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The Historical Amendability of the American Constitution: Speculations on an Empirical Problematic

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The Historical Amendability of the American Constitution: Speculations on an Empirical Problematic

Keywords

Amendability, Constitution, Congress, Bill, Amendment, Proposed Amendment and Bill totals, Congressional eras

THE HISTORICAL AMENDABILITY OF THE AMERICAN CONSTITUTION: SPECULATIONS ON AN EMPIRICAL PROBLEMATIC

DARREN R. LATHAM *

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“[I]t will be far more easy to obtain subsequent than previous amendments to the Constitution . . . [E]very amendment to the Constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise, in relation to any other point, no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue.”

—Alexander Hamilton, 1788¹

“The States are now so numerous that I despair of ever seeing another amendment to the Constitution, although the innovations of time will certainly call, and now already call, for some.”

—Thomas Jefferson, 1823²

“[N]o impulse short of the impulse of self-preservation, no force less than the force of revolution, can nowadays be expected to move the cumbrous machinery of formal amendment erected in Article Five.”

—Woodrow Wilson, 1885³

INTRODUCTION

“Easy.” “Difficult.”⁴

1. THE FEDERALIST NO. 85 (Alexander Hamilton).

2. Letter from Thomas Jefferson to George Hay (1823), in 10 THE WRITINGS OF THOMAS JEFFERSON 265 (Paul L. Ford ed., 1892-99) [hereinafter Letter to George Hay], available at <http://etext.lib.virginia.edu/jefferson/quotations/foley>. That view contrasts starkly with Jefferson’s convention era thinking: “We must be content to accept [the Constitution’s] good and to cure what is evil in it hereafter.” Letter from Thomas Jefferson to John Brown (1788), in 5 THE WRITINGS OF THOMAS JEFFERSON 19 (Paul L. Ford ed., 1892-99) [hereinafter Letter to John Brown], available at <http://etext.lib.virginia.edu/jefferson/quotations/foley>.

3. WOODROW WILSON, CONGRESSIONAL GOVERNMENT 163 (Meridian Books 1956) (1885).

4. The ultimate inquiry in which I engage goes deeper than the simple conclusion that our constitution is “difficult” to amend because it has been amended far less frequently than most others. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM.

Explicit commentary on how amendable—through the Article V process—the American Constitution has been rarely exceeds such unsophisticated labels.⁵ Even the recent flurry of Article V-centered literature reaches only sweeping generalizations about the level of difficulty in the formal process. Most authors recite such simple glosses as mere prelude to histories of, or normative speculation about, non-formal or extra-Article V amendment.⁶

This Article addresses the varying level of difficulty of formal constitutional change, focusing primarily on pre-“modern” times. As developed in this Article, the pre-modern age runs through the first century and a half of the Constitution of 1788 and it is little understood. Today, by contrast and regardless of the descriptive terms we use, we share at least a general understanding of the impediments to, and likelihood of success of, contemporary constitutional amendments. Some say amendment is hard to achieve, others that it is easy, depending on normative perspectives; but all speak of the same generally-known conditions. This Article also explores the amendability question in earlier eras, where those contemporary commonplaces cannot reach.

The full historical record dwarfs the limited range of materials considered by almost all prior studies that have touched on the amendability question.⁷ The relevant record includes not just the vast, elusive set of indicia of some sort of historically-varying “amendment need” and the ratification process surrounding the few proposals Congress actually has put to the states for consideration, but also includes the history surrounding each of the over eleven thousand amendment proposals that have been introduced in Congress.⁸ Admittedly, then, the relevant historical record is too far-flung to engage in a single article through a direct historical analysis.

POL. SCI. REV. 355, 365 (1994) (citing comparative data that the U.S. Constitution is the second most-difficult to amend). Rather, I consider the degree to which our amendability has matched our expectations or normative views as a varying matter across our history. Moreover, since, as detailed below, it is the congressional gate-keeping stage of the process, and not the states’ ratification stage, where the history of amendment difficulty most resides, I do not focus on ratification difficulty. Other writers have addressed the historically-increasing, theoretical difficulty for popular supermajorities to ratify amendments and ease for miniscule minorities to block them, due to the addition of states and accompanying demographic shifts. See, e.g., Peter Suber, *Population Changes and Constitutional Amendments: Federalism Versus Democracy*, 20 U. MICH. J.L. REFORM 409 (1986-87) (arguing, based on a rich empirical study, that the delicate balance between federalism and democracy interests embodied in Article V has been sharply skewed towards federalism by demographic patterns the framers did not anticipate).

5. See discussion *infra* Part II.B.2 (presenting the history of the implementation of amendments and discussing literature pertaining to the amendment process).

6. *Id.*

7. See discussion *infra* Parts II.A, II.B (reviewing major works on the amendability question and analyzing prior studies on this issue).

8. See *infra* Part II.B.2 (providing a historical background of the amendment process).

But I propose we can quickly distill at least a useful overview of the full amendability history using indirect means. To do so, I capitalize on one particular benefit of the record's large size: that significant patterns sometimes can be drawn from large data aggregations with quantifiable characteristics, using numerical methods. Here, I first seize on the particularly-accessible tallies of amendments proposed in each Congress. Using that data as a beginning framework, I then speculate on the macro-level historical evolution of the "difficulty" of amendment.

The methodological lynchpin of this experiment in glimpsing the big picture of amendability is my attempt to explain a simple but surprising empirical observation. On first looking at the congressional side of the amendability question, I was struck by the number of amendment proposals that had been formally introduced, over eleven thousand, compared to the very few of those proposals that had passed both houses with the requisite two-thirds majority, thirty-three.⁹ What is more, the total numbers of amendments proposed in each Congress did not merely increase over congressional history with the size of Congress; there was wide fluctuation in numbers from term to term—with a low of just one in the 4th Congress (1795-97) and historical high of 773 in the 91st Congress (1969-70).

Those preliminary empirical observations led immediately to two further empirical questions: Did the total numbers of general bills introduced also fluctuate from Congress to Congress so unpredictably? And if so, were there overlapping causes of the erratic patterns of numbers of proposed amendments and bills such that their totals, over time, in fact correlated (in a statistically significant way)?

Surprisingly, yes. Bills, also erratic in frequency, had totals indeed related to those for proposed amendments. That led me to speculations on the causes of that phenomenon that, in turn, produced a preliminary theory: seven discrete eras of "amendability," or at least of the history of Congress

9. The contrast is even starker if we exclude the Bill of Rights and the two initially unratified amendments Congress proposed to the states with it (the now Twenty-Seventh Amendment and a proposal on the size of the House), since several states had made their ratifications of the original Constitution contingent on the immediate adoption of a bill of rights. On that view, the Congress has produced only twenty-three amendments by the formal process. By contrast, the states have exhibited a comparatively-high rate of ratification. Of the thirty-three amendments Congress proposed, the states ratified twenty-seven. The six left on the table were proposals to control the growth of the size of the House of Representatives in a manner more detailed than the Constitution provides (1789), to strip citizenship from those receiving foreign titles of nobility (1810), to effectively constitutionalize the institution of slavery (the "Corwin Amendment," 1861), to give Congress explicit power to ban child labor (1924), to explicitly extend equal rights to women (ERA, 1972), and to confer on the District of Columbia attributes of statehood, including representation in the House (1978). 3 PROPOSED AMENDMENTS TO THE U.S. CONSTITUTION 1787-2001, 1718-19 (John R. Vile ed., 2003) [hereinafter PROPOSED AMENDMENTS]. For convenience, I have appended a table detailing the dates and subjects of the thirty-three amendments proposed by Congress. See *infra* App. A.

in its amendment gate-keeping capacity.

For convenience (and roughly related to contemporary political events) I call the seven eras the Founding (1791-1812), Antebellum (1813–1858), Civil War–Early Reconstruction (1859-1868), Latter Reconstruction–Gilded Age (1869-1886), Populist–Progressive (1887-1916), Suffrage–Prohibition (1917-1930), and Modern (1931-2004).

An idealized graphic may clarify what I have just described. That is, the empirical core of this article explores how one should interpret an observation like the following:

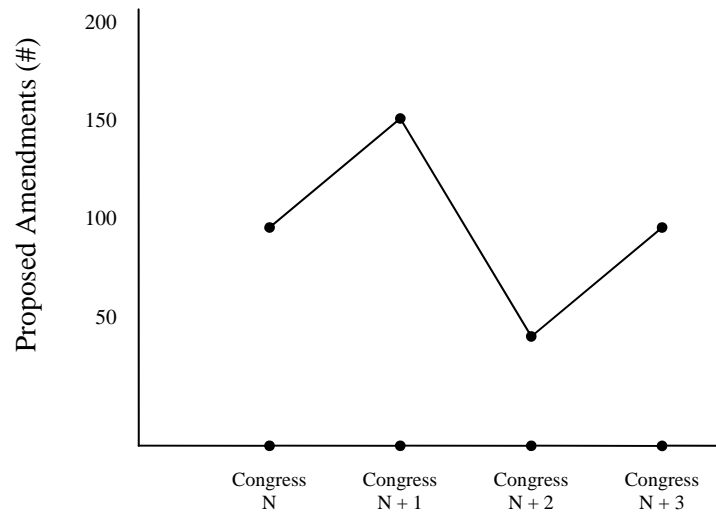
FIGURE 1:

Simplified Correlation Illustration

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Again, the above graph is idealized to make clear the basic point. In fact, the real variation in the intensities of bill proposing and amendment proposing activity from Congress to Congress is not as precisely matched as this illustration. But the real numbers do tend to a close, statistically significant match over the entire history of Congress. What is more, the match is strikingly close in particular historical eras and distinctly non-existent or negative in others.

My question is why this correlation? Why, when (1) general congressional legislation and proposed amendments are introduced by different procedural vehicles (bills and joint resolutions, respectively);¹⁰ (2) the ranges of topics addressed by bills and proposed amendments overlap only partially;¹¹ (3) the general likelihood of success of the two historically has varied significantly (if for no other reason than the majority versus two-thirds vote requirements); and (4) though perceptions of each have changed substantially, bills and proposed amendments have always been regarded as distinctly different from each other?¹² Given all those factors suggesting independence between those two spheres of congressional activity, what drives the wide variations in total quantities of bills and proposed amendments from Congress to Congress to be in sync with each other much of the time, but abruptly not so in distinct eras?

10. See *infra* Part II.C (discussing the historical evolution of bill introduction procedures and the process of joint resolution as the means for proposing amendments).

11. See *infra* Part III.B (characterizing congressional attitude towards the amendment process).

12. See *infra* Parts II.A, II.B (presenting the available literature and modern theoretical work discussing the amendment process).

There had to be some common motivation that could drive members of Congress both to introduce bills and to propose amendments, independent of their substantive topics, and that when present to a higher degree among a significant number of members, unrestrained by prudence or procedure, would result in a higher number of bills or proposed amendments and vice versa. I believe the motivation is “grandstanding,” “credit-seeking,” or, in the terminology of the political scientist, “careerism.” And the impact of careerism on the relationship between bill and amendment proposing appears to vary across the seven eras I identify.¹³

True, it is suspect to construct this speculation around aggregate characteristics, the mere rates at which amendments have been proposed from historical Congress to historical Congress. I do not deny that it is the substantive content, legislative history, social goals, and political motivations of particular proposals that ultimately will yield a sophisticated understanding of the history of attempted formal constitutional change. But any manageable study first demands some principled means by which researchers can select particular subsets of the proposed amendment data for investigating those underlying characteristics.

That is, the apparent evolution in amendment-proposing history this Article infers from a macroscopic view may offer points of departure for more-particularized future studies. Here, I (i) examine amendment-proposing rates over time in comparison with the corresponding rates of introduction of general legislation; from which I (ii) distinguish the seven distinct historical eras of congressional amendment proposing; and then (iii) engage and survey a range of empirical and theoretical sources, in history, political science, and legal scholarship that contextualize the analysis. Though my seven-era framework will likely be proved too precocious in a later, more-thorough analysis, it is a first vehicle for speculation about the empirical evidence. In essence, this Article is primer for the legal scholar on the interdisciplinary and empirical landscape framing the amendability analysis. It knits together relevant but diverse sources of data and fields of research.

Part I briefly overviews (A) the broader theoretical motivations and potential implications of the amendability analysis and (B) the numerical analysis through which I distinguish seven historical eras of amendment proposing. Part II, on existing literature, then reviews the present background of interdisciplinary scholarship from which the analysis proceeds. Part III next develops a theory of the cause of the bill introduction–amendment proposing correlation, and Part IV reports the raw numerical analysis that “tests” that theory. That sets the stage for the heart

13. See *infra* Part II.C.3 (discussing careerism and its effect on congressional behavior).

of the article, Part V's contextual analysis of the seven-era structure yielded by that raw numerical analysis. Alongside the speculations on what the numerical analysis says about the evolving character of amendment proposing in relation to normal legislation, I include even less grounded speculations about a general, mass-psychological congressional attitude towards the amendment process in each of the seven congressional eras—the evolving “Zeitgeist of amendability in Congress.” Finally, after some tentative inferences from that analysis in Part VI, the Article concludes with recommendations for future researchers including on operationalizing “amendment need” and micro-analysis of congressional activity to determine and assess responsiveness to that need, or “amendability.”

I. A FRAMEWORK FOR AMENDABILITY ANALYSIS

A. *Overview of the Broad Theoretical Problematic: Operationalizing “Amendability,” Partially, in Terms of Congressional Gate-Keeping*

This numerical analysis of amendment proposing offers the project of constitutional scholarship a framework for exploring a historical question most theoretical stances seem to ask, even if only implicitly.¹⁴ That is, using the patterns and transition points identified here, we can begin to evaluate Congress's fulfillment of the formal gate-keeping role assigned to it (in co-tenancy with the inchoate convention process of Article V) by the Constitution.

Congressional gate-keeping, with its two-thirds supermajority threshold, was one component of the 1788 adopters' attempt to temper their own and future generations' immediate popular will. Itself an “unconstitutional” yet necessary act, the Constitution of 1788 sought to remedy the virtual immutability of the Articles of Confederation that preceded it.¹⁵ The primary mechanism for constitutional change divided the process into two stages: first, congressional approval of a proposed change; then, states' ratification.¹⁶ Accordingly, the adopters must have expected the change

14. See *infra* Part II.B.3 (providing the arguments made by modern theorists on the role of Congress in the amendment-proposal process).

15. The Articles of Confederation required unanimity of the states for change. ARTICLES OF CONFEDERATION art. XIII (1777) (“[No] alteration at any time hereafter [shall] be made in any of [the Articles of Confederation]; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.”).

16. U.S. CONST. art. V states:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one

mechanism's first stage, the congressional gate keeping function, to allow change proposals to pass to the second stage, decision by the states when actually needed.¹⁷

At the same time, the adopters expected that Congress as gatekeeper would be responsive to something. I call that thing "amendment need." Amendment need probably should signify some significant aggregate level of desire for change by "the people," perhaps filtered by congressional judgment.¹⁸ And it is the level of responsiveness to amendment need, both through congressional gate keeping and post-Congress ratification that I define here to be the Constitution's "amendability."

Hence, the whole "amendability" question is much broader in scope than the focus of this Article. Not only do I give short shrift to the eleven thousand proposed amendments (with each of their full legislative histories) as individual entities, only considering their tallies and most-common subjects; but I also defer theorizing and assessing amendment need.¹⁹ Ultimately, even amendability is only a part of and draws its relevance from a broader theoretical question: How closely, over history, has the amendability quotient matched expectations or demands deemed relevant by political theory (and which political theory is important)?

A few quick assumptions, easily discredited for their simplicity, nonetheless illustrate the relationship among the components raised by that broadest question: Suppose (i) amendment need is determined by the

or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

I focus on the first alternative for proposing amendments—Congress—since the convention method has never been invoked. The convention method was, however, close to invocation in the 1960s in response to Supreme Court reapportionment decisions and more recently to call for a national balanced budget amendment. John R. Vile, *American Views of the Constitutional Amending Process: An Intellectual History of Article V*, 35 AM. J. LEGAL HIST. 44, 63 (1991). But a fear of a potentially unwieldy and unlimited process has inspired writers to argue against the convention method throughout our history. *See id.* at 54, 56-57, 63-65 (presenting arguments made by different writers, including judges, senators, and law professors, pertaining to the failure to adopt constitutional changes through conventions).

17. *See infra* Part II.B.1 (arguing that there was no expectation that congressional gate keeping would be a significant impediment to constitutional change).

18. In one sense, the supermajority rules of the gate keeping role suggest that Congress was not intended to be a simple conduit of raw popular will. However, the parallel provision for an amending convention to arise from the call of two thirds of the states suggests that the intent may have been just that.

19. The era-by-era, contextual historical analysis of Part V *infra* does, however, acknowledge at least the most obvious arguable indicia of amendment need, those very few instances that gave rise to amendment proposals that succeeded in Congress. More difficult to theorize are criteria to identify amendment need in other circumstances. Probably the most popular candidate for a particular instance of that is the Supreme Court's initial resistance to New Deal legislation, discussed in the Modern era analysis. *See infra* Part V.G.

understanding of it by the adopters,²⁰ whose thinking was uniform with the thinking of, say, Alexander Hamilton; (ii) Hamilton thought that any time a majority of the voting citizenry in each of three-fourths of the states supported a constitutional change,²¹ Congress would present them with a proposed amendment;²² (iii) throughout our history, there had been several hundred instances rising to that level of popular support for constitutional change on discrete topics; and (iv) Congress had, nonetheless, proposed only thirty-three amendments. Then Congress would have been not very responsive to amendment need, hence making amendability low, which would be contrary to the adopters' expectations of high amendability.

Again, the extent to which that hypothetical represents the best theory of amendment need, the actual understanding and expectations of the ratifiers, the actual subsequent history of popular support for change, and, perhaps most importantly, the relevance of ratifiers' expectations compared to those of subsequent political entities defines areas for deeper research and theory.²³

*B. Overview of the Numerical Analysis:
Seven Eras of Amendment Proposing Distinguished*

The justification for my methodology in this initial look towards amendability is this: having first concluded that any reckoning of the difficulty of formal amendment must compare the hard-to-operationalize quality of amendment need with the corresponding response under Article V, I next assume that some initial analysis of Article V activity in general will likely provide insights into what that activity is responding to, and hence, how to later operationalize amendment need itself. The congressional role, rather than the chronologically, and causally-precedent circumstances to which these proposals in Congress respond, is the more empirically-accessible at the outset.²⁴

While the more than eleven thousand amendments proposed to the United States Constitution have evaded comprehensive analysis at any level, I conclude that a macroscopic view of them can yield the type of useful insights that often inhere in large data aggregations. What emerges here are discernible patterns in the history of congressional attitudes on the

20. Alone, this is a controversial and originalist assumption.

21. See *infra* note 41 and accompanying text.

22. Article V, in turn, on this view then provided some wiggle room: only two-thirds, not three-fourths, of each house of Congress had to pass the proposed amendment.

23. I also do not take a position here on the relevance of such a determination to constitutional theory, if any.

24. The focus here is primarily on congressional activity because that is where almost all the Article V action lies, since there have been no amendment proposals through the Article V alternative convention proposing mechanism that bypasses Congress.

practice of amendment-proposing.

As detailed in Part III, I posit that responsiveness to amendment need can be operationalized in terms of congressional use of the amendment process as a political or policy tool; that, in turn, can be evidenced in part by the relationship between the aggregate character of normal legislative bill proposing, on the one hand, and the aggregate character of amendment proposing activity (via “joint resolutions” similar to bills), on the other. Then, using the number of amendment attempts for each Congress, I outline an evolution of the independence of the aggregate level of enthusiasm for amendment proposing from Congress’s level of enthusiasm for more-general legislative activity. I call that concept “motivation independence,” for now.²⁵ Its converse, which emerges in the Latter Reconstruction–Gilded Age era and dominates in the Modern era, I call “promiscuous careerism.” Finally, I examine how patterns and variability in motivation independence versus promiscuous careerism relate to contextual historical data that will likely bear most on the amendability question.

Again, the way I explore motivation independence in these data may seem far too superficial. I merely compare trends in quantity of amendments proposed from Congress to Congress numerically with trends in quantity of general legislative bills proposed during those Congresses. Any congressional fool can (now²⁶) toss a bill in the hopper, some might say, so why should these aggregate numbers matter?

But the value of bill sponsorship quantities as an indicator of the character of legislative motivation already has currency in political science. For instance, Wendy Schiller argued the relevance of these data in a 1995 study of the Senate:

Because so few bills actually become law, one might question the worth of any study of bill sponsorship. In contrast to the vast amount of knowledge that exists about legislators and roll-call voting . . . , few works seek to explain the choices legislators make when building their agendas. Unlike roll-call voting, where senators face a predetermined set of alternatives they had no part in shaping, bill sponsorship is under the control of the individual legislator. As such, a study of bill sponsorship provides a rich source of information about how legislators interact with their institutions when there appears to be few rules to limit their behavior.²⁷

25. In this Article, I use loose, tentative definitions for discussion. Later in the development of this theory, the definitions will become more analytic.

26. *But see infra* Part II.C.1 (discussing the difficulty of member bill introduction in earlier historical eras).

27. Wendy J. Schiller, *Senators as Political Entrepreneurs: Using Bill Sponsorship to Shape Legislative Agendas*, 39 AM. J. POL. SCI. 186, 186-87 (1995) (omitting Schiller’s

And the value of my much broader—that is, collective (aggregate), longitudinal, bicameral, and comparative,²⁸ use of quantitative sponsorship data is the identification of what seem to be seven qualitatively distinct eras of amendment proposing activity spanning the history of Congress (at least for purpose of discussing a problematic).

Artificial as it may seem on its own, this empirical analysis may provide an important counterbalance to our current, generally non-empirical (though sometimes narratively and theoretically rich) understandings. For the period following the Founding and through the early twentieth century, we generally have only sparse sources of information about several important variables in the amendability equation. Those variables include, for instance, (i) the general motivations and decision calculus of congresspersons in the sponsorship of and voting on proposed amendments, (ii) their perceptions of amendment need and likelihood of amendment success, and (iii) their views of constitutional meaning and the role of the amendment process.²⁹ Our understanding is limited to (i) statements by individual congresspersons of either their own perspectives or their assessments of the views of their colleagues and (ii) limited, contemporary assessments by historians or political partisans.³⁰ Those sources are problematic not only in the potential that they are not sufficiently representative, but also because human beings, even experts drawing conclusions in their specific fields of study, are notoriously bad in assessing patterns and relationships and making appropriate inferences. Studies since the 1960s have empirically verified a pervasive tendency of the human mind both to fail to recognize existing associative relationships in data sets and to believe in the existence of relationships that do not, in fact, exist.³¹ (This is not indictment of the sophisticated, systematic

footnote one: “In the 99th Congress, only 236 of 2,638 public bills became law. In the 100th Congress, only 300 of 2,772 public bills became law.”).

28. By contrast, Schiller’s study looks at individual member bill totals, over just two Congresses, for just the Senate, and not compared to sponsorship of legislative devices other than bills. *Id.* at 187 n.2.

29. See *infra* note 32 and accompanying text.

30. See *infra* Parts II.A, II.B (describing the limited works produced in this area).

31. See generally RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 97 (1980) (providing, in more technical terms, the findings of several empirical psychological studies where “reported covariation was shown to reflect true covariation far less than it reflected theories or preconceptions of the nature of the associations that ‘ought’ to exist. Unexpected, true covariations can sometimes be detected, but they will be underestimated and are likely to be noticed only when the covariation is very strong, and the relevant data set excludes ‘decoy features’ that bring into play popular but incorrect theories.”). Nisbett and Ross explain that those phenomena owe to a variety of limitations in the human observational and inferential faculties: “Objects or events are judged as frequent, probable, or casually efficacious to the extent that they are readily ‘available’ in memory By default, more vivid information is more likely to enter inferential processes than is less vivid information . . . [which is] dangerous because the vividness of information is normally related only obliquely at best to its true value as

techniques of modern historians and political scientists but, rather, a recognition of the potential unreliability of some of the sources upon which they must rely.) Hence, the potential value of examining the amendability data systematically: it may either reveal the existence of large-scale patterns that have gone unobserved or unreported or debunk as false some general perceptions and claims about what was going on at various points in our history.

In brief, from that empirical analysis I preliminarily conclude that if the oscillation between motivation independence and promiscuous careerism over the seven eras hints at any broad trend, it is that amendment proposing activity has gone from a generally “seriousminded,” policy-oriented approach in the Founding era to a norm of grandstanding in the present Modern era (beginning around 1931), through a series of distinct intervening historical stages with anomalies that independently merit further study.

Moreover, combining additional numerical data with historians’ assessments of typical or aggregate psychological attitudes in Congress, concerning the likelihood of success of proposed amendments or prudential reverence towards the Constitution and the process itself, I am able to speculate about the evolution of the *Zeitgeist* of amendability³² in Congress.

It seems the Founding and Modern eras represent opposite extremes in the *Zeitgeist* of amendability; but the path between them was not a steady descent. In the Founding era (1791-1812), there was a high degree of optimism about the likelihood of success of amendments combined with a strong prudential reverence for the amendment process that suppressed the

evidence.” *Id.* at 7-8. Moreover, “[p]reexisting knowledge structures influence unduly, and often without the individual’s awareness, the characterization of the event. [And] [i]n characterizing samples, the lay scientist usually is at the mercy of the sample of events that can be retrieved from memory.” *Id.* at 9. Finally, in attempting to generalize from observations in the sample to the population as a whole, individuals often have little understanding of the importance of the sample size and its freedom from bias. *Id.*: see also Aaron D. Twerski & Neil B. Cohen, *Informed Decision Making and The Law of Torts: The Myth of Justiciable Causation*, 1988 U. ILL. L. REV. 607, 627 (1988) (“More than two decades of research establishes that people making decisions—whether laymen or scientists—consistently make gross errors in evaluating objective information.”). The general defects in human inference documented by those modern studies have long been observed anecdotally: “It is evident that when the instances on one side of a question are more likely to be remembered and recorded than those on the other, especially if there be any strong motive to preserve the memory of the first, but not of the latter, these last are likely to be over-looked, and escape the observations of the mass of mankind.” JOHN STUART MILL, *A SYSTEM OF LOGIC: RATIOCINATIVE AND INDUCTIVE* 585 (People’s ed., Longmans, Green, & Co. 1896) (1843). “[P]opular induction depends upon the emotional interest of the instances, not upon their number.” BERTRAND RUSSELL, *PHILOSOPHY* 269 (1927).

32. See *infra* Part III.B (setting forth the theory of the *Zeitgeist* of amendability in Congress).

pace of amendment proposing.³³ There is little evidence of abuse of the amendment process for purely credit-seeking purposes at that time.³⁴ Moving into the Antebellum era (1813-1858), both the perceived likelihood of success and the reverence for the process diminish, to some degree, though they persist at moderate levels relative to the entire congressional history.³⁵ The path of diminution then continues through and beyond the (*sui generis*) Civil War era into the Latter Reconstruction–Gilded Age era (1869-1886).³⁶ Aided by the great easing of procedural constraints on individual bill proposing, that era, like the Modern era, is marked by both a dim assessment of the likelihood of success of amendments and a low degree of reverence for the amendment process. Here as well, an easing of constraints on individual bill sponsorship allows credit seeking to first emerge in full form, creating a prominent culture of “promiscuous careerism” in Congress.³⁷

But the dual decline in assessment of success and reverence for the process abates for a time. On the one hand, due to the century-long gap in amendments by the normal (non-Civil-War) means, the view of likelihood of success does continue its own decline and reach a historical low in the next, Populist–Progressive era (1887-1916). However, reverence for the amendment process substantially revives in that era. Moreover, credit seeking remits, so that bill and amendment proposing return to more independent and serious-minded endeavors. Then, with the rapid congressional-passage and ratification successes of a number of amendments, the Suffrage-Prohibition era (1917-1930) sees a peak in the assessment of likelihood of success of amendments, though the reverence for the process begins to decline again.³⁸

Ultimately, though, with the Modern era (1931-present), the pessimistic irreverence first seen in the Latter Reconstruction, Gilded Age era reemerges in full force and congeals into what appears to be the current, seemingly-permanent, static *Zeitgeist* of amendability, of which I presume most readers have a general sense.

33. See *infra* notes 296-99 and accompanying text.

34. See *infra* Part V.A (discussing the likelihood of careerist motivations in the amendment process during the Founding and Modern eras).

35. See *infra* Part V.B (examining court decisions that serve as evidence of the lack of promiscuous careerism).

36. See discussion *infra* Part V.C (explaining that the short duration of this era contributed to motivation independence in the amendment process).

37. See *infra* Part V.D (asserting that promiscuous careerism appeared in this era mainly due to the lesser impediments in bill introduction and the topic overlap in amendment proposals).

38. See *infra* Part V.F (concluding that this era demonstrates that motivation independence may dominate a congressional era even after the historical emergence of promiscuous careerism).

II. THE SPARSE EXISTING LITERATURE RELATED TO AMENDABILITY

My analysis places the numerical findings into the context of our current multi-disciplinary understanding of the amendability of the Constitution. Amendability has not comprehensively been addressed by any single discipline or line of analysis, but, rather, has been touched on in different ways from several scholarly perspectives. Two categories of scholarship directly implicate amendability: (1) proposed amendment scholarship and (2) constitutional theory. A third category, the analysis of Congress done by political scientists, explains the character of and identifies trends in the general congressional data that this Article compares with amendment-proposing activity. Though law, history, and political science in the aggregate have already produced a substantial body of work on amendment proposing activity that implicates amendability, scholars in those disciplines have not considered the macro-level analysis derived from the variations in the frequency of attempts to amend the Constitution over time I present here.

While I draw from proposed amendment scholarship, congressional analysis, and legal theory separately, all three are critical to the amendability question. Each provides unique insights as well as defects remedied by the others. For instance, the dispersion of expertise finds that the two most prominent modern proposed amendment scholars are a political scientist, John Vile, and a historian, David Kyvig.³⁹ By contrast, while there has been a recent flurry of activity in legal commentary regarding the amending process, legal scholars virtually ignore the proposed amendment history. They focus, rather, on the successful amendments and alternatives to the formal amendment process, Bruce Ackerman and Akhil Amar being representative of the alternative-forms-of-amendment camp.⁴⁰

To assess amendability in its full scope, however, the three disciplines (and perhaps more) must be codependent. Legal scholarship, to the extent it has touched on the area, lacks several analytical components: (i) a historical narrative of the type Kyvig provides, (ii) understanding of Congress as a sophisticated institution and of the primary sources of proposed amendments, general congressional activity, and the non-judicial indicia of amendment need, and (iii) savvy with the numerical methods routinely employed by political scientists. And while this inquiry is

39. See *infra* Part II.A (presenting in detail the work of these two scholars).

40. See Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155 (1996-97) (providing an extensive comparative summary and critique of Ackerman's, Amar's, and others' non-formal amendment theories through the mid-1990s). In opposing the lack of reverence for the formal amending process espoused by those current legal theorists, Vile and Kyvig are monolithic in their conservatism. In this Article, I attempt to be more agnostic.

historical at its core, history also tends to lack the understanding of the behavior of Congress as a political institution on the micro and macro level and sophistication of inquiry into the quantitative data known to the political scientist. Finally, completing the circle, political science and history often seem less suited to framing the inquiry into amendability demanded by constitutional theory as deftly as the legal scholar.⁴¹

A. Proposed Amendment Scholarship

Proposed amendment scholarship is comprised mostly by the work of just three scholars: two historians and a political scientist. At least until David Kyvig's 1996 treatise on the history of attempted amendment,⁴² modern proposed amendment scholarship was sparse and eclectic at best. The limited nature of the canon in this area has probably derived from the limitations of the data sources for proposed amendments themselves.⁴³ As law librarian Thomas E. Heard lamented in 1992, except for some rare exceptions where scholars have compiled proposed amendments in a small subject area, "[a]s long as proposed amendments remain scattered through the vast and unwieldy compilations of House and Senate bills and are accessible only through relatively obscure indexes of varying quality, it will be difficult to determine accurately their utility as tools in legal, historical, and social sciences research."⁴⁴ The analysis of this Article provides some structure for determining which portions of that difficult data set most merit further examination.

Prior to Kyvig, Ohio State University Professor Herman V. Ames's *Proposed Amendments to the Constitution of the United States, 1789-1889*⁴⁵ had been the standard in proposed amendment scholarship, and several scholars had attempted to extend his project into contemporary times.⁴⁶ In addition to cataloguing the approximately 1700 proposed amendments introduced in Congress during its first 100 years, amendment

41. For example, in his review of Kyvig's 1996 book, DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE CONSTITUTION, 1776-1995* (1996), Professor Chemerinsky uses the deep insights and historical knowledge he acknowledges Kyvig provides to more-directly frame the type of theoretical questions that motivate this article. Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561 (1998) (book review). See *infra* note 109 and accompanying text.

42. KYVIG, *supra* note 41.

43. See Thomas E. Heard, *Proposed Constitutional Amendments as a Research Tool: The Example of Prohibition*, 84 LAW LIBR. J. 499 (1992) (discussing the format and availability of proposed amendments and using the national prohibition as an example).

44. *Id.* at 508.

45. HERMAN V. AMES, *PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, 1789-1889* (1897) (originally published as 2 AMERICAN HISTORICAL ASSOCIATION, *ANNUAL REPORT FOR THE YEAR 1896*, having been awarded the best monograph prize by the association in 1895).

46. See *infra* note 54 and accompanying text.

by amendment, Ames wrote about the broader trends and eras he observed. Specifically, he determined that amendment proposals in the first 100 years of the Constitution naturally fell into four distinct periods: (1) 1789-1803: perfecting the details;⁴⁷ (2) 1803-1860: general alterations;⁴⁸ (3) 1860-1870: slavery and reconstruction;⁴⁹ and (4) 1870-1889: general emendations.⁵⁰

Reviewing the full span of the first 100 years, Ames observed: “The prospect of almost certain failure does not seem to have diminished the number of amendments offered. In recent years there has been a gradual increase in the number presented.”⁵¹ Specifically, “[d]uring the fourth period there were over four hundred distinct propositions introduced, and in the 50th Congress forty-eight resolutions, proposing amendments on twenty different subjects, were presented.”⁵² Ames charged future generations of scholars with the study of proposed amendments as a window to contemporary popular feeling and political theory that will enhance our understanding of constitutional history.⁵³

47. Ames described the Bill of Rights as a response to “the spirit of dissatisfaction” expressed by the 124 amendments proposed immediately following ratification and general demand to further limit the power of federal government over the states. The other thrust of proposals focused on correcting minor problems regarding the judiciary and electoral system, exemplified by the 11th and 12th amendments. AMES, *supra* note 45, at 19.

48. In the next period, General Alterations (1804-1860), spanning more than half the 100 years he studied, Ames identified the most numerous propositions to be changes in the election, term, removal, compensation, and duties of members of the legislative, executive, and judicial departments. *Id.* at 19-22.

Other common amendment topics during this time were presidential election, term and veto power and abolition of slavery. But other than the slavery issue, there were very few amendments dealing with relationship between federal government and individuals; Ames attributes that to dissatisfaction in this area having been allayed by Bill of Rights. *Id.* at 10-22.

49. The third period of Slavery and Reconstruction (1860) saw a reversal: after the war, “amendments relating to the legal status of individuals, which had previously been of the least, now became of the greatest importance.” *Id.* at 23.

50. In the last two decades of the first century, Ames notes that proposed amendment activity lapsed back into the generality of the beginning of our constitutional government. Two significant classes of proposals dominated: changes in the form of government and government powers. Changes in the form of government included the choice, term, composition, and duties of the legislative, executive, and judicial branches. Powers of government proposals in Ames’s mind evinced a drift toward paternalism, limiting powers of Congress, protecting the civil and political rights of the individual, and correcting social and political abuses. *Id.* at 24.

51. *Id.* at 25.

52. *Id.*

53.

The detailed examination of the proposed amendments which follows shows that the importance of these propositions does not lie in their influence in effecting actual changes within the Constitution merely, but that they are indices of the movements to effect a change, and to a large degree show the waves of popular feeling and reflect the political theories of the time. It is believed that a study of the efforts to amend the Constitution will contribute to a fuller and clearer understanding of our history, both constitutional and political.

Id. at 25 .

But no one since Ames had matched his model with all its comprehensiveness, depth, and detail. Rather, a series of scholars continued the counting and cataloguing, to some degree, for the period after the Constitution of 1788's first hundred years.⁵⁴

In recent years, political scientist John Vile had been the most pure chronicler, in the Ames model, of proposed amendments. His *Encyclopedia of Constitutional Amendments, Proposed Amendment, and Amending Issues, 1789-2002*⁵⁵ contains a great deal of data tabulated in the appendices, upon which, along with his article on intellectual history⁵⁶ and other writings, I have relied substantially for this Article.

Kyvig's subsequent work, however, provided a powerful historical narrative beyond all that preceded it. As legal historian Kermit Hall has observed,

[i]t covers the sweep of the American constitutional experience, treating not only the history of the twenty-seven amendments made to the nation's organic law but *the most important of* the more than 10,000 proposed amendments. Kyvig is sensitive to the politics of constitutional amendment without reducing its history to a simple narrative of political wrangling. The result is a study that fits the Article V amending process to issues of federalism, popular sovereignty, and, to a lesser extent, separation of powers.⁵⁷

A primary weakness of Kyvig's work for my purposes, however, is found in the emphasized portion of Hall's critique above: Kyvig is selective, focusing "only on those unratified amending proposals that he thinks had widespread congressional support."⁵⁸ And despite (or perhaps because of) my extensive reliance on Kyvig for this Article, I add two criticisms.

First, he seems to blur the distinction between gate keeping and ratification in his assessments of how easy or hard it was to attain amendments at various points in our history. He often skips past the gate

54. For instance, M.A. Mussmanno expressly stated he was furthering Ames's work, but does not attempt the scope of Ames's general observations or narrative. M.A. MUSMANNO, PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, 1889-1928 (1929) (subtitled "A Monograph on the Resolutions Introduced in Congress Proposing Amendments to the Constitution of the United States of America"). Other compilation contributions covering 1889 through 2001—published as House, Senate, or Congressional Research Service documents and at most providing a few words of topical description but not a narrative in the vein of Ames—are reprinted in the three volume compendium edited by Professor Vile. PROPOSED AMENDMENTS, *supra* note 9.

55. JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-2002 (2003).

56. Vile, *supra* note 16.

57. Kermit L. Hall & David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995*, 41 AM. J. LEGAL HIST. 487, 487 (1997) (book review) (emphasis added).

58. John Vile, *Explicit and Authentic Acts, By David Kyvig*, 14 CONST. COMMENT. 416, 419 (1997) (book review).

keeping issue and discusses the difficulty of ratification. But with only thirty-three proposals coming out of Congress, it is very difficult to say what would not have been ratifiable. Only six in over two hundred years have failed to be ratified, for a 27/33 ratification rate, which seems fairly high compared to, for instance the 33/11,000 passage rate of Congress. Moreover, even the few proposals approved by Congress have yielded some real ratification surprises, such as the quick ratification of the Sixteenth Amendment authorizing the income tax and the failure of the Equal Rights Amendment (“ERA”).

Second, it is not clear by what standard Kyvig operationalizes amendment need. Kyvig’s historical narrative may be the key and perhaps even the core to understanding the need for amendments at various points in our history, but it is certainly not the end of the story. For instance, what is the popular will component of amendment need? While not addressing it comprehensively, Kyvig does periodically refer to it. For example, he observes that in the 1960s, “direct election [e.g., abolition of the electoral college], according to public opinion surveys, was the most widely approved amendment proposal of the era.”⁵⁹

I discuss the operationalization of amendment need further at the end of the Article.

B. Constitutional Theory

A thorough exposition of original understandings, the intellectual history of Article V, and modern constitutional theory both exceed the constraints of a single article and are well covered elsewhere in comparison to the core of my analysis here. Accordingly, I make only brief observations about the high amendability expectations of the adopters, examples of evolving perspectives in the intervening intellectual history, and the scant direct attention to the issues I raise in modern theoretical works.

1. Adopters

The amending process was not much discussed in the Convention itself, and Article V embodies compromise on the central debate concerning it; whether the Congress or the states were best to propose amendments.⁶⁰

A major selling point to the ratifying conventions, in order to forestall the opponents’ attempts to invoke changes to the plan of the convention

59. KYVIG, *supra* note 41, at 393.

60. *See* Vile, *supra* note 16, at 48 (affirming that the topic of amending the Constitution was not discussed extensively at the Constitutional Convention); *see also* U.S. CONST. art. V (providing that “[t]he Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . .”).

prior to ratification (or previous amendments), was that subsequent amendments could easily be attained under Article V if particular aspects of the scheme proved unworkable or undesirable. For example, in attempting to convince the New York delegation, Hamilton wrote: “whenever . . . ten states [i.e., three-fourths of the original thirteen] were united in the desire of a particular amendment, that amendment must infallibly take place.”⁶¹ That suggests (i) there was no expectation that congressional gate keeping would be a significant impediment to constitutional change; (ii) at least in the Constitution’s early years, proposed amendments would frequently issue from Congress for states’ ratification; and (iii) a requisite three-fourths of states frequently would ratify amendments proposed by Congress. That congressional gate keeping was not expected to be an impediment is seen in the Anti-Federalist argument that the process would be too difficult, focusing on the difficulty in getting three-fourths of the states to ratify.⁶²

It would then seem that history has disappointed the expectations of the adopters with regard to congressional gate keeping at least in the early years. On the other hand, the states have indeed frequently ratified the proposals they have received from Congress.⁶³

To be clear, to suggest that Congress’s gate keeping role has been far more stringent than expected is not to conclude the adopters also expected reckless constitutional mutation. Certainly Madison’s goal in offering the structure of Article V was to achieve a process with some restraint.⁶⁴ But an assessment of the degree to which the ratifiers shared that view of the meaning of the language used is, again, complicated by the fact that some were selling the new Constitution as acceptable because it was easy to amend.

61. FEDERALIST NO. 85 (Alexander Hamilton). Similarly, a delegate to the Connecticut convention assuaged concerns about particular problems in the Constitution by noting that Article V “proves a remedy for whatever defects it may have This is an easy and peaceable way of amending any parts of the Constitution which may be found inconvenient in practice.” DEBATES OF THE CONNECTICUT CONVENTION (Jan. 9, 1788) (statement of Delegate Richard Law), in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 200 (Jonathan Elliot ed., 2d ed. 1836-1845).

62. See Vile, *supra* note 16, at 49 (citing a speech by Patrick Henry to the Virginia ratifying convention).

63. See Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251, 262 (1996) (contrasting the over seventy percent ratification rate for amendments sent from Congress to the states with the arguably much more difficult, preceding stage in the process—“getting the amendment off Capitol Hill”).

64. See, e.g., Denning, *supra* note 40, at 158 (arguing that “efficiency, if it means ‘easy’ change, was not a goal of Article V’s principle architect, James Madison. Rather, this formal amending process was meant [by Madison] to ensure that constitutional changes are imbued with stability and legitimacy”).

2. *Intervening intellectual history*

Professor Vile's article on intellectual history⁶⁵ discusses evolving historical views on a variety of Article V topics. He chronicles writings and statements from the colonial to modern periods on normative aspects of amendability, the efficacy of Article V, constitutional interpretation as an alternative to formal change, revision of Article V itself, proposed amendment topics and movements, proposals to rewrite the entire Constitution, and most prominently, the convention alternative for proposing amendments.⁶⁶ Drawing from Vile and other sources, I focus here on evolving views of amendment difficulty in particular and the degree to which the discourse has divided that question into separate consideration of its components: amendment need, congressional gate keeping, and ratification. In sum, after the Founding era and through the Modern era, the sparse commentary relevant to amendability seems to track the generally declining path of the perceived likelihood of success of proposed amendments. From a high point in the Founding Era (described above), perceptions of likelihood of success declined to a low point in the Populist-Progressive era, briefly and dramatically reversed following the success of amendments in the Suffrage-Prohibition era, and then declined again to the present pessimism.⁶⁷

As early as 1803, Justice Marshall seems to have viewed amendment as particularly difficult, but appropriately so and justification for broad judicial construction.⁶⁸ And his view of amendment difficulty had perhaps deepened thirty years later when he would describe the "unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of congress, and the assent of three-fourths of [the] states . . ."⁶⁹

That Marshallian sense of amendment difficulty became increasingly widespread as the nineteenth century wore on with no amendment production from Congress or invocation of the convention method. Following the ratification of the Twelfth Amendment in 1804⁷⁰ and the passage of the Titles of Nobility amendment by Congress in 1810,⁷¹ no amendments were proposed by Congress or ratified by the states until the Corwin Amendment was proposed in 1861.⁷² And already in 1823,

65. Vile, *supra* note 16.

66. *Id.*

67. *See infra* Part V (discussing the relevant congressional eras).

68. *Marbury v. Madison*, 5 U.S. 137, 176 (1803) ("The exercise of this original right [of the people to establish principles of government that 'conduce to their happiness'] is a very great exertion, nor can it, nor ought it, to be frequently repeated.").

69. *Barron v. Baltimore*, 32 U.S. 243, 250 (1833).

70. *See* App. A (providing a table of all the amendments provided by Congress for ratification).

71. *Id.*

72. *Id.*

Jefferson would lament that “[t]he States are now so numerous that I despair of ever seeing another amendment to the Constitution, although innovations of time will certainly call and already call, for some.”⁷³

Perhaps owing both to the fifty-year drought of amendment proposals and the single-issue polarization of congressional politics, by the time of the Civil War a preference for trying the convention over the congressional method was expressed in diverse corners. It was preferred by as divergent parties as Lincoln, who argued for it in his first inaugural address, and the Confederacy, whose constitution called for state conventions to propose amendments.⁷⁴ Reflecting the apparent view that Article V posed too high a bar for amendment proposing, the Confederate Constitution required only three states to require its Congress to call a convention for proposing amendments (which would become effective upon ratification by only two-thirds of the states).⁷⁵ But following the reconstitution of the political dynamics in Congress and the success of the Civil War Amendments—by the congressional method, favor for the convention method gave way to the more prevalent fear of its open-ended nature.

The Civil War Amendments, however, were generally viewed as *sui generis* and did not rehabilitate the perceived unlikelihood of success of other formal constitutional reforms.⁷⁶

A more potent intellectual phenomenon, however, arose at that time: the intensification of popular and scholarly interest in constitutionalism in general surrounding the centennials, in the 1870s and 1880s, of American independence and the Constitution of 1788.⁷⁷ That, coupled with the successful and serious experience with amendment proposals in the Civil War Amendments, fed a revival of reverence for the Constitution and amendment process.⁷⁸

But even as the glow of constitutional reverence peaked towards its centennial, attention turned toward the extreme difficulty of amendment⁷⁹ and remained there through the early twentieth century. This sense

73. Letter to George Hay, *supra* note 2.

74. Vile, *supra* note 16, at 54-55.

75. *Id.*

76. *Id.* at 55 (asserting that the existing constitutional structure at the time of the Civil War could not have effected the needed constitutional changes).

77. See KYVIG, *supra* note 41, at 188 (“Americans referred to the Constitution as ‘the Ark of the Covenant,’ Independence Hall as ‘the holiest spot of American earth,’ and visitors to it as ‘pilgrims’ . . .”).

78. See *id.* (“Reconstruction left many Americans believing that all major constitutional problems had been solved. Moreover, the emergency worshipful attitude toward the Constitution fostered resistance to any notion that it might deserve further reform.”).

79. See, e.g., WILSON, *supra* note 3, at 242 (“It would seem that no impulse short of self-preservation; no force less than the force of revolution, can nowadays be expected to move the cumbrous machinery of formal amendment erected in Article V. That must be a tremendous movement which can sway two-thirds of each house of Congress and the people of three-fourths the states.”).

prompted academic discussion of the propriety of constitutional change by judicial interpretation, such as Christopher Tiedman's 1890 *The Unwritten Constitution of the United States*, though Tiedman's more particular goal seems to have been to ensure "judges do their best to read laissez-faire economic doctrines into the Constitution and to assure the protection of capitalistic rights under the broad rubric of substantive due process."⁸⁰ Along with advocacy of expansive judicial interpretation came calls to formally amend Article V itself. Typical⁸¹ was Herbert Croly's advocacy, in a 1914 book, for the adoption of a plan by Senator La Follete where amendments proposed only by a majority of both houses of Congress, or by one-fourth of the states, would be adopted by ratification of only a majority of the states.⁸²

Fighting such calls to alter Article V, a 1915 article by Joseph Long⁸³ exhibits the still-high intellectual reverence for the process at a major transition point in the congressional dynamic, when optimism about success is about to make its upswing.⁸⁴ Long's acknowledged target in the article was the movement to amend Article V to make the amendment process easier. His main argument was that the recent success of the Sixteenth and Seventeenth amendments had overcome the longstanding opinion that amendments had become "practically impossible under ordinary circumstances . . ."⁸⁵ But why, if the Constitution in fact was relatively easy to amend, had there been no amendment through the normal (non-Civil War) process in a century? Long suggests that amendment need was low and amendment proposing consisted mainly of imprudent credit-seeking: many of the proposals introduced in Congress were merely repetitious of other topics; many of those topics were not serious and of a trivial character better left to general legislation; and for those reasons, very few of the proposals had sufficient merit to reach a vote in Congress.⁸⁶

80. Vile, *supra* note 16, at 58 (citing CHRISTOPHER TIEDMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWERS IN THE UNITED STATES (1971 reprint of 1886 ed.)).

81. *Id.* at 59.

82. HERBERT CROLY, PROGRESSIVE DEMOCRACY 231 (The Macmillan Co. 1914) (1909).

83. Joseph R. Long, *Tinkering with the Constitution*, 24 YALE L.J. 573 (1915).

84. *See id.* at 578 (concluding that the Constitution can be peaceably amended in the constitutional process).

85. *Id.* at 576 (quoting CHARLES A. BEARD, AMERICAN GOVERNMENT AND POLITICS 62 (1912)). Also noting Woodrow Wilson's 1885 lament about Article V, Long observes that "[t]hese expressions are fairly representative of the opinion of students of constitutional history a few years ago." *Id.*

86. *Id.* at 578-79. Writing at the end of the Populist-Progressive era when the frequency of general legislation introduced in Congress reached its historical peak, see *infra* tbl.5, Long notes surprise at the comparatively low number of amendments being proposed at that time. Long, *supra* note 83, at 574. As set forth in Part V.E, *infra*, I conclude that may have been due to the relatively-high degree of "prudential reverence" in the congressional Zeitgeist of amendability at that time, which Long may not have been able to see from his perspective.

While there had been periods of unrest suggesting apparent amendment need, after those “temporary conditions” disappeared the Constitution was found “adequate as it stood.”⁸⁷

As a normative matter for Long, the relative stability of the federal Constitution was a happy contrast to the mutability and increasing prolixity of state constitutions, which had “long since ceased to be constitutions in a true sense.”⁸⁸ Long gushed his reverence for the federal constitution, “justly regarded as the greatest government ever ordained by man,” and set a high threshold of amendment need: absolute necessity, meaning the end could not be accomplished by other means.⁸⁹ Amendments were especially unnecessary if they could be accomplished by state action or if they dealt in code-like, legislative details, in contrast to the Constitution, which spoke in “generals.”⁹⁰ Among the ends better suited to state action were two contemporarily-prominent proposed amendment topics (that perhaps were the secondary target of Long’s article): women’s suffrage and prohibition.⁹¹ Perhaps because he considered the degree of difficulty of constitutional amendment to be appropriate, nothing in Long’s work suggests the existence or legitimacy of non-formal constitutional change.

Long’s analysis of amendability suffers from the same failing I have noted in the work of some modern scholars: it does not sufficiently scrutinize Congress’s gatekeeping role. In judging responsiveness to amendment need, Long notes that both the Sixteenth and Seventeenth Amendments had been ratified very quickly after passing Congress, within four years and twelve months, respectively.⁹² By contrast, it had taken Congress fourteen years to propose the Sixteenth Amendment to the states, following the Supreme Court’s decision invalidating the income tax in *Pollock v. Farmers’ Loan & Trust Co.*,⁹³ and eighty-seven years for the Seventeenth amendment since direct election of Senators was first proposed in Congress.⁹⁴ But Long is dismissive of those delays: “time is inevitably required to develop a sentiment in favor of a proposed change.”⁹⁵

As I conclude in Part V, though optimism about likelihood of success of amendments peaked during the next era, Suffrage-Prohibition (1917-1930),

87. Long, *supra* note 83, at 579.

88. *Id.* at 580.

89. *Id.* at 581.

90. *See id.* (conjecturing that a constitution’s permanence is indispensable to garner respect as fundamental law).

91. *See id.* at 581-82 (finding such amendments objectionable when they result in a loss of state sovereignty without any proportionate benefit).

92. *See id.* at 578 (noting that proposed amendments seldom represent the public will and, instead, embody the individual opinion of the proposing congressman).

93. 158 U.S. 601 (1895), superseded by constitutional amendment, U.S. CONST. amend. XVI.

94. Long, *supra* note 83, at 587-88.

95. *Id.* at 587.

with the adoption of the Eighteenth and Nineteenth Amendments, reverence for the process takes its final plunge at this time and optimism ultimately follows. It seems likely the Prohibition debacle at least partially caused this.⁹⁶ As chronicled by Kyvig, the damage began even before Prohibition went into effect. For instance, anti-prohibition forces in Ohio, fearing the state legislature to be too much under the influence of prohibition lobbyists, succeeded in persuading the citizens to pass (by a wide margin) a change of the state constitution to allow referendums on federal amendments.⁹⁷ Then, following ratification of the Eighteenth Amendment by the Ohio General Assembly, the new referendum process was invoked and led to a vote by Ohio citizens that rejected the amendment.⁹⁸ However, in the *Hawke v. Smith* decisions,⁹⁹ the Supreme Court upheld the Ohio General Assembly's ratifications of not only the Eighteenth Amendment, but also the Nineteenth Amendment.¹⁰⁰ The Court rejected Ohio's attempt, though a state constitutional amendment, to allow popular referendums to undo the effect of a positive vote for ratification of a proposed federal amendment by the body selected by Congress for that purpose, the state legislature.¹⁰¹ As Kyvig observes,

[r]egardless of logic and legal soundness, *Hawke v. Smith* left a large and lasting impression that the Article V amending process denied democratic choice in the case of national prohibition . . . [And] [t]he New York Times, no enthusiast for referendums, called the *Hawke v. Smith* decision a 'shocking' failure to represent the will of the people of Ohio.¹⁰²

The quick ratifications of the Sixteenth, Seventeenth, Eighteenth, and Nineteenth amendments and the imbroglio over the Eighteenth seem to have led to a temporary shift in congressional views of Article V. In a 1926 article, *Amendment of the Constitution: Should It Be Made More Difficult?*, Professor Justin Miller observes that prior to the 1925 Wadsworth-Garrett Resolution in Congress, most of the proposals to change Article V were introduced to simplify the amendment process.¹⁰³

96. See KYVIG, *supra* note 41, at 225 (describing Congress's adoption of the Volstead Act, a strict interpretation of the Eighteenth Amendment that sweepingly defined "intoxicating beverages" as those that contained more than one-half percent of alcohol, contrary to popular anticipation).

97. See *id.* at 242 (adding that voters utilized the referendum to address woman suffrage).

98. *Id.*

99. (*Hawke I*), 253 U.S. 221 (1920); (*Hawke II*), 253 U.S. 231 (1920).

100. *Hawke I*, 253 U.S. at 231 (upholding ratification of Eighteenth Amendment); *Hawke II*, 253 U.S. at 232 (upholding ratification of Nineteenth Amendment).

101. *Hawke I*, 253 U.S. at 231.

102. KYVIG, *supra* note 41, at 245-46.

103. Justin Miller, *Amendment of the Federal Constitution: Should It Be Made More Difficult?*, 10 MINN. L. REV. 185, 196 (1926); see Wadsworth-Garrett Resolution, S.J. Res. 4, 68th Cong. (1925) (seeking to endow States with more power over ratification).

The Wadsworth-Garrett Resolution of 1925, however, sought to make amendment more difficult in three ways: it would have (1) required the members of at least one house of the legislature of any ratifying state to have been elected after the amendment had been proposed, (2) allowed any state to require that ratification by its legislature be subjected to confirmation by popular vote, and (3) allowed any state to change its vote on ratification until either three-fourths the states had ratified or one-fourth had rejected the proposed amendment.¹⁰⁴

That the Wadsworth-Garrett Resolution would have left unchanged the congressional gatekeeping stage of the Article V process while making ratification substantially more difficult shows recognition of the comparatively high threshold of congressional gatekeeping. Miller answered no to the question posed by the title of his article.¹⁰⁵ Even after the recent amendment successes, he agreed with those who characterized “the process of amending the Constitution [as] already so difficult that people must be practically in a state of revolution before they can secure an amendment.”¹⁰⁶ “Putting additional handicaps in the way of amendment . . . in a crisis would constitute an invitation to impatient people to adopt violence as a method instead of the slow, quiet processes of today.”¹⁰⁷ Any greater hardships in the process might jeopardize the outlet it provides for “groups of people [brought] to the explosion point” by the continuing limits of “outlets for such accumulation of human energy” brought by urbanization and industrialization.¹⁰⁸

By the 1933 repeal of Prohibition, it seems that the ratification rollercoaster of 1913 to 1920 had derailed and widespread enthusiasm for amendments as a policy tool evaporated. As set forth in Part V of this Article, this is the point in history where I conclude that the character of the congressional gatekeeping component of the amendment process moves into the current Modern era. The country had been chastened both by the increasingly obvious failure of Prohibition and by the process questions that had arisen during the recent ratification experiences.¹⁰⁹ So in 1932, Professor Hugh Willis wrote *The Doctrine of the Amendability of the United States Constitution*,¹¹⁰ but focused on process issues such as the

104. Wadsworth-Garrett Resolution, S.J. Res. 4, 68th Cong. (1925).

105. See Miller, *supra* note 103, at 205-06 (concluding that making the amendments process more difficult, coupled with the increasing density of population and general education, will result in an “explosion point”).

106. *Id.* at 205.

107. *Id.* at 205-06.

108. *Id.* at 206.

109. See KYVIG, *supra* note 41, at 240 (asserting that the adoption of the Eighteenth and Nineteenth Amendments occurred during tumultuous World War I years, which cultivated a sense of abandonment of traditional constitutional boundaries).

110. Hugh Evander Willis, *The Doctrine of the Amendability of the United States*

ratification questions, the convention method alternative, and arguments for implied limits on amendment subjects.¹¹¹ The growing sense of resignation to low-amendability is particularly stark in Roosevelt's decision not to pursue the amendment process to validate his New Deal programs.¹¹² The Supreme Court's acquiescence to the constitutionality of those programs beginning, in earnest, in 1937, only furthered the decline in interest in amendments, and a lull in intellectual attention to the subject, which continued until the *Brown v. Board* decision in 1954.¹¹³

While *Brown* showed the potential substantial social impact of an amendment, touched off much scholarly discourse on constitutional interpretation, and inspired a new round of reactionary amendment proposals in Congress, the basic conception of amendability under Article V does not seem to change. Though the quasi-revolutionary conditions of the Civil Rights Movement and the anti-Vietnam War protests did produce proposals from Congress on D.C. electors for president, the poll tax ban, voting rights for eighteen-year-olds, equal rights for women, and D.C. representation in Congress, the three of those that were ratified were of relatively-limited consequence.¹¹⁴ And while Congress's purported three-year extension of time for ratification of the ERA, as well as a strong movement of state petitions for invoking the convention method for proposing amendments (to introduce a balanced-budget amendment), did induce waves of scholarly attention in the late 1970s and 1980s, that discourse is primarily limited to those particular nuances.¹¹⁵ The other amendments ratified in this last stage, the Twenty-Fifth (presidential succession) and Twenty-Seventh (banning pay raises applicable to the then sitting Congress) have no direct significance for the amendability discourse, though the two-hundred year delay between congressional passage and final ratification for the Twenty-Seventh Amendment did spark increased scholarly interest in amendments in general and the

Constitution, 7 IND. L.J. 457 (1932).

111. See *id.* at 460-64 (discussing the argument for a repeal of Article V and its implications on States' equal representation).

112. See KYVIG, *supra* note 41, at 289-323 (noting some evidence that Roosevelt viewed the amending process as a politically-difficult, in addition to unwise or unnecessary, means of resolving his clash with the Supreme Court over congressional power).

113. See *id.* at 347-48 (recalling the Supreme Court's announcement that constitutional amendments have consequences that the states must recognize (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954))).

114. See Peter M. Shane, *Voting Rights and the "Statutory Constitution,"* 56 LAW & CONTEMP. PROBS. 243, 254-55 (1993) (comparing the anticipation of amendments in response to crises with the actual result). For example, since 1939, every Congress had proposed a poll tax ban, and the Twenty-Fourth Amendment that proscribed poll taxes came into effect in the 1960s. *Id.* By 1964, however, only five states still had active poll taxes, thus rendering the Twenty-Fourth Amendment largely inconsequential. *Id.*

115. See *infra* notes 117-25 and accompanying text (discussing Walter Dellinger's work in those areas).

delayed-ratification issue in particular.¹¹⁶

In the final stage of intellectual history leading to contemporary thought, it seems that the pessimism and irreverence that characterize the Modern era sow the seeds of theories of non-formal constitutional change which abound today.

3. *Modern theorists*

The following section attempts to engage the modern scholarship that most-directly touches on the historical amendability questions with which this article is concerned. But the works that more tangentially or implicitly address amendability are too many to comprehensively canvas here. Hence, I discuss only a representative sampling of them.

Of all the modern legal scholars, Walter Dellinger probably has the most substantial amendment-process oeuvre. But it is his focus on process that makes the majority of Dellinger's work not directly relevant here. In general, his writings respond to two political phenomena contemporary with them: (1) the question of using the Article V convention alternative to call a constitutional convention limited to just one particular topic, in this case a balanced budget amendment¹¹⁷ and (2) the debates surrounding the ERA, which raised the validity of states' purported rescissions of earlier ratifications, on the one hand, and the legitimacy of Congress's extension of the original seven-year ratification period for the ERA by three years, on the other.¹¹⁸ On those questions, Dellinger argues, for instance, that (1) constitutional conventions under Article V cannot constitutionally be limited to single issues or be controlled by Congress or prior mandates of state legislatures once convened¹¹⁹ and (2) the Court should resolve ERA

116. See, e.g., Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 682 (1993) (endorsing the concurrent legislation model, whereby a proposed amendment is treated like a statute that must be enacted by Congress in concurrence with States' ratification); Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 497 (1992) (examining the controversies over congressional compensation in American history).

117. See Walter E. Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623, 1624 (1979) [hereinafter Dellinger, *Recurring Question*] (arguing that a constitutional convention must have authority to consider and propose to the states whatever amendments it deems fit); Walter E. Dellinger, *Who Controls a Constitutional Convention?—A Response*, 28 DUKE L.J. 999, 999 (1979) [hereinafter Dellinger, *Who Controls*] (dispelling the notion that state legislatures control the text of proposed amendments at constitutional conventions).

118. See Walter E. Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 386 (1983) [hereinafter Dellinger, *Legitimacy*] (developing a model of judicial review of amendment process issues); Walter E. Dellinger, *Constitutional Politics: A Rejoinder*, 97 HARV. L. REV. 446, 446-47 (1983) [hereinafter Dellinger, *Constitutional Politics*] (criticizing the view that Congress should have the final word in constitutional issues pertaining to amendment adoption).

119. Dellinger, *Recurring Question*, *supra* note 117, at 1630.

issues by following the Article V formula more faithfully. That is, Dellinger argued the Court should discard its *Coleman v. Miller*¹²⁰ precedent and return to the business of determining amendment-ratification issues itself, rather than viewing them as nonjusticiable and giving Congress discretion to decide as “promulgator” of ratified amendments.¹²¹

Despite his primary focus on those process issues, Dellinger does engage the amendment difficulty question.¹²² He notes that implicit in the stance of those arguing for states’ authority to rescind ratifications and preclude congressional extension of time for ratification (or long periods under the “contemporaneous consensus” doctrine) is the suggestion that the expressly-stated requirements of Article V make the amendment process “too easy.”¹²³ His response notes that there are a very large number of proposed amendments compared to adopted amendments over our entire history, that the several then recently-adopted amendments addressed only minor matters, and that the decision of Roosevelt and his advisors not to pursue the amendment option for validating his New Deal programs was a particularly strong example of at least a perception of amendment difficulty.¹²⁴ Ultimately, though, Dellinger’s assessment of historical difficulty is general, and he concludes that “[w]hether amending the Constitution is too easy remains a question for individual judgment.”¹²⁵

Most of the other modern theorists assess the historical degree of the difficulty of formal Article V amendment in even more general terms.¹²⁶

120. 307 U.S. 433 (1939) (denying writ of mandamus to compel the Secretary of Senate of the State of Kansas to erase an endorsement on the Kansas Senate’s resolution ratifying the Child Labor Amendment—holding the question nonjusticiable and, by implication, to be finally determined by Congress’s decision whether to promulgate the amendment as ratified).

121. Dellinger, *Legitimacy*, *supra* note 118, at 389-405.

122. *Id.* at 427.

123. *Id.*

124. *Id.* at 427-29.

125. *Id.* at 430. Two additional articles round out Dellinger’s amendment process oeuvre. See Walter E. Dellinger, *Amending Process*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 72-75 (Leonard W. Levy & Kenneth L. Karst eds., 2000) (noting that all the amendments but three have fallen into four historical clusters: 1789-1804; 1866-1870; 1913-1933; and 1961-1978); Walter E. Dellinger, *The Amending Process in Canada and the United States: A Comparative Perspective*, 45 *LAW & CONTEMP. PROBS.* 283 (1982) (describing, for instance, how other than the provision for Senate representation, the delicate federal-state balance of authority to propose and ratify amendments in Article V is the most pronounced exhibition of the federal character of the Constitution).

126. Unelaborated assertions of the present “difficulty” of amendment are common. See, e.g., Michael C. Dorf, *Equal Protection Incorporation*, 88 *VA. L. REV.* 951, 987 (2002) (“Given the difficulty of the constitutional amendment process, the People will typically only resort to it in addressing questions of value on which there is an unusual degree of consensus.”); Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 *TUL. L. REV.* 247, 274 (2002) (“[T]he requirements of Article V that make formal amendments difficult ensure that changes to the fundamental law are legitimate.”); Stephen M. Griffin, *The Nominee is . . . Article V*, 12 *CONST. COMMENT.* 171, 172 (1995) (“By making it difficult to change the Constitution, the

Those generalizations appear in three categories of works, which vary by their degree of directness in engaging the amendability question: (a) discussions of the normative attractiveness of our Constitution's current "obduracy";¹²⁷ (b) normative critiques of the difficulty of obtaining a particular class of amendments relative to obtaining amendments in general;¹²⁸ and (c) the implied descriptive assessments of the Constitution's general difficulty of amendment, across all categories of topics, that can be inferred from various general theories of interpretation.¹²⁹

Though a gross oversimplification as applied to any particular interpretative theory, the implied descriptive assessments might be thought to range from a strict originalist presumption of relative amendment ease to a highly non-documentarian assumption of the great difficulty of formal amendment. Chemerinsky has described the necessary "balance between entrenchment and flexibility" that creates that theoretical continuum: "If a constitution makes change too difficult, it will obstruct necessary and desirable social reforms. Revolution will become the only way of altering the government. But if change is too easy, then a constitution fails to achieve its objective of protecting society's most cherished values from majoritarian control."¹³⁰

After discussing the three general categories of tangentially-relevant constitutional scholarship, I conclude this overview by demonstrating how David Strauss's recent "irrelevance" thesis¹³¹ is itself irrelevant for the particular question addressed in this Article.

Framers forced a significant amount of constitutional change off the books and thus limited the ability of the Constitution to structure political outcomes. To the extent that we believe that constitutionalism should play this role, we should favor making change through Article V easier.").

127. See *infra* notes 132-147 and accompanying text (comparing works by John Ferejohn and Lawrence Sager and by William Forbath regarding the general normative debate).

128. See *infra* notes 135-166 and accompanying text (analyzing commentators' criticisms of Congress's institutional self-interests).

129. See *infra* notes 167-170 and accompanying text (focusing on the assumptions behind constitutional amendment).

130. Chemerinsky, *supra* note 41, at 1563-64; see also Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251, 254-55 (1996) ("The amending process helps maintain the delicate balance between democracy and limited government If it is too difficult to change the constitution, the people may become frustrated and resort to extra-legal behavior Thus, the particulars of the amending clause of any given constitution affect the stability and durability of that constitution and of constitutionalism in that society.").

131. See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1459-60 (2001) (concluding that a formal amendment process was inconsequential to the establishment of America's constitutional order).

a. *Direct normative perspectives on the general degree of difficulty of amendment under Article V*

A recent exchange between John Ferejohn and Lawrence Sager, on the one hand,¹³² and William Forbath, on the other¹³³ illustrates the general normative debate. Ferejohn and Sager argue that the Constitution's obduracy to Article V change "conduces to the realization of the Constitution's liberty-bearing provisions."¹³⁴ First, because the supermajoritarian rules demand "broad popular support," a "diversity of perspective" and "generality of consensus" to pass an amendment,¹³⁵ drafters and ratifiers gravitate towards "propositions of general or abstract value" that account for the potential interests of future generations.¹³⁶ Next, the fact that "the internal commitments represented by the liberty-bearing provisions of the Constitution" are "set forth in abstract moral terms" requires that the Supreme Court provide the normative detail.¹³⁷ But the difficulty of amendment under Article V discourages "anything like close popular oversight of the process of constitutional enforcement," which insulates the Court from popular review¹³⁸ and the process from "blatant majoritarian expropriation."¹³⁹

But Forbath laments that "obduracy on the order of the U.S. Constitution may actually erode and thwart a nation's capacity for realizing many of its deepest constitutional commitments."¹⁴⁰ Rather than seeing "popular oversight" as a threat to the constitutional interpretation and enforcement, he concludes that "popular constitutional politics have been the central source of the judicial interpretations Ferejohn and Sager most prize."¹⁴¹ Moreover, "[m]ovements to amend . . . are a central, generative form of such politics, and a constitution too obdurate often stifles them."¹⁴²

Focusing more on political theory, Ferejohn and Sager's generalizations on amendment difficulty do not purport to describe any particular era of our history; but Forbath, focusing on the twentieth century, touches on something like the declining "Zeitgeist of amendability in Congress" I articulate in Part V. In particular, he notes that the Progressive Era in the

132. John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929 (2003).

133. William E. Forbath, *The Politics of Constitutional Design: Obduracy and Amendability—A Comment on Ferejohn and Sager*, 81 TEX. L. REV. 1965 (2003).

134. *Id.* at 1968.

135. Ferejohn & Sager, *supra* note 132, at 1957.

136. *Id.* at 1958-59.

137. *Id.* at 1960.

138. *Id.*

139. *Id.* at 1930.

140. Forbath, *supra* note 133, at 1965.

141. *Id.* at 1966.

142. *Id.*

first part of the twentieth century “saw the only serious efforts in U.S. history to amend Article V.”¹⁴³ The extreme obduracy of the Constitution was widely recognized, and the most influential lawmakers and politicians, including Theodore Roosevelt and Woodrow Wilson, supported liberalizing the amendment rules.¹⁴⁴ “But the era ended before [the forbearers of the New Deal in the Progressive Era] turned their considerable constitutional-political energies to that task.”¹⁴⁵ Hence, two decades later, “[t]he overbearing obduracy of the unamended Article V diminished the jurisgenerative politics of the New Deal moment, and deprived us of new constitutional texts- texts on which citizens and courts could have rested claims to extend and deepen our constitutional commitments in ways we would prize.”¹⁴⁶

b. Normative perspectives on the relative difficulty of amendment for particular constitutional subjects

While normative views of scholars like Ferejohn, Sager, and Forbath lament or praise a degree of amendment difficulty that is uniform across all categories of amendment topics, some writers have decried a practical *non*-uniformity when it comes to amendment topics that negatively impact the self-interest of members of Congress: namely, that as a practical matter Congress already makes obtaining amendments in that category more difficult than in others.¹⁴⁷ Those commentators criticize Article V’s grant of authority to block amendments to the extent that it enables Congress to impose a *de facto* higher barrier for, and defeat, measures that threaten its own institutional interests and power.¹⁴⁸ That critique is the more sophisticated and relevant to my analysis, since it addresses the congressional gatekeeping role, though the commentary on undue uniformity carries some threads of amendability-thinking meriting brief mention here as well.

One critic of the higher barrier to change erected by Congress’s institutional self-interest focuses on the Progressive Era’s pragmatic remedy for the intransigence of congressional stakeholders.¹⁴⁹ Kris Kobach

143. *Id.* at 1976.

144. *Id.*; see KYVIG, *supra* note 41, at 473 (viewing the difficulty of the amendment process as a tool for “antidemocratic motivations of an economic elite that had designed the Constitution”).

145. Forbath, *supra* note 133, at 1982.

146. *Id.* at 1979-80.

147. See, e.g., Kris W. Kobach, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 YALE L.J. 1971, 1974 (1994) (asserting that the amendment process exposes Congress’s “inherent structural interest in prolonging the tenure of its sitting members”).

148. See *id.* at 1973 (proposing that the primary motivation that drives Congress in adopting the amendment process stems from hostility at the idea of term limits).

149. *Id.* at 1974.

observes an alternative, incremental path to Article V amendment that “emerged to overcome an overwhelming structural barrier to amending the Constitution in a way that conflicts with the inherent self-interest of members of Congress.”¹⁵⁰ That is, state-level activity in the years preceding the Seventeenth and Nineteenth Amendments showed how states can one by one adopt changes that alter the political structure of Congress until it is induced to act.¹⁵¹

Donald Boudreaux and A.C. Pritchard arrive at a similar criticism of congressional self interest under an economic analysis.¹⁵² They argue that “Congressional control over the agenda of constitutional amendment restricts the ability of the people to control Congress effectively through the Constitution.”¹⁵³ They suggest amending Article V to provide for direct petition by the people to propose amendments, but pessimistically argue that such an Amendment will likely fail anyway because it would threaten the interests of Congress.¹⁵⁴ They contend that the only successful amendments to limit the power of the federal government, the Bill of Rights, were able to pass merely because the federal government had not yet effectively organized itself as an interest group to protect its own power.¹⁵⁵

And Mark Tushnet focuses on how that government entrenchment has become a particular impediment to structural representation changes.¹⁵⁶ He argues that a less difficult Article V amendment process might ease the weight of existing constitutional structure and allow creative thinking to remedy the inherent defects of the constitutionally sanctioned two-party system.¹⁵⁷ Greater ease of amendment could then lead to a parliamentary

150. *Id.* at 1999.

151. *Id.* at 1977-84. The popular election of senators was brought about by individual states one by one allowing citizens to influence the state legislature’s choice of senator. *Id.* at 1977. Only after the composition of the Senate was significantly weighted with representatives chosen under this system was the Seventeenth Amendment able to overcome the Senate’s resistance to its own change. *Id.* at 1977-78. Similarly, the Nineteenth Amendment’s massive electorate shift was resisted as a threat to sitting congressmen until state by state extension of the franchise to women incrementally transformed the structure of Congress and eventually compelled the federal system to follow suit. *Id.* at 1978-79. Koback argues congressional term limit amendment may be following a similar path. *Id.* at 1979.

152. See Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amending Process*, 62 *FORDHAM L. REV.* 111 (1993) (constructing a model to predict when interest groups choose between the amendment process and statutory change).

153. *Id.* at 160.

154. *Id.*

155. See *id.* at 140 (“Today, because of the presence of a strong federal government, the Bill of Rights could not have been enacted via Article V.”).

156. Mark Tushnet, *The Whole Thing*, 12 *CONST. COMMENT.* 223, 223 (1995).

157. *Id.* at 225 (“There may be room . . . between the desire to avoid creating an amendment process that is too easy to use, and sticking with the present strong supermajority requirements of Article V.”).

system of representation.¹⁵⁸

While Kobach, Boudreaux, Pritchard, and Tushnet lament that amendment difficulty in practice varies with the degree of congressional self-interest, a second group of normative critiques also decries the textual uniformity of Article V amendment difficulty across varying classes of amendment topics. But they posit that changes in fundamental rights should be more difficult to achieve than other types of amendments.¹⁵⁹ That group, however, divides on whether the trouble with present uniformity is that it makes amending in the current undifferentiated regime too easy, and hence open to unwise fundamental change, or too hard, and therefore too resistant to needed non-fundamental alterations.¹⁶⁰

For example, Sanford Levinson believes that fundamental rights amendment should be more difficult than other forms of amendment, but suggests that ordinary amendment is too difficult in general.¹⁶¹ He advocates changing Article V to make amendment easier by lessening the ability of small states to block amendments, at least for amendments involving term limits and other structural features of the Constitution.¹⁶²

At least one scholar goes the other way, however, and argues that the congressional method of Article V amendment may be too easy in certain circumstances.¹⁶³ Noting that over seventy percent of the amendments sent from Congress to the states have been ratified, Elai Katz posits that a “maverick Congress could propose an unwise amendment, which the states are likely to ratify.”¹⁶⁴ He suggests that the more difficult convention method of Article V is superior to the easier congressional method because it is likely to be a more publicized and deliberative process.¹⁶⁵ He argues

158. *See id.* at 224 (observing that arguments for proportional representation are more prevalent than constitutionalists believe).

159. *See* Sanford Levinson, *The Political Implications of Amending Clauses*, 13 CONST. COMMENT. 107, 107-09 (1996) (considering two types of written constitutions: one that sets out political structures and governmental authority and limitations that can be changed by ordinary legislation and the second that is impervious to change); Katz, *supra* note 130, at 254 (lauding the amendment process, which characterizes certain rights as inalienable while allowing for constitutional evolution alongside changes in political values).

160. *Compare* Levinson, *supra* note 159, at 199 (declining to adopt the view that states have the right to change their minds regarding ratification), *with* Katz, *supra* note 130, at 287 (opining that the framers rightly rejected an amending clause containing numerous unalterable provisions).

161. Levinson, *supra* note 159, at 120-23 (“I can think of no good reasons to support the formal stasis engendered by Article V . . . I can think of no defense for the present rules of this particular game unless one is committed simply to making it extremely difficult to engage in formal amendment.”) (emphasis in original).

162. *Id.* at 120 (“How can anyone seriously defend, in 1995, the present system that in essence allows one house of 13 states to block the desires of the remaining public?”).

163. Katz, *supra* note 130, at 262.

164. *Id.*

165. *See id.* at 287 (noting that public awareness of a proposed issue may arise only after the legislature has already been elected).

that the more difficult route should be required when attempting to alter fundamental rights such as First Amendment freedoms.¹⁶⁶

These normative critiques all share a specificity in framing the ultimate question not present in the problematic outlined in this Article: they all assert the amendment process is too hard or too easy in reference to some specific normative goal. My project is not to put forward any normative goal against which the effectiveness of Article V can be judged, but rather it is to inform that assessment of effectiveness in any relevant theoretical context. While that may test the assumptions of some normative critiques of Article V, it more directly applies to the following descriptive assumptions contained within general interpretive theories.

c. Descriptive assumptions about amendability in general, implicit in interpretive theories

Implicit in articulations of general theories of constitutional interpretation are descriptive assumptions or assessments that amending the Constitution is either easy, seen in some strong originalist theories, or difficult, seen in nondocumentarian or evolutionary theories.

Appeals to original intent often imply a belief that amendment is easy enough and need not be supplemented by dubious judicial activism.¹⁶⁷ Moreover, arguments against non-Article V change imply a belief that Article V is adequate to keep the Constitution up to date.¹⁶⁸ For instance, Henry Paul Monaghan argues that Article V amendment is only as difficult as it needs to be.¹⁶⁹ In defending Article V as the exclusive mode of amendment he cautions against the potential of unrestrained majoritarianism to be exclusionary¹⁷⁰ and warns that easier amendment will likely weaken the Constitution by allowing ideologized amendments.¹⁷¹

166. See *id.* at 288-90 (approaching the issue of amending the First Amendment in a prudential way rather than considering the legal necessity).

167. See, e.g., ROBERT F. BORK, *THE TEMPTING OF AMERICA* 171 (1990) ("We remain entirely free to create all the additional freedoms we want by constitutional amendment or by simple legislation, and the nation has done so frequently."); Raoul Berger, *Lawrence Church on the Scope of Judicial Review and Original Intention*, 70 N.C. L. REV. 113, 132-33 (1991) ("'Cumbersomeness' affords no dispensation to the judiciary to ignore the Article V reservation of amendment to the people.").

168. See, e.g., Berger, *supra* note 167, at 122 ("To be sure, the capacity to adapt to changing substantive policy needs is . . . a basic goal; but where does the Constitution make the courts the instrument of change?") (internal citations and quotations omitted).

169. See Henry Paul Monaghan, *We the Peoples, Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 144 (1996) ("Nothing is 'easy' about the processes described by Article V. This was the constitutional design.").

170. *Id.* at 175 ("Whereas in the past, popular sovereignty became a battle cry for those expressing yearnings for inclusion into the political and social order, in the hands of current powerholders 'We the People' seems likely to justify exclusion, defining what 'Real Americans' stand for.") (internal citations omitted).

171. See *id.* (admonishing that a move from normal politics to politics of constitutional amendment would compromise safeguards for individual liberty and minority rights).

The undemocratic nature of Article V that troubles Bruce Ackerman and Akhil Amar poses no problem for him.¹⁷²

Proponents of a non-interpretivist approach, on the other hand, proceed on the premise that the formal amendment process is too difficult and unresponsive to the changing needs of democracy.¹⁷³ Most of these scholars do not advocate an easier amendment process, but rather justify the creative interpretation that has arisen to supplement an imperfect Article V.¹⁷⁴ Bruce Ackerman, however, does make the normative argument for easing the amendment process for all types of amendment proposals because of the pernicious results of such robust interpretive theories.¹⁷⁵ He proposes amending Article V to allow a second-term president to propose amendments of any type¹⁷⁶ in response to the emerging trend of attempting to transform the constitution through presidential appointments to the Supreme Court.¹⁷⁷ Implicit in his belief that transformative appointments may be too easy because they can be abused by Presidents without substantial mandates for fundamental change,¹⁷⁸ is the descriptive assessment that congressional gatekeeping, in

172. See *id.* at 144-45 (claiming that in the debate over congressional authority, Article V was viewed as the exclusive mode of amendment).

173. See, e.g., Lawrence Church, *History and the Constitutional Role of Courts*, 1990 WIS. L. REV. 1071, 1078 (1990) (commenting that Article V “process is too cumbersome and erratic to serve as the sole vehicle for constitutional development in a complex and rapidly changing society”). But see Dellinger, *Legitimacy*, *supra* note 118, at 386 (urging that Article V should not be made any more difficult by unclear rules, while not explicitly stating that Article V is too difficult). Dellinger takes issue with the Political Question doctrine and the policy goal of “contemporary consensus” espoused in *Coleman v. Miller*, 307 U.S. 433 (1939) (determining timeliness of ratification requires determination of contemporaneous consensus and that Congress is better suited than the Court to answer political questions). He believes leaving amendment issues in Congress’s hands invites uncertainty. Dellinger, *Legitimacy*, *supra* note 118, at 427-30. Furthermore, Dellinger argues that prior rejection, subsequent rescission, and passage of time should not nullify state ratification of amendments. *Id.* at 419. Such requirements reflect an assumption that amendment is too easy and “additional hurdles should supplement the expressly stated requirements of article V.” *Id.* at 427. He recommends that Article V be interpreted as a series of formalities with which strict compliance ensures legitimacy; nothing more should be read into it. *Id.* at 419. “Attention to these formalities is more likely to provide clear answers than is a search for the result that best advances an imputed ‘policy’ of ‘contemporaneous consensus.’” *Id.* at 418.

174. See Church, *supra* note 173, at 1073-74 (calling for the rejection of extreme positions, namely the complete adherence to or abandonment of the founders’ view of the courts’ roles in the amendment process).

175. See generally Bruce Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988) (assessing strengths and weaknesses of alternative modes of constitutional transformation).

176. See *id.* at 1182 (adding that proposed amendments must be approved by two-thirds of both houses of Congress and three-fifths of voters in two successive presidential elections).

177. See *id.* (comparing presidentially-led proposals to the Founders’ assembly-led systems).

178. *Id.* at 1181 (arguing that Roosevelt’s New Deal was a result of such transformative appointments and that Reagan attempted another such transformation through the rejected

practice, has been too unresponsive.

Finally, some writers appear to fall in the middle of the spectrum. Stephen Presser, for instance, has argued that amendment should not be made more difficult or limited in his criticism of the *Guidelines for Constitutional Amendments*.¹⁷⁹ In 1999, a group called Citizens for Constitutional Change published a report entitled “‘Great and Extraordinary Occasions’: Developing Guidelines for Constitutional Change,” which sets forth eight “Guidelines for Constitutional Amendment.”¹⁸⁰ The Guidelines propose a set of abstract principles for determining whether amendment is appropriate. These abstract principles were intended to curb the recent proclivity to constitutionalize policies the authors see as less than Constitution-worthy. Presser argues that Article V’s supermajority requirements already provide the necessary restraint.¹⁸¹ Therefore, he concludes that amendments “are not some dangerous threat to our democratic Republic,” and that while amendment is a “solemn” exercise of democracy, “it is not one that should be discouraged in the manner that the authors of *Great and Extraordinary Occasions* seek to do.”¹⁸² Presser, however, is in the distinct minority¹⁸³ in arguing that the historical degree of amendability under Article V has been just right.

d. The general irrelevance of Strauss’s “irrelevance” thesis

In his 2001 article, David Strauss argues that “our constitutional order would look little different if a formal amendment process did not exist,” because “[a]t least since the first few decades of the Republic, constitutional amendments have not been an important means by which the Constitution, in practice, has changed.”¹⁸⁴ As evidence for this thesis,

appointment of Robert Bork to the Supreme Court).

179. See Stephen B. Presser, *Constitutional Amendments: Dangerous Threat or Democracy in Action?*, 5 TEX. REV. L. & POL. 209, 217 (2000) (proposing that the Founders intended for constitutional change to be a tool for democratic action).

180. CITIZENS FOR THE CONSTITUTION, GREAT AND EXTRAORDINARY OCCASIONS: DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE 7 (1999), available at <http://www.constitutionproject.org/cai/guidelines/index.html> (considering whether: (1) the proposed amendment addresses matters that are of lasting concern; (2) the proposed amendment makes the system more politically responsive; (3) there are obstacles to the achievement of the proposed amendment’s objectives by other means; (4) the proposed amendment is consistent with related constitutional doctrine; (5) the proposed amendment embodies enforceable standards; (6) the proponents of the proposed amendment contemplated the consequences of their proposal; (7) there has been debate on the proposed amendment’s merits; and (8) Congress has provided for a set States-ratification deadline to ensure a concurrent consensus by Congress and the states).

181. Presser, *supra* note 179, at 217.

182. *Id.* at 224-25.

183. See Denning & Vile, *supra* note 126, at 251-52 (distinguishing Presser’s thesis from the more generally accepted sentiment that provisions for formal amendment to the Constitution are indeed relevant).

184. Strauss, *supra* note 131, at 1457.

Strauss cites four phenomena: (1) many constitutional changes have occurred without formal amendment; (2) despite the rejection of some particular amendments, the constitution has changed; (3) several amendments initially thought important had little effect until society later changed by other means; and (4) some amendments merely ratified changes that had already occurred through other means.¹⁸⁵ Strauss provides two qualifications to his general thesis. First, he limits the claim about irrelevance to the context of a “mature democratic society.”¹⁸⁶ Amendments in “fledgling constitutional order,” by contrast, may play a significant role in the initial establishment of the constitutional regime.¹⁸⁷ Second, amendments have served the two ancillary functions of establishing the rules of the road on uncontroversial issues that must be settled (such as presidential disability through the Twenty-fifth Amendment) and suppressing outliers by turning “all-but-unanimity into unanimity” on a particular issue (such as the abolishing of poll taxes through the Twenty-fourth Amendment).¹⁸⁸

The validity of Strauss’s thesis aside,¹⁸⁹ it does not claim that the factual degree of difficulty of formal constitutional amendment is irrelevant. Rather, Strauss at least implicitly suggests that low amendability may legitimate informal means of constitutional change.¹⁹⁰ And, by extension, the degree of amendability may determine the degree of legitimacy of the practice.¹⁹¹

But, as my primary purpose is to provide an unbiased account of the very interesting empirical data on large-scale patterns in amendment-proposing history, I will remain neutral on the theoretical implications of that empirical evidence. I will, however, return to Strauss in my speculations on operationalizing amendment need in Part VII.B.

C. Scholarship on Congress

Political scientists rarely address proposed amendments directly. Rather,

185. *Id.* at 1459.

186. *Id.* at 1460.

187. *Id.* at 1460-61. Strauss notes that though the first twelve amendments to the American constitution may have played a significant role in establishing the American constitutional regime, more likely they did not.

188. *Id.* at 1461.

189. See, e.g., Denning & Vile, *supra* note 126, at 252 (critiquing Strauss for his general historical characterizations); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 987 (2002) (contesting the general theoretical implications of Strauss’s argument); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 299 (2001) (using the examples of the Nineteenth Amendment and the failed ERA to demonstrate the relevance of amendments and proposed amendments).

190. Strauss, *supra* note 131, at 1457.

191. *Id.* at 1467.

they focus on the process and motivations for introducing normal legislation in Congress. My analysis relies directly on their work for the theory of bill introductions and expands on their theories for my paradigm of amendment proposing.

The analyses in Parts III through V focuses more on the introduction of bills by individual congresspersons than on introduction by committees. By the end of the nineteenth century, over ninety percent of public bills were introduced by individual members,¹⁹² and that dominance continues to present Congresses.¹⁹³ And while at the beginning of Congress the opposite was true, with virtually all public bills in the House introduced by committees and well over half introduced by committees in the Senate,¹⁹⁴ joint resolutions that are used to introduce proposed amendments have been almost exclusively introduced by individuals from the inception of Congress.

The following sets forth (1) the historical evolution of bill introduction procedure; (2) the less-storied process of the joint resolution, the vehicle for proposing amendments; and (3) research on the general motivations for bill sponsorship over the history of Congress. These understandings of current and historical congressional dynamics provide the foundations for my theorizing the potential cause of the bill-proposed amendment totals correlation.

1. Evolution of bill introduction procedure: From difficulty to trivial ease

By the beginning of the twentieth century, bill introduction in both houses had largely evolved to the current form of relatively free introduction by individual members. Political science studies of the incremental historical development of procedures that led to this modern form explain that the House and Senate did not arrive at free introduction in the same way, nor do they have similar legislative environments even today. Rather, the speed and character of the change differed in the two chambers. The House not only took longer to reach the norm of introduction by individual members, but came to it only through ceding control to standing committees and rules and sacrificing floor introduction;

192. See Joseph Cooper & Elizabeth Rybicki, *Analyzing Institutional Change: Bill Introduction In the Nineteenth-Century Senate*, in *U.S. SENATE EXCEPTIONALISM* 182, 199 (Bruce Oppenheimer ed., 2002) (demonstrating that the majority of bills are now introduced by individuals whereas before the mid-eighteen-hundreds, the majority of bills were introduced by committees).

193. See *id.* at 193 (describing that the growth of member bills introduced on the floor continues to this day due to changes in congressional rules regarding standing committees, access to the floor, and debate and amendment on the floor, though the changes in the House and the Senate have been different).

194. See *id.* (noting that historically, House committees introduced virtually all public bills, and Senate committees introduced well over half of public bills).

the Senate, by contrast, to this day retains much more autonomy and floor access for its members.¹⁹⁵

Joseph Cooper and Elizabeth Rybicki designate three stages in the nineteenth-century evolution of bill introduction procedure focusing primarily on the Senate.¹⁹⁶ They distinguish:¹⁹⁷ (1) 1789 to 1825, which saw the right of individual by individual members arise in the Senate, but not the House;¹⁹⁸ (2) 1825 to 1861, which saw the frequency of individual bill sponsorship in the House slowly develop, equaling that in the Senate by end of this era;¹⁹⁹ and (3) 1861 to 1897, which saw the emergence of the modern regime of free individual introduction in both houses, though a stark split in member access to the floor and procedural control between the two chambers.²⁰⁰

195. *See id.* (distinguishing the Senate from the House for changing more rapidly by taking pains to “limit the monopoly power of committees, to preserve the access of members to the floor, and to protect freedom of debate and amendment on the floor,” resulting in Senators being able to introduce bills on the floor without loss of power to standing committees); *see also* Joseph Cooper & Cheryl D. Young, *Bill Introduction in the Nineteenth Century: A Study of Institutional Change*, 14 LEGIS. STUD. Q. 67, 68 (1989) (focusing an analysis on bill introduction in the House and excluding discussion of the Senate to understand better institutional change in a more detailed, but older, study). Though relying on these two studies produces two over-generalizations, neither undermines the general understanding of the legislative process necessary for my analysis: (1) Both studies focus on public bills. Thus, even though the bill totals I use include both public and private bills, the similarities in the evolution of their introduction process are sufficient for my exploratory purposes; (2) I rely more on the House than the Senate for characterizing the evolution of bill introduction procedure for my analysis. This is because though amendments have been proposed in both houses, the House has generally carried significantly greater proposal numbers and has almost always introduced substantially more bills. Since the only proposed amendment totals presently tabulated for many Congresses do not distinguish between the bodies, I generally default to the assumption that House procedure dominates the process I examine.

196. Cooper & Rybicki, *supra* note 192, at 183.

197. *Id.* at 183; *see also* Cooper & Young, *supra* note 195, at 71-98 (focusing on the House alone). In his earlier study, Cooper, with Young, divides the approximately 100 year period over which the present system of free and unrestricted bill introduction by individual members evolved into two distinct stages and subdivides the second stage into four phases. In the first stage (1789 to 1821), the House as a whole exercised stricter and more detailed control over decision making on subjects and introduction of bills. In the second stage (1821-1891), the House moved away from that strictness to the present openness though four phases: Phase 1 (1821-1837) characterized by confusion in the introduction process, Phase 2 (1837-1861) where member bills were permitted but chaos reigned in the procedure by the late 1850s, Phase 3 (1861-1881) where the clarity of the procedure improved, and Phase 4 (1881-1891) where member bills achieved their present domination.

198. Cooper & Rybicki, *supra* note 192, at 183. This first stage includes the growth and decline of the first political party system and the emergence of standing committee systems in both bodies.

199. *Id.* at 186. This second stage includes the rise and fall of the second party system and the period in which the Senate replaced the House as the premier legislative institution.

200. *Id.* at 188. This final stage is the era of our third party system which resulted in party leaders in both houses of Congress having an unprecedented degree of control.

a. Stage I: Early Decades, 1789-1825

While the House did not begin accepting bills from individual members until the 1830s,²⁰¹ a qualified right of individual introduction existed in the Senate from 1789 and strengthened quickly.²⁰² The qualification stemmed from an initial two-part conception of bill introduction: (1) general principles of policy should be settled by the legislative body as a whole (legislative body of either the House or Senate) “before the business was sent to smaller committees” and (2) bills should be introduced only with permission of the whole.²⁰³ Accordingly, subjects were introduced in the form of resolutions, petitions, and messages; important areas of policy were first discussed on the floor or in a Committee of the Whole before being referred to committee; and both houses required permission of the whole body for a bill to be introduced.²⁰⁴ But even at the outset, the House rules on introduction were stricter, requiring that even when a member’s motion for leave to bring in a bill was approved, the issue “be sent to a smaller committee to frame and bring in the actual bill.”²⁰⁵

The whole body’s control over initial consideration eroded, however, as initial floor consideration became a mere mechanism for committee reference. In each body, though, the decline of the role of the whole and the development of standing committees occurred at different rates.²⁰⁶ While by 1820, both houses gave standing committees power to propose bills on subjects referred to them, and committee bills were the dominant vehicle for advancing public legislation, House members continued to rely exclusively on resolution of inquiry to refer public bills to committees.²⁰⁷

201. See Cooper & Young, *supra* note 195, at 70 (explaining that a bill was permitted only when the House approved its introduction, and any bill so approved was not to be introduced by an individual member, but was referred to a committee for drafting and introduction). Cooper and Young conclude that “the legislative process was seen as one which began with the consideration of subjects that might or might not lead to actual bills.” *Id.* at 70.

202. See Cooper & Rybicki, *supra* note 192, at 184 (clarifying that though the rules allowed an individual member to introduce a bill, “bills were seen as ‘inchoate law’ and therefore not properly introducible solely on the authority of an individual member or committee”).

203. *Id.* at 183-84; see also Lauros G. McConachie, Congressional Committees, in 15 LIBRARY OF ECONOMICS AND POLITICS 127 (Richard T. Ely ed., 1973) (1898) (explaining that the small committees have existed since the first House which has always retained the power to choose the size and number of committees).

204. Cooper & Rybicki, *supra* note 192, at 184.

205. *Id.*

206. See *id.* at 183-84 (expounding that by 1809, small committees in both houses functioned far more as advisors to the whole than as its instructed agents and by 1817, standing committees dominated select committees in receipt of business from the floor); see also JOSEPH COOPER, CONGRESS AND ITS COMMITTEES 51 (1988) (describing the change in attitude towards committees becoming more positive as the number of standing committees increased).

207. Cooper & Rybicki, *supra* note 192, at 185.

In the Senate, by contrast, member public bills were present from the start, attained sizeable proportions even before the advent of the standing committee system, and rose to even greater proportions once the standing committee system had emerged and been given bill power.²⁰⁸

Member autonomy as the primary distinction between the House and Senate in their procedural evolution is also seen in the much greater strictness of the House in the level of control of business and debate on the floor.²⁰⁹ Beginning in 1811 the House started turning the previous question into an effective method of cloture, adopted a general germaneness rule in place of the limited germaneness provision in its original rules, and began to define an order of business in its rules.²¹⁰ “In contrast, the Senate eliminated its previous-question rule, did not adopt a general germaneness rule, and declined to write the rudimentary order of business it followed in practice into its rules.”²¹¹

b. Stage II: The Growth of Member Bills, 1825-1861

Member bills became the primary mode of introduction in the Senate and, more slowly, the House in the next phase (while the disparity in member control over introduced legislation widened).²¹² Beginning in the mid-1820s, member bills quickly rose to prominence in the Senate, with the House lagging behind for several decades and not matching Senate procedure until the Civil War.²¹³ In the Senate, the percentage of bills introduced by individual members at first increased steadily from 1820s levels, fell back briefly in mid-1840s, but then resumed an upward climb.²¹⁴ “[B]y the mid-1850s, seventy percent of public legislation was introduced by members, not committees.”²¹⁵

In the House, interest in member bills began intensifying in the late 1820s and 1830s and led to two important rule changes: (1) The 1837 House reformulated its original bill introduction rule to clarify authority of members to introduce bills they drafted “once the permission of the House had been secured and to protect the authority of standing committees to

208. *See id.* (noting that even in this Senate there were restrictions on individual bill introduction of permission and a day’s notice to introduce a bill, and members were occasionally challenged when attempting to circumvent those requirements).

209. *Id.* at 186.

210. *Id.*; *see also* McConachie, *supra* note 203, at 124 (explaining that at least 350 select committees existed in the 3rd Congress for every petty claim, but that the number of committees fell to ten by 1810, but increased back to fifty by 1893).

211. Cooper & Rybicki, *supra* note 192, at 186; *see* McConachie, *supra* note 203, at 260 (describing the Senate as “tortoise-like” with respect to changing its rules and lagging far behind the House).

212. Cooper & Rybicki, *supra* note 192, at 186.

213. *Id.*

214. *Id.*

215. *Id.*

receive such bills” once introduced²¹⁶ and (2) “[i]n 1838 a second rules change provided additional time in the order of business for members to introduce bills.”²¹⁷ Following those changes, the percentage of member bills accelerated, so that by 1861 House member bills matched the Senate at seventy-one percent.²¹⁸

But the houses diverged further on options and procedure once a bill was introduced. “The House continued to outpace the Senate in elaborating its rules regarding the conduct of business.”²¹⁹ The Senate neither addressed the filibuster, which became a problem for the first time, nor the problem of germaneness.²²⁰ The Senate finally did incorporate an order of business, though a less rigorous one than that of the House.²²¹ Cooper and Rybicki note that “[a]s a consequence [of such resistance to change], the power of individual members remained strong in the Senate.”²²²

c. Stage III: The Triumph of Member Bills, 1861-1897

The final period of evolution in legislative process cemented not only member bill introduction as the norm, but also the disparity between strong control of activity on and access to the floor by individual members in the House and the stark relative freedoms for Senators.²²³ By the 1880s, virtually all public bills were member bills in both the House and Senate.²²⁴ “In the House the 1880 rules changes removed the historic requirements for permission and one day’s notice [which had long been mere formalities] but also totally barred debate on referral of bills.”²²⁵ Then, with the 1890 rules changes, introduction and reference were taken off the floor (so there was no chance to challenge reference) and the basic framework of modern practice was established.²²⁶

Senate procedural change did not go nearly so far. The Senate resisted the House model for standing committees, which defined their jurisdictions in the rules from the beginning and in 1880 made reference of legislation to them in line with these jurisdictions mandatory.²²⁷ In the Senate, rather,

216. *Id.*

217. Cooper & Rybicki, *supra* note 192, at 186 (citing Cooper & Young, *supra* note 195, at 70).

218. *Id.*

219. *Id.* at 187. Accord McConachie, *supra* note 203, at 37 (describing the growth of the House’s rules from a “small series of simple resolutions” to “an intricate, logically arranged code . . .”).

220. Cooper & Rybicki, *supra* note 192, at 187; *see also* McConachie, *supra* note 203, at 115 (attributing the use of filibuster by the minority group as a source of power).

221. Cooper & Rybicki, *supra* note 192, at 187.

222. *Id.* at 187-88.

223. *Id.* at 188-89.

224. *Id.* at 188.

225. *Id.* at 189.

226. *Id.*

227. *Id.*

jurisdictions continued not to be formally defined but entirely controlled by precedent and reference to committees remained subject to the discretion of the Senate as a whole.²²⁸ Senators could still (1) “object to the reference of bills and place them directly on the calendar,” (2) “debate and add instructions to referral motions,” (3) “propose reference to a select committee,” and (4) influence which of the more than forty standing committees existing in the early 1890s received a bill.²²⁹

In sum, House changes reflected centralization of power in the Speaker that occurred after 1870 and especially after 1880.²³⁰ The Senate, by contrast, “resisted rules changes that would alter its fundamental character as a body that worked on the basis of mutual consent and forbearance, even as the strength of the party began to rise in the 1880s and 1890s.”²³¹

d. Conclusions

During the nineteenth century, both houses transformed the introduction of public legislation from a committee-dominated process to one in which introduction was “a hallmark of member prerogative and activity.”²³² But the pace of change varied substantially, with the Senate far ahead of House until the 1850s.²³³ And while transition to member bills climaxes in the House in 1890 by taking introduction and reference off the floor, that floor limitation does not occur in the Senate.²³⁴

2. The comparatively-free introduction procedure, in historical congresses, for joint resolutions: The vehicle for amendment proposing

Early on, the joint resolution was established as the means of introducing proposed amendments in both houses.²³⁵ Though functionally equivalent to

228. *Id.*

229. *Id.* at 189-90; see also FLOYD M. RIDDICK, CONGRESSIONAL PROCEDURE 315 (1941) (explaining the ability of Senators to refer bills to standing committees, for which for the 76th Congress totaled thirty).

230. Cooper & Rybicki, *supra* note 192, at 190.

231. *Id.* at 191.

232. *Id.* at 193.

233. *Id.*

234. *Id.*

235. See ASHER C. HINDS, 5 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 7029 n.3 (1907). *Accord* Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) (holding that notwithstanding Article I, Section 7, Clause 3 of the Constitution, a joint resolution proposing an amendment to the Constitution passed by two-thirds majorities of the House and Senate did not need to be presented to the President and rejecting a challenge to the Eleventh Amendment on the grounds that it had not been presented to the President). Article I, Section 7, Clause 3 of the Constitution provides,

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the

the bill in most respects, the joint resolution did not impose the same severe restrictions on individual member introduction as bills did for much of the nineteenth century. I selected the House for my brief exploration of joint resolution history because House Members have proposed significantly more amendments than have Senators, and the procedure for introducing bills in the House has undergone substantially more change.

While the time available for introducing resolutions in the House was sparse in early years, members' personal privilege to introduce resolutions was not otherwise restricted. And though in the rules of the first session of the first Congress there was no explicit rule on the order of business,²³⁶ today joint resolutions are codified in House procedure. They may originate in either the House or Senate, not, as is sometimes incorrectly assumed, jointly in both Houses.²³⁷ But as they differ little in practice from a bill, the two forms are often used interchangeably.²³⁸ The principle differences from bills are that joint resolutions may include a preamble preceding the resolving clause and that when a joint resolution is used to propose an amendment to the Constitution, it is not then presented to the President for approval.²³⁹ And, in general, joint resolutions "are used for what may be called incidental, unusual, or inferior purposes of legislating"²⁴⁰

Rules and Limitations prescribed in the Case of a Bill.

U.S. CONST. art. I, § 7, cl. 3. Counsel for Hollingsworth et al., arguing the invalidity of the amendment, framed the argument in support of the amendment as follows: "[A]s two thirds of both Houses are required to originate the proposition, it would be nugatory to return it with the President's negative, to be re-passed by the same number . . ." *Hollingsworth*, 3 U.S. (3 Dall.) at 379. To that, they replied, "the reasons assigned for his disapprobation might be so satisfactory as to reduce the majority below the constitutional proportion. The concurrence of the President is required in matters of infinitely less importance . . ." *Id.* Attorney General Lee responded "[b]ut has not the same course been pursued relative to all the other amendments, that have been adopted?" *Id.* at 381. The Court upheld the validity of the Eleventh Amendment despite its not having been presented to the President. Justice Chase asserts "[t]here can, surely, be no necessity to answer [Hollingsworth's argument]. The negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution." *Id.*

236. See ASHER C. HINDS, 4 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 3056 (1907) (describing how the current House rules relating to the order of business are a substantial change from the rules of the first House).

237. CHARLES W. JOHNSON, HOW OUR LAWS ARE MADE, S. DOC. NO. 108-93, at 7 (1st Sess. 2003), available at <http://thomas.loc.gov/home/lawsmade.toc.html>; see also Forms of Congressional Action, <http://www.house.gov/rules/lphforms.htm#jointresol> (setting forth the standard form for presenting a joint resolution).

238. JOHNSON, *supra* note 237.

239. *Id.*

240. RULES AND MANUAL OF THE HOUSE OF REPRESENTATIVES FOR THE ONE HUNDREDTH CONGRESS § 397 (annotation on JEFFERSON'S MANUAL portion of the House Manual) [hereinafter HOUSE RULES], printed in H.R. DOC. NO. 99-279, at 183 (1987). Examples of the incidental, unusual, or inferior forms of legislation subject to joint resolutions include extending the national thanks to individuals, the invitation to La Fayette to visit America, notice to a foreign government of the abrogation of a treaty, declaration of intervention in Cuba, correction of an error in an existing act of legislation, enlargement of the scope of

3. *General motivations for sponsorship of legislation over the history of Congress: Careerism vs. policy orientation*

For working assumptions about the psychology of legislative process since the 1st Congress, I marry detailed studies of twentieth century bill sponsorship with the more sparse historical scholarship available on earlier congressional behavior. The actions of modern congresspersons are viewed as serving one or more of three broad aims—power within the legislature, reelection, and policy goals.²⁴¹

In variance of that paradigm developed for modern Congresses, however, my model of sponsorship activity across the entire congressional history focuses on just two opposing categories of motivations: (1) careerism and (2) policy orientation. Careerism subsumes the modern category of reelection but defines a broader concept, as explained below. And by policy orientation, I mean a general propensity to pursue policy goals, as opposed to other ends, in proposing legislation. Both are questions of degree.

This careerism–policy orientation dichotomy (and continuum) supplants the modern triad: power within the legislature, reelection, and policy goals in this study in order to conform to the historical studies of bill and joint resolution sponsorship and the preliminary nature of this analysis. Power within the legislature fades to the background for now because it is comparatively more difficult to track and it appears less relevant as we move the focus from all congressional activity to motivations for the introduction of legislation.²⁴² And I have expanded the reelection factor to the broader notion of “careerism” to fully account for the characteristics of older, nineteenth century Congresses in a historical analysis.

While even the extreme cynic would not deny an enduring contribution of some sort of “policy orientation,” the proposition that legislation has at times been proposed to achieve policy goals, the historical incarnations of careerism may not be so familiar. That and the related complication raised by the distinction between constituency-topic and national-topic legislation bear some elaboration.

a. *Nineteenth century versus twentieth century careerism*

The main motivation behind the typical modern congressperson’s

inquiries provided by law, special appropriations for minor and incidental purposes, establishing the date for convening of Congress, and extending the termination date for a law. *Id.*

241. See Cooper & Rydicki, *supra* note 192, at 196 (attributing the source of the formulation to RICHARD FENNO, CONGRESSMEN IN COMMITTEES (1973)).

242. See Cooper & Rydicki, *supra* note 192, at 197-98 (“The authority to introduce bills at one’s own discretion is not a preeminent source of personal power within a legislative body in a separation-of-powers framework . . .”).

proposing legislation is political recognition as a path to reelection.²⁴³ Modern examples of this “reelectioneering” focus of careerism include gaining political notoriety by taking a distinct position on an existing issue, bringing attention to an issue in the political forum to influence the agenda, or improving one’s political reputation as an expert or advocate by prolific activity in a particular area.²⁴⁴ Self-interested congresspersons in the nineteenth century, by contrast, appear to have had ambitions broader than reelection.

Cooper and Rybicki argue that framing careerism as based only on a desire for reelection is insufficient because “members in the House and Senate [in the 1800s] did not desire or expect to spend most of their careers in Congress.”²⁴⁵ In fact, “[i]n the House, members often chose not to run for reelection, and in the Senate, resignations before the end of one’s term were common.”²⁴⁶ Future career interests of sitting members of Congress were instead broader than continued congressional service: “They sought to use service in Congress as a pathway to state and national offices of a variety of types. If, then, we define careerism in terms of the pursuit of a political career, not merely a legislative career, the external form of careerist explanation remains applicable.”²⁴⁷

Cooper and Rybicki tie their findings to the longstanding view that the historical “increase in the number of member bills was tied to the desire of members to publicize themselves for their own personal and political gain.”²⁴⁸ They conclude that “the [most] substantial argument for the

243. See Schiller, *supra* note 27, at 188 (identifying congresspersons as calculating individuals who weigh the political cost of their decisions).

244. See *id.* at 189-91 (elaborating that legislator as a rational political actor is cautious of the effect bill sponsorship will have on his reputation, influence, and chance of reelection).

245. *Id.* at 198.

246. *Id.* (citing David Brady et al., *The Roots of Careerism in the U.S. House of Representatives*, in 24 LEGIS. STUD. Q. 489, 489 (1999); Douglass Price, *Careers and Committees in the American Congress: The Problem of Structural Change*, in THE HISTORY OF PARLIAMENTARY BEHAVIOR (William Ayderlotte ed., 1977); RANDALL RIPLEY, *POWER IN THE SENATE* (1969)). Brady distinguishes between electoral safety and desire to serve for long periods to conclude that they result from different factors, and thus careerism was present earlier in history than previously thought. Brady, *supra*, at 507.

247. Cooper & Rydicki, *supra* note 192, at 198. The reelectionist focus of careerism in the Modern Era is thought to embody an emphasis on the delivery of particularistic benefits to constituents as the primary means of winning re-election. *Id.* at 197 (citing MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977); DAVID R. MAYHEW, *THE ELECTORAL CONNECTION* (1974)). And “credit seeking, advertising, and position taking were identified as the three prime strategies for members to follow to win reelection.” *Id.* Cooper and Rybicki note, however, that position taking suggests that something beyond the delivery of particularistic benefits is important in winning reelection. *Id.* Moreover, Mayhew argues that, in the case of the Senate, position taking is the most important of the three. MAYHEW, *supra*, at 73.

248. Cooper & Rydicki, *supra* note 192, at 198 (citing DE ALVA S. ALEXANDER, *HISTORY AND PROCEDURE OF THE HOUSE OF REPRESENTATIVES* (1916)).

power of self interest in explaining the evolution of bill introduction [is] the desire of members to advance their careers by using member bills to publicize themselves.”²⁴⁹

Of course, that acquisition of member freedom to introduce bills has also proved invaluable to narrower twentieth-century schemes to self-promote for retaining a particular office. But legislation suited to broad careerist goals often differs in substantive focus from that suited to narrow careerism. The “national-topic” versus “constituency-topic” distinction in legislative type reflects that difference.

b. A complication for the theory of cause for the bill–amendment proposing correlation: Constituency-topic vs. national-topic bills

From the evidence that, to some degree, members of Congress used bill introduction to advance their careers from early in the nineteenth century to modern times, I assume that careerism has played a role in amendment proposing as well. The analysis of this Article now shifts to the more difficult question of the extent to which the same careerist interests that motivated general bill sponsorship have also motivated constitutional legislation. This analysis, however, is complicated by the distinction between sponsorship of “constituency topic” bills and sponsorship of “national topic” bills. Cooper and Rybicki define constituency topic bills in the Senate as those that “confer a highly disproportionate benefit on a particular state.”²⁵⁰ I expand that definition to include bills that confer a highly disproportionate benefit to a particular congressional district for House legislation.

In the nineteenth century, as members gained the ability to individually sponsor legislation, they focused much more on constituency-topic bills than did the committees. For example, looking at member-sponsored bills only in a sample of nine Senates from the 12th (1811-13) to the 34th (1855-57) Congress, there was a roughly equal split between constituency topic and national topic bills.²⁵¹ That contrasts with committee and members bills taken together, where constituency-topic bills comprise far less than half of all congressional legislation during the same period.²⁵² In fact,

249. *Id.* at 198-99.

250. *Id.* at 198. Cooper and Rybicki note that constituent topic bills include “road and harbor repair or construction, railroad construction, incorporation, establishment of collection and judicial districts, compensation of judges and other public officials, the time and place for holding district court, Indian removal, restoration of civil liberties, settlement of private land claims, and grants of land or the right-of-way through public lands.” *Id.* at 199 tbl.10.4.

251. *Id.* at 199 (noting that an average of 50.3% of member bills were a constituency topic during this period and thus concluding that the member bills were equally divided between constituency and national topic bills).

252. *See id.* at 199 (noting the trend from percentage Member-Introduced Public Bills

members introduced approximately sixty-two percent of the constituency topic bills during the nine-Senate span.²⁵³ As Cooper and Rybicki note, “it is clear that members, not committees, were the driving force in the growth of constituency topic bills to a far greater degree than with respect to national topic bills.”²⁵⁴

The authors note further that the House data makes an even stronger case for the role of constituency pleasing in propelling member bills: “In the House . . . the percentage of member bills that were constituency topic rose from 42 percent in the 27th Congress (1841-43), shortly after the rules changes of 1837-38, to 70 percent in the 31st Congress (1849-51) and 73 percent in the 32nd Congress (1851-53),” as member bills in the House exploded.²⁵⁵ This finding, however, need not suggest greater careerism in the House. Rather, to the extent national-topic bills are more suited for credit claiming in pursuit of national office (e.g., the presidency) than reelection to Congress, a stronger percentage of national-topic bills were introduced by Senators than by members of the House.²⁵⁶ This is consistent with the contemporary understanding of the broader political goals of Senators to pursue national offices.

Figure 2 illustrates the dramatic change in the magnitude, sources, and composition of bill introduction that accompanied the easing of procedural constraints over a forty-year span in the nineteenth century:

with Constituency Topic column in Table 10.4).

253. *Id.* (averaging the percentage of constituency-topic bills introduced by members from Table 10.4).

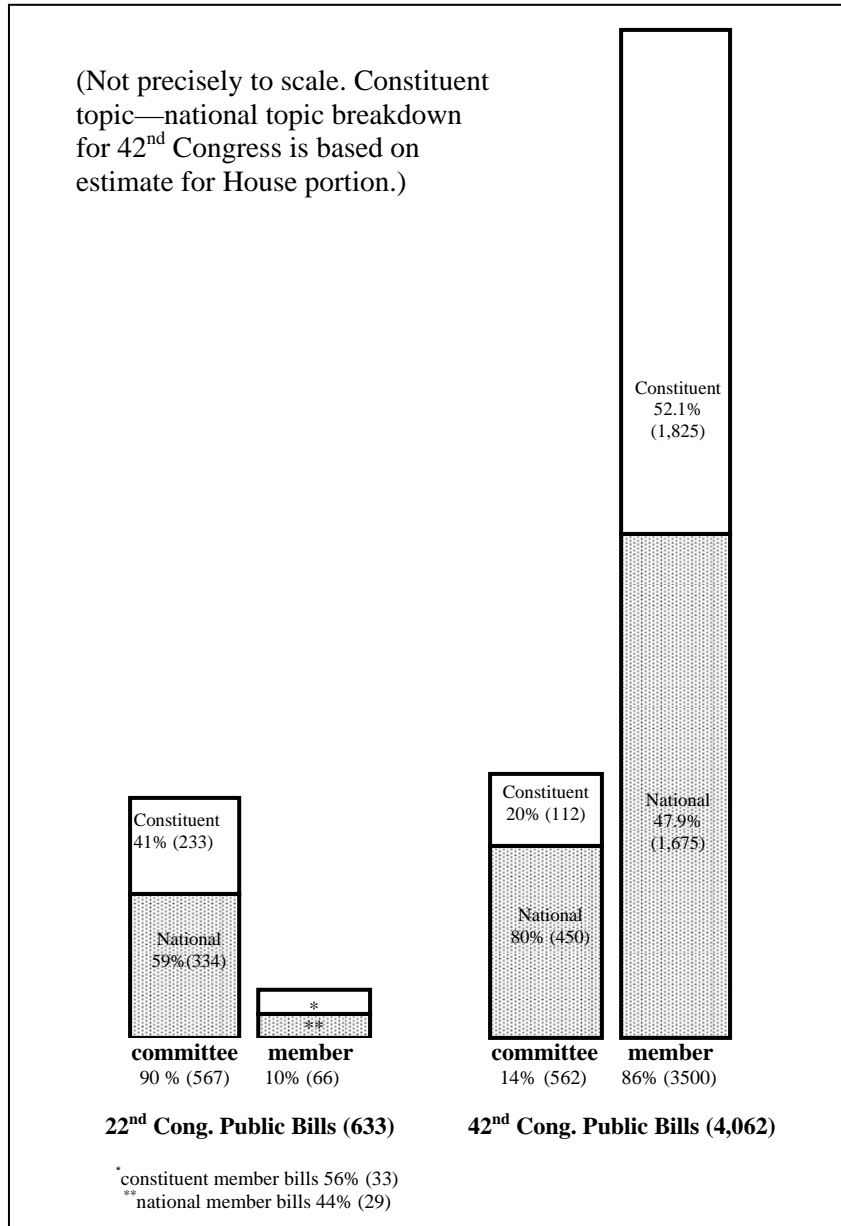
254. *Id.* at 199.

255. *Id.* at 200-01.

256. *Id.* at 201.

FIGURE 2:

Comparison of Public Bills Only, Between 22nd Congress (1831-33) and 42nd Congress (1871-73)



The theory set forth in Part IV shows how the dramatic shift in the power and role of individual members from the early to late nineteenth century may have played a crucial role in establishing the dynamic that drives the correlation between bill and amendment revealed by the numerical analysis.

c. Conclusions

In sum, the theory developed in the next part must acknowledge several background conditions governing aggregate bill and amendment introduction that have dramatically changed character relative to each other between early and modern Congresses: (1) members of Congress were generally motivated by careerism (as the political scientists suggest they have been from early on), but the members' focus shifted from an emphasis on acquiring national stature to an emphasis on reelection;²⁵⁷ (2) member legislation has generally been weighted towards constituency topics;²⁵⁸ but (3) plausible amendment topics were generally national topics;²⁵⁹ (4) joint resolutions, the vehicle for proposing amendments, initially differed dramatically from bills in the ease of their introduction;²⁶⁰ and (5) the proportion of total bills that were sponsored by members rose to over ninety percent by the end of the century.²⁶¹

III. FROM GENERAL THEORIES OF CONGRESSIONAL BEHAVIOR AND HISTORIES OF PROCEDURE TO A SPECIFIC THEORY OF CORRELATION BETWEEN BILL- AND AMENDMENT-SPONSORSHIP ACTIVITY

Building on the political-scientists' understanding of Congress, this Part (A) presents a general theory of congressional motivation as cause of correlations between bill- and amendment-proposing rates and (B) speculates on criteria for a "Zeitgeist of amendability in Congress."

A. General Theory of Congressional Motivation as Cause of Correlation Between Rates of General Bill and Amendment Proposing

Attuned to the history of motivations for and procedural constraints on bill and amendment proposing, I now return to the question that started this Article: Why might bill and amendment proposing rates be correlated to some substantial and significant degree from Congress to Congress?

257. See Brady, *supra* note 246, at 490 (explaining the change in patterns of careerism throughout the twentieth century and pointing to the wealth of political science literature chronicling this change).

258. Cooper & Rybicki, *supra* note 192, at 198.

259. *Id.* at 201.

260. See HOUSE RULES, *supra* note 240, § 397.

261. Cooper & Rydicki, *supra* note 192, at 199.

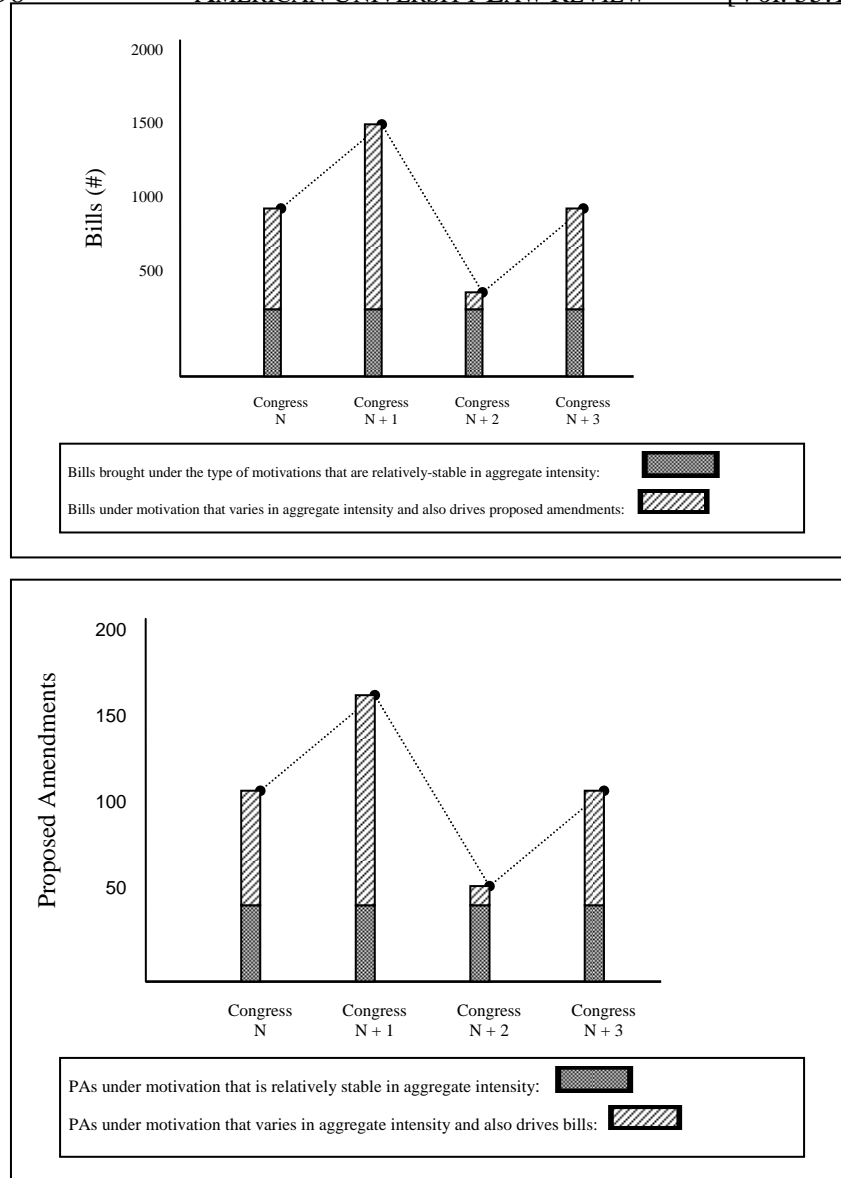
First, I concede the threshold limitations of existing political-science scholarship. It does not provide enough insight for my preliminary theory of causation to be framed either with scientific precision or with a scope that explains all of the relevant legislative activity. This analysis is preliminary and too much data remains inaccessible or un-obtained thus far. (The numerical correlation itself, in contrast with its cause, is established with statistical accuracy in Part IV.) Therefore, I cannot proceed in the traditional style of inquiry by stating a concrete theory that would give rise to a particularized null hypothesis against it, which the subsequent numerical analysis would or would not disprove (within a range of statistical error). Instead, I outline two separate working models of causation, each of which points to the same cause for the correlation. The two models embody two alternatives for theorizing with incomplete information: (1) direct generalization from established premises and (2) reasoning back to a general outline of likely real conditions from extreme cases where the analysis is simplified. The first approach, in chart form, presents reasonable assumptions about the majority of the data and the typical aggregate motivations, based on what we already know about Congress. The second approach speculates on the effects were all congresspersons to behave at each of two extremes. It then argues why the aggregation of real activity most likely tend towards one of those extremes more than towards the other. The strength of my preliminary theory of causation is that both models point to the same conclusion: a varying aggregate enthusiasm for careerism impacts both bill introduction and amendment proposing.

1. First approach: general assumptions and typical cases

For the generalization approach, I begin by deconstructing my earlier simplified idealized graph of the correlation phenomenon (Figure 1). First, I assume that the total number of bills and proposed amendments for any Congress are composites of (1) introductions caused by factors relatively stable in aggregate intensity, and (2) introductions caused by less-stable factors. Based on these assumptions, the otherwise-inexplicable correlation between seemingly independent processes is a relationship between the unstable factors in bill proposing and amendment proposing, illustrated as follows.

FIGURE 3:

The Idealized Correlation Illustration Broken Down



In Figure 3, I assume that neither bill introduction nor amendment proposing is entirely erratic in intensity. Instead, each phenomenon has at its core, activity that is relatively stable in intensity over time and not related to the other. They are, however, similar in the aspect of their relative stability. That is reasonable and consistent with the factors inveighing against a relationship between bill and amendment proposing. But on top of that core activity is a substantial amount of sponsorship in both the normal and constitutional legislation spheres that is highly-

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variable and may share a cause or causes.

To assist the speculation on what may be the longitudinally-unstable and common causes, the next three figures examine the motivations that drive most of the sponsorship activity for member bills, committee bills, and proposed amendments.

FIGURE 4:

*General model of an individual congressperson's motivation for introducing a particular bill.**

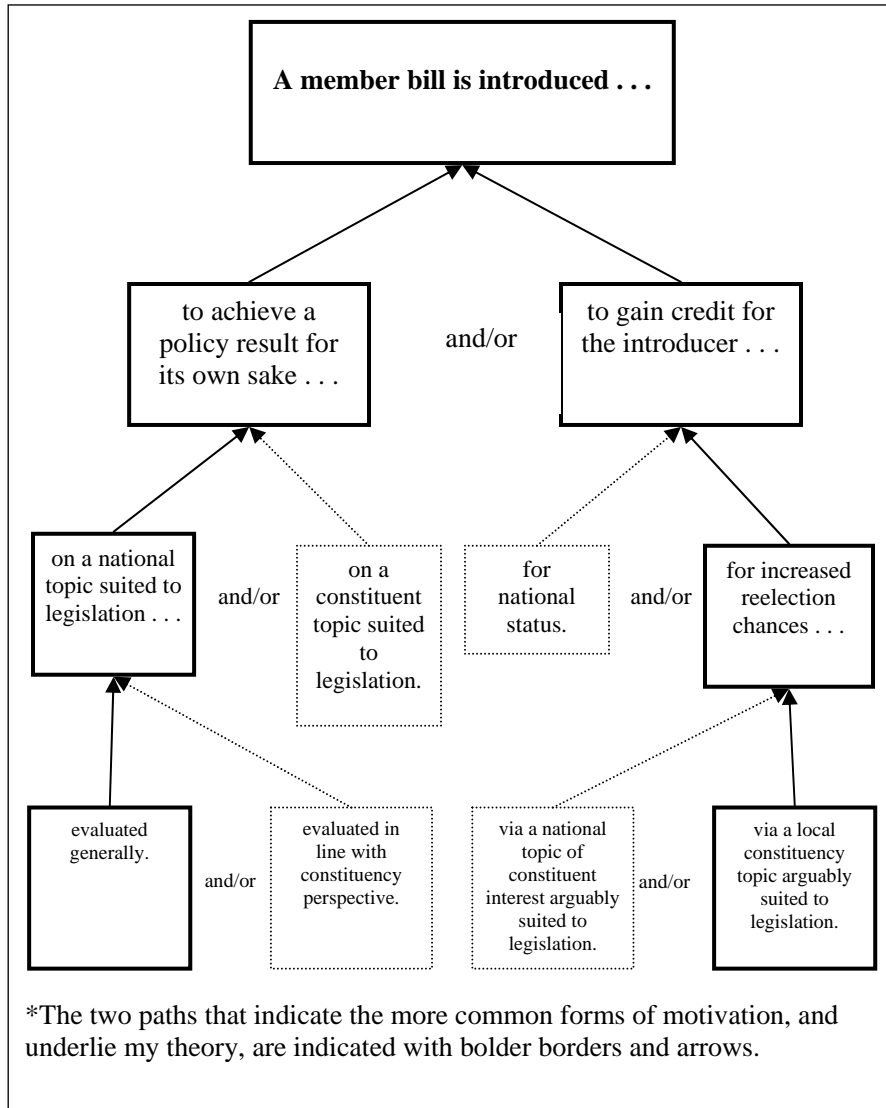


FIGURE 5:

*General model of the collective motivation of a majority of a congressional committee that votes to introduce a bill.**

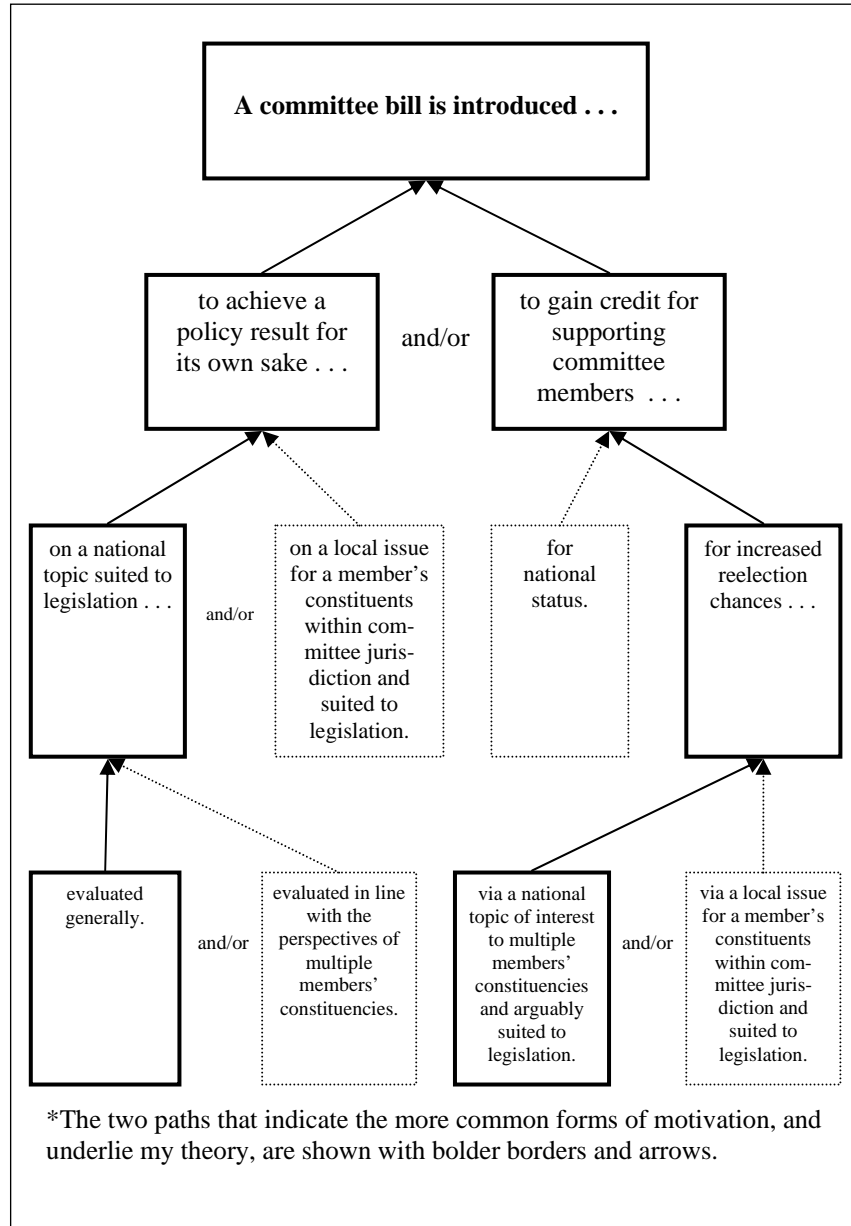
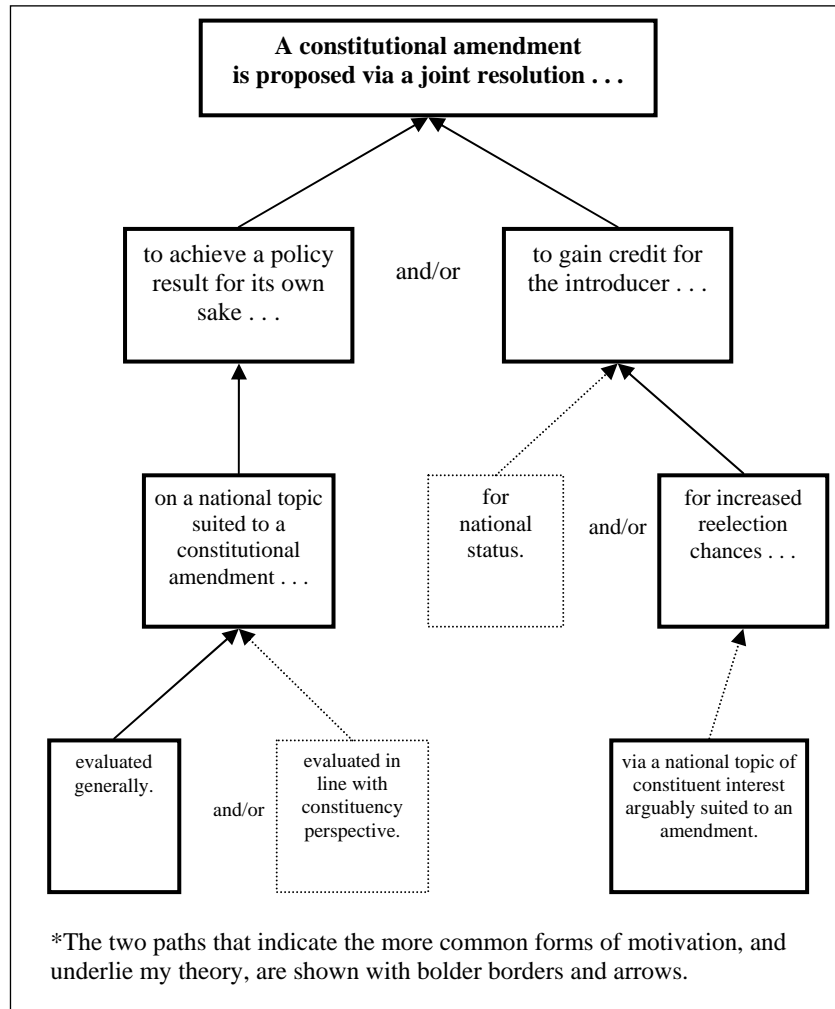


FIGURE 6:

General model of an individual congressperson's motivation for proposing an amendment



In the following table, I compare side-by-side the two most-likely motivation types for member bills, committee bills, and proposed amendments which I draw from the three previous figures. The table then examines the likelihood that the aggregation of one or the other of those motivation types would produce the bills–proposed amendments correlation.

TABLE 1:

Speculative General Theory of Causes of Correlation between Bill and Proposed Amendment (PA) Totals²⁶²

Bills		Proposed Amendments	Likelihood this motivation factor caused per-congress bill totals to correlate with PA totals over time.
Member	Committee ²⁶³		
<p>Most member bills are introduced . . .</p> <p>(factor 1) to achieve a policy result for its own sake on a national topic suited to legislation, evaluated generally,</p> <p>or</p> <p>(factor 2) to gain credit for the introducer for increased reelection chances via a local constituency topic arguably suited to legislation.</p>	<p>Most committee bills are introduced . . .</p> <p>(factor 1) to achieve a policy result for its own sake on a national topic suited to legislation, evaluated generally,</p> <p>or</p> <p>(factor 2) to gain credit for supporting committee members for increased reelection chances via a national topic of concern to multiple members' constituencies and arguably suited to legislation.</p>	<p>Most amendments are proposed . . .</p> <p>(factor 1) to achieve a policy result for its own sake on a national topic suited to a constitutional amendment, evaluated generally,</p> <p>or</p> <p>(factor 2) to gain credit for the introducer for increased reelection chances via a national topic of constituent concern, arguably suited to an amendment.</p>	<p><u><i>Probability of correlation on factor 1:</i></u></p> <p>It is improbable that the quantity of independently valuable bills on national topics suited to legislation would track the quantity of independently valuable proposed amendments on national topics suited to constitutional amendment to such a degree and over a sufficient span of congresses to produce a statistically significant correlation.</p> <p><u><i>Probability of correlation on factor 2:</i></u></p> <p>It is more likely that what primarily causes the substantial variances in the magnitudes of sponsorship activity in both general and constitutional legislation to be similar to each other is "promiscuous careerism": a varying aggregate enthusiasm for careerism that impacts both bill and PA introductions. That is, viewed in the aggregate, increases or decreases in enthusiasm for careerism simultaneously translates to both bills and PA introductions, though the primary constituent concerns targeted may be local topics in the former and national topics in the latter case.</p>

To summarize, Table 1 concludes that the substantial correlation

²⁶². I simplify this analysis in the sense that it considers only the most-likely categories of motivation for member bills, committee bills, and proposed amendments. It does not contemplate the effect of mixed motivations and it is a general and not era-specific theory (though introduction procedures and dynamics varied as they evolved through historical eras).

²⁶³. Again, the contribution of committee bills to the bill totals diminishes substantially by the end of the nineteenth century. That is reflected in my era-by-era analysis, set forth, *infra* Part V.

between bill and amendment proposing totals over a span of Congresses signals that varying intensities of similar careerist motivations have determined the intensities of both bill and amendment sponsorship. I call this phenomenon “promiscuous careerism” and will discuss it further in Part V.²⁶⁴

The following will demonstrate how this conclusion is reached by other means and then will address the broader contours of this causation theory.

2. *Alternative approach to causation with similar result: negative implications of an analysis of extreme cases*

I begin this alternative speculation on causes with simple, idealized (extreme) conditions and then move to real-world assumptions. This reasoning again leads to my tentative conclusion that the bill–amendment proposing correlation is a strong indicator of a predominance of careerism in aggregate amendment-proposing activity. The methodological theory here is that by first examining the predictable results of absolute or extreme types of congressional behavior under extreme or idealized political conditions, the potential impacts of that type of behavior are easier to see. Each of the factors are considered in the extreme case and actual conditions are less extreme; therefore, the impacts are also likely present to a lesser degree in reality.

a. *Idealized, extreme conditions for initial speculation*

I assume that the motivation of an individual congressperson in introducing a particular bill, or joint resolution, in reality, ranges somewhere between “pure careerist,” which roughly translates into credit seeking or grandstanding, and “policy purist,” which represents an orientation to achieving some policy end for the independent virtue of that end. To begin developing a model, however, I start by considering the simpler cases, either where every member of Congress is a pure careerist or where every member is a policy purist. While not even the worst or the best historical congressperson has likely reached the extremes of either consistent pure careerism or consistent policy purism those archetypes at least provide outer boundary conditions within which to speculate.²⁶⁵

The second factor I idealize to begin the analysis is the relationship between the potential bills and the potential proposed amendments the hypothetical congressperson might sponsor. I assume perfect “topic

264. See *infra* Part V.B.

265. See HANS VAN DEN DOEL & BEN VAN VELTHOVEN, *DEMOCRACY AND WELFARE ECONOMICS* 103 (Brigid Biggins trans., Cambridge Univ. Press 2d ed. 1993) (1979) (relating the concept of careerists to American politics and the concept of paternalists (what I refer to as “policy purists”) to European politics).

overlap,” meaning that for every issue of constituent interest, there are both potential general bills and potential proposed amendments, regardless of how substantively appropriate or likely to succeed if introduced without political repercussions to the congressperson (based on, for example, their frivolous or otherwise unsuitable nature). I refer to those options as “plausible” legislation.

b. Effects under the extreme conditions

The idealized circumstances where all congresspersons are pure careerists and there is total topic overlap would produce strong, if not perfect, correlation in the per-Congress rates of bill sponsorship and amendment proposing as follows.²⁶⁶ The range of potential bills or proposed amendments the pure careerist considers introducing in each Congress would arise from the issues important either to local constituents or national constituencies with whom the congressperson seeks to gain a favorable reputation. While pleasing those constituencies most effectively would require introducing legislation that becomes law, only a small percentage of bills introduced get that far. So the primary opportunity for claiming credit will lie in the ability to claim the mere *introduction* of legislation.²⁶⁷ Now the congressperson can safely assume a low degree of voter sophistication with regard to this practice, though he or she cannot assume a complete absence of it. Hence, within the limits of what on its face seems plausible—as all options are presumed to be under the perfect topic overlap condition—I conclude that the pure careerist will introduce both general legislation and amendment-proposing legislation on each topic he or she finds politically important to address.

Under the pure-careerist conditions, perfect correlation arises when each issue is always plausibly amenable to exactly the same number of general bills and proposed amendments; then we would see exactly the same number of both types of legislation in each Congress, and hence a perfect correlation of bill and amendment proposing rates throughout history.

Introducing the reality that the magnitude of total general bills is always so much greater than that of proposed amendments, however, would not preclude at least a strong correlation under this model. Even with that substantial disparity between the magnitudes of total bills and total amendments in each Congress, strong correlation could easily exist in the idealized circumstance of pure careerism. For instance, assuming still the

266. *But see id.* (explaining that a politician would need to have a monopoly position to truly be purely policy-oriented and that the practical reality of maintaining political power requires him to be a careerist).

267. *See id.* at 119 (highlighting that because voters are short-sighted, politicians must focus on short-term measures such as bill introduction in order to be politically successful).

premise that all issues are amenable to both types of legislation, it may be the norm that one proposed amendment is thought to carry the punch of multiple general bills. If that proposed amendment/general bills ratio were constant across issues and Congresses, we would still get perfect correlation in the rise and fall of rates for each Congress, though the absolute numbers of proposed amendments and bills would be quite different. While there is obviously not a constant ratio in reality, some significant disparity between the number of proposed amendments and general bills deemed amenable to a particular issue seems endemic. And common sense supports the proposition that even pure credit seekers view a proposed amendment as a less common act than a general bill.

On the other hand, while perfect correlation is *theoretically* possible where the polar opposite motivation—policy purism—is present, the further assumptions required for that are too artificial to exist to any degree in reality. If all congresspersons were policy purists, perfect correlation would have to occur in one of two ways. First, it could be that from Congress to Congress, there is a fixed ratio of (1) topics seriously subject to²⁶⁸ general bills to (2) topics seriously subject to proposed amendments. What varies is the work load of members in the aggregate, causing a variation in the amount of legislative activity. A second cause could be that a rise or fall in the number of topics seriously subject to proposed amendments just happens to also correspond to a rise or fall of the same magnitude in topics seriously subject to general bills, throughout history. Since both those potential causes of correlation in the policy purist model likely do not exist to any degree, I will assume their absence and assume that policy purism would lead to near-zero correlation.²⁶⁹

c. Implications under real-world conditions

To the extent that sufficient topic overlap is present, then, it is not a far stretch from the above analysis to conclude that a substantial, albeit not perfect, correlation in the rates over history must imply that some degree of careerism has played a substantial role.

In sum, approaching the question from multiple directions, I conclude it is very likely that some substantial degree of careerism is the necessary cause of any significant degree of correlation between bill and amendment totals.²⁷⁰

268. “Seriously subject to” is shorthand for the proposition that legislation in the topic area could be offered to achieve desirable policy ends, as opposed to only provide a vehicle for claiming credit in addressing the topic.

269. See VAN DER DOEL & VAN VELTHOVEN, *supra* note 265, at 103 (concluding that a pure paternist, what I term a policy purist, cannot succeed in a two-party system unless he has a monopoly position).

270. The degree and level of influence of careerism defies precise assessment because of

B. Speculations Beyond Explaining the Correlation: Congressional Attitude Towards the Amendment Process as Group Psychology—the “Zeitgeist of Amendability in Congress”²⁷¹

Each of Part V’s separate contextual analyses (of each of the seven eras) ends with one additional speculation, beyond what has caused the degree of correlation between the bill and amendment proposing tallies of the particular era. In those concluding speculations, I characterize the general congressional attitude towards the amendment process. And I frame that characterization in terms relevant to the broader quest for understanding Congress’s “responsiveness” to amendment need. Thus, it is an assessment of an evolving congressional group psychology.

various difficult-to-track variables. For instance, the general theory raises the potential effect of diminished topic overlap—that is, variability in the earlier assumption that every issue of constituent interest is plausibly (though not necessarily seriously) amenable to both general and constitutional legislation. Less than perfect or low topic overlap could have a dampening affect on the correlation in the case of pure credit seekers. That is, the absence of the option of a plausible bill on an issue amenable to a proposed amendment or vice versa could defeat the correlation effect. However, to the extent the congressional action is also influenced by an alternative credit seeking motivation, that may not occur. Specifically, it could be that congresspersons are motivated to record a volume of legislative activity, of any type, to a degree that varies from Congress to Congress. To the extent that motivation is also at play the potential dampening affect of low topic overlap would be diminished. Nonetheless, the era-by-era analysis of Part V must consider whether comparatively low topic overlap is the culprit in eras of comparatively low or no correlation.

Consider the simple example of a congressperson motivated only by the desire to create a record of action on topic X. The more topic X is at least arguably amenable to both general and constitutional legislation, the more likely he or she may be to introduce both a general bill and proposed amendment. For example, assume that today (1) anti-flag burning is a policy position reasonably pursuable only through constitutional amendment and (2) highway funding is pursuable only through general legislation, but (3) regulation of abortion funding could be argued to be pursuable through both (to some degree). In this example, abortion funding regulation exhibits high topic overlap while anti-flag burning and highways are low overlap categories of potential legislation. To the extent legislation in the aggregate tends toward the low topic overlap categories, the correlation effect I have described above may be dampened.

The dampening dynamic can be easily seen if one considers how the above three legislative topic examples would be addressed in a simple legislative setting. A congressperson in an era where the only issue of interest to his or her constituents is flag burning and who, through a careerist motivation, is interested only in doing something of record regardless of its likelihood of success, will propose an amendment and not introduce a bill. The sample congressperson likewise would introduce only general legislation in response to highway issues. By contrast, that careerism-motivated congressperson in a district where abortion funding is on the minds of constituents would propose both an amendment and a bill (regardless of the likelihood of success), to maximize the careerist benefits of doing something of record. Though all three situations involve only careerist motivations, the effect on legislative activity is translated into a correlation in bill and amendment proposing only in the last, where topic overlap is maximized. In the first two, with zero topic overlap, the correlation effect of my Stage I Hypothesis above is completely undercut. Zero topic overlap occurs only in my extremely simplified example and not, as will be made plain in the analysis that follows, in the history of Congress.

271. My use of “Zeitgeist” does not invoke any technical sense intended by its coiner, Hegel, or his followers but only its modern colloquial usage: the “general intellectual and moral state or the trend of culture and taste characteristic of an era.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2657 (1993).

I derive that “Zeitgeist” primarily from the interrelationship between (1) the position of the era on the “promiscuous careerism”—“motivation independence” continuum; (2) any evidence of limits on careerist activity rooted in a prudential view of the Constitution or amendment process that may predominate in that congressional era;²⁷² and (3) the mass view of the likelihood of success of proposed amendments for the era. Before continuing the analysis, some terms bear repeating, redefinition, or introduction: (1) “Careerism” generally denotes some sort of focus on credit seeking.²⁷³ (2) “Promiscuous careerism” signifies a focus on credit seeking that does not distinguish between normal and constitutional modes of legislation. Hence, unless handicapped by procedural or other external factors, promiscuous careerists will introduce both bills and proposed amendments in order to seek credit on topics arguably suited to both modes of legislation.²⁷⁴ (3) “Prudential careerists,” by contrast, for prudential or other reasons, are less promiscuous and distinguish between normal and constitutional modes of legislation. Hence, they might not always seek credit through a proposed amendment every time one would plausibly suit a topic also addressed by a bill. (4) “Motivation independence” is the legislative philosophy that treats normal and constitutional legislation as distinct, rarely-overlapping tools. I speculate that most holding this view tend towards a non-careerist and policy-purist orientation. But this class could include prudential careerists, to the extent they exist. (5) Finally “policy purism,” again, signifies being purely oriented to achieving some policy end solely for the virtue of that end, independent of personal benefit to the legislator. Policy purists introduce legislation, normal or constitutional, only that is well-suited to achieving the particular policy end and possesses a reasonable possibility of success. All policy purists are motivation independent, though not necessarily vice-versa, since some tending towards motivation independence might nonetheless possess a degree of careerism in their psychologies.

To repeat from the preceding Part V.A, the core of each of the seven era-by-era analyses in Part V first characterizes the era as dominated by either motivation independence or promiscuous careerism (or neither), depending

272. See *supra* Part V.A.1.

273. See also VAN DER DOEL & VAN VELTHOVEN, *supra* note 265, at 103 (defining a careerist as one who “maximizes the number of votes given to himself, to his party or to his regular coalition partners”).

274. Promiscuous careerism is closely related to but not necessarily synonymous with “pure careerism.” See *supra* tbl.1. Most pure careerists probably are promiscuous in this regard, though I admit the possibility of a purely self-promoting member of Congress who nonetheless distinguishes between the modes of legislation for one reason or another. At the same time, many promiscuous careerists utilizing both modes of legislation whenever possible may not be at the extreme in their self-promotion and may have some policy orientation in their psychology.

on the numerical results (and contextual factors).

My first move beyond those characterizations, in the quest for Congress's "Zeitgeist of amendability" in each particular era, relates those qualities to the perceived likelihood of success of proposed amendments. I hypothesize the combination of (1) a particular mass perception of likelihood of success and (2) a dominate character of careerism and its relationship to legislation sponsorship in an era would have the following effects on the aggregate level of amendment proposing:

Table 2:

Relationship between perceived likelihood of success of proposed amendments and their introduction rate, depending on the nature of careerism in the era

	<i>Low Perceived Likelihood of Success</i>	<i>High Perceived Likelihood of Success</i>
<i>Promiscuous-Careerism Dominated Era</i>	Likelihood of success is not likely to affect decision to propose amendment.	
<i>Motivation-Independence Dominated Era</i>	Fewer proposals.	Higher proposal rate, unless tempered by prudential view of process.

The relationships identified in Table 2 potentially allow some simple backward moves from hard data of proposal rates (available to fill the interior of the table for each era) to the more elusive quality represented in the horizontal axis, the perceived likelihood of proposed amendment success. Those moves, in turn, lead to my looser speculations on the

Zeitgeist of a particular congressional era with regard to the amendment process.

For instance, to the extent the causation analysis leads to the conclusion that a particular era was dominated by motivation independence, then evidence of a relatively heightened rate of amendment proposing in that era would, under Table 2, lead to the conclusion that at that time, the generalized view was that the likelihood of success of proposed amendments was relatively high. On the other hand, an era dominated by motivation independence where there is other persuasive evidence of a heightened view of the likelihood of success of amendment proposals, but where the proposing rate is nonetheless relatively low, would be evidence that a prudential view of the amendment process dominated in that era, dampening the rate of amendment proposing.

In sum, in the more speculative final portions of each of the seven subsections of Part V, I use the apparently-necessary relationships of Table 2 to predict the presence or absence of one of the qualities tracked in the table when it is otherwise not known. Following that, I express the Zeitgeist for each congressional era as the sum of three factors: (1) the degree of tendency towards promiscuous careerism instead of motivation independence, (2) the perceived likelihood of amendment proposal success, and (3) the degree to which the amendment process is viewed prudentially (e.g., tends toward prudential careerism).

Looking at the seven eras together, I tentatively conclude that Congress has evolved to the modern era's Zeitgeist of promiscuous, non-prudential, amendability pessimism through a series of intervening, distinct Zeitgeists, as detailed in Part V.²⁷⁵

IV. THE RAW DATA AND NUMERICAL ANALYSIS OF THE PROPOSED AMENDMENT AND BILL TOTALS

Part IV provides the structure and basis for the contextual analysis of the numerical results that follows in Part V. To do this, I (1) identify the specific sources of data and analytical methods used and (2) report the numerical results of the correlation analysis. Since I have begun here with a theory of potential causes of a correlation between bill and amendment proposing rates, my later numerical confirmation of that correlation bolsters the causal premises I have identified as necessary for the

275. Admittedly, the methodology of these additional speculations is even more attenuated than what I use to investigate the cause of the bill-proposed amendment correlations. Survey questions interrogating the thinking of a scientific sampling of members of Congress on these issues would be more direct. But they are not available for the historical periods. I am, however, occasionally able to compare my speculations with the closest facsimile to psychological survey data that has come down to us—spontaneous, contemporaneous testimonials.

correlation to exist.

A. *Methodology and Sources*

My analysis starts with two sets of numerical data: (1) the total numbers of proposed amendments for each Congress (both houses) and (2) the total general bills proposed (as an indicator of overall congressional activity). I first look at trends in the proposed amendment numbers from Congress to Congress and compare those trends with trends in the total numbers of bills proposed for each Congress. Next, I compare my numerical conclusions with the substantive categories of proposed amendments that predominated in the seven historical eras delineated by the numerical analysis. Finally, I compare this analysis with the other contemporary constitutional history,²⁷⁶ the intellectual history of amendment scholarship, and constitutional theory, and the understanding of the legislative process developed in the preceding section. For this study, I consulted numerous sources to compile proposed amendment totals for the full life of the Constitution. Some sources overlapped, some were slightly inconsistent, and some I consulted merely for verification. Unlike the bill totals, all the proposed amendment total sources are to some degree from secondary sources;²⁷⁷ at no point was I compelled to physically count individual proposed amendments. Nonetheless, the data are, in general, maddeningly dispersed in the literature. This problem will not be magnified however, because contemporaneous year-by-year amendment totals are now added to a single Internet source.²⁷⁸

Bill totals involved more meticulous counting than did the proposed amendments, especially in the earliest years.²⁷⁹ And like the proposed

276. For those prominent amendment topics and relevant contemporary history, I rely extensively on VILE, *supra* note 55, at 540 app. D.

277. See *infra* app. B.

278. Congress's website, thomas.loc.gov, provides full text searches of bills for each Congress, currently going back to the 101st Congress. The proposed amendment data on the 104th Congress, for example, come from <http://thomas.loc.gov/home/search.html>, clicking on "Summary and Status Information about Bills and Resolutions" within the Advanced Search function, selecting the 104th Congress, and searching for proposed amendments. Specifically, on November 3, 2004, the search "proposing amend constitution" in that database, with the options for (1) searching for word variants, (2) in all bills, (3) from both houses, and (4) with the outside number of bills to be retrieved at 1,000 selected, yielded a set of 166 proposed amendments (after factoring out a few bills returned that were not proposed amendments by, for example, scrutinizing any items that were not listed as either House or Senate joint resolutions).

279. The sources for bill totals are (1) 1st through 15th Congresses: Senate and House Journals. Hand counting of bills and joint resolutions enumerated in indices at the end of each volume. Since that count was taken for this article, these early journals have been placed on Thomas in full-text format. (2) 16th through 40th Congresses: House Journal. (3) 41st through 80th Congresses: Congressional Record, Appendices, Histories of Bills and Resolutions. (4) 80th through 108th Congresses: Congressional Record, Daily Digest. In the first issue of the Congressional Record for each new Congress, the "Daily Digest"

amendment totals, recent bill totals are now available on the Internet.²⁸⁰ The table below shows my estimated proposed amendment and bill totals through the One-Hundred-Eighth Congress.

TABLE 3:

Raw Data

	Congress		Bills	PAs	PAs sent to states by Congress
(sui generis)	1st	1789-91	223	188	12 amendments (including 27th) sent.
	2nd	1791-93	139	7	<i>Bill of Rights (10 amendments) ratified.</i>
	3rd	1793-95	190	8	11th Amendment sent and ratified.
	4th	1795-97	160	1	
	5th	1797-99	269	6	
	6th	1799-01	201	7	
Founding	7th	1801-03	157	15	
	8th	1803-05	233	13	12th Amendment sent and ratified.
	9th	1805-07	258	11	
	10th	1807-09	265	17	
	11th	1809-11	337	8	Titles of nobility amendment sent.
	12th	1811-13	386	6	
	13th	1813-15	474	39	
	14th	1815-17	537	18	
	15th	1817-19	537	25	
	16th	1819-21	496	12	
	17th	1821-23	508	27	
	18th	1823-25	568	18	
	19th	1825-27	728	39	
	20th	1827-29	678	16	
	21st	1829-30	1043	10	
	22nd	1831-32	1139	19	

contains a "Resume of Congressional Activity of the [previous Congress]." That resume contains numerous aggregate legislative statistics, including total numbers of bills introduced. The Resumes of Congressional Activity have recently become available on the Internet for Congresses since the 80th (1947-48) at <http://thomas.loc.gov/>.

280. The analysis in this article uses total numbers of bills without distinguishing between public and private bills. While public bills would seem to be much more interesting correlates to amendment proposing activities, many of the above sources do not separate the public from the private bills in the aggregate totals they provide. For convenience, this article relies on the totals provided in the above sources. A cursory examination suggests that the private bill numbers are minimal in comparison with the public bills and do not corrupt the analysis.

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	23rd	1833-34	971	20
	24th	1835-36	1265	26
Antebellum	25th	1837-38	1965	28
	26th	1839-40	1406	7
	27th	1841-42	1385	25
	28th	1843-44	1127	12
	29th	1845-46	1264	7
	30th	1847-48	1435	5
	31st	1849-50	1078	12
	32nd	1851-52	1076	5
	33rd	1853-54	1666	4
	34th	1855-56	1606	0
	35th	1857-58	1691	3

	36th	1859-60	1741	191	
	37th	1861-62	1665	10	Corwin Amendment sent.
Civil War– Early Reconstruction	38th	1863-64	1608	66	
	39th	1865-66	2357	162	13th & 14th Amendments sent. <i>13th ratified.</i>
	40th	1867-68	3710	109	<i>14th Amendment ratified.</i>
	41st	1869-70	5314	15	15th Amendment sent <i>and ratified.</i>
Latter Reconstruction –Gilded Age	42nd	1871-72	5943	35	
	43rd	1873-74	6434	31	
	44th	1875-76	6230	39	
	45th	1877-78	8735	41	
	46th	1879-80	10067	47	
	47th	1881-82	10704	49	
	48th	1883-84	11443	60	
	49th	1885-86	15002	53	
	50th	1887-88	17078	48	
	51st	1889-90	19630	51	
	52nd	1891-92	5682	64	
	53rd	1893-94	12226	46	
54th	1895-96	14585	46		
55th	1897-98	18463	47		
Populist– Progressive	56th	1899-00	20893	70	
	57th	1901-02	25460	64	
	58th	1903-04	26851	32	
	59th	1905-06	34879	46	
	60th	1907-08	38388	63	
	61st	1909-10	44363	62	16th Amendment sent.
	62nd	1911-12	38032	93	17th Amendment sent.
	63rd	1913-14	30053	118	<i>16th and 17th Amendments ratified.</i>
64th	1915-16	30052	97		
Suffrage– Prohibition	65th	1917-18	22594	92	18th Amendment sent.
	66th	1919-20	21967	74	<i>18th Amend. ratified. 19th sent & ratified.</i>
	67th	1921-22	19889	107	
	68th	1923-24	17462	108	Child Labor Amendment sent.
	69th	1925-26	23801	54	
	70th	1927-28	23897	66	
	71st	1929-30	24453	73	

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	72nd	1931-32	21382	172	20th Amendment sent.
	73rd	1933-34	14370	75	<i>20th Amend. ratified. 21st sent & ratified.</i>
	74th	1935-36	18754	98	
	75th	1937-38	16156	178	
	76th	1939-40	16105	92	
	77th	1941-42	11334	53	
	78th	1943-44	8334	78	
	79th	1945-46	10330	78	
	80th	1947-48	10797	87	22nd Amendment sent.
	81st	1949-50	14988	75	
	82nd	1951-52	12730	104	<i>22nd Amendment ratified.</i>
	83rd	1953-54	14952	162	
	84th	1955-56	17687	142	
	85th	1957-58	19112	179	
	86th	1959-60	18261	222	23rd Amendment sent.
Modern	87th	1961-62	18376	395	<i>23rd Amendment ratified. 24th sent.</i>
	88th	1963-64	17479	525	<i>24th Amendment ratified.</i>
	89th	1965-66	24003	499	25th Amendment sent.
	90th	1967-68	26460	524	<i>25th Amendment ratified.</i>
	91st	1969-70	26303	773	
	92nd	1971-72	22969	524	26th Amend. sent & ratified. ERA sent.
	93rd	1973-74	23396	382	
	94th	1975-76	21096	326	
	95th	1977-78	19387	373	DC representation amendment sent.
	96th	1979-80	12583	291	
	97th	1981-82	11490	221	<i>(Time for ERA ratification expires)</i>
	98th	1983-84	10559	161	
	99th	1985-86	9885	130	<i>(Time for DC rep. amend. expires.)</i>
	100th	1987-88	9588	118	
	101st	1989-90	10352	184	
	102nd	1991-92	12016	151	<i>27th Amendment ratified.</i>
	103rd	1993-94	9824	156	
	104th	1995-96	6,808	166	
	105th	1997-98	7,532	129	
	106th	1999-00	8,968	80	

	107th	2001-02	8,956	86
	108th	2003-04	8,468	83
Totals			1,200,902	11,165

B. Raw Numerical Results

1. Data plots

First, I plotted the proposed amendment and bills introduced totals for each Congress as a line graph over time. Because the total number of bills is so much greater than amendments for each Congress, I could not record the totals on the same graph and make any sort of comparison of their trends. In order to compare the two graphs, I standardized each data set. Thus each series was expressed in terms of the distance each data point (total for a Congress) was in standard deviations (not absolute numbers) from the mean for the whole series (set at zero on the graph).²⁸¹

Line graphs produced from this data, first of amendments and then of bills and amendments together, standardized for side by side comparison, follow.

281. See RAND R. WILCOX, APPLYING CONTEMPORARY STATISTICAL TECHNIQUES 38 (2003) (describing the process by which to standardize a data set as subtracting the mean and dividing by the standard deviation). The purpose of standardizing a data set is to force the mean to be zero and the standard deviation to be one so that two different data sets can be compared.

FIGURE 7:

Proposed Amendments

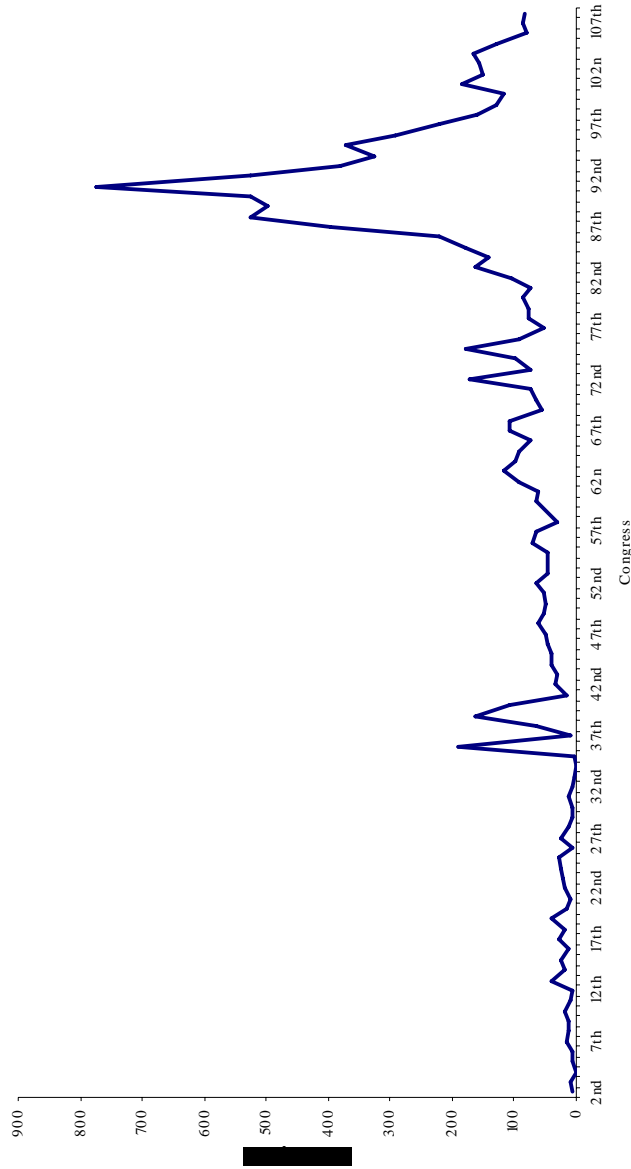


FIGURE 8:

Bills/Proposed Amendments Standardized Series

Looking at the standardized plots together, I noticed not only what visually appeared to be an overall correlation, but also what seemed to be distinct eras of correlation, eras of no correlation, and eras of negative correlation. Those visual observations lead to my numerical analysis to determine correlation, which in turn produced the breakdown into seven historical eras, as described below in Figures 7 and 8.

2. *Correlation analysis*

In looking for greater precision than what could be visually observed in the line graphs, I first calculated the Pearson Correlation Coefficient²⁸² for the entire data set, finding a statistically significant correlation of 0.448. Then I worked to define the seven distinct eras by trial and error. I looked at correlations from the 3rd Congress to the 23rd Congress (sixty-six years) forward from each Congress (in conjunction with graphs of the bill and amendment distributions) to identify periods for testing. I then experimented with the end points to identify the following seven eras. The boundaries of the eras are set to capture maximum significant correlations in certain eras.

Table 4, below, summarizes this. The table includes the correlations for each of the seven eras as well as the statistical significance of each correlation value and the number of data pairs for each era (that is, the number of Congresses covered for each era).²⁸³ Finally, for each era I also checked for correlations between the number of bills proposed in one Congress and the number of amendments proposed in the next, consecutive Congress in order to determine whether amendment activity is a delayed response to bill proposing activity. That is labeled “lag one.” The two instances where the lag one correlations were more significant are also noted in the table.

282. See GARY L. TIETJEN, A TOPICAL DICTIONARY OF STATISTICS 115 (1986) (defining the Pearson’s correlation coefficient as “a measure of the linear relationship between x and y”).

283. See WILCOX, *supra* note 281, at 142 (explaining that the level of significance is the probability of a “Type I error”). A “Type I error” occurs when the hypothesis is rejected under circumstances when in fact the hypothesis was correct. *Id.*

TABLE 4

Correlation Analysis Results

Era	Years	Congresses	#	Bill and Proposed Amendment Tallies, Congress by Congress				[Lagged Relations: Bills in One Congress and Proposed Amendment in the Next Congress]		
				Are they correlated?	Nature of Correlation	Correlation (significance)	Are they correlated?	Nature	Corr. (sign)	
Founding	1791– 1812	2 nd –12 th	11	No	n/a	-0.016 (.962)				
Antebellum	1813– 1858	13 th –35 th	23	Yes (negative)	Moderately Negative	-0.461 (.027)	Yes	Moderately Negative	-0.567 (.005)	
Civil War–Early Reconstruction	1859– 1868	36 th –40 th	5	No	n/a	0.191 (.759)				
Latter Reconstr.– Gilded Age	1869– 1886	41 st –49 th	9	Yes	Highly Positive	0.826 (.006)				
Populist– Progressive	1887– 1916	50 th –64 th	15	No	n/a	0.345 (.207)	Yes	Highly Negative	-0.638 (.011)	
Suffrage– Prohibition	1917– 1930	65 th –71 st	7	Yes (negative)	Highly Negative	-0.850 (.015)				
Modern	1931– 2004	72 nd –108 th	37	Yes	Highly Positive	0.755 (.000)				
ALL ERAS	1791– 2004	2 nd –108 th	106	Yes	Moderately Positive	0.448 (.000)				

As Table 4 records, the correlations shift—non-linearly between low, moderate, and high, as well as between positive and negative, over the seven eras I defined.

Those are the primary numerical characteristics for which I seek possible explanations from the external historical context in the era-by-era analysis that follows in Part IV. That analysis is also informed by two additional quantitative measures: (1) the evolution in the general magnitude of total bills and proposed amendments, on average, from era to era; and (2) the per-Congress rate at which Congress had passed proposed amendments to be sent on for states ratification, measured at the midpoint of each era. Those quantities evolved over the seven eras as follows:

TABLE 5

Additional Data and Calculations

Era	Mean Bills ²⁸⁴ Per:		Mean PAs Per:		Bills/PA Ratio	Amend. Passage Rate	
	Congres s	Member	Congres s	Membe r		Historical	For Era
Founding (1791–1812)	344	2.26	9	0.06	38.2	1.63 ²⁸⁵	1.18 ²⁸⁶
Antebellum (1813–1858)	985	3.56	16	0.06	61.6	0.63 ²⁸⁷	0
Civil War – Early Recon. (1859– 1868)	2216	8	108	0.42	20.5	0.48 ²⁸⁸	0.6
<i>Procedural Revolution: Member bills now relatively freely introduced; sharp increase in introduction rates.</i>							
Latter Recon.– Gilded Age (1869–1886)	8875	23.7	41	0.11	216.5	0.4 ²⁸⁹	0.11
Populist– Progressive (1887– 1916)	25,109	53.42	63	0.13	398.6	0.32 ²⁹⁰	0.13

284. Number of House members for each congress found in Charlie Rose, *History of the United States House of Representatives, 1789-1994* (1994), available at <http://www.clerkweb.house.gov/histrecs/househis/lists/divisionh.htm>. Senate figures are derived from the United States Senate website, *Learning About the Senate, Senate Statistics*, at <http://www.senate.gov/learning/html> (last visited Oct. 22, 2000).

285. By the midpoint of the first era, 1802, Congress was in its eighth incarnation and had passed thirteen amendments: the Bill of Rights; the Twenty-Seventh Amendment (addressing congressional pay, passed 1789 but not ratified until 1992); the Eleventh Amendment (addressing states' immunity, passed 1794, ratified 1798); and a Madisonian proposal on legislative apportionment, passed in 1789 but never ratified.

286. For the amendment passage rate in the Founding era, I am including the activity of the First Congress. And each era's rate is for the entire era, not calculated at the midpoint.

287. By the 24th Congress in 1836, Congress had passed only two more amendments, the Twelfth (election of president and vice president, passed 1803, ratified 1804) and an amendment banning titles of nobility, passed 1810 but never ratified.

288. By the 38th Congress in 1864, Congress had passed just two more, the Corwin Amendment, passed 1861 and never ratified, and the Thirteen Amendment (passed 1864, ratified 1865).

289. By the 45th Congress in 1878, Congress had passed two more amendments, the Fourteenth (passed 1866, ratified 1868) and the Fifteenth (passed 1869, ratified 1870).

290. By the 57th Congress in 1902, Congress had not passed any more amendments.

Suffrage– Prohibition (1917– 1930)	22,009	41.45	82	0.15	268.4	0.34 ²⁹¹	0.43
Modern (1931–2004)	14,913	27.88	218	0.41	68.4	0.32 ²⁹²	0.24

Most striking in Table 5, besides the high numbers of proposed amendments during the Congresses of the Civil War and Modern eras, is the dramatic increase in general legislative bills during the Populist-Progressive era. That, now century-old, phenomenon persists as a peak in legislative activity despite the continued procedural easing that occurred after the peak of activity (where bill introduction that started off as a burdensome task for individual congresspersons became progressively easier) as well as subsequent increases in the size of Congress. Also striking is that, by proportional comparison to general bills, proposed amendments were by far the rarest in the Populist-Progressive era.

The ensuing analysis in this Article (1) compiles the qualitative history of the most constitutionally-significant political events, the most pervasive proposed amendment topics, the evolving character of the general legislative process for each of the seven eras, and indicia of congressional motivation and (2) suggests potential causes for the above-described quantitative variations, era by era, that may be derived from these compiled aspects of external conditions.

V. CONTEXTUAL ANALYSIS OF THE NUMERICAL RESULTS ACROSS THE SEVEN CONGRESSIONAL ERAS

To review, my general model suggests that what has caused the substantial variances in the magnitudes of sponsorship activity in both general and constitutional legislation to be similar to each other is a varying degree of promiscuous careerism (aggregate enthusiasm for careerism that impacts both bill and proposed amendment introductions). That dynamic is at play even though the primary constituent concerns targeted by the

291. Congressional passage picked up with the Progressive era. By the 68th Congress in 1924, Congress had passed five more amendments: (1) the Sixteenth (authorizing income tax, passed 1909, ratified 1913); (2) the Seventeenth (direct election of senators, passed 1911, ratified 1913); (3) the Eighteenth (Prohibition, passed 1917, ratified 1919); (4) the Nineteenth (women's suffrage, passed 1919, ratified 1920); and (5) an the child labor amendment, passed in 1924 but not ratified.

292. By the 90th Congress in 1968, Congress had passed another six: (1) the Twentieth (terms and succession, passed 1932, ratified 1933); (2) the Twenty-First (repealing Prohibition, passed 1933, ratified 1933); (3) the Twenty-Second (limiting the president to two terms, passed 1947, ratified 1951); (4) the Twenty-Third (governing electors from the District of Columbia, passed 1960, ratified 1961); (5) the Twenty-Fourth (barring poll taxes, passed 1962, ratified 1964); and (6) the Twenty-Fifth (presidential succession, passed 1965, ratified 1967).

careerist impulse may be local topics for bills, and national topics for proposed amendments. Again, the correlation through the Congress ending in the year 2004²⁹³ of 0.448 carries a statistical significance level of 0.001 that lends reliability to the conclusion that the correlation reflects a real relationship²⁹⁴ over the full history of Congress. But looking at discrete segments of congressional history also reveals the sporadic presence of a countervailing tendency. That is, we sometimes see the converse of the phenomenon where this promiscuous careerism holds sway to such a degree as to produce a correlation. It reveals specific eras of relative “motivation independence.”

The main work of this section is to take the causation speculation further and consider the contextual reasons why either promiscuous careerism or motivation independence would dominate in each of the eras. I looked for those causes in the contemporary conditions of each era, including the character of the major topics of proposed amendments, the nature of the process of introducing legislation in general, constitutionally significant external political events, and anecdotal evidence of the *Zeitgeist* of amendability in Congress.

The question of whether context explains the dominance of promiscuous careerism or motivation independence, or neither, is made additionally complex for three of the eras. In those, I must also address the causes of two further nuances in the relationship between bill and amendment proposing revealed by the numerical analysis in part IV: (1) negative correlations and (2) lagged correlations. Regarding negative correlations, in the simple causation speculations described in part III, I had conceived of promiscuous careerism as a causative third factor, independent of and driving both bill introduction and amendment proposing in the eras where it is present. But a negative correlation also suggests a causal interrelationship between just bill and amendment proposing, such as trade-off in energy, resources, or motivation between the two spheres of activity.²⁹⁵ Regarding lagged correlations, the numerical results also show that the causal phenomenon sometimes first manifests in bill proposing. That is, the correlation found to exist in some eras between bills in one Congress and proposed amendments in the next Congress—suggesting that bill proposing “leads” amendment proposing.

Putting those predicted and extraordinary numerical findings together, the following era-by-era analysis considers that while the Modern era shows a consistent, long-term positive correlation between levels of bill

293. Leaving out the *sui generis* 1st Congress.

294. Even stronger lag one correlation of 0.466, but less significant at 0.10.

295. In simple terms, a negative correlation between two variables indicates that when one variable is high the other variable is low.

and amendment proposing and the Latter Reconstruction-Gilded Age era exhibits an even stronger correlation, the intervening era of Suffrage-Prohibition strangely shows a very strong negative correlation. The correlation was negative in the Antebellum era as well. That may reflect a time trade off in the Antebellum era due to the procedural difficulty of bill introduction in that early part of congressional history. But in the Suffrage-Prohibition era, bill introduction had become free and easy, suggesting a different cause, perhaps trade off in interest or energy. Moreover, I speculate on that second peculiarity, that in the Antebellum and Populist-Progressive eras the only significant strong correlation is found not between bills and proposed amendment totals in the same Congress but between general bill totals in one Congress and proposed amendment totals in the next Congress. In other words, bill proposing “leads” amendment proposing in those eras. Why? Perhaps there is a longer “gelling period” for amendment proposing in those eras. And because that lagged effect dissipates between the Populist-Progressive and Suffrage-Prohibition eras while most of the significant factors are similar, except for a diminution in reverence for the Constitution, I conclude that reverence for the Constitution was a likely cause of the gelling effect or the lag.

In sum, on the main question of causation for the correlation across all the eras, I tentatively conclude that the independence of amendment-proposing activity from more general careerist motives (promiscuous careerism) has diminished significantly since the late nineteenth century, with some striking, though perhaps historically-explained, anomalies, and has consistently remained very weak in the modern era beginning around 1930. Similarly, the congressional Zeitgeist of amendability, as summarized in Part I.B, also undergoes an interrupted decline across the history of Congress. Those interruptions reflect varying reverence for the amendment process and assessment of the likelihood of success of proposed amendments.

A. *First Era, Founding, 1791 to 1813*²⁹⁶

To some extent, the Founding Era must be treated as *sui generis*. If my theory of causation is correct, then the severe procedural constraints in the House would have precluded a strong correlation at that time. With member introductions so curtailed, the common forces theorized to cause bill and proposed-amendment totals to correlate could not get sufficient traction. That is, there was not sufficient freedom of action on the bill

296. Bills-Prop. Amends. Correlation: -0.087 (effectively zero). Significance: 0.799 (not significant). N: 11. Mean Bills Per Congress/Per Member: 344/2.26. Mean Proposed Amendments/Per Member: 9/0.06. Amendment Passage Rate: Historical, 1.5; For Era - 1.08.

introduction side for the ebbing and flowing of careerist motivations to match what careerism might have been translating to the pace of amendment proposing. On that account, the absence of finding a strong correlation here means my theory of what might cause a correlation survives to be tested in subsequent eras.²⁹⁷

At the same time, though, the numerical result of no appreciable correlation at all,²⁹⁸ not just the absence of a strong one, may say more than just that my basic theory is not defeated. That is because, the potential force of the careerism cause I have theorized is not eliminated by the procedural constraints, only weakened. First, while member introduction of bills in the House was barred, it was allowed and being practiced in the Senate. True, that is not enough to facilitate the appearance of a careerism-driven correlation in the total numbers on its own, since, in this era, less than ten percent of the total bill output of Congress came from members.²⁹⁹ So the more important contribution to careerism being able to drive bill introduction at least to some degree is that House members could exert their careerist motives through the committees. That is, though it is a less-direct conduit for individual careerism than are individual bills, careerism could impact aggregate numbers through committee bills in the way indicated by the right-hand, primary path of Figure Five: “to gain credit for supporting committing members for national status.”

Thus, since it seems that careerist motivations, to the extent they existed, could have produced at least a moderate correlation in the Founding era, the absence of any correlation at least supports the thesis that promiscuous careerism had not arisen at all or at least was substantially outweighed by motivation independence at this time.

Indeed, from the combination of (1) the absence of any correlation and (2) the historical context, contemporary legislative and political conditions and expressed views of the viability of the Article V process, set forth below, I tentatively conclude that at least a moderate degree of motivation independence, evidencing a serious-mindedness about constitutional amendments, prevailed at this time.

First, the absence of correlation could not result merely from a lack of issues to grandstand about. Rather, the Founding era saw numerous

297. Since the presence of a strong correlation would suggest a different cause than the one I have hypothesized.

298. Specifically, since the negligible correlation coefficient of -0.087 is not statistically significant, the correlation is effectively zero. That is not surprising given the small number of Congresses examined (eleven).

299. See Cooper & Rybicki, *supra* note 192, at 187 (providing data in Table 10.2 that, as late as 1831, when member bills were on the rise, they comprised only ten percent of the total number of bills). That is a speculation warranted by Cooper & Rybicki's data that, as late as 1831, when member bills were on the rise, they comprised only ten percent of the total.

significant constitutional and political events in a short span. Those include, for example, *Chisolm v. Georgia*;³⁰⁰ the Alien & Sedition Acts of 1798;³⁰¹ congressional control passing from the Federalists to Jefferson's Democratic Republicans; *Marbury v. Madison*;³⁰² Jefferson imposing an embargo to avoid war;³⁰³ and the War of 1812 itself. Though the potential for local-constituency-pleasing on some of those issues may be debatable, its absence would not be determinative here; any careerist impulses at this stage were, in the aggregate, directed more towards general and national political positions than towards congressional reelection.

It is true that, instead of credit-seeking topics related to those ripe political conditions, the major categories of proposed amendments identified by Ames and Vile are exclusively constitutional subjects not amenable to general legislation.³⁰⁴ Those significant categories of proposed amendment interest included: (1) judicial jurisdiction, (2) legislative terms, (3) selection of the executive, and (4) titles of nobility.³⁰⁵ Notably absent from the prominent proposed amendment categories are proposals related to either the War of 1812 or the Alien and Sedition Acts; both issues were primary focuses of general legislative activity and seemingly ready targets for grandstanding constitutional legislation.

Although we may consider the major categories of proposed amendment topics for each era to be presumptive evidence of major categories of amendment need, they only inform and do not determine the analysis. That is, to the extent that the major categories of proposed amendment topics were topics that would not fit well into normal legislation, the opportunity for careerism to manifest in correlation between the aggregate bill and proposed amendment numbers is obviously diminished. However, it does not preclude that phenomenon from occurring. First, the accumulation of a

300. 2 U.S. (2 Dall.) 419 (1793) (construing the Supreme Court's jurisdiction to hear suits brought against states without the states' consent), superseded by constitutional amendment, U.S. CONST. amend. XI.

301. 1 Stat. 570 (1798) ("Alien Act") (authorizing the President of the United States to deport any illegal immigrant if the President considers the immigrant dangerous, even if the country was in a time of peace); 1 Stat. 596 (1798) ("Sedition Act") (making it a crime to publish "false, scandalous, and malicious writing" regarding the government or government officials).

302. 5 U.S. (1 Cranch) 137 (1803) (establishing judicial review of the constitutionality of acts of other branches).

303. See Robert F. Turner, *State Responsibility and the War on Terror: The Legacy of Thomas Jefferson and the Barbary Pirates*, 4 CHI. J. INT'L L. 121, 126-27 (2003) (discussing Jefferson's belief that an embargo could be used to avoid war).

304. The Eleventh Amendment, overturning *Chisholm*, does not appear on the list of frequent proposals probably because Congress passed it the very year after the offensive Supreme Court decision.

305. See VILE, *supra* note 55, at 541-42 (listing, by year, the most frequent proposals introduced in Congress).

sufficient number of minor categories of amendment-need that, by contrast, are also bill-amenable may be sufficient. Second, sufficient fodder for promiscuous careerists may also exist among the categories of topics of plausible normal legislation in the form of topics also amenable to amendments. As noted above, that seems to hold for the Founding era.

While Kyvig speaks to this era, suggesting that the germ of grandstanding was present in the latter part of the Founding era, his evidence is weak. He observes:

The fairly even balance between Federalists and Jeffersonian Republicans in Congress and state legislative majorities made it unlikely that any meaningful amendment could be adopted. Yet to those people who wanted to make the strongest possible declaration of public policy, calling for alteration of the Constitution seemed an appropriate gesture³⁰⁶

Kyvig's evidence is that the eight amendments proposed by the "Hartsfield Federalists" in 1812 to "restore national harmony" following the declaration of war against Britain lacked a serious chance of success.³⁰⁷ But the Hartsfield Federalists' own apprehension of their impoverished chances of success is dubious, given the hubris with which this generation had sought change at the Founding itself.³⁰⁸ And while Kyvig also notes that the initial feeling at the Founding was that the Bill of Rights had taken care of all the problems,³⁰⁹ the observation directly accounts only for the low numbers of amendment proposals and does not necessarily establish that those proposals had to have been for credit-seeking purposes only.

In sum, it seems likely that the great majority of both bills and proposed amendments in the Founding era were proposed for policy purist ends and not merely offered for personal credit, due to the difficulty of bill introduction and a serious and optimistic attitude towards the amending process. Though the credit claiming motivation may have begun germinating at the outset, it appears to have been far too early in the history of Congress for it to have blossomed. That is, it is likely that the era was dominated by motivation independence.

Moreover, the nascent *Zeitgeist* of amendability likely was one of optimistic reverence. In other words, a relatively high general sense of the likelihood of success of amendments proposed along with a prudential reverence towards the Constitutional and amendment process tempered the

306. KYVIG, *supra* note 41, at 119.

307. *Id.* at 120-21.

308. *See id.* at 8 (elaborating on the debates taking place around the time of the Founding).

309. *Id.* at 85-88 (noting the perception that the Bill of Rights was an example of how the amendability of the Constitution provided a method to define, empower and control republican government).

frequency of amendment proposing. The extreme cynicism towards likelihood of success in the constitutional amendment process that Jefferson later expressed³¹⁰ had not taken hold (though it likely began to seep in towards the end of the era). Rather, the Bill of Rights and two additional proposed amendments cleared the congressional hurdle by 1794, one of which had been ratified by the states in 1798. Perhaps the first germ of cynicism about the process as a whole had been planted by the failure of the states to ratify Congress's 1789 proposal that would later become the Twenty-seventh Amendment.³¹¹ But that failure likely would have been attributed more to the peculiar substance of the proposed amendment rather than the insurmountability of the congressional gate-keeping stage. Given that relative optimism about the likelihood of success, then, the relatively low level of proposed amendments offered, nine per Congress and 0.06 per member per Congress (the lowest of all seven eras), suggests, under the dynamic I posit in Table 2, a prudential reverence towards the exceptional character of the amendment process.

*B. Second Era, Antebellum, 1813 to 1858*³¹²

In contrast to the Founding, the next era, Antebellum (1813 to 1858), did yield a substantial, significant correlation, albeit a negative one. Moreover, the negative correlation was even stronger and more significant at lag one (between bill totals in one Congress and proposed amendment totals in *the next* Congress).³¹³

While there are no obvious reasons, a hypothesis for the correlation being negative is that (1) there was no force tending towards positive correlation because promiscuous careerism, minimal at best in the Founding era, still had not attained prominence in this Antebellum era; and (2) the negative aspect of the correlation arose because the energy or political capital required for bill introduction by members of Congress made focusing on general legislation versus amendment proposing an either/or activity.

First, the absence of a positive correlation is consistent with the character

310. See Letter to George Hay, *supra* note 2 (speculating that the increase in the number of states in the Union will curtail future success of constitutional amendments).

311. See KYVIG, *supra* note 41, at 461 (discussing the Twenty-Seventh Amendment's original proposal in 1789 and its subsequent history and ratification).

312. Bills-Prop. Amends. Correlation: -0.464 (moderate). Significance: 0.026 (significant). N: 23. Mean Bills Per Congress/Per Member: 985/3.56. Mean Proposed Amendments/Per Member: 16/0.06. Amendment Passage Rate: Historical, 0.58; For Era, 0. Moreover, the lag one correlation is a strong -.591, with a significance level of 0.003.

313. Because the period encompassed twenty-three Congresses, the greater statistical significance over the Founding era, which was much shorter, is not surprising. What holds some surprise, however, are both that the correlation is negative and that it is an even higher negative correlation of 0.591 at lag one.

of the major categories of proposed amendments in this era. None of the major categories of proposed amendments seem very susceptible to contemporaneous non-constitutional legislation efforts. The Antebellum era roughly corresponds to Ames's second period which featured: "General Alterations," featuring proposals directed to the election, competence, terms, and duties of the members of the legislative, executive, and judicial branches, abolition, war powers, and executive powers.³¹⁴ Ames finds very little individual-rights proposals because the Bill of Rights, as Kyvig agrees, had allayed recent concerns.³¹⁵

More importantly, evidence that the absence of a correlation corresponds to a lack of dominant promiscuous careerism may be found in the series of constitutionally significant historical events that frame this era: (1) *McCulloch v. Maryland*,³¹⁶ upholding congressional power to create U.S. banks through a broad interpretation of Congress's Necessary and Proper Powers while finding a corresponding substantial limit on the states' power to interfere with such federal endeavors (through taxation, in that case); (2) the Missouri Compromise of 1820³¹⁷, establishing Maine as a free and Missouri as a slave state and setting the 36'30" parallel as the demarcation for the slave status of future states; (3) the emergence of the Monroe Doctrine;³¹⁸ (4) *Barron v. Mayor & City Council of Baltimore*,³¹⁹ holding that the Bill of Rights did not apply to states; (5) *Luther v. Borden*,³²⁰ holding the resolution of a military struggle for control of Rhode Island to be a political question outside the competence of judicial review; (6) the Compromise of 1850,³²¹ a series of five bills admitting California as free,

314. See HERMAN V. AMES, *THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY* 19-22 (Washington: Government Printing Office, 1897) (describing the proposed amendments to the Constitution between 1804 and 1860).

315. Though Ames emphasized that this era, more than the other three in the Constitution's first hundred years, was marked by conflict between broad constructionists and strict constructionists in Constitutional interpretation. AMES, *supra* note 314, at 20, 22.

316. 17 U.S. (4 Wheat.) 316 (1819).

317. See 3 Stat. 545 (1820) (admitting Missouri into the Union as a slave state, admitting Maine into the Union as a non-slave state, and prohibiting slavery in certain territories); see also Robert J. Kaczorowski, *Popular Constitutionalism Versus Justice in Plaincloths: Reflections From History*, 73 *FORDHAM L. REV.* 1415, 1425 n.93 (2005) (noting that the Missouri Compromise was repealed by Congress and declared unconstitutional in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)).

318. 41 *ANNALS OF CONG.* 12-24 (1823) (providing President Monroe's annual address to Congress which outlined the United State's interest in the Western Hemisphere and warned European nations to stop colonizing in the area). This policy later became known as the Monroe Doctrine.

319. 32 U.S. (7 Pet.) 243 (1833).

320. 48 U.S. (7 How.) 1 (1849).

321. See W. Sherman Rogers, *The Black Quest for Economic Liberty: Legal, Historical, and Related Considerations*, 48 *HOW. L.J.* 1, 33 (2004) ("The Compromise of 1850 provided that the United States would fulfill the following requests: admit California as a free state; organize the rest of the territories without restrictions on slavery; outlaw the slave

establishing the rest of the Mexican session as territories of Utah and New Mexico without restrictions on slavery status, settling a border dispute between Texas and New Mexico, abolishing slavery in the District of Columbia, and adding teeth to the Fugitive Slave Act;³²² (7) the Kansas-Nebraska Act of 1854,³²³ allowing Kansas and Nebraska to each decide the slavery question for itself; and (8) *Dred Scott v. Sandford*,³²⁴ declaring blacks to be barred from national citizenship and finding the Missouri Compromise to be unconstitutional. Most of these events provided a sufficient base for at least plausible legislation in both normal and constitutional spheres.

The second factor contributing to the negative correlation was the high costs of individual legislation rising from the continuing difficulty and confusion surrounding the bill introduction process. While senators had achieved free introduction, the House was still in the latter half of Cooper and Young's Stage I (which ends in 1821),³²⁵ with little to no bill introduction by members of Congress, and then in Stage II's "Conflict and Confusion over the Introduction of Business."³²⁶ How the difficulty of normal legislation related to the activity level for the comparatively unencumbered joint resolution process for amendments, of course, is not clear. I speculate that the marshalling of resources to bring general legislation was so burdensome that the degree to which it was employed produced a deficit in the general resources of motivation predicate to initiate legislation in the constitutional arena.³²⁷

trade in the Capitol Washington, D.C. (but not slavery itself); and enact a tougher Fugitive Slave Act.").

322. See Kaczorowski, *supra* note 317, at 1426 (explaining that the Fugitive Slave Act of 1793 was enacted to enforce the constitutional right of slave-owners to recover their runaway slaves). The Fugitive Slave Act was strengthened in 1850 after Congress received pressure from southerners. The Fugitive Slave Acts were later repealed by Congress during the Civil War. *Id.* at 1428.

323. See 10 Stat. 277 (1854) (organizing the territories of Nebraska and Kansas and allowing territories west of the Missouri to make their own determination regarding the legality of slavery).

324. 60 U.S. (19 How.) 393 (1857). This case is commonly referred to as the "Dred Scott" case.

325. Cooper & Young, *supra* note 195, at 69.

326. Specifically, the Antebellum period encompasses the first two phases in Stage II—Phase One (1821-1837)—and most of Phase Two (1837-1861). *Id.* at 71, 75. Cooper and Young note that Stage I saw a slow transition from an exclusive committee of the whole method of bill introduction to introduction by standing committees as well. *Id.* at 69-71. They then label Phase One of Stage II as "Conflict and Confusion over the Introduction of Business" because the committee referral process and committee system were not well settled and confusion and discord reigned. *Id.* at 71-72. Phase Two, beginning in 1837, offered hope for clarity, with the rule changes that made individual member's introduction of bills on leave a realistic option. *Id.* at 75-76. However, "by the late 1850s the conduct of business in the House had become chaotic and a source of severe frustrations for members." *Id.* at 78.

327. A more-detailed study, separating Senate bill and amendment totals from House bill and amendment totals, however, might prove otherwise.

More surprising and mysterious than the negative correlation, though, is that the negative correlation is stronger and more significant at lag one. Why does there appear to be a stronger relationship between the number of bills proposed in one Congress and the number of amendments proposed in the *next* Congress?

This lagged relationship may provide a more specific understanding of the dynamics around what I just hypothesized to be the cause of the negative correlation. Bill activity preceding amendment activity suggests that if there is a causal relationship between the two, causation runs from bill proposing to amendment proposing, and not vice versa. It may be that the one-congress delay is caused by a larger run up time or “gelling period” for amendment proposing. That is, if bill proposing saps energy away from amendment proposing to produce the negative correlation, the effect is more strongly seen in the subsequent Congress. Another cause might be reverence for the Constitution and amendment process.

Finally, regarding the *Zeitgeist* of amendability, if this era truly falls in the bottom sector of Table 2, due to it truly being dominated by motivation independence, as the correlation analysis seems to suggest, and if the perceived likelihood of amendment success is lower in this era than in the Founding era, then we might expect to see fewer amendment proposals here. But we do not. Rather, the mean proposed amendments per member remain the same as that in the Founding (0.6), and the mean proposed amendments per Congress nearly double (from nine to sixteen).³²⁸ That suggests a combination of two things: (1) at least the germ of promiscuous careerism is present (which, though still not strong enough to manifest in the correlation analysis, at least is more prominent than in the Founding) and (2) on a broad aggregate level, the view of the likelihood of amendment success is not quite as dim as anecdotal evidence suggests. To the extent there remains an aggregate view that success is still reasonably likely, then, by Table 2, a prudential view of the process tempering the number of proposals does not dominate to the same extent present in the Founding era. (On the other hand, the lagged relationship in the negative correlation does suggest some reverence.) In short, compared to the Founding era, the *Zeitgeist* in the Antebellum seems to have become somewhat less optimistic and somewhat less reverent.

A concluding caveat on causation: the analysis for this era must recognize that the closer we moved towards the Civil War, the deeper the sectional divisions grew and the more pervasive sectional differences became in the dominant political issues of the day.³²⁹ Under those

328. Tbl.5, *supra* Part IV.B.2.

329. See Lincoln L. Davies, *Lessons For an Endangered Movement: What a Historical Juxtaposition of the Legal Response to Civil Rights and Environmentalism Has to Teach*

circumstances, especially with the carefully maintained near fifty-fifty split in the Senate between slave and free states, one would assume the real likelihood of success on any amendment proposal to be increasingly low. That is, in fact, reflected in the near vanishing of amendment proposing activity in the last decade before the Civil War.³³⁰ The 32nd to 35th Congresses, 1851-1858, introduced just twelve amendment proposals. That contrasts starkly with the 36th Congress, which is the beginning of the next era, and had 191 proposed constitutional amendments.

*C. Third Era, Civil War–Early Reconstruction, 1859 to 1868*³³¹

With this era's short duration and disrupted Congress, its lack of correlation may be *sui generis*. It is either so unique a political era that amendability patterns are suspended or so short an era that the small sample size cannot yield a meaningful statistic.

In contrast to the ambiguity of this era within the history of amendability, one definite and enduring feature of congressional activity emerges at this time: the bill-proposing process is finally clarified at the beginning of Cooper and Young's Phase Three in 1861.³³² The newly clarified bill-proposing process inaugurates a steady rise in bill-proposing all the way through the extreme jump in activity at the end of the nineteenth and beginning of the twentieth centuries that defines the Populist–Progressive era.

For the amendment-proposing ledger, there is a sharp increase in amendment proposing activity just before, during, and just after the Civil War. Ames recognizes that, in this historical era marked by the last days of slavery, extreme North-South conflict and concern with state sovereignty, federalism, and nationhood, the civil war, emancipation, and the beginning of reconstruction, the once-ignored legal status of individuals became extremely important.³³³ Accordingly, amendment proposals during this era were dominated by issues of slavery, the executive, apportionment, suffrage, and equal rights—culminating with the first two Civil War amendments (Thirteenth Amendment, proposed 1864, ratified 1865;

Environmentalists Today, 31 ENVTL. L. 229, 251 (2001) (noting the increase in tension and division among the country as the Union moved closer to the Civil War).

330. See KYVIG, *supra* note 41, at 134 (“Amendment declined during the antebellum era because most other problems could be dealt with by the lesser means of ordinary legislation, executive determination, or judicial review; the truly monumental constitutional problem of the age could be settled only by revolution.”).

331. Bills-Prop. Amends. Correlation: 0.191 (effectively zero). Significance: 0.759 (not significant). N: 5. Mean Bills Per Congress/Per Member: 2216/8. Mean Proposed Amendments/Per Member: 108/0.42. Amendment Passage Rate: Historical, 0.42; For Era, 0.8.

332. Cooper & Young, *supra* note 195, at 83-91.

333. See AMES, *supra* note 314, at 23 (noting that after 1864 Congress's focus shifted from war measures to the amendability of the Constitution).

Fourteenth Amendment, proposed 1866, ratified 1868).³³⁴

Given the volatility of Congress as a functioning institution at this time and the short duration marked by this episode in the numerical results, only the roughest speculations about amendability can be made. On one hand, the falling of procedural impediments to grandstanding and the absence of a correlation between the numbers of proposed amendments and non-constitutional bills might lead to the conclusion that motivation independence continued to dominate in this era over any tendency towards promiscuous careerism. On the other hand, the lack of correlation may simply be a result of the small sample size.

The exceptionalism of the era also obscures the speculations on the *Zeitgeist* of amendability. For instance, Kyvig notes that at least one historian has asserted that the 191 proposal increase in the 36th Congress represented grandstanding rather than serious attempts to amend,³³⁵ and has concluded that there was a near impossibility of amendment during that timeframe.³³⁶ Kyvig, on the other hand, disputes that assessment by pointing to the fact that, during the Articles of Confederation era, all but one state had allowed amendments to the Constitution in order to rescue the Union.³³⁷ The central impediment to understanding the era lies in distinguishing the North-South divide from the general amendability *Zeitgeist*. But it makes sense to do so since, as set forth below, with the close of Reconstruction, Congress as an institution reverts at least partially to the pre-war evolutionary path of the character of the legislative process.

*D. Fourth Era, Latter Reconstruction–Gilded Age, 1869 to 1886*³³⁸

The numbers for the Latter Reconstruction–Gilded Age era show a substantial shift from those of the Civil War–Early Reconstruction and prior eras. A very strong and statistically significant 0.826 correlation establishes the relationship between bill and amendment proposing that, according to my working model, shows that promiscuous careerism predominated. In sum, the dissipation of the conflict of the era that preceded the Civil War and streamlining of procedures combined to usher

334. See VILE, *supra* note 55, at 544-45 (providing a list of the most frequent proposals introduced in Congress).

335. See KYVIG, *supra* note 41, at 152 (presenting the argument that supporters of constitutional reform “were simply going through motions they knew to be hopeless”).

336. *Id.*; see also DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 547 (1978) (explaining the many hurdles that would have to be overcome in order for a constitutional amendment to take hold).

337. KYVIG, *supra* note 41, at 152. Thus, even if the success of a constitutional amendment would require near unanimity among the states, that level of agreement had been reached in the past and could potentially be reached again.

338. Bills-Prop. Amends. Correlation: 0.826 (high). Significance: 0.006 (significant). N: 9. Mean Bills Per Congress/Per Member: 8875/23.7. Mean Proposed Amendments/Per Member: 41/0.11. Amendment Passage Rate: Historical, 0.4; For Era, 0.

in an era where congresspersons were free to engage in credit seeking through both bill introduction and amendment proposing. The fact that levels of activity in each of these categories rose and fell in such substantial accord strongly suggests that credit-seeking, rather than conviction, now predominated in the proposing of amendments.

Promiscuous careerism's first significant appearance in this Latter Reconstruction–Gilded Age era is consistent with two factors external to the numerical analysis. First, the impediments to bill introduction are finally cleared³³⁹ and congressional activity has moved sufficiently beyond the immediate institutional anomaly of the Civil War period. Second, the primary categories of proposed amendments in the Latter Reconstruction–Gilded Age era appear to exhibit a high degree of topic overlap, making ideal conditions in which promiscuous careerism may operate. Ames characterized roughly this same time span, 1870–1889, as comprising two classes (1) form of government and (2) governmental powers.³⁴⁰ More specific is Vile's list of the most frequent categories of amendment proposals during this time, which included: (1) suffrage; (2) executive eligibility, terms, choice; (3) legislative compensation; (4) direct election of senators; (5) war claims prohibition; (6) Prohibition; and (7) the item veto.³⁴¹ Of paramount significance is that most of the topics easily could have been subject to normal legislation as well. All but two of the general areas embraced by those topics (presidential and senatorial elections) invoked constituent interests or policy goals also amenable to bills.

Unlike the prior three periods, the numerical results for this era do not require clarification from the historical context. The reasonable assumptions underlying my working model do not lead to any likely causes for a substantial correlation other than promiscuous careerism. That is not to say, however, that in eras that lack the correlation, such as the prior three, the converse is proven. I do not presume the absence of promiscuous careerism from the absence of the correlation. While such is one possibility, another hypothesis was that promiscuous careerism dominated but its representation in the numerical analysis was dampened by other factors. That was a primary issue for which I examined contextual factors

339. This era spans the majority of Cooper and Young's Phase Three of bill introduction with its improved clarity, and the first half of Phase Four, where member bills dominated. Cooper & Young, *supra* note 195, at 75, 83. Rule changes in 1867 and 1872 led to improved clarity and member bills on leave increased substantially. *Id.* at 83–86. In fact “[b]y the late 1870s the granting of leave had long been automatic and the requirement for notice generally ignored.” *Id.* at 87. Then with Phase Four, beginning in 1881, “the dominance of member bills was further consolidated” and “the modern procedure for bill introduction” emerged. *Id.* at 91.

340. AMES, *supra* note 45, at 24.

341. See VILE, *supra* note 55, at 545–46 (listing the most frequently proposed constitutional amendments).

in the prior three eras.

In the present era, where there is the correlation, I test the promiscuous careerism conclusion against the contextual data only for any reason to disbelieve it. Here, there is none. The prominent events in constitutional history included: Johnson's impeachment in 1868,³⁴² the end of Reconstruction in 1877,³⁴³ the emergence of the National American Woman Suffrage Association,³⁴⁴ the emergence of the national Prohibition party,³⁴⁵ the Slaughterhouse Cases (1873) and Civil Rights Cases (1883),³⁴⁶ and the emergence of the Woman's Christian Temperance Union.³⁴⁷ Those events, independently or together, are not sufficiently skewed towards only constitutional or legislative action to preclude promiscuous careerism from dominating the flow of legislative activity.

Also, an expansion of the perceived scope of normal legislation paved the way for unrestricted promiscuous careerism to manifest through correlation in bill and proposed amendment totals. As Kyvig notes, the Civil War initiated a change in prevailing constitutionalism.³⁴⁸ Instead of whether the Constitution specifically authorized an action, the question became whether its implied powers were sufficiently broad to condone it.³⁴⁹

342. See generally CHESTER G. HEARN, *THE IMPEACHMENT OF ANDREW JOHNSON* (2000) (providing background information on the circumstances surrounding Johnson's impeachment).

343. ROBERT M. GOLDMAN, *RECONSTRUCTION AND BLACK SUFFRAGE: LOSING THE VOTE IN REESE AND CRUIKSHANK* 117 (2001).

344. See JANE HANNAM, MITZI AUCHTERLONIE & KATHERINE HOLDEN, *INTERNATIONAL ENCYCLOPEDIA OF WOMEN'S SUFFRAGE 200-01* (2000) (explaining the formation of the Association in 1890 via the merger of the National Woman Suffrage Association and the American Woman Suffrage Association).

345. See ERNEST H. CHERRINGTON, *THE EVOLUTION OF PROHIBITION IN THE UNITED STATES OF AMERICA: A CHRONOLOGICAL HISTORY OF THE LIQUOR PROBLEM AND THE TEMPERANCE REFORM IN THE UNITED STATES FROM THE EARLIEST SETTLEMENTS TO THE CONSUMMATION OF NATIONAL PROHIBITION* 167 (Patterson Smith 1969) (1920) (noting that the national Prohibition party "pioneered the path of political activity for the Prohibition movement" and laid the foundation for the eventual passage of the Prohibition Amendment). *But see* DAVID E. KYVIG, *REPEALING NATIONAL PROHIBITION* 46 (2000) (arguing that the Anti-Saloon League was a more effective advocate than the Prohibition Party).

346. See *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding that the Fourteenth Amendment did not grant Congress the ability to prohibit racial discrimination by private entities, only state and local actors); *Slaughterhouse Cases*, 83 U.S. 36 (1873) (interpreting the Fourteenth Amendment narrowly so that its provisions could not be held to extend to further limit states' rights to legislate its citizens beyond the prohibition of slavery).

347. See RUTH BORDIN, *WOMAN AND TEMPERANCE: THE QUEST FOR POWER AND LIBERTY, 1873-1900* 10-11 (1981) (discussing several factors contributing to the development of the Woman's Christian Temperance Union including: the emergence of an upper and middle-class in America, the progress of industrialization leading to middle-class women devoting themselves to homemaking as a full-time endeavor, the fall of the birthrate in the nineteenth century leading to the increase of leisure time for women to devote to activism, the influx of immigrants to provide childcare and other domestic services, and the increase in educated women).

348. KYVIG, *supra* note 41, at 154.

349. *Id.*

In addition to being continuing grist for the proposed amendment mill, many government legislative objects previously thought to be beyond constitutional powers and thus requiring amendment could now be seen as potentially subject to general legislation within the broadly construed implied powers granted by the Constitution.³⁵⁰ At the same time, Kyvig muses that while Antebellum amendment proposing mostly focused on limiting the federal government, the Civil War initiated a shift toward amendment proposals that sought to broaden federal power.³⁵¹

Turning to the *Zeitgeist* of amendability, considering all the relevant indicators together confirms a lack of reverence for the process (axiomatic to an era truly dominated by promiscuous careerism) and pessimism towards the likelihood of success of proposed amendments. If this era truly ushers in strong dominance of promiscuous careerism in Congress, then a perceived low likelihood of success would not have seriously deterred amendment proposing. Indeed, compared to the Antebellum period, the mean proposed amendments per Congress for this era increased by 256% and the rate per member nearly doubled.³⁵² That, despite Ames's observation that the proposal faced a "prospect of almost certain failure"³⁵³ (which Kyvig agrees the politicians believed though he disputes whether it was true). The amendment introduction process, Ames notes, merely reflected "waves of popular feeling" in the same manner as general legislation.³⁵⁴

*E. Fifth Era, Populist–Progressive, 1887 to 1916*³⁵⁵

The prior era, Latter Reconstruction–Gilded Age, appears to have seen the emergence of promiscuous careerism as a major factor driving amendment proposing rates. For the Populist–Progressive era, however, a substantial shift in the numerical analysis suggests a suspension of the prominence of promiscuous careerism as a motivation underlying amendment proposing. Here, the numbers reflect an insignificant (effectively zero) 0.345 direct correlation and a significant negative correlation of 0.638 at lag one.

The analysis of whether promiscuous careerism has gone into remission must begin with the huge spike in the Populist–Progressive era of the

350. *Id.* at 154–55.

351. *Id.*

352. Tbl. 5, *supra* Part IV.B.2.

353. AMES, *supra* note 45, at 25.

354. *Id.*

355. Bills–Prop. Amends. Correlation: 0.345 (effectively zero). Significance: 0.207 (not significant). N: 15. Mean Bills Per Congress/Per Member: 25,109/53.42. Mean Proposed Amendments/Per Member: 63/0.13. Amendment Passage Rate: Historical, 0.32; For Era, 0.13. Moreover, the lag 1 correlation is a high -0.638, with a significance level of 0.001.

numbers of bills being proposed: 25,109 per Congress (53.42 per member) on average. Even factoring in the addition of new members of Congress, that is more than two and a half times the rate of the prior era, Latter Reconstruction-Gilded Age, and twenty-times the rate in the Antebellum Era.

That raises the question of why, with such a dramatic increase in the volume of legislative activity, the strong and significant correlation demonstrated in the Latter Reconstruction-Gilded Age Era disappears. Moreover, why is it instead replaced by a significant negative correlation at lag one?

The potential cause I suggested for the negative correlation at lag one in the Antebellum era seems explicative of only half the story in this era. While there may also be a “gelling time” for amendments to explain the lag,³⁵⁶ the explanation for the negative aspect of the correlation in the Antebellum era, time, energy, or political capital trade off primarily due to the procedural difficulties faced by individual legislators, does not hold in this new era of unfettered bill introduction.³⁵⁷

But while there may no longer have been impediments to introducing legislation in general, it may be that the focus of legislative energy was again an either/or proposition in the Populist–Progressive era. The nature of the amendment proposing interest at this time supports that hypothesis. Of the six main categories of significant proposals Vile³⁵⁸ lists—direct election of senators, income tax, presidential term length and limits, uniform laws for marriage and divorce, women’s suffrage, and dates of congressional sessions—four are susceptible only to constitutional, rather than general, legislation.³⁵⁹ It suggests that motivation independence dominated over promiscuous careerism.

In addition to the subject matter of the amendment proposals themselves, the major historical events of this period suggests a cause for independent attention to constitutional legislation: the Centennial of Constitution; the Populist and Progressive movements; the *Pollock* decision in 1895³⁶⁰ outlawing income tax; the Spanish-American War; the proposal of what would become the Sixteenth Amendment in 1909 and its ratification in

356. But even if that explanation were so, it only raises the question of why that delay only appears in the Antebellum and Populist-Progressive eras.

357. There also is a small possibility that this phenomenon is a fluke: the significance level of our negative correlation (0.011) is not nearly as good as in the prior error (0.006), so we cannot be as confident that -0.638 gestures at a true relationship. At minimum, it is clear that there has been shift away from the very strong positive correlation we saw in that Latter Reconstruction era.

358. Now in the second century of the Constitution, we are beyond Ames.

359. VILE, *supra*, note 55, at 546-49.

360. *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895).

1913,³⁶¹ reinstating the income tax; and the Seventeenth Amendment,³⁶² bringing direct election of senators, also ratified in 1913.³⁶³

Turning to the amendability Zeitgeist, those factors arguing for seriousness of congressional amendment proposing must be reconciled with Kyvig's assessment that the era exhibited an unprecedented pessimism in popular perception of amendability. Kyvig cites the turn of the century as the high-point in amendability pessimism, noting one scholar's assertion that "[a] constitutional amendment is so remote a possibility as scarcely to be worth consideration."³⁶⁴ This is not a surprising sentiment given that a constitutional amendment had not occurred by the normal process since 1804. That feeling continued into the second decade of the twentieth century when, in 1912, the Progressive Party's platform called for an Article V change to approve amendments by a popular majority of the states.³⁶⁵ Not until 1913, with amendments authorizing the income tax (Sixteenth)³⁶⁶ and direct election of senators (Seventeenth),³⁶⁷ did perceptions begin to change. In fact, the Sixteenth Amendment was proposed by wealthy, conservative Senate Republican leader Nelson Aldrich (as part of a strategy for achieving other legislative ends) because he was so sure that it could not be ratified.³⁶⁸

My group-psychological model of Table 2³⁶⁹ dictates that if (1) I am correct to conclude the era is dominated by motivation independence with regard to the relationship between the intensities of normal and constitutional legislation and (2) Kyvig is correct that the perception of likelihood of success reached its lowest, then there should be a relatively low number of amendments proposed at this time. In fact, the data bear that conclusion out. Despite the three-fold spike in bill introduction that marks the era, amendment proposing increases only by eighteen percent per member, allowing the proposed amendments-to-bills ratio to reach its lowest by far in the history of the U.S. Congress.³⁷⁰

While my Table 2 model does not completely determine the Zeitgeist

361. U.S. CONST. amend. XVI.

362. U.S. CONST. amend. XVII.

363. *Id.*

364. Arthur W. Machen, Jr., *The Elasticity of the Constitution*, 14 HARV. L. REV. 200, 209 (1900).

365. See KYVIG, *supra* note 41, at 193 (pointing out that the Progressive Party platform offered a more simplistic solution to Article V reform than those proposed by various congressmen).

366. U.S. CONST. amend. XVI.

367. U.S. CONST. amend. XVII.

368. KYVIG, *supra* note 41, at 202.

369. Tbl.2, *supra* Section III.B.

370. See tbl. 5, *supra* Section IV.B.2. The Bills/PA Ratio was 398.6. The second closest in size, Suffrage-Prohibition, era is 268.4. Those numbers are striking compared to those for the four eras that preceded this one, 38.2, 61.6, 20.5, and 216.5, respectively, and for the Modern era 67.4.

when motivation independence dominates and likelihood of success is low, Kyvig offers external evidence that enhances the picture. He argues that, at least during times spanning the first half of my Populist–Progressive era, there was a substantial constitutional reverence stemming both from the feeling that the Civil War Amendments had fixed what was wrong and from accolades for the Constitution associated with its centennial.³⁷¹ It is consistent with that assessment that proposed amendments were indeed rare when compared with bill proposing rates, which outnumbered proposed amendments nearly four hundred to one; a ratio radically higher than in all other eras.³⁷² Also consistent with that is the one-Congress lag for the negative correlation.

In sum, it seems this era was marked by an intensely pessimistic view of success but reverential view of the process, independence, and serious-mindedness of legislative action.

*F. Sixth Era, Suffrage–Prohibition, 1917 to 1930*³⁷³

In the preceding Populist–Progressive era, a slip in the strength of a positive correlation (from its predecessor era) suggested an increase in motivation independence and, by extension, a subsiding of promiscuous careerism;³⁷⁴ the Suffrage-Prohibition Era, from 1917 to 1930, seems to mark an even stronger shift in that direction.

The Suffrage-Prohibition era exhibits stronger, less ambiguous quantitative indicators: a very strong negative correlation of 0.850 appears and, unlike the Populist-Progressive era, there is no corresponding significant lagged correlation. One conclusion to draw from the diminution of the lag factor is that the amendment-proposing “gelling time” I posited for the lagged correlations in the Antebellum and Populist-Progressive eras has diminished. And this may have been caused by a diminution in reverence for the amendment process.³⁷⁵

Moreover, the negative correlation is nearly twice as strong as the negative correlation that characterized the Antebellum era and 33.2 % stronger than the negative correlation of 0.638 at lag one of the Populist-Progressive era. Why so strong a negative correlation? Perhaps the trade-off between general legislative and amendment proposing energy of the last

371. KYVIG, *supra* note 41, at 188.

372. Table 5, *supra* Part IV.B.2.

373. Bills-Prop. Amends. Correlation: -0.850 (high). Significance: 0.015 (significant). N: 7. Mean Bills Per Congress/Per Member: 22,009/41.45. Mean Proposed Amendments/Per Member: 82/0.15. Amendment Passage Rate: Historical, 0.34; For Era, 0.71.

374. Without taking into account the lag factor.

375. Cf. KYVIG, *supra* note 41, at 214-15 (relating the post-Antebellum era’s increase in amendment activity to the fact that the issues were no longer critical to the survival of the nation, but those of modernizing the government to suit the progressive era).

era continues to this era, but is even more prominent. And maybe it is stronger due to an increased emphasis on amendment proposing—an emphasis that plays out in the increased passage rate of seventy-one percent for this era.

That trade-off explanation is consistent with a cursory glance at the significant categories of amendment proposals for this time: women's suffrage; treaty ratification; presidential disability; amendment ratification procedure (associated with Prohibition's passage and repeal); child labor; income tax; and the dates and terms of the office of presidents and members of Congress.³⁷⁶

Almost all are exclusively the province of constitutional, rather than normal, legislation. That focus conforms to the maintenance of amendment-proposing levels while normal legislative activity dropped significantly from that of the prior era.

The above makes clear the one characteristic of the congressional dynamic relevant both to the broader path of the general-constitutional legislation relationship across congressional history and to speculations on the Amendability Zeitgeist: motivation independence may dominate a congressional era even after the historical emergence of promiscuous careerisms as a pervasive motivating force and after the freeing of members to act on their motivations without procedural restraints.

Finally, additional evidence of congressional attitude during this era suggests a new development in the congressional Zeigeist of amendability. Kyvig notes a resuscitation of the perception of likelihood of amendment success ignited by the ratifications of the Sixteenth and Seventeenth Amendments and a corresponding spike in amendment proposing.³⁷⁷ Indeed, he observes that 1920 “marked a high point of progressive enthusiasm about achieving fundamental change through explicit and authentic acts of constitutional amendment.”³⁷⁸ Now, the mass-psychological model of Table 2 suggests that a higher perceived likelihood of success in a motivation-independent era should produce higher levels of amendment proposing—unless the motivation for more amendment proposals is dampened by a prudential views of the process. Here, the increase in proposals suggests the absence of any dampening affect from a prudential view of the process. That conclusion may be related to the

376. See generally KYVIG, *supra* note 41, at 62, 324-26, 367, 460-61, 469-70, 548-51 (correlating the proposed amendment categories to the major historical events of the era, including World War I (suffrage, treaty ratification, income tax), President Wilson's stroke (presidential disability, date and term limits), Wilson's inability to get the Senate to ratify the Treaty of Versailles (treaty ratification), Prohibition (amendment ratification, child labor), Suffrage, and Congress's proposal of a child labor amendment in 1924).

377. KYVIG, *supra* note 41, at 214.

378. *Id.* at 239.

change in the nature of the causation from the prior era to this one, namely the demise of the one-Congress lag, or “gelling period,” for the energy trade-off in bill proposing to affect amendment proposing as a negative correlation. To repeat, the “gelling period” may have arisen in two prior eras (Antebellum and Populist-Progressive) from a more reverential view of the amendment process in those eras, which translated to the longer run-up time to propose an amendment. It seems that, in turn, that run-up time disappears in the Suffrage-Prohibition era as reverence for the process diminishes as well.

In sum, while Congress remained generally serious-minded about proposing amendments independent of general legislation, and optimism about the likelihood of success of those amendments peaked, reverence for the amendment process diminished as compared to the prior Populist-Progressive Era.

A final caveat to this era: the amendment exuberance that marked the era diminished as we approached the Modern Era in 1931: “In retrospect, it would become evident that 1920 did not represent an incoming flood tide of constitutional change but the crest of a wave soon to dissipate.”³⁷⁹ That is, Kyvig notes, enthusiasm for further amendment soured as unhappiness with national prohibition grew.³⁸⁰

*G. The Modern Era, 1931 to Present (2004)*³⁸¹

Two possible explanations come to mind for the mimicry between proposed amendment and bill totals in the Modern Era, which begins around 1931 with a strong, significant 0.755 correlation.

First, the conclusion dictated by my working model suggests that the correlation indicates the dominance of promiscuous careerism. That is, the anomalies characterizing the two prior eras—serious-mindedness towards legislation in general; a heightened view of the likelihood of success of proposed amendments; a high, though diminishing, prudential reverence for the amendment process—ceased in the Modern Era. Therefore, the promiscuous careerism pattern first established in the Latter Reconstruction Era could reassert itself.

The second is that the sustained correlation is not a sign that careerism is significantly more robust, but only that normal legislative activity has moved into spheres previously considered the province of only

379. *Id.*

380. *Id.* at 261.

381. Bills-Prop. Amends. Correlation: 0.755 (high). Significance: 0.000 (significant). N: 33. Mean Bills Per Congress/Per Member: 15,693/29.42. Mean Proposed Amendments/Per Member: 233/0.44. Amendment Passage Rate: Historical, 0.32; For Era, 0.21.

constitutional legislation. That is, more policy topics are legitimately, independently amenable to separate legislation in the constitutional and non-constitutional spheres. That explanation would allow for amendment totals' mimicry of bill tallies to have arisen from serious policy pursuits rather than shallow reelectioneering. A potential cause for that dynamic would be the Supreme Court's expanded interpretation of the Commerce Clause power in 1937, just after the beginning of the modern era.³⁸²

That alternative hypothesis does not, however, seem supported in a cursory review of the substantive history of amendment proposing in the Modern Era. The comparative length of the Modern Era demands more than a quick consideration of a handful of categories that comprise the major subjects of proposed amendments. In this seventy-four year span, the major categories vary from sub-period to sub-period and generally repeat all the significant categories of proposals from the prior eras (except those where an amendment has already been passed). But I can extract a general sense of the most prominent, repeating amendment subjects from Vile's analysis, as follows:

TABLE 6:

Prominent Modern Era Legislation (through 2002)

382. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (determining if Congress has the power to regulate commercial activity by looking at the activity's effect upon commerce); *United States v. Darby*, 312 U.S. 100 (1941) (furthering the development of a broad definition of interstate commerce by holding that Congress can regulate labor conditions because they effect the overall competitiveness of businesses in different states); *Wickard v. Filburn*, 317 U.S. 111 (1942) (broadening congressional power to regulate commerce even more by deciding that Congress can regulate small, local activities if the aggregate effect will affect interstate commerce). The post-*United States v. Lopez*, 514 U.S. 549 (1995) partial retrenchment in Commerce Clause doctrine is both too limited and too recent to affect this part of the analysis.

<i>Prominent Category of Proposed Amendments</i>	<i>Years Prominent</i>	<i>Also Amendable to General Legislation?</i>	<i>If So, Does Legislative Power Come from Expanded Commerce Clause?</i>
Balanced Budget	21 (1974–02)	No	n/a
Equal Rights Amendment	17 (1945–82)	Yes	Yes
Electoral College	17 (1949–02)	No	n/a
Abortion (“Right to Life”)	10 (1973–87)	No	n/a
Prayer in Schools or Public Places	10 (1962–84)	No	n/a
Presidential Term Limits	6 (1940–47)	No	n/a
Congress Tenure and Term Limits	6 (1976–97)	No	n/a
Taxation	7 (1933–98)	Yes	No
School Busing	4 (1970–73)	Yes	Yes
Treaties	6 (1945–57)	Yes	No
ANALYSIS:			
Amenable to general legislation		34	31.7%
—Due to expanded Commerce Clause		21	20.1%
Not amenable to general legislation		70	67.3%

Table 6³⁸³ suggests that the Supreme Court’s expansion of the subjects that fall under Congress’s competence, through interpretative expansion of the Commerce Clause power, may explain only a portion of the correlation. (And, of course, even that Commerce Clause-enabled mimicry may contain some careerism.) Hence, the strong 0.755 correlation likely shows the dominance of promiscuous careerism.

That conclusion is consistent with other external conditions, such as the major historical events of the Modern Era: the Great Depression, the New Deal and the rise of the administrative state, World War II, the Civil Rights Movement, the Cold War, and all the other significant events of the past seventy-four years. Modern Congresses cannot be said simply to have lacked grist for the mills of serious and independent constitutional legislative activity.

Those observations challenge Kyvig’s critique of FDR’s judgment not to pursue constitutionally enshrining the New Deal. Kyvig first notes that

383. VILE, *supra* note 55, app. at 550-58. “Appendix D: Most Popular Amending Proposals by Year & Key Events and Publications Related to Constitutional Amendments” provides the source for the “Years Prominent” column.

while the first third of the twentieth century taught that the amendment process could be highly unpredictable and volatile, six amendments were added and another endorsed by Congress.³⁸⁴ The New Deal then presented a constitutional crisis similar to the Founding and Civil War.

Kyvig argues that with Roosevelt's huge 1936 landslide, including majorities of three hundred thirty-one to one hundred-two in the House and seventy-six to twenty in the Senate, he had the power to formally enshrine in the written Constitution: "the notion of collective responsibility for the social welfare of the individual [that had been raised to] a higher level than ever before reached in the United States . . . [and constituted] as close to a consensus as the American electorate achieved in the twentieth century."³⁸⁵ Kyvig laments that the changes brought by the transformative (to use Ackerman's term)³⁸⁶ opinions of the Supreme Court altered the nature of American government at the time, but "lacked the clarity and specificity of constitutional amendments."³⁸⁷ Hence, "[d]ebate over the nature of federal responsibility for domestic social conditions would continue, almost unabated, and serve as a focus of political contention over the subsequent half century."³⁸⁸

Kyvig's conclusion, that Roosevelt was wrong to perceive "the amending process as impossibly difficult and amendment itself as unnecessary,"³⁸⁹ may itself be undercut by the change in congressional gatekeeping that my numerical data suggest may have been manifest as early as 1931. Perhaps, instead, FDR was right about the chances for approval of the type of amendments he needed. Consistent with that view, in the twenty years following Roosevelt's 1937 Court Packing Plan, amendment proposals shifted to restrictions on federal power and the presidency, though they neither overturned nor confirmed the New Deal.³⁹⁰ "Instead, the unsettled nature of American policies regarding government revealed itself."³⁹¹ And that certainly presented a broad platform from which New Deal opponents and supporters, and their political successors, could grandstand.

384. See KYVIG, *supra* note 41, at 288 (noting that after the flurry of activity both conservatives and reformers regarded the amendment process with suspicion).

385. *Id.* at 313-14.

386. See *id.* at 476 (referencing BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991)).

387. *Id.* at 289.

388. *Id.*

389. *Id.* at 290.

390. See VILE, *supra* note 55, at 122 (affirming the view that the Court Packing Plan caused significant constitutional ripples). The proposed amendments in the decade following the Court Packing Plan included proposed presidential term limits, changes to the method of treaty ratification, judiciary reform, and alterations to the means of amending the Constitution. *Id.* app. at 550-51.

391. KYVIG, *supra* note 41, at 316.

That the amendability ennui which seems emergent in the New Deal era was not transformed by the 1960s four amendment ratifications is likely because they fell into familiar patterns. Three dealt with suffrage and to varying degrees responded to Supreme Court decisions in *Brown v. Board of Education*³⁹² and voting rights cases: the Twenty-Third Amendment (presidential electors for D.C.); the Twenty-Fourth Amendment (abolishing poll taxes); and the Twenty-Sixth Amendment (right to vote for eighteen year olds). The fourth, the Twenty-Fifth Amendment,³⁹³ dealt with the highly topical concern of presidential succession in the wake of Kennedy's assassination.

Moreover, unlike the possible effect of the Sixteenth Amendment on the dynamic of the Prohibition–Suffrage Era, congressional expectations on the level of support for ratification were probably unaltered by the rapid ratification of the Twenty-Sixth Amendment in the 1960s.³⁹⁴ The scope and effect of that amendment were narrow and it was soon followed by the failure to ratify the ERA in the 1970s.³⁹⁵ With the ERA, Kyvig concludes that the “liberal view lingered longer in Congress than in state legislatures,” which harbored relatively conservative views on gender, as well as race issues (explaining also the defeat of Congress's proposal for D.C. congressional representation).³⁹⁶

Finally, since the conservative ascendancy of the 1980s, amendments were frequently proposed; a balanced budget amendment was the most widely discussed reform of the 1980s and early 1990s.³⁹⁷ Kyvig notes that political conditions mirrored those of the end of the nineteenth century in that the contending parties were closely balanced but that, “[u]nlike a century earlier, however, when the view prevailed that the Constitution neared perfection, toward the end of the twentieth century discontent festered and serious reform schemes proliferated.”³⁹⁸

392. 347 U.S. 483 (1954).

393. See Dellinger, *Legitimacy*, *supra* note 118 (suggesting that these four amendments were adopted not because the amendment process is simple, but because they were uncontroversial measures which had already been more or less enacted, be it through legislation or Supreme Court decisions).

394. *But see* KYVIG, *supra* note 41, at 409 (discussing expectations for an easy ratification of the ERA). Kyvig explains that congressional leaders' experiences with the easy ratification process of the Twenty-fifth and Twenty-sixth amendments accustomed them to think of the congressional approval process as difficult, but that once that hurdle had been overcome, the states would easily fall in line. *Id.*

395. See *id.* at 409-25 (outlining the bitter battles waged over the ratification of the ERA, finally culminating in its defeat).

396. *Id.* at 425.

397. VILE, *supra* note 55, app. at 555-56. According to Vile, from 1980 to 1994, a balanced budget amendment was proposed eight times. Other popular amendments during the conservative ascendancy were amendments on right to life and congressional term limits. *Id.*

398. KYVIG, *supra* note 41, at 426.

In sum, this analysis of the Modern Era suggests that the relationship between the levels of congressional bill and amendment proposing activity over this sustained and uninterrupted period signals that promiscuous careerism has become cemented as the major determinant of amendment proposing.³⁹⁹ As Kyvig observes, “Article V requirements [have] made it quite likely that no amendment of any sort could be adopted in a contentious political climate of balanced power.”⁴⁰⁰ And though he does not address the issue systematically throughout the narrative, Kyvig seems to agree with the entrenchment of grandstanding in the Modern Era. That is, at least since the 1980s, “amendments, designed as much to articulate a position as to achieve adoption, [have] flourish[ed]” and “striking a constitutional posture [has] bec[o]me a popular means of dealing with besetting problems of government.”⁴⁰¹

The Zeitgeist analysis here is informed by the observation with which I began this Article, that we all already have a general sense of the character of contemporary amendability, as contemporary American citizens in general and as students of the American legal and political systems in particular. Drawing on this shared knowledge, I simply claim that the current perceived likelihood of success of proposed amendments in Congress is relatively low and that there is no sweeping prudential reverence for the amendment process pervading Congress. If that first observation is, in fact, correct, then as per my Table 2 model, we truly are in an era dominated by promiscuous careerism. For if not, then we would see a relatively low number of proposed amendments per Congress rather than the historically-high rate of 233 mean proposed amendments per Congress and 0.44 per member that have characterized the modern era.

VI. TENTATIVE INFERENCES FROM THE PRELIMINARY ANALYSIS:
DECLINE OF MOTIVATION INDEPENDENCE THROUGH THE SEVEN ERAS

The following table summarizes the findings and inferences of the preceding part, from which some additional speculations can be made.

399. If so, we may next ask whether the loss of independence in amendment proposing activity is a sign of rational acceptance of or psychological resignation to the general unamendability of the Constitution in modern times.

400. KYVIG, *supra* note 41, at 425.

401. *Id.*

TABLE 7:

Summary of Analysis and Inferences

<i>Era</i>	<i>Correlation/ Significance</i>	<i>Special Conditions</i>	<i>Tentative Conclusions</i>
Founding (1791-1812)	Effectively Zero ⁴⁰²	Bill introduction difficulty.	Serious proposals, optimism about amendment success, and prudential reverence for the process.
Antebellum (1813-1858)	-0.464/0.026	Bill introduction difficulty.	Negative correlation due to trade-off from difficulty; lagged due to gelling time, cause by reverence. But both reverence and optimism are somewhat diminished.
<i>at lag 1</i>	-0.591/0.003		
Civil War- Early Recon. (1859-1868)	Effectively Zero ⁴⁰³	Civil War.	Sui generis due to Civil War. But doesn't destroy existing patterns of development in dynamics of congressional legislation.
Latter Recon.— Gilded Age (1869-1886)	Strongest Positive 0.826/0.006	Introduction difficulty gone.	Grandstanding takes hold. Pessimism towards success and low reverence (until the centennial enthusiasm takes effect).
Populist-- Progressive (1887-1916)	0.345/0.207	Legislative explosion.	Negative trade-off despite no introduction difficulty; lagged relationship corresponds to increased reverence, though there is extreme pessimism about amendment success.
<i>at lag 1</i>	-0.638/0.011		
Suffrage-- Prohibition (1917-1930)	Very Strong Neg. - 0.850/0.015	Recent and contemporane ous amendment success.	Gelling time disappears, energy trade-off stronger; increased focus on amendments. Peak optimism, but reverence diminishes.
Modern (1931-2004)	Strong Positive 0.755/0.000	Expansion of Commerce Clause power.	Credit seeking dominates, though some correlation may be due to expansion of scope of legislation. Zeitgeist is pessimistic irreverence.

In its first half century, Congress appears to have viewed the amendment

402. -0.087/0.799.

403. 0.191/0.759.

process with serious optimism. At that time, probably because introducing a bill was difficult, amendment proposing had not yet become a semi-serious activity wedded to motivations underlying other legislative activity.

But, beginning in the middle of the nineteenth century, an extreme difficulty in passing amendments emerged concurrently with Congress's clarification of the general legislative process, which was designed to make it more accessible to individual members. At that time, independent amendment proposing began its decline toward the Modern Era attitude of relative amendment impotence, pessimism about amendment success, and lack of reverence for the process.

However, a few major political events temporarily interrupted that decline. Foremost among those were the Civil War, the centennial of the Constitution, the Populist and Progressive responses to urbanization and modernization, the 1913 twin amendment successes of income tax and direct election of Senators, and Prohibition's adoption and repeal.

Amendability's demise is reflected not only in the careerism-dependent character of amendment proposing activity, but also in the decline in number of already proposed amendments making it out of Congress to be ratified by the states: the amendment-passing rate during the Constitution's first eighty years was dramatically higher than the rate for the last 136. Between 1789 and 1869 there were sixteen amendments for an amendment rate of 0.2 per year, or one amendment every five years.⁴⁰⁴ Between 1869 and 2005, there have been only eleven amendments⁴⁰⁵ (one of which was the repeal of another) for an amendment rate of 0.08, or one amendment every twelve years.⁴⁰⁶ And those eleven amendments do not mirror the breadth of scope of the first sixteen but, rather, are comprised of: three relating to the franchise (extending it to women and young adults and eliminating poll taxes), one enacting and one repealing prohibition, one relating to income tax, and the remainder relating to presidential succession, direct election of senators, and presidential and congressional terms.

404. But Congress passed two proposed amendments that were never ratified in this era: (1) an amendment related to titles of nobility (passed in 1810) and (2) the Corwin amendment (passed in 1861). VILE, *supra* note 55, app. at 541, 544.

405. See U.S. CONST. amend. XV (general suffrage); U.S. CONST. amend. XVI (income tax); U.S. CONST. amend. XVII (direct election of Senators); U.S. CONST. amend. XVIII (prohibition); U.S. CONST. amend. XIX (women's suffrage); U.S. CONST. amend. XX (lame duck reduction and order of succession); U.S. CONST. amend. XXI (repeal of prohibition); U.S. CONST. amend. XXII (presidential term limits); U.S. CONST. amend. XXIII (District of Columbia representation in electoral college); U.S. CONST. amend. XXIV (prohibition of poll taxes); U.S. CONST. amend. XXV (presidential disability); U.S. CONST. amend. XXVI (set the voting age at eighteen); U.S. CONST. amend. XXVII (time limits for congressional pay raises).

406. Congress passed three proposed amendments that were never ratified in this era: (1) child labor (1924), (2) the ERA (1972), and (3) D.C. representation (1978).

VII. AREAS FOR FURTHER EMPIRICAL RESEARCH AND
THEORETICAL DEVELOPMENT

The history of motivation independence versus promiscuous careerism and the *Zeitgeist* of amendability in Congress outlined here is merely a rough roadmap for further inquiry into congressional responsiveness to amendment need. Again, it is initially counterintuitive to have begun by looking at a congressional response without having first defined to what Congress has been responding. But this approach makes sense as a matter of practical empirical methodology. In order to identify what congressional activity has been in reaction to, looking at the readily accessible (though voluminous) congressional activity is a helpful starting point. Of course, in that inquiry we must not forget that what Congress has *not* reacted to will be equally important in the responsiveness calculus.

So, before going into too much detail examining congressional amendment-proposing activity, it is probably best to use some initial observations to develop a theory and empirically examine amendment need, the operationalization of which will require a thoughtful and searching analysis. Only after doing that and then taking the congressional responsiveness inquiry to a more specific, substantive level can we begin to assess amendability.

A. *Operationalizing Amendment Need*

Strauss's irrelevance argument seems to start with the outer boundary of amendment need, over the course of our constitutional history, at no more than the thirty-three amendments that Congress offered up to the states for ratification.⁴⁰⁷ He then proceeds to whittle that down to zero actual amendment need, or close to it. But it cannot be that simple. A broader conception of amendment need is dictated by both simple Article V arithmetic and political theory. And that broader conception of amendment need requires an inquiry that steps beyond the universe of the thirty-three, ratified or rejected, congressionally-proposed amendments.

The arithmetic argument relates the quantum of support for an amendment on a particular topic among voters in state legislatures, or would-be state conventions, to the quantum of support in Congress. The narrow view, that limits amendment need to only the thirty-three congressionally-passed amendments, seems to presume the following: whenever there has been support for a proposed amendment among

407. See Strauss, *supra* note 131, at 1463-64 (arguing that only when three conditions are present will an amendment be significant: when legislative or judicial means of change are unavailable, when society comes around to thinking or believing in line with the change brought by amendment, when it establishes "a precise rule" rather than "a vague norm").

majorities of voters in three-fourths of the state legislatures, or would-be conventions, then there has also been support of two-thirds majorities in both the House and Senate (since two-thirds is less than three-fourths). But that is not necessarily so.

To see the flaw in the narrow conception of amendment need, consider the possible level of support in the Senate in the following scenario: On some particular proposed amendment topic there is majority legislative support in a bare three-fourths majority of states (thirty-eight). Suppose further that across the minority of twelve opposing states, the majorities opposing the amendment are so strong and vehement that no senator from one of those states would vote for it. (That could be caused by some combination of careerism and—to the extent a senator's genuine policy views reflect those of the vehement majority in his or her state on the topic—policy purism.) Then, to pass the congressional gate and be proposed to the states for ratification, the amendment would need the votes of sixty-seven of the seventy-six senators from the supporting states. That is, ten senators—just thirteen percent of the senators from the supporting states—could block the amendment. And given congressional self-interest, possible policy-purist views, reverence for the amendment process, staggered senatorial tenures, et cetera, it is possible to imagine particular amendment topics and circumstances that would produce that quantum of opposition. The consequence is that the arithmetic is not as simple as three fourths being greater than two thirds.

In addition, political theory must interrogate Congress's role with regard to amendment need. Should it really be only passive and responsive? Or, instead, should Congress, at times, lead ahead of a solidified supermajority of political will in the states? That is, does amendment need sometimes need to be discovered by Congress, whose action in proposing an amendment to the states becomes the genesis of a popular movement for political support? The six unratified amendments⁴⁰⁸ are a minor example of such affirmative action by Congress failing, which Strauss uses to support his thesis. But that seems to overlook the spectacular success of something arguably analogous to a pro-active Congress: the Philadelphia Convention

408. See VILE, *supra* note 55, at 183 (describing the six failed amendments: the first, in 1789, was included in the original Bill of Rights and dealt with the size of Congress in proportion to the population; the second, introduced in 1810 and known as the Reed Amendment or the Phantom Amendment, would have removed U.S. citizenship from individuals who accepted titles of nobility; the Corwin Amendment, the third failed amendment was passed by Congress in 1861, and would have barred future amendments that limited the practice of slavery; the fourth was the Child Labor Amendment, introduced in 1924; the fifth was the ERA, passed by Congress in 1972; lastly, in 1978, Congress passed an amendment to treat the District of Columbia as a state for certain voting-related purposes).

of 1787.⁴⁰⁹ Did that hyper-creative, proactive, opinion-leading body really bequeath a national deliberative assembly utterly devoid of a role in constitutional leadership?

It seems then, that additional evidence of amendment need, beyond that which produced the thirty-three amendments Congress proposed to the states, may be gleaned from the historical record. It may be found either in issues that garnered supermajority popular support in the states but flunked the Article V arithmetic in Congress or in issues that were ripe for popular support but lacked congressional leadership. Engaging this type of inquiry, Stephen Griffin has suggested that the historical inquiry will reveal there was little need for change in the nineteenth century:

[T]he most important reason the Constitution did not experience significant change in the nineteenth century was that little was expected of the national government. The Civil War Amendments were approved under special circumstances and their potential for expansion of national authority was quickly nullified by the profound localism and antigovernment attitudes typical of nineteenth-century politics. The weight of the enormous social and economic changes of the late nineteenth century was borne by state governments⁴¹⁰

But though localism and anti-government attitudes may have been strong forces, they were not uniform across the entire century, and the amendment need calculus should attempt a more-detailed parsing.

If such additional evidence of actual or potential popular support for amendments is discovered, then the last question is whether to deem that evidence of amendment need. It is a question of normative constitutional theory about which I remain agnostic in this article. The best starting point for speculation on criteria is probably the familiar, including the thirty-three proposals from Congress and the prominent constitutional crises examined by Strauss and others. Did the forces that led to the Eighteenth Amendment (instituting Prohibition) constitute amendment need? What about the forces leading to the Corwin amendment? Or do we just say a need was present but the Corwin amendment was the wrong response? And how about the New Deal? The theoretical task, already engaged and partially completed by a variety of scholars—albeit indirectly, would seem

409. See JOHN R. VILE, *THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA'S FOUNDING 181-83* (2005) (explaining that in the late eighteenth century, it was common practice for state legislatures to write and pass constitutions). Therefore, the very gathering of the Constitutional Convention was as novel an idea as its final output. *Id.* While the Constitutional Convention's original purpose was simply to adjust the Articles of Confederation, the production of an entirely new Constitution was justified on the grounds that it was a mere proposal to the states. *Id.*

410. Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Practice*, in *RESPONDING TO IMPERFECTION: THE THEORY & PRACTICE OF CONSTITUTIONAL AMENDMENT* 37, 50 (Sanford Levinson ed., 1995).

to be to first answer the question whether those and similar examples should constitute amendment need and then identify the more generalizable criteria that lead to those answers.

Something like this has already been attempted, though only for prospective purposes to evaluate current and future amendment proposals. In 1999, a group called Citizens for Constitutional Change published a report entitled “Great and Extraordinary Occasions: Developing Guidelines for Constitutional Change,” which sets forth eight “Guidelines for Constitutional Amendment.”⁴¹¹ Prepared in the wake of Republicans taking control of Congress in the 1990s and increased interest in amendments on topics such as a balanced budget,⁴¹² school prayer,⁴¹³ and flag burning,⁴¹⁴ the guidelines preach restraint. Thus, they caution that amendments should: focus on topics also important to subsequent generations, enhance political responsiveness or individual rights, only be used as a last resort, be “consistent with related constitutional doctrine,” not be purely aspirational, contemplate consequences for other constitutional principles, be fully and fairly debated, and have a nonextendable deadline for ratification to ensure a contemporaneous consensus.⁴¹⁵ While lauding all the guidelines in general, Chemerinsky has noted the practical difficulty a current generation faces in judging the enduring importance of a proposed amendment to future generations.⁴¹⁶

While all the Guidelines seem generally suited to the historical inquiry as well, one in particular raises a final theoretical issue for amendment need.

411. CITIZENS FOR THE CONSTITUTION, *supra* note 180.

412. *See id.* at 2 (explaining the amendment passed in the House of Representatives and twice failed in the Senate by only one vote).

413. *See id.* (arguing that, if passed, the proposals on religion would substantially alter the present understanding of our system of religious liberty).

414. *See id.* (listing the flag burning amendment with the balanced budget amendment, as passing in the House and only narrowly failing the Senate by one vote). In his 1998 review of Kyvig’s book, Chemerinsky comments on an almost verbatim draft of the same principles that Citizens for Constitutional Change had circulated in 1997. Chemerinsky, *supra* note 41, at 1572-75.

415. CITIZENS FOR THE CONSTITUTION, *supra* note 180, at 7. In full, the “Guidelines for Constitutional Amendments” ask: (1) Does the proposed amendment address matters that are of more than immediate concern and that are likely to be recognized as of abiding importance by subsequent generations? (2) Does the proposed amendment make our system more politically responsive or protect individual rights? (3) Are there significant practical or legal obstacles to the achievement of the objectives of the proposed amendment by other means? (4) Is the proposed amendment consistent with related constitutional doctrine that the amendment leaves intact? (5) Does the proposed amendment embody enforceable, and not purely aspirational, standards? (6) Have proponents of the proposed amendment attempted to think through and articulate the consequences of their proposal, including the ways in which the amendment would interact with other constitutional provisions and principles? (7) Has there been full and fair debate on the merits of the proposed amendment? (8) Has Congress provided for a nonextendable deadline for ratification by the states so as to ensure that there is a contemporaneous consensus by Congress and the states that the proposed amendment is desirable?

416. Chemerinsky, *supra* note 41, at 1574.

Guideline Three asks, “[a]re there significant practical or legal obstacles to the achievement of the objectives of the proposed amendment by other means?”⁴¹⁷ The commentary to Guideline Three explicitly equates the other means with those available in the “political realm.”⁴¹⁸ Hence, it asks whether the objective of the proposed amendment could instead be achieved through “federal or state legislation or state constitutional amendment.”⁴¹⁹ Examples of proposals that have first exhausted those particular means are given. The commentary studiously avoids, however, any explicit reference to the judicial recognition of informal constitutional change. But the implication is there. It notes that after the Supreme Court invalidated a state flag-desecration statute, “Congress responded by attempting to draft a federal statute that proscribed desecration without violating the Court’s interpretation of the First Amendment.”⁴²⁰ Accordingly, “[n]ow that the Supreme Court has invalidated the federal statute,” an amendment would comport with Guideline Three unless a different statute could pass the Court’s test.⁴²¹

In sum, in addition to the necessary empirical inquiries I have described, there also remains the theoretical problem of determining the extent to which a need for constitutional change constitutes “amendment need” within my framework.

B. Micro-Analysis of Congressional Responsiveness

The data from Modern, Founding, and Antebellum eras at least roughly match our general expectations; the Civil War Era is *sui generis* and difficult to pin down and the Latter Reconstruction-Gilded Age fits neatly into the general model by exhibiting the emergence of promiscuous careerism.⁴²² That leaves the anomalous Populist-Progressive (1887-1916) and Suffrage-Prohibition (1917-1930) eras as the best first candidates for closer scrutiny. The anomalies, again, are a strong, negative, lagged correlation in the Populist-Progressive era and a strong negative correlation in the Suffrage-Prohibition era.⁴²³

417. CITIZENS FOR THE CONSTITUTION, *supra* note 180, at 7.

418. *Id.* at 14.

419. *Id.*

420. *Id.* at 16.

421. *Id.*

422. Tbl. 5, *supra* Part IV.B.2.

423. The first approach might challenge the validity of the numerical analysis directly. For instance, are the amendment “totals” for each Congress unreliable because of the frequent repetition of the same topic in many separate amendment-proposing resolutions in the same Congress? *See, e.g.,* Long, *supra* note 83, at 578 (explaining that while there have been around two thousand proposed amendments to the Constitution, the proposals cover relatively few topics). Probably not, because my general assumption is that the repetition phenomenon is distributed across all the eras. And it is difficult to understand how it only could contribute to either a positive or negative correlation. At most, it would dampen the

In Part V, I have theorized the causes of the anomalies based on some additional, contextual historical data. For the Populist-Progressive era the bills to proposed amendments relationship is negative because of a trade-off in political energy and lagged due to a longer “gelling time” for the amendment proposals, perhaps due to greater reverence for the amendment process. For the Suffrage-Prohibition era, I speculate that the negative aspect of the relationship continues based on the same cause and that the lagged aspect disappears with a diminution in reverence.

It is difficult to assess the validity of my causal speculations when they are based mostly on psychological factors, and all the subjects are now dead. Worse still, these eras predate the boom in the collection both of social science survey data in general and compilation of “vital statistics” and other studies of Congress in particular. But as with any American historical era, there must at least be eclectic accumulations of relevant contemporaneous writings.

A reasonable plan of research for either of the two anomalous eras might begin by selecting a subset of the Congresses spanning the era and then selecting a sample of proposed amendments from each Congress. That should, of course, be done such that it would be reasonable to infer that the average accumulated characteristics of the sample are likely to match those of the whole population. That may be difficult to structure given the potentially divergent relevant characteristics of topic categories of proposed amendments and their likely lack of normal or other statistically reliable distribution across the congressional record.

But assuming a reasonable sample is amassed, the next step would be to closely investigate the characteristics of each proposed amendment in it. That would, at minimum include examining all that was said and written about the proposal in committee or on the floor. Further, any particular statements or general characteristics of the sponsors might be considered. Data on any committee or floor votes on the proposed amendment should also be accumulated.

Finally, the congressional analysis for the era should be compared against a more searching inquiry into potential amendment need (or at least the need felt for constitutional change), as I have described in section A above.

CONCLUSION

It seems the character of amendment proposal has changed significantly since the Founding. We appear to have moved from generally

strength of a correlation. But, in any case, the degree to which the repetition phenomenon is equally distributed across all my eras is worth investigating.

independently-motivated amendment proposing to the stagnant modern era of promiscuous careerism. Or in broader terms, I tentatively conclude that Congress has evolved to the Modern Era's *Zeitgeist* of promiscuous, non-prudential, irreverent amendability pessimism through the series of intervening, distinct *Zeitgeists* detailed in Part V. That shift is just the beginning of the inquiry. Further questions for constitutional history and theory are whether and to what degree that shift corresponded to a change from relative amendability to relative unamendability, at what stages our history that occurred, and its relevance to constitutional theory. That analysis requires moving from the macro-level framework presented here to historical analyses of discrete amendment topics and their relationship to other events and causes. Moreover, the core of interest for constitutional theory would seem to be the shift into, then between, and then away from the anomalous Populist-Progressive (1887-1916) and Suffrage-Prohibition (1917-1930) eras.

APPENDIX A:

*The Thirty-Three Amendments Proposed by Congress for Ratification*⁴²⁴

<i>Proposal</i>	<i>Proposed</i>	<i>Ratified</i>
Congressional Representation (to control growth of size of House)(this and next were first two of 12 amendments proposed as a bill of rights)	1789	
Twenty-Seven Amendment (congressional compensation)	1789	1992
First through Tenth Amendments (Bill of Rights)	1789	1791
Eleventh Amendment (state sovereign immunity)	1794	1795
Twelfth Amendment (election of President and V.P.)	1803	1804
<i>Titles of Nobility (to strip citizenship from those accepting foreign titles)</i>	1810	
<i>Corwin Amendment (to protect institution of slavery)</i>	1861	
Thirteenth Amendment (banning slavery)	1865	1865
Fourteenth Amendment (various rights against state infringement, etc.)	1866	1868
Fifteenth Amendment (right to vote)	1869	1870
Sixteenth Amendment (income tax)	1909	1913
Seventeenth Amendment (direct election of Senators)	1912	1913
Eighteenth Amendment (Prohibition)	1917	1919
Nineteenth Amendment (women's suffrage)	1919	1920
<i>Child Labor Amendment (to give Congress power to regulate child labor)</i>	1924	
Twentieth Amendment (reducing "lame duck" period post federal election)	1932	1933
Twenty-First Amendment (repealing Prohibition)	1933	1933
Twenty-Second Amendment (presidential term limit)	1947	1951

424. Compiled from PROPOSED AMENDMENTS, *supra* note 9, at li, 1718-19.

2005]	HISTORICAL AMENDABILITY	257
	Twenty-Third Amendment (D.C. presidential voting)	1960 1961
	Twenty-Fourth Amendment (banning poll taxes)	1962 1964
	Twenty-Fifth Amendment (succession to office of President and V.P.)	1965 1967
	Twenty-Sixth Amendment (18-year-olds' right to vote)	1971 1971
	<i>Equal Rights Amendment (to ban discrimination on account of sex)</i>	1972
	<i>D.C. Representation in Congress</i>	1978

APPENDIX B:

Sources Consulted for Proposed Amendment Totals

(1) For 1789-1889: Herman V. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of Its History* (1896), *reprinted in* PROPOSED AMENDMENTS TO THE U.S. CONSTITUTION 1787-2001, at 1 (John Vile ed., The Lawbook Exchange) (2003). There were 1,300 amendments proposed between 1787 and 2001. Ames chronicles all the amendment proposals during the first 100 years of Congress that he was able to discover. The amendments are numbered consecutively, but with some lettered additions between numbers. The list actually begins prior to the 1st Congress and covers amendments proposed during the Constitutional Convention. The list also includes a few later amendments proposed by states directly instead of by bill. Around 1,750 amendments were proposed during this period when including the amendments proposed during the Constitutional Convention. For the annual amendment totals spanning 1789 to 1889, I have drawn from Ames's list of proposals actually introduced in Congress and excluded the few, anomalous, state proposals.

(2) For 1889 to 1926: CHARLES C. TANSILL, *PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES INTRODUCED IN CONGRESS FROM DECEMBER 4, 1889, TO JULY 2, 1926*, (arranged by Tansill) Senate Documents, No. 93, 69th Congress, 1st Session, 1926. (Cited in S. Prt. 99-87, Appendix C) (Washington D.C.: U.S. Government Printing Office, 1969) (providing a chronological enumeration of the proposed amendments, including date, sponsor, and subject).

(3) For 1889 to 1928: M.A. MUSMANNO, *PROPOSED AMENDMENTS TO THE CONSTITUTION: A MONOGRAPH ON THE RESOLUTIONS INTRODUCED IN CONGRESS PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA*, (WASHINGTON: U.S. GOVERNMENT PRINTING OFFICE) (1929) (illustrating that another 1,300 Constitutional Amendments were proposed during this thirty-nine year period).

(4) For 1947 to 1953: EVERETT S. BROWN, (80th through 82nd Congresses) *Proposed Amendments to the Constitution of the United States*

of America, Introduced in Congress from the 69th Congress, 2d. Session through the 87th Congress, 2d Session, December 6, 1926, to January 3, 1963 (Cited in S.Prt. 99-87, Appendix C) (Washington, D.C.: Government Printing Office, 1963).

(5) For 1969 to 1984: RICHARD A. DAVIS, PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES INTRODUCED IN CONGRESS FROM THE 91ST CONGRESS, 1ST SESSION, THROUGH THE 98TH CONGRESS, 2ND SESSION, JANUARY 1969-DECEMBER 1984 (Washington, DC: Congressional Research Service) (1985) (Congressional Research Service Report No. 85-36 GOV).

(6) For All Congresses: JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-2002 at Appendix D (2003).

(7) For current congresses: *See* Thomas website, *supra* note 278.