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Adam C. Pritchard

University of Michigan Law School, acplaw@umich.edu

Donald J. Boudreaux

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REWRITING THE CONSTITUTION: AN ECONOMIC ANALYSIS OF THE CONSTITUTIONAL AMENDMENT PROCESS

DONALD J. BOUDREAUX* & A.C. PRITCHARD**

In this Article, the authors develop an economic theory of the constitutional amendment process under Article V, focusing particularly on the roles that Congress and interest groups play in that process. The authors construct a model to predict when an interest group will seek an amendment rather than a statute to further its interests, highlighting how interest group maintenance costs and anticipated opposition affect that choice. They then discuss the efficiency goals of constitutionalism—precommitment and reduction of agency costs—and argue that the structure of the amendment process under Article V prevents realization of these goals. The authors contrast the Bill of Rights amendments, which established precommitments and reduced the agency costs of government, with the latter seventeen amendments, which expanded the federal government and increased agency costs. They attribute the change in the nature of the amendments to the interest-group domination of the political process and Congress' control over the constitutional amendment agenda. The authors conclude that the Founders' intent to put the Constitution beyond the reach of factions backfired: although factions cannot control the content of the Constitution, neither can the majority. In fact, Article V prevents the majority from precommitting itself and hinders its ability to control the agency costs of government, as evidenced by the history of the failed amendments. Although the authors conclude that Article V thwarts the efficiency goals of constitutionalism, they predict that little can be done to remedy this flaw.

INTRODUCTION

CONSTITUTIONS establish the “higher law” of the land by establishing the basic structural and procedural principles of government. In addition, they constrain governments' power to interfere with the rights and liberties that citizens regard as too precious to trust to their public officials. These constitutional constraints on public officials would be chimerical if they could be altered by ordinary politics. As Bruce Ackerman points out, “all the time and effort required to push an initia-

* Department of Legal Studies, Clemson University. M.A. New York University, Ph.D. Auburn University, J.D. University of Virginia.

** Office of the Solicitor General, United States Department of Justice. M.A. University of Chicago, J.D. University of Virginia.

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tive down the higher law-making track would be wasted unless the Constitution prevented future normal politicians from enacting statutes that ignored the movement's higher law achievement."¹ Constitutional law is higher, however, only when compared with the results of daily politics; it limits the hurly-burly of everyday politics by providing "rules of the game."² Accordingly, constitutions are designed to be more durable than statutes.³

The United States Constitution attains this durability by making the process of amending it more difficult and more costly than the enactment of ordinary statutes by using both supermajorities and split decisionmakers. Thus, Article V permits Congress, by a two-thirds vote of each house, to propose amendments, and requires a minimum of three-fourths of the state legislatures to ratify a proposed amendment for it to become a part of the Constitution.⁴ Alternatively, Article V provides that the Constitution may be amended by convention, though this method has never been employed.⁵

Since the adoption of the Constitution in 1789, only twenty-seven amendments have been enacted out of the more than 10,000 proposed in Congress.⁶ Notwithstanding the significant obstacles placed in the way of those seeking constitutional change, the relative rarity of successful constitutional amendments still poses something of a puzzle. After all, although the Founders created barriers to amendment, they did not want to foreclose it entirely. In fact, the Founders conceived Article V as a

1. Bruce Ackerman, *We the People: Foundations* 9 (1991).

2. Gary M. Anderson et al., *Behind the Veil: The Political Economy of Constitutional Change*, in *Predicting Politics: Essays in Empirical Economics* 89, 89 (W. Mark Crain & Robert D. Tollison eds., 1990).

3. See, e.g., W. Mark Crain & Robert D. Tollison, *Constitutional Change in an Interest-Group Perspective*, 8 *J. Legal Stud.* 165, 168-69 (1979) ("[A] constitutional provision confers more durable protection than is possible by ordinary legislative action." (quoting William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & Econ.* 875, 892 (1975))); Dennis C. Mueller, *Constitutional Rights*, 7 *J.L. Econ. & Organization* 313, 329 (1991) ("A right created by a simple majority vote in the postconstitutional stage is less secure than one protected by the constitution, since it can be taken away by a majority vote.").

4. Article V provides:

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 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.

U.S. Const. art. V.

5. See Lawrence M. Friedman, *American Law* 184 (1984).

6. See Richard B. Bernstein & Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* 169 (1993).

remedy to the overly difficult amendment process under the Articles of Confederation.⁷ Moreover, one might have expected that the growth of the regulatory welfare state, and concomitant shift in the allocation of power from the state governments to the federal government, would have resulted in additional constitutional protections, in order to restrain and focus the power of the federal government. Yet, this has not been the case.

We construct in this Article an economic framework to explain the constitutional amendment process and the relative dearth of amendments enacted through that process. Using efficiency justifications commonly offered for constitutionalism, we also evaluate the twenty-seven amendments that have been enacted. Employing the traditional method of economic analysis of political institutions, we also explore the influence of interest groups on amendment of the Constitution. This method, known as Public Choice analysis,⁸ assumes that public-sector employees are no more enlightened, intelligent, or public-spirited than persons who work in the private sector.⁹ Consequently, government actors and interest groups rationally pursue their own self-interests in the same way that private actors do in the marketplace; i.e., they further their self-interest by seeking a governmental privilege: a rule or law that is favorable to a group.

Public Choice theory is now accepted as a useful tool for understanding the outcomes of political processes¹⁰ as well as the behavior of bu-

7. As Alexander Hamilton reportedly remarked at the Constitutional Convention, "It had been wished by many, and was much to have been desired, that an easier mode of introducing amendments had been provided by the Articles of Confederation." 5 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 531 (photo. reprint 1941) (Jonathan Elliot ed., 1845).

8. We distinguish between "positive" and "normative" Public Choice literature. The former describes and predicts political events, while the latter evaluates the way political institutions *should* be structured. James Buchanan has contributed much to the normative Public Choice literature on constitutions. See generally James M. Buchanan, *Freedom in Constitutional Contract* (1977) (arguing that individuals can secure and retain freedom only in constitutional contracts). For a methodological justification for distinguishing between positive and normative social science, see Milton Friedman, *The Methodology of Positive Economics*, in *Essays in Positive Economics* 3 (1953).

9. See, e.g., James D. Gwartney & Richard E. Wagner, *Public Choice and the Conduct of Representative Government*, in *Public Choice and Constitutional Economics* 3 (James D. Gwartney & Richard E. Wagner eds., 1988). Gwartney and Wagner state:

[T]he men and women working in government as politicians and bureaucrats are pretty much like their counterparts in the private sector. If pursuit of such rewards as personal wealth, power, and prestige motivates people in the marketplace, there is every reason to believe that these same elements will motivate them in the political arena.

Id. at 7.

10. See, e.g., Randall G. Holcombe, *An Economic Analysis of Democracy* (1985) (developing new public choice model of resource allocation by representative democracy); Robert E. McCormick & Robert D. Tollison, *Politicians, Legislation, and the Economy, An Inquiry Into the Interest-Group Theory of Government* (1981) (using public choice approach to study the behavior of politicians in supplying legislation and wealth transfers); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influ-*

reaucratic agencies.¹¹ Other than some early work by James Buchanan and Gordon Tullock,¹² however, positive Public Choice theory generally has not been used to study the constitutional amendment process. Exceptions exist,¹³ but our survey of the Public Choice literature reveals a relative inattention to the economics of constitutional change. We hope here to begin to fill this gap.

In this Article, we analyze the role of interest groups in shaping the United States Constitution and the prospects for majoritarian control of the process of constitutional amendment. In Part I, we examine the legislature's role in supplying privileges to interest groups, comparing it with other sources of supply, and comparing the forms those privileges take, either as statutes or as amendments. We then construct a positive model predicting when interest groups will be willing to pay the greater costs of constitutional protection, emphasizing how the costs of organizing those groups and their expected opposition affects that choice. In Part II, we discuss two normative economic theories that provide efficiency justifications for constitutionalism. The first, precommitment, is a device that restrains majorities from taking actions that they might later regret.¹⁴ The second, reduction of agency costs,¹⁵ attempts to limit the damage willful government actors impose on the public.¹⁶

Part III applies our positive model to the normative goals of constitutionalism and predicts that the obstacles to amendment will stymie any majoritarian precommitment to restrict the power of government, and thus the power of the majority. For similar reasons, constitutional amendments limiting the agency costs of the federal government are also unlikely. Under our model, amendments remain possible only in highly consensual contexts or where members of the group (or groups) disadvantaged by an amendment are too diffuse to establish effective opposition.

After constructing our theoretical model, Part IV examines Congress' historical record in amending the Constitution and concludes that this

ence, 98 Q.J. Econ. 371 (1983) (creating economic model of political competition among pressure groups).

11. See, e.g., William A. Niskanen, Jr., *Bureaucracy and Representative Government* (1971) (applying economic analysis to bureaucracies); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1, 47-52 (1983) (same).

12. See James M. Buchanan & Gordon Tullock, *The Calculus of Consent* ch. 6 (1962).

13. See, e.g., McCormick & Tollison, *supra* note 10; Mueller, *supra* note 3.

14. See *infra* part II.A.

15. Agency costs are all costs incurred by a principal in relying upon another person (or persons) to accomplish the principal's tasks. Agency costs are the sum of "(1) the monitoring expenditures of the principal, (2) the bonding expenditures by the agent, [and] (3) the residual loss." Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. Fin. Econ. 305, 308 (1976). The third component of agency costs, residual loss, results from the fact that few, if any, agency relationships will perfectly protect principals from their agents' shirking behavior. See *id.*

16. See *infra* part II.B.

record substantially conforms with our model. Comparing the amendments composing the Bill of Rights with the latter seventeen amendments, we demonstrate that the increase in interest-group activity that followed the creation of a strong federal government has altered dramatically both the amendment process and the results that flow from it. While the Bill of Rights established credible precommitments and reduced agency costs, the amendment process has evolved toward expanding the federal government and increasing Congress' ability to extract rents and to redistribute wealth. Finally, we look at several failed amendments, examine the reasons for their failure, and predict the prospects for passage of some recently proposed amendments. We conclude that Article V thwarts the efficiency goals of constitutionalism, which is a consequence of Congress' control over the amendment agenda and interest-group domination of the political process. We predict, however, that little can or will be done to remedy this defect. The Framers had but one chance to get Article V right, *before* the federal government became established; we must live with their failure to do so. Economics' epithet as the "dismal science"¹⁷ is well-deserved in this instance.

I. INTEREST-GROUP RENT-SEEKING THROUGH STATUTES AND CONSTITUTIONAL AMENDMENTS

In this Part, we construct a predictive model of constitutional amendment. We focus on the choices interest groups make, both among suppliers of special privileges (the legislature, executive, judiciary), and the durability of those privileges (achieved either through statute or amendment). We argue that interest groups invest in political activity so as to maximize their investment returns. We argue further that the value an interest group places on durability turns on the organizational ability of both the group and its opposition.

First, we assume that people are always self-interested rational actors.¹⁸ This approach is necessarily reductionist, but the gains in analytical precision and predictive power outweigh the loss of subtlety and texture. Notwithstanding our view of individual behavior, we recognize that societal and economic changes can alter the constraints on people's cost-benefit calculus, thus altering observed political behavior and, occasionally, people's view of the Constitution. It follows that people seek constitutional change to further their own interests. Political activity, broadly defined, produces constitutional amendments—in short, the Constitution is not above politics. We reject a romanticized view of the Constitution, just as we reject a romanticized view of politics in

17. James M. Buchanan, *Toward Analysis of Closed Behavioral Systems*, in *Theory of Public Choice* 11, 17 (James M. Buchanan & Robert D. Tollison eds., 1972).

18. *See, e.g., id.* at 16 ("The economic model of behavior is based on the motivational postulate of individual utility maximization.").

general.¹⁹

Second, we further assume that rational actors pursue monopoly rents in the political arena.²⁰ Monopolistic opportunities can be created through government action; economists describe the expenditures actors incur in creating and exploiting such opportunities as "rent-seeking."²¹ Government regulation provides the most durable streams of rents because the government typically can limit entry to the market by competitors.²² To maximize the expected net benefits of rent-seeking, interest groups will rationally allocate their funds among alternative suppliers of privileges (legislature, executive, judiciary, and administrative agencies).²³ Thus, the branches of government comprise a set of alternative fora in which interest groups pursue privileges.

Rent-seeking through the government can occur in several ways. First, interest groups can seek rents from the executive branch by lobbying for changes in administrative regulations and enforcement practices. Second, interest groups can secure rents through the judiciary by persuading courts to interpret statutes or constitutional provisions in a manner consistent with their goals. Whenever a judge interprets a statute, she implicitly determines the value of the rents generated by that rule and identifies the beneficiaries of those rents. Accordingly, interest groups possessing a stake in the interpretations of statutes and regulations will attempt to influence judicial decisions through investments in litigation and by influencing judicial selection.²⁴ In some cases, however,

19. For a more high-minded view of the nature of constitutional change, see Ackerman, *supra* note 1, at 34-57.

20. In economic theory, a rent is a payment to a supplier exceeding the supplier's costs. See, e.g., Edwin G. Dolan & David E. Lindsey, *Economics* 535 (6th ed. 1991) ("An economic rent is any payment to a factor of production in excess of its opportunity cost."). Because a supplier requires monopoly power in order to earn returns in excess of costs over time, economists often use the term "monopoly profit" as a synonym for rent.

21. See, e.g., Robert D. Tollison, *Rent Seeking: A Survey*, 35 *Kyklos* 575 (1982). Of course, at the limit, competition among interest groups could entirely dissipate the available rents, and legislative activity would yield only normal returns. Nonetheless, the attempted investment in rent-seeking leads to deadweight social loss. See Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 *J. Pol. Econ.* 807, 812 (1975).

22. See Yale Brozen, *Is Government a Source of Monopoly?*, in *Is Government the Source of Monopoly? and Other Essays* 4 (Cato Institute Paper No. 9, 1980). The government's ability to protect monopolies is in turn the product of the government's monopoly over the legitimate use of deadly force. This monopoly over deadly force can be valuable, as the death toll among firms selling illegal drugs testifies. Violence often will be the most cost-effective way to protect monopoly profits (ignoring externalities).

Legislators can extract rents from firms by threatening regulation that would destroy or impair the value of prior industry-specific capital investments. See Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 *J. Legal Stud.* 101, 103-09 (1987).

23. See Susan M. Olson, *Interest-Group Litigation in Federal District Court: Beyond the Political Disadvantage Theory*, 52 *J. Pol.* 854, 858 (1990) ("Often the same grievance can theoretically be remedied through favorable administrative action, state or federal legislation . . . or even the popular ballot if initiative and referendum are available. . . . [A]ll [interest groups] seek the most effective use of their resources.").

24. See, e.g., Ira Glasser, *Talking Liberties*, *Civil Liberties* (ACLU, New York, NY),

expected judicial hostility to a provision may require the more drastic approach of constitutional amendment to ensure that that provision will succeed. Third, interest groups may seek rents by lobbying the legislature to enact a statute. Protective tariffs and import quotas, farm subsidies, and occupational-licensing requirements are only a few examples of the many interest-group privileges obtained by statute. Last—and most important for our purposes—interest groups can seek rents from the legislature through constitutional provisions. We focus here on interest groups seeking rents through constitutional amendment, as well as the ability of discrete interest groups to block amendment proposals that otherwise enjoy wide public support.²⁵

Once an interest group has decided upon the legislature as the source for its desired privilege, the group must choose whether to seek enactment of a new law or a constitutional amendment. Why do we not witness all interest groups seeking and securing constitutional protections for their desired privileges? The inevitable economic answer: constitutional provisions cost more. This is, of course, by design.

Simply put, amendments cost more because they require more lobbying and other expenditures than statutes. Usually, an interest group can achieve its desired political goals at a lower cost through statutory enactment than through constitutional amendment, especially at the federal level. Enacting a federal statute requires the approval of only a majority of each house of Congress (or, in the event of a Presidential veto, approval by two-thirds).²⁶ In contrast, an amendment requires the approval of a two-thirds majority in Congress (or two-thirds of state legislatures), as well as the approval of three-fourths of the state legislatures (or three-fourths of the states by convention).²⁷ Moreover, the interest group incurs the costs of amendment immediately, while the benefits accrue only in the long run. The interest group thus discounts those future benefits to reflect the time value of money. In addition, future changes in technology may reduce the value of an amendment to an interest group.²⁸ More important, an interest group may fear losing its investment to future unexpected judicial interpretation of an amendment, which also limits the group's demand for the amendment. An amendment that backfires on an interest group may be exceptionally costly to repeal.

Winter 1991-92, at 12 (discussing the role of anti-abortion groups in judicial selection during the Reagan-Bush era: "Our opponents' organization changed politics, and politics changed the Court.").

25. Persuading the Supreme Court to change its interpretation of the Constitution provides an alternative to rent-seeking through constitutional amendment. An inquiry into such judicial amendment, however, is far beyond the scope of this Article.

26. See U.S. Const. art. I, § 7.

27. See U.S. Const. art. V.

28. See McChesney, *supra* note 22, at 101. For example, a constitutional amendment conferring a monopoly in the manufacture and sale of buggy whips would have been extremely valuable in 1890, and virtually worthless in 1990.

One can predict when a group will choose to pursue statutory protection over a constitutional amendment. If the benefits of amendment are greater than the costs of obtaining one, a group will opt for constitutional change. If the added cost of constitutional protection exceeds the added benefit for an interest group, that group will pursue statutory protections. Explaining this choice requires an understanding of how the costs and benefits of traveling the constitutional route differ among groups.

A. Maintenance Costs

Interest groups differ in their "maintenance costs." Maintenance costs are the costs an interest group incurs over time in order to continue to lobby effectively for privileges conferred by the government. We hypothesize that interest groups with high maintenance costs have a greater demand for constitutional protection of their privileges than do groups with low maintenance costs.

This hypothesis is an intertemporal application of Mancur Olson's theory of collective action.²⁹ The theory of collective action holds that a group of individuals sharing an identifiable common interest often faces significant obstacles in organizing to compete for favorable legislation.³⁰ Olson's theory focuses on the costs of initial organization; our application of that theory focuses on the costs of maintaining group organization over time.

Group size directly influences maintenance costs. For example, reducing the number of farmers lowers their costs of political organization. If farmers' wealth and the aggregate power of their votes remain constant (as it would under a geographical, rather than numerical, representation scheme like that of the United States Senate), their political clout—and, hence, their political gains—will increase relative to that of other political actors.³¹ The smaller the group, *ceteris paribus*, the more potent their political force.

As groups grow larger, maintenance costs increase because of the difficulty of excluding non-contributors from the benefits of favorable legisla-

29. See Mancur Olson, Jr., *The Logic of Collective Action* (Harvard Econ. Stud. No. 124, 1965).

30. See *id.* at 7. Olson states that:

[I]t would not be rational for [a particular producer] to sacrifice his time and money to support a lobbying organization to obtain government assistance for the industry. [It is not] in the interest of the individual producer to assume any of the costs himself. A lobbying organization, or indeed a labor union or any other organization, working in the interest of a large group of firms or workers in some industry, would get no assistance from the rational, self-interested individuals in that industry.

Id. at 11 (original emphasis deleted).

31. See, e.g., *The Economist Survey of Agriculture*, *The Economist*, Dec. 12-18, 1992, at S3 (in insert appearing after page 60) (providing empirical evidence showing the worldwide increase in farm subsidies as the number of farmers has decreased). The organization of farmers is enhanced by the existence of giant agribusinesses which find it profitable to lobby for privileges for agriculture.

tive activity. A classic free-rider problem arises whenever individuals have incentives to hold out or shirk from the group effort.³² This problem occurs when each member of a group refuses to pull his own weight in the hope that the collective efforts of other members will make up for his laxity. Group organizers may respond by rewarding members for cooperation or sanctioning them for noncooperation.³³ They can limit these selective incentives to participating members in the group and thus discourage free riding in other benefits where exclusion is more difficult.³⁴ Despite these incentives, larger groups generally will have higher organization costs over time than smaller groups.

High-maintenance-cost groups will not anticipate being an effective political force in the future. Because they have no assurance of maintaining their organization in future periods, high-maintenance-cost groups are likely to demand the greater durability provided by amendments. On the other hand, low-maintenance-cost groups anticipate their continued effective organization through time. Thus, because these groups have a comparative advantage in purchasing continued protection of their privileges from future legislatures, they value constitutional protections less and are more likely to seek statutes.

Compare a group seeking an amendment that confers mainly diffuse or ideological benefits (prohibition of alcohol, for example) with a labor union seeking a provision that excludes non-union labor from government-contract work. Proponents of Prohibition cannot keep the benefits derived from prohibiting alcohol consumption from being enjoyed by those who did not contribute to the passage of a Prohibition amendment. All who oppose drinking gain psychological satisfaction from the increased sobriety in the community.³⁵ Free riders cannot be excluded; therefore, the group seeking Prohibition has high maintenance costs. By contrast, union leaders collect dues period after period from the beneficiaries of the rule excluding non-union labor, thus offsetting their maintenance costs and facilitating group organization over time.³⁶

A group that has coalesced only temporarily, such as Prohibitionists, cannot defend statutory privileges against competing interest groups in the future. By contrast, a low-maintenance-cost group, like a union, can lobby the legislature period after period, and can thus achieve and main-

32. See, e.g., Olson, *supra* note 29, at 48 ("the larger the number of members in the group the greater the organization costs, and thus the higher the hurdle that must be jumped before any of the collective good at all can be obtained").

33. See *id.* at 51.

34. See *id.*

35. This assumes that the rule is effective, a subject of considerable dispute in the Prohibition era.

36. See, e.g., *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961) (affirming that unions may collect "agency fees" (dues) from every employee—union member or not—within a unit it represents). The Court recognized that agency fees eliminate the problem of free riders, "non-members who obtain, without cost to themselves, the benefits of collective bargaining procured through the efforts of the dues-paying members." *Id.* at 763 n.14.

tain its privileges at a lower total cost over time. Therefore, an interest group's demand for constitutionally protected privileges will rise as its maintenance costs increase. Conversely, a group with decreasing maintenance costs will reduce its demand for constitutional amendments.³⁷

B. *Strength and Timing of Expected Opposition*

Also affecting an interest group's choice between constitutional amendments and statutes is its expectation of opposition to its proposal. This opposition may be weak or strong, and it may arise in the present or the future. Thus, a proposal can encounter one of four possible forms of opposition.

First, significant opposition may never arise. Opposition may be too weak in the present to block a constitutional amendment or statute, and may also have no future prospect of successfully challenging the proposal. Second, significant and lasting opposition may coalesce immediately upon introduction of a proposal. Such opposition may be strong enough to block an amendment, and may even be strong enough to block a statute. Third, strong opposition to a proposal may be expected to emerge only in the future. Finally, significant opposition may exist in the present, but be expected to decline in the future. An interest-group's choice between an amendment and a statute will vary depending on how it perceives the strength and timing of its opposition.

When considering the strength of a group's opposition, one must remember that the opposition must be stronger to block a statute than to block an amendment. Consider an amendment to the Constitution. Article V requires the agreement of two-thirds of the members of each house of Congress and three-fourths of state legislatures. To block the amendment, opponents need only muster negative votes from just over one-third of Congress *or* from just over one-fourth of the state legislatures. Therefore, opponents will almost always prevail unless they are geographically confined, with access to only an exceptionally limited number of representatives or financial resources. By contrast, blocking a statute requires greater political muscle. Absent a presidential veto, opponents must marshal, not one-third, but over one-half of congressional votes, and do not have an opportunity to block the proposal in the states.

Another factor contributing to an interest group's choice between amendment and statute is the timing of opposition. Suppose that a proposal generates no notable opposition at the present time and no opposi-

37. This conclusion assumes that interest groups' leaders are well-behaved agents for members of the groups. If leaders promote their own welfare at the expense of the group, the analysis becomes more complex. To avoid unnecessary complexities, we assume that leaders of interest groups do not themselves constitute interest groups within interest groups and that leaders are reasonably good agents for their members. On the intricacies of this problem in the context of interest-group litigation, see Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470 (1976).

tion is expected in the future. Such a proposal is one for which societal consensus is likely to persist over long periods—for example, a proposal making the Fourth of July a national holiday. Lacking significant opposition to the proposal, proponents could secure an amendment with relative ease. In this case, however, the additional benefits of amendment do not justify the added costs. Under these circumstances, two reasons will lead advocates of the proposal to settle for a statute. First, a statute would face little risk of future repeal because there is unlikely to be future opposition to it. Second, even when there is little cost to securing a super-majority, as here, there are other costs to amendments, such as the cost of lobbying states for approval. Simply put, a statute is cheaper. Thus, when interest groups anticipate no significant strengthening of opposition, a statute will do just as well as a constitutional amendment at much less cost.³⁸

One example of such a proposal is a change that is Pareto-improving.³⁹ By definition, such a proposal will make some people better off without making anyone worse off; i.e., no one loses now or in the future. A Pareto-improving change never generates opposition.⁴⁰ Although such changes cost relatively little to enact, proponents of Pareto-improving proposals will not seek to enact them through amendment unless the existing constitution requires it. This may seem counter-intuitive, but because no opposition to a Pareto-improving statute is expected to emerge, and since there is little risk of future repeal, an amendment would confer no additional benefits over a statute.

A proposal can fail to generate opposition (without being Pareto-improving) where free-rider problems prevent significant opposition from arising, even where the proposal generates net losses in social welfare. As the number of members in a group increases, per-capita benefits decrease and the likelihood of free riding increases. If a sufficient number of group members free ride, the group accomplishes little or nothing.⁴¹ When the losers are dispersed widely and have nothing in common other than their losses from the proposal, organizing political opposition may be prohibitively costly.⁴² Proponents who anticipate no future opposition will settle for a statute and save the additional costs of an amendment.

Consider the second possibility: significant opposition currently exists and is expected to last long into the future. In such a case, opponents

38. This assumes the political strength of the proponent group remains unchanged over time.

39. See David D. Friedman, *Price Theory* 438 (2d ed. 1990) (defining Pareto improvement as "a change that benefits one person and injures nobody").

40. This assertion ignores strategic behavior.

41. See Olson, *supra* note 29, at 48.

42. But see Jonathan R. Macey, *The Role of the Democratic and Republican Parties as Organizers of Shadow Interest Groups*, 89 Mich. L. Rev. 1 (1990) (discussing political parties as organizational devices for reducing the cost of political activity by dispersed groups).

will likely have at least the minimum number of votes necessary to block a proposed amendment. Indeed, the highly visible process of proposing a constitutional amendment may signal to opposing interest groups the need to block even a vaguely worded proposal. Moreover, it is difficult to tie an amendment to other more popular proposals as is often done in so-called "omnibus" statutes.⁴³ In the present-opposition scenario, opponents may even be able to block a statute.

The fact that a proposal is opposed immediately, however, has no relation to its potential social benefit or harm. Such a proposal may in fact reduce social welfare—for example, a proposal to do away with police and fire protection—but it need not necessarily do so. For instance, consider a proposal that would eliminate import restrictions and tariffs on foreign goods. Economists almost universally agree that trade restraints reduce overall social welfare.⁴⁴ The beneficiaries of trade restraints are concentrated, however, and can immediately oppose all free-trade proposals; the losers are dispersed and unable to respond effectively. In such a case, a constitutional amendment guaranteeing free trade is exceedingly unlikely; even a statute faces considerable obstacles.

Consider the third case: opposition currently wields no political power but is expected to do so in the future. Reasons for such delayed opposition vary. Opponents may currently lack political voice but will gain it in the future—for example, prospective immigrants. Also, potential losers under the proposal may not know during the current period that they will be harmed if the *ex ante* chance that a randomly selected person will be a winner under the proposal exceeds fifty percent or if there is inadequate information during the current period about the likely general effects of the proposal. This prospect has some aspects of a Rawlsian "veil of ignorance,"⁴⁵ but we make no normative assumptions about the rules at issue.

This delayed-opposition scenario is the paradigm for constitutional amendment. Supporters of this third type of proposal can more easily garner the votes necessary to secure a constitutional amendment in the current period. Because an amendment, rather than a statute, will better withstand organized opposition in the future, proponents expect higher net benefits from an amendment than from a statute. Therefore, interest groups will desire an amendment in the current period, making it more costly for opponents to repeal.

Consider the final possibility, in which opposition arises today but is

43. See, e.g., Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 1990 U.S.C.A.N. (104 Stat.) 1388.

44. See, e.g., Bruno Frey et al., *Consensus and Dissension Among Economists: An Empirical Inquiry*, 74 *Am. Econ. Rev.* 986 (1984) (reporting the results of an international survey of 936 economists showing that nearly nine out of ten economists agree that tariffs and import quotas typically reduce general economic welfare).

45. John Rawls, *A Theory of Justice* 12, 136-42 (1971) (arguing for a procedural device whereby people would choose the rules for society before society comes into existence and, hence, before people know their particular places in society).

expected to diminish in the future. In the present, the opposition can block both an amendment and a statute. In the future, however, the opposition will probably not be strong enough to block even a statute. Thus, an interest group will play a waiting game until the opposition subsides, and will then seek to enact a statute.

In sum, our economic theory predicts that advocates of a proposal will choose to secure it through an amendment either when they have high maintenance costs, or when opposition is weak today but expected to intensify in the future. Otherwise, the interest group will typically find a statute to be an attractive substitute for an amendment.

II. EFFICIENCY JUSTIFICATIONS FOR CONSTITUTIONALISM

We shift now from the positive theory of constitutional change to normative justifications for constitutionalism. The normative criterion applied here is wealth maximization, otherwise known as efficiency.⁴⁶ This Part discusses two efficiency justifications that have been offered for constitutionalism: precommitment and reduction of agency costs.

A. *Precommitment*

Economists commonly view constitutions as societal precommitment devices. They assume that, ordinarily, the availability of more choices increases wealth. Yet, it is not unlikely that individuals will take potentially rash or harmful actions in the future that are inconsistent with their long-term self-interest. Consequently, if possible, one would like to foreclose that possibility by limiting one's range of future choices. Thus, the economic theory of precommitment theorizes that an individual will restrict his future range of choices in order to rationally maximize his utility (or "preference satisfaction") over the long run. In like manner, by having his crew bind him to the mast, Ulysses avoided being drawn to the rocks by the enchanting song of the sirens.⁴⁷ Ulysses knew that he was only imperfectly rational, and he rationally planned to overcome his weakness.⁴⁸

Extending this theory from individuals to societies, precommitment through a constitution allows a supermajority to put certain actions beyond the power of government and, thus, beyond the reach of any subsequent majority coalitions. By limiting the range of collective choice, constitutions protect a realm of individual decision-making.⁴⁹ Constitutionalism can hence bind an entire society to the mast.

46. See Richard A. Posner, *The Economics of Justice* at vii (1981). For a critique of efficiency as a normative justification for legal rules, see Jules L. Coleman, *Markets, Morals, and the Law* (1988).

47. See Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* 36 (1979).

48. See *id.*

49. See Buchanan & Tullock, *supra* note 12, at 72 (discussing the relative advantages of collective and individual choice).

In his classic study, Jon Elster lists five criteria for precommitment:

- (i) To bind oneself is to carry out a certain decision at time t_1 in order to increase the probability that one will carry out another decision at time t_2 .

- (ii) If the act at the earlier time has the effect of inducing a change in the set of options that will be available at the later time, then this does not count as binding oneself if the new feasible set includes the old one.

- (iii) The effect of carrying out the decision at t_1 must be to set up some causal process in the external world.

- (iv) The resistance against carrying out the decision at t_1 must be smaller than the resistance that would have opposed the carrying out of the decision at t_2 had the decision at t_1 not intervened.

- (v) The act of binding oneself must be an act of commission, not of omission.⁵⁰

Constitutions may satisfy these criteria. The great durability of constitutional provisions permits majorities to put certain actions effectively beyond their reach, thus satisfying the first criterion. Although constitutions both grant and limit power, only the limits qualify as precommitments and satisfy the second criterion. Importantly, judicial independence creates an enforcement mechanism external to majoritarian agents, which satisfies the third criterion. By placing a binding interpretation power in a life-tenured group of decisionmakers, the majority has placed their precommitment beyond their ability to renege (assuming faithful agency on the part of the judiciary⁵¹). In contrast, placing precommitment enforcement in the hands of majoritarian agents in the legislature would not limit future choices effectively.

Satisfaction of the fourth criterion, however, requires some degree of uncertainty in evaluating potential future positions or other causes for delay in opposition. If actors can predict who will win or lose under a given rule, resistance to its implementation at t_1 will be as great as at t_2 . On the other hand, if no one knows how a rule will affect them, the level of resistance will be less in the future than in the present, thus making enactment of the rule more likely. Finally, constitutions generally satisfy the fifth criterion because they require affirmative conduct to be enacted. Thus, societies, like individuals, theoretically can precommit to a future

50. Elster, *supra* note 47, at 39-46.

51. For an analysis of this assumption, see Donald J. Boudreaux & A.C. Pritchard, *Reassessing the Role of the Independent Judiciary in Enforcing Interest-Group Bargains*, Const. Pol. Econ. (forthcoming) (on file with the *Fordham Law Review*).

course of conduct.⁵² Defining *who* does the precommitting, however, substantially complicates the assessment of the value of constitutions as societal precommitment devices, because constitutional provisions inevitably carry over from generation to generation.

How does a majority of society precommit to its preferences at the least cost? Societal preferences may remain relatively stable between generations. If so, granting earlier generations a preferred position in shaping the constitution is the least-cost method of precommitment.⁵³ Even this modified version of precommitment, however, appears to run foul of Elster's fifth criterion requiring that precommitment be an act of commission, not omission. Societal failure to repeal a constitutional provision seems like an act of omission. Elster cites the example of a child who has reached an age where he is finally able to reject the authority of his parent, but accedes to that authority nonetheless, deeming it to be in his best interest.⁵⁴ Elster argues that one cannot be confident that the child would have subjected himself to this authority if an alternative option had been available:

The fact that someone prefers not to leave a given state is not evidence that he would freely have entered that state from all of the states that are open to him. There are transaction costs and uncertainties involved that destroy the apparent symmetry of entry and exit. . . . *Preferences are always relative to a past history of choices*, and if the child had known from experience the states to which he prefers the state of being bound, his preferences might have been very different.⁵⁵

So, too, with societies. One cannot conclude confidently that the people of the United States would have arrived at the present constitutional scheme without its peculiar constitutional history. Indeed, one can argue confidently the opposite conclusion that, if the American people were to start from a *tabula rasa*, the constitution they would choose would differ substantially from the existing one. Despite these formal obstacles to societal precommitment, however, the practical realities of interest-group politics pose an even more formidable barrier to welfare-enhancing societal precommitment. Constitutionalism—although it grants a preferred position to the views of individuals long dead—might be the closest approximation to the aggregation of the precommitment preferences of millions of people.

52. Constitutions are difficult to amend, which means that constitutional provisions will inevitably endure throughout generations. From the perspective of pure democratic theory, this intergenerational binding appears fatal to a normatively justifiable constitutional precommitment—only a *current* majority can precommit itself. Economic theory, however, puts aside such normative issues and reduces the question to one of relative transaction costs.

53. See Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *Constitutionalism and Democracy* 195, 218-19 (Jon Elster & Rune Slagstad eds., 1988) (discussing James Madison's views on the difficulty of constitutional amendment).

54. See Elster, *supra* note 47, at 46-47.

55. *Id.* at 47 (emphasis added).

Even if this precommitment theory does not accurately and fully reflect the contemporary preferences of the governed population, constitutionalizing a rule may be justified if the costs of repeatedly considering a decision outweigh the benefits of achieving present social preferences.⁵⁶ Embedding certain rules in the Constitution effectively creates a "dictatorship" in the enforcement agent, the federal judiciary, which reduces the costs of decision-making.⁵⁷ This role, however, permits the judiciary to impose external costs on society, given that the judiciary's views may differ substantially from those of society at large.⁵⁸ Furthermore, due to differences in opinions, constitutionalizing a rule may provoke *greater* controversy rather than less, as *Roe v. Wade*⁵⁹ arguably did.⁶⁰ Therefore, a simple reduction in decision-making costs is unlikely to justify delegating decision-making to a judicial "dictator."⁶¹

Procedural obstacles in the legislature may adequately protect statutes from the continual reconsideration that might otherwise justify a dictatorship rule. Once enacted, statutes have remarkable staying power. Society nonetheless may have an interest in using the Constitution to slow changes desired by the majority. Instability may erode the ability of majorities to govern if it impairs confidence in popular government.⁶² Stabilizing governance rules encourages investment and avoids the deadweight losses that accrue from continual attempts to manipulate the decision-making rules.⁶³ In sum, society may benefit from constitutional precommitment, if the rule adopted reasonably reflects the views of the majority and is not susceptible to abuse by the chosen enforcement agent.

B. Reduction of Agency Costs

While democratic societies have to concern themselves with majoritarian overreaching, they also must worry about the agency costs

56. See Ronald A. Heiner, *Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules*, 15 J. Legal Stud. 227, 229 (1986) (arguing that precedents make it easier or less costly for judges to rule because they do not have to rethink each decision). Cf. Stephen Holmes, *Gag Rules or the Politics of Omission*, in *Constitutionalism and Democracy*, *supra* note 53, at 19, 20 ("Every institution is equipped to resolve certain difficulties better than others. By staying its hand, the Court can improve its overall performance. By refusing either to uphold or overturn a governmental action, it can avoid decisions that might damage its credibility and overtax its limited problem-solving capacities.").

57. See Buchanan & Tullock, *supra* note 12, at 99 ("One method of eliminating bargaining costs is to delegate decision-making authority to a single individual and agree to abide by the choices that he makes for the whole group.").

58. See *id.*

59. 410 U.S. 113 (1973).

60. See Cass R. Sunstein, *Constitutions and Democracies: An Epilogue*, in *Constitutionalism and Democracy*, *supra* note 53, at 327, 340-41 (removing the issue of abortion from public debate through constitutional law may increase conflict).

61. See Buchanan & Tullock, *supra* note 12, at 99.

62. See *id.*

63. See Jon Elster, *Introduction to Constitutionalism and Democracy*, *supra* note 53, at 1, 9.

of government. These costs make self-restraint more important to societies than to individuals. Ordinarily, individuals will act in their own self-interest; they cannot, however, generally rely on others, such as their representative agents, to act in their best interests. Unfortunately, society runs up against the self-interest of its representatives in attempting to induce those representatives to work on society's behalf. As common experience demonstrates, voting does not perfectly constrain political actors to work in the interests of the majority that elected them.

Constituents cannot rely upon their legislators to act as perfect agents. Entry barriers in the market for legislators create rents that legislators can extract from the people at large. A lack of perfect competition can generate legislative "slack," a subject of extensive study by public choice scholars.⁶⁴ Where legislative slack exists, legislators will not act as agents of the people, but rather in their own interests. Even if legislators desired to be the perfect agents of their constituents, however, other government actors would contribute to agency costs. Legislators might not be able to monitor these other government actors effectively. Moreover, these monitoring costs leave room for government actors in the executive branch and independent agencies to maximize their own interests, at the expense of the public at large.

Consequently, society needs to place limits on its political agents. According to the political theories that view government as a form of contract among the governed, people place restraints on government before it comes into being as a means of decreasing agency costs.⁶⁵ These theories reflect the practical insight that once the government has been established, government actors form a powerful interest group well-placed to impose substantial agency costs on the citizenry at large. This constitutes the classic normative case for constitutional limitations.⁶⁶

Constitutionalism promises to reduce these agency costs. For example, bicameralism and separation of powers are thought to discourage interest-group wealth transfers.⁶⁷ Split decisionmakers increase legislators' costs of securing agreement, and hence, the costs of seeking rents.⁶⁸

64. See, e.g., Joseph P. Kalt & Mark A. Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions*, 33 J.L. & Econ. 103, 104-06 (1990) (arguing that policymakers' ideology represents rational shirking). *But see* William R. Dougan & Michael C. Munger, *The Rationality of Ideology*, 32 J.L. & Econ. 119, 120-30 (1989) (arguing that apparent ideological voting may be a mechanism for long-term bonding).

65. See John Locke, *The Second Treatise of Civil Government* 48-51 (J. W. Gough ed., 1947) (1690) (arguing that divestiture of natural liberty ends and civil society begins when people consent to subject themselves to the political power of a majority-run body). *See also* James M. Buchanan, *The Limits of Liberty* 31-34 (1975).

66. Note the symmetry between this normative position and the delayed-opposition scenario predicted by our positive theory. *See supra* part I.B (discussing the strength and timing of opposition).

67. See Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 Geo. Wash. L. Rev. 50 (1987).

68. See Saul Levmore, *Bicameralism: When are Two Decisions Better than One?*, 12

Constitutional provisions limiting the means that government actors can employ or the ends that they can seek have a similar effect.

C. *Precommitment and Agency Costs Compared*

Although the concepts of agency costs and precommitment are related, they are distinct. Agency costs arise only when an individual, or group of individuals, relies on the efforts of another (the agent) to achieve the individual's goals. Even if a group can rely on its political actors to act as perfect agents, it also must consider the value of precommitment. History relates many actions that a majority took that it later came to regret.⁶⁹ Constitutional precommitment promises to reduce those costs of regret, if the majority can decide what actions to place beyond its reach.

The ideas of precommitment and limiting agency costs have long been significant elements in constitutional theories. The Framers recognized these important goals when they were drafting the original Constitution⁷⁰ and their views are echoed by modern constitutional theorists.⁷¹ Modern scholars attempt to dissolve the "counter-majoritarian diffi-

Int'l Rev. L. & Econ. 145, 151-59 (1992) (arguing, in part, that bicameralism fosters less wasteful rent-seeking and corruption than supermajoritarianism).

69. *Compare* *Korematsu v. United States*, 323 U.S. 214, 219 (1944) (upholding government detention of Japanese-Americans) with Act of Aug. 10, 1988, Pub. L. No. 100-383, 1988 U.S.C.C.A.N. (102 Stat.) 903 (providing restitution to Japanese-Americans and Aleuts interned during World War II).

70. Alexander Hamilton argued that an independent judiciary was necessary:

No legislative act, therefore, contrary to the Constitution, can be valid. . . . [T]he power of the people is superior to both [the legislature and the judiciary], and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.

The *Federalist* No. 78, at 467-68 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Under this view, legislative slack may permit legislatures to impose agency costs by enacting statutes that are contrary to the interests of the majority and contrary to the Constitution. Later in the tract, however, Hamilton shifts gears in his defense of independent judicial enforcement of the Constitution:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

Id. at 469. Independent judges are thus necessary to protect the majority from their own worst impulses—a classic precommitment strategy where long-term preferences trump later desires—as well as to limit agency costs imposed by the legislature.

James Madison echoed Hamilton's sentiments:

In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful

culty"⁷² by tying constitutionalism to long-term majoritarian preferences. Only through *ex ante* constitutionalism can majorities effectively constrain themselves and their agents. Once the negative effect of proposed laws on particular interest groups becomes clear, these groups will converge to derail such laws regardless of the net social benefit. A central question that we seek to answer, therefore, is the likelihood of majoritarian precommitment and reduction of agency costs through constitutional amendment, given the role of interest groups in political activity. In Parts III and IV, we will use the normative criteria developed above to evaluate the amendment process and the amendments themselves.

III. THE STRUCTURE OF CONSTITUTIONAL AMENDMENT

Adopting as our benchmark the efficiency justifications described above, this Part will now evaluate the Article V amendment process.

Article V's requirements of a split decisionmaker and supermajority clearly advantage minority interest groups that oppose amendment. The extremely high cost of amending the Constitution is, of course, by design. Approval by three-fourths of state legislatures effectively bars proposed amendments which, if enacted, would directly transfer wealth from society at large to a concentrated interest group. State legislatures are comprised of representatives of large numbers of people spread over a wide swath of the national geography, thus creating a great diversity of economic interests and culture. This almost guarantees that any interest group seeking an inefficient transfer of rents by constitutional amendment will have to pay a price that far exceeds the value of the amendment to that group. In fact, of the twenty-seven amendments to the Constitution in more than 200 years, only a handful can be characterized

factions or parties be gradually induced, by a like motive to wish for a government which will protect all parties, the weaker as well as the more powerful.

The Federalist No. 51, at 324-25 (James Madison) (Clinton Rossiter ed., 1961). Madison's argument highlights the importance of uncertainty for attaining constitutional provisions fostering efficiency. See *supra* part II.A. (discussing Elster's fourth criteria for precommitment); see also Buchanan & Tullock, *supra* note 12, at 78 (stating that "[t]he uncertainty that is required in order for the individual to be led by his own interest to support constitutional provisions that are generally advantageous to all individuals and to all groups seems likely to be present at any constitutional stage of discussion").

71. Most notably, this view has been a central theme of James Buchanan's work. See James M. Buchanan, *The Domain of Constitutional Economics*, 1 Const. Pol. Econ. 1 (1990) (describing constitutional political economic research and distinguishing it from conventional economics by pointing out that constitutional economics focuses on the choice among—rather than within—constraints); see also Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 Stan. L. Rev. 759, 795 (1992) ("Sometimes the majority's will is best effectuated by compelling adherence to its long-term aspirations and commitments, rather than permitting satisfaction of transient desires. On this view, invalidating a piece of majoritarian legislation can be perfectly consistent with majoritarianism.").

72. Alexander Bickel, *The Least Dangerous Branch* 17 (1962).

as devices for inefficiently creating and transferring rents.⁷³ However, many of the amendments indirectly facilitated the institutional ability of Congress to serve as a source of rents.

Notwithstanding Article V's protection of the status quo, its procedures cannot guarantee that a majority of the *people* support a constitutional amendment. Because the Constitution can be amended solely by the actions of political representatives, the opportunity exists for shirking by the people's elected representatives. This shirking can take two forms: enacting an amendment that a majority (or substantial minority) of the people oppose, or failing to enact an amendment that a supermajority of the people favor.⁷⁴

The first possibility, enacting an amendment contrary to the will of the majority, can take place only under specific conditions. Although Article V's requirement of a supermajority in Congress seems to ensure that at least a majority of the citizenry supports an amendment, agency costs make a congressional majority no guarantee of a popular majority. Nonetheless, the supermajority requirement at least increases the odds that a majority of people favor an amendment. Congress can still enact an amendment that a majority of the people oppose, however, when a currently dominant political group has substantial "market power" in competing for votes. It can use that market power to gain advantages without fear of political retribution. In our predominantly two-party system, a party will have substantial market power when it controls both chambers of Congress, as well as a substantial majority of the state legislatures.

Such a landslide is the political equivalent of a major product innovation in a market for goods or services. In product markets, these competitive advantages translate into increased profits for firms. In political markets, politicians in the dominant party may use their advantage to centralize power at the expense of competing units of government.⁷⁵ Alternatively, a dominant political party may use its current electoral edge to create a structural advantage that will assist the party in winning future elections.⁷⁶ The currently dominant party may attempt to solidify its position through amendment to the Constitution, even at the expense of current political support if a constitutional change promises to yield

73. This is not true of constitutional amendments at the state level. See Anderson, *supra* note 2, at 91.

74. From an efficiency perspective, legislative shirking must be judged by the intensity of groups favoring and opposing a proposal. If a substantial minority vehemently opposes a bill that a small majority slightly favors, a legislator would be shirking if he voted for the proposal under the criteria employed here.

75. See Jody Lipford & Bruce Yandle, *Exploring Dominant State Governments*, 146 *J. Institutional & Theoretical Econ.* 561, 561-65 (1990) (providing empirical evidence that a state's share of tax revenue increases with concentration of dominant party in state legislature and concluding that dominant parties within state legislatures are able to maximize their political gains).

76. See Gary M. Anderson & Robert D. Tollison, *Legislative Monopoly and the Size of Government*, 54 *Southern Econ. J.* 529, 533 (1988).

significant future political support.⁷⁷

Where a proposal would appear to benefit all political actors at the expense of the public at large, little organized opposition to an amendment will arise. Unless the amendment harms the interests of political actors at the state level, no opposing group will coalesce outside of Congress. Although the public as a whole will suffer from the constitutional change, without an "outsider" group in a position to generate opposition, ordinary citizens are too diffused to organize collectively. Congress' control over the constitutional agenda means that amendments facilitating the ability of legislators to serve as brokers for rent-seeking will receive sympathetic treatment in that branch. The only remaining substantive limit placed on Congress' ability to amend the Constitution is Article V's guarantee of equal suffrage in the Senate. Thus, Congress is well placed to impose substantial agency costs on their constituents through amendment to the Constitution.

The second possibility—namely, the failure to enact an amendment favored by a supermajority of the voting population—is more likely, especially if that amendment aims to reduce agency costs of government. Amendments that confer a small benefit on a large percentage of the population are unlikely to find much support in Congress, particularly if that amendment impairs the interests of its members. Free-rider problems will keep an effective group from coalescing to push such a proposal.⁷⁸ In addition, no member of Congress could extract rents from a provision with widely spread benefits. Although they may be socially desirable, wide-spread benefits do not produce votes or contributions.

Further, Congress has organized its operating procedures to maximize the likelihood that its members will be re-elected, not to register voter preferences efficiently. Congress uses committee systems, rules of order, and seniority systems to maximize the control exercised by its most senior members, who consequently have substantial control of Congress' legislative agenda.⁷⁹ This control facilitates interest-group access to legislative processes (and correspondingly, members' ability to extract votes and contributions from those interest groups). This access gives interest groups a great ability to block amendments that might impair their interests.

The structure of Article V also ensures that interest groups are well-placed to block majoritarian proposals that might harm the group's interests. Collective-action problems are likely to impede the ability of majorities to enact constitutional provisions to precommit against rash

77. This assumes the party has the requisite party discipline. Where individual legislators are free to ignore the preferences of the party as a whole, these legislators will have little incentive to jeopardize their own political base for the advantage of the party.

78. For a discussion of the free rider problem, see *supra* notes 32-34 and accompanying text.

79. On the efficiency justifications for seniority systems, see Kenneth Shepsle & Barry Nalebuff, *The Commitment to Seniority in Self-Governing Groups*, 6 J.L. Econ. & Organization 45, 49 (Special Issue, 1990).

action or to reduce agency costs because the benefits of such provisions would be spread so widely.

IV. AN ECONOMIC HISTORY OF CONSTITUTIONAL AMENDMENT

This Part applies the framework developed above to analyze several amendments to the Constitution. We focus on the role interest groups play in the process of constitutional amendment and the role Congress plays as an agenda setter. In particular, we explore the ability of majorities to restrain their political agents through amendment, and the ability of majorities to precommit against engaging in undesirable future acts. Our analysis is divided into three subsections: the Bill of Rights,⁸⁰ the Eleventh through Twenty-seventh Amendments, and amendments that have failed to be proposed or ratified.

A. *The Bill of Rights*

The concern that the Philadelphia Convention had inadequately restrained the federal government drove the campaign for a Bill of Rights.⁸¹ The political setting in which the Bill of Rights was enacted substantially resembled that of the Convention. In both contexts, government actors were not yet effectively organized as an interest group. Moreover, the absence of non-governmental interest groups revolving around the national government made both the original deal and the subsequent amendments possible. Government actors thus constituted the sort of delayed opposition found in the paradigm case above for constitutionalizing a rule.⁸² If a strong federal government had been in place at

80. Some will question treating the Bill of Rights as amendments. Many believe that those amendments were part of the original deal, necessary to gain enactment of the Constitution. Nonetheless, the Bill of Rights was enacted through the Article V amendment process. Although James Madison and other supporters of the proposed Constitution did promise to push for a Bill of Rights in the First Congress after the Constitution was ratified, see *James Madison to George Eve, Orange, 2 January, reprinted in 2 The Documentary History of the First Federal Elections 1788-1790*, at 330-31 (Gordon DenBoer & Lucy Trumbull Brown eds., 1984), enacting the Bill of Rights was not a precondition to ratification, nor was the content of the Bill of Rights specified in advance. The Federalists deflected demands for a second convention and channelled the demand for a Bill of Rights through the Article V amendment process. See *Madison to Alexander Hamilton, 1788, reprinted in 2 The Bill of Rights: A Documentary History 848* (Bernard Schwartz ed., 1971) ("The plan mediated by the friends (of) the Constitution is to preface the ratification with some plain & general truths that can not affect the validity of the act; & to subjoin a recommendation which may hold up amendments as objects to be pursued in the constitutional mode."). Therefore, the history of the Bill of Rights does shed light on the amendment process. Treating the Bill of Rights as part of the original deal suppresses the sharp contrast between the character of the first ten amendments and the latter seventeen. Only the Bill of Rights places substantive limits on federal government action.

81. See, e.g., William Lee Miller, *The Business of May Next 244-59* (1992) (describing James Madison's encouragement of the campaign for the Bill of Rights).

82. See *supra* part I.B.

the time of the Convention and its ratification, the Constitution would have taken on a very different character.

The first ten amendments to the Constitution promote policies that could have been accomplished through statutes and that did not require constitutional amendment. The Bill of Rights restrict the federal government's ability to act in certain ways, but nothing in the original Constitution required amendments to achieve these restraints. Political pressures on Congress and the Executive might have constrained the government. After all, absent the Bill of Rights, Congress was not obliged to regulate speech or the press, or to deny trial by jury, or to inflict cruel and unusual punishments. Proponents of the Bill of Rights sought constitutional restraints not because amendment was necessary—as a legal matter—to achieve their goals,⁸³ but rather in order to increase the costs borne by *future* opponents seeking to use government in ways prohibited by the Bill of Rights. Statutory attempts to rein in these officials would likely have failed because, once the government became established, concentrated interest groups would have disproportionate influence in representative democratic institutions. Moreover, the Convention's innovation of real majoritarian power in a representative legislature created the possibility of majoritarian abuse, in addition to the familiar agency cost problem of government. Simple majoritarian protection through a *statutory* Bill of Rights would not have sufficed precisely because the benefits flowing from these rights were so widespread.⁸⁴ Due to the free-rider problem, majorities inevitably face the highest maintenance cost in protecting their prerogatives. On the other hand, government actors are a discrete, well-organized group with a considerable advantage in the fight for statutory privileges, and they would be a constant threat to repeal a statutory Bill of Rights. Few would benefit from abrogating these rights; many would suffer a net detriment from denial of these rights. The former group thus could more easily solve free-rider problems in order to achieve legislative success. Therefore, the best chance for citizens at large to limit the government's power was for the proponents of the Bill of Rights to insist during the drafting and ratifying stages—before future government insiders became aware of who they were—that the government be checked constitutionally. Otherwise, the agency costs would be spread too widely for a coherent interest group to emerge and push for

83. Indeed, opponents of the Bill of Rights claimed that government lacked the power to interfere with individual liberties. In their view, the Bill of Rights was at best superfluous, see James Wilson, *An Address to a Meeting of the Citizens of Philadelphia (1787)*, reprinted in 1 *The Bill of Rights: A Documentary History* 528, 529 (Bernard Schwartz ed., 1971) (stating that the Bill of Rights is a "defect in the proposed constitution"), and, at worst, mischievous. The mischief they feared was that the enactment of the Bill of Rights would imply that the federal government possessed greater powers than was intended. See *The Federalist* No. 84, at 514 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

84. See A.C. Pritchard, Note, *Government Promises and Due Process: An Economic Analysis of the "New Property"*, 77 Va. L. Rev. 1053, 1066-74 (1991).

government limitations. Absent constitutional amendment, the diffuse majority would have simply been taxed by excessive levels of agency costs imposed by actors in the federal government.

The Founders thought that the Articles of Confederation were defective because they conferred too little power on the national government,⁸⁵ and left too much room for wasteful rent-seeking at the state level.⁸⁶ The inefficient practices of the state governments included the confiscation of property, the abrogation of debts, the issuance of paper money, and the imposition of tariffs and taxes on commerce from their sister states.⁸⁷ Most members of the Constitutional Convention, therefore, had complementary goals: enhancing the power of the federal government and limiting the abuses of overreaching state governments.⁸⁸

The Constitution helped attain the goals of strengthening property rights and the enforceability of contracts, but, in so doing, it sparked the opposition of state political actors who were dependent on rent-seeking at their level.⁸⁹ For example, New York legislators feared the loss of tariff revenue on imported goods coming through New York en route to New Jersey and Connecticut.⁹⁰ The proposed Constitution also raised fears that a strong federal government would itself act as a powerful interest group, capable of extracting substantial rents. Proto-antifederal-

85. See Randall G. Holcombe, *Constitutions as Constraints: A Case Study of Three American Constitutions*, 2 Const. Pol. Econ. 303, 306 (1991).

86. See Harry N. Scheiber, *Federalism and the Constitution: The Original Understanding*, in *American Law and the Constitutional Order* 85, 87 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978) (stating that "[t]he ills that beset America . . . included . . . 'a constant tendency in the States to encroach on the federal authority' [and] . . . a pattern of manifest infringement of 'the rights and interests of each other' and oppression of 'the weaker party within their respective jurisdictions.'" (quoting Madison's notes of June 8, 1787, in 1 Records of Federal Convention of 1787, at 164)).

87. See William H. Riker, *The Lessons of 1787*, 55 Pub. Choice 5, 7 (1987).

88. See John P. Kaminski, *The Making of the Bill of Rights: 1787-1792*, in *Contexts of the Bill of Rights* 18, 19 (Stephen L. Schechter & Richard B. Bernstein eds., 1990).

Members of the Constitutional Convention also were aware of the efficiency justifications for constitutionalism, although they articulated these purposes differently. Madison understood that future government officials were apt to aggrandize themselves at the expense of citizens at large:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government . . . the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

The Federalist No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) Madison's agency cost perspective anticipates a major theme in Buchanan & Tullock, *supra* note 12.

Madison also was concerned by the need for majoritarian precommitment in drafting the Constitution. "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part." *Supra* at 323.

89. See Robert A. McGuire & Robert L. Ohsfeldt, *Self-Interest, Agency Theory, and Political Voting Behavior: The Ratification of the United States Constitution*, 79 Am. Econ. Rev. 219, 222 (1989).

90. See Kaminski, *supra* note 88, at 35.

ists, skeptical of the Convention's prospects for success, boycotted the Convention confident that they could scuttle any increase in federal power at the ratification stage.⁹¹ The members of the Constitutional Convention, however, unilaterally changed the rules for ratification. They bypassed the state legislatures whose approval was required to make changes under the Articles and sent the proposed Constitution to state ratifying conventions. In so doing, the Federalists attempted to circumvent the rent-seeking opposition of state legislators, knowing that state political actors would jealously protect their prerogatives.⁹² But the Federalists' stratagem was not entirely successful. The Antifederalists countered by seeking a revision of the Constitution. Their arguments played on the concern that the newly strengthened federal government would overshadow the state governments.⁹³

The role of state governments complicates the economic account of the enactment. Like federal political actors, political actors at the state level imposed agency costs on the people at large.⁹⁴ By the time of the Constitutional Convention, state governments already had organized effectively to protect their interests; thus, state political actors could impose agency costs on their constituents. Notwithstanding these agency-cost problems, the interests of state political actors seeking a Bill of Rights roughly coincided with the interests of the populace. An increase in the power of the federal government would increase the prospects for rent-seeking at the expense of both the state governments *and* the people.⁹⁵ Conversely, a decrease in the power of the federal government would increase the opportunities for rent-seeking at the state level.⁹⁶ Consequently, in addition to the Bill of Rights, the Antifederalists wanted a clear transfer of power to the state governments.⁹⁷

In this, the Antifederalists were only partially successful. Although

91. See Riker, *supra* note 87, at 16-17.

92. See *id.* at 17.

93. See, e.g., *Patrick Henry's Speech (June 7, 1788) before the Virginia Ratifying Convention*, reprinted in *The Anti-Federalist Papers and the Constitutional Convention Debates* 210 (Ralph Ketcham ed., 1986) (arguing that even if all the citizens of Virginia wanted to alter the government, they could be prevented from doing so by a minority of citizens of the United States).

94. Competition among the states for constituents and firms limits the ability of state political actors to extract rents from their constituents.

95. At the Virginia convention, James Monroe urged that the national government not be allowed to do "harm, either to States or individuals." Kaminski, *supra* note 88, at 31. On the congruence of state and individual interests in limiting federal rent-seeking, note the symmetry of the Ninth and Tenth Amendments, which respectively reserve rights to the people and powers to the states.

96. See *Debates, New York Ratifying Convention, 1788*, reprinted in 2 Schwartz, *supra* note 80, at 857, 866 ("The idea of two distinct sovereigns in the same country, separately possessed of sovereign and supreme power, in the same matters at the same time, is as supreme an absurdity, as that two distinct separate circles can be bounded exactly by the same circumference.").

97. See *George Mason's Objections to the Proposed Federal Constitution, 1787*, reprinted in 1 Schwartz, *supra* note 83, at 444, 446; *Letter of Agrippa, 1788, to the Massachusetts Convention, (Feb. 5, 1788)*, reprinted in *id.* at 516-21; Richard Henry Lee, *Letter*

the Bill of Rights (unlike the original Constitution) did not limit the power of state governments, neither did it provide a clear-cut victory for political actors committed to rent-seeking at the state level.⁹⁸

James Madison, fearing the risks to a strong federal government that a second convention might bring,⁹⁹ astutely seized control of the agenda for constitutional change.¹⁰⁰ Madison carefully chose among the amendments that had been proposed by the state ratifying conventions.¹⁰¹ He selected those amendments that reduced the agency costs of the federal government and served as precommitments against majoritarian abuse, but did little to increase directly the domain of state-level rent-seeking. Indeed, Madison further attempted to limit the amount of rent-seeking available at the state level, but he failed. Madison's proposal to limit state restrictions on the rights of conscience, the press, and criminal jury trial was rejected by the first Senate,¹⁰² whose members were selected by the state legislatures at that time. Because state governments remained effective political forces in the early days of the Republic, the failure of Madison's proposal suggests that the enactment of the Bill of Rights was not wholly free of interest group pressure.¹⁰³ Nonetheless, Madison largely succeeded in deflecting the push for increased state power.

Certain amendments, such as the Second¹⁰⁴ and the Tenth,¹⁰⁵ explicitly protected state governments and state political actors. Other state-sponsored amendments would have aided their interests indirectly. For example, one of the amendments proposed by several state ratifying conventions¹⁰⁶ (and endorsed by Thomas Jefferson)¹⁰⁷ would have prohib-

from the Federal Farmer, Oct. 9, 1787, in 2 *The Complete Anti-Federalist* 230, 232 (Herbert J. Storing ed., 1981).

98. This is indicated by the tepid response from the Antifederalists to Madison's proposed Bill of Rights. See Kaminski, *supra* note 88, at 47. See also Miller, *supra* note 81, at 262 ("Patrick Henry is reported to have said that he would have preferred a single amendment disallowing direct taxes to all the amendments approved by Congress.").

99. See *Madison to G.L. Turberville, 1788*, reprinted in 2 Schwartz, *supra* note 80, at 930-31.

100. See Miller, *supra* note 81, at 259. Proponents of the Constitution comprised a majority in both houses of the first Congress. See *Madison to Jefferson, 1788*, reprinted in 2 Schwartz, *supra* note 80, at 993.

101. The state conventions proposed all of Madison's amendments, except for the Takings Clause of the Fifth Amendment and his attempt to limit state government powers. See Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131, 1182 (1991).

102. See Wilfrid E. Rumble, *James Madison on the Value of Bills of Rights*, in XX *Nomos* 122, 136 (J. Roland Pennock & John W. Chapman eds., 1979). The Senate also rejected Madison's proposal to codify the doctrine of the separation of powers. See Herman V. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of Its History*, in 2 *Annual Report of the American Historical Association for the Year 1896*, at 26-27 (1897).

103. See Miller, *supra* note 81, at 254.

104. U.S. Const. amend. II (establishing the right to bear arms).

105. U.S. Const. amend. X (reserving powers not delegated to the United States to the States or to the people).

106. These included Massachusetts, New Hampshire, and New York. See 1 Elliot, *supra* note 7, at 323, 326, 330.

ited the federal government from granting monopolies. Madison, however, omitted this provision from his draft proposal for the Bill of Rights.¹⁰⁸ While the monopoly amendment would have limited the power of the federal government to expropriate the wealth of the citizenry at large, it also would have protected the prerogatives of the states over the property within their boundaries. By limiting the ability of the federal government to expropriate wealth from individuals, the monopoly amendment would have left greater wealth for the states to extract from their citizens. Rent seekers, as a rule, do not care for competition.

The Bill of Rights, however, largely reduced the agency costs of the federal government, rather than increased the domain of rent-seeking available to state political actors.¹⁰⁹ Because state governments provided a coherent interest group with a substantial interest in revising the draft, opponents of the proposed Constitution were well-organized. To make their opposition to the proposed Constitution politically effective, however, opponents also needed an issue that would generate popular support and thus garner votes in the first congressional elections. The Antifederalists invoked the need for a second convention to enact a Bill of Rights protecting the liberty of the people.¹¹⁰ They did not want to make the same mistake of boycotting a second convention, where the balance of power would have been more likely to favor the states.¹¹¹

This strategy took advantage of the popular fear that federal politicians might act contrary to the interests of the people.¹¹² Relying on the events that led to the Revolution, the rhetoric of the Antifederalists highlighted the problem of the government acting as an interest group (affecting agency costs), rather than the need to restrain future majorities (precommitment). The Declaration of Independence, after all, reads as an indictment of a distant government that does *not* respond to the majority.¹¹³ It declares a natural right of the people to control their agents

107. See *Jefferson to Madison, 1789*, reprinted in 2 Schwartz, *supra* note 80, at 1140-43.

108. As a result, we only can speculate how such a provision might have affected the struggle between Franklin Roosevelt and the Supreme Court over the New Deal, which involved a considerable number of government-sponsored monopolies. See generally Gary M. Anderson & Robert D. Tollison, *Congressional Influence and Patterns of New Deal Spending, 1933-1939*, 34 J.L. & Econ. 161 (1991).

109. See *Madison to Jefferson, 1788*, reprinted in 2 Schwartz, *supra* note 80, at 992, 993. See also Miller, *supra* note 81, at 253 (“[Madison] also omitted most of those proposed amendments that did not partake of the nature of great rights of mankind, and all that were in effect disputes about the powers and structure of government (like amendments removing the direct taxing power).”).

110. See Riker, *supra* note 87, at 29-30.

111. See *supra* note 91 and accompanying text.

112. See Robert A. Rutland, *The Birth of the Bill of Rights, 1776-1791*, at 124-58 (1955).

113. Each of the passages begins with “HE” and cites a specific failure of the King to serve the interests of the American people. Included among the charges: “He has refused to pass other Laws for the Accommodation of large Districts of People, unless those People would relinquish the right of Representation in the Legislature, a right inestimable

in government.¹¹⁴ There is not a hint of limiting majoritarian powers here, only objections to the failure of King George III to serve the interests of the majority, which is a classic agency-cost concern. This concern for agency costs would have been too diffused to support organized opposition, however, had it not coincided with the interest of state political actors in protecting their rent-seeking domain against federal encroachment. Efficiency justifications, no matter how compelling, face substantial political obstacles absent interest group support.

At the time of the Founding, however, interest group politics at the federal level did not present a great obstacle to the enactment of constitutional provisions fostering efficiency. The weakness of the national government under the Articles of Confederation posed a problem for efficient government, but presented an opportunity for efficient constitution writing.¹¹⁵ Although the national government's weakness created substantial conflict between the states with commensurate rent-seeking, the Bill of Rights would not have been enacted if the national government had been more powerful at that time.

In fact, the Bill of Rights encountered weak opposition at the time of enactment, but stronger opposition was anticipated from future political actors in the federal government. Initially, the Federalists opposed revision of the proposed Constitution, but they backed down because they feared that, without a Bill of Rights, a second convention might be called, or that North Carolina and Rhode Island might decline to join the still very fragile union.¹¹⁶ The members of the First Congress essentially were coerced into acting in a public-regarding fashion. If they failed to produce a credible Bill of Rights, there was a real threat that the fledgling union would collapse, thus eliminating all possibilities for future rent-seeking at the federal level.¹¹⁷ Self-interest of the Federalists aligned with the public interest, but only for a brief period. After being empowered for just a short time, government officials and employees began to identify their personal interests more closely with that of the govern-

to them and formidable to tyrants only." The Declaration of Independence para. 5 (U.S. 1776).

114. *See id.* at para. 2.

115. The inefficiency of the national government under the Articles of Confederation may have been limited to the inability to control rent-seeking by the states. In other respects, such as limiting the size of the federal government, the Articles may have provided for *more* efficient government than that brought about by the new Constitution.

116. *See* Bernard Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights* 156 (1977). North Carolina had declined to ratify until a Bill of Rights should be passed. *See, e.g.,* North Carolina Convention Debates, 1788, in 2 Schwartz, *supra* note 80, at 933, 959 (Willie Jones, leader of the North Carolina Antifederalists said: "[South Carolina and Georgia] cannot exist without North Carolina. There is no doubt we shall obtain our amendments, and come into the Union when we please.").

Rhode Island illustrated rent-seeking run amok at the state level. *See* Riker, *supra* note 87, at 22. The state's initial failure to join the Union hardly could have come as a surprise.

117. *See* Forrest McDonald, *E Pluribus Unum: The Formation of the American Republic, 1776-1790*, at 351-52 (2d ed. 1979).

ment. The benefits of limited government to these officials came to be outweighed by the benefits they would enjoy from their unconstrained ability to use government as they chose. Government officials then coalesced into an effective interest group, opposing legislative and judicial attempts to constrain their powers.

Thus, from an agency-cost perspective, enacting the Bill of Rights assuaged a generally-held fear that, once empowered, the national government would emerge as a powerful interest group in its own right. Once a government comes into power, political actors inevitably threaten generally desired liberties.¹¹⁸ For example, the First Amendment directly constrains Congress' ability to act in each of the amendment's protected areas.¹¹⁹ Absent the First Amendment, government officials would have been too eager to interfere with speech, the press, and so on. Even the threat of interference would have provided an effective tool for extracting rents from affected interest groups.¹²⁰ The Fourth Amendment¹²¹ provides another example. Ordinarily, government officials will be sufficiently organized to block any attempts, either statutory or constitutional, to restrict their use of governmental power and their exercise of discretion. We would predict that the Fourth Amendment would not have been proposed by Congress if there had been a Federal Bureau of Investigation in 1789, poised to object to constraints on its investigative authority.¹²²

In addition to reducing agency costs, the Bill of Rights precommits the majority against certain actions. Certainly the drafter, James Madison, saw the Bill of Rights as an important precommitment device:

[I]n a Government modified like this of the United States, the great danger lies rather in the abuse of the community than in the legislative body. The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, that which pos-

118. Although the Ninth and Tenth amendments do not specify the rights retained by individuals or the powers denied to the government, they indicate that individuals enjoy unenumerated rights against the government and that the national government is denied certain powers. See Randy E. Barnett, *Introduction: James Madison's Ninth Amendment, in The Rights Retained by the People: The History and Meaning of the Ninth Amendment* 13-14 (Randy E. Barnett ed., 1989).

119. U.S. Const. amend. I. This is obvious for the freedoms of speech, press, assembly, and petition, and perhaps less so obvious for freedom of religion. Historically, however, religion has been a source of jurisdictional competition for government. See Harold Berman, *Law and Revolution* 269 (1983) ("Underlying the competition of ecclesiastical and royal courts from the twelfth to the sixteenth centuries was the limitation on the jurisdiction of each: neither pope nor king could command the total allegiance of any subject."). See also Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1, 4-5 (1989).

120. See McChesney, *supra* note 22, at 101.

121. U.S. Const. amend. IV (prohibiting unreasonable—and warrantless—searches and seizures).

122. *But see* Telford Taylor, *Two Studies in Constitutional Interpretation* 38-44 (1969) (arguing that the purpose of the Fourth Amendment was to confine the use of warrants, not warrantless searches).

sesses the highest prerogative of power. But it is not found in either the executive or legislative departments of Government, but in the body of the people, operating by the majority against the minority.¹²³

Madison believed that the constitutional architecture adopted at the Convention ameliorated agency-cost concerns. Nonetheless, certain amendments are difficult to explain on other than agency-cost grounds.¹²⁴ One explanation is that the Antifederalists' political influence produced the proposed amendments from which Madison chose his proposed amendments, thus the concern for agency costs, while Madison's agenda control allowed him to give play to his concerns in the drafting, thus the concern for precommitment. Indeed, the true character of the Bill of Rights probably captures something of both agency costs and precommitment—attempts to limit the power of government ordinarily cannot be parsed neatly into agency cost and precommitment groups.

In sum, the Bill of Rights restricts government power, thus reducing the choices available to both majorities and government officials. Whether the central purpose of the Bill of Rights was precommitment or reduction of agency costs, its enactment occurred because of the lack of an established national government. The very existence of government creates a strong interest group opposed to restrictions on the government's latitude—politicians and government employees. Today, because of the presence of a strong federal government, the Bill of Rights could not be enacted via Article V.

B. *The Eleventh Through Twenty-seventh Amendments*

We now turn to the latter seventeen amendments. These amendments, adopted after the creation of a strong federal government, raise an important question: is it still possible, after the government has been established and interest groups have coalesced around and within it, to limit the power of the government through the Constitution?

These amendments, as opposed to the Bill of Rights, provide a truer test of Article V's efficacy in enacting constitutional provisions that serve the efficiency justifications of precommitment and reducing agency costs. At the outset, we note that, unlike the Bill of Rights, the Eleventh through Twenty-sixth amendments could not have been statutes since they all required amending the Constitution itself to enact the desired rule into law.¹²⁵ For example, changing the Presidential inauguration date to January 20th required an amendment because March 4th was

123. *House of Representatives Debates, May-June, 1789, reprinted in 2 Schwartz, supra* note 80, at 1012, 1029 (introducing Madison's draft proposal to the House).

124. For example, Madison's first proposed amendment increased the ratified size of the legislature while his second, now the Twenty-seventh Amendment, limited the ability of Congress to vote itself pay raises. *See id.* at 1026.

125. As discussed below, the Twenty-seventh Amendment is an exception. *See infra* note 199 and accompanying text.

specified in the Constitution.¹²⁶ The fact that the rules embodied in amendments eleven through twenty-six *required* constitutional amendment suggests that limiting federal power was not a primary objective. As noted above, rules limiting government typically can be achieved by statute or amendment; amendment simply achieves greater durability. Analysis of the latter amendments confirms the intuition that they were not intended to restrict the reach of the federal government.

1. States' Rights Amendments

One congressional objective in proposing constitutional amendments is to take power from the other branches of government. Nevertheless, only five amendments have specifically overruled Supreme Court decisions, although many reflect contemporary interpretations of the Constitution by the Supreme Court. For example, the Eleventh Amendment, which bars federal courts from adjudicating lawsuits brought against a state by citizens from another state or foreign country,¹²⁷ overruled the Court's decision in *Chisholm v. Georgia*.¹²⁸ There, the Court ruled that jurisdiction under Article III extended to lawsuits brought against a state, thus subjecting states to lawsuits brought in forums beyond their control.¹²⁹

Facing substantial debt obligations still outstanding from the revolutionary era and numerous land claims held by out-of-state and foreign speculators,¹³⁰ the states secured the Eleventh Amendment to protect their treasuries from such claims. Their ability to do so reflects the fact that the federal government was still in its infancy and the state governments remained the focus for interest group activity. Further, the bondholders and land claimants were widely diffused; many were foreigners and they had little ability to organize collectively to protect their interests.

The language of the Eleventh Amendment, however, does not restrict the ability of state citizens to bring suit in federal court under the Con-

126. Compare U.S. Const. amend. XX with U.S. Const. amend. XII (changing dates of elections).

127. See U.S. Const. amend. XI. The other examples are: the Fourteenth Amendment, (overruling *Dred Scott v. Sandford*, 60 U.S. 393 (1856)); the Sixteenth Amendment (overruling *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895)); the Nineteenth Amendment (overruling *Minor v. Happersett*, 88 U.S. 162 (1874)); and the Twenty-sixth Amendment (overruling *Oregon v. Mitchell*, 400 U.S. 112 (1970)).

128. 2 U.S. (2 Dall.) 419 (1793).

129. See *id.* at 479.

130. See, e.g., *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798) (holding that the Eleventh Amendment denied federal jurisdiction over pending cases brought by citizens of foreign states against any one of the United States). Nevertheless, the interests of foreign landholders and bondholders were protected by treaty. See, e.g., *Definitive Treaty of Peace Between the United States of America and his Britanic Majesty*, Sept. 3, 1783, U.S.-Gr.Brit., art. 5, 8 Stat. 80, 82 (stating that Congress will "earnestly recommend . . . to the legislatures of the respective states, to provide for the restitution of all estates, rights and properties, which have been confiscated, belonging to real British subjects").

tract Clause.¹³¹ Smaller, more geographically concentrated groups of bondholders and landholders within the states were better able to organize and to protect their rights to enforce state obligations in federal court. In fact, leaving this avenue open was no oversight—state politicians did not need to protect the state treasuries against all claimants, only against claimants who could not vote for them.

The Twelfth Amendment¹³² also reflects the ability of the states to organize to protect their interests in the early days of the republic, albeit in a more limited way than the Eleventh Amendment. First, the Twelfth Amendment ensured that Vice-Presidential candidates would not compete against Presidential candidates. More important, the Twelfth Amendment also clarified the rules for Presidential selection, making the outcome of the electoral college more certain, thereby reducing the House of Representatives' opportunity to select a President.¹³³

The controversy that followed the election of 1800 made clear to state legislators that Congress could have a decisive influence in Presidential elections.¹³⁴ The Twelfth Amendment makes the vote of the electors, appointed by the state legislatures, more valuable because the state electors are more likely to determine the outcome of a Presidential election. It thus protects the interests of state legislators in Presidential selection.

The Eleventh and Twelfth Amendments are two of only four post-Bill of Rights amendments that arguably restrict the power of the federal government.¹³⁵ Nonetheless, they hardly qualify as precommitments or devices to reduce agency costs. Although they may have a slight tendency to reduce the federal rent-seeking domain, they were enacted primarily to permit *greater* rent-seeking by state political actors, without any collateral benefit to the citizenry at large.

After these early rent-seeking successes, states' power over the process of constitutional amendment declined. This occurred partly because the

131. U.S. Const. art. I, § 10. The Supreme Court has ignored the language and extended the bar to citizens of the state being sued. See *Hans v. Louisiana*, 134 U.S. 1 (1889). For an argument that the Eleventh Amendment means what it says, see Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 Harv. L. Rev. 1342 (1989).

132. U.S. Const. amend. XII (modifying procedures for electing the President and Vice-President).

133. See, e.g., Akhil R. Amar & Vik Amar, *President Quayle?*, 78 Va. L. Rev. 913, 922-23 (1992) (noting that a motivating force behind the adoption of the Twelfth Amendment was the fear that the House would too easily have the opportunity to install an unqualified President).

134. See Bernstein & Agel, *supra* note 6, at 62-63. The election of 1800 ended up in an Electoral College deadlock between Jefferson and Burr. It took thirty-six ballots in the House of Representatives to break the tie, resulting in the election of Jefferson.

135. The other two are the Twenty-first Amendment (repealing Prohibition), and the Twenty-seventh Amendment (restricting Congress' ability to vote itself pay raises). We question below the assumption that the Twenty-first Amendment limited government. We also note that the Twenty-seventh Amendment is not a post-Bill of Rights amendment, given that it was formally proposed by the First Congress along with the Bill of Rights; its ratification simply occurred much later than that of the first ten amendments.

number of states has increased, but primarily because the Thirteenth through Seventeenth Amendments gave the federal government leverage over the states. Further, no coherent interest group has emerged to replace the states in seeking to limit the power of the federal government. Thus, the dominant trend of the Amendments has been to expand federal power and to reduce the checks on that power.

2. Franchise Expanding Amendments

Many of the later amendments expand the right to vote, either directly or indirectly. The Fifteenth, Nineteenth, and Twenty-sixth Amendments extend the franchise to blacks,¹³⁶ women,¹³⁷ and eighteen to twenty-one-year-olds,¹³⁸ respectively. The Twenty-third Amendment extends the franchise in presidential elections to citizens of the District of Columbia.¹³⁹ In addition, the Twenty-fourth Amendment prohibits state enforcement of poll taxes in federal elections.¹⁴⁰

Expanding the franchise has two predictable effects: (1) it provides a supply of votes to the enacting coalition and (2) it increases the likelihood of redistribution of wealth through government. Dominant coalitions are unlikely to offer the franchise to people likely to vote against them, while opposing groups will seek to block disadvantageous franchise extensions. For these reasons, franchise extensions are most likely when a dominant party, able to overwhelm any opposition, stands to benefit from that extension.

Even if expanding the franchise does not produce a predictable benefit for one party at the expense of the other, however, a larger electorate tends to create greater opportunities for redistribution. The franchise usually is extended to groups that contribute relatively little to the tax base and consequently favor greater redistribution through government.¹⁴¹ Additionally, while expanding the franchise enhances the interests of the newly represented, it exacerbates the collective-action problem of the electorate generally. As more people are allowed to vote, the benefits to the individual voter of monitoring government fall. Extending the franchise, therefore, reduces average voter monitoring of politicians,¹⁴²

136. See U.S. Const. amend. XV.

137. See U.S. Const. amend. XIX.

138. See U.S. Const. amend. XXVI.

139. See U.S. Const. amend. XXIII.

140. See U.S. Const. amend. XXIV.

141. See John S. Mill, *Considerations on Representative Government* (1861), reprinted in John Stuart Mill, *Three Essays* 143, 279 (Oxford Univ. Press ed. 1975) ("It is also important, that the assembly which votes the taxes, either general or local, should be elected exclusively by those who pay something towards the taxes imposed. Those who pay no taxes, disposing by their votes of other people's money, have every motive to be lavish, and none to economize.").

142. See Dennis C. Mueller, *Public Choice* II 205-06 (1989). As Mueller points out: [w]hen two candidates compete for the votes of a large electorate, each individual's vote has a negligible probability of affecting the outcome. Realizing this, rational voters do not expend time and money gathering information about can-

granting the legislature wider latitude to extract rents from the citizenry at large.

The Fifteenth Amendment¹⁴³ and the two prior Reconstruction amendments—the Thirteenth¹⁴⁴ and Fourteenth¹⁴⁵—reflect attempts by the dominant coalition of the Republican Party to lock in future political support through the Constitution while its opposition was still disenfranchised.¹⁴⁶ Section Two of the Fourteenth Amendment,¹⁴⁷ as well as the Fifteenth Amendment,¹⁴⁸ promised a steady stream of electoral support for the Republicans, while Section Three of the Fourteenth Amendment¹⁴⁹ promised to limit the Democratic Party's competitiveness by barring its most likely candidates for office.

Other provisions of the amendments were necessary to make voting rights effective. Citizenship, and the civil rights attendant to citizenship, are prerequisites to the right to vote.¹⁵⁰ Moreover, protecting the rights of property and contract for blacks created a larger base from which politicians could extract wealth, while at the same time it impaired the political base of the Democratic Party.¹⁵¹ It is exceedingly difficult to extract rents from individuals who are kept in bondage. Republicans were well aware that opposition to these rules would increase substantially in the future—that is, after Reconstruction. Consequently, these amendments were enacted when the Republican-controlled federal government had the southern states under military occupation and martial law, thus limiting the effect of southern racist sentiment at the polls. But

didates. They remain 'rationally ignorant' of both the issues in the election and the opposing candidates' positions on these issues.

Id. As the franchise is expanded, the typical voter invests less in learning about the issues and the candidates as well as about the performance of politicians in office.

143. U.S. Const. amend. XV (extending suffrage to all male citizens regardless of race or color).

144. U.S. Const. amend. XIII (abolishing slavery).

145. U.S. Const. amend. XIV (ensuring against State abridgement of federal privileges and immunities and guaranteeing the right to due process and equal protection among other citizens' rights).

146. See William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* 163-65 (1965).

147. U.S. Const. amend. XIV, § 2. Section Two guarantees proportional representation and provides for enforcement: "when the right to vote at any election . . . is denied . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

148. U.S. Const. amend. XV.

149. U.S. Const. amend. XIV, § 3. Section Three prohibits any Confederate supporter who held office pre-war from holding federal or state office, unless Congress votes to exonerate "by a vote of two-thirds of each House."

150. See, e.g., Ga. Const. art. II, § 1, para. II (1974) ("Every person who is a citizen of the United States and a resident of Georgia as defined by law, who is at least 18 years of age and not disenfranchised by this article, and who meets minimum residency requirements as provided by law shall be entitled to vote at any election by the people.").

151. Insofar as competition from black producers and merchants reduced the profits of their white counterparts, Democratic politicians could extract fewer rents from their core political base.

the Republicans could not doubt that Reconstruction eventually would give way to a restoration of political power to the former Confederate states. Therefore, politicians from the victorious Union states seized the opportunity to constitutionalize their desired policies before former Confederates returned to positions of power within national and state governments. The result was a steady stream of northern black votes for Republican candidates—a trend that lasted until the New Deal.¹⁵²

Although the Reconstruction amendments expanded federal power (particularly the sections authorizing congressional enforcement), they also might be seen as precommitments by the state governments, limiting the ability of state majorities to take advantage of minorities. We think that this view is mistaken.¹⁵³ Congress secured state ratification of the amendments only by excluding the secessionist states and by conditioning readmission to the Union on prior ratification.¹⁵⁴ This coercive requirement hardly can be considered a commitment by those states. The coercion necessary to ratify the amendments eliminates the possibility that southern state majorities were seeking to precommit themselves. Rather, the Reconstruction amendments constitutionally recognized the expansion of federal power stemming from the Union victory in the Civil War.

The choice of amendment rather than statute for the provisions of the Fourteenth Amendment also reflects the need for durability in the face of the real threat of hostile judicial interpretation of the provisions. Congress feared that a Supreme Court with a number of antebellum holdovers might overturn the Civil Rights Act of 1866. Consequently, the Fourteenth Amendment restated those statutory provisions to give them greater durability. In other words, Congress used the Constitution to guarantee that its increase of federal power would not fall to a Court intent on defending states' rights.

3. The Progressive-Era Amendments

The Sixteenth¹⁵⁵ and Seventeenth¹⁵⁶ Amendments also increased fed-

152. Blacks were third-party beneficiaries of the efforts of Republicans. Unhappily for the Republicans, they were partially cheated of their expected reward—the political support of black voters—by a judiciary that failed to enforce fully their privileges and permitted the disenfranchisement of blacks during the Jim Crow era. Nor could the Republicans have anticipated that later generations of federal judges would employ the Fourteenth Amendment to displace state decisionmakers—northern and southern—in a wide range of areas unrelated to race. *See, e.g., Reed v. Reed*, 404 U.S. 71, 74 (1971) (holding that an Idaho statute that gives preference to men over women who are “similarly situated” violates the Equal Protection Clause of the Fourteenth Amendment).

153. Of course, we do not question the normative correctness of these amendments—only the motivation for their adoption.

154. *See* Alan P. Grimes, *Democracy and the Amendments to the Constitution* 40-41, 50, 58 (1978).

155. U.S. Const. amend. XVI (granting Congress the power to levy a federal income tax).

156. U.S. Const. amend. XVII (establishing procedures for the election of Senators).

eral power. The federal government expanded rapidly in the post-Civil War era, but this early expansion was achieved mainly through increased regulation and an aggressive tariff policy. These provided alternative methods of wealth redistribution for legislators with limited taxing authority.¹⁵⁷ Indeed, the Supreme Court ruled in *Pollock v. Farmers' Loan & Trust Co.*¹⁵⁸ that taxation of income from real or personal property violated the constitutional requirement that direct taxes be apportioned among states according to population.¹⁵⁹ Thus, absent a judicial about-face, Congress needed the Sixteenth Amendment to tax income and fund wealth redistributions directly.

Similarly, the Seventeenth Amendment¹⁶⁰ eliminated the control of state legislatures' power to appoint U.S. Senators—a prerogative that made the Senate a bastion of states-rights supporters and a substantial obstacle to the expansion of the federal government into the realm of traditional state powers.¹⁶¹ Further, the increasing nationalization of the economy and the growth of the federal regulatory role motivated interest groups to organize on a national basis. As a result, congressional politicians saw an opportunity to supply legislative protection of interest-group privileges on a national scale. Proponents of expanding federal authority were opposed by state legislators, who were eager to protect their own rent-seeking domains from federal encroachment. State opposition thus posed a serious obstacle to increasing rent-seeking opportunities at the federal level, and to maximizing the value of congressional seats.¹⁶²

The nearly contemporaneous ratification of the Sixteenth and Seventeenth amendments¹⁶³ therefore was no accident. Representatives from southern states strongly favored the federal income tax because it would enhance opportunities for wealth redistribution, with the cost shouldered primarily by the industrial northeastern states, where incomes were highest.¹⁶⁴ Indeed, the lock that southern senators had on the Senate com-

157. See generally Richard A. Posner, *Taxation by Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 22, 28-29 (1971) (arguing that a function of government regulation is to perform distributive and allocative chores usually associated with the taxing or financial branch of government).

158. 157 U.S. 429 (1895).

159. See *id.* at 583.

160. U.S. Const. amend. XVII.

161. This was, of course, the intention of the Framers. See, e.g., The Federalist No. 62, at 377 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (The appointment of the Senators by the state legislature gives "the State governments such an agency in the formation of the federal government as must secure the authority of the former . . .").

162. Our analysis here relies heavily on Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment* (1990) (unpublished M.A. thesis, Dept. of Econ., Clemson University, on file with the *Fordham Law Review*) (arguing that the Seventeenth Amendment, by making the constituency represented in the Senate overlap closely the constituency represented in the House, reduced the costs to interest groups of rent-seeking at the national level).

163. February 25, 1913 and May 31, 1913, respectively.

164. See Grimes, *supra* note 154, at 66-74.

mittees as a result of their seniority meant that southern representatives would derive disproportionate advantage from those rent-seeking opportunities created by the income tax.¹⁶⁵ Western states also favored greater wealth redistribution, though western states would have fewer opportunities to take advantage of any wealth redistribution.

At that time, many western states had three-party systems (Democratic, Republican and Populist/Progressive), in which control of the state legislatures, and thus the appointment of senators, "cycled" among the three parties. The resulting rapid turnover in Senate tenure meant a continuing seniority disadvantage, with correspondingly fewer redistributive opportunities. Direct elections promised to reduce this cycling effect and to increase the seniority of western state senators.

The passage of the Sixteenth Amendment made the enactment of the Seventeenth Amendment vitally important to western and northern members of Congress. Conversely, the Seventeenth Amendment was passed without the southern representatives' support.

The Nineteenth Amendment, which granted women the right to vote,¹⁶⁶ also reflects the importance of tying arrangements in securing constitutional amendment. Arguably, this amendment is understood as the product of logrolling between advocates of female suffrage and advocates of Prohibition.¹⁶⁷

Suffragists had sought a constitutional amendment for more than fifty years.¹⁶⁸ If these groups had been forced to act independently, the persistently high maintenance costs of suffrage groups might have kept women from gaining the ballot for an even longer period.¹⁶⁹ The Prohibition movement was the main organizational glue holding women's groups together. In fact, the Women's Christian Temperance Union ("WCTU") was the largest organization of women in the late nineteenth century. In pursuit of a ban on the manufacture and sale of alcoholic beverages, the WCTU became a supporter of women's suffrage.¹⁷⁰

After achieving Prohibition in 1919, the political-organizational apparatus devoted to banning alcohol could then be turned with relative ease to the pursuit of women's suffrage. But the suffragists had to strike while their political iron remained hot—hence the close proximity of the Eighteenth and Nineteenth amendments. Given the alliance between the "wets" (those opposing Prohibition) and the antisuffragists,¹⁷¹ the Nine-

165. Absent GOP opposition, the South's one-party system ensured that southern Congressmen always would have the greatest seniority.

166. See U.S. Const. amend. XIX.

167. See Ethel B. Jones, *The Economics of Woman Suffrage*, 20 J. Legal Stud. 423, 426 (1991).

168. See *id.* at 423.

169. See *id.*

170. See *id.* at 426.

171. See Clement E. Vose, *Constitutional Change: Amendment Politics and Supreme Court Litigation Since 1900*, at 56 (1972).

teenth Amendment was not possible before the Eighteenth Amendment had removed the liquor lobby's opposition.¹⁷² This connection can be considered a form of constitutional logrolling.

The Eighteenth Amendment also has connections to the Sixteenth Amendment.¹⁷³ Ideological forces played a prominent role in securing Prohibition. Nevertheless, ideology is unlikely to have been powerful enough, standing alone, to overcome the obstacles to a constitutional amendment banning liquor. Prohibition cost the federal government substantial revenue, but that revenue was replaced by the new federal income tax.¹⁷⁴

Prior to the advent of the modern income tax, the two largest sources of federal government revenue were customs duties¹⁷⁵ and liquor taxation.¹⁷⁶ The sum of customs duties and liquor taxes exceeded revenues generated from the income tax until America's involvement in World War I.¹⁷⁷ The income tax then proved its prodigious ability to generate revenues.¹⁷⁸ Income-tax revenues nearly tripled between 1916 and 1917¹⁷⁹ and, between 1917 and 1918, they increased more than six-fold.¹⁸⁰ The legislation that generated the enormous 1918 increase in income-tax receipts—the War Revenue Act of 1917—was enacted in October 1917, two months before Congress successfully proposed the Eighteenth Amendment.¹⁸¹ Thus, members of Congress were aware in

172. See Jones, *supra* note 167, at 423. The obstacle posed by the liquor lobby partially explains the long time lag between the Supreme Court's decision denying constitutional protection for women's suffrage, see *Minor v. Happersett*, 88 U.S. 162, 178 (1874) (holding that a state constitutional provision that grants only males the right to vote does not necessarily violate the Constitution), and passage of the amendment.

173. For further discussion on this issue, see Donald J. Boudreaux & A.C. Pritchard, *The Price of Prohibition* (1993) (unpublished manuscript, on file with the *Fordham Law Review*).

174. See Roy G. Blakey & Gladys C. Blakey, *The Federal Income Tax* 143 (1940). As a wartime measure to conserve grain, the government outlawed the manufacture of liquor. See Arthur A. Ekirch, Jr., *The Decline of American Liberalism* 250 (1955). Wartime prohibition may have made general prohibition more palatable insofar as voters became more accustomed to doing without liquor and, hence, less likely to punish a politician at the polls for supporting the Eighteenth Amendment. But the short time span between the institution of wartime prohibition and Congressional approval of the Eighteenth Amendment (less than a year) weakens the credibility of this explanation. Because we have no data on the extent of enforcement of wartime prohibition, we refrain here from commenting other than to express our skepticism that it significantly eased the way for the Eighteenth Amendment. More likely, wartime prohibition was secured by the same forces that pushed the Eighteenth Amendment.

175. See Bureau of the Census, U.S. Dept. of Commerce, *Historical Statistics of the United States: Colonial Times to 1970 Part 2*, 1106, series Y 352-57 (1975) [hereinafter *Bureau of the Census*].

176. See *id.* at 1107-08, series Y 358-73.

177. See *id.* at 1106, series Y 352-57; *id.* at 1108, series Y 358-73.

178. See Blakey, *supra* note 174, at 591, Table 39.

179. See Bureau of the Census, *supra* note 175, at 1107, series Y 358-372.

180. Income-tax revenues in 1916 were \$125 million; in 1917 they were \$360 million; in 1918 they were \$2.3 billion. See Blakey, *supra* note 174, at 591.

181. See *id.* at 151.

October 1917 of the income tax's great revenue potential.¹⁸² By the fall of 1917, Congress looked to the income tax as the chief source of revenue for the federal government. Consequently, in December 1917, Congress could vote for Prohibition at a lesser cost: lost liquor-tax revenues were easily replaced by the rapidly rising revenues obtained from taxing individual and corporate incomes.

In February 1933, the Twenty-first Amendment quickly repealed the Eighteenth Amendment, making it the only amendment repealing another.¹⁸³ Popular wisdom holds that fourteen years of experience taught politicians and the American people about the impracticality of banning alcohol consumption.¹⁸⁴ Although this explanation of the Twenty-first Amendment has some validity, it fails to explain adequately the motivation for repealing the Eighteenth Amendment only fourteen years after its ratification.

Rather than merely responding faithfully to citizens' wishes, the Twenty-first Amendment's proposal reflected Congress' desire for liquor-tax revenues to replace income-tax revenues lost during the Great Depression,¹⁸⁵ during which income-tax revenues fell fifty-six percent.¹⁸⁶ A House leader in the fight for a congressional passage of the Twenty-first Amendment admitted in 1934 that "if we [anti-prohibitionists] had not had the opportunity of using that argument, that repeal meant needed revenue for our Government, we would not have had repeal for at least ten years."¹⁸⁷

The Twenty-first Amendment did generate higher liquor-tax revenues. Liquor-tax receipts were \$8.7 million in 1932, \$43.2 million in 1933, \$258.9 million in 1934, \$411 million in 1935, and \$505.5 million in 1936.¹⁸⁸ These revenues were significant to a Depression-era federal government facing a substantial decline in income tax receipts.

Examination of the political coalition that supported Prohibition's repeal reveals that politicians differed with non-politician supporters on how to spend the additional revenues from liquor taxation. Organized labor, as well as wealthy industrial capitalists, supported the Twenty-first Amendment. They hoped that increased liquor taxes would substitute

182. Congress believed the War Revenue Act of 1917 would raise approximately \$2.5 billion annually. *See id.* This estimate was sound. In 1918 the federal government took in \$2.3 billion in income-tax revenue. *See id.* at 591.

183. *See* Bernstein & Agel, *supra* note 6, at 170.

184. *See, e.g., id.* at 175 (discussing public resistance to the Eighteenth Amendment).

185. *See, e.g.,* Mark H. Leff, *The Limits of Symbolic Reform: The New Deal and Taxation, 1933-1939*, at 31 (1984) (quoting the 1932 Democratic Party platform calling for repeal of the Eighteenth Amendment in order "to provide therefrom a proper and needed revenue." (quoting Donald B. Johnson & Kirk H. Porter, *National Party Platforms 1890-1972*, at 332 (1973))).

186. In 1930, the U.S. government took in \$2.41 billion as revenue from income taxation, while in 1932, the government took in only \$1.06 billion. Income-tax receipts fell to only \$0.75 billion in 1933. *See* Blakey, *supra* note 174, at 591.

187. Leff, *supra* note 185, at 31-32.

188. *See* Bureau of the Census, *supra* note 175, at 1107-08, series Y 358-373.

for income taxes, thus reversing or restraining the expansion of income taxation.¹⁸⁹ In contrast, politicians saw liquor taxes as a means of buoying government spending in the wake of rapidly declining income-tax receipts.¹⁹⁰

Along with the increase in liquor-tax receipts following ratification of the Twenty-first Amendment, income-tax receipts as a percentage of GNP also rose consistently during this period.¹⁹¹ This fact rebuts the claim that wealthy industrialists and organized labor—both seeking reductions in the burden of the income tax—were the primary forces persuading Congress to propose the Twenty-first Amendment. Rather, it shows that members of Congress desired higher revenues. Liquor taxation, though not a perfect substitute for income taxation, was a conspicuous potential source of such revenues.

Even if the citizenry during the 1920s and early 1930s did feel unduly hindered by Prohibition, Congress could have chosen not to enforce it, much as states today do not enforce laws against adultery and sodomy.¹⁹² Without first legalizing liquor production and sales, however, Congress could not have easily collected tax revenues from those activities.¹⁹³ Openly taxing liquor without repealing the Eighteenth Amendment would have flouted the Constitution too brazenly (and unnecessarily, given that repeal was possible). The historical record supports our contention that Congress' desire for increased revenue drove the Twenty-first Amendment, rather than popular sentiment against Prohibition or the desire for lower income taxes.

4. Politically Neutral Amendments

Unlike the contentious fights over Prohibition and its repeal, some constitutional amendments succeeded because, *ex ante*, groups were unable to predict who would be disadvantaged by them. For example, near

189. For evidence of organized-labor's support of ratification of the Twenty-first Amendment, see *Repeal Would Cause Large Income Tax Cut*, 23 American Federation of Labor Weekly News Service 1 (June 3, 1933).

190. See Leff, *supra* note 185, at 31.

191. Federal government income-tax receipts were 1.3% of GNP in 1933, the year the Twenty-first Amendment was both proposed and ratified. These receipts remained at 1.3% of GNP in 1934. They rose to 1.5% of GNP in 1935, 1.7% in 1936, and to 2.4% in 1937. Moreover, after falling from 4.1% of GNP in 1931 to 3.3% in 1932, total federal-government receipts as a percentage of GNP also increased steadily following prohibition's repeal. By 1938, the federal government's share of GNP (6.6%) was nearly double its share in 1933 (3.6%). For the figures upon which these calculations are based, see Bureau of the Census, *supra* note 175.

192. For a current example, consider the fact that laws against fornication and adultery remain on the books in several states, despite a general lack of enforcement and compliance. See Richard A. Posner, *Sex and Reason* 260-261, 309 (1992). Undoubtedly, many Americans today would favor repeal of these statutes. Nevertheless, many such statutes remain law while people everywhere violate these statutes with impunity. No one lobbies to repeal an unenforced law.

193. Similarly, state governments could not have collected these revenues, which explains the motivation for ratification.

the end of his second term, President Reagan argued that the Twenty-second Amendment constrained democratic choice and should be repealed.¹⁹⁴

When the amendment was proposed in 1947 by Illinois Republican Rep. Everett Dirksen, the Republican party was smarting from their four defeats at the hands of Franklin Delano Roosevelt. Though the Republican Party had a majority in both the House and the Senate, they needed Democratic votes to secure the requisite two-thirds majority.¹⁹⁵ Roosevelt's assertion of executive authority, however, had come partially at the expense of the Southern Democrats who occupied important leadership positions in Congress, and thus may explain their decisive votes in favor of the amendment's passage.¹⁹⁶

At the time, the only effect of the amendment that could be predicted with any certainty was that Congress would gain power relative to the President, regardless of the President's political affiliation. The states could not reliably predict whether limiting the terms of the President would increase or decrease the growth of the federal government at their expense. Ronald Reagan, with his agenda of deregulation, was as likely as another Franklin Delano Roosevelt, with his agenda of government expansion. At the time of enactment, neither the Democrats nor the Republicans could know which party would be disadvantaged by the Twenty-second Amendment.

The Twentieth¹⁹⁷ and Twenty-fifth¹⁹⁸ Amendments—"house keeping" measures clarifying Presidential succession—were unlikely to generate interest-group opposition. No group was likely to lose from the passage of these amendments (unlike the Twenty-second Amendment, under which no group could *predict* who would be harmed). They were enacted as constitutional amendments simply because the existing text required it.

In sum, few, if any, of the post-Bill of Rights amendments either limit the agency costs of the federal government or precommit the majority. The Eleventh, Twelfth and Twenty-first Amendments, while on their face limiting the federal government, are in fact rent-seeking opportunities by state and federal legislators. Only the Bill of Rights places substantive limits on federal government action. Thus, with the exception of

194. See U.S. Const. amend. XXII. A version of this amendment had previously been approved by the Senate in 1824 and again in 1826. See Ames, *supra* note 102, at 22.

195. The major-party composition of the 80th Congress (1947-49) was as follows. House: 245 Republicans, 188 Democrats. Senate: 51 Republicans, 45 Democrats. Congressional Quarterly: 1947, at 93 (1947). Assuming party-line voting and no abstentions, the Republicans would have required at least 291 GOP House members and 65 GOP Senators to garner the necessary two-thirds majority for successful proposal of this amendment. Thus, Democrats' votes were necessary.

196. Of the 47 House Democrats who voted in favor of proposing the Twenty-second Amendment, 42 were from southern states. Of the 13 Senators who supported this amendment, 9 were from southern states. See *id.* at 96-97.

197. U.S. Const. amend. XX (lame-duck amendment).

198. U.S. Const. amend. XXV (establishing procedures for presidential succession).

the Twenty-seventh Amendment, no amendment ratified after 1791 has a precommitment component or was an attempt to reduce agency costs. The dominant trend of the amendments is to expand the powers of the federal government, increasing federal rent-seeking opportunities correspondingly.

The single exception to this trend, the Twenty-seventh Amendment, effectuates a rule which did not require amendment to implement. Nor does this amendment expand the powers of government. The Twenty-seventh Amendment is unusual in that, although ratified in 1992, it was proposed by James Madison (along with the Bill of Rights) more than 200 years before its ratification. Consequently, the Twenty-seventh Amendment is at least partly the product of that era of American politics prior to the coalescing of interest groups within government.¹⁹⁹

C. *The Failed Amendments: Past and Future*

More than ten thousand amendments have been introduced in Congress since the ratification of the Constitution.²⁰⁰ Of the thirty-three amendments proposed by Congress, the states have failed to ratify only six.²⁰¹ We could not possibly examine all of the failed proposals here; instead, we shall examine the interest-group dynamics of a few notable examples. In looking at these particular cases, we hope to extract some larger economic principles for the process of constitutional amendment. After looking at two of the amendments that failed in the states, we will look at some amendments recently proposed in Congress and predict their prospects for success based on the positive theory developed earlier. Finally, we will draw some conclusions about the efficacy of Article V for achieving the efficiency goals of constitutionalism and make some suggestions for amending Article V itself.

1. Past Failures

A conventional interest-group account explains the failure of the child labor amendment, which Congress proposed in 1924 to overturn the Supreme Court's decisions in *Hammer v. Dagenhart*²⁰² and *Bailey v.*

199. On the ratification process for Madison's second proposed amendment, see Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-seventh Amendment*, 61 Fordham L. Rev. 497 (1992); Laurence H. Tribe, *The 27th Amendment Joins the Constitution*, Wall St. J., May 13, 1992 at A15.

200. See Bernstein & Agel, *supra* note 6, at 169.

201. See *id.* at app. B, at 301-303. The six include Madison's first (increasing the size of the legislature with population growth); an amendment revoking the citizenship of any person accepting a title of nobility from a foreign sovereign; an 1861 amendment protecting slavery (mooted by the Civil War); the child labor amendment of 1924; the Equal Rights Amendment; and the District of Columbia Statehood amendment, proposed in 1978. The D.C. Congressional amendment received a chilly reception in the states, which had no interest in dividing the pork up among more claimants.

202. 247 U.S. 251 (1918) (holding as unconstitutional an act that prohibited the interstate transportation of goods made at factories in which children under the age of fourteen had been employed).

*Drexel Furniture Co.*²⁰³ Samuel Gompers, head of the American Federation of Labor, called a national conference of interest groups to push for the amendment in the wake of the Court's decisions. From this conference emerged the Permanent Conference for the Abolition of Child Labor.²⁰⁴ The amendment provided:

Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

Section 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.²⁰⁵

Not surprisingly, most prominent among the groups that supported the amendment were trade unions and school teachers.²⁰⁶ Competition provided by child labor reduced the monopoly wage rates demanded by trade unions. Schoolteachers could expect an amendment prohibiting child labor to bring higher rates of school attendance, with commensurate greater demand for educational services and larger school budgets.²⁰⁷

The push for the amendment also included a number of prominent women's groups.²⁰⁸ The women supporting the child labor amendment were hardly a cross section of American society. Rather, they were ideologically motivated veterans of Hull House and the women's suffrage movement.²⁰⁹ These women saw federal regulation of the treatment of children as the first step toward emancipating women.²¹⁰ They were partially responsible for specifying eighteen rather than sixteen years old as the relevant age in the amendment and the use of "labor" rather than "employment" in the amendment's text.²¹¹ The use of "eighteen" and "labor" suggested the broader aims of some of the amendment's supporters, and the amendment's opponents used those objectives to great effect in fighting the amendment. The ideological element in the pro-amendment coalition caused the group to overreach and the amendment ultimately to fail.

203. 259 U.S. 20 (1922) (holding that a congressional act which was designed to discourage child labor through tax penalties could not be sustained as constitutional by claiming federal taxing power, because that type of regulation is reserved exclusively to the states).

204. See Walter I. Trattner, *Crusade for the Children* 163-64 (1970).

205. *Id.* at 168.

206. See Grimes, *supra* note 154, at 102.

207. See E.G. West, *The Political Economy of American Public School Legislation*, 10 J.L. & Econ. 101, 125-27 (1967) (identifying the forces behind compulsory attendance laws). *But see* Linda N. Edwards, *An Empirical Analysis of Compulsory Schooling Legislation, 1940-1960*, 21 J.L. & Econ. 203 (1978) (questioning the assumption that compulsory attendance laws increase school enrollment).

208. See Grimes, *supra* note 154, at 102.

209. See Bill Kauffman, *The Child Labor Amendment Debate of the 1920s*, in 16 *Essays in Political Economy* 10 (Ludvig von Mises Institute, 1992).

210. See *id.* at 14. More extreme advocates urged the centralization of child-rearing in the state in order to allow American women to "take their rightful place in society." *Id.*

211. See *id.* at 9.

The opposition to the amendment was also predictable. David Clark, editor of the *Southern Textile Bulletin*, organized the Executive Committee of Southern Cotton Manufacturers, which staged a full scale political blitz against the amendment.²¹² Child labor gave southern textile producers a comparative advantage over their New England competitors, who were constrained by more restrictive state legislation.²¹³ The Executive Committee was joined by the National Association of Manufacturers, the Sentinels of the Republic, and the *Woman Patriot*, the former mouthpiece of the Anti-Suffrage Association. These groups had in common their business funding and their opposition to government intervention.²¹⁴ They principally argued that Congress could not be trusted with the power conferred by the amendment and believed that the amendment threatened parental control of education and of child labor at home and on the family farm.²¹⁵ The first charge resonated loudly within the Roman Catholic church. The church feared government intervention in parochial education, which had come under siege during the 1920s.²¹⁶ The Catholic church's opposition led to the defeat of the amendment in Massachusetts, despite the comparative disadvantage that the state's textile mills faced from the use of child labor in the South.²¹⁷ Likewise, farm organizations, fearing the regulation of child labor on family farms, played a key role in defeating the amendment in rural states.²¹⁸

Because they exploited the agency cost threat posed by the expansion of congressional power, opposition groups proved too strong for supporters of the amendment. By granting Congress broad discretion over the regulation of child labor, the amendment created the potential for interest groups to manipulate Congress to extract rents from more diffuse interests. Interests opposing the amendment that appeared ineffective at a national level, however, proved to be quite effective at the state level. Consequently, the amendment stalled in the states, but was later rendered moot by the Supreme Court's reinterpretation of the reach of the Commerce Clause, which granted Congress all the power that the amendment would have conferred and more.²¹⁹

The Equal Rights Amendment ("ERA"), perhaps the most prominent of the failed amendments, requires a more complicated interest group analysis. The amendment provided as follows:

212. See Stephen B. Wood, *Constitutional Politics in the Progressive Era: Child Labor and the Law* 42-51 (1968).

213. See *id.* at 298.

214. See Trattner, *supra* note 204, at 166-67.

215. See *id.* at 170-71; Kauffman, *supra* note 209, at 12-15.

216. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking down Oregon's attempt to prohibit parochial education).

217. See Trattner, *supra* note 204, at 175-76.

218. See *id.* at 174.

219. See *United States v. Darby*, 312 U.S. 100, 121 (1941) (finding that the Fair Labor Standards Act of 1938 is within the commerce power and connected with the Fifth and Tenth Amendments).

1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
3. This amendment shall take effect two years after the date of ratification.²²⁰

The ERA had overwhelming support when approved by the Congress.²²¹ However, the state legislatures failed to ratify the amendment in part because of the perceived vagueness of its terms. The ERA's opponents argued that its vague terms would free the judiciary to mandate, among other horrors, single-sex bathrooms, homosexual marriage, federal funding of abortion, and the drafting of women into the military.²²²

The burden that vagueness imposed on the ERA's passage illustrates how the need for judicial enforcement complicates the strategic choices of interest groups. If we loosen the assumption of faithful agency by the judiciary, the costs of vagueness quickly become overwhelming. The vagueness of the ERA was especially damning in the wake of the Warren Court, which had interpreted creatively the Constitution to recognize a number of previously undiscovered constitutional rights.²²³ After the Warren Court's activism, state politicians were wary of entrusting such politically charged subject matter to the federal judiciary.

Specific language in a statute or constitutional amendment increases the probability that judges will enforce the provision in a way that maximizes the benefits to the purchasing interest group. Specific language may induce faithful agency by the judiciary if ignoring those specific mandates might impair the judiciary's prestige in the public mind. Conversely, specificity increases the costs of enactment by making opposition more likely since potential losers will be able to identify themselves more readily. As a consequence, if the federal judiciary is perceived to be a faithful agent of the enacting coalition, both statutory and constitutional provisions often will be phrased in vague terms, with their proponents taking their chances on judicial enforcement.

The costs associated with vagueness became painfully apparent the year after the ERA was proposed, when the Supreme Court guaranteed the right to abortion in *Roe v. Wade*.²²⁴ The decision's extremely loose connection to the Due Process Clause lent credibility to the arguments of ERA opponents who alleged that the Supreme Court would freely override the social policies of the states.²²⁵ Vagueness, coupled with the fear

220. Jane J. Mansbridge, *Why We Lost the ERA* 1 (1986).

221. *See id.* at 11-12.

222. *See* Mary F. Berry, *Why ERA Failed* 102 (1986).

223. *See, e.g.,* *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (applying "one person, one vote" standard to hold that the Equal Protection Clause requires that the seats in both houses of a bicameral legislature must be apportioned on a population basis (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963))).

224. *See* 410 U.S. 113, 162-64 (1973).

225. *See* Mansbridge, *supra* note 220, at 27.

of expansive judicial interpretation, led to consequences that the enacting voter was unlikely to have supported back in 1865 when voting for the Fourteenth Amendment. The parade of horrors predicted by ERA opponents seemed more plausible (and more threatening) in the hands of a Court that appeared intent on furthering a substantive ideological agenda. Moreover, many of the ERA's supporters, like the National Organization of Women, also supported *Roe*, and the two causes became intertwined in the minds of some state politicians.²²⁶

Vagueness also creates the risk of free riding by groups that have not contributed to the acquisition of the provision, which in turn may hamper the ability of interest groups to organize. Through favorable judicial interpretation, women have gained a free ride from the Equal Protection Clause of the Fourteenth Amendment, despite their failure to contribute to its passage.²²⁷ Free riding discourages the initial formation of interest groups because of the collective action problem that it creates: no one wants to contribute to the common good because the benefits are shared equally, whether or not one contributes. Judicial protection for women's rights under the Equal Protection Clause²²⁸ impaired the development of groups supporting the ERA. Indeed, the new found protections under the Equal Protection Clause, in tandem with the benefits provided to women under federal civil rights legislation, rendered the ERA only marginally beneficial, thus impeding organization in support of the amendment.²²⁹

In an effort to overcome their high maintenance costs, ERA supporters increasingly became radical in their claims for the ERA (such as extending the draft to women).²³⁰ These claims, while solidifying the support of activist volunteers, caused the defection of marginal supporters.²³¹ This suggests an interesting dynamic at work in ideologically-based interest groups like those that pushed the ERA. Radicalism may be necessary to provide the requisite psychic benefits for volunteers who cannot point to any tangible result from their efforts. In an earlier example, Prohibition supporters would not have settled for an amendment limiting the hours and locations of saloons. Similarly, ideological elements in the movement for a child-labor amendment insisted upon broad language which ultimately led to the demise of that amendment. Thus, a

226. *See id.* at 13. Towards the end of the ratification period, some feminist attorneys argued that state equivalents of the ERA required state funding for abortions. *See id.* at 123-24.

227. *See* Ruth B. Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 Wash. U. L.Q. 161, 161-72. According to Ginsburg, "the framers of the fourteenth amendment did not contemplate sex equality." *Id.* at 161.

228. *See e.g.*, *Craig v. Boren*, 429 U.S. 190, 204 (1976) (holding that Oklahoma statute which had a gender-based difference in the legal age to purchase beer violated the Equal Protection Clause of the Fourteenth Amendment).

229. *See* Mansbridge, *supra* note 220, at 46.

230. *See id.* at 2-3.

231. *See id.*

tendency toward ideological purity may reduce the effectiveness of ideological interest groups with the marginal voter.

The history of the ERA also illustrates the complicated interaction between the provisions of Article III and Article V. Article III's grant of judicial independence gives judges substantial discretion over the interpretation of the Constitution.²³² Employed expansively, this discretion may produce substantive results that are indistinguishable from Article V's amendment. Such expansive interpretation of Article III by judges is sometimes justified by the difficulty of amendment under Article V.

The ERA's history makes that justification appear to be a self-fulfilling prophecy. Expansive interpretation may deter groups from seeking amendments because of the free-rider problems it causes for interest-group formation, while, at the same time, fear of unpredictable consequences may enhance opposition to proposed amendments. Thus, at the margin, the expansive interpretation of the Constitution permitted by Article III deters constitutional amendment through Article V.

2. Future Failures

We turn now to several amendments currently under consideration in Congress.

One example is an amendment limiting the terms of members of Congress.²³³ Such an amendment has little prospect of success, because Congress is unlikely to restrict its own ability to extract money and votes. Unlimited terms, in conjunction with the seniority system employed by Congress, create a form of property rights for members of Congress. By creating partial monopolies over certain legislative domains, these property rights reduce competition among members of Congress for committee chairmanships, which under congressional rules give them wide discretion over the enactment of legislation. Without the monopoly power conferred by these quasi-property rights, competition would dissipate the rents available to members of Congress.²³⁴ These property rights also can be transferred from generation to generation, thus maximizing the value of both legislation (by making repeal less likely) and Congressional seats (by securing legislators' ability to extract the rewards provided by their positions).²³⁵

A term-limits amendment would disrupt this system of property rights, forcing members of Congress to compete among themselves for

232. See generally Boudreaux & Pritchard, *supra* note 51.

233. No term-limits amendment has been formally proposed by Congress. For an example of such a provision at the state level, see Cal. Elections Code § 25003 (West 1993).

234. See James M. Buchanan, *Rent Seeking, Noncompensated Transfers, and Laws of Succession*, 26 J.L. & Econ. 71, 78-82 (1983).

235. See generally Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislators, Like Firms, Are Not Organized as Markets*, 96 J. Pol. Econ. 132 (1988) (arguing that the workings of Congress appear remarkably suited to legislators' reelection goals).

choice committee assignments and control over legislation. This would impair their ability to extract rents from interest groups and reduce the value of a congressional seat. Congress' opposition to the amendment can be expected. Moreover, the Democratic Party has been the dominant coalition in the House of Representatives for generations and has little incentive to jeopardize its comfortable situation. Although the Republican Party views the amendment as an opportunity to restore its competitiveness, it has no market power with which to enact the requisite amendment. This absence of power contrasts sharply with the market power Republicans wielded after the Civil War. At that time, the party used its power to gain the Reconstruction amendments. The structural advantages conferred by those amendments permitted the Republicans to dominate the post-war era. Today, the Republican Party lacks the market power necessary to gain the term-limits amendment.

Linda Cohen and Matthew Spitzer argue that a term-limits amendment would encourage more rent-seeking in Congress, rather than less.²³⁶ They contend that shortening the tenure of members of Congress will induce representatives to adopt a short-term perspective, thus encouraging "looting" by lame-duck legislators.²³⁷ According to Cohen and Spitzer, legislators would seek more bribes and promises of lucrative employment from interest groups in lieu of campaign contributions and votes.²³⁸ Even assuming that term limits could lead to a short-term perspective, however, the amendment could bring a net social benefit through less legislative wealth redistribution. Indeed, Cohen and Spitzer concede that term limits could reduce the overall amount of legislation.²³⁹ Much legislation sought by interest groups produces rents only over time. In order to extract those rents, politicians must be able to threaten credibly the repeal of that legislation in future periods. If politicians cannot extract those rents in future periods, they will have less incentive to enact the legislation in the first place. This suggests that members of Congress would shift to extracting rents by threatening legislation, rather than by creating legislation that produces a stream of rents for interest groups which Congress can later extract.²⁴⁰ Even that threat may be lessened, however, since term limits would disrupt the system of property rights in Congress. This would force members of Congress to spend time and resources competing among themselves for control over legislation. Under the current regime, politicians have revealed a prefer-

236. See Linda Cohen & Matthew Spitzer, *Term Limits*, 80 *Geo. L.J.* 477 (1992).

237. See *id.* at 521.

238. See *id.* at 509-510.

239. See *id.* at 509.

240. On the distinction between rent creation and rent extraction, see generally McChesney, *supra* note 22 (arguing that politicians may maximize returns first by threatening and then by forbearing expropriation of existing private results). See also R. Beck et al., *Rent Extraction Through Political Extortion: An Empirical Examination*, 21 *J. Legal Stud.* 217, 217 (1992) (providing empirical evidence supporting McChesney's theory).

ence for power over money, choosing reelection over cashing in on their positions. After all, most politicians could secure jobs that are much more lucrative than a congressional salary.²⁴¹

The "long-term perspective" brought about by the desire for reelection has substantial social costs. Legislation that transfers wealth by protecting an interest group usually has a substantial effect on the allocation of resources.²⁴² This allocative effect brings with it a dead-weight loss to society which may be much greater than the amount of wealth transferred to the purchasing interest group. For this reason, the direct bribes that Cohen and Spitzer fear would result under a term-limits regime may be much less costly for society than the rents that would otherwise be created by legislation. Given these possible disruptions to their property rights regime, however, members of Congress are unlikely to pass a term-limits amendment.

Similar obstacles face the balanced-budget amendment.²⁴³ Running a budget deficit year after year allows politicians to transfer wealth from unrepresented future generations to currently effective interest groups.²⁴⁴ Over time, interest payments on the accumulating debt requires a greater percentage of the budget and the creditworthiness of the government correspondingly declines.²⁴⁵ The nation as a whole bears these costs, however, and members of Congress are not held individually responsible for the continually growing national debt. Members of Congress find themselves in a Prisoner's Dilemma in acting as agents for their constituents: securing pork for their districts continues to produce votes and contributions, while voting to limit spending or raise taxes is certain to impair their ability to be reelected.²⁴⁶ As members of Congress will always retain some ability to impose externalities on currently unrepresented future generations, they will continue to resist the precommitment that a balanced budget amendment would impose.²⁴⁷ Instead of precommit-

241. We readily concede that there may be exceptions to this proposition. Despite the relatively low salaries that Congress pays its members, a significant number seem to emerge from congressional service with substantial wealth. The wealth producing advantages that result from congressional service may accrue only over time, thus supporting the theory that members of Congress are not opposed to term limits because they think that it will lead to increased rent seeking.

242. See Posner, *supra* note 157, at 28-29.

243. For the text of one version of such an amendment, see E. Donald Elliott, *Constitutional Conventions and the Deficit*, 1985 Duke L.J. 1077, 1104 n.102.

244. See generally Edward Foster, *The Balanced Budget Amendment and Economic Thought*, 2 Const. Commentary 353 (1985) (surveying public choice theories of the budget deficit).

245. See James D. Davidson, *Budget Amendment Foes Forget Constitutional History*, Wall St. J., June 4, 1992, at A9.

246. See Mark A. Zupan, *An Economic Explanation for the Existence and Nature of Political Ticket Splitting*, 34 J.L. & Econ. 343, 352-53 (1991).

247. See Jeffrey H. Birnbaum, *House Rejects Bid to Require Balanced Budget*, Wall St. J., June 12, 1992, at A2 ("The House, after intense lobbying by Democratic leaders and an unusual coalition of interest groups, narrowly defeated a constitutional amendment that would have required the U.S. government to balance its budget.").

ment, when provisions are proposed that would limit spending (such as Gramm-Rudman-Hollings),²⁴⁸ Congress provides enough loopholes and exceptions to make those provisions unenforceable.²⁴⁹ A similar fate would likely befall any constitutional amendment that made it through Congress.

The term-limits amendment and the balanced-budget amendment face an insurmountable obstacle in Congress' control over the agenda of the constitutional amendment process. Our analysis of the successful amendments shows that Congress has used its agenda control over the constitutional amendment process to expand its own influence and power, with a corresponding increase in the opportunities for rent-seeking at the federal level. Both precommitment strategies and the reduction of agency costs require that the majoritarian Congress be controlled through the Constitution. Our positive theory of constitutional amendment and the history of Article V, demonstrate however, that Congress is unlikely to impose restrictions on itself that would impair its members' ability to extract money and votes.

Congressional control over the agenda of constitutional amendment restricts the ability of the people to control Congress effectively through the Constitution.²⁵⁰ As a consequence, Article V poorly serves the normative efficiency theories of constitutionalism. By placing the foxes in charge of the chicken coop, the Framers made Article V useless for achieving those efficiency goals of constitutionalism: precommitment and the reduction of agency costs.

These flaws suggest that Article V itself should be amended. A revised Article V could provide for direct petition by the people to propose constitutional amendments.²⁵¹ An expanded right of petition would permit individuals to place constitutional amendment proposals on the state's ballot for approval by popular referendum. Such a mechanism, even if it incorporated super-majoritarian provisions, would give the people the power to bind their agents and themselves through the Constitution.²⁵²

248. Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. §§ 901-922 (1988 & Supp. IV 1992).

249. *See id.* § 905(g). This section of Gramm-Rudman-Hollings Act contains a list, running for more than two pages, of government-spending programs protected to one degree or another from mandatory budget cuts. For example, the Alaska Power Administration, the National Credit Union Administration, and the annuity fund for survivors of Tax Court judges are just three of the numerous budget items protected from the Gramm-Rudman-Hollings budget ax.

250. We discount here the convention method for amending the Constitution, primarily because it has never been used. The flaw in the convention method is that it relies on the state legislatures to call a convention; state legislatures may also be a source of agency costs.

251. *See* Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988). Amar has suggested that no amendment is necessary to empower the people to amend the Constitution.

252. Of course, any popular movement to amend the Constitution would face the same—if not greater—problems of collective action that are faced by interest groups.

With that mechanism available, proposals that enjoy broad popular support, like the balanced-budget and term-limits amendments, would stand a fighting chance of ratification. The amendment process might move closer to serving the efficiency goals of constitutionalism.

Those readers not caught up by the persuasiveness of our argument for amending Article V already will have recognized the absurdity of our having offered it. An amendment to Article V would surely fall prey to the same forces that doom the term-limits and balanced-budget amendments. In the words of Thomas Foley, the current Speaker of the House of Representatives: "I'm a real fiery defender of the Constitution. . . . On my watch, I'm not going to have the Constitution amended, if I can avoid it."²⁵³ Members of Congress would have to be very public-spirited to cede the effective monopoly they exercise over constitutional amendment. Our historical survey shows that the assumption of private interests more reliably predicts the success or failure of a proposed constitutional amendment. We offer our proposal to amend Article V as a final example of a failed amendment, quite certain that it is sure to be strangled in the cradle as quickly as it comes forth from our word processor. We thus conclude that Article V, despite its flaws, will remain the sole avenue for amending the Constitution.

CONCLUSION

We have attempted in this Article to develop an economic theory, both positive and normative, of constitutional amendment under Article V. Our positive theory focused on the role of interest groups in pushing for, and opposing, constitutional amendments. The predictive variables that we identified were maintenance costs and the anticipated timing and strength of opposition. Our normative theory focused on the reduction of agency costs and precommitment strategies as the efficiency goals of constitutionalism.

We applied our positive theory to the history of constitutional amendment under Article V to assess its efficacy in achieving those normative goals. Our analysis of the twenty-seven constitutional amendments enacted contrasted the Bill of Rights, which has elements of both agency-cost reduction and precommitment, with the latter seventeen, which have increased the agency costs of the federal government and have little or no precommitment character. The variables that we identified as responsible for this shift were the decline of the states as a coherent interest group and Congress' agenda control over constitutional amendment, which permits Congress to satisfy the demands of government as an interest group. We concluded that, in attempting to put the Constitution beyond the reach of narrow interest groups, the Founders also put the Constitution beyond the ability of the majority to precommit on substan-

253. David Rogers, *After Years of Gridlock and Scandals, Foley Appears Poised to Fulfill Potential as Speaker*, Wall St. J., Dec. 4, 1992, at A10.

tive matters and to control the agency costs imposed by their representatives in Congress. The history of the failed amendments supports this conclusion: countless amendments have failed that would have restricted the power of the federal government. Although the Framers put the Constitution largely out of the reach of "factions," other than the faction of government itself, they did so at the cost of depriving the majority of meaningful control over the content of the Constitution, and destroying the usefulness of Article V in serving the efficiency goals of constitutionalism. Despite our view that the Article V amendment process is dramatically flawed, we remain pessimistic that anything can or will be done to improve the process.