THE TIERED ARTICLE V

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ABSTRACT

When the authors of the United States Constitution drafted Article V, they intended to strike a balance between constancy and modernity. That balance would account for the authors’ fallibility while at the same time establishing an enduring constitutional regime that was the unquestionable source of the nation’s most deeply entrenched legal norms. Experience has shown that Article V fell short of that aim. Instead, it has handcuffed constitutional modernization, either precluding needed reforms or forcing constitutional changes to seep through alternative, informal pathways for the creation of new “constitutional” law. That pattern can and should be averted.

In this Article, I propose a unique, tiered scheme for constitutional change that would work alongside existing Article V procedures. That scheme can solve the modernization problem facing our constitutional regime without undermining its constancy or fundamental status. The new amendatory procedure would contain three steps for the easier proposal, initial passage, and final ratification of an amendment that is based upon existing language in a state constitution. It would lower the supermajority requirements of Article V, but would be supported by many of the same justifications levied in favor of those stringent supermajority requirements in the first place. Such a change to the way we change the Constitution is sorely needed.

INTRODUCTION

In modern American politics there are few constants. Polarized parties take opposing stances on seemingly every issue on the legislative agenda.1 But one touchstone favored on both sides of the aisle is the Constitution, a frequently-cited source of support for a plethora of political arguments.2

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2 For example, following the 2010 midterm elections incoming Republicans in the House read the Constitution’s full text on the floor and implemented a new rule requiring
Politicians have good reason to make such arguments. Citizens seem entranced by the power of the nation’s founding document, which despite its age maintains massive popularity. The Constitution’s drafters have taken on mythical characteristics in the popular imagination and are credited with great wisdom and unprecedented powers of foresight which still ought to be respected today. This allows the Constitution to act as an agreed and final source for the norms to which the nation is most deeply committed.

The popularity of the Constitution should not be taken for granted. As the founders recognized, a sustainable constitutional regime must be both constant enough to remain fundamental in the popular consciousness yet flexible enough to modernize as circumstances change and errors in the original distribution of powers reveal themselves. In the absence of such a balance, the overthrow of the constitutional regime is an ever-present danger.

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4 Some founding fathers may have been nonplussed by such plaudits. “Jefferson wrote [condescendingly] in an 1816 letter that ‘Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment.’ ” Kathleen M. Sullivan, Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever, 17 CARDOZO. L. REV. 691, 694 (1996).

5 James Madison recognized these competing concerns in the Federalist Papers. See John O. McGinnis & Michael B. Rappaport, Our Supermajoritarian Constitution, 80 TEX. L. REV. 703, 786 (2002) (quoting THE FEDERALIST No. 43 (James Madison)).

6 “Americans moved quickly to the conclusion that if a constitution rested upon popular consent, then the people could also replace it with a new one. . . . Since fallibility was part of human nature, provision had to be made for altering institutions after
In practice, our Constitution has proved remarkably resistant to change through the formal amendment process. Only 33 amendments have been formally proposed, and only 27 have been ratified by the states.\textsuperscript{7} And while the Supreme Court has long been able to interpret the Constitution in ways that glossed over its foibles and aligned it with modern mores, the Court’s role as a modernizing force is eroding as other amorphous sources of informal, constitution-like law have emerged in a process I call “constitutional seepage.” Those informal sources of constitution-like law are themselves an insufficient means of constitutional modernization, both because they undermine the fundamentality of the text as a whole and because they lack sufficient normative force.

This Article argues that an additional, tiered method for constitutional change, working alongside existing Article V procedures, can solve the modernization problem facing our constitutional regime without undermining its constancy or fundamental status. An easier proposal and ratification procedure for certain types of amendments can allow gradual changes to the fundamental rights of citizens and permit necessary alterations to the structural prescriptions in the Constitution’s text.

My proposal is for a three step alternative procedure for the passage of a limited category of would-be amendments that copy a state constitution’s language.\textsuperscript{8} In the first step, such an amendment could be formally proposed by three-fifths of both houses of Congress or by three-fifths of the state legislatures. In the second step, that amendment could be initially ratified for a 25-year period by two-thirds of the state legislatures. At the end of that period, the amendment enters the third step: final ratification. The amendment could either receive final ratification by a vote of three-fourths of the states or be discarded as so much constitutional jetsam. As I argue below, this procedure both lowers the barrier to entry for new constitutional amendments and maintains the high supermajority requirements for final ratification that are needed to give appropriate normative weight to constitutional prescriptions. It also strengthens the hands of the states in the amendment process and adds a desirable element of cautious empiricism currently lacking from Article V.

This Article proceeds as a thought experiment on the desirability of such an alternative, easier scheme for the passage of constitutional amendments.

experience revealed their flaws and unintended consequences. Thus the amendment process was predicated not only on the need to adapt to changing circumstances, but also on the need to compensate for the limits of human understanding and virtue.” Lutz, \textit{supra} note 3, at 238-39.

\textsuperscript{7} Sullivan, \textit{supra} note 4, at 692.

\textsuperscript{8} In Part II I provide a more detailed description of my tiered amendatory scheme. In addition, in Part IV, I discuss in more detail what qualifies as an amendment which “copies” a state constitution’s language.
I begin by describing the historical landscape of amendments in America.\textsuperscript{9} I detail the failure of Article V to allow for sufficient modernization of the text,\textsuperscript{10} then discuss the alternative informal mechanisms for constitutional change that have arisen in modern America through “constitutional seepage.”\textsuperscript{11} After explaining why neither these mechanisms nor a lower supermajority requirement for all future amendments would be a sufficient solution to problem of constitutional stagnation,\textsuperscript{12} I outline my own scheme for a tiered amendatory system that would meet the competing demands for constitutional modernization and stability.\textsuperscript{13} I then argue that the lower supermajority requirements of my tiered amendment scheme are actually supported by many of the same justifications levied in favor of the significantly more onerous Article V regime.\textsuperscript{14} Finally, I discuss the need for a strong Supreme Court to interpret and apply an alternative amendatory scheme such as the one I propose\textsuperscript{15} before offering a brief conclusion on the plausibility of such a change to our constitutional regime.\textsuperscript{16}

I. THE HISTORY (OR LACK THEREOF) OF AMENDMENTS

That the rate of formal amendment to the Constitution has been extremely low should come as no surprise.\textsuperscript{17} The Article V process for amendment is incredibly daunting. Amendments can only be proposed by one of two large supermajorities; two-thirds of both houses of Congress, or two-thirds of the state legislatures voting to request that Congress hold a constitutional convention.\textsuperscript{18} Amendments must then be approved by an even more substantial supermajority—three-fourths of the states—to be ratified.\textsuperscript{19}

Although the Constitution’s authors drafted extreme rigidity into the document, their aim was not to create an altogether stolid text; it was rather

\begin{itemize}
\item \textsuperscript{9} See infra Part I.
\item \textsuperscript{10} See infra Part I.A.
\item \textsuperscript{11} See infra Part I.B.
\item \textsuperscript{12} See infra Part I.B.2 and I.C.
\item \textsuperscript{13} See infra Part II.
\item \textsuperscript{14} See infra Part III.
\item \textsuperscript{15} See infra Part IV.
\item \textsuperscript{16} See infra notes 106-108 and accompanying text.
\item \textsuperscript{17} “Our Constitution is . . . the most difficult to amend among all Western constitutions, and we have the third-lowest amendment rate in the industrialized world.” WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 49 (2010) (citing STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 197-203 (G. Alan Tarr & Robert F. Williams eds., 2006)).
\item \textsuperscript{18} U.S. CONST. art. V.
\item \textsuperscript{19} Id. The states can ratify either by a vote of their legislatures or by conventions held in those states, as directed by Congress.
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to achieve an appropriately conservative pace of change in the nation’s foundational legal norms. James Madison argued that the high supermajority requirements of Article V would militate “against two equal dangers: ‘that extreme facility [of majority rule] which would render the Constitution too mutable; and that extreme difficulty [of unanimity], which might perpetuate its discovered faults.’” Article V was a mechanism to prohibit majoritarian tyranny while leaving open an avenue for change when faults in the text became apparent. This built on a tradition of amendatory practice that had become entrenched in the states by 1780, based on an understanding of governmental institutions as experiments that would require alteration over time as new information came to light.

There are substantial reasons to support both limited flexibility and significant constancy in the nation’s constitutional norms. The case for some flexibility is apparent; no group of legislators operating at a single time is likely prescient enough to foresee all the problems that will face the polity in future years. Nor is that group likely to recognize the faults in the governing arrangements they have devised. George Washington recognized these perceptual limitations when he said of the members of the constitutional convention “I do not think we are more inspired, have more wisdom, or possess more virtue, than those who will come after us.” As many of the founders recognized, at least some mechanism for textual modernization was needed.

Yet while complete rigidity is problematic, some level of constancy is also desirable in the most enduring norms of a society. Low amendment rates imply that the system established by the Constitution is functioning smoothly and that additional change would only disrupt the prevailing homeostasis. Constancy in a society’s entrenched norms also suggests

20 McGinnis & Rappaport, supra note 5, at 786 (quoting THE FEDERALIST NO. 43 (James Madison)).

21 During the constitutional convention, George Mason argued that “the plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence.” MAX FARRAND, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 202-03 (1937) (cited in Levinson, supra note 3, at 3).

22 Lutz, supra note 3, at 239.


24 Basic armchair psychology suggests that constancy itself breeds a favorable impression amongst citizens. “Cognitive dissonance theory might predict, for example, that one will tend to adjust and even find merit in structures that are in fact difficult to change.” Sanford Levinson, THE POLITICAL IMPLICATIONS OF AMENDING CLAUSES, 13 CONST. COMMENT. 107, 108 (1996).
that the fundamental rights of citizens, particularly minorities, have been adequately safeguarded. If one of the primary functions of a constitution is to preserve such a basic set of fundamental entitlements for everyone, then the very presence of a multitude of amendments might “trivialize [the Constitution] in the sense that they clutter it up and diminish its fundamentality.”

Frequent amendments would give citizens the impression that even those rights entrenched as “fundamental” are subject to ordinary political struggle, so much so that they are reduced to statutes passed through a different process. “If a particular fundamental right or rule can be altered by mere amendment, then all can, and commitments to constitutional rights become less stable than they were before.”

A. The Failure of Article V

The exceptionally low historical rate of amendment suggests that the present American constitutional regime has resoundingly failed to strike the proper balance between modernization and constancy. Article V has proven too rigid for the limited modernization it should enable, mostly stifling constitutional innovation. While tens of thousands of amendments have been proposed, “only thirty-three have received the necessary congressional supermajorities and only twenty-seven have been ratified by the states.”

Of these, the first ten were part of the Bill of Rights passed quickly after the Constitution’s ratification and are hardly adjustments to it, but rather necessary parts of the bargain struck amongst the states to secure ratification.

One might counter that current Article V amendment procedures present no normative problem; citizens at large give their stamp of approval to the constitutional regime through tacit acquiescence. The very fact that an amendment procedure exists at all gives meaning to any citizen’s or group’s inaction when faced with a set of fundamental norms that could be changed.

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25 Sullivan, supra note 4, at 696.
26 Id. at 692.
28 Sullivan, supra note 4, at 692.
29 Id.
30 Some theorists go even further in their evaluation of the role of popular approval on the Court’s decisions, suggesting that the popular will of the American people is an important constraint on any discretion exercised by the Justice of the Supreme Court. BARRY FRIEDMAN, THE WILL OF THE PEOPLE 9-16 (2009). According to Friedman, “[w]e have the Court we do because the American people have willed it to be so. . . . The American people have always had the ability to limit judicial review—or even to eliminate it entirely.” Id. at 9.
even if that change is exceedingly difficult. If existing norms at one time garnered enough popular support to clear daunting supermajority hurdles, it seems right to require some significant groundswell of public opinion to alter them.

But the laborious process for formal amendment outlined in Article V is too crude a measure of tacit approval. Rather than capturing broad acquiescence, it captures only instances of nearly universal support for or opposition to a constitutional rule. Given the statistical likelihood that any effort to formally amend the Constitution will fail, political actors are discouraged from turning to the formal amendment process to propose even wildly popular changes or to challenge norms which garner significant public disapproval. Ultimately, fewer amendment proposals are made given Article V’s strict supermajoritarian requirements, depriving the public sphere of genuine debate on possibly favorable alterations to the Constitution’s text. “Article V constitutes an iron cage with regard to changing some of the most important aspects of our political system. But almost as important is the way that it also constitutes an iron cage with regard to our imagination.”

B. The Supreme Court and “Constitutional Seepage”

That low rate of amendment has not, however, permanently tied the American constitutional regime to the mores of yesteryear. Throughout most of the nation’s history and arguably until the end of the Warren Court, a satisfactory (though imperfect) mechanism for modernization has existed

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31 “[T]he nature of the Constitution as a text that carries with it an invitation to amend ... means that each generation of Americans has indeed expressed a form of consent.” William T. Han, Chain Novels and Amendments Outside Article V: A Literary Solution to a Constitutional Conundrum, 33 HAMLIN L. REV. 71, 94 (2010).

32 Some have argued that the combination of Article V’s supermajority rules and the supermajority necessary for initial ratification of the Constitution demonstrate that “the central principle underlying the Constitution is governance through supermajority rules.” McGinnis & Rappaport, supra note 5, at 705. If this is the case, supermajority support for a norm suggests its proper place in our constitutional regime, and large supermajority requirements to overturn that norm, once enacted, are entirely appropriate.

33 See Mark Tushnet, Entrenching Good Government Reforms, 34 HARV. J.L. & PUB. POL’Y 873, 876 n.10 (citing Peter Grief, A Constitutional Amendment for Every Occasion? Congress Seems to Think So, CHRISTIAN SCI. MONITOR (Aug. 24, 2010), http://www.csmonitor.com/USA/Politics/DC-Decoder/2010/0824/A-constitutional-amendment-for-every-occasion-Congress-seems-to-think-so) (noting that Congress members have proposed over 10,000 amendments since 1971); Sullivan, supra note 4, at 692 (noting that tens of thousands of amendments have been proposed).

through the Supreme Court. The Court has proved capable of providing needed updates to the American constitutional regime by an incremental, common-law like process, one which expands the realm of constitutionally protected rights gradually and without undermining the longevity of those rights already established. The Court thus refines constitutional precepts over time and across generations. In the face of Article V’s overly-rigid amendatory structure, the Court has been able to strike something closer to the balance Madison desired between constitutional constancy and the need to modernize the text to overcome its apparent faults.

The Court therefore became a vital cog in the nation’s constitutional regime. While the age of the Constitution and its inherent resistance to formal amendment all but guarantee that the wording of the document will “reflect the problems of yesterday and not those of today,” the Supreme Court in many ways served as a constitutional convention of last resort, a viable alternative to the formal Article V amendment process for needed modernization. Such updates have been integral to the preservation of the Constitution’s vitality for subsequent generations; they have ensured that any popular discontent with the outdated text could be addressed without disregarding or discarding the nation’s founding document.

But the Court’s historical role as the modernizer of the Constitution has slowly been supplanted in modern America in a process I call “constitutional seepage.” As many theorists have rightly pointed out, what was once a constitutional regime defined only by the text and the Court’s authoritative elaborations thereon has been expanded today to include numerous other informally “constitutional” norms. Some argue that such informal norms define rights and responsibilities which are just as fundamental as those formally enacted in the text or announced by the Court. Some have claimed that so-called “superstatutes” have come to the fore and obtained a level of popular entrenchment rivaling actual

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37 Eskridge Jr. & Ferejohn, supra note 17, at 37.
38 This is a function broadly accepted as appropriate for the Court to perform. Even those who view the text itself as the ultimate source of legal authority in America pay tribute to the Court’s interpretations as authoritative elaborations thereof, elaborations that allow the text to maintain its status as a trump to ordinary legislation. See Id. at 34; Ronald Dworkin, Rights as Trumps, in THEORIES OF RIGHTS 153-67 (Jeremy Waldron ed., 1984).
39 For instance, David Strauss has argued that genuine constitutional change occurs frequently outside of the formal Article V amendment process. David A. Strauss, The Irrelevance of Constitutional Amendments, 114 Harv. L. Rev. 1457, 1459 (2001); see also Eskridge Jr. & Ferejohn, supra note 17, at 42-43.
amendments while remaining experimental and far more flexible. Others contend that certain key “constitutional moments” are the true loci of shifts to America’s entrenched norms, modernizing a regime otherwise extremely resistant to change. In any event, many theorists deny that the only genuine amendments to the Constitution are the numbered additions appended to the text. Thus, they contend that the American constitutional regime has expanded well beyond the text and the Supreme Court’s explications of its meaning.

Constitutional seepage thus both demonstrates a problem with the ability of citizens to modernize the American constitutional regime and presents an apparent, but ultimately an insufficient, solution to that problem.

1. The Problem Highlighted by Constitutional Seepage

First, proponents of alternative, informal methods of constitutional change are unified in their belief that these methods highlight a fundamental problem in our constitutional system; the pace of constitutional modernization has decelerated well below that which would be normatively desirable. As Sanford Levinson has argued, Article V is “the worst single part of the Constitution” and helps produce a “dysfunctional, even pathological” political system in America. The difficulty of amendment under Article V ensures that amendments themselves are no longer a meaningful source for the many needed changes in the constitutional regime.

The problem is exacerbated because the Supreme Court no longer satiates the popular thirst for constitutional modernization. More and more strained readings of the Constitution over the last half-century have begun to stretch the document to its limits and beyond. Professor Henry Monaghan famously argued that the Warren Court introduced a series of legal doctrines that were constitutionally inspired but not necessarily constitutionally mandated, insofar as Congress retained the power to override those doctrines through legislation. Such doctrines indicate that the Court was beginning to reach the limits of plausibility in interposing

40 Id. at 46, 64.
42 See, e.g., Sanford Levinson, How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) >27: Accounting For Constitutional Change, in Levinson, supra note 3, at 13-36.
modern constitutional rules into the outdated, sparse words of the text. Additionally, there has been a backlash against “judicial activism” that expands upon the original meaning of the Constitution’s authors, largely by those opposed to the Warren Court’s expansive reading of the text. In light of these changes in the political environment, and given the relatively small workload the Court can possibly bear, each decision the Court does issue has become more significant as one of only a few opportunities for constitutional modernization, and each decision that alters the prevailing constitutional regime is subject to withering criticism pro forma that both questions the new expansion and discourages the Justices from issuing further modernizing opinions. These factors have combined to limit any Supreme Court Justice’s capacity for modernization of the nation’s fundamental law. That has left a yawning modernization gap in our constitutional regime, into which have stepped alternative mechanisms to create constitution-like law and relieve pent-up societal pressure for updates to America’s most enduring legal commitments.

The modernization gap extends beyond issues of fundamental rights; the structure of our national government has not been recalibrated in a way that would overcome obvious quirks in governmental design that prohibit the political branches from functioning smoothly. While the fundamental structure and function of the political branches has been incredibly stable over time, the drastically changing dynamics of the country since the

45 “Early proponents of originalism such as Robert Bork and Professor Raoul Berger criticized the Warren Court’s willingness to invalidate legislation based on what they viewed as the Court’s substantive political values. They presented originalism as an antidote to “judicial activism” because originalism was a normatively neutral form of constitutional interpretation. At that time, originalism was said to reduce judicial discretion and the concomitant opportunity for judges to impose their own political values under the guise of judicial review.” Rebecca E. Zeitlow, Popular Originalism? The Tea Party Movement and Constitutional Theory, 64 FLORIDA L. REV. 483, 506-07 (2012) (citations omitted).


47 That increased scrutiny also lends significant instability to the Court’s constitutional decisions as future challenges by litigants seeking a reversal of the Court’s doctrine become more and more likely. Sweeping reversal in the Court’s jurisprudence is a very real possibility that undermines the role that jurisprudence plays as an effective component of the constitutional regime.

48 Arguably only eight (and perhaps as few as two) amendments to the structure of our national government have ever been ratified. See Sullivan, supra note 4, at 693 (arguing that only the seventeenth and twenty-second amendments “worked significant structural changes in the original constitutional framework”). Arguably included on this list are the twelfth amendment concerning the procedure of electors voting for president; the sixteenth,
founding suggest that significant structural alterations are almost certainly appropriate.\textsuperscript{49} Consider just a few examples. The Senate’s equal representation of the states, combined with its cloture rules, effectively give legislators elected by less than eleven percent of the national population the power to dictate the national legislative agenda.\textsuperscript{50} The President’s inability to exert further control over the budgeting process in a polarized two-party system ensures the fiscal incoherence of the federal government.\textsuperscript{51} And as society grows larger and more complex, the strain on legislators seeking to deliver the broad array of services needed in a complex modern society requires further devolution of powers to administrative agencies able to dictate national policy without the inconvenience of ever standing for

establishing Congress’ power to tax; the seventeenth, providing for popular election of senators; the twentieth, which addresses issues including the end of the President and Vice-President’s terms and the vice President’s assumption of the presidency in cases of the President-elect’s death, as well as the need for at least one annual meeting of Congress; the twenty-second, implementing presidential term limits; the twenty-third, providing for electors for the District of Columbia; the twenty-fifth, regarding Presidential disability and succession; and the twenty-seventh prohibiting raises for congressmen without an intervening election of representatives. U.S. CONST. amends. XII, XVI, XVII, XX, XXII, XXIII, XXV, XXVII. Although others might also belong on this list, in no event have structural amendments occurred with anything approaching high regularity or even moderate frequency.

As noted above, this kind of structural stability is perhaps even greater than that anticipated by the Constitution’s authors. See, e.g., Letter of George Washington to Bushrod Washington, November 10, 1787, in Kammen, supra note 23, at 83 (cited in Levinson, supra note 3, at 3); ESKRIDGE JR. & FEREJOHN, supra note 17, at 48 (“Most framers of the Constitution of 1789 expected it to last a long time, an expectation that has been borne out beyond their hopes.”).

49 Given that modern life consists of a far more complex series of interpersonal interactions than any one of the Constitution’s authors could have envisioned, it is at least arguable that some alterations in the way the government functions are necessary to ensure that those interactions proceed smoothly. This may be especially important in light of today’s polarized and stagnant political culture where Congress enjoys startlingly low popular support, behind even those figures reported for BP at the height of the Deepwater Horizon oil spill. Bob Scheiffer, Congress’ Approval Rating: How Low Can It Go?, CBSNEWS.COM, Nov. 20, 2011, http://www.cbsnews.com/8301-3460_162-57328351/congress-approval-rating-how-low-can-it-go/. Perhaps more than eight minor adjustments to the structural approach taken by the Constitution’s authors have been appropriate over the past 220 years. See supra note 48.

50 What’s Gone Wrong in Washington?, THE ECONOMIST, Feb. 18, 2010, http://www.economist.com/node/15545983 (“[S]tates like Wyoming (population: 500,000) have the same clout in the Senate as California (37m), so that senators representing less than 11% of the population can block bills.”).

These pressing structural issues are likewise next to impossible to address through formal amendment or Supreme Court decision-making.

2. Constitutional Seepage as an Insufficient Solution

Constitutional seepage presents an apparent solution to the modernization problem in the form of alternative mechanisms for informal constitutional change. However, that solution is insufficient in the final analysis. These methods for creating constitution-like law cannot solve the modernization issue in a way that creates the caliber of fundamental norms that actual amendments to the Constitution’s text would.

First, alternative, informal methods of constitutional modernization threaten to undermine the authority and centrality of the existing Constitution. If these alternative mechanisms really can rewrite the nation’s fundamental norms, neither the Constitution itself nor the decisions of the Supreme Court are the place to look for such norms. Other laws would have the same level of fundamentality, although that fundamentality and the process by which they became so entrenched are open to debate. Constitutional seepage to other fundamental laws also raises significant Rule of Law concerns for the norms that are the foundation of our country.53 “Constitutional law” cannot serve its anchoring role in the polity if it is at best difficult and at worst impossible to identify. Including other sources within the category of “constitutional law” comes at the cost of undermining the Constitution’s position as the ultimate and final legal authority in a society overcrowded with statutes and regulations vying for citizens’ respect.54

52 This has led some scholars to argue that the Supreme Court should do more to ensure that the massive administrative state is more robustly democratic. See, e.g., Richard J. Pierce, Jr., Democratizing the Administrative State, 48 WM. & MARY L. REV. 559 (2006).

53 As Lon Fuller famously argued, “[e]ven if only one man in a hundred takes the pains to inform himself” of the state of the law, “this is enough to justify the trouble taken to make the laws generally available.” LON FULLER, THE MORALITY OF LAW 51 (1964). No clear hierarchy of alternative constitution-like norms exists, and hence no guidelines for rational actors to determine whether other sources have created truly fundamental and unencroachable standards for citizen and government conduct appear. This murkiness is in direct contrast to the substantial publicity afforded to any change in the constitutional regime through formal, textual amendment. Brannon P. Denning & John R. Vile, The Relevance of Constitutional Amendments: A Response to David Strauss, 77 TUL. L. REV. 247, 279 (2002).

54 Some might argue that the cross-generational authority of the Constitution would be undermined if the founding generation could only create constitutional norms by meeting daunting supermajority thresholds while later generations could update the Constitution
Furthermore, informal solutions for the constitutional modernization problem are flawed because the norms they create are not necessarily equivalent normatively to those already recognized as part of our constitutional regime. Even if time has made such informal “constitutional” law appear as deeply entrenched as the actual Constitution’s text, that informal law’s very absence from the document means that it is always subject to modification and repeal. Dramatic changes can come at unpredictable and unexpected intervals. Informal norms within the constitutional regime may establish broader rights for citizens, but the potential violability of those rights is open to debate in a way that formally entrenched constitutional rights are not. The “inherently unstable nature of informal change” counsels against relying too heavily upon such change to quench society’s thirst for constitutional modernization.

C. Easier Amendments?

The tempting, but ultimately misguided, solution to the modernization problem and the insufficiency of informal constitutional law is to simply lower the bar for constitutional amendments across the board. At first glance, reducing the size of the supermajorities required under Article V might appear to introduce precisely the desired amount of flexibility into the constitutional regime. But while this one-size-fits-all approach to simpler constitutional amendment might seem to resolve the modernization problem, it is likewise an insufficient solution to meet the goals of those supporting modernizing shifts to our most fundamental norms.

In the first place, it is not clear that a new norm which meets only lowered supermajority requirements will attain the same fundamental status in the legal system as existing constitutional norms. Just as informal constitution-like law may be undermined by its lack of fundamentality, so might easily-passed constitutional amendments lack the normative punch the existing Constitution’s text packs. Supporters of new constitutional norms seek both full fundamentality for the changes they propose and a coinciding lower barrier for the passage of new norms in the constitutional regime. But it may not be possible to so readily disaggregate fundamentality and supermajority. The high hurdles both the original document and subsequent amendments had to pass to attain ratification imbued the text with inherent authority from a normative perspective.

通过非文字过程要求较小的支持群体。See McGinnis & Rappaport, supra note 5, at 796-97.
55 Denning & Vile, supra note 53, at 256.
56 John O. McGinnis and Michael B. Rappaport argue that the supermajoritarian requirements for both passage of the original Constitution and amendment thereto “are
generating a level of cross-generational equity as the constitutional regime remained in force over time.\textsuperscript{57} It is not at all clear that such authority will be replicated if the hurdles to ratification are lowered across the board. If what is needed are additional rights with equivalent fundamentality to those existing in the constitutional regime, diluting the fundamentality of all such rights while creating new and inherently weaker ones hardly solves the problem.

Even if norms passing lower supermajority hurdles can attain the same status as existing constitutional norms, the easier pathways to amendment may simply introduce too much malleability into the constitutional regime.\textsuperscript{58} The Madisonian balance between modernization and constancy is delicate. An amendment threshold set too low might release the hounds of majoritarian tyranny too readily, running roughshod over the rights of minorities previously thought to be fundamental or cementing a ruling coalition’s grip on the levers of power. There are also important repercussions for our theory of popular sovereignty in finding the right balance in our amendment procedures. “A process that is too easy does not provide enough distinction between constitutional matters and normal legislation, thereby violating the assumption of the need for a high level of deliberation and debasing popular sovereignty. One that is too difficult, on the other hand, interferes with the needed rectification of mistakes, thereby violating the assumption of human fallibility and preventing effective recourse to popular sovereignty when necessary.”\textsuperscript{59}

The question, then, is this: if the current constitutional regime goes too far in the direction of rigidity but an across-the-board path to easier amendment would go too far in the direction of malleability, is there a useful middle ground that can achieve a Madisonian balance more in line with the vision of the framers and the needs of the country? The thesis of this Article is that such a middle ground exists. As I argue below, a tiered amendment process that capitalizes upon the strengths of state constitutions,
lowers the supermajority requirements for formal proposal and initial ratification, and then draws upon the stringent supermajority requirements of Article V to reconfirm and finally ratify amendment proposals could strike the right balance. This change in the way we change the constitution would allow needed modernization of the regime while preserving the document’s overall fundamentality through conservatively-paced alteration. By lowering the barriers to entry for new constitutional amendments while maintaining high hurdles for the ultimate entrenchment of those norms, proponents of new rights can both open a path for successful constitutional amendments and maintain the fundamentality of all constitutional norms.

II. A Tiered Amendment Procedure

I propose a new amendatory scheme to modernize the constitutional regime through easier formal amendments as an alternative to informal mechanisms for modernization that circumvent Article V. This scheme would be available only for a federal amendment which copies an existing state constitutional provision. It would proceed in three steps. In the first step, amendments could be formally proposed by either three-fifths of both houses of Congress or three-fifths of the state legislatures. In the second step, the amendment could be preliminarily ratified by two-thirds, rather than three-fourths, of the state legislatures. Once the proposal has achieved initial ratification, it would become an effective constitutional amendment for the following 25 year period. In the third step, the amendment would be put to a vote for formal ratification by three-fourths of the states. The amendment would only obtain permanent entrenchment if it succeeded at this stage. This requirement echoes the supermajority requirements (and thus the normative force) of the existing Article V procedure for a typical amendment.

Before considering the propriety of each step in turn, it is important to emphasize that this proposal, though designed to lower the barriers to entry for new amendments, is more conservative than simply lowering the Article V supermajority requirements across the board. The inputs available to this process will already have been well-vetted; only norms formally enacted in a state constitution can be proposed for ratification through this two-step procedure. State constitutions should provide fertile ground for modernizing experiments with governing institutions. The rate of amendment to state constitutions is 9.5 times that of the federal constitution. Amendments to state constitutions themselves are generally

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60 I discuss in more detail what is meant by an amendment proposal which “copies” an existing state constitutional provision in Part IV.

61 “As of 1991, the fifty state constitutions had been in effect for an average of 95
far easier to pass and thus occur much more frequently than national amendments, providing an ample pool from which amendment authors can draw. States readily could fill their role in our federal system as laboratories of democracy.

This tiered amendment process will be poised to capitalize on state innovations dealing not only with fundamental rights, but also with the basic structure of the national government. As discussed earlier, a variety of structural idiosyncrasies have long prevented the political branches from functioning smoothly. Changes in our governing structure may be required, and although the states have many ready examples of structural changes that may be desirable writ large, Article V effectively precludes them. An easier method to change the prevailing governing structure seems justified.

years, and had been amended a total of 5,845 times, or an average of 117 amendments per state.” Lutz, supra note 3, at 247. Excluding amendments that have not been of national constitutional concern, Lutz estimates that the “adjusted state amendment rate” still is roughly four times the national amendment rate. Id. at 251.

“Collectively states have held more than 230 constitutional conventions and have adopted 146 constitutions. They have added over 5,000 amendments (over 100 per state).” Cain & Noll, supra note 27, at 1519-20 (citations omitted).

“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

State constitutions “have been the first to adopt important innovations in government structure and political rights, including women’s suffrage, the line-item veto, direct democracy, balanced budget requirements, and the direct election of upper houses in legislatures.” Cain & Noll, supra note 27, at 1519-20 (citations omitted).

See supra notes 48-52 and accompanying text. Amendment authors could easily identify possibilities for duplicative federal amendments and make clear, simple proposals for change to the constitutional regime.


Often, the very lawmakers whose careers are founded upon the existing structural arrangements are the only actors with the ability to initiate structural change. This is largely due to the impracticality of the State-initiated constitutional convention method for amendment. Michael B. Rappaport, Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them, 96 Va. L. Rev. 1509, 1526-32 (2010).

One could argue that frequent experimentation with the national government’s
Some might argue that there are dubious risks for those supporting a new constitutional right or a change to the nation’s governing structure in shepherding their proposals through the process for state constitutional amendment. The outcomes of that process are not guaranteed, and disapproval at the state level may ultimately prove fatal to the movement nationally. But the risk is worth the reward. If successful, proponents of a new constitutional amendment will get to see their proposal in practice. The amendment’s trial-by-fire will provide the most compelling case possible in its favor. And even if the proposal is not successful at the state level, just raising it may get the issue to the fore of national attention, which might in turn lead to public approval of a national amendment through the existing Article V process. This breaks the “iron cage” of Article V, rekindling the nation’s imagination around the possibility of worthy constitutional amendment.

A. Step One: Formal Proposal

The formal proposal process in my scheme is characterized by reduced,

structure is far too dangerous an enterprise, even if it may produce some desirable changes. A national government that pitches to and fro between unsuccessful and inconsistent structural configurations would undermine the constitutional regime’s ability to prevent politicians’ efforts to acquire and hold ever more power. Ill-conceived changes to the balance of powers may throw the government into temporary incoherence, or worse still may open the door for particularly despotic individuals or groups to secure and maintain hegemonic power. “In the extreme, excessive openness to constitutional change would lead to constant revisions of the rules, particularly by groups or parties that happen to have the upper hand at a particular time. This instability could weaken respect for government (i.e., reduce its legitimacy) and could encourage or enable those in power to try to lock in their positions or lock out opposition.” Cain & Noll, supra note 27, at 1536.

However, a relatively safe course for experimentation with the structure of and relationship between the national political branches can be charted by relying upon the states to test a variety of alternative arrangements before scaling them up at the national level. Additionally, the reconfirmation requirements of my proposal control for any distinctions between state and national government, which should become apparent once an amendment has been initially ratified and passes through the 25-year “free look” period.

69 LEVINSON, supra note 34, at 165.

70 A related concern is whether State constitutions likewise fail to reflect the modern understanding of fundamental rights that the majority of citizens support. Admittedly, State constitutions may not currently uphold the rights of all minority groups deserving of such protection. But they do protect some, and if some of those protections were expanded throughout the nation at an appropriately conservative pace, it would not undermine the fundamentality of all rights in the constitutional regime as some of the alternative methods of informal change discussed earlier would. This tiered amendatory procedure is the best method to provide fundamental protection of at least some rights, albeit only those identified and accepted in a state constitution (or implanted there in the future by activists supporting new fundamental rights).
but still substantial, supermajority requirements. First, an amendment could formally be proposed by three-fifths, rather than two-thirds, of both houses of Congress. This reduction in the required supermajority should boost the rate of amendment proposal. As noted earlier, under current Article V strictures, only 33 amendments have been formally proposed by both houses of Congress.\textsuperscript{71} Empirical studies of the rate of state constitutional amendment suggest that lowering the supermajority requirement for formal proposal of a federal amendment would have a significant impact on the frequency (and eventual success) of such formal proposals. While the success rate of state constitutional amendments proposed by a simple bicameral legislative majority is a robust 71\%, that rate drops to 56\% when a three-fifths supermajority is required, and drops further to only 44\% when a two-thirds supermajority is necessary.\textsuperscript{72} Thus, in comparison to an amendment proposed by a simple majority, an amendment that must be proposed by a three-fifths majority is roughly 1.26 times more difficult to ratify, while an amendment that must be proposed by a two-thirds majority is 1.62 times as difficult to ratify.\textsuperscript{73}

Because the three-fifths requirement is meaningfully less difficult, it would encourage more serious efforts to propose new amendments, given the greater likelihood that such proposals will ultimately pass muster. It is in part the exacting supermajoritarian hurdle itself that discourages activists from writing serious amendments in the first place, given the political risks to anyone supporting an amendment that is sure to fail.\textsuperscript{74} Citizens are similarly unlikely to think creatively about possible constitutional change: “Because it is so difficult to amend the Constitution—it seems almost utopian to suggest the possibility, with regard to anything that is truly important—citizens are encouraged to believe that change is almost never desirable, let alone necessary.”\textsuperscript{75} A lower supermajority hurdle is likely to increase the number of formal proposals for constitutional amendments, the first step in allowing the formal amendatory procedure itself to fulfill

\textsuperscript{71} Sullivan, supra note 4, at 692. See also The Failed Amendments, USConstitution.net, www.usconstitution.net/constamfail.html. The constitutional convention method for amendment remains untested because it has never been utilized.

\textsuperscript{72} Lutz, supra note 3, at 255 tbl. 9, 256.

\textsuperscript{73} Id. at 255 tbl. 9.

\textsuperscript{74} “If the probability of an amendment being passed under the current rule is relatively small then legislators may not risk the ‘political capital’ involved in proposing an amendment which has only a small chance of passing. This implies that the impact of an adjusted amendment provision would likely be larger than simply the outcome of votes on observed amendments.” Rosalind Dixon & Richard T. Holden, Amending the U.S. Constitution via Article V: The Effect of Voting Rule Inflation, June 24, 2008, at 22 (June 24, 2008), available at www.mit.edu/~rholden/papers/Dixon-Holden%20June%2024.pdf.

\textsuperscript{75} LEVINSON, supra note 34, at 165.
society’s need for modernization in our fundamental law.

Furthermore, there may be reason to believe that a three-fifths congressional supermajority requirement is closer to the amendment proposal difficulty the founders originally had in mind. As the number of states (and congressional representatives) has increased dramatically since the Constitution was first penned, the difficulty of reaching the Article V supermajorities has dramatically increased through what Rosalind Dixon and Richard T. Holden have termed “voting rule inflation.” This occurs because the likelihood that a small minority blocking an amendment that would be beneficial for the general polity increases as the absolute number of votes required to pass that amendment also increases. Thus, a two-thirds majority in the 1789 Senate is actually equivalent to a 59% majority in today’s Senate, and a two-thirds majority in the 1789 House is equivalent to only a 53% majority today.

At the same time, experience suggests that a three-fifths-of-Congress supermajority requirement would retain enough constitutional constancy to preserve a Madisonian balance in the Constitution. The difficulty of successfully shepherding legislation through the Senate, which effectively requires a 60-vote supermajority to overcome filibusters, provides ample anecdotal evidence that this change would not engender amendatory profligacy. Additionally, as I describe in more detail below, this lower supermajority hurdle applies only to amendment proposals; further supermajority protections against innumerable amendments that might undermine the fundamentality of constitutional law are available in the initial and final ratification steps of my scheme.

An amendment could also be proposed by three-fifths of the state legislatures in my scheme. As discussed above, the lower three-fifths supermajority requirement should achieve a Madisonian balance between modernization and constancy. Additionally, the new amendment mechanism returns some constitutional power to the states by allowing them to push for constitutional change without calling for a convention. The utility of the convention method has long been questionable; it has

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76 Dixon & Holden, supra note 74, at 4.
77 Id. at 5.
78 Id. at 20.
never been utilized and is not a viable alternative for the proposal of constitutional amendment. Concerns about the need for coordination amongst the states regarding subject matter and the possibility of a “runaway convention” that veers widely from the topic the states hoped to address by amendment counsel strongly against this method. Rather than restricting the states’ ability to propose constitutional change by requiring them to call a little-understood and potentially disastrous constitutional convention, my method would open the door for states to propose the national adoption of constitutional experiments whose success at the state level recommends scaling up to national prominence.

B. Step Two: Initial Ratification

Once an amendment has been formally proposed under my scheme, it is subject to a vote for initial ratification by a lower state supermajority of two-thirds, rather than three-fourths. The reduced supermajority threshold seems justified as a method to lower the barriers to entry for worthy amendments. Empirical researcher Donald Lutz has claimed that “the U.S. Constitution’s amendment rate would triple if the state ratification requirement were reduced to two-thirds (still a formidable supermajority).” Lutz’s research on state amendatory procedures reveals that while ratifying an amendment by a two-thirds supermajority of the state legislature is 1.60 times as difficult as ratifying that amendment by a simple majority, ratification by a three-quarters supermajority is even more prohibitive—approximately 1.80 times as difficult as ratification by a simple majority. A meaningful reduction in the difficulty of at least initially ratifying an amendment makes it far more likely that a spirit of cautious empiricism can take root within our constitutional tradition, encouraging more amendment proposals and low-risk, temporary entrenchment of new constitutional norms. Useful experiments with differing government structures are much more likely with this seemingly small reduction in the barrier to entry for a new constitutional amendment.

To ensure that the amendatory process remains sufficiently conservative, my scheme adds a proving ground for would-be amendments which are initially ratified. The 25-year initial ratification period allows amendment supporters to test the analogue between the national and state

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80 Rappaport, supra note 67, at 1532.
81 Id. at 1526-31. “Because the rules are not clear, it is possible that the states will authorize a limited convention on one subject, but the convention will end up proposing an amendment on a different subject—what I call a non-conforming amendment.” Id.
82 ESKRIDGE JR. & FEREJOHN, supra note 17, at 49 (citing Lutz, supra note 3, at 265).
83 Lutz, supra note 3, at 259 tbl. 10.
constitutions, as the two will not always be in perfect lockstep. When new innovations have been tried successfully at the state level, they can be more easily duplicated at the national level and given a “free look” before receiving full and final ratification. The initial ratification period thus provides space for useful, temporary trials of new constitutional norms.

C. Step Three: Final Ratification

Although it allows for easier initial ratification of constitutional changes, my proposal maintains stringent supermajority requirements for final ratification of new amendments. This has salutary effects on the fundamentality and normative force of permanently entrenched constitutional norms. As noted above, a strong supermajority requirement for constitutional entrenchment may be necessary to avoid diluting the fundamentality of the rights protected by the constitutional regime. A lower initial ratification barrier in a tiered amendment process does not necessarily threaten the fundamentality of those rights. By ultimately passing those high supermajority hurdles after a brief testing period, these proposals will have the same significant normative force as existing constitutional norms. Further, the pace of constitutional change will be slow enough to preserve the fundamental status of existing constitutional law. This final ratification step makes the tiered approach more appropriate than lowering Article V requirements across the board, which might disrupt the prevailing balance of society through a deluge of change that makes the Constitution seem equivalent to ordinary legislation.

III. A SUFFICIENT SUPERMAJORITY

There are many justifications for a strong supermajority requirement for amendments to the Constitution. But when those justifications are examined closely, it is apparent that the minor easing of Article V’s requirements I have described is desirable. In fact, it may actually serve those same justifications originally levied in support of Article V’s onerous supermajority requirements.

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84 Sullivan, supra note 4, at 696.

85 Arguably, the additional “free look” such amendments receive at the national level imbues those that later receive final ratification with even greater authority. Only those amendments that are highly successful and hugely popular will receive the support needed to be reconfirmed and finally ratified, suggesting that such amendments are truly worthy of inclusion in our constitutional regime.

86 Sullivan, supra note 4, at 696-97.
A. Clarity of “Constitutional” Law

Much like a constitutional regime limited to the text as amended by Article V and Supreme Court elaborations thereon, my scheme limits the realm of meaningful “constitutional law” to an easily-recognized body of norms. My scheme is importantly distinct from informal methods for the creation of constitution-like law that are part of the constitutional seepage process discussed earlier. It would satisfy the Rule of Law’s demand that the most fundamental tenets of our legal system remain clear and publicly accessible. My proposal would also allow amendment authors to reinforce rights that may have been tentatively announced by the Supreme Court and adopted in state constitutions, at least much more frequently than has been the case under the Article V regime. Future Supreme Court Justices would be less willing to cut back on formally-entrenched constitutional rights than they might have been if those rights were merely embedded in the Court’s own precedents. Such amendments would give those announced rights greater protection than stare decisis itself can provide. The Supreme Court could no longer reverse course without directly contravening the Constitution’s text, an act of jurisprudential gymnastics of which even the Justices likely are incapable (and unlikely to pursue given the risk of losing popular support for the Court itself).

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87 As Kathleen Sullivan has noted, citizens very infrequently have met Article V requirements to overturn a Supreme Court decision, perhaps as few as four times in the nation’s history. “[T]he Eleventh Amendment barred suits in federal court by citizens of one state against another state, the Fourteenth recognized the United States citizenship of African-Americans, the Sixteenth permitted Congress to impose an income tax, and the Twenty-Sixth lowered the voting age to eighteen—all in contrast to what the Supreme Court had said the Constitution permitted or required.” Id. at 693.

88 This may also temper particularly distasteful judicial efforts to reduce the reach of a precedent case by “refining” an existing decision with an eye towards outright reversing that decision at a later date, when it can be considered outdated in light of subsequent developments in the case law. In previous work, I have referred to this process as judicial “subtraction by addition,” a variety of what Professor Barry Friedman has termed “stealth overruling” that “chops a precedent to a stub.” See Gentithes, supra note 36, at 884-889 (quoting Barry Friedman, The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona), 99 GEORGETOWN L.J. 1, 12 (2010)).

89 The real interpretive leeway will be in applying such amendments in future jurisprudence, where Justices might seek to add to existing tests or creatively interpret the meaning of a new amendment’s language. But this process is no different from the traditional development of common (and arguably constitutional) law. If anything, more certainty is injected into the process as all Justices on the court will at least be required to begin the discussion from a common plateau of understood and unquestionably applicable constitutional norms. See Gentithes, supra note 36.

90 As many pundits have contended, Chief Justice Roberts’s recent opinion on the
B. Predictive Inaccuracy

In their Article Majority and Supermajority Rules: Three Views of the Capitol, John McGinnis and Michael Rappaport suggest that strong supermajority requirements for the entrenchment of constitutional norms are often necessary to protect citizens from the deeply misguided constitutional rules legislators might otherwise write. Given the many unpredictable changes society is certain to undergo over time, a single legislative body operating at any given time will often inaccurately predict what will be best for that society in future years. Rather than allowing a temporary majority of faulted legislators to easily create new language in the Constitution, a high supermajority procedure such as Article V ensures that only extremely popular norms subject to less individual predictive inaccuracy become a formal part of the constitutional regime.

Predictive inaccuracy is of very little concern under my tiered amendment proposal. States can implement new understandings of fundamental rights or significant structural reforms and provide empirical insight into the effects of those innovations. Although state and national governments are not perfect analogues, they are sufficiently similar to suggest that state-level experiments can greatly reduce future-predicting error rates. Additionally, the initial ratification period creates a real-world test for any would-be amendment passed through this alternative scheme. While certainly problems beyond the scope of the 25-year free look may arise, that period will provide a useful window into the likely effects of the constitutional change at the heart of the amendment. Errors in predicting the future ramifications of the amendment are thus likely to be corrected within that frame, and concerns over dead-hand control of an amendment’s authors are assuaged.

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Patient Protection and Affordable Care Act, President Obama’s signature legislative achievement to date, lends credence to the view that one of Roberts’s primary criteria in deciding a constitutional case is the esteem of the Court itself in the popular consciousness. See, e.g., Linda Greenhouse, The Story So Far, N.Y. TIMES, July 26, 2012, http://opinionator.blogs.nytimes.com/2012/07/25/the-story-so-far/?hp (summarizing coverage of the Chief Justice’s opinion).

92 Id.
93 Id. at 1171.
McGinnis and Rappaport also note that higher supermajority requirements for the entrenchment of constitutional norms force the drafters of such norms to view their proposals from a perspective similar to John Rawls’s famous “veil of ignorance.” Rawls suggested that the “principles of justice” that should guide society are those we would support from what he termed the “original position,” a perspective we adopt when given the chance to consent to be governed from behind a “veil of ignorance” about our own characteristics and social status. McGinnis and Rappaport argue that higher supermajority requirements for the entrenchment of constitutional norms require the authors of such norms to take a similarly enlightened, objective perspective. They must consider how a change to the constitutional regime will affect all citizens in the future because the support of all such citizens, rather than only the other members of any temporary majority group or party, is necessary to entrench that desired change.

Concerns that the authors of amendments entrenched through a simplified ratification procedure will fail to take a sufficiently objective, veil-of-ignorance-style perspective seem justified on the surface. Recent political history strongly suggests that temporary legislative majorities will take every opportunity to cement their powerful position. These majorities are often too shortsighted to consider how changes they entrench might affect them should they become a minority in the future. Thus, any

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94 Id. at 1175.
95 JOHN RAWLS, A THEORY OF JUSTICE 3-19 (rev. ed. 1999). From behind this veil, “the parties do not know certain kinds of particular facts. First of all, no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like.” Id. at 118. This procedure “ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances.” Id. at 11.
96 McGinnis & Rappaport, supra note 91.
98 Consider Republican lawmakers’ use of, then opposition to, the budget reconciliation process within the past decade. “Republicans denounced the idea of using reconciliation for health care reform—even though when they controlled Congress they used it to create the drug benefit for Medicare, and defended the procedure as recently as 2005.” David M. Herszenhorn, Budget Reconciliation, N.Y. TIMES,
amendment procedure must guarantee that alterations are not made solely for immediate political gain.

However, these concerns are also addressed in my tiered amendment scheme. To begin, the state constitutional norms addressed in this simpler process will already have been tested in those states, providing objective evidence upon which amendment proponents and opponents can base their respective arguments. Parties on both sides of the issue will thus have the opportunity to develop extensive and detailed views on the matter before it is even proposed at the national level. 99

Furthermore, the mandatory 25-year initial ratification period will undermine the efforts of incumbent politicians who might seek amendments that will perpetuate their own (or their party’s) grip on power. Any single party or group will be forced to recognize that the political landscape can change dramatically in a quarter-century. An effort to change the governing structure in a way that favors those groups today might ultimately be to their detriment by the time an ultimate ratification vote arrives. Political gamesmanship should thus play an extremely limited role in the push for an amendment under my scheme. Although not guaranteed, more objective authorial perspectives are at least sufficiently likely to emerge.

D. Special Interests

Perhaps McGinnis and Rappaport’s greatest contribution to the theory of supermajority voting rules is their observation on the interplay between such rules and political special interests. Special interests will generally support legislation skewed in favor of a subset of actors within society, whether or not it promotes the greater public good. 100 Such special interests tend to support “bad” legislation that only will provide some special benefit or rent for their supporters while drawing little notice from the public at

99 If necessary, an additional requirement that a state constitutional norm be in existence for a certain number of years before it becomes eligible for proposal and initial ratification at the national level could also be added to my scheme. This would give further opportunity for objective observance and the collection of empirical data about the effects of potential national amendment.

To avoid making a particular would-be amendment an ever-present and divisive political issue, limitations to the frequency of amendment proposals could also be added. If a proposal to textually entrench any particular state constitutional norm could only be made at infrequent intervals, perhaps once every ten years, particularly controversial issues would not come to dominate political debate. As noted earlier, later reconfirmation and ratification requirements applicable after a significant passage of time also ensure that any predictive inaccuracies on the part of the state legislators are not easily made permanent nationally. See supra Part III.B.

100 McGinnis & Rappaport, supra note 91.
large, such as the earmarks available in the appropriations process. McGinnis and Rappaport conclude that “when special interests promote the passage of . . . legislation, supermajority rule can be more desirable than majority rule, because the supermajority rule provides a counterweight to the special interests” as they seek to promote largely unnoticed bad law. On the other hand, supermajority rules are less desirable where special interests disfavor legislation, as is often the case regarding regulatory proposals. Supermajority rules for the passage of potentially bad amendments (which are especially risky given their long shelf-life and effect on future generations) thus might seem warranted to prohibit special interests from co-opting the amendment process to entrench undesirable norms in the constitutional regime without wide public awareness.

My proposal accounts for McGinnis and Rappaport’s special interest concern. Although moneyed special interests may be in the best position to generate the sustained campaign necessary for final ratification of an amendment, even those interests must produce an amendment that has proven workable and popular enough during the past 25 years to garner the support of three-fourths of the states. Such special interests may succeed in making temporary gains by passing the lower barrier for initial ratification, but they do so at the risk of undermining their long-term position if the amendments that garner such initial support prove to benefit only a privileged few during the 25 year free look period. Achieving the kind of broad popular support needed for final ratification almost necessarily requires that amendment’s authors avoid kowtowing to special interests.

There is also little risk that amendments to the structure of our federal government can be gamed to serve special interests. The very special interest with the most skin in the game of structural amendments are today’s sitting legislators, which are likely to see significant changes in the balance of political power between the time an amendment meets lower initial ratification requirements and when it must face a final ratification vote. This passage of time will make it extremely difficult for any particular political group to imbed structural changes that will perpetually favor only themselves. The tiered amendment process thus largely diffuses the threat McGinnis and Rappaport identify that a special interest might co-opt the constitutional amendment process if the supermajority hurdles to amendment were lowered.

IV. AMENDMENT MECHANICS AND ADMINISTRATIVE COSTS

101 Id. at 1130.
102 Id.
103 Such supermajority rules enhance the power of minority special interests to prevent the passage of desirable statutes. Id. at 1137-40.
Constitutional norms are designed to endure far longer than ordinary legislation. Given that longevity, actors motivated by the opportunity for political gain will predictably attempt to abuse any amendment process to more permanently entrench norms they find especially favorable. Thus, there is a constant risk that nefarious actors will use a simplified amendment procedure that should be available only for specific types of norms to entrench unrelated legal rules instead. It is therefore essential that alternative amendment procedures state clearly when they can and cannot be applied. As McGinnis and Rappaport point out, “administrative costs” are endemic in any amendment rule that uses a variety of ratification procedures given the trouble in defining carefully the types of amendments subject to each procedure. “[A] system with multiple voting rules rather than a single voting rule applicable to all legislation requires matching rules to particular legislation.”

How high these administrative costs rise depends on the clarity of the voting rule itself. Significant error rates, either in the form of needlessly applied rigorous supermajority requirements or improperly utilized streamlined pathways to amendatory ratification, will reduce the normative payoff of the alternative amendment process. Careful consideration of these costs and the ways to reduce them is therefore warranted.

To promote clarity and reduce administrative costs, my scheme is made available only for amendments that copy existing state constitutional norms. On its own, the limited applicability of the lower initial ratification barrier should avoid some obvious definitional quagmires, such as an effort to determine when a proposed amendment touches upon a “fundamental right” and must meet existing Article V requirements.

Nonetheless, administrative controversy seems inevitable and is limited only by the imagination of the drafters of would-be amendments. For instance, amendment authors are certain to seek the wiggle room in an amendment that “copies” existing state constitutional language. Certainly

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104 Id. at 1144.
105 Id. (“The substantiality of such costs will depend on the clarity of the definitions that guide application of the appropriate rule.”).
106 Id. (discussing these two distinct types of error inherent in any system with multiple voting rules).
107 The example provided by State amendatory procedures themselves can be particularly enlightening. For example, state constitutions have introduced a variety of controls regarding would-be amendments subject to a less-restrictive ratification procedure than Article V, including limits on “the number of amendments that can be made per session; the number of times a measure can be resubmitted and the number of subjects that can be covered by one amendment.” Cain & Noll, supra note 27, at 1524 (citing Gerald Benjamin, Constitutional Amendment and Revision, in Tarr & Williams, supra note 17, at 177, 183-84).
changes in some basic grammar or wording may be necessary in order to apply state constitutional language to our national Constitution. The proper extent of the changes that are permissible is unclear. A brightline rule either disallowing any alterations or permitting a wide variety of revisions seems misguided. What is needed is a fluid test that prohibits changes in meaning while allowing changes in applicability. Such a rule will need to account for the particularized circumstances of the amendment at issue, both in its original form in a state constitution and in its proposed form for national constitutional entrenchment. That requires the application of a flexible standard rather than a hard-and-fast rule, and appropriately falls within the realm of the judicial branch.

An impartial adjudicative body is best suited to equitably enforce the borders of permissibility around this alternative amendatory procedure. In another article, McGinnis and Rappaport have highlighted the need for a strong Supreme Court to enforce definitional boundaries between varied majority and supermajority rules for the passage of legislation. A strong Supreme Court likewise will play a vital role in implementing the new tiered amendment framework. The Court must be willing to clearly define when an amendment proposal is subject to the alternative ratification procedure I have described, and additionally handle questions as to whether

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108 I use the word “rule” to denote a legal norm that operates through logical if-then relationships that apply in an all or nothing manner, illustrated with descriptive vocabulary specifying the condition of the rule and the necessary outcome as clearly as possible—such as a speed limit with clearly delineated fines for its violation. Such rules have the advantages of predictability in enforcement and interpretation, but greatly limit downstream discretion on the part of those implementing that rule in the name of equity.

In contrast, I use the word “standard” to denote a legal norm that utilizes value-based terms, such as “reasonable” or “cruel,” as a means to incorporate value judgments within the norm itself. Thus, while rules require upstream value judgments by the norm’s author, standards push that value judgment downstream, relying on lower-level legal actors, typically judges, to give the norm its teeth. In positivistic terms, a standard is more akin to a command by the norm’s author ordering the applier or interpreter of the norm to make a value judgment at that later stage.

While it is outside the scope of this Article, there is an interesting and ongoing debate on the propriety of judicial rules as opposed to judicial standards. Compare Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989) with FREDERICK F. SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991).

109 “Supreme Court judicial interpretation can either raise or lower the administrative and substitution costs of a supermajority rule. By providing clear interpretations of key terms in supermajority rules, the Court can lower the administrative costs of defining and enforcing the rules. By making it harder for political actors to substitute action under majority rule for action blocked by supermajority rule, the Court can reduce substitution costs, and thereby harmonize the supermajoritarian provisions with the rest of the Constitution.” McGinnis & Rappaport, supra note 5, at 758.
the lower supermajority requirements were actually met. The Court is an appropriate body for the task. It can maintain needed separation from the political branches and interest groups supporting these amendments while bringing greater objectivity to the resolution of administrative conflicts.

Because my tiered amendment proposal will reinforce the Court’s primary role within the constitutional regime, it should empower the Court to definitely resolve such administrative conflicts. My scheme seeks to staunch the flow of constitutional seepage to other informal and ill-defined methods of constitutional modernization, thereby reconfirming that our constitutional regime has only limited sources: the original text, amendments passed either through the traditional Article V process or my new tiered scheme, and the elaborations on that language promulgated by the Supreme Court. If my scheme is enacted, the Court will face less competition from other informal sources of fundamental norms in our constitutional regime. Its decisions therefore will maintain the same normative force in the future as they have in the past. That normative authority will be particularly useful when a controversy arises over the use of the new tiered amendment procedure.

**CONCLUSION**

The difficulty of the Article V amendment process ensures that our constitutional regime, as currently constructed, will fail to meet the perpetual need for further modernization at a not-too-distant point in our future. This eventuality has disastrous consequences. First, the Constitution will fail to maintain the desirable balance between modernization and constancy envisioned by the framers. Second, the Constitution’s text and the Supreme Court’s elaborations upon it will continue to lose their primacy as sources of “constitutional law” in America. Other amorphous routes to the creation constitution-like norms will proliferate, undermining the fundamentality and finality of the commitments in the Constitution’s text itself. In addition, strict Article V supermajority requirements will continue to prohibit the federal adoption of state-level experiments with governing structures that could solve some of the quagmires facing our national government. Under the circumstances, change to the way we change the Constitution is highly desirable.

In this Article, I have proposed one such change that would meet many of the challenges facing the constitutional regime. My proposal is not set in stone; it has been the aim of this Article to start a useful dialogue on how we might break the “iron cage” of Article V to better our nation. I have set out to prove that it is possible to do so while maintaining a rough Madisonian balance between constitutional modernization and constancy.
Though there may be other admirable alternatives, I believe my tiered amendatory scheme is up to the task.

Even if my position is correct, instituting the tiered amendment scheme I recommend is a daunting task. Only a constitutional amendment itself, passed under the strictures of the very amendment process it seeks to amend, could create the simpler ratification processes I have described. But Congress is unlikely on its own accord to take up such an amendment that in the long run could substantially limit its own powers. The states are also likely to shy away from calling a constitutional convention that would both undermine the powers of legislators with national ambitions and potentially trigger a runaway convention. 110

In practical terms, what would be necessary to initiate the kind of constitutional change I have described is a campaign of massive public pressure on congressmen to propose that change to Article V’s amendment procedures. Perhaps this is not as unrealistic as it seems. Such a movement could take root in the current political environment if it is painted as a means to achieve greater control over a national legislature that is massively unpopular 111 and renew the popular support for the Supreme Court to act as a constitutional convention of last resort. 112 Perhaps now is the time to seize upon the widespread distaste for our national government, at the same time ensuring that needed changes to our most fundamental legal commitments and basic governing structure can realistically be entrenched in our constitutional regime. The primacy and authority of our formally-enacted constitutional commitments can and should be restored by channeling public frustration with the current political stalemate into a movement to amend Article V to include a tiered structure for future amendments.

110 Rappaport, supra note 67, at 1526-31.
111 As noted earlier, Congress is startlingly unpopular in modern America. Scheiffer, supra note 49.
112 Public esteem for the Court has been in rapid decline for the past decade, and its approval rating plummeted to as low as 41% following the most recent term. Adam Liptak & Allison Kopecki, Public’s Opinion of Supreme Court Drops after Health Care Law Decision, N.Y. TIMES, July 18, 2012, http://www.nytimes.com/2012/07/19/us/politics/publics-opinion-of-court-drops-after-health-care-law-decision.html.