms here, while also pointing out that they are often imperfect substitutes for formal constitutional change.

A significant strain of literature in the United States has focused on courts as a locus of these "informal" methods of constitutional change. Courts, as David Strauss notes, can engage in "dynamic" approaches to constitutional interpretation, which means that constitutional norms are often effectively updated simply via a process of constitutional construction, or common law–style incremental change.[59] Strauss argues that this form of common law–style change means that in the United States, formal processes of constitutional amendment are more or less irrelevant; if courts adopt a common law–based approach to constitutional interpretation, Strauss argues, formal changes to the text of a constitution will be neither necessary nor sufficient to ensure the updating of constitutional meaning in line with changing social circumstances and understandings.[60]

A leading example which Strauss gives in support of this thesis involves the history of the Equal Rights Amendment ("ERA") in the United States and the progressive interpretation by the Court of the Equal Protection Clause to require "an exceedingly persuasive justification" for all classifications based on sex.[61] This approach has led the Court to strike down almost all those classifications based on sex that equal rights feminists were targeting. On this basis, Strauss argues that

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57 *See* Versteeg & Zackin, *American Constitutional Exceptionalism*, *supra* note 3, at 1658 fig.3 (finding sharp increases in the average length of both world and U.S. state constitutions over time).

58 *See* Dixon, *supra* note 8, at 99–100.

59 *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 888–900, 905–06, 935 (1996); *see also* RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION 1, 20 (2d ed. 2013).

60 *See* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1458–59, 1462–63 (2001) (arguing that the U.S. constitutional "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"). For the limits to the Straussian thesis as applied to more concrete, specific constitutional "rules," see Rosalind Dixon, *Updating Constitutional Rules*, 2009 SUP. CT. REV. 319, 336–38.

61 *See* United States v. Virginia, 518 U.S. 515, 524 (1996) (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979)).

"it is difficult to identify any respect in which constitutional law is different from what it would have been if the ERA had been adopted."[62] The difference between formal and informal approaches to constitutional change in this context, therefore, may simply have been one of timing—formal amendment through the ERA would have constituted a more rapid route for achieving change that eventually occurred anyway.[63]

Of course, courts are far from the only informal method of constitutional change. Other branches of government, as well as citizens, may also be engaged in these processes. Bruce Ackerman, for instance, has argued that across the course of U.S. history there have in fact been a series of "constitutional moments" in which both legislators and citizens have been engaged in a process of informal constitutional change: the New Deal, the Civil Rights Acts, and, arguably, post-1989 changes to the constitutional order, such as the North American Free Trade Agreement.[64] Legislatures at times have also engaged in forms of constitutional updating via the adoption of statutes that come to have quasi-constitutional or "super-statute" status.[65] Finally, as Keith Whittington has pointed out, throughout U.S. history the three branches of government have engaged in processes of "constitutional construction," where their interactions have created and

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62 Strauss, *supra* note 60, at 1476–77.

63 The ERA was passed by Congress and sent to the states for ratification in 1972 but narrowly failed to gain the necessary degree of state support for ratification within the ten-year period set by Congress. From the 1970s onwards, the Supreme Court slowly but steadily increased the level of scrutiny it applied to sex-based classifications. In *Reed v. Reed*, 404 U.S. 71, 76 (1971), the year before the ERA was sent to the states for ratification, the Court applied a heightened version of rational basis review to invalidate a state law giving preference to a male administrator of an estate. *Id.* at 76. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Court held that "close judicial scrutiny" should be applied to classifications based on sex and relied on this to invalidate a federal law distinguishing between male and female military personnel for the purposes of the eligibility of their spouse to a dependency allowance. *Id.* at 682. In *Craig v. Boren*, 429 U.S. 190 (1976), the Court relied on the same standard to invalidate a state law prohibiting the sale of certain types of alcohol to men under twenty-one, when women over eighteen were permitted to purchase it. *Id.* at 197–99. In 1982, in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), the Court struck down a state law prohibiting men from being admitted to a state school nursing program, *id.* at 733; and in 1996, the Court endorsed a standard of "exceedingly persuasive justification" of classifications based on sex and applied it to invalidate a state law prohibiting women from being admitted to a previously all-male state college, which relied on a military-style, "adversative" method of instruction, *see Virginia*, 518 U.S. at 522, 524.

64 *See* ACKERMAN, *supra* note 9, at 40–41; Bruce Ackerman, *2006 Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737, 1756–57 (2007).

65 *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216–17 (2001).

changed the meaning of concepts that are ambiguous or left open in the constitutional text, such as the standard for impeachment of executive or judicial officials.[66]

In many contexts, these informal methods of updating are imperfect substitutes for formal methods of constitutional change. Differences in legal or political cultures may affect the ability or willingness of different actors to engage in informal updating. Various scholars, for example, have argued that courts in the United States have been particularly interested in engaging in judicial updating.[67] It may be that in countries with more formal legal traditions, or which place a higher premium on judicial restraint, courts may be less able to engage in processes of informal constitutional change. Similarly, justiciability doctrines may limit a court's ability to even engage with an area where constitutional change is needed. In other words, there may well be circumstances in which formal routes of constitutional change are blocked, but informal mechanisms are not adequate substitutes.

In addition, informal methods of change are more likely to work for constitutional provisions that are standard-like rather than rule-like in their nature. In general, the more rule-like—and consequently clear—a given constitutional provision is, the harder it will be for actors to find informal ways to reinterpret it.[68] The text of the constitution may itself be sufficiently clear that even scholars and judges who generally endorse a dynamic or "living" approach to constitutional interpretation would suggest that a court cannot legitimately interpret relevant constitutional language so as to achieve an outcome more in line with current social needs and expectations.

Provisions involving numbers often provide a good example of this kind of rule-like provision and the difficulties involved in updating it. In the United States, for instance, the Constitution contains a number of specific numerical rules: a rule that each state is entitled to two Senators,[69] a requirement that each congressional district contain at least 30,000 voters,[70] clauses prescribing minimum age qualifications for the House, Senate, and presidency,[71] and a clause prescribing a right to trial by jury in all cases where the amount in controversy ex-

66 *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 17–19 (1st paperback ed. 2001).

67 *See, e.g.*, Strauss, *supra* note 60.

68 *See* Dixon, *supra* note 60.

69 U.S. CONST. art. 1, § 3, cl. 1.

70 *Id.* art. I, § 2, cl. 3.

71 *See id.* art. I, § 2, cl. 2–3; *id.* art. II, § 1, cl. 5 (establishing minimum age limits of twenty-five, thirty, and thirty-five for the House, Senate, and presidency respectively).

ceeds twenty dollars.[72] Changing social circumstances have clearly affected the degree to which rules of this kind fit current political conditions. The Two Senators Rule, for instance, has led to the dilution of voting power for racial minorities in ways that have arguably made the Senate increasingly out of sync with evolving commitments to racial equality evidenced in the Reconstruction Amendments and the Voting Rights Act of 1965.[73] For the Qualifications Clauses, the relevant age requirements were formulated on the assumption of much higher turnover in office due to lower life expectancy. And for the Twenty Dollars Clause, the real value of twenty dollars from 1791 is now vastly higher due to inflation. Nobody seriously suggests, however, that these problems provide a basis for the Supreme Court to engage in creative reinterpretation of these requirements.

The Court could, of course, interpret these requirements to better reflect current conditions by reading them in a functional rather than literal way.[74] Instead of reading the word "two" to literally mean two, it could thus read it as expressing a certain historically defined balance between the representation of large and small states in which every state is entitled to a minimum of two senators, but larger states such as New York, California, and Texas are entitled to up to twelve senators, based on population.[75] Similarly, the Court could read the word

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72 *See id.* amend. VII. Numerical provisions are not the only rule-like provisions in the U.S. Constitution. A few examples include the clause preventing members of Congress from holding any other office, *see id.* art. I, § 6, cl. 2, the clause preventing the government from granting titles of nobility, *see id.* art. I, § 9, cl. 8, and the clause requiring the president to be a natural-born citizen, *see id.* art. II, § 1, cl. 5.

73 Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.). On the difference between descriptive and substantive representation, see HANNA FENICHEL PITKIN, THE CONCEPT OF Representation 60–61 (1st paperback ed. 1972). For arguments about the unintended but clear racially disparate impact of the Two Senators Rule, see Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL'Y 21, 43–47 (1997); Neil Malhotra & Connor Raso, *Racial Representation and U.S. Senate Apportionment*, 88 SOC. SCI. Q. 1038, 1046 (2007) (suggesting that these effects are "a classic example of [the] unintended consequences" of a rule-like constitutional provision).

74 *See* Dixon, *supra* note 60.

75 This would preserve the ratio between the population of the largest and smallest three states at the founding (as measured by the 1790 census). In 1790, the three largest states (Virginia, Pennsylvania, North Carolina) had 43% of the national population, while the smallest three (Delaware, Rhode Island, Georgia) had 6%. *See* RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES 3 (1793), https://www.census.gov/prod2/decennial/documents/1790a.pdf [https://perma.cc/SQN7-YMQQ]. In 2010, by contrast, the three largest states (California, Texas, New York) had 26% of the national population, while the three smallest (Wyoming, Vermont, North Dakota) had only 0.6%. *See U.S. Census 2010: Interactive Population Map*, U.S. CENSUS BUREAU, http://www.census.gov/2010census/popmap/ [https://perma.cc/7UR6-U6SP] (follow "Total Population").

"thirty-five" in the Qualifications Clauses as effectively requiring a much *lower* minimum age for office (based on the greater exposure of potential candidates to formal education, and traditional and social media debates about political issues) or conversely a much higher age, which would ensure some form of effective term limit for members of Congress and the Senate.[76] And it could read "twenty dollars" to mean a much higher amount, as adjusted for inflation.[77]

Almost all constitutional scholars agree, however, that it would be illegitimate, or at least deeply problematic, for the Court to adopt this kind of evolving approach to the relevant constitutional rules. Some critical legal scholars note the possibility of the Court adopting this kind of approach but do not to endorse it.[78] Rather, they note the possibility to show the pervasive indeterminacy in formal constitutional language.[79] Among liberal constitutionalists, even scholars who generally suggest that almost all constitutional change can be achieved via informal rather than formal means tend to reject the idea that the Court should update requirements of this kind via a process of constitutional interpretation.[80] In this sense, formal procedures for constitutional amendment may be essential to the ability of constitutional drafters to include rule-like or specific provisions in a constitution. And rule-like or specific provisions appear to be increasingly common in modern constitutionalism.[81]

B. Overriding Judicial Decisions

Another important function of formal constitutional amendment procedure is to provide a mechanism by which democratic majorities

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76 *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 536 (1983) (suggesting a figure based on the basis of "a minimum number of years after puberty"); Dixon, *supra* note 60, at 333.

77 *See* Dixon, *supra* note 60, at 336.

78 *See* Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1174 (1985); Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 686–87 (1985) (arguing that the minimum age clause is "simply the framers' shorthand for their more complex policies").

79 *See* Peller, *supra* note 78; Tushnet, *supra* note 78.

80 *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 305 (2007) ("When the text is relatively rule-like, concrete and specific, the underlying principles [behind it] cannot override the textual command."); Strauss, *supra* note 59, at 906 ("[N]o one *seriously* suggests that the age limits specified in the Constitution for Presidents and members of Congress should be interpreted to refer to other than chronological (earth) years . . . ." (emphasis added)).

81 *See, e.g.*, Versteeg & Zackin, *American Constitutional Exceptionalism*, *supra* note 3, at 1663–66 (presenting evidence that both U.S. state constitutions and most constitutions around the world have a considerably higher level of detail than the U.S. Constitution).

may override a court's interpretation of existing constitutional language. Part of the idea of an entrenched constitution is that it should impose some set of constraints on current majority decisionmaking. Constraints of this kind can help reduce the "transaction costs" of ordinary democratic politics,[82] allow for meaningful deliberation within a polity,[83] and ensure some degree of protection for minority rights.[84] But democratic theorists also increasingly emphasize the idea that democracy entails scope for actual participation by citizens in democratic processes.

Democracy, as Justice Stephen Breyer noted, is premised on an idea of active self-government by citizens, or "liberty of the ancients" as well as "liberty of the moderns."[85] "[L]iberty of the ancients," as Benjamin Constant noted in defining the two broad forms of liberty, also involves "an active and constant participation in collective power";[86] to use Justice Breyer's language, "the people themselves should participate in government—though their participation may vary in degree."[87] Participation of this kind, Jeremy Waldron has argued, extends to constitutional as well as ordinary politics; in a democracy, Waldron argued, there is broad scope for reasonable disagreement among citizens as to the scope of constitutional requirements.[88] There may be broad consensus among reasonable citizens as to the need to recognize minimum rights to "free speech and freedom of association," which establish the basic "deliberative context . . . for formal political decision-making."[89] But beyond that, the idea of individuals as self-governing actors in a democracy implies a commitment to participation—and more specifically, majority-based decisionmaking—in the resolution of *constitutional* as well as more ordinary political disagreements.[90]

Some constitutions contain special mechanisms for the expression of disagreement of this kind by providing for the legislative override of court decisions without reliance on processes of constitutional amendment. In Canada, for instance, the Constitution Act can only be

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82 JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 6–7 (1962).

83 Christopher L. Eisgruber, *Dimensions of Democracy*, 71 FORDHAM L. REV. 1723 (2003).

84 *Cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, at x (1977).

85 STEPHEN BREYER, ACTIVE LIBERTY 3–4 (2005) (quoting Benjamin Constant).

86 *Id.*

87 *Id.* at 15.

88 *See* JEREMY WALDRON, LAW AND DISAGREEMENT 278–81 (1999).

89 *Id.* at 283.

90 *See id.* at 243, 282–85.

amended by quite onerous procedures, but Section 33 of the Canadian Charter of Rights and Freedoms provides that most of the rights provisions contained in the Charter can be overridden by ordinary legislative vote on a five-year renewable basis.[91] Similar powers of formal legislative override are also found in Poland, Mongolia, Belgium, Luxembourg, and Finland—and in a range of countries with constitutions that lack formally entrenched status.[92]

Similarly, some constitutions at least arguably give the legislature power to alter the jurisdiction of particular courts. In the United States, for instance, Article III of the Constitution gives Congress power to make "exceptions" to the appellate jurisdiction of the Supreme Court.[93] Some constitutional scholars suggest that this also provides a means by which Congress may attempt to override a decision of the Supreme Court with which a majority strongly disagrees,[94] although others contest whether the courts would give effect to jurisdiction-stripping legislation if it purported to strip jurisdiction from all courts.[95] The logic of how such a power operates is as follows: a court renders a decision that a democratic majority finds unacceptable; Congress responds by reenacting relevant legislation, or similar legislation, or the executive responds by declining to implement a court decision; and, at the same time (or subsequently), Congress passes legislation formally ousting the jurisdiction of federal and state courts to hear a challenge to the validity of this broad class of provisions. Congress invoked this very logic in threatening to use its powers under

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91 Canadian Charter of Rights and Freedoms § 33, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.); JANET L. HIEBERT, CHARTER CONFLICTS 46, 62 (2002); Tsvi Kahana, *The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter*, 44 CAN. PUB. ADMIN. 255, 276 (2001).

92 *See* STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM 5–6 (2013).

93 U.S. CONST. art. III, § 2 (giving the Supreme Court "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make" over designated classes of cases).

94 *See, e.g.*, Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1041 (1982); Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 929 (1982).

95 *See, e.g.*, Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1008, 1042 (2007); Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1045 (2010); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 34–36 (1990); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 921–22 (1984); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 238 (2007).

Article III to override decisions of the federal courts following *Brown v. Board of Education*,[96] which involved school desegregation, and various Supreme Court decisions protecting the civil liberties of communists and communist sympathizers.[97] In India, the Lok Sabha (the lower house of the Indian Parliament) has frequently relied on a similar power as a means of attempting to override courts' decisions.[98]

In most countries with entrenched constitutions, however, there is no formal power of legislative override or jurisdiction stripping of this kind. Formal procedures for constitutional amendment are thus the *only* formal mechanisms available to legislatures, or democratic majorities, in seeking to override a decision of the court with which they disagree. In the United States, Article V has played only a minimal role of this kind in modern times. The formal threshold for amendment is too high to provide much threat against even fairly unpopular judicial decisions because relatively small minorities can block the use of the formal amendment power. But in many other countries, and indeed many U.S. states where amendment rules are more flexible, formal amendment has been a central tool for the expression of legislative or popular disagreement with court decisions.[99]

Take the experience in India, where most amendments require approval by a majority of all members of the Parliament and two-thirds of those present and voting.[100] Formal processes of constitutional amendment became an important tool for the override of court decisions in the first year of the 1950 Constitution's operation. The first such amendment (the First Amendment) was passed only one year after the Constitution came into effect and sought to override two important decisions of the Supreme Court of India ("SCI") on the

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96 347 U.S. 483 (1954).

97 *See* Yates v. United States, 355 U.S. 66 (1957); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Watkins v. United States, 354 U.S. 178 (1957).

98 The technique has been to place legislation on a special constitutional schedule where judicial review may not be taken. *See, e.g.*, INDIA CONST., *amended by* Constitution (Fourth Amendment) Act, 1955 (adopted in response to *West Bengal v. Banerjee*, (1954) SCR 558 (India) and *Shrinivas v. Sholapur Spinning & Weaving Co.*, (1954) SCR 674 (India)); INDIA CONST., *amended by* Constitution (First Amendment) Act, 1951 (adopted in response to *Madras v. Dorairajan*, (1951) SCR 525 (India)); Rosalind Dixon, *Constitutional Drafting and Distrust*, 13 INT'L J. CONST. L. 819, 836–37 (2015); Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476, 485–86, 488 (2003).

99 *See* Dixon, *supra* note 8, at 98 (noting the importance of constitutional amendment in "trumping existing judicial interpretations"); Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 35 (1989); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 178–79 (1983).

100 *See* INDIA CONST. art. 368, cl. 2.

right to freedom of expression and the scope for the state to make certain "reservations" in public education or employment.[101] The Indian Constitution was originally drafted so as to allow various restrictions on free speech, including laws relating to "libel, slander, defamation, contempt of court," or any other matter which offended "decency or morality or which undermine[d] the security of, or tend[ed] to overthrow, the State."[102] But in an early case, *Thappar v. Madras*,[103] the SCI read those limitations narrowly to permit only those kinds of restrictions that had the *sole* purpose of protecting "the security of the State" or preventing its overthrow and not regulations that had more diverse purposes or were directed toward less serious, more localized threats.[104] This was met with significant opposition from the Congress-led government, as well as various state governments, and proposals were made immediately to override the SCI's decision by constitutional amendment.[105] The Lok Sabha had no difficulty passing such an amendment.

The same basic dynamic applied to changes made by the First Amendment in the ability of the state to make reservations in public education based on caste and other forms of disadvantage. In drafting the original Constitution, the Indian framers expressly provided for such reservations in the context of public employment but made no similar provision with respect to education.[106] The SCI, in *Madras v. Dorairajan*,[107] read this omission to be significant and struck down attempts by the State of Madras to reserve seats based on caste, gender, and religious minority status in state medical and engineering colleges as contrary to general principles of equality or nondiscrimination under the Constitution. The relatively flexible amendment rule once again allowed the Parliament to trump this decision.[108] The First Amendment inserted new language providing that nothing "shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for

101 *See* INDIA CONST., *amended by* Constitution (First Amendment) Act, 1951.

102 INDIA CONST. art 19, cl. 2 (amended 1951).

103 (1950) SCR 594 (India).

104 *Id*. at 601–02.

105 The judgment in *Thappar* was handed down on May 26, 1950. (1950) SCR 594, 594 (India). In Parliament on May 16, 1951, Jawaharlal Nehru proposed that a bill to amend the Constitution be placed before a select committee. *See* Constitution (First Amendment) Act, 1951 (India).

106 *See* INDIA CONST. art. 16, cl. 3 (amended 1951).

107 (1951) SCR 525 (India).

108 *See* Statement of Objects and Reasons, The Constitution (First Amendment) Act, 1951 (India).

the Scheduled Castes and the Scheduled Tribes."[109] In later cases such as *Balaji v. Mysore*,[110] the SCI affirmed this new language as sufficient to give the state broad scope to make reservations in an educational context based on caste.[111]

A similar pattern has taken hold in Colombia with respect to certain decisions made by the Colombian Constitutional Court. In Colombia as well, the basic amendment threshold is quite flexible—amendments can be passed using only a simple majority of Congress in the first round and an absolute majority in the second.[112] For example, in 1994, the Court issued a landmark decision holding that possession of a small amount of drugs for personal use (a "personal dose") could not be criminalized or prohibited (even while leaving laws prohibiting drug trafficking in place).[113] The decision provoked significant controversy and proved unpopular with Colombian politicians; a series of presidents and other leaders backed constitutional amendments to overturn it.[114] In 2009, Congress passed an amendment partially reversing the Court's decision—the amendment allowed Congress to prohibit the possession of a personal dose, while also taking criminal punishment out of play and holding that treatment and counselling-based measures should be used instead, and always with the consent of the affected person.[115] The Colombian case perhaps shows a kind of democratic dialogue between the Court and political actors.[116]

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109 *See* INDIA CONST. art. 15, § 4, *amended by* Constitution (First Amendment) Act, 1951.

110 (1962) SCR (Supp. 1) 439 (India).

111 *See id.* at 441. The Court upheld a broad scope for such reservations in general and simply insisted that in making them, the state target disadvantage or "backwardness" rather than caste alone and respect some outer limit on the percentage of seats reserved. The Court deemed a reservation of sixty-eight percent of seats as too high. *Id.* at 440.

112 *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 375 (Colom.) (amended 2009), *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., Anna I. Vellvé Torras & Jefri J. Ruchti trans., HeinOnline 2010).

113 *See* MANUEL JOSE CEPEDA ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW 55 (2017) (discussing Corte Constitucional [C.C.] [Constitutional Court], mayo 5, 1994, Gaviria Diaz, J., Sentencia C-221/94 (Colom.)) (finding that prohibiting a "personal dose" was unconstitutional).

114 *See id.* at 56.

115 *See* C.P. art. 49 (Colom.), *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., Anna I. Vellvé Torras, Jefri J. Ruchti & Maria del Carmen Gress trans., HeinOnline 2017); L. 2/09, diciembre 21, 2009, DIARIO OFICIAL [D.O.] 47,570 (COLOM.), http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=38289 [https://perma.cc/N3FZ-WQT7].

116 The amendment was subsequently challenged as an unconstitutional constitutional amendment; this challenge was rejected on technical grounds, but the Court also emphasized that the personal dose was prohibited but not criminalized by the amendment. *See* CEPEDA ESPI-

Finally, consider the importance of judicial override as a source of amendments in some U.S. states. In the states, amendment thresholds are normally much more flexible than those found in the U.S. Constitution and often include tools, like the ballot initiative, that allow popular involvement.[117] In some states, for example, amendment has been used to tie the hands of courts so that their criminal procedure decisions under state constitutions are no more generous than those made by the U.S. Supreme Court under the U.S. Constitution.[118] This has often been in response to decisions that were perceived by citizens or politicians as tilting the balance too far in favor of defendants.[119] More recently, amendment by popular initiative was used in California to reverse judicial recognition of same-sex marriage by the California Supreme Court,[120] although this state constitutional amendment was itself subsequently mooted by U.S. Supreme Court decisions recognizing same-sex marriages as a U.S. constitutional right.[121]

As these examples suggest, the goal here is not to argue that particular amendments in response to judicial decisions are always desirable from a normative perspective. The point instead is simply to note that in some cases, allowing some scope for democratic override of judicial decisions interpreting a constitution may be a good thing for a democracy and that flexible amendment rules play this role much more effectively than rigid ones.

NOSA & LANDAU, *supra* note 113, at 57 (discussing C.C., julio 22, 2011, Henao, J., Sentencia C-574/11 (Colom.)).

117 *See* Dixon & Holden, *supra* note 23, at 195.

118 *See, e.g.*, FLA. CONST. art. I, § 12 (providing that state search and seizure provision "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court"); John Dinan, *State Constitutionalism*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 863, 882–83 (Mark Tushnet, Mark A. Graber & Sanford Levinson eds., 2015) (providing examples).

119 *See* Dinan, *supra* note 118, at 882 (noting that the lockstep provision of the Florida Constitution was a response to a Florida Supreme Court decision interpreting the Florida Constitution to provide more protection against electronic eavesdropping than that provided by the U.S. Supreme Court applying the Federal Constitution).

120 *In re* Marriage Cases, 183 P.3d 384, 401 (Cal. 2008); *See* CAL. CONST. art. 1, § 7.5 (California Marriage Protection Act, Proposition 8 (Nov. 4, 2008)), *invalidated by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.* Hollingsworth v. Perry, 570 U.S. 693 (2013).

121 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) (holding that there is a federal constitutional right to same sex marriage); *Hollingsworth*, 570 U.S. at 697 (holding that plaintiffs lacked standing to challenge a lower court ruling striking down Proposition 8).

C. *A Democratic Safety Valve: Preventing Constitutional Replacement and Pressure on Courts*

There are also potentially important pragmatic reasons for a democracy to allow a reasonable scope for formal constitutional change. Placing an entire democratic constitution in a legal "iron cage" may encourage political elites to turn to other mechanisms for achieving change, which may be more difficult to constrain, more destabilizing, or more damaging to judicial independence and the rule of law.[122]

1. *Avoiding Constitutional Replacement*

Even provisions that make a constitution formally unamendable do not completely foreclose the possibility of formal constitutional change to relevant provisions. This is because even if the tools of constitutional amendment are blocked, there is always some possibility of replacing the existing constitution entirely, or, in other words, of writing a new constitution.[123] Whether replacement is a realistic possibility of course depends in part on assumptions embedded in a given legal and constitutional culture. Within the United States, for example, Sanford Levinson has argued that the difficulty of amendment under Article V coupled with significant flaws in the existing constitutional text means that Americans should be willing to consider the possibility of constitutional replacement by convening a series of new constitutional conventions designed to achieve this result.[124] Aside from certain sympathetic segments of the academy, however, wholesale constitutional replacement is hard to envision in the United States. The U.S. Constitution simply has too long a history and is too venerated by the American public for constitutional replacement to be a realistic response (at least for most people) to the rigidity of formal constitutional amendment under Article V.

In many newer democracies, in contrast, there is weaker popular and elite attachment to existing constitutional arrangements, and, thus, it is more plausible to think that limits on constitutional amendment may lead to a process of constitutional replacement.[125] Imposing

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122 For constitutions that authorize authoritarian rule, preventing constitutional change will of course be even more damaging from a democratic perspective. *E.g.*, Ridwanul Hoque, *The Recent Emergency and the Politics of the Judiciary in Bangladesh*, 2 NUJS L. REV. 183 (2009) (India).

123 *See* David Landau & Rosalind Dixon, *Constraining Constitutional Change*, 50 WAKE FOREST L. REV. 859, 867–70 (2015) (noting the feasibility of replacement as a substitute for amendment in recent projects of authoritarian constitutional change).

124 *See* SANFORD LEVINSON, FRAMED 331–45 (2012).

125 It is relevant in this light that the average lifespan of a constitution is under twenty

limits on the formal power of constitutional amendment may thus increase the incentive for dominant political elites to turn to constitutional replacement as a means of achieving desired forms of constitutional change.

Compared to constitutional amendment, processes of constitutional replacement may be harder for law or legal institutions to constrain. This Article's authors argue elsewhere that it is both possible to imagine imposing legal constraints on processes of constitutional replacement and, moreover, that such restraints have actually existed in practice.[126] However, restrictions on constitution-making may be antithetical to some versions of classical constituent power theory.[127] They may also be practically difficult for courts to successfully enforce or deploy.[128]

Because constitution-making moments theoretically put the entire constitutional order up for grabs, they may place institutional stability at greater risk. Again, this point can be overstated—Ozan Varol for example has pointed out that constitutionalism is "sticky," such that many provisions tend to remain in national constitutions even after processes of wholesale replacement.[129] But compared to amendment, replacement may still place the basic institutional order at a higher risk of change.

Constitutional amendment procedures, in this sense, can thus serve not only as a vehicle for constitutional change. They can also serve as an important "safety valve" against the possibility of more sweeping, and potentially more destructive, forms of change.[130]

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years. *See* ELKINS, GINSBURG & MELTON, *supra* note 3, at 2 (citing an average constitutional lifespan of nineteen years in a statistical study).

126 *See* Landau & Dixon, *supra* note 123, at 876–88 (surveying a range of procedural and substantive restraints on constitution-making); *see also* Joel I. Colon-Rios, *A New Typology of Judicial Review of Legislation*, 3 GLOBAL CONSTITUTIONALISM 143, 162–68 (2014) (examining the emergence of a possible new model of judicial review where courts will review the exercise of the constituent power in replacement processes).

127 Colon-Rios, *supra* note 126, at 168 (arguing that such a conception would involve the "rejection of popular sovereignty as providing the ultimate basis for the authority of a constitutional system").

128 *See* Landau & Dixon, *supra* note 123, at 870 (arguing that the best way to understand limits in this area is pragmatic rather than philosophical or conceptual).

129 *See* Ozan O. Varol, *Constitutional Stickiness*, 49 U.C. DAVIS L. REV. 899, 902–03 (2016); *see also* ELKINS, GINSBURG & MELTON, *supra* note 3, at 57–59 (finding, through statistical tests, that most constitutional provisions are unaltered even by a process of constitutional replacement).

130 *See* Landau & Dixon, *supra* note 123, at 873–75.

2. *Avoiding Pressure on Courts*

Another danger of having formal processes of constitutional amendment that are too onerous is that dominant political actors may look for ways of achieving desired forms of change via informal means, such as by placing pressure on the judiciary. Take Nicaragua as an example. In 2009, President Daniel Ortega attempted to extend his own term in office by proposing formal amendments to existing presidential term limits.[131] When that proposal was defeated in the national legislative assembly, he turned to informal modes of constitutional change involving a petition to the Supreme Court of Nicaragua arguing that the relevant constitutional provision creating the term limit was itself an unconstitutional constitutional amendment.[132] Ortega succeeded in this unusual argument before the Court, but only after launching a direct attack on judicial independence in Nicaragua.[133] The bench that heard the case was composed entirely of Sandinista-appointed judges.[134] This was no accident; as the European Union noted, the panel that heard the case "met during the night, in the absence of three of the six member judges, who were not invited and who were replaced by three pro-government judges."[135]

India provides another example. In endorsing a doctrine of unconstitutional constitutional amendment, the SCI created a check against the potential for future abuse of constitutional change.[136] Yet in doing so, in the short term, the Court also increased incentives for Prime Minister Indira Gandhi to turn to more informal methods to achieve her political program. One of these methods involved a direct attack on the independence of the Indian judiciary. One of the hallmarks of judicial independence in India has been the understanding that the appointment of its Chief Justice should not reflect any form of "reward" for decisionmaking loyal to or approved by the government but rather should be based strictly on norms of seniority.[137] Indira Gandhi, however, directly flouted that convention in response

131 *See* Rosalind Dixon & Vicki C. Jackson, *Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests*, 48 WAKE FOREST L. REV. 149, 163 (2013).

132 *Id.* at 163–64.

133 *See id.*

134 *Id.*

135 *Id.* at 203 (citation omitted).

136 Bharati v. Kerala, (1973) 4 SCC 225 (India).

137 *See, e.g.*, Kim Lane Scheppele, *Declarations of Independence: Judicial Reactions to Political Pressure*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS 227, 254 (Stephen B. Burbank & Barry Friedman eds., 2002).

to *Bharati v. Kerala*.[138] She passed over three Justices in the majority in the case for appointment to be the Chief Justice, thereby seeking to create a Court more favorable to upholding the validity of future constitutional amendments or legislation, and shortly thereafter she declared a state of emergency for two years.[139]

The danger of such informal constitutional change is its tendency to further control the judiciary beyond the specific issue that began the initial attack on judicial independence.[140] This is particularly true in newer or more fragile democracies where a tradition of judicial independence may be lacking.[141] In these contexts, attempts to pack a court with judges loyal to the government, or dominant political elite, may have a pronounced and pernicious effect on judicial behavior. For core constitutional disputes, courts may lack the independence necessary to serve as a check on governmental power. And courts that have been deliberately stacked with judges loyal to the government may lack basic professional legal skills or public confidence of the kind needed to settle disputes even in ordinary cases.

III. The Virtues of Constitutional Rigidity

Rigid constitutions, of course, have their own benefits, some of which this Article highlights. It focuses here on the avoidance of abusive forms of constitutional change that threaten to erode democracy because that is perhaps the least known of the major benefits and the one that is most relevant to this Article's argument.

A. Stability and the Separation of Ordinary and Constitutional Politics

Rigid constitutions by definition are more difficult to change than flexible ones; this may result in increasing the stability of the existing constitutional order. Stability is of course not an unalloyed good; for reasons laid out above, constitutions at times may need to be updated or changed as a democratic response to judicial decisionmaking.[142] But many theorists argue that frequent changes to at least certain aspects of a constitutional order may have undesirable normative effects, ar-

138 (1973) 4 SCC 225 (India).

139 Scheppele, *supra* note 137, at 254.

140 *See generally* Gardbaum, *supra* note 10, at 295–303 (giving recent examples of retaliatory actions taken against constitutional courts and illustrating how a backlash often reaches further than the event that instigated it).

141 *Id.* at 289.

142 *See* Elkins, Ginsburg & Melton, *supra* note 3, at 162 (warning against excessive rigidity).

guing, for example, that constitutions act as focal points.[143] In this sense, they allow political and social actors to carry out their goals more easily by permitting agreement on the basic rules by which decisions are made.[144] If these ground rules can be changed too easily and too frequently, many of these benefits may be lost. Political elites and social movements may be uncertain what these ground rules are or may spend much of their time and effort fighting over what the ground rules should be rather than seeking other goals within that framework.[145]

Constitutions are also often seen as self-commitment devices, modelled on Ulysses binding himself to the mast in order to resist the lure of the Sirens.[146] Written constitutions in this sense may allow a polity to resist temporary majoritarian impulses that are harmful to the long-term health of the country. A number of different goals of constitutionalism might be served by this kind of self-commitment. For example, populist political movements might suggest a set of economic or social measures that will produce short-term gains, such as increases in economic growth, but at a long-term cost to political or economic institutions, or to other long-term goals like environmental health.[147] Constitutions may limit these projects by committing the political system to a set of institutions or goals that cannot be easily changed in the short run. Similarly, temporary majorities may seek to repress minority groups, but in the longer term, all groups may be better off—for economic, social, and political reasons—if such repression cannot be carried out by shifting majorities.[148] Again, constitutionalism may help ameliorate this problem by limiting the ability of political majorities to take such action.

The self-commitment model makes the most sense with a relatively rigid conception of constitutional change, where there is separation between the thresholds for normal political processes like lawmaking and constitutional amendment. Without this separation, self-commitment may fail because majoritarian forces will be able to

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143 *See, e.g.*, Tonja Jacobi, Sonia Mittal & Barry R. Weingast, *Creating a Self-Stabilizing Constitution: The Role of the Takings Clause*, 109 Nw. U. L. Rev. 601, 612 (2015).

144 David A. Strauss, *Legitimacy, "Constitutional Patriotism," and the Common Law Constitution*, 126 Harv. L. Rev. F. 50, 51–52 (2012).

145 *See id.* at 51 (noting that a constitution "resolves some issues so that we do not have to relitigate them constantly").

146 *See, e.g.*, Jon Elster, Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints 88–89 (2000).

147 *Cf.* John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 Tex. L. Rev. 1929, 1958 (2003).

148 *See* Ferejohn, *supra* note 23, at 503–04.

easily use the mechanisms of constitutional change to enshrine their will.[149] Rather than reflecting the long-term good of the political system, constitutions may become reflections of short-term goals and desires, just like ordinary politics. For example, short-term majorities interested in changing a constitution to better repress minority rights will be able to do so easily if they must merely meet a threshold similar to that found in ordinary politics.

The relationship between stability, self-commitment, and the threshold for formal constitutional amendment is a complex one. This is because of the existence, noted above, of substitutes for formal constitutional change, such as informal constitutional change and wholesale constitutional replacement.[150] In some contexts, a threshold for formal constitutional change that is too high may incentivize actors to pursue other routes of change that are more destabilizing of the constitutional order. Zachary Elkins, Tom Ginsburg, and James Melton, for example, present empirical evidence that constitutions are most likely to avoid replacement if they have an intermediate level of amendment difficulty rather than a very high one or a very low one.[151] The key intuition is that while extremely flexible constitutions may lose their basic stability, making replacement likely, extremely rigid ones may push political leaders towards complete replacement because of their inability to pursue constitutional amendment. And this relationship may be especially problematic if, as seems likely, constitution-making processes that replace an existing constitution entirely are especially destabilizing. The need for stability may thus suggest the desirability of some rigidity in the amendment rule, but perhaps not a highly rigid constitution.

B. Identity and Constitutional Culture

An understudied but potentially important point concerns the relationship between the threshold for constitutional change and the identification of citizens with their constitutional text. This identification may be important in realizing a range of goals associated with constitutionalism. For example, it may enhance stability by making replacement less likely; popular buy-in of existing constitutions will increase resistance to attempts to scrap the existing constitutional text. It may also aid social and political forces in realizing the objectives

149 *See* Dixon, *supra* note 8, at 102.

150 *See supra* Section II.C.

151 *See* ELKINS, GINSBURG & MELTON, *supra* note 3, at 139–41.

enshrined in a constitution by increasing support for those objectives and thus placing pressure on politicians to achieve them.

It is plausible that there is some relationship between thresholds for constitutional change and the degree of popular buy-in that a constitution is likely to receive. As Richard Albert has pointed out, thresholds for constitutional change have a symbolic as well as practical purpose.[152] That is, they help to mark out the most fundamental values of a polity.[153] Where, for example, certain constitutional provisions are made impossible to change or especially difficult to change (such as the German human dignity clause), they send a message about the importance of those constitutional provisions.[154] In this sense, when rigid constitutions create a clear separation between ordinary and constitutional politics, they may also increase the importance and centrality of constitutions to citizens.

Rigidity may also tend to be correlated with other aspects of constitutional design. As noted by several scholars, for example, the extreme difficulty of amendment in the United States may be correlated with a relatively brief, framework Federal Constitution that often lays out just the broad outlines of institutional design.[155] The brevity of the constitutional text may reduce the need for frequent updating, while the lack of detail in many of the Constitution's provisions may facilitate the operation of substitutes for formal change, such as judicial interpretation or informal change through other political institutions.[156] In contrast, the model explored by, among others, Mila Versteeg and Emily Zackin is one where constitutions are more flexible and also lengthier and more detailed.[157] Increased length and detail may increase the need for flexible tools of constitutional change because these constitutions may need to be updated more often and because increased detail may reduce the salience of informal means of change. It may be that the length of constitutions, for example, is also correlated with degrees of popular identification—citizens may recognize and assimilate core constitutional values more easily if these are

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152 Albert, *Expressive Function*, *supra* note 13, at 227.

153 *See id.*

154 *See id.* at 266.

155 *See, e.g.*, Versteeg & Zackin, *American Constitutional Exceptionalism*, *supra* note 3, at 1701.

156 *See supra* Sections II.A, II.B.

157 *See* Versteeg & Zackin, *American Constitutional Exceptionalism*, *supra* note 3, at 1702–05.

found in a briefer rather than lengthier text. The issue, at any rate, needs more empirical investigation.[158]

C. *Deterring Abusive Acts of Constitutional Change*

If constitutional amendment procedures are too flexible, they may pose distinct dangers to democracy and the rule of law; dominant political elites may rely on formal amendment procedures to undermine even quite thin procedural notions of democracy, such as the idea of a system of government based on regular free and fair elections.[159] Identifying the threat to democracy in this way uses a minimalist understanding of democracy. The protection of free and fair elections is an idea of democracy that almost all political theorists can endorse, regardless of their particular, potentially more expansive, understanding of democracy.[160] It represents a form of overlapping consensus among different or competing understandings of democracy, based on a willingness to leave certain other ideas about democracy to the side for the purpose of reaching agreement on a common "democratic minimum core."[161] Yet it is also an understanding of democracy that, in many countries around the world, is increasingly threatened—by attempts of dominant political elites to insulate themselves from meaningful electoral competition or accountability and to entrench their own hold on power.[162] "Abusive" constitutional practices of this

158 A recent study of popular identification with U.S. state constitutions finds no relationship between the age, length, or frequency of amendment of a constitution and its degree of support by citizens in a survey. *See* Nicholas O. Stephanopoulos & Mila Versteeg, *The Contours of Constitutional Approval*, 94 WASH. U. L. REV. 113, 152 (2016). These results might show the irrelevance of constitutional design to constitutional identification, the availability of substitutes that serve as loci of popular identification, or the lack of salience of subnational constitutions to the lives of most citizens.

159 We do not focus on a related issue: overly flexible amendment rules in the early years of a constitution's operation may in some cases undermine the necessary incentive for all parties to invest in the relevant constitutional bargain or system. *See* Huq, *supra* note 5, at 1228. Often, however, this danger of overly flexible amendment can be addressed via a temporary limit on formal constitutional amendment, or amendment "freeze." *See id.* at 1229. For examples of these kinds of provisions, see U.S. CONST. art. V (regarding slavery); Constitution of the Irish Free State 1922 art. 50 (varying amendment procedures for the first eight years of the Constitution); 1958 CONST. art. 7 (Fr.) (prohibiting amendment when the President of the Republic has resigned, died, or been impeached).

160 *See, e.g.*, RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 143–50 (2003).

161 *See* Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1907–08 (2006).

162 As Levitsky and Way point out, this is often done through measures that make states "competitive authoritarian" regimes, where nonfraudulent elections are still held, but incumbents compete on an unequal playing field where they are very difficult to dislodge. *See* STEVEN LEVITSKY & LUCAN A. WAY, COMPETITIVE AUTHORITARIANISM 5–7 (2010).

kind frequently involve reliance on formal processes of constitutional amendment.[163]

In Hungary, for instance, after gaining power in 2010 with a simple majority of votes but over two-thirds of seats, the Fidesz Party began amending the Hungarian Constitution, which could be done by Parliament alone through a two-thirds majority, to reduce the jurisdiction and powers of key institutions like the Constitutional Court.[164] It then engaged in wholesale constitutional replacement, which it also asserted could be carried out by the two-thirds majority.[165] The new Constitution weakened checking institutions designed to rein in electoral majorities and made it harder to dislodge the incumbent party from power.[166]

In Zimbabwe, after winning office in 1980, President Robert Mugabe likewise began to use a variety of tactics to retain his hold on power, including a series of constitutional amendments that could be carried out through a two-thirds amendment threshold.[167] Throughout the 1980s, with the support of a ZANU-PF-controlled Parliament, Mugabe introduced amendments giving the President greater control over judicial appointments, creating an executive rather than ceremonial presidency, abolishing the office of prime minister and the Senate, and creating a unicameral parliament.[168] In parallel to this, he also sought to shore up the dominance of ZANU-PF via a system of economic patronage involving the redistribution of formerly white-owned land, largely to ZANU-PF supporters.[169] And to allow this, he again relied on processes of formal constitutional amendment.

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163 *See* Landau, *supra* note 2, at 195 (defining "abusive constitutionalism" as "the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before"); Kim Lane Scheppele, *Not Your Father's Authoritarianism: The Creation of the "Frankenstate,"* EUR. POL. & SOC'Y NEWSL. (Am. Pol. Sci. Ass'n, Washington, D.C.), Winter 2013, at 5, 5 (discussing an evolved form of authoritarianism that relies on combinations of constitutional mechanisms).

164 *See, e.g.*, Gabor Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?* 19 CONSTELLATIONS 182 (2012); Scheppele, *supra* note 163.

165 Scheppele, *supra* note 163, at 7–8.

166 *Id.*; *see also* Miklós Bánkuti, Gábor Halmai & Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, 23 J. DEMOCRACY 138, 139–40 (2012).

167 Lloyd Sachikonye, *Constitutionalism, the Electoral System and Challenges for Governance and Stability in Zimbabwe*, 4 AFR. J. ON CONFLICT RESOL. 171, 174–77 (2004).

168 *See id.*

169 *See* Norma Kriger, *Liberation from Constitutional Constraints: Land Reform in Zimbabwe*, 27 SAIS REV. INT'L AFF. 63, 71 (2007); Robert B. Lloyd, *Zimbabwe: The Making of an Autocratic "Democracy,"* 101 CURRENT HIST. 219, 220 (2002); John McClung Nading, *Prop-*

A similar pattern applies in Latin America. In Venezuela, for example, upon taking power in 1998, President Hugo Chavez used constitutional replacement largely to sweep the institutional order clean and shut down institutions still allied with the opposition, as well as to entrench more power in the presidency.[170] Similarly, in Ecuador, President Rafael Correa quickly replaced the Ecuadorian Constitution in 2008 after coming to power, thereby allowing him to pack key institutions, strengthen the presidency, and pursue ideological goals.[171] In both countries, leaders subsequently adopted a process of constitutional amendment after these replacements had been carried out. The key goal of these proposed amendments in both countries was to eliminate presidential term limits.[172] Elsewhere in Latin America, including in Colombia, Bolivia, Nicaragua, and Honduras, leaders have sought constitutional changes to lengthen or eliminate presidential term limits.[173]

A more rigid amendment rule may make constitutional changes that weaken democracy more difficult. This is true even though leaders also rely on other mechanisms, such as informal change and placing pressure on courts for favorable interpretations. Venezuela offers an interesting example: after replacing the Venezuelan Constitution, Chavez used a combination of formal and informal tools to maintain power. For example, the Constitution created a new appointment mechanism for the Supreme Court that gave a significant role to civil society; however, Chavez used transitional appointments and other tools to make sure that he did not lose control of the Court to independent factions of civil society.[174] Chavez also used a mix of formal and informal mechanisms to control the media and weaken the political opposition.[175] Using informal means, in other words, he under-

erty Under Siege: The Legality of Land Reform in Zimbabwe, 16 EMORY INT'L L. REV. 737, 756 (2002).

170 *See, e.g.*, ALLEN R. BREWER-CARIAS, DISMANTLING DEMOCRACY IN VENEZUELA 54–55 (2010); David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923, 941–49 (2013).

171 *See* Catherine M. Conaghan, *Ecuador: Correa's Plebiscitary Presidency*, 19 J. DEMOCRACY 46, 51–52 (2008).

172 *See* David Landau, *Term Limits Manipulation Across Latin America—and What Constitutional Design Could Do About It*, CONSTITUTIONNET (July 21, 2015), http://www.constitutionnet.org/news/term-limits-manipulation-across-latin-america-and-what-constitutional-design-could-do-about-it [https://perma.cc/3HSZ-DLPJ].

173 *See id.*; Nicholas Casey, *Bolivian President Concedes Defeat in Term-Limit Referendum*, N.Y. TIMES (Feb. 24, 2016), https://www.nytimes.com/2016/02/25/world/americas/bolivian-president-evo-morales-concedes-defeat-in-term-limit-referendum.html [https://perma.cc/YS68-GAJB].

174 *See* BREWER-CARIAS, *supra* note 170, at 106–07.

175 *See id.* at 153.

mined the tools in his own new Constitution in order to maintain power. Much existing scholarship on so-called hybrid regimes, those stuck between democracy and dictatorship, has emphasized their reliance on informal institutions and informal methods of change.[176]

However, as the examples above demonstrate, formal constitutional change is central to many projects of democratic erosion.[177] The main reason seems to be that there are some changes that are much more difficult to carry out through alternative means. Term limits, which are generally enshrined in clear and specific terms in a constitutional text, offer an interesting example.[178] In some contexts, where the rule of law is very weak at the domestic and international level, it may be possible for executives to simply overstay their constitutional terms without paying any significant penalty. But increasingly, regimes may face substantial domestic and international repercussions for remaining in power beyond their allotted mandate. And given the rule-like quality of term limits, it is very difficult to envision informal changes or judicial interpretations that would achieve the same result as formal constitutional change.[179] Put more generally, to achieve at least some key goals, actors seeking to undermine democracy will often prefer or require resort to formal mechanisms of constitutional change.

In the United States, for example, the rigid amendment mechanism of Article V of course would not serve as a protection against any form of democratic erosion. Such a belief would be a foolish one. Take the judiciary as an example. Political actors could potentially use ordinary law to carry out a range of attacks against the federal judiciary and the Supreme Court, such as abolishing the lower federal courts, cutting the jurisdiction of the Supreme Court through the Exceptions Clause, packing the Court through adding more Justices, or cutting the budget of the judiciary.[180] Informal means, such as bribing or threatening Justices, could also be used (and indeed have been used in other countries with similar formal designs to those found in the

176 *See* LEVITSKY & WAY, *supra* note 162, at 27–28 (arguing that "informal institutions" are particularly crucial to the dynamics of competitive authoritarianism).

177 *See* Landau, *supra* note 2, at 212–14.

178 *See, e.g.*, Tom Ginsburg, James Melton & Zachary Elkins, *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807, 1814 (2011) (finding that "term limits are surprisingly effective in constraining executives from extending their terms" in democratic systems).

179 In this sense, a term limit is similar to the numerical clauses studied above in Section II.A that cannot usually be updated through judicial or other informal means.

180 For a reflection on some of these methods, see Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1004–05 (1965).

United States).[181] But the extreme difficulty of formal amendment would plausibly hinder certain kinds of changes. Without a formal amendment, for example, it is much less likely that a would-be autocrat would be able to extend his or her presidential term limit and stay beyond eight years. It might also be true that certain kinds of reductions in the protection of individual rights (such as the criminalization of core political speech) would also be difficult to carry out without formal change to the First Amendment.[182]

IV. The Case for a Tiered System of Constitutional Change

The virtues of both the flexible and rigid models of constitutional change are substantial. The flexible model in some sense empowers the democratic populace to exercise ongoing oversight of their institutional order, allowing them to update the constitutional text frequently so as to control their political agents and preventing overreliance on judges as a mode of constitutional change. The rigid model defends the stability and identity of core democratic institutions, helping to protect against the possibility of erosion.

Constitutional designers do not face the sharp trade-off between these two competing models that is sometimes assumed.[183] It is natural that designers would, in many contexts, seek to serve both of these sets of goals. One possibility, examined first in Section IV.A, is that designers could select a level of constitutional change that reflects an

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181 In Argentina, for example, Supreme Court Judges also have life tenure, but presidents have historically used bribes and threats to force resignations in order to gain a supportive Court. *See* Gretchen Helmke, Courts Under Constraints: Judges, Generals, and Presidents in Argentina 62, 65 (2005); Christopher J. Walker, *Judicial Independence and the Rule of Law: Lessons from Post-Menem Argentina*, 14 Sw. J.L. & Trade Am. 89, 103 (2007).

182 In this sense, designers who seek constitutional rigidity as protection against abusive constitutionalism must, of course, also be concerned with the alternative of constitutional replacement. As noted above in Part III, one impact of a rigid constitution may be to encourage political leaders to seek replacement or constitution-making processes. The examples here include many cases where leaders sought replacement alongside of (as in Hungary) or instead of (as in Venezuela) constitutional amendment. In the United States, of course, constitutional replacement is virtually unthinkable, despite the rigid amendment rule found in Article V, because of the distinctive nature of U.S. constitutional culture. But in many other contexts, it is clear that political leaders view amendment and replacement as substitutes and thus that one unintended byproduct of rigid amendment rules might be to encourage more constitutional replacement. *See* Landau & Dixon, *supra* note 123, at 865 (noting that "replacement, like amendment, is a potential tool for democratic abuse").

183 *See, e.g.*, Versteeg & Zackin, *American Constitutional Exceptionalism*, *supra* note 3, at 1700–05 (contrasting two models of constitutionalism, one with a "spare and entrenched" framework and the other which is characterized by "broad scope, highly detailed nature, and popular responsiveness").

average level of difficulty between rigidity and flexibility. The alternative, examined in Section IV.B, is for a tiered or hybrid system of constitutional change, in which some parts of the constitution are relatively easy to change and others are more difficult. This hybrid design, which, as already shown, is quite popular in comparative constitutional law, best responds to the contrasting strengths of each style of constitutional change.

A. A "Moderate" Level of Amendment Difficulty

One way in which drafters may respond to the contrasting strengths of the two models is to adopt an amendment rule that requires *moderate* but not extremely high levels of supermajority support for the legislative proposal or approval of amendments. Constitutions worldwide adopt a range of different procedures for constitutional amendment. They alternately require the popular ratification of amendments, legislation that proposes an amendment containing a single subject be passed twice by different houses or in different time periods, ratification within a certain time frame, or some combination of these requirements.[184] They also adopt a range of distinct supermajority thresholds for the legislative proposal or approval of amendments.

Some empirical studies have shown that the level of supermajority support required for the proposal of an amendment in a legislative setting is a determinant of the actual success of constitutional amendment.[185] There is also evidence of a positive correlation between constitutions adopting a "moderately difficult" procedure for constitutional amendment and the chances that a constitution will survive or endure over the long term. Donald Lutz, for instance, found in a study of thirty national constitutions that both an easy amendment process and a very difficult amendment process (which leads to a very low amendment rate) produce a higher probability that a constitution will be replaced entirely.[186] Similarly, in a much larger study of global

184 *See, e.g.*, Dixon, *supra* note 8, at 104–08; Bjorn Erik Rasch & Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, *in* DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY 319, 326–32 (Roger D. Congleton & Birgitta Swedenborg eds., 2014).

185 *See, e.g.*, Dixon & Holden, *supra* note 23, at 198; Ferejohn, *supra* note 23, at 524. *But see* Ginsburg & Melton, *supra* note 4, at 712 (finding no statistically significant relationship between amendment difficulty and amendment rate and arguing that cultural variables are more likely to explain amendment rates).

186 Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 237, 245 (Sanford Levinson ed., 1995).

constitutions across time, Elkins, Ginsburg, and Melton found that constitutions that are moderately difficult to amend are less likely to be replaced than those that have extremely permissive or demanding formal requirements for constitutional amendment.[187]

A "moderately" difficult supermajority requirement for the legislative proposal or approval of amendments is thus one possible way of balancing the expected benefits and costs of amendment flexibility; unlike some other procedural requirements (such as a single-subject rule or double passage), supermajority rules can be calibrated at a variety of different levels of difficulty. A unitary and moderate amendment rule, however, achieves neither the virtues of flexibility nor those of rigidity all that well. That is, the threshold chosen may be too high to make constitutional provisions as easily updatable as would be desirable.[188] At the same time, it may be too low to provide stability to the constitutional text or to prevent abusive forms of constitutional change.[189] Absent the very limited empirical data noted above, there is no particular reason to believe that the optimum is a halfway point between rigidity and flexibility since such a point may simply sacrifice many of the benefits of both systems.

More precisely, it may be helpful to think of constitutions as containing different kinds of provisions with different functions. These different kinds of provisions vary in terms of their needs and risks of constitutional change. In lengthy constitutions, for example, detailed, specific, and technical provisions may need frequent updating. Take a provision explaining the distribution of fiscal resources between different levels of government. The initial allocation of these resources may prove unworkable, or an initially satisfactory allocation may become problematic with time. In contrast, other kinds of provisions may have less of a need to be updated, such as basic principles of the state, which should not change frequently, or changes that may be both more destabilizing and more dangerous to democracy, as with at least some rules governing the functioning of state institutions like courts. Based on experience, and without denying that the particular balance is often contextual, there is at least some knowledge of which kinds of provisions fall in which of these categories. The broad point is that constitutions are heterogeneous texts and different kinds of provisions should be treated differently,[190] while a unified amendment

187 ELKINS, GINSBURG & MELTON, *supra* note 3, at 140–41.

188 *See supra* Section II.A.

189 *See supra* Section III.C.

190 *See* Rosalind Dixon & David Landau, *Competitive Democracy and the Constitutional*

rule would impose the same moderate level of difficulty across the entire text.

B. Tiered Constitutional Design

As emphasized above in Part I, many constitutional designers seem to have recognized and responded to this logic by using a multitrack system of constitutional change rather than a uniform or single-track system. There are of course a number of ways to do this, as explored in more detail below. Ideally, however, a multitrack system of constitutional change should allow constitutional design to respond to the various benefits of a both flexible and rigid system.

For example, in such a system, the default rule for constitutional change can be relatively undemanding. Thus, if political actors need to update constitutional provisions, they will likely be able to do so. The facility of formal change should reduce reliance on other means of constitutional updating like judicial interpretation. Moreover, the ability of political actors to overrule courts on many questions of judicial interpretation should reduce the force of the counter-majoritarian difficulty and of political pressures to pack judiciaries or attack judicial independence.[191] At any rate, when working with a detailed and lengthy constitutional text (as is now the norm around the world), a relatively flexible background rule of constitutional change seems like a virtual necessity. There is no other way for democratic actors to make changes to obsolete or unworkable provisions in the text, short of the highly destabilizing alternative of wholesale constitutional replacement.[192]

At the same time, the key contribution of a tiered system is to capture some of the benefits of a rigid system of constitutional change. Through some combination of express constitutional text and judicial interpretation, change to certain constitutional articles may be made either more difficult or impossible. The rigidity of these provisions may protect the stability of certain aspects of the constitutional order, thus preserving the value of the constitution as a focal point and precommitment device and perhaps defending against forms of constitutional change that pose a threat to the democratic order.[193] If designers or courts can, for example, identify constitutional provisions or

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Minimum Core, *in* ASSESSING CONSTITUTIONAL PERFORMANCE 268, 269 (Tom Ginsburg & Aziz Z. Huq eds., 2016).

191 *See supra* Sections II.B, II.C.

192 *See supra* Section II.A.

193 *See supra* Part III.

classes of change that pose a particularly substantial threat of democratic erosion, they can require more onerous procedures to make these changes or, in the extreme, attempt to make changes to these provisions impossible by any means. When a constitution makes its strict one-term limit on presidents unamendable (as in Honduras)[194] or when it requires more demanding procedures, like a referendum, for changes to the "fundamental structure" of the state (as in Ecuador),[195] the text may be playing a role in enhancing the stability of core parts of the constitutional text and in fending off attempts at democratic erosion.

The identification of certain norms or values as especially protected may also build a sense of identity or constitutional culture around a constitution, despite the flexibility of most of its provisions. For example, the unamendable clauses of the Brazilian Constitution[196] or the specially protected fundamental principles of the South African Constitution[197] may serve as a basis for popular identification, even though both documents are quite detailed and lengthy overall. In effect, a tiered system of constitutional change may be part of a process through which a longer constitution gains an identity as a statement of founding normative values and as a more fundamental text than ordinary legislation.

All of this, of course, is just a theoretical case for a tiered system of constitutional change. It demonstrates that a multitrack model might be able to combine the virtues of a flexible and rigid system of constitutional change. This Article has not yet demonstrated how such a system could be designed or whether it is likely to achieve its goals in practical terms. The rest of this Article is devoted to those tasks. The upshot is that a large number of countries are using these tools, but there is still much to learn about the functionality of these tiered designs in different contexts. The task is a worthwhile albeit extremely challenging one.

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194 CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS [HONDURAS CONST.] 1982, art. 374, *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., Maria del Carmen Gress & Jefri J. Ruchti trans., HeinOnline 2015).

195 ECUADOR CONST. arts. 441–442 (distinguishing an "amendment" procedure from a "partial" reform procedure and requiring that the latter be used for certain forms of change).

196 *See* C.F. art. 60(4) (Braz.) (prohibiting amendments that are "aimed at abolishing" certain fundamental principles including federalism, "direct, secret, universal and periodic suffrage," the "separation of powers," and "individual rights and guarantees").

197 *See* S. AFR. CONST., 1996, § 74 (requiring a more demanding procedure for amendments to certain basic principles).

V. The Architecture of Constitutional Tiering

This Part surveys the possibilities of a multitrack design of constitutional amendment rules, based on the practice of a wide range of systems around the world. It would be far too ambitious, at least at this stage, to seek a set of clear best practices. At any rate, the precise content and strength of different designs for constitutional change will inevitably be affected by the particular context for constitutional drafting. In some cases, the context for a particular constitutional transition may mean parties to constitutional negotiations are quite willing to endorse a tiered approach to constitutional amendment, whereas in others, parties' concerns about lock-in, or investment in the constitutional bargaining process, may mean they are unwilling to adopt even a demanding uniform track for constitutional amendment.[198] Political considerations of this kind will inevitably dictate the plausibility of the whole idea of tiering.

However, in contexts where tiering is politically plausible, this Part seeks to explain the range of choices faced by constitutional designers on this issue, as well as to clarify tradeoffs and illuminating possibilities that have been underexplored in existing work. It treats a range of issues: (a) the kinds of provisions given heightened protection and placed on a higher tier, (b) the choice between rule-like and standard-like identification of the protected forms of constitutional change, (c) the related choice between ex ante and ex post construction of protections, (d) the number of tiers, and (e) the kinds of procedural devices used to make constitutional change more difficult at higher tiers. Comparative experience illuminates the range of possibilities on each issue. Unfortunately, it also suggests that these choices are sometimes made without full consideration of their consequences.

At minimum, constitutional designers and courts should carefully consider which provisions should be protected in light of the purposes and functions of tiering. It is not always clear that this is done. Consider for example the multitrack system of constitutional change in California, which, like many U.S. states, distinguishes between a constitutional "amendment" and a "revision," a distinction that has been actively policed by the courts.[199] The main distinction between those devices in California is that popular initiative can be used for amendment but not revision, while the state legislature can initiate either

198 *See, e.g.*, Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 Int'l J. Const. L. 636, 638 (2011); Huq, *supra* note 5, at 1178.

199 *See, e.g.*, Cal. Const. art. XVIII.

form of change.[200] In recent caselaw, the California Supreme Court has suggested that a change will be more likely deemed a revision if it affects the structural or institutional pieces of the California Constitution and if it affects a large number of distinct provisions of the Constitution.[201] Thus, for example, the court allowed a popular initiative to reverse judicial recognition of same-sex marriage in the state in 2009, holding in effect that this was not a change to structural provisions that was sweeping enough to constitute a revision.[202]

The jurisprudence on the distinction may make little sense in light of its function. It is unclear, for example, why popular initiative is more suspect when used to alter structural provisions of the California Constitution rather than rights provisions. The purpose of a popular initiative would seem to be to allow the public to act as a direct check on governmental institutions that might be seeking to entrench their own power rather than serving the popular will. This concern would seem to be at its highest when dealing with issues of structural and institutional reform, where incumbents may use their position to stymie necessary reforms that will harm their interests. In these contexts, the initiative may be a valuable way for the public to do an end-run around self-interested political elites. In contrast, the risks of a popular device like the initiative may be highest when a proposal attacks a vulnerable minority group, as with the proposal to reverse recognition of same-sex marriage.[203] Use of direct democracy devices like the initiative in these contexts may raise significant concerns about constitutionalism losing one of its core purposes, the protection of the rights of minorities. In this sense, the California system clearly responds to the logic of tiering, but the substance of what is placed on each tier may make little sense in light of the procedural differences between the tiers.

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200 *See id.*

201 *See, e.g.*, Strauss v. Horton, 207 P.3d 48, 99 (Cal. 2009) (holding that a proposed change reversing judicial recognition of same-sex marriage was not a revision because it did not work a "substantial change in the governmental plan or structure," regardless of whether it impacted a "foundational constitutional principle"); Raven v. Deukmejian, 801 P.2d 1077, 1089 (Cal. 1990) (holding that a proposed change forcing the California Supreme Court to interpret criminal procedure protections to be no more generous than those found in the Federal Constitution was a revision because it worked "a fundamental change in our preexisting governmental plan"); McFadden v. Jordan, 196 P.2d 787, 796 (Cal. 1948) (emphasizing the sheer scope of a proposed change and the number of provisions it would impact in labelling it a revision).

202 *See Strauss*, 207 P.3d at 99.

203 *See id.* at 106 (rejecting an argument that change should be considered a revision if it limits rather than extends rights protections).

A. The Objects of Protection

A first key question is what kinds of provisions or constitutional changes should be placed on higher tiers, or, in other words, given special degrees of protection within the constitutional order. An attractive approach to tiering will focus on protecting the "democratic minimum core" of constitutional provisions.[204] This consists of those provisions or aspects of the constitutional order that are essential for the preservation of competitive electoral democracy.[205] The European Union's accession criteria, for example, require a commitment to democracy, the rule of law, human rights, and the protection of minorities.[206] These minimal criteria for democracy emphasize the importance of free elections, the right to form political parties, a free press, liberty of speech and personal opinion, restrictions on executive power, and access to independent courts.[207]

Another way to envision such a democratic minimum core is to consider recent experiences with abusive constitutionalism or democratic erosion, such as those outlined above in countries like Venezuela and Hungary. What emerges is the sensitivity of democracy when the independence of institutions charged with checking incumbents or overseeing the electoral process is threatened. These institutions vary depending on context, but almost always include courts, and may include ombudspersons, electoral tribunals, and institutions overseeing and regulating the media.[208] By attacking these institutions, incumbents can make themselves much more difficult to dislodge and prevent the opposition from being able to compete on a level playing field.[209] Recent experience also suggests that, at least in presidential systems, incumbents may undermine democracy by seeking to extend or eliminate term limits.[210] Although presidents in such a world would

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204 *See* Dixon & Landau, *supra* note 190, at 268.

205 *See id.* at 276.

206 Presidency Conclusions, Copenhagen European Council § 7(A)(iii) (June 21–22, 1993).

207 *See* Roger J. Goebel, *Joining the European Union: The Accession Procedure for the Central European and Mediterranean States*, 1 INT'L L. REV. 15, 24, 27–29, 42 (2003).

208 *See, e.g.*, BREWER-CARIAS, *supra* note 170, at 57–60, 152–55 (explaining how Chavez undermined the judiciary and other institutions such as the media); Bánkuti, Halmai & Scheppele, *supra* note 166, at 139–40, 143–44 (laying out how the Fidesz Party undertook changes to undermine the Constitutional Court, ordinary judiciary, ombudspersons, and institutions regulating the media).

209 *See* LEVITSKY & WAY, *supra* note 162, at 10–12 (noting how competitive authoritarian regimes use unequal access to law and media to perpetuate their power and to undermine the rights of opposition and minority groups).

210 *See supra* text accompanying notes 172–73 (describing recent experiences across Latin America); *see also* Ginsburg, Melton & Elkins, *supra* note 178 (giving a number of examples).

continue to face periodic competition from voters, there is a risk that elections will become increasingly unequal affairs. Long-serving presidents will likely use their formal powers, visibility, and informal mechanisms such as distribution of patronage to marginalize the opposition and to weaken or take control of checking institutions such as courts.

Both perspectives therefore suggest a core set of institutions, limits, and rights that might be protected under a "democratic minimum core" approach. From the perspective outlined here, protection for such a minimum core offers key advantages of a rigid system of constitutional change. It should protect the stability of the basic institutional order because changes to those institutions and provisions protecting a minimal concept of electoral democracy will likely be among the most destabilizing acts for a constitutional democracy. Such an approach should also provide protection against democratic erosion.

Furthermore, a minimalist approach allows constitutional designers, judges, and other domestic and international political actors to flesh out the content of the core through exploration of transnational practice.[211] Based on comparison with other democratic orders and the lessons of experience, these actors can determine which provisions are essential to competitive democracy and which kinds of changes are most likely to pose a threat to those provisions.[212] The amenability of the democratic minimum core to transnational practice may ease the operation of the system; it gives courts, for example, a set of tools with which to determine whether intervention is appropriate.[213] At the same time, the use of transnational practice to determine a democratic minimum core may help to inhibit judges or constitutional designers from overplacing provisions or institutions on the higher tier. If a proposed change based on transnational practice does not appear to pose a significant threat to competitive democracy, then it should be alterable using the constitution's default amendment rules. Placing too many forms of change on the higher tier essentially converts a tiered constitution into a rigid one, forfeiting the benefits of a flexible system of constitutional change. Overuse as well as underuse of tiered constitutional architecture appears to be a major problem in comparative experience.[214]

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211 *See generally* Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606 (2015).

212 *See id.* at 629–30.

213 *Id.*

214 *See id.* at 620–23 (giving examples of potential overuse of the unconstitutional constitutional amendment doctrine in both India and Colombia).

Many examples of tiering around the world are motivated by the intuition of protecting a democratic minimum core. The 1996 South African Constitution is one example. In South Africa, the Constitution adopts two distinct tracks for constitutional amendment. The ordinary requirements for amendment are that a bill proposing an amendment be passed by a two-thirds majority in the National Assembly.[215] The Constitution also creates a special set of requirements for amendments to the amendment rule itself, as well as to Section One of the Constitution, which sets out the founding values or principles of the Constitution. These are

> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> (b) Non-racialism and non-sexism.
> (c) Supremacy of the constitution and the rule of law.
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness[,][216]

and the status of South Africa as "one, sovereign, *democratic* state."[217] Amendments to these provisions require a seventy-five percent supermajority in the National Assembly and a supporting vote of six provinces in the National Council of Provinces.[218] Some of these requirements may go beyond what is strictly required for a system of competitive democracy, but the South African Constitution nonetheless provides one model for the tiering of constitutional amendment rules based on a concern for competitive democracy, since it explicitly targets the minimum institutional requirements for competitive democracy for special protection.

Other countries protect institutions or provisions based on domestic, regional, or transnational experiences of democratic erosion. Term limits offer a rich example. The Honduran Constitution from 1982 to 2015 (when the term limit was removed by the country's Supreme Court) prevented any amendment to a constitutional provision limiting presidents to one term.[219] The Colombian Constitution, fol-

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215 S. AFR. CONST., 1996, § 74(3).

216 *Id.* § 1.

217 *Id.* (emphasis added).

218 *Id.* § 74(1). There is also a third tier of amendment that protects the Bill of Rights, as well as other matters affecting certain interests of the provinces. *Id.* § 74(2)–(3). This tier allows amendment with a two-thirds vote of the National Assembly and a vote of six provinces in the National Council of Provinces. *Id.*

219 *See* HONDURAS CONST. art. 374. It reinforced even this eternity clause by stating any

lowing an episode in which the popular President Alvaro Uribe first amended the Constitution to allow a second term and then attempted an amendment to seek a third term as well (which was blocked by the Colombian Constitutional Court),[220] was recently changed back to a one-term limit, now providing that any change to that provision could only be done through a constituent assembly or a constitutional referendum initiated by the public and not by Congress alone as with normal amendments.[221] In both countries, historical experiences suggested that term limits needed to be especially protected to defend against abusive acts of constitutional change. Other countries inside and outside the region, such as El Salvador, the Central African Republic, and Mauritania, contain provisions prohibiting amendment to their provisions on presidential term limits as well.[222]

Finally, in a third set of countries, either the constitutional text itself or judicial doctrine protects a concept such as the "basic structure," "fundamental structure," or "fundamental principles" of the constitution and places these aspects of the constitution on a higher tier. The constitutions of Ecuador, Venezuela, and Bolivia, for example, do this explicitly;[223] in other countries, like India, it has been done through judicial doctrine.[224] Concepts like this are ambiguous and require significant interpretation by judges or other actors. However, they may offer a reasonable hook through which to protect a democratic minimum core. In Colombia, for example, the Constitutional Court's decision denying President Uribe's constitutional amendment allowing a third consecutive term held that the proposal replaced fundamental principles of the existing constitutional text because it undermined basic machinery of the democratic order.[225] The Court pointed out how a president's extremely long tenure would create

official attempting to change that provision, or offering support to someone attempting to change it, would be removed from office and barred from seeking public office for ten years. *See id.* art. 239.

220 CEPEDA ESPINOSA & LANDAU, *supra* note 113, at 352–53, 359 (discussing C.C., febrero 26, 2010, Sierra Porto, J., Sentencia C-141/10 (Colom.)).

221 *See* C.P. art. 197 (Colom.).

222 *See* C.A.R. art. 35 (Cent. Afr. Rep.); CONSTITUTION OF EL SALVADOR 1983, art. 248; CONSTITUTION OF THE ISLAMIC REPUBLIC OF MAURITANIA 1991, art. 99.

223 ECUADOR CONST. arts. 441–442 (requiring that changes to the "fundamental structure" of the constitution be carried out by a more demanding "partial" reform procedure rather than a less demanding "amendment" procedure); *see also* VENEZUELA CONST. arts. 340, 342 (same); CONST. art. 411 (Bol.) (same with respect to "fundamental bases" of Constitution).

224 *See* Bharati v. Kerala, (1973) 4 SCC 225, 985 (India).

225 CEPEDA ESPINOSA & LANDAU, *supra* note 113, at 352 (discussing C.C., febrero 26, 2010, Sierra Porto, J., Sentencia C-141/10 (Colom.)).

substantial electoral inequality with any potential challengers, given the president's visibility and control of the patronage apparatus of the state over time.[226] The playing field would be heavily stacked against potential challengers, particularly at the stage of a second reelection bid. The decision also emphasized that a president in office for twelve years would likely control virtually all of the independent institutions (such as courts and prosecutors) that were charged with checking his or her power.[227] The Court bolstered this analysis with a review of transnational practice, finding pure presidential systems allowing more than two four-year terms in office to be extremely unusual and potentially dangerous.[228]

In India, similarly, the Supreme Court's use of the basic structure doctrine has focused in large part on constitutional amendments that pose a threat to judicial independence or jurisdiction, at times in a context where democratic erosion had been a significant threat. Several historical uses of the basic structure doctrine dealt with amendments that sought to immunize important issues, such as nationalizations and election disputes, from judicial review by taking them outside of the SCI's jurisdiction.[229] In 2015, the SCI used the doctrine to strike down an amendment that would have changed the appointment procedure to the Court by replacing the historical collegium system, whereby judges themselves select new judges, with a new judicial appointments commission that would have given the executive a far greater role in judicial appointments.[230] These decisions raise an obvious risk of self-protectionism, but there is also no doubt that issues related to the independence of the judiciary can, in certain cases, form part of the democratic minimum core.[231]

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226 *Id.* at 356.

227 *Id.* at 354–55, 357 (giving an in-depth treatment of the interaction of a second reelection on appointment mechanisms for the Constitutional Court, independent prosecutor's office, and other bodies).

228 *Id.* at 354; *see also* Dixon & Landau, *supra* note 211, at 632–33 (describing the Court's reliance on comparative experience).

229 *See, e.g.*, Minerva Mills, Ltd. v. India, (1981) 1 SCR 206 (India) (striking down an attempt to immunize all constitutional amendments from judicial review); Gandhi v. Narain, AIR 1975 SC 1590 (India) (suggesting that an attempt to strip the courts of power to review election law was likely a violation of the basic structure doctrine); Bharati v. Kerala, (1973) 4 SCC 225 (India).

230 *See* Rehan Abeyratne, *Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective*, 49 GEO. WASH. INT'L L. REV. 569, 569–74 (2017) (summarizing and critiquing the decision).

231 Of course, the fact that certain issues connected to judicial design likely form part of the minimum core does not mean that every aspect of that design does so. As Abeyratne points out, the recent decision striking down changes to the judicial appointment rule protected a peculiar

We also recognize that many forms of tiering respond to other needs and values. Thus, constitutions commonly protect provisions other than the democratic minimum core. As Richard Albert points out, these provisions respond to a variety of different factors.[232] Sometimes, it would appear that constitutional designers seek to specially entrench provisions that are closely related to a country's conception of identity, for example, by protecting a monarchical role, religious identity, or founding ideology.[233] In other cases, provisions become entrenched because of specific bargains that are struck between contending political factions, and thus, the tiered provisions serve to protect that bargain.[234] Two examples are the clause in the original U.S. Constitution that prohibited the abolition of the slave trade before 1808 and the clause that allows amendments to the equal suffrage provision giving each state the same number of Senators with the consent of all states.[235] The former emerged as a bargain at the Constitutional Convention between slave-holding and non-slave-holding states, while the latter had its origins in a deal between high- and low-population states.

Furthermore, some forms of tiering seem to respond to a thicker conception of democracy than a minimal conception of electoral democracy. This may be what Judge Richard Posner has called "Concept 1" democracy, which bases itself on direct citizen participation and a thicker conception of equality of persons, in contrast to a "Concept 2" democracy, which is a minimal electoral democracy.[236] Some constitutions, for example, place all existing rights guarantees on a higher tier requiring a more difficult process of change or simply prohibit changes that limit those guarantees altogether.[237] Given that many

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form of judicial self-selection that is not found in most other democratic constitutions. *See id.* at 613. Exploration of comparative practice or transnational anchoring would be useful in determining what is truly part of the democratic minimum core. *See* Dixon & Landau, *supra* note 211, at 630–37.

232 *See* Albert, *Constitutional Handcuffs*, *supra* note 13, at 678–97 (developing a typology of purposes of specially entrenched provisions).

233 *See id.* at 678–85.

234 *See id.* at 693.

235 U.S. CONST. art. V.

236 POSNER, *supra* note 160, at 131.

237 *See, e.g.*, CONSTITUTION DE LA REPUBLIQUE DEMOCRATIQUE DU CONGO [CONGO CONST.] 2006, art. 220, *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., Jefri J. Ruchti trans., HeinOnline 2011) (prohibiting "[a]ny constitutional revision having for its object or for [its] effect the reduction of the rights and freedoms of the person"); CONSTITUTION OF THE REPUBLIC OF MOLDOVA 1994, art. 142(2) (Constitutional Court Mold. trans., 2016) (same); CONSTITUTION OF THE REPUBLIC OF NAMIBIA art. 132 (Ombudsman Namib. trans., 2016) (same); CONSTITUTION OF ROMANIA 1991, *as republished* 2003, art. 152 (Constitutional

constitutions also now include a large number of rights, including newer forms of rights like socioeconomic rights and environmental rights, this can place a substantial obstacle in the way of projects of constitutional change. Ecuador, for example, contains both one of the most extensive and creative sets of rights in the world and a provision stating that any amendment that establishes any restriction to rights and guarantees must be carried out via constituent assembly rather than through the basic procedure of constitutional amendment or the even more demanding procedure of "partial" reform.[238] Not all of these rights can plausibly be understood as part of the democratic minimum core, but many (such as socioeconomic and environmental guarantees) can easily be seen as important to thicker conceptions of democracy.

In particular contexts, these additional reasons for specially entrenching certain provisions may have force. The entrenchment of founding principles or other symbolic issues may help to build a sense of constitutional identity.[239] And entrenching important bargains between competing political factions may help to stabilize a constitutional order by giving groups assurance that their core interests will be protected.[240] But these forms of entrenchment should be carefully used. Their main cost is that they can undermine the benefits of flexible constitutionalism by, for example, preventing needed updating or giving disproportionate power to judges as updaters. If too much is placed on the higher tier, a tiered model essentially becomes rigid constitutionalism. For example, a believer in substantive and participatory Concept 1 democracy may think that only the minimum core electoral provisions associated with Concept 2 electoral democracy should be placed on a higher tier. The remaining provisions, although important, might emerge from a process that is more open to democratic contestation.[241] It is one thing to say that a constitution

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Court Rom. trans., 2009) (same); CONSTITUTION OF UKRAINE art. 157 (Constitutional Court Ukr. trans., 2017) (same); ECUADOR CONST. arts. 441, 442, 444 (allowing amendments that establish restrictions "on rights and guarantees" only by constituent assembly, and not by either of two lesser methods of constitutional change).

238 *See* ECUADOR CONST. arts. 441, 442, 444. On the 2008 Ecuadorian Constitution's multitude of rights guarantees, including rights for nature, and the problems rendering them enforceable, see Mary Elizabeth Whittemore, Comment, *The Problem of Enforcing Nature's Rights Under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite*, 20 PAC. RIM L. & POL'Y J. 659 (2011).

239 *See* Albert, *Expressive Function*, *supra* note 13, at 264.

240 *See* Albert, *Constitutional Handcuffs*, *supra* note 13, at 693–98 (noting the motive for these efforts although noting that they often fail in the long run).

241 As noted by Posner, this participatory process is the essence of Concept 1 democracy at

should take steps to prevent actors from eroding electoral democracy; it is another to protect any change to existing rights provisions.[242]

B. The Choice Between Rules and Standards

Constitutions worldwide adopt two broad models or approaches to constitutional tiering: one that involves a relatively narrow, rule-like approach and another that relies on broader, vaguer constitutional standards. One approach is to specifically identify individual provisions or groups of provisions that are either made completely unamendable or which require a more restrictive path in order to be amended. As already noted, for example, a number of constitutions provide language explicitly prohibiting amendments to provisions providing for presidential term limits.[243] Other constitutions give heightened protection to a specifically identified group or set of provisions found in the text.

Two examples are the German Basic Law, which not only protects federalism-based principles but also provides that the guarantees of fundamental rights in Articles One through Twenty of the Basic Law are unamendable,[244] and the South African Constitution, which singles out particular sections and chapters of the Constitution and requires that changes to these provisions be carried out through special procedures.[245] Finally, some constitutions identify classes of provisions and make these classes either more difficult or impossible to amend. As noted above, for example, some constitutions state that

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any rate, since a polity's values themselves can only emerge from deliberation. POSNER, *supra* note 160, at 131.

242 Indeed, recent Ecuadorian experience illustrates the concrete danger with such an approach. In 2014, the Constitutional Court held that an attempt to remove presidential term limits could use the lowest tier of change, "amendment." *See* Landau, *supra* note 172. It rooted this decision in part in an argument that the change would expand the fundamental rights of voters to choose their leaders and politicians to seek reelection, thus expanding rather than restricting fundamental rights. *Id.* In 2017, after a change in presidential administration, the new President, Lenin Moreno, sought a referendum on whether to reimpose presidential term limits. However, he faced a credible threat that the Constitutional Court would hold that only a constituent assembly could reimpose term limits since the reimposition might restrict the fundamental rights expanded by the earlier change. In light of this threat, Moreno used a questionable maneuver to schedule the referendum and preempt the Constitutional Court's ruling. *See* Mauricio Guim & Augusto Verduga, *Ecuador's "Unstoppable" Constitutional Referendum*, I-CONNECT (Dec. 16, 2017), http://www.iconnectblog.com/2017/12/ecuadors-unstoppable-constitutional-referendum [https://perma.cc/9UZZ-P5VH].

243 *See supra* text accompanying notes 219–22.

244 GG art. 79(3) (Ger.).

245 For example, Section 1 and Chapter 2 of the Constitution are placed on higher tiers and require special procedures including a higher supermajority (in the former case) and approval by a certain number of subnational units (in both cases). *See* S. AFR. CONST., 1996, § 74.

any restriction or abolition of rights provisions or "fundamental rights provisions" are prohibited.[246] All of these designs—those that single out individual provisions, multiple provisions, or classes of provisions for protection—have a relatively specific and rule-like character.

Other constitutions seek to protect broader, more structural and standard-like constitutional norms. Constitutions in Chad, East Timor, and Guinea, for example, all protect the principle of the "separation of powers" by making it unalterable.[247] Other constitutions adopt even more general, standard-like commitments to preservation of commitments to constitutional democracy. The French Constitution, for instance, provides that the "republican form of government shall not be the object of any amendment,"[248] and the Italian Constitution provides that the "form of Republic shall not be a matter for constitutional amendment."[249] In the same tradition, the Cameroon Constitution prohibits amendments "affecting the republican form . . . of the State"; the Constitution of the Dominican Republic provides that the "form of government . . . must always be civil, republican, democratic and representative"; the Gabon Constitution provides that the "Republican form of the State . . . [is] intangible and cannot be the object of any revision"; the Senegalese Constitution provides that the "republican form of the State . . . may not be made the object of a revision"; and the Tunisian Constitution states that the "system is republican" and that this cannot be amended.[250] The Constitution of the Democratic Republic of the Congo also gives heightened (formally unamendable) protection to "the principle of universal suffrage" and "the representative form of Government."[251] At times, tiers of amendment are identified in even broader terms, by referring, for example, to the "fundamental structure" or "fundamental bases" of the consti-

246 *See supra* note 237.

247 *See* CONSTITUTION OF THE REPUBLIC OF CHAD 1996, art. 223; CONSTITUIÇAO [CONSTITUTION] 2002, art. 156 (Timor-Leste) (Gov't Timor-Leste trans.); CONSTITUTION OF MAY 7, 2010 art. 154 (Guinea).

248 1958 CONST. art. 89 (Fr.) (English ed., Constitutional Council Fr. trans., 2013).

249 Art. 139 Costituzione [Cost.] (It.) (Parliament It. trans., 2014).

250 CONSTITUION OF THE REPUBLIC OF CAMEROON art. 64 (Afr. Agenda trans., 2008); CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA art. 268 (Dom. Rep.), *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., Luis Francisco Valle Velasco & J.J. Ruchti trans., HeinOnline 2015); CONSTITUCIÓN DE LA REPÚBLICA DE GABÓN art. 117, *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., J.J. Ruchti & Maria del Carmen Gress trans., HeinOnline 2014); LA CONSTITUTION DE LA REPUBLIQUE DU SENEGAL art. 103, *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., J.J. Ruchti trans., HeinOnline 2016); CONSTITUTION OF THE TUNISIAN REPUBLIC art. 1 (U.N. Dev. Programme trans., 2014).

251 *See* CONGO CONST. art. 220.

tution and by requiring changes to that structure to be carried out by more onerous routes than the default rules of change.[252]

In prior work, this Article's authors have argued that the only truly effective way of addressing the danger of abusive constitutional change will be via the adoption of some standard-like language of this kind.[253] First, in seeking to define a list of "essential" constitutional provisions, drafters will inevitably suffer from forms of bounded rationality, meaning that they cannot foresee the full range of ways in which democracy or democratic institutions may be attacked in the future.[254] Even if they could foresee all of these ways, experience has shown that democratic erosion is possible through a large number of different routes. Any complete list of protected provisions would thus need to be extremely long, effectively changing the design into a rigid one.[255]

The narrower, more rule-like the definition of a "heightened" constitutional tier, the greater the scope will be for dominant political actors to work around this list by utilizing other routes that achieve the same end. Take the example of freedom of speech. One way in which abusive constitutional actors may seek to restrict or repeal rights to free speech will be via amendments that directly alter the scope of guarantees of freedom of expression, possibly by adding more restrictions or exceptions to the right. But there are a number of other ways in which a similar end could be achieved. Would-be authoritarian actors could pass constitutional amendments changing the regulatory or administrative structure for institutions like the media and universities and use this oversight to weaken the ability of those institutions to check the government. They could also take constitutional or subconstitutional actions to undermine the independence of institutions, such as courts, and then use existing legal tools, like defamation suits, to harass opposition speakers. A standard-like principle would seem to be the only way to evaluate all the different direct and indirect routes in which norms of free speech could be attacked. Many other pieces of the democratic minimum core, such as the independence of the courts or the fairness of elections, are similarly vulnerable to attack by a number of different means.[256]

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252 *See supra* note 223 (referring to the Constitutions of Venezuela, Ecuador, and Bolivia).

253 Dixon & Landau, *supra* note 211, at 627–28.

254 *See id.* at 625.

255 *See id.* at 626–27 (warning against a "potential adverse impact" standard because it places too many things on a higher tier of amendment).

256 *See* Landau, *supra* note 2, at 259 (noting that in the Hungarian case, several different routes were taken to undermine the independence of the constitutional and ordinary judiciary).

This importance of standard-like language is further supported by recent work by Kim Scheppele that highlights the way in which interaction effects between different constitutional changes, rather than simply individual constitutional changes taken in isolation, can undermine the constitutional order.[257] As an example, Scheppele looks at amendments to the previous constitution of Hungary and eventually its wholesale replacement. Scheppele labels Hungary as a "Frankenstate."[258] She notes that when challenged on the changes to its Constitution, the ruling party argued that each of the individual components (changes to the jurisdiction of courts and selection of judges, for example, or gerrymandering) were found in other democratic constitutional orders (the United States, for example, in the case of severe gerrymandering).[259] Within these other orders, the provisions might be problematic but would not necessarily take the country outside the bounds of liberal democracy. But Scheppele argues that the combination of these programs has been devastating for electoral democracy in Hungary, making the ruling party very difficult to dislodge while greatly weakening checks on its authority.[260] The risk of rule-like language in this context is that a series of individual changes might pass muster under the rules, but the combination of changes may amount to a substantial democratic erosion. Although no constitutional design can easily deal with this difficult problem, a standard-like approach rather than a checklist of rules seems to offer the most hope because such an approach will more easily detect the overall effect of a package of changes.[261]

Rule-like and standard-like approaches are not mutually exclusive, and, in many contexts, it will be a good idea to use both. Thus, standard-like language can be combined with heightened entrenchment for certain select rule-like requirements that have been proven through experience to be particularly problematic—such as a given set of presidential or congressional term limits or perhaps the rules governing selection or jurisdiction of the courts.[262] This rule-like language

257 Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 GOVERNANCE 559 (2013).

258 *Id.* at 560.

259 *Id.* at 561 ("Each law was clearly vetted so that its Fidesz defenders could say that there was some law just like it somewhere in Europe.").

260 *Id.*

261 *See id.* at 562 (calling for a shift in evaluations of the rule of law from a checklist-based approach to a more holistic approach); Dixon & Landau, *supra* note 211, at 625–26 (arguing that a narrow approach to protecting certain democratic provisions can easily be evaded).

262 *See supra* text accompanying notes 208–10.

itself may have important advantages in some contexts. Clearer and more specific language may require less judicial interpretation and thus be more susceptible to political forms of enforcement.[263] In the context of an attempt to abolish term limits, for example, opposition political groups might more easily mobilize around provisions that clearly prohibit amendment of a one-term presidential limit than they will around more ambiguous provisions protecting the "fundamental structure," "separation of powers," or "republican form of government." In many contexts where abusive acts of constitutional change are being carried out, judicial independence is problematic and courts are under immense political pressure.[264] In these contexts, political enforcement may have a more realistic chance of working than resort to the courts. Moreover, clearer and more rule-like restrictions may also help to increase certainty during periods of institutional contestation, thus helping to facilitate a smooth transition.[265]

C. Ex Ante Versus Ex Post Protection

An important aspect of constitutional design (envisioned broadly) in this area is the extent to which it is carried out not only ex ante by constitutional designers during constitution-making processes, but also ex post by judges seeking to defend the constitutional order against constitutional change.

The language taken from a large number of constitutions in the prior two Sections demonstrates the ex ante approach—constitutional designers have often included textual language in constitutions to either make some kinds of constitutional change impossible (absent wholesale replacement) or to require a more demanding procedure to bring it about.[266] Of course, even where this language is explicit, there may be questions about its justiciability, or amenability to decision by the courts. However, designers sometimes can and do remove doubt on this point by including a provision giving the judiciary the power to determine which route a given project of constitutional change must take.[267]

In some cases, courts have developed doctrines that have effectively created tiered systems of constitutional change even absent ex-

263 *See infra* Section VI.B.

264 *See infra* Section VI.A.

265 *See, e.g.*, Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 248–49 (2009).

266 *See supra* Section V.A.

267 *See, e.g.*, ECUADOR CONST. art. 443 ("The Constitutional Court shall rule which of the procedures provided for in the present chapter pertains to each case.").

plicit constitutional language clearly creating tiers.[268] India and Colombia, both very widely studied systems, are good examples.[269] The Indian Constitution contains only a relatively weak version of textual tiering to protect federalism and does not include an explicit limit on the amending power (indeed politicians later added language explicitly denying the existence of any such limit), but the SCI, after first settling on a position that fundamental rights could not be restricted at all, has subsequently settled on a position preventing any change to the "basic structure" of the Constitution.[270] The Colombian Constitutional Court, likewise, and despite a constitutional text seeming to give the Court power to review amendments only for procedural errors in passage,[271] has held that the amendment power cannot be used to undertake "a substitution of the constitution," or, in other words, to replace partially or completely any of its defining principles.[272]

The justifications for these judge-made doctrines, both in these countries and elsewhere, vary widely. Sometimes, the argument is that the constitution implicitly sets up a form of tiering. The Colombian Constitution, for example, discusses the possibility of holding a constituent assembly, but it does not say that certain forms of change must be carried out using this route.[273] The Court has held that the possibility of a constituent assembly should be read to imply that certain forms of change are equivalent to replacing rather than amending the Constitution and that these forms of change should be reserved to the people using their "original constituent power" through a constituent assembly rather than to the "derivative constituent power," which is exercised by governmental institutions acting through ordinary mechanisms of reform.[274] In effect, the Court is reading the Constitution to create a crude division between the mechanisms of ordinary

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268 *See generally* Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657 (2013) (tracing the spread of the doctrine to a number of countries in different regions).

269 For a detailed overview and comparison of the positive and negative experiences of the use of the doctrine in each system, see Dixon & Landau, *supra* note 211, at 614–23.

270 *See* INDIA CONST. art. 368; Bharati v. Kerala, (1973) 4 SCC 225, 985 (India).

271 *See* C.P. art. 241 (Colom.) (giving the Constitutional Court the power to rule on proposed constitutional amendments "only for errors of procedure").

272 *See* CEPEDA ESPINOSA & LANDAU, *supra* note 113, at 341 (discussing C.C., julio 9, 2003, Montealegre Lynett, J., Sentencia C-551/03 (Colom.)).

273 C.P. arts. 374, 376 (Colom.).

274 *See* CEPEDA ESPINOSA & LANDAU, *supra* note 113, at 341; *see also* Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 INT'L J. CONST. L. 339, 342–44, 347–50 (2013) (explaining and critiquing this theoretical approach).

amendment, for example approval by a relative and then absolute majority of Congress in two separate legislative sessions,[275] and changes to fundamental constitutional principles, which can only be carried out by constituent assembly. An alternative but related possibility is that the very notion of constitutional "amendment," as opposed to replacement, implies limits on the degree of constitutional change that will be carried out by such a mechanism.

Within the particular contexts of India and Colombia, these judge-made doctrines have been useful in stabilizing constitutional text, increasing identification of core constitutional principles, and preventing abusive forms of constitutional change.[276] In both of these cases, the doctrines arguably emerged because of constitutional designs that made the mechanisms of constitutional change too flexible in light of their political context.[277] In Colombia, approval by majorities in two legislative sessions was fairly difficult in the fragmented political context just after approval of the 1991 Constitution, but it became extremely easy during the presidency of Alvaro Uribe, who benefitted from a high approval rating and a strong congressional coalition.[278] Uribe could easily garner sufficient votes to approve amendments extending his term, first in 2006 and again in 2010.[279] The Indian Constitution, as noted above, does contain a tiered approach to amendment, which is designed to give special protection or entrenchment to certain federalism-based constitutional principles.[280] But the scheme created by the Constitution, which allowed most amendments to be carried out by a two-thirds majority of those present and voting in Parliament, also turned out to be too permissive in a context in which a single political party, the Congress Party, historically dominated the political systems. For example, this system was too permissive of most forms of amendment to guard against the danger of abusive constitutional change by Prime Minister Indira Gandhi before and during her "Emergency" (1975 to 1977), in which she jailed political opponents and attacked the courts.[281] The decision of the SCI to imply a basic structure doctrine could thus be seen in part as a re-

275 *See* C.P. art. 375 (Colom.).

276 *See* Dixon & Landau, *supra* note 211, at 614–15.

277 *Id.*

278 *See id.* at 615–16.

279 *See id.*

280 *See* India Const. art. 368.

281 *See, e.g.*, Neuborne, *supra* note 98, at 492–95 (exploring the attempts by Gandhi to attack the courts in the 1970s and judicial responses).

sponse to the weakness of the initial design of the Indian constitutional amendment procedure.

But at the same time, wholly judge-made doctrines like these are second-best responses to contexts where the constitutional design otherwise gives judges and political actors no effective avenue for blocking abusive exercises of constitutional change.[282] The first-best response is likely ex ante textual language in the constitution itself, rather than a wholly judge-made doctrine. This is first because relatively few courts are likely to imply such a power (and are even less likely to deploy it in significant cases) when there is no clear textual source for their authority in the constitution. The high courts of India and Colombia, for example, are each widely considered among the most activist tribunals in the world and have a distinctive conception of roles based on distrust of the political system.[283] Outside of these contexts, judicial construction and use of the doctrine becomes less likely.

Even if judges do derive such a doctrine, their legitimacy in using it may suffer because of the absence of explicit textual authority for their rulings. This is particularly important because the doctrine is likely to be most important in cases that are politically charged and which will involve powerful political leaders seeking to push through constitutional changes. For example, in a well-known 2011 case, the Hungarian Constitutional Court was petitioned but refused to derive an unconstitutional constitutional amendment doctrine to block changes proposed by the ruling party of Hungary that greatly restricted the Court's jurisdiction by taking away its ability to review fiscal matters.[284] The Court held that such limits on the power of constitutional amendment might exist but that it would generally be beyond the authority of the Court to identify or deploy them given the existing constitutional text.[285] While critics have viewed the decision as

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282 On theories of the second best, see generally, P. Bohm, *On the Theory of "Second Best,"* 34 REV. ECON. STUD. 301 (1967); Otto A. Davis & Andrew B. Whinston, *Welfare Economics and the Theory of Second Best*, 32 REV. ECON. STUD. 1 (1965); R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956); M. McManus, *Comments on the General Theory of Second Best*, 26 REV. ECON. STUD. 209 (1959).

283 *See* David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319, 327–28, 343 (2010) (on Colombia); Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 3, 12–14, 66–67 (2009) (on India).

284 *See* Halmai, *supra* note 164, at 191–99.

285 *See id.* at 195–96.

a part of the story of erosion of democracy in Hungary,[286] the Court would plausibly have been more willing to strike down the amendments if the existing Hungarian Constitution had given it clearer authority to do so. Indeed, the Court explicitly relied on the absence of any "eternity clause" or other form of tiering in the Hungarian Constitution as a justification for its decision.[287]

Finally, we note that a judge-made doctrine is likely only going to be able to create a fairly crude form of tiering. In both Colombia and India, the unconstitutional constitutional amendment doctrine creates a simple division between most changes, which can be carried out using ordinary amendment mechanisms, and changes to the "basic structure" or "fundamental principles," which would appear to require wholesale constitutional replacement. One could plausibly question whether this is the best way to calibrate the procedural differences between tiers. It may be, for example, that the higher tier should be protected by higher supermajority requirements or other procedural devices like temporal gaps between votes rather than by requiring complete constitutional replacement. Courts generally lack the jurisprudential resources to impose these procedural requirements unless they are explicit in the text.[288]

D. The Nature and Number of Constitutional Tiers

Constitutions with tiered constitutional designs demonstrate a number of different approaches to the design of these tiers. A significant number of constitutions simply include eternity clauses and state that these provisions or parts of the document may not be changed.[289] These eternity clauses may be targeted at specific provisions (as with presidential reelection in Honduras),[290] directed at a large number of provisions (as with the number of African and Latin American consti-

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286 *See, e.g.*, *id.* at 191–99 (arguing that decisions of the Hungarian Constitutional Court have led to a lack of power of judicial review necessary to check the political branches).

287 *See id.* at 195.

288 The most plausible exception is adding a referendum requirement as part of a process of fundamental constitutional change since, like a constituent assembly, this could be justified through arguments concerning the power of the people or "constituent power" in making fundamental constitutional decisions. *Cf.* Conseil constitutionnel [CC] [Constitutional Court] decision No. 62-20DC, Nov. 6, 1962, Rec. 27 (Fr.) (refusing to use existing constitutional rules to invalidate a referendum on whether to amend the French Constitution and allow direct presidential reelection because the referendum was a direct expression of national sovereignty).

289 For examples, see *supra* notes 244–52; Albert, *Constitutional Handcuffs*, *supra* note 13, at 665–66.

290 *See* HONDURAS CONST. art. 374 (stating that the articles referring to the "presidential term" and "the prohibition to be again President of the Republic" may not be amended).

tutions that prohibit restrictions on constitutional rights),[291] or aimed at broader principles like human dignity, federalism, or the separation of powers (as in Germany and Brazil).[292] The eternity clause may send the strongest possible signal about the identity of a given constitution, which is likely why it was used in Germany after World War II.[293] At the same time, the existence of an eternity clause raises difficult philosophical and interpretive questions. The most pressing is whether such a clause can be changed through a process of wholesale constitutional replacement or is unchangeable even through that means.

Whatever the philosophical answer to this question may be, its existence may create a problematic ambiguity. A prominent example stems from the presidency of Manuel Zelaya in Honduras. Zelaya, a populist leader allied with Hugo Chavez, sought to hold a nonbinding poll on whether to replace the Honduran Constitution of 1982.[294] One of the core legal arguments marshalled by opponents was that the real intent of Zelaya was to change the eternity clause found in the existing Constitution that prohibited any presidential reelection so that he could remain in power.[295] Zelaya and his allies never explicitly stated that this was his intent, but they also at times responded with arguments that the democratic process had to allow some process through which fundamental constitutional changes could be made.[296] The process ended with Zelaya's removal in a military coup and Honduras's consequent suspension from the Organization of American States. Arguably, the eternity clause played some role in building mutual frustration rather than creating some process for potential change that contending parties could agree upon.[297] The Honduran example

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291 *See supra* text accompanying note 237.

292 *See* C.F. art. 60(4) (Braz.); GG art. 79(3) (Ger.).

293 For a discussion of the importance of this entrenchment, particularly of the human dignity clause, see DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 42–45 (3d ed. 2012).

294 *See* NOAH FELDMAN, DAVID LANDAU, BRIAN SHEPPARD & LEONIDAS ROSA SUAZO, REPORT TO THE COMMISSION ON TRUTH AND RECONCILIATION OF HONDURAS: CONSTITUTIONAL ISSUES 10–22 (Mar. 2011), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=1915214 [https://perma.cc/7PP4-42H6] (giving the factual background to the controversy).

295 *See id.* at 11, 30.

296 *See id.* at 38 (noting that Zelaya never expressly stated he intended to change the no reelection clause); *see also* Albert, *Constitutional Handcuffs*, *supra* note 13, at 692–93 (critiquing the eternity clause as "handcuffing" prospects for constitutional change).

297 A role was also played by Article 239 of the Honduran Constitution, which stated that those seeking to change the no-reelection ban would "cease" to hold office and be barred for a period of ten years. *See* HONDURAS CONST. art. 239; Dixon & Jackson, *supra* note 131, at 175–78 (noting the ambiguity that Article 239 created in the Honduran crisis).

of course does not suggest that eternity clauses should never be used, but it does suggest some cautions regarding their use.

This ambiguity can be removed through another constitutional design in which some parts of the constitution are explicitly made unamendable except via a constituent assembly.[298] This design still raises some difficult questions. Albert argues, for example, that this design makes it too difficult for democratic forces to seek constitutional change.[299] Given that—at least in this Article's proposal—the main target of constitutional tiering will be the democratic minimum core, this objection may not bite as deeply.[300] Even extraordinary restrictions on constitutional change may be justifiable in the name of democracy if the purpose and effect of those restrictions is to defend democracy itself. Still, from a pragmatic perspective, forcing a significant number of constitutional changes to be carried out only through constitutional replacement may overincentivize the often destabilizing process of constitution-making, forfeiting one of the benefits of a flexible system of constitutional change.

Thus, in many contexts, the ideal response may be one in which a constitution contains multiple tiers short of replacement rather than making the second-tier replacement itself. These tiers will differ in terms of the supermajorities or other processes required for change—a topic treated in more depth just below. Constitutions also vary widely in terms of the number of tiers they contain. Some constitutions, for instance, simply adopt a higher tier and a lower tier, like amendment and revision in California and other U.S. states;[301] others contain two such tiers plus constitutional replacement, as in Venezuela and Ecuador.[302] Still others adopt a larger number of different tracks for amendment based on the subject matter of a given change.[303]

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298 *See* ECUADOR CONST. arts. 441–444 (making restrictions on "rights and guarantees," and changes to the constitutional amendment rule itself, only achievable by constituent assembly).

299 *See* Albert, *Constitutional Handcuffs*, *supra* note 13, at 698 (arguing that because of democratic values, eternity clauses should be replaced with an "entrenchment simulator," where provisions are made impossible to change for some period of time and then placed on a higher tier).

300 *See supra* Section V.A.

301 *See, e.g.*, CAL. CONST. art. XVIII.

302 Each constitution distinguishes amendment from one higher tier of constitutional change, called "constitutional reform" in Venezuela and "partial" reform in Ecuador. *See, e.g.*, ECUADOR CONST. arts. 441–444; VENEZUELA CONST. arts. 340–349; *supra* text accompanying notes 43–48.

303 *See, e.g.*, Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, §§ 38–45 (U.K.); *supra* text accompanying notes 31–35.

A focus on the democratic minimum core suggests that it may be desirable to have a relatively few tiers, such as two in addition to replacement, rather than a large number. The higher tier might protect those changes that threaten the democratic minimum core, while the other tier acts as the default for ordinary constitutional change. As noted earlier, the minimum core can be attacked in a number of different ways, and it makes sense to protect all such routes.[304] At the same time, creating a large number of additional tiers for different subjects may threaten to ossify too much of the constitution, thereby losing some of the benefits of flexibility. Furthermore, it may be that a simplified system of constitutional change provides higher expressive or identity-based benefits, given that a more complex system may be more difficult for citizens to comprehend.

E. The Procedural Differences Between Constitutional Tiers

In constructing different tiers of amendment, constitutional drafters can use a range of different tools.[305] Perhaps most obviously, they can rely on heightened legislative supermajority requirements for the proposal or approval of amendments. They can also distinguish higher tiers by including additional institutional veto points, such as by requiring approval of second chambers of legislatures or approval in a popular referendum.[306] Finally, designers can include rules requiring that approval of some amendments be considered separately from other changes (single subject requirements) or that they take more time by, for example, demanding that amendments be passed in separate votes in multiple legislative sessions or within an intervening election.[307] We treat these possibilities in turn. One preliminary point: higher tiers, in theory, should be more difficult to amend than lower tiers. But given the complexity of constitutional amendment rules, there are examples from comparative constitutionalism where this criterion is not unambiguously met. In Ecuador, for example, change to provisions within the lowest "amendment" tier can be done by Con-

304 *See supra* Section V.B.

305 Some existing empirical work suggests that there are limits to the extent to which amendment rates are sensitive to differences in amendment rules. *See* Ginsburg & Melton, *supra* note 4, at 90. This work indicates that other factors, such as a country's past experience with amendment, or "amendment culture," may play a more significant role. *See id.* However, this work has not specifically measured the impact of amendment rules on particular types of change, such as those impacting the democratic minimum core. *See* Dixon & Landau, *Democratic Minimum Core*, *supra* note 190, at 285.

306 Dixon, *supra* note 8, at 104–08.

307 *See id.* at 105–08.

gress alone through a two-thirds vote; the higher "partial" reform tier requires a referendum but can also apparently be passed by a simple majority in Congress.[308]

1. Heightened Supermajorities

Perhaps most commonly, higher tiers of amendment can be protected through increased requirements of legislative approval. For example, the default rule for amendments might be a simple or absolute majority, while some amendments might require two-thirds approval. Or ordinary amendments might be approved with a two-thirds vote of a parliament, while others may require a seventy-five percent threshold. The appeal of these kinds of rules is obvious: they make it easy to measure and adjust levels of difficulty.

However, overreliance on these rules is problematic, primarily because it can be very difficult for constitutional designers to determine ex ante how challenging various thresholds of change will actually prove to be. Supermajority thresholds are very sensitive to the distribution of political power and particularly to the shape of the party system and its interaction with electoral rules. The fragmentation of parties plays an obvious role here—where a country has two or more strong parties, a two-thirds or three-quarters threshold may require something close to consensus between competing political movements. In contrast, in a dominant party system like the ones found in South Africa and in India for much of its history, where one party controls most political power, a two-thirds threshold (or one even higher) can often be cleared without the need for any negotiation with other political forces.[309] Dominant political parties also may have less to fear in terms of future electoral repercussions if they support forms of constitutional change that end up being deeply unpopular with the electorate. Dominant political parties may face so little meaningful electoral competition that their members do not fear losing office even where they take unpopular actions.[310]

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308 *See* ECUADOR CONST. arts. 441–442.

309 *See, e.g.*, Sujit Choudhry, "*He Had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. 1, 44 (2009) (S. Afr.); Rosalind Dixon & Adrienne Stone, *Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection*, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 95, 108 (David Dyzenhaus & Malcolm Thornburn eds., 2016) (discussing the Congress Party in India).

310 *See* SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 135 (2015).

The strength of political parties also plays a role. In a competitive system with several strong parties and a tradition of party discipline, it should be difficult for a political leader or movement to gain supermajority support for a particular proposed constitutional change without also persuading several of the heads of major parties (including opposition parties) to support the change.[311] Strong and stable political parties may be particularly unlikely to support changes to a constitution that have the capacity to adversely impact their electoral prospects in the future. However, where parties are weaker or less institutionalized and disciplined, it may be easier for a dominant individual political leader to gain supermajority support for a particular amendment. If the leader in question is charismatic and popular, he may be able to persuade individual legislators to support a proposed change through the use of incentives such as patronage.[312] Individual legislators may have shorter time horizons than strong political parties, and their political commitments with which a proposed amendment could conflict may be less developed.

The broad point, then, is that the functioning of supermajority rules depends heavily on the details of political context. This context is not fixed—it often changes after a constitution is written as, for example, old parties die and new parties are born, support for historically hegemonic political forces erodes because of corruption or other factors, and electoral laws are changed. From the standpoint of constitutional designers, this makes it difficult to predict the effect of different supermajority thresholds when they will be needed most.

2. Referendums and Institutional Veto Points

A second design adds additional procedural requirements for changes placed on a higher tier of amendment, beyond those existing on the default tier. For example, some federal constitutions require that changes directly affecting the interests of subnational units also be approved by the upper house of their federal legislature, while ordinary amendments must only be approved by the lower house.[313] These kinds of requirements may be useful for particular functional purposes, but they are probably of relatively little use in checking abu-

311 *See* Dixon & Stone, *supra* note 309, at 107–08 (giving as examples the United States and the United Kingdom).

312 *See* Landau, *supra* note 283, at 335–36 (discussing these problems of weak party systems in the context of Colombia).

313 *See, e.g.*, S. AFR. CONST., 1996, § 74 (requiring that the upper house of Parliament, the National Council of Provinces, be involved in approving some classes of constitutional change).

sive acts of constitutional change. This is particularly true where, as is often the case, these upper chambers have traditions of deference rather than equal partnership within the political system.

One common design worth more careful study is to add a referendum requirement for certain constitutional changes. This requirement seems to correspond to a logic that is consistent with the general contours of constituent power theory—more fundamental political decisions, such as those involving the higher tier, should be made with input from the people. The risks of this form of popular involvement in constitutional change are especially clear in the context of feared democratic erosion: the same powerful leaders or movements seeking these changes may be able to manipulate the popular will so as to gain support for their proposals.

However, comparative evidence suggests that, at times, referendums do slow or stop problematic projects of constitutional change. For example, in 2000, voters in Zimbabwe rejected a constitution proposed by President Mugabe with potentially antidemocratic effects in a range of areas.[314] And in several recent Latin American cases, referendums have played a major role in limiting presidents from seeking extensions or abolition of term limits. In 2007, voters in Venezuela rejected a series of constitutional reforms proposed by President Chavez, including the abolition of term limits and sweeping institutional changes—although, two years later, they approved a narrower set of reforms eliminating term limits alone.[315] In 2016, voters in Bolivia also rejected an attempt by President Morales to seek a fourth term in office (he has been in power since 2006).[316] And in Ecuador, the opposition to President Correa sought to have his proposal eliminating term limits placed on the higher tier of "partial" reform rather than the lower tier of "amendment" because they felt they might be able to win that referendum.[317] They failed in this effort when the Constitutional Court held that the "amendment" tier could be used, allowing unilateral approval by the Correa-controlled Congress.[318] However, Correa's successor Lenin Moreno held a 2018 referendum on whether to reimpose term limits, and the populace voted overwhelmingly in favor of doing so.[319]

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314 *See* John Hatchard, *Some Lessons on Constitution-Making from Zimbabwe*, 45 J. AFR. L. 210, 214–15 (2001) (U.K.).

315 *See* JAVIER CORRALES & MICHAEL PENFOLD, DRAGON IN THE TROPICS 34–39 (2011).

316 *See generally* Casey, *supra* note 173.

317 *See generally* Landau, *supra* note 172.

318 *See id.* (discussing the opposition strategy).

319 *See* Maggy Ayala & Marcelo Rochabrún, *Ecuador Votes to Bring Back Presidential*

The utility of referendums in these cases may stem from voters' ability to sniff out forms of political change that, although issued in the name of the people, are in fact highly elite driven. In the term limits cases mentioned above, for example, it is notable that highly popular presidents like Chavez and Morales could lose referendums—they were personally popular, but their proposals to remain in office indefinitely were not.[320] All of this suggests that it would likely be a mistake to rely on referendums as the sole protection for a higher tier.[321] But they may be very useful as an additional protection.

3. Single Subject Requirements

Constitutions can provide that either all changes or those on higher tiers must treat only a single subject per amendment.[322] For abusive forms of constitutional change in particular, a single subject rule—or a requirement that amendments be passed one by one, rather than in a bundle, may have particularly significant effects. One of the key tactics of abusive constitutional actors is to bundle antidemocratic forms of constitutional change with more democratic ones; by doing so, they often hope to confuse voters as to the true democratic character of proposed amendments.[323] They also often hope to "buy" the support of potential opponents. There are thus persuasive, although empirically untested, reasons for thinking that a single subject rule may help defeat certain forms of abusive constitutional change.

4. Temporal Limitations

Finally, and with notable exceptions, existing scholarship has overlooked the potential of temporal limitations as a source of reinforced protection for certain forms of constitutional change.[324] Yet some constitutions do provide that amendments must be passed in

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Term Limits, N.Y. TIMES (Feb. 4, 2018), https://www.nytimes.com/2018/02/04/world/americas/ecuador-presidential-term-limits.html [https://perma.cc/3BJB-ZTSS].

320 *See generally* CORRALES & PENFOLD, *supra* note 315; Casey, *supra* note 173.

321 Of course, constitutions can also increase the participation thresholds or voting thresholds needed for a successful referendum on the higher tiers, thereby giving the device more of a supermajoritarian rather than majoritarian character. *See, e.g.*, FLA. CONST. art. XI, § 5(e) (requiring that proposed amendments or revisions be approved by sixty percent of voters in a referendum).

322 *See, e.g.*, *id.* art. XI, § 3 (requiring that popular initiative aiming to amend the constitution encompass "but one subject and matter directly connected therewith").

323 *See* Dixon & Landau, *supra* note 211, at 625.

324 *See* Albert, *Constitutional Handcuffs*, *supra* note 13, at 711–12 (calling for rules that require citizens to approve amendments by multiple votes, separated by time lapses).

multiple legislative sessions.[325] Others provide that amendments require multiple legislatives votes with an intervening election[326] or that amendments only be carried out at certain intervals.[327] Rules requiring time lapses, or, even better, multiple elections between votes on constitutional changes, may be especially beneficial when considering amendments that may have an antidemocratic or destabilizing effect. This is because the forces seeking such changes often attempt to mobilize temporary majorities in order to expand and extend their power; temporal limits on amendment may slow amendments enough so that they do not come into effect before these forces lose power. And as Bruce Ackerman suggests with respect to the United States, repeated and sustained majorities in favor of substantial constitutional changes, with intervening elections, help to demonstrate durable rather than transient support for those changes.[328] This suggests that it may be worthwhile to consider placing temporal restrictions on particularly sensitive tiers of amendment.

VI. Tiering in Action

This Article so far has made a normative case for a hybrid or tiered design of constitutional design, as opposed to a purely flexible or rigid design. It has also explored the architecture of a tiered constitutional design. This Part gives some thought to how tiered constitutional designs function in practice. The main conclusion is that while enforcement is of course difficult and in any case imperfect, these designs have promise as a control of problematic exercises of constitutional change in various circumstances, and there are ways for both designers and enforcers (such as judges) to improve their effectiveness. The goal must not be perfect enforcement, but rather sufficient enforcement or threat of enforcement to act as a speed bump that slows some destabilizing or antidemocratic projects of constitutional change and which deters others from being carried out by political actors in the first place.

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325 *E.g.*, C.P. art. 375 (Colom.) (requiring that constitutional amendments be approved by both houses of Congress in two separate sessions).

326 *E.g.*, 1975 Syntagma [Syn.] [Constitution] 110 (Greece) (Kostas Mavrias & Epaminondas Spiliotopoulos eds., Xenophon Paparrigopoulos & Stavroula Vassilouni trans., Hellenic Parliament trans., 2008) (requiring that amendments be proposed by one Parliament and voted on and adopted by another).

327 *See id.* (forbidding constitutional change within five years of a previous change).

328 *See* Ackerman, *supra* note 9, at 285–88.

A. Judicial Enforcement and Transnational Anchoring

The enforcement of tiered constitutional language often depends heavily on judges, who are charged with interpreting clauses in order to determine whether a given project or change falls on a lower or higher tier. In contexts where powerful political actors are proposing potentially destabilizing and antidemocratic constitutional changes, this will not be an easy task. The same political actors who propose these changes may also attempt to pressure or pack the courts that will be ruling on their proposals.

Design is relevant in these contexts. As noted above, one reason for preferring ex ante language creating constitutional tiers is that judges working with such language may have more authority and grounding to enforce limits on constitutional amendment.[329] But, of course, the independence of a court and its sense of judicial role will also be important.

A comparison between two Latin American countries with recent efforts to extend term limits may demonstrate the point. The Colombian Constitution does not have a clear system of tiers, nor does the Court have any clear authority to review constitutional amendments for anything other than procedural errors in their passage.[330] Nonetheless, the Court used its previously constructed version of the unconstitutional constitutional amendment doctrine to strike down a proposed referendum on a constitutional amendment that would have allowed President Uribe to seek a third consecutive term in office.[331] In effect, the Court held that the proposed amendment impacted core principles of the existing Colombian Constitution and that such a change could only be carried out by a constituent assembly.[332] This decision is celebrated because of its impact in preventing a potential democratic erosion in Colombia; Uribe accepted the Court's decision and announced that he would not run for reelection.[333]

In contrast, the Ecuadorian Constitution includes a carefully calibrated scheme of constitutional tiers, which requires that any change to the "fundamental structure" or restriction on fundamental rights be

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329 *See supra* Section V.C.

330 C.P. art. 241(1) (Colom.) (giving the Constitutional Court the power to review laws amending the constitution, of whatever origin, only for procedural errors in their formation).

331 *See* CEPEDA ESPINOSA & LANDAU, *supra* note 113, at 352 (discussing C.C., febrero 26, 2010, Sierra Porto, J., Sentencia C-141/10 (Colom.)).

332 *See id.* at 353.

333 *See* ISSACHAROFF, *supra* note 310, at 148 (arguing that "the [Colombian] constitutional court emerged as the sole check on the prospect of increasingly unilateral executive power").

carried out through more demanding procedures of reform.[334] Furthermore, the Constitutional Court of Ecuador is textually required to determine which of the tiers is the correct path for any given constitutional change.[335] When President Correa presented his proposal wholly eliminating presidential term limits, the opposition offered the Court very strong arguments that such a change surely impacted the "basic structure" of the Constitution and plausibly also imposed a "constraint on constitutional rights and guarantees."[336] Thus, at a minimum, designers should have followed the more demanding "partial" reform path, which would have required a referendum in addition to congressional approval, rather than the default "amendment" path.[337] If the change also restricted constitutional rights, the change would have been impossible except via constituent assembly.[338] Yet the Court brushed aside these arguments and issued a decision allowing Correa to use the amendment route, thus avoiding a potentially problematic referendum.[339]

The constitutional design gave the opposition more ammunition in the Ecuadorian case; nonetheless, a number of factors in the political and judicial context made enforcement more likely in the Colombian case. Uribe was a powerful and popular politician, but he presided over a diverse coalition, and the Colombian Constitutional Court, in particular, maintained independence and had a long history of judicial activism. In Ecuador, in contrast, Correa had established a far higher degree of control over all state institutions, including the judiciary.[340]

In cases like Ecuador, where courts are controlled by the executive, judicial enforcement is unlikely to be a promising route. In many contexts, however, enforcement is more possible, but courts face significant political pressure. In these contexts, courts may be able to

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334 ECUADOR CONST. arts. 441, 442, 444.

335 *See id.* art. 443.

336 *Id.* art. 442; *see, e.g.*, Carlos Bernal Pulido, *There Are Still Judges in Berlin: On the Proposal to Amend the Ecuadorian Constitution to Allow Indefinite Presidential Reelection*, I-CONNECT (Sept. 10, 2014), http://www.iconnectblog.com/2014/09/there-are-still-judges-in-berlin-on-the-proposal-to-amend-the-ecuadorian-constitution-to-allow-indefinite-presidential-reelection/ [https://perma.cc/DQH4-LFHN].

337 *See* ECUADOR CONST. art. 441.

338 *See id.* art. 444.

339 *See* Carolina Silva-Portero, *Chronicle of an Amendment Foretold: Eliminating Presidential Term Limits in Ecuador*, CONSTITUTIONNET (Jan. 20, 2016), http://www.constitutionnet.org/news/chronicle-amendment-foretold-eliminating-presidential-term-limits-ecuador [https://perma.cc/W8ZU-JWEF].

340 *See id.*

increase both the stability and effectiveness of a tiered approach to constitutional amendment by anchoring the content of different tiers in a comparative analysis of evolving global or comparative constitutional practice.[341] In other words, the notion of a constitutional democratic minimum core can be tied to an overlapping consensus among democratic countries' constitutional and legal practices.[342] Constitutional drafters, in some cases, may also be able to encourage this approach by directing courts to consider comparative practices in interpreting the meaning of their constitutional amendment provisions.[343]

By considering whether the particular constitutional arrangements under attack are present in a large number of other constitutional democracies, a court will often gain a clearer sense of whether such arrangements are fundamental to the democratic minimum core that should be placed on the higher tier.[344] In many contexts, it can also provide them with an additional source of legitimacy in interpreting those requirements since they can bolster their decisions by pointing to other systems where similar changes have been viewed as a threat to democracy. Global constitutional norms do not have the same normative force or appeal in every constitutional context. In some cases, dominant political actors may in fact explicitly reject global approaches as neocolonial or imperialist in nature and insist on a wholly nationalist approach to constitutional change.[345] Even in those contexts, a court can look to transnational practice as a source, while couching its decision in more local terms. But in many other cases, legal and political elites will view global norms and practices as a relevant guide to behavior. In those contexts, a court that cites these practices will also gain an important additional source of perceived legitimacy for any decision to require a higher, more demanding set of requirements for formal constitutional change. Instead of being seen as enforcing a purely domestic or subjective conception of democracy,

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341 *See* Dixon & Landau, *supra* note 211; *see also* Lech Garlicki & Zofia V. Garlicka, *External Review of Constitutional Amendments? International Law as a Norm of Reference*, 44 ISR. L. REV. 343 (2011) (Isr.) (proposing that international law be used to help build theories of unamendability).

342 *See supra* Section V.A.

343 *See* S. AFR. CONST., 1996, § 36(1) (requiring courts to consider international law, and authorizing them to consider comparative or foreign law, in the process of interpreting the bill of rights).

344 *See* Landau & Dixon, *supra* note 123, at 879.

345 For additional discussion of contexts where references to international or transnational norms will likely backfire, see *id.* (discussing examples of nationalist approaches to constitutional change from Venezuela and Zimbabwe).

a court will be perceived by an important audience as enforcing a more objective, widely shared set of democratic constitutional understandings.

The Colombian Constitutional Court in fact bolstered its decision that Uribe's proposed term-limit change was an unconstitutional constitutional amendment with an extensive reference to transnational practice. Based on a comparative survey, it found that allowance of more than two four-year presidential terms was highly unusual both in regional and broader comparative practice with respect to pure presidential systems and, further, that such a system was viewed by legal and political science scholars as giving a problematic degree of power to the president.[346] This conclusion increased the Court's confidence, based on its domestic historical and institutional analysis, that allowance of three four-year presidential terms would cause unacceptable distortion to the separation of powers. The Colombian Court's decision stands as an example of judicial use of transnational anchoring to bolster the legitimacy of judicial decisionmaking on threats to the democratic minimum core.

B. Popular Enforcement and Constitutional Language

Given the challenges associated with judicial enforcement of limits on amendment in many common circumstances, constitutional designers and scholars should also be attuned to the possibility of nonjudicial routes through which amendment tiers might gain force. In some cases, opposition groups may mobilize around language prohibiting certain forms of constitutional change; in other cases, the threat of such mobilization may deter actors from carrying out such projects.

Ecuador again presents a fascinating recent example. While the Ecuadorian Constitutional Court played virtually no role in impeding Correa's project, his project did cause a major public backlash, crystallized in a series of massive protests.[347] In a Congress over which he had firm control, the outcry was sufficient to force a major change to the project—presidential term limits were eliminated, but this change would come into effect only after the 2017 election, forcing Correa to

346 *See* CEPEDA ESPINOSA & LANDAU, *supra* note 113, at 354–55 (discussing C.C., febrero 26, 2010, Sierra Porto, J., Sentencia C-141/10 (Colom.)).

347 *See* Martin Pallares, Opinion, *Ecuador's Political Eruption*, N.Y. TIMES (Sept. 1, 2015), https://www.nytimes.com/2015/09/02/opinion/ecuadors-political-eruption.html?_r=0 [https://perma.cc/F5G7-LK59].

leave power before he could return.[348] This was a potentially significant concession from the perspective of democracy: it allowed time for an alternative presidential candidate to establish his or her credibility as a long-term rival to Correa, for the ruling party to develop a stronger identity separate from Correa, and for the Ecuadorian public to see ongoing social and economic prosperity without Correa.[349]

The force of the opposition reflected public unease with the possibility of a president staying in power indefinitely. But the opposition also had considerable success with its campaign arguing that a change this fundamental should be tested in a public referendum.[350] In effect, the opposition lost in the courts (as they had believed they would) but made headway with political arguments that the pathway of constitutional change being pursued by Correa, and the ends he was seeking, were illegitimate and self-serving. The change to the amendment proved to be highly significant—even though a candidate from Correa's movement, Lenin Moreno, won the 2017 election, Moreno broke sharply from Correa on the term limits issue. Indeed, one of his first major acts was to seek a referendum on whether to reimpose presidential term limits, and that referendum passed overwhelmingly in February 2018.[351]

Another prominent example of popular enforcement of tiered constitutionalism occurred in Honduras in the case referred to previously, where President Manuel Zelaya in 2009 sought a pathway towards constitutional replacement.[352] While the courts used a series of technical arguments linked to the lack of legal authority held by Zelaya and the illegality of the process he proposed in light of existing law, the opposition outside of the courts seized on constitutional articles limiting presidents to only one term in office, preventing those articles from being amended, and providing penalties for political offi-

348 *See* Taylor Gillan, *Ecuador Lawmakers End Presidential Term Limits*, JURIST (Dec. 4, 2015, 8:43 AM), http://www.jurist.org/paperchase/2015/12/ecuador-lawmakers-end-presidential-term-limits.php [https://perma.cc/YPT2-9D8Y].

349 *See* David Landau, Brian Sheppard & Rosalind Dixon, Opinion, *How to Fix Latin America's 'Strongman' Problem*, N.Y. TIMES (Dec. 17, 2015), http://www.nytimes.com/2015/12/18/opinion/how-to-fix-latin-americas-strongman-problem.html [https://perma.cc/GM57-E7N8].

350 Indeed, it is worth noting that an aborted attempt by Correa supporters to allow the amendment to come into effect immediately, allowing Correa to run as a candidate in 2017, was structured as a proposal for a referendum. *See* Ysol Delgado, *Ecuador's Rafael Correa to Supporters: Thanks But I Won't Run for Reelection*, PANAM POST, (Aug. 21, 2016, 1:24 PM), http://panampost.com/ysol-delgado/2016/08/21/ecuador-president-correa-reelection-thanks-but-no/ [https://perma.cc/8ANV-EZWS].

351 *See* Ayala & Rochabrun, *supra* note 319.

352 *See* FELDMAN, LANDAU, SHEPPARD & SUAZO, *supra* note 294, at 10–15.

cials seeking to change the prohibition.[353] Thus, the popular reaction against Zelaya centered on the eternity clause prohibiting presidential reelection. The Zelaya episode ended with an extraordinarily destabilizing step: a military coup that removed Zelaya and installed his vice president as the new president.[354] Many analysts believe that Zelaya also posed a threat of democratic erosion within Honduras, and the no-reelection clause served as a focal point for the opposition because it was a potent symbol of the unconstitutionality of his actions.[355]

Finally, recent experience in Paraguay offers a promising example of popular enforcement of a specially entrenched term limit. In 2017, allies of incumbent president Horacio Cartes sought to amend a provision limiting presidents to one five-year term in order to allow his reelection.[356] This change was sought using the country's default amendment mechanism of absolute approval in both houses of Congress, followed by a proposed referendum.[357] However, the Paraguayan Constitution expressly stated that changes to "the duration of . . . mandates" (among certain other subjects) could only be made by the procedure used for a "reform" rather than a mere amendment, which would require a constituent assembly.[358] The Senate pressed ahead and passed the proposal despite this language.[359] However, this led to massive popular protests, along with pressure from the United States and the Catholic Church.[360] In the face of this popular pressure, the lower house rejected the measure.[361]

These three episodes of popular enforcement highlight the relationship between tiered amendment systems, constitutional language, and popular identification. The debates between rigid and flexible amendment rules are embedded in broader discussions about consti-

353 *See id.* at 28–31.

354 *Id.* at 15–19.

355 *See, e.g.*, HUMAN RIGHTS FOUND., THE FACTS AND THE LAW: BEHIND THE DEMOCRATIC CRISIS OF HONDURAS, 2009, at 157–58 (2010); Frank M. Walsh, *The Honduran Constitution Is Not a Suicide Pact: The Legality of Honduran President Manuel Zelaya's Removal*, 38 GA. J. INT'L & COMP. L. 339, 357–60 (2010).

356 *See* Ignacio González Bozzolasco, *Paraguay: La Reelección Presidencial y los Inicios de la Carrera Electoral 2008*, 37 REV. CIENCIA POL. 543, 559–60 (2017) (Chile).

357 *See* CONSTITUCIÓN DE LA REPÚBLICA DE PARAGUAY [PARAGUAY CONST.] 2009, art. 290, *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., Maria del Carmen Gress trans., HeinOnline 2012).

358 *See id.* arts. 289–291.

359 *See* Laurence Blair, *Paraguay's Reelection Crisis is Over—for Now*, WORLD POL. REV. (May 2, 2017), https://www.worldpoliticsreview.com/articles/22024/paraguay-s-re-election-crisis-is-over-for-now [https://perma.cc/ET6M-2RXW].

360 *See id.*

361 *Id.*

tutional models; in recent work, the logic of a long, detailed, and flexible constitutional model is contrasted with that of a short, abstract, and rigid one.[362] In an empirical sense, many uses of tiered amendment designs also take a tiered approach to constitutional language. That is, detailed and specific language is generally left on the lower tier and thus made relatively flexible, while the higher, more entrenched tier tends to contain more abstract language, including basic principles like the "separation of powers" and the founding values of the state.[363] At least when federal and state constitutionalism are viewed as part of the same package, the United States also shows roughly such a design: the U.S. Constitution is not only extremely rigid but also famously short and written in framework-like language, while most state constitutions are not only easier to change but also extensive and detailed.[364]

A tiered approach to language, like such an approach to amendment, may have significant benefits. Specific and detailed language allows actors to give detailed instructions to institutions on a number of topics, thus easing coordination in modern politics and increasing the buy-in of competing interest groups without delegating too much power to courts or ordinary political processes.[365] But more abstract and framework-like language may also have key advantages. It may, for example, increase comprehension, identification, and attachment by ordinary citizens in their constitutions.[366] Increased identification may build a constitutional culture through time, helping to protect in a general way against destabilizing and antidemocratic change. In a more specific sense, as the three examples show, such language may also serve as a focal point for popular resistance to elite attempts at manipulating the constitution.

The precise way in which a tiered system of constitutional language can be used to build popular identification with core aspects of

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362 *See* Versteeg & Zackin, *Constitutions Unentrenched*, *supra* note 3, at 657–58; ELKINS, GINSBURG & MELTON, *supra* note 3, at 82–88 (arguing for the virtues of flexibility and specificity as better promoting constitutional longevity).

363 *See supra* Sections V.A, V.B (giving examples).

364 *See* Versteeg & Zackin, *American Constitutional Exceptionalism*, *supra* note 3, at 1643–46; Stephanopoulos & Versteeg, *supra* note 158, at 138–39 (finding higher levels of popular identification with the Federal Constitution than with state constitutions).

365 *See* ELKINS, GINSBURG & MELTON, *supra* note 3, at 82; Dixon & Ginsburg, *supra* note 198, at 655–56.

366 In a survey of U.S. state constitutions, Stephanopoulos and Versteeg found little relationship between length and popular identification with the constitution, but they did find that citizens who know more about their state constitutions identify more heavily with them. *See* Stephanopoulos & Versteeg, *supra* note 158, at 145, 152–53.

a constitution is a difficult and open question, largely beyond the scope of this Article. In many cases, this might be achieved by protecting founding values, basic principles, or a core set of rights that strongly resonate with transnational practices, while also expressing a distinctive set of local understandings. In others, it might be achieved with more precise but simple, accessible, rule-like language that is viewed by citizens as the heart of the constitution, as with the Honduran and Paraguayan no-reelection clauses.[367]

In each case, however, the core feature would be that the higher tier would not only be formally more difficult to amend, but also general and parsimonious enough to capture the public imagination, whereas more ordinary provisions are more detailed and technical in nature. Designed in this way, the tiering of constitutional provisions may create mutually reinforcing forms of judicial and popular checks on abusive constitutional change: if a higher constitutional tier is not only formally more entrenched, but also expressed in relatively accessible constitutional language, this may increase the chances of effective popular, as well as judicial, checks on antidemocratic constitutional change.

Conclusion

This Article illuminates an important and ubiquitous but overlooked form of constitutional design: a tiered procedure of constitutional amendment. Article V in the United States creates a crude version of this tiering;[368] Article V in conjunction with the flexible system of change found in many state constitutions creates a more comprehensive version. As demonstrated, a large number of constitutions worldwide use a variety of tiered designs. This Article argues that such a system shows great promise in combining the virtues of flexible and rigid constitutionalism. It can allow actors to make needed updates to the constitution, while also preserving the core of the constitution against destabilizing and antidemocratic forms of change, and helping to build a constitutional identity.

Studying tiered constitutional designs in light of these core purposes suggests important insights that could be used to improve the way in which constitutions are drafted and enforced. Designers should consider the potential dangers of entrenching too many provisions (for example, placing all rights on the higher tier), of adopting an

367 *See* Honduras Const. art. 223; Paraguay Const. art. 229.

368 *See* U.S. Const. art. V.

overly rule-based approach that could be evaded by would-be authoritarian actors, and of protecting higher tiers solely through devices like enhanced supermajorities with effects highly contingent on details of political context. Judges can improve the enforcement of tiered clauses by using comparative law, testing domestic constitutional change in light of a global understanding of those institutions that are essential for electoral democracy.

This Article's brief survey of the practice of tiered clauses in the face of antidemocratic efforts should be sufficient to show that perfection in enforcement is an unrealistic goal in such a challenging area. The question, however, is whether both the design and doctrine surrounding tiered designs can constitute a sufficient obstacle to authoritarian projects that some of them are deterred and others are slowed down enough to be derailed. The key issue, in other words, is not whether these designs can succeed in ideal conditions with robust constitutional culture and high levels of judicial independence—antidemocratic or destabilizing projects of constitutional change are unlikely to emerge under such conditions at any rate. It is instead whether a tiered design can function under the more difficult conditions where authoritarian threats typically occur with threatened and delegitimized institutions and weaker courts. The record suggests pause but also potential. At least where clauses can serve as the focal point for popular support in addition to or instead of judicial enforcement, they can serve a very valuable purpose.

Despite the challenges of constitutional design in this area, the question of which design best defends the basic stability and democratic core of the constitutional order, without leading to ossification, is a crucial one. Unfortunately, future events across a range of countries seem likely to provide more insight into whether the best approach is flexible constitutionalism, the tiered design explored here, or instead a return to the rigid framework model embraced in the United States but in few other countries around the world.