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FEDERALISM AND CONSTITUTIONAL HYPER-RIGIDITY: A COMPARATIVE ANALYSIS OF THE FEDERALIST AMENDMENT MECHANISMS WITHIN THE AUSTRALIAN AND UNITED STATES CONSTITUTIONS

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Abstract

The amendment mechanisms contained within the Australian and United States Constitutions, being Section 128 and Article V respectively, have many structural similarities. Both amendment mechanisms are purposed towards protecting federalism insofar as they require the achievement of more than just a simple constituent majority before a referendum proposal will succeed. In fact, the entrenchment of the Australian and United States 'double' and 'super' majority requirements respectively were specifically included as a protection for the federal distribution of power originally mandated within the Constitutions of each. Building upon that framework, if the Australian and American constitutional amendment mechanisms are purposed towards protecting federalism, what happens if neither can achieve their purpose and, thus, are 'hyper-rigid'? The consequence of hyper-rigidity within an amendment mechanism itself often is that Courts will step in to make decisions about fundamental constitutional matters, such as those with respect to the division of federal power, which would otherwise be put to the people of a constituency. This article explores claims about amendment mechanism hyper-rigidity before addressing the issue of how the Australian and United States amendment mechanisms can be reformed to afford these Constitutions the degree of amendability necessary for the respective countries to act within an increasingly centralised world, without altering the nature and distribution of federal power allocated within each.

I. INTRODUCTION

Federalism is a foundational principle upon which many Constitutions have been created. The Australian Constitution carefully divides political power between different parts of the Federation. Similarly, in the United States, the Constitution divides political power between different parts of the Federation. The incredible globalisation that has occurred since the Industrial Revolution has pressured classically federalised nations into becoming increasingly

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centralised. Globalisation has brought with it the need for countries and their respective Constitutions to respond – as a strong united front – to international problems. Considering this shift, it is important to understand how federalist nations originally enshrined the principle of federalism within the structure of their Constitutions at the time that federal power was first distributed. By understanding the mechanisms through which federalism is embedded within the structure of a Constitution, we can understand how that Constitution is equipped (or not) to respond to international problems, which often requires the action of a functional and centralised power.

This article suggests that federalism is primarily enshrined within the structure of the Australian and United States Constitutions through their respective amendment mechanisms. This article also suggests that this enshrinement has played an important role in effecting and perpetuating constitutional hyper-rigidity in these countries. The problem with entrenching federalism through a Constitution's amendment mechanism is that any issue with the mechanism itself becomes a constraint on the expression of federalism within that country. In the case of Australia and the United States, the amendment mechanisms of both countries' Constitutions have long since been criticised for being 'hyper-rigid.' As each country has struggled to keep up as federalised powers within an increasingly globalised world, they have both, in some respects, become increasingly centralised. This increasing centralisation has largely occurred *informally* or, in other words, by decision of the Courts and not by decision of each countries' constituent people through a referendum. This is not only a direct consequence of the hyper-rigidity of the amendment mechanisms, but it also directly contravenes the rule established by the amendment mechanisms themselves, namely, that the federal distribution of power should be altered only by the decision of the people.

The outcome of these circumstances presents a conundrum. The Australian and the United States Constitutions express federalism through their amendment mechanisms. But, as these countries have become more centralised (as a development concurrent with globalisation), the federal distribution of power has been altered by the Courts and not by constituents *because* of the hyper-rigidity of the mechanisms. The issue to be addressed, then, is this: how can we reduce the hyper-rigidity of the Australian and American constitutional amendment mechanisms without altering the nature of federalisation within both countries? By reducing the hyper-rigidity without altering the federal distribution of power, the hope is that both countries will be empowered to continue developing alongside globalisation and respond to international problems, by becoming centralised, if necessary, but without straying from the original conception of federalism.

Section 2 discusses the relative hyper-rigidity of the amendment mechanisms within the Australian and United States Constitutions. It draws upon Richard Albert's method of measuring constitutional rigidity as the grounds for stating that both the Australian and American constitutional amendment mechanisms are, in fact, 'hyper-rigid.' It suggests that this hyper-rigidity arises from the fact that both mechanisms are purposed towards structurally enshrining the principle of federalism but have failed to protect this purpose because alterations to the federal distribution of power have occurred informally by the decision of the Courts. It is this failure of the amendment mechanisms to fulfill their constitutional purpose in protecting federalism that forms the basis of any claim that they are hyper-rigid. It is important to confirm here that the constitutional hyper-rigidity discussed in this article is not a claim relevant to the entirety of the Australian and American Constitutions themselves. The claim extends only to the actual formal amendment mechanisms, being Section 128 and Article V in the Australian and United States Constitutions respectively. The term 'hyper-rigid' will also be used only in a limited sense, namely, to refer to a mechanism that has failed to do what it was intended to do. Other broader or general claims of hyper-rigidity and constitutional un-amendability will not be addressed in this article.

Section 3 presents a reformative proposal to rectify the hyper-rigidity of the Australian and American constitutional amendment mechanisms without altering the nature of federalism and the distribution of federal power within both countries. It suggests that this balance could be appropriately struck in Australia by reducing the Section 128 referendum 'double majority' to a 'simple majority' and supplementing this reduction by introducing an ability for States to initiate referendums in Australia. In the United States, the suggestion is that this balance could be struck by reducing the Article V referendum 'super-majority' to a 'double majority.' Globalisation has meant that many countries and Constitutions have had to change to adapt to modern times. In both Australia and America, over time we have seen an increase in centralised federal power that has occurred in response to different demands. The necessity of these developments in the modern globalised world, however, do not mean that the original conceptions of federalism enshrined within each Constitution must be rid of entirely. This article proposes modest reform for implementation in both countries that could foster the degree of amenability in a Constitution's amendment mechanism arguably necessary within a modern Constitution – by which I refer to one that is merely not 'hyper-rigid' – whilst maintaining the original nature of federalism provided for in that Constitution at its conception.

Section 4 addresses practical issues that arise with respect to the reformative proposal and discusses the possible downsides of more easily amended Constitutions. Section 5 concludes with some reflections on the implications of this analysis and reformative suggestion more generally for comparative constitutional study.

II. EVALUATING HYPER-RIGIDITY IN A CONSTITUTIONAL AMENDMENT MECHANISM

What is constitutional hyper-rigidity? How do we measure it? When can we say that a Constitution's amendment mechanism is 'hyper-rigid'? Several notable scholars writing in the field of comparative constitutional law have already provided comprehensive analyses of this topic. I do not seek to reinvent the wheel with respect to general conceptions of constitutional hyper-rigidity except to identify what has emerged regarding how a proper analysis of this should be undertaken.

A. MEASURING CONSTITUTIONAL HYPER-RIGIDITY

Richard Albert's method of measuring constitutional rigidity is perhaps one of the most-cited concepts in the field of comparative constitutional study. Albert suggests that constitutional hyper-rigidity can only be evaluated by examining a Constitution's formal codified rules of change in light of the broader political and cultural context within which it exists.[1] More specifically with respect to the hyper-rigidity of an *amendment mechanism* rather than just a Constitution itself, Tom Ginsburg and James Melton similarly suggest that the amendment difficulty of a Constitution can be measured by taking into account what they call the 'amendment culture,' being "the set of shared attitudes about the desirability of amendment, independent of the substantive issue under consideration and the degree of pressure for change."[2] Ginsburg and Melton suggest that a Constitution, and thereby its amendment mechanism, can be described as 'hyper-rigid' when the belief in the difficulty of achieving an amendment is so high that it is no longer sought.

Vicki Jackson, amidst her analysis of the United States Constitution, similarly discusses the extra-legislative influences that can affect the amendability of a Constitution. Jackson suggests that the mere "belief in the near impossibility of amendment contributes to the US

[1] Richard Albert, "Measuring Amendment Difficulty" in Richard Albert (ed), *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press, 2019) 96 at 98.
[2] Tom Ginsburg & James Melton, "Does the Constitutional Amendment Rule Matter At All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty" (2015) 13(3) Int. J. Const. Law 686 at 699.

constitutional culture's disposition not to amend."[3] She argues the constitutional amendment route is often not considered viable in the United States "either because (the political actors) believe it so unlikely to succeed and/or because they believe other approaches have normative advantages."[4] In response to Jackson's assessment, Joel Colón-Ríos suggests that non-use of an amendment mechanism itself is not solely responsible for the impossibility of constitutional amendment and the subsequent rigidity of a Constitution.[5] Instead, he points to the "very few opportunities for formal public participation,"[6] where the amendment rule, "for the most part, places the amending power in the ordinary institutions of government."[7]

The consensus between Albert, Ginsburg, Melton, Jackson, and Cólon-Ríos, appears to be that the amendability of a Constitution and its amendment mechanisms (as is relevant to this article), cannot be determined simply by assessing a Constitution's formal codified rules of constitutional change in isolation. Assessing the hyper-rigidity of an amendment mechanism requires more than merely examining for example, the number of formal constitutional amendments which have occurred through the employment of that mechanism as against the number of years that Constitution has been in existence. On this basis, it is not enough to say that the amendment mechanism within the Australia Constitution is hyper-rigid by comparison to that within the United States because the Australian Constitution has been formally amended 8 times in 120 years (roughly once every 15 years), as opposed to the American statistics of 27 amendments in 234 years (roughly once every 9 years). How then can hyper-rigidity be calculated? The answer lies in the two-part 'method' of assessing constitutional hyper-rigidity that emerges from the literature and is best summarised by Richard Albert.

Albert suggests that what amounts to hyper-rigidity, when assessing it through the lens of a broader contextual assessment, firstly "turns on a prior question: what good is the constitution for?"[8] In other words, the first step in assessing constitutional hyper-rigidity requires the assessor to consider the "theory of constitutional purpose,"[9] namely, what the Constitution (or in this case, its amendment mechanism) was *intended* or *purposed* to do. Secondly, what must then be considered is whether the formal amendment rules within the

[3] Vicki Jackson, "The (Myth of the Un-)Amendability of the US Constitution and the Democratic Component of Constitutionalism" (2015) 13(3) Int. J. Const. Law 575 at 576.
[4] *Ibid* at 587.
[5] Joel Cólon-Ríos, "Introduction: the Forms and Limits of Constitutional Amendments" (2015) 13(3) Int. J. Const. Law 567 at 570.
[6] *Ibid.*
[7] *Ibid.*
[8] *Albert, supra* note 1.
[9] *Ibid.*

Constitution enables this intended purpose to be realised.[10] If a Constitution's amendment mechanism does not do what it is intended to do, it can be said to be 'hyper-rigid.' Thus, for the purposes of this article, I have adopted this two-part method of assessing hyper-rigidity and applied it to the question of hyper-rigidity with respect to the Australian and American constitutional amendment mechanisms, being Section 128 and Article V respectively. Throughout this article, as I alluded to earlier, I apply the term 'hyper-rigid' to have a limited meaning, being that hyper-rigidity means only that a thing does not do what that thing was intended to do – and does not instead refer to any kind of meaning with respect to grand statements of impossibility and the like. What, then, is the purpose of the Australian and American constitutional amendment mechanisms? Are these purposes realised in practice? I begin first with an examination of Australia.

B. ASSESSING THE HYPER-RIGIDITY OF THE AUSTRALIAN CONSTITUTIONAL AMENDMENT MECHANISM

The formal mechanism for amending the Australian Constitution is articulated within Section 128. At its conception, the Australian Constitution institutionalised Section 128 as a mechanism for formal constitutional amendment.[11] Section 128 ensures that initiation and ratification of any proposals to formally amended the Australian Constitution can occur only through the formal referendum process. The Section 128 referendum mechanism has two components. Firstly, a Bill proposing the alteration of the Constitution must be passed by an absolute majority of at least one House of Parliament. Secondly, and following this parliamentary approval, the Bill must receive approval by a majority of people nationwide, in addition to a majority within a majority of the States. This second aspect of the formal constitutional referendum amendment mechanism is the famously described 'double majority' requirement.

At Federation, when six British colonies united in 1901 to become the new nation 'Australia,' the rationale for the double majority requirement was based on arguments about Australian federalism. There were concerns that without the double majority requirement, "the interests and feelings of remote and insignificant portions of the [proposed] Federation"[12] would be "sacrificed to those of the dominant majority."[13] As Nicholas Aroney explains, the

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[10] *Ibid.*

[11] *Constitution of the Commonwealth of Australia*, Section 128.

[12] Robert Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government* (Angus & Robertson, 1897) 13.

[13] *Ibid.*

"central question of federalism…is how to unite a number of separate political societies into a composite society in a manner that preserves the 'collective and corporate life of each State.'"[14] Thus, when the Australian Constitution was drafted, the solution was to "give a majority of the component communities and the majority of the composite community 'concurrent powers of veto' over proposed legislation and proposed constitutional amendments" through implementing the double majority requirement.[15] Approval by the States *and* by the Commonwealth in Australia was required to amend the Constitution, and this double majority stipulation was used as a device for preserving the "system of federal representation"[16] and, in general, federalism in Australia.

On this basis, my argument is that the amendment mechanism chosen within Australia, being the double majority formal referendum process described in Section 128 of the Constitution, was selected for the purpose of constitutionally entrenching and protecting *federalism*. Section 128 is arguably the primary method through which federalism is "articulated through the [Australian] Constitution,"[17] given that the word 'federalism' does not actually itself appear anywhere throughout the document. Notwithstanding this absence, the decision to use the referendum amendment mechanism clearly arose solely "from the Convention negotiations of the 1890s as a compromise"[18] of power between the Commonwealth, States, electorate, and politicians. It is clear, then, that the *purpose* of the Australian constitutional amendment mechanism was at Federation, and still is today, to enshrine the principle of federalism.

But does the Section 128 amendment mechanism, in practice, fulfil its purpose of enshrining federalism within the Australian Constitution? According to Albert's method, if it does not, then the mechanism can be decisively classified as 'hyper-rigid.' Since the *Engineers* case in 1920,[19] the "High Court has proved adept at moulding State-based systems of government envisaged by the drafters into a more centralised version."[20] In response to an increasingly globalised world, Australia has been described as "the incredible shrinking

[14] Nicholas Aroney, "Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890-1901" (2002) 30(2) Fed. Law Rev 265 at 270.
[15] *Ibid* at 272.
[16] *Ibid* at 275.
[17] Alan Fenna, "Centralising Dynamics in Australian Federalism" (2012) 58(4) Australian Journal of Politics & History 580 at 582.
[18] *Ibid.*
[19] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) HCA 54.
[20] James Allan & Nicholas Aroney, "An Uncommon Court: How the High Court of Australia as Undermined Australian Federalism" (2008) 30(2) Sydney Law Review 245 at 290.

federation."[21] This description "captures a frequently observed reality: Australian federalism has travelled far from its original conception."[22] Over the last 100 years, there have been several judicial decisions which have altered the nature and distribution of federal power in Australia. For example, in the *Tasmanian Dam* case,[23] the High Court held that the Australian federal legislature is entitled to "make laws for implementing any treaty to which Australia is a party."[24] Similar decisions were handed down in the *Koowart* case,[25] and in the High Court's decision in *Victoria v Commonwealth*.[26]

These judicial decisions have altered and broadened the Australian Commonwealth's federal power with respect to its ability to override State legislation and policy by reference to the external affairs power provided under Section 51(xxix) of the Constitution. These informal constitutional amendments, made through decisions of the judiciary, have "resulted, paradoxically, in a series of silent amendments to the Constitution augmenting federal power that have been made by a process no more democratic than is involved in the voting among the seven Justices of the High Court of Australia."[27] The degree to which federal powers have been altered informally by the Courts, and not formally by the decision of Australian constituents in a referendum, suggests that the Section 128 constitutional referendum amendment mechanisms insufficiently protects the principle of Australian federalism as it was intended to do so. The decisions of *Koowarta*,[28] *Tasmanian Dam,*[29] and *Victoria v Commonwealth,*[30] demonstrate that federal power has been acceded *without* application of the formal referendum amendment mechanism process stipulated within the Australian Constitution. It is not problematic itself that the High Court has made decisions regarding the interpretation of the Constitution. This is what it is supposed to do. However, the frequency within which federal distribution of power – and thereby the structure of the Australian Constitution – has been altered *without* input from the people of Australia through a Section 128 referendum, suggests that this mechanism is (at least somewhat) inaccessible.

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[21] Robert French, "The Incredible Shrinking Federation: Voyage to a Singular State?" in Nicholas Aroney Gabrielle Appleby, & Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 43.
[22] Alan Fenna, "Centralising Dynamics in Australian Federalism" (2012) 58(4) Australian Journal of Politics & History 580 at 580.
[23] *Commonwealth v Tasmania* [1983] HCA 21.
[24] Greg Taylor, "Federalism in Australia" (2010) 4(2) Int J Const Law 171 at 175.
[25] *Koowarta v Bjelke-Petersen* [1982] HCA 27.
[26] *Victoria v Commonwealth* [1957] HCA 54.
[27] *Taylor*, *supra* note 24.
[28] *Koowarta v Bjelke-Petersen* [1982] HCA 27.
[29] *Commonwealth v Tasmania* [1983] HCA 21.
[30] *Victoria v Commonwealth* [1957] HCA 54.

It is not entirely true to suggest that all alterations to federal power since Federation have occurred by decisions of the Courts in Australia. Indeed, as Greg Taylor summarises,[31] several Section 128 referendums have taken place through which the nature of Australian federalism has shifted. For example, Taylor describes that in the 1928 referendum, Section 105A was added to the Constitution, which permitted "the federal and State governments to make arrangements for their joint public debt."[32] Again, in 1946, Section 51(xxiiiA) was added to the Constitution to provide the "federal Parliament power over various pensions, unemployment benefit, student and family allowances and also medical and dental services."[33] Finally, in 1967, the power to make laws with respect to Indigenous Australians was removed from the States' legislative powers alone, and was given concurrently to the federal legislature in accordance with Section 51(xxvi) of the Constitution.[34]

What is important for the purposes of this article, however, is whether Section 128 of the Constitution adequately protects the nature of federalism and the federal distribution of power in Australia *as it was intended to do*. It is my argument that the *frequency* with which Courts have altered the federal distribution of power in Australia over the last 100 years suggests that the Section 128 amendment mechanism has largely not been able to do what it is intended to do. As we know, at Federation, the Section 128 amendment mechanism was introduced with its 'double majority' requirement to ensure that alterations to the distribution of federal power was always approved by both the majority of constituents and the majority of the States. Careful consideration went into entrenching the double majority requirement to ensure that the voices of smaller States were given equal weight in such decisions. It is, however, exactly this 'double majority' threshold that has been criticised for making formal alterations to the Constitution difficult to effect given the extra hurdle in place. The suggestion historically has been that "if only a national majority had been necessary,"[35] rather than the mandated 'double majority,' then "five more [constitutional] amendment proposals"[36] might have been achieved. Putting this argument to one side, what is relevant is the fact that the *frequency* of judicial decisions in which the nature of federalism in Australia has been altered suggests that the mechanism has failed to do what it was intended to do, and consequently, is

[31] *Taylor*, *supra* note 24 at 178-179.
[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*
[35] Scott Bennett, "The Politics of Constitutional Amendment" (Research Paper No 11, Politics and Public Administration Group, 23 June 2003) at 12.
[36] *Ibid.*

itself 'hyper-rigid.' Arguably, if the Section 128 amendment mechanism itself was less 'hyper-rigid', then these 'centralised' judicial decisions would not have occurred.

C. ASSESSING THE HYPER-RIGIDITY OF THE UNITED STATES CONSTITUTIONAL AMENDMENT MECHANISM

The formal mechanism for amending the United States Constitution is articulated within Article V. Similar to Australia, within the United States Constitution, the choice to entrench the formal referendum amendment mechanism within Article V was originally, and still is, primarily an expression of federalism. Federalism is a "distinctive character"[37] of the United States Constitution and has even been described as its "foundational principle."[38] Whilst the term 'federalism' cannot be found anywhere in the written Constitution itself,[39] it is "*everywhere* in the document."[40] It is uncontroversial and well accepted that one of the main purposes the United States Constitution serves is its role in adjusting "the relations between [the] National Government and the State Governments – the so-called 'federal balance.'"[41] The United States Constitution carefully affords each State with unique powers that are distinct from those given to the federal government. The States are provided with "sufficient institutional autonomy to make independent policy choices."[42] They are also equal as against each other, and equal as against the federal government who has "no agency in the composition of state governments."[43] Federalism in the United States has been said to 'play out' its tensions in the context of an "indestructible Union, composed of indestructible states."[44]

Arguably the predominant way that the American 'federal balance' is constitutionally enshrined is through the formal amendment mechanism introduced within Article V. Unlike in Australia, each American State is constitutionally empowered to propose and submit amendment proposals to Congress.[45] American States also play a "constitutive role in the senate, the House of Representatives, [and in] the Electoral College."[46] By comparison to

[37] William Ross, "The Constitutional Law of Federalism in the United States and Australia" (1943) 29(7) Va Law Rev 881 at 883-884.
[38] Michael Greve, "Federalism" in Mark Tushnet & Sanford Levinson (eds), *The Oxford Handbook of the U.S. Constitution* (Oxford University Press, 2015) at 1.
[39] *Ibid* at 2.
[40] *Ibid* at 2.
[41] *Ibid.*
[42] *Ibid;* Douglas Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law" (1992) 92 Columbia Law Rev 249.
[43] *Greve, supra* note 36.
[44] Ibid.
[45] *Ross, supra* note 35.
[46] *Greve, supra* note 36.

Australia on these points, American States have more power amongst the United States federation than their Australian counterparts. However, slightly by contrast to Australia, the American Article V amendment mechanism in practice requires that two-thirds of both houses of Congress must vote in favour of an amendment proposal, which then must be ratified by three-fourths of all American States before any change to the written Constitution is affected. This two-step process has been famously described as the 'supermajority requirement,' because a threshold higher than a mere double majority from both the Congress and by the States is required before a proposed amendment will be successfully adopted. While both the Australian and United States Constitutions require a constitutional amendment proposal to pass through two-stages in the voting process (largely as a consequence of the nature of federalism and the division of federal power in these countries), Australia's passing threshold is a 'double majority,' whilst in America, the threshold is the obviously higher 'supermajority.'

In any case, it is clear that federalism is a core principle (if not *the* core principle) of the United States Constitution. Throughout the structure of the Constitution, the federal distribution of power is emphasised in several ways. I suggest that the degree to which the constitutional amendment procedure is protected, which is evidenced by the high 'supermajority' threshold required before the amendment mechanism will be triggered, is indicative of the *purpose* of this amendment mechanism itself. If the nature of the federal distribution of power within America was intended to mould and be changed quite easily – as is the case with respect to any structural changes to the Constitution – than the threshold for triggering the amendment mechanism might not have been so high. For this reason, I argue that the *purpose* of the Article V amendment mechanism (albeit not the *only* purpose) is to constitutionally enshrine the principle of federalism. My position is bolstered by the very fact that the high 'supermajority' threshold of consensus required before change to the structure of the American Constitution will be enacted – such as changes with respect to federalism – is itself evidence that the amendment mechanism is at least partly purposed towards maintaining the complex federal division of power within the United States Constitution.

But does the Article V amendment mechanism in practice fulfil its purpose of enshrining federalism within the American Constitution? As was the case in my assessment with respect to Australia, according to Albert's method, if it does not, then the mechanism can be decisively classified as 'hyper-rigid.' In America, there has also been a marked shift towards centralisation since the creation of the Constitution. Similar to Australia, this shift is said to have been enacted through informal decisions made by the judiciary, which have been made without deference to the people of the American constituency, and have arguably occurred as

a consequence of the need to develop or 'keep up' within an increasingly globalised world. In the United States, the "federal judiciary has played an important, partly independent role,"[47] and a great deal of decisions regarding the American federal balance and distribution of power has been "left to judicial discretion."[48] The United States Constitution is also frequently criticised for being "not easily amended,"[49] as it has been formally altered "less frequently…than most other nations – and much less frequently amended than many state-level constitutions in the United States."[50] Stanford Levinson refers to amendments of the United States' Constitution as "practically impossible,"[51] and criticises the "impermeable" Article V mechanism as responsible for this hyper-rigidity.[52]

The focus for this article, however, is not to engage in the long-since fought over issue of general hyper-rigidity within the American Constitution. The purpose, instead, is to question whether the Article V *amendment mechanism* is hyper-rigid, which is determined by assessing whether it achieves its intended purpose. General difficulty in bringing about formal amendments to a Constitution is not itself indicative of hyper-rigidity within an amendment mechanism. The United States Constitution has, in any case, historically been "amended with amazing speed."[53] In particular support of this sentiment, Jackson uses the example of the 26th amendment to the Constitution which was proposed, ratified, and implemented all within three months.[54] Examples such as these demonstrate that it is not necessarily just the two-step 'supermajority' threshold required in the votes of both Congress and the States that plays into the issue. Indeed, there have been 234 times throughout history where this two-step supermajority threshold has been reached and formal Article V amendments to the American Constitution have been enacted. What is relevant is the degree to which issues relating to the federal distribution of power have occurred *formally* through the Article V amendment mechanism as against those decided *informally* by the Courts.

As Paul Collins discusses, the United States judiciary have, on several landmark occasions, acceded and altered the federal balance and distribution of power within the United

[47] *Ibid* at 5.
[48] *Ibid.*
[49] *Jackson, supra* note 3, at 577.
[50] *Ibid*.
[51] Stanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We The People Can Correct It)* (Oxford University Press, 2006).
[52] *Ibid.*
[53] *Jackson, supra* note 3, at 577.
[54] *Ibid.*

States through decisions made by the Supreme Court.[55] Two relevant cases which Collins outlines demonstrate what I believe to be a distinction between constitutionally 'right' and 'wrong' uses of judicial decision-making with respect to federalism. The first case is that of *United States v Lopez*, within which the Supreme Court ruled that Congress had exceeded its legislative powers under the Commerce Clause.[56] The second case is that of *Boerne v Flores*, within which the Supreme Court broadened the scope of Congress' power of enforcement under Section 5 of the Fourteenth Amendment.[57] In my opinion, in *United States v Lopez*, the Court was doing what Courts are meant to do, namely, interpreting the relevant constitutional provisions and *adjudicating* the actions of federal constituent parts as a means of determining whether the actions of a constituent part have gone too far in the exercise of its carefully and constitutionally allocated power. In *Boerne v Flores*, the Court was doing what Courts are *not* meant to do, namely, *expanding* the degree of constitutional federal power given to one constituent part under the Constitution. The fact that Courts have altered the nature and distribution of federal power through its decision making – even if this had occurred only once since the inception of the Constitution – is indicative of a failure of the Article V amendment mechanism to protect and enshrine federalism as it was meant to.

Thus, my suggestion with respect to the American constitutional amendment mechanism is the same as that made with respect to Australia and is as follows: the American Article V amendment mechanism can be described as 'hyper-rigid' because of its failure to do what it is intended to do, namely, to protect the constitutional nature and distribution of federal power. The same conundrum then arises: the amendment mechanism is purposed towards protecting federalism, but its failure to do so is evidenced by the fact that the Courts have altered the federal distribution of power. This has evidently occurred in lieu of a formal amendment process, which would require that the two-step 'supermajority' threshold be reached and would require that the decision be put to the American people.

My conclusion is *not* that the Article V amendment mechanism is totally ineffective at affecting constitutional change. As Jackson has established, the number of formal amendments that have taken place since 1787 demonstrate that this is clearly not the case. Instead, my suggestion is that the *frequency* of judicial decisions in which the nature of American federalism has been altered suggests that the mechanism has failed to do what it was intended

[55] Paul Collins, "Towards an Integrated Model of the U.S. Supreme Court's Federalism Decision Making" 2007 37(4) OUP 505.
[56] *City of Boerne v. Flores,* 521 U.S. 507 (1997).
[57] *United States v. Alfonso D. Lopez, Jr.,* 514 U.S. 549 (1995).

to do. On this basis alone, I suggest that the mechanism can be described as 'hyper-rigid' in the limited definition of hyper-rigidity which I use here. Arguably, if the Article V amendment mechanism was less hyper-rigid, then the United States Supreme Court would never have to make decisions with respect to the division and distribution, expansion, and acceding of federal power and could have instead continued interpreting and adjudicating the exercise of federal power as is constitutionally appropriate.

III. A NEW PROPOSAL

The formal amendment mechanisms within Section 128 and Article V of the Australian and United States Constitutions, respectively, are both purposed towards constitutionally enshrining the principle of federalism and protecting the federal distribution of power. As I have argued, the composition of these amendment mechanisms has limited their ability to achieve their purpose to the extent that there have been informal decisions by the Courts regarding the distribution of federal power. To this end, I have suggested that both the Australian and the United States amendment mechanisms are, in fact, hyper-rigid.

Despite the similarities between the Australian and American Constitutions in this regard, there are several unique and marked differences between the two constitutional amendment mechanisms. In Australia, the States do not have the ability to initiate a formal referendum under Section 128. In America, the two-step vote requires a 'supermajority' threshold be reached, whereas in Australia, the two-step vote requires only a 'double majority' be achieved. Consequently, while both Constitutions' amendment mechanisms are hyper-rigid on much the same basis, the ways in which this hyper-rigidity must be addressed is different and unique to each. In this section, I propose one solution for each Constitution.

A. AUSTRALIA – INTRODUCING STATE-INITIATED REFERENDA

My recommendation to address the hyper-rigidity of the Section 128 amendment mechanism within the Australian Constitution is two-fold. Firstly, I recommend that the two-step 'double majority' requirement for a referendum proposal to succeed be reduced to a one-step 'simple majority.' Secondly, I recommend that the Constitution should be amended to empower States to initiate a referendum. As I have explored earlier, there has been a historical suggestion that "if only a national majority had been necessary"[58] for the passing of constitutional amendment

[58] Scott Bennett, "The Politics of Constitutional Amendment" (Research Paper No 11, Politics and Public Administration Group, 23 June 2003) at 12.

proposals rather than the mandated 'double majority,' then "five more constitutional amendment proposals"[59] might have been achieved. While it cannot be known in advance or in hindsight whether this statement is true, there is merit to the suggestion that reducing the threshold required to pass proposed constitutional amendments would increase the degree to which amendments are sought. It is for this reason that my first proposal to directly reduce the hyper-rigidity of the Section 128 amendment mechanism is to reduce the two-step 'double majority' threshold to a one-step 'simple majority' requirement.

As I have already explained, the double majority requirement itself was the primary way through which the nature of Australian federalism was protected at Federation. The introduction of the two-step double majority threshold meant that when counting votes in a referendum, "the interests and feelings of remote and insignificant portions of the [proposed] Federation"[60] would *not* be "sacrificed to those of the dominant majority."[61] Both a majority of the people overall and a majority of the States had to be reached. It is for this exact reason that my reformative proposal for Australia is two-fold, with the second aspect being the proposal that States be provided with the power to initiate a referendum of their own accord. This is not the first time the introduction of State-initiated referendum has been proposed in Australia and the recommendation has, in fact, gained traction since the late 20th century. In 1988, the Constitutional Commission recommended that the Australian Constitution be amended "to allow constitutional amendments to be initiated by a majority of State parliaments, which also represented an overall majority of Australians."[62] This was recommended on the basis that "the existing monopoly by Federal Parliament has proved inadequate as a vehicle for producing the constitutional changes which Australia needs for political, social, and economic reasons."[63]

Since the Constitutional Commission's report of 1988, there have been several other notable attempts made to broaden the right of referendum-initiation to include the Australian States "on grounds of federal balance."[64] These have largely been rejected on the basis that, although "the existing procedure of [S]ection 128 has an obvious bias in favour of pro-

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[59] *Ibid.*
[60] Robert Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government* (Angus & Robertson, 1897) at 13.
[61] *Ibid.*
[62] Brian Galligan, "The Referendum Process" in Brian Galligan (ed), *A Federal Republic: Australia's Constitutional System of Government* (Cambridge University Press, 1995) at 115.
[63] Constitutional Commission, *Final Report* (Canberra: The Australian Government Publishing Service, 1988) at 859.
[64] *Galligan, supra* note 58, at 116.

Commonwealth amendments being proposed,"[65] they do have to "run the gauntlet of a thoroughly federal and popular referendum procedure before they can be ratified."[66] Along a similar vein, it has been argued that the two-step "'double majority' requirement endows States of small population with a disproportionate capacity to thwart Commonwealth Government plans."[67] In this sense, the Section 128 amendment mechanism has been described as being "centralist on referendum initiation and federalist on referendum ratification."[68] However, despite these concerns, the proposal to "amend the Constitution to allow states to initiate referenda has been previously endorsed."[69] In addition to the recommendation of the constitutional Commission, the proposal has been approvingly referred to by academics such as Jeffrey Goldsworthy,[70] and Anne Twomey.[71] Overall it is accepted that allowing the States to initiate a referendum addresses "the overwhelmingly centralist-tendency of past referenda,"[72] would "strengthen the Constitution,"[73] and would "enhance the right of the people to determine the content of their Constitution."[74] As Goldsworthy has noted, to prevent "people from rectifying [constitutional] deficiencies is unfair to them even more than it is unfair to the States."[75]

While I agree with the proposal to introduce the ability for States to initiate a referendum directly, I do not think this proposal should ever be introduced in isolation from other amendments. This is fundamentally because doing so would run the risk of disproportionately favouring the States. For this reason, my reformative proposal for Australia is two-fold, and aims to strike the balance between the current 'centralist' initiation procedure and the 'federalist' (and hyper-rigid) two-step double majority referendum amendment mechanism. The combination of my two proposals for Australia ensures that the loss of protection to federalism that would flow from removing the two-step 'double majority,' requiring a consensus of the people *and* the States, and reducing the threshold to a one-step 'simple majority' of the people alone would be compensated for by enabling the States to

[65] *Ibid.*
[66] *Ibid.*
[67] *Ibid.*
[68] *Ibid.*
[69] Augusto Zimmermann & Lorraine Finlay, "Reforming Federalism: A Proposal for Strengthening the Australian Federation" (2011) 37 Monash University Law Review 230.
[70] Jeffrey Goldsworthy, "A Role for the States in Initiating Referendums" (Eighth Conference of the Samuel Friffith Society, 7-9 March) at 35.
[71] Anne Twomey, "Reforming Australia's Federal System " (2008) 36 Federal Law Review 77.
[72] *Zimmermann & Finlay, supra* note 65, at 231.
[73] *Ibid.*
[74] *Ibid.*
[75] *Goldsworthy, supra* note 66.

initiate a referendum themselves. Removing the double majority requirement alone would affect the degree of constitutional protection afforded to federalism that the introduction of the mechanism was purposed towards in the first place. Introducing the ability for States to initiate their own referendums alone would swing the other way in disproportionately favouring the States.

By introducing *both* of my recommendations, the aim is to reduce the hyper-rigidity of the amendment mechanism within the Australian Constitution *without* affecting the nature of federalism and the federal distribution of power in Australia. It is my proposal that the loss to federalism as originally intended at Federation by removing the two-step double majority requirement would more than certainly be compensated for by introducing a State-based ability to initiate referendum. The aim in making these reformative changes is to foster the degree of amenability arguably necessary within the Australian constitutional amendment mechanism in modern times by reducing the threshold responsible for its hyper-rigidity, whilst maintaining the original nature of Australian federalism provided for at the Constitution's conception.

B. AMERICA – LOWERING THE THRESHOLD

In order to address the hyper-rigidity of the Article V amendment mechanism within the United States Constitution, my proposal is that both the two-step 'supermajority' required before a constitutional amendment proposal is passed be reduced to a two-step 'double majority' similar to that currently evident within Australia. As was the case in my proposal with respect to the Australian amendment mechanism, the aim is to reduce the hyper-rigidity of the mechanism without altering the degree to which the nature of federalism and the federal distribution of power is protected within the United States. As I have explored earlier, the intention of the framers of the United States Constitution when constructing Article V "appears to have been to balance out the power of the federal government and allow the states to collectively act if Congress did not."[76] The mechanism was constructed specifically for the purpose of protecting American federalism. However, Article V of the United States Constitution includes an additional sub-mechanism that does not exist in counterpart in Australia. In addition to stipulating the usual referendum process procedures, Article V also empowers Congress to call a Convention for proposing amendments upon receipt of an application from two thirds of the Legislature. The inclusion of the possibility for such a Convention within the Article V

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[76] Karen DeSoto, "Is It Time for a U.S. Article V Constitutional Convention? A Brief Discussion about American Constitutional Reform Procedure" (2018) 5(1) Universidade Federal do Paraná 251.

mechanism is an additional way through which federalism is protected within the United States Constitution, as it aims to "curtail Congress's power and provide more direct power to individual citizens through their state constitutional convention representatives."[77]

Whilst the Convention mechanism within Article V has never been effectively used to date, it is an important aspect of the federalism amendment mechanism; the existence upon which I predicate my reformative suggestion for the American Constitution. It is clear that the justification for implementing the two-step 'supermajority' approval and ratification process was purposed towards protecting American federalism. However, in my opinion, there is no satisfactory justification for the requirement that a two-step '*super*majority' rather than the kind of two-step 'double majority' we see in Australia was necessary. Richard Albert opines that "Article V's federalist supermajority requirements make the United States Constitution one of the world's most difficult to amend formally."[78] In this regard, Albert notes that "there have been thousands of Article V proposals…yet only thirty-three have met the congressional supermajority requirements."[79] Also writing in this regard, Jeffrey Goldsworthy observes that "the supermajoritarian requirements of Article V are so onerous as to be arguably undemocratic, by making it much too easy for minorities to veto constitutional amendments."[80] Rosalind Dixon also refers to the effect of the supermajority requirement as being the "virtual impossibility of formal amendment to the Constitution under Article V."[81] Amongst his assessment of the 'supermajority requirement,' Albert concludes that "Article V was therefore meant to be what Brannon Denning describes as a "federalism-reinforcing" barrier to constitutional change."[82] In Albert's opinion, the supermajority threshold "assured that no amendment would come to pass without something close to consensus across the nation."[83]

Considering the degree of academic debate that has occurred with respect to the necessity of the imposition of the exceptionally high supermajority requirement, it is my position that the framers of the United States Constitution did not appropriately justify the implementation of it when constructing the Article V mechanism. Notwithstanding this

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[77] *Ibid* at 252.
[78] Richard Albert, "Constitutional Disuse or Desuetude: The Case of Article V" (2014) 94(3) Boston University School of Law 1029 at 1030.
[79] *Ibid* at 1032.
[80] *Ibid* at 1048; Jeffrey Goldsworthy, "Constitutional Cultures, Democracy, and Unwritten Principles" (2012) 2012(3) University of Illinois Law Review 683.
[81] *Albert, supra* note 74; Rosalind Dixon, "Updating Constitutional Rules" (2009) 1 The University of Chicago 319.
[82] *Albert, supra* note 74; Richard Bernstein, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* (University Press of Kansas, 1993).
[83] *Ibid.*

apparent lack of justification, it is well accepted in academic discourse today that the imposition of the two-step 'supermajority requirement' was *another* way through which the Article V mechanism worked to protect federalism as it was intended to do. It is my suggestion, however, that the nature of American federalism would *not* be affected by reducing the two-step 'supermajority' requirement to a two-step 'double majority' requirement for two reasons. Firstly, and perhaps most simply, because the two-steps would still exist. As we have seen in Australia, the implementation of the two-step 'double majority' requirement has been effective in ensuring that constitutional amendment proposals are approved only upon receipt of proper consensus amongst the people of Australia, in addition to a consensus amongst the States of Australia. My proposal for Australia is to reduce this two-step 'double majority' threshold to a simple one-step majority of the people of the Australian constituency only because this reduction could be *supplemented* with the introduction of State-initiated referendum. However, because the States are already empowered to do so in America, this reformative change would not be appropriate in the United States. On this basis, I do not recommend removing the American two-step process, but I do propose to reduce the two-step 'supermajority' requirement to the Australian 'double majority' equivalent for two reasons. The first is because the Australian 'double majority' process, which requires approval at two levels from the people and the States, has been sufficient in structurally protecting against supposedly 'excessive' constitutional amendments and alterations to the federal distribution of power in Australia.

The second reason why the reduction to a two-step 'double,' rather than 'super,' majority is feasible is exactly because of the Article V's additional inclusion of the possibility for a constitutional amendment proposal Convention. As I have stated earlier, this is an additional Article V mechanism that does not exist in Australia but does provide an important extra power that protects American federalism and a means through which federalism is protected, as it curtails "Congress's power and provide more direct power to individual citizens through their state constitutional convention representatives."[84] Therefore, any effect upon American federalism felt by the removal of the two-step 'supermajority' requirement in favour of a 'double majority' is, in my opinion, more than compensated for by the separate Convention power already provided for in the Article V amendment mechanism. For these reasons, my proposal is that the reduction of the two-step 'supermajority' to a two-step 'double majority' within the American Article V amendment mechanism would be a sufficient reduction to reduce the hyper-rigidity of the amendment mechanism *without* affecting the nature of

[84] *DeSoto, supra* note 72, at 252.

federalism and the federal distribution of power within the United States. Given the extent of the criticisms frequently thrown towards the Article V mechanism for its hyper-rigidity, reducing a stipulation as onerous as the supermajority requirement (given its apparent lack of formal justification) is, in my opinion, a modest step in the right direction. The aim of my proposal for the United States is to foster the degree of amenability necessary within the American constitutional amendment mechanism to enable the country to function efficiently on the international playing field. As I have made clear, my proposal for doing so is to reduce the supermajority threshold as a means of easing the current hyper-rigidity of the Article V amendment mechanism whilst maintaining the original nature of American federalism provided for at the Constitution's conception.

IV. THE PROBLEMS

There are two problems posed by my argument which I must address. The first is in relation to the practical issues that arise with respect to my reformative proposal. To ignore the basic threshold question of how any proposed constitutional changes could be implemented would be a mistake. Naturally, any proposal for an alteration to a constitutional amendment mechanism within either America or Australia would require a referendum, which (ironically) could only occur by using the amendment mechanisms that is itself the subject of the proposed change. Jim McGinty discusses this conundrum and lists the things he believes restrict these changes while also, and perhaps without realising it, illuminating the solution. McGinty refers to "lack of political will, the pressures of the political environment, or lack of public support" as blockades to the implementation of proposed constitutional amendments.[85]

While it is true that legislative decision-making remains in the hands of the Australian Parliament and American Congress, decisions as to *who* sits within these sectors remains exclusively with the relevant constituents. What is needed, then, is a constituency that is strongly in favour of implementing constitutional changes and are willing to vote as such. Of course, nothing any individual academic, politician, or any other interested individual could write or say could single-handedly bring about this 'will.' But that is the beauty of democracy. Proposals for constitutional improvement must be desired by the constituency in question, and this cannot be forced. Nevertheless, it would be wrong to overlook the difficulty that this presents: a constitutional amendment mechanism cannot be 'improved' such as I have

[85] Jim McGinty, "A Human Rights Act for Australia" (2010) 12 University of Notre Dame Australia Law Review 1 at 5; National Human Rights Consultation Committee, *Report of the National Human Rights Consultation Committee* (2009) 6.

suggested without the amendment mechanism itself being used to do so, a process which can only occur when the relevant political will, political environment, and public support exists. Suggesting how this could be brought about is beyond the scope of this paper, but it would be remiss for me to ignore this difficult reality.

The second issue worth touching on are the possible downsides of a more easily amended constitution. Hyper-amendability has been said to lead to, amongst other things, inconsistencies in political decision-making, constitutional instability, and the erosion of the democratic order.[86] For this reason, it is worth considering whether the reformative proposal I present in this paper would bring about constitutional hyper-amendability in either Australia or America. I suggest it would not. My proposal with respect to Australia would improve the ease with which constitutional amendments are put forward by States and passed by the Federation's constituents, relevant to the unique federal division of power across the country. In this sense, it is not comparable to constitutional amendment procedure that are allegedly 'hyper-amendable,' such as the citizen-initiated referenda seen in California. Furthermore, my proposal to alter the 'supermajority' element of the Article V amendment mechanism within the United States Constitution would, in my opinion, bring America closer to Australia's perceived form of 'hyper-rigidity' than to any form of 'hyper-amendability.' The Australian Constitution has been criticised for many things, but hyper-amendability is not one of them. The exact nature, advantages, and disadvantages of 'hyper-amendability' and how it has manifested in examples across a range of democratic constitutional nations is beyond the scope of this paper. Nevertheless, it is worth noting that for the reasons outlined above, I do not believe this is an issue that would come into play with respect to the constitutional reformative proposal I present in this paper.

V. REFLECTION AND CONCLUSION

This paper has argued, firstly, that the Australian and American amendment mechanisms are hyper-rigid in the limited sense of the term as they have not fully achieved their purpose in protecting federalism. Building upon this position, I have attempted to reduce the hyper-rigidity of the Australian and American constitutional amendment mechanisms without altering the nature of federalism within both countries. In Australia, my suggestion is that this could be done by reducing the two-step 'double majority' requirement to that of a one-step 'simple majority,' and by supplementing this reduction by introducing the ability for States to initiate

[86] David Landau, "Abusive Constitutionalism" (2013) 47(189) University of California 181.

a referendum. In America, my suggestion is to reduce the two-step 'supermajority' requirement to a two-step 'double majority' whilst retaining the Convention mechanism already contained within Article V. In doing so, the hope is that both Australia and the United States will be empowered to continue developing alongside global evolution and be able to respond to increasingly international problems. Whether this development requires the two countries to provide a more centralised response or not, the aim was to create an amendment mechanism amenable to these demands without straying from the original conception of federalism.

The issue of constitutional hyper-rigidity is tough to tackle. Many people have written extensively on these issues. The intention of this article was not to re-address general ideas of constitutional hyper-rigidity itself, but rather to suggest practical and modest ways in which the amendment mechanisms contained within the Australian and United States Constitution could be made more adaptable and amendable to change where necessary, whilst retaining the structures of constitutional change and the nature of federalism and the distribution of federal power already in place. It is important to recognise that formal constitutional change is, by comparison to introducing a Bill in Parliament, difficult to enact; but it is meant to be this way. If a Constitution could be changed at the snap of one's fingers, a whole raft of other issues would arise. However, the mechanisms through which formal constitutional changes are enacted are one of the most crucial structural aspects of a Constitution. In an increasingly globalised world, there will always be a degree to which formal written Constitutions need to develop to stay alive and contemporary for the relevant society of the time. This developmental requirement, however, must be balanced against the necessity that the foundational principles, which form the basis upon which a Constitution is constructed in the first place, are maintained. There is no need at all to amend a Constitution to stay 'current' if the foundational principles are done away with. If this were the case, a new Constitution could simply be written every time the need arose. Maintaining the validity of a Constitution within a modern world requires that modern demands be balanced against the retention of that historic Constitutions foundational principles. For the purposes of this article, the foundational principle in question is the principle of federalism, which intrinsically formed and shaped both the Australian and Untied States Constitutions at their inception.

This paper has attempted to increase the adaptability and amendability of the Australian and United States Constitutions in response to an increasingly globalised world through reducing the hyper-rigidity of their respective amendment mechanisms, but without straying from the fundamental principle of federalism underlying and informing both. It has arguably done so without bringing into play issues of hyper-amendability, but also without ignoring the

harsh and ironic reality that any implementation of my proposals would require use of the mechanisms which I suggest are themselves problematic. A whole separate issue entirely is whether the Australian and American Constitutions should continue to be informed by the principle of federalism. For now, however, it is enough to suggest ways in which this foundational principle could be better constitutionally protected without straying too far from its original conception, but far enough that the Australian and United States Constitutions are amendable enough to adapt within the modern, globalised world whenever this may be necessary.