Springboard to Article V (or Electoral Democracy and the End of Constitutional Amendment in the Nation and States)

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Abstract

Drafted in exceedingly sparing terms and notoriously difficult to amend, the U.S. Constitution is falling short in one of the most important functions of a government charter: establishing and maintaining a fair and just electoral framework—marked by rules that promote the values of equality, participation, competition, and transparency in elections. That is, the Constitution increasingly fails to preserve electoral democracy even as the nation's systems for voting and elections are plagued by a cascade of problems. State constitutions, though not uniform, are uniformly easier to amend than the national charter and tend to be better stewards of electoral democracy. But state constitutions are typically an afterthought in discussions about American constitutionalism, if even thought of at all. In this context, however, they have something quite valuable to contribute. As this Article contends, there is an informal role that state charters can play, should play, and indeed, have played to nudge their federal counterpart in the right direction by helping to facilitate Article V amendments aimed at improving electoral democracy. The Article proceeds in three parts.

In Part I, the Article discusses two concepts that are central to constitutional democracies like ours: constitutional amendment and electoral democracy. It engages with prevailing scholarship on these topics to explain what they are, why they are so essential, and how they relate to and differ from each other. While the discussion in this Part is largely one based in theory, the discussion in Part II is mostly descriptive. It highlights how these two key concepts manifest differentially under America's fifty-one constitutions. Part III, the final Part, builds on the theoretical and descriptive analyses in Parts I and II to introduce a novel concept, a "springboard amendment," by which state constitutional reform can help to facilitate corresponding federal change through Article V. Then, drawing on history, it illustrates that springboarding actually occurs, again, focusing on amendments related to electoral democracy. Though clearly exhibiting favorable disposition to springboard amendments, especially given the difficulty of amending our Constitution, this Part nevertheless acknowledges that springboarding could lead to negative outcomes, including through reference to the Redemption and Jim Crow periods that came on the heels of Reconstruction, undoubtedly the nadir for constitutional amendment and electoral democracy in the United States. The Article concludes with some

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musings about the obstacles to amendment and the role of the academy in the project of constitutional change in the hopes that its members will help promote constructive thinking and dialogue about constitutionalizing electoral democracy at the state and national levels.

Table of Contents

Introduction

The subject of extensive legal scholarship and commentary, constitutional amendment in the United States has been examined from a range of perspectives. A generation and a half ago, amidst the rise in modern legal conservatism and during a period marked by what one scholar termed "Constitutional Amendmentitis,"[1] it was common for scholars and officials to intone a Madisonian chant for "constancy"[2] in our national charter to preserve "stability" in the regime it has fostered.[3] This so-called "plea for patience"[4] came from even prominent liberals who previously advocated for constitutional reform,[5] consistent with the admonition that would-be reformers should honor the "strong presumption *against* constitutional amendment" that has served as a "bedrock in our constitutional history . . . ."[6] A decade later, though seemingly more amenable to the prospect of altering constitutional text, others

[1] Kathleen M. Sullivan, *Constitutional Amendmentitis*, Am. Prospect, Oct. 1, 1995.
[2] *See, e.g.*, Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 Cardozo L. Rev. 691 (1996).
[3] Citizens for the Constitution, Great and Extraordinary Occasions: Developing Guidelines for Constitutional Change 9–10 (1999).
[4] Ruth Bader Ginsburg, *On Amending the Constitution: A Plea for Patience*, 12 U. Ark. Little Rock L. Rev. 677 (1990).
[5] *Compare id., with* Ruth Bader Ginsburg, *The Equal Rights Amendment Is the Way*, 1 Harv. Women's L. J. 19 (1978), *and* Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. Cin. L. Rev. 1 (1975).
[6] Sullivan, *supra* note 2, at 694–703 (emphasis added).

nevertheless pitched the "the benefits of informal amendment,"[7] even suggesting the phenomenon's virtual inevitability.[8] Skeptical that "the formal amendment game is worth the candle,"[9] some among this cohort went so far as to declare the Article V amendment process "irrelevan[t]."[10] These and similar positions stand in stark contrast to a spate of more recently published works that contend "the nation is ready for a new wave of [formal] constitutional change."[11] Today, authorities on the subject, myself included, are more prone to identify some of the most intractable problems presently facing the country and lay blame for them on entrenched constitutional structures and omissions to highlight the desperate need for amendment.[12] They suggest an array of specific modifications to cure discrete constitutional infirmities,[13] and promote more sweeping reforms to address a broader menu of interlocking, deeply embedded shortcomings.[14]

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[7] Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 Drake L. Rev. 925, 933 (2007).

[8] David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 Harv. L. Rev. 1457, 1458–59 (2001) (arguing that "the forces that bring about constitutional change work their will almost irrespective of whether and how the text of the Constitution is changed.").

[9] Gerken, *supra* note 7; *see* Heather K. Gerken, *The Right to Vote: Is the Amendment Game Worth the Candle?*, 23 Wm. & Mary Bill Rts. J. 11 (2014); *see also* Heather K. Gerken, *On Voting Rights, Amendments Are Too Hard to Achieve and Enforc*e, N.Y. Times, (Nov. 4, 2014), https://www.nytimes.com/roomfordebate/2014/11/03/should-voting-in-an-election-be-a-constitutional-right/on-voting-rights-amendments-are-too-hard-to-achieve-and-enforce [https://perma.cc/GT25-G54Q].

[10] Strauss, *supra* note 8, at 1457.

[11] John F. Kowal & Wilfred U. Codrington III, The People's Constitution: 200 Years, 27 Amendments, and the Promise of a More Perfect Union 254 (2021).

[12] Wilfred U. Codrington III, *The Framers Would Have Wanted Us to Change the Constitution*, The Atlantic (Sept. 30, 2021), https://www.theatlantic.com/ideas/archive/2021/09/framers-would-have-wanted-us-change-constitution/620249/ [https://perma.cc/9FD4-ZXV9].

[13] *See, e.g.*, David Faris, *Dianne Feinstein Proves We Need Term Limits in Congress*, Newsweek (May 26, 2023), https://www.newsweek.com/dianne-feinstein-proves-we-need-term-limits-congress-opinion-1802662 [https://perma.cc/C7DC-23C6]; Jeffrey L. Fisher, *The Supreme Court Reform that Could Actually Win Bipartisan Support*, Politico (July 21, 2022), https://www.politico.com/news/magazine/2022/07/21/supreme-court-reform-term-limits-00046883 [https://perma.cc/7XJV-T72H]; Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 Election L. J. 263, 282–83 (2020) (calling for a multifaceted right to vote amendment); Wilfred U. Codrington III, The Electoral College's Racist Origins, The Atlantic (Nov. 17, 2019), https://www.theatlantic.com/ideas/archive/2019/11/electoral-college-racist-origins/601918/ [https://perma.cc/TX2Q-UBQS] (arguing for the abolition of the Electoral College); Frederick A. O. Schwarz, Jr., *Saving the Supreme Court*, Democracy: J. of Ideas (2019), https://democracyjournal.org/magazine/54/saving-the-supreme-court/ [https://perma.cc/PE68-K8EP] (arguing for Supreme Court term limits and staggered appointments); Lani Guinier & Penda D. Hair, *A Voting Rights Amendment Would End Voting Suppression*, NY. Times (Nov. 3, 2014), https://www.nytimes.com/roomfordebate/2014/11/03/should-voting-in-an-election-be-a-constitutional-right/a-voting-rights-amendment-would-end-voting-suppression [https://perma.cc/3JXZ-R2EQ] (proposing a right to vote amendment).

[14] Wilfred U. Codrington III, *Move to Amend*, N.Y.U. J. Legis. & Pub. Pol'y Quorum (2023), https://nyujlpp.org/quorum/codrington-move-to-amend/ [https://perma.cc/EK96-4TW9] [hereinafter *Move to Amend*]; Wilfred U. Codrington III, *The Political Process, The Court, and Constitutional Amendment*, Balkinization Blog (Sept. 04, 2022), https://balkin.blogspot.com/2022/09/the-political-process-court-and.html [https://perma.cc/UM28-23TS]; Kowal & Codrington, *supra* note 11; Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It) (2006).

Experts have likewise examined the mechanics of U.S. constitutional change, including the institutional dynamics at play among key actors. They have appraised Congress's authority in the amendment process[15] and that of the states.[16] They have also inquired into the lack of presidential role[17] and debated what place, if any, courts should occupy in amendment politics.[18] Scholars have probed the never-used convention method, including the possible dangers stemming from the lack of rules to govern such an assembly.[19] And perhaps the subject most explored, at least of late, analyzes the present difficulty of altering the Constitution[20]—including the causes and ramifications of Article V's potential desuetude[21]—typically opening and concluding with proclamations of its "constructive unamendability."[22]

Notwithstanding the extensive scholarly compilation on the topic, a separate but related subject has received only limited attention: the states' *informal* involvement in federal constitutional amendment. States occupy an informal role when they engage in the amendment process extra-legally, acting in their non-official capacity to influence the adoption of new constitutional provisions.[23] Given the extremely broad jurisdiction afforded to them

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[15] *See generally* Donald J. Boudreaux & A. C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 Fordham L. Rev. 111 (1993) (advancing an economic-based theory of Article V amendment examining the relationship between Congress's gatekeeping role and the response of interest groups).

[16] *See generally* Philip L. Martin, *State Legislative Ratification of Federal Constitutional Amendments: An Overview*, 9 U. Rich. L. Rev. 271 (1975).

[17] *See generally* Sopan Joshi, *The Presidential Role in the Constitutional Amendment Process*, 107 Nw. U. L. Rev. 963 (2013).

[18] *Compare, e.g.,* Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process,* 97 Harv. L. Rev. 386 (1983) (presenting a model of judicial review in Article V controversies), *with* Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 Harv. L. Rev. 433 (1983) (calling for judicial deference to Congress in questions related to the political act of constitutional amendment).

[19] *Compare* Kenneth F. Ripple, *Article V and the Proposed Federal Constitutional Convention Procedures Bills*, 3 Cardozo L. Rev. 529 (1982) (arguing that Congress has constitutional authority to enact measures to govern key aspects of an Article V convention, including the agenda), *with* Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 Yale L.J. 677, 742 (1993) (by its "very nature . . . a constitutional convention . . . is inherently illimitable in what it may propose[,]" rendering "any federal constitutional convention . . . necessarily a 'runaway' convention.").

[20] Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 Am. Pol. Sci. Rev. 355, 362 (1994) (compiling data showing that "the U.S. Constitution has the second-most-difficult amendment process."); Rosalind Dixon, *Partial Constitutional Amendments*, 13 U. Pa. J. Const. L. 643, 646 (2011) (arguing that "from both a historical and comparative perspective . . . the requirements under Article V governing the proposal of amendments are too onerous."); *id.* at 652 (asserting "that increases in the number of states over time have made the requirements for the ratification of proposed amendments progressively more difficult to satisfy" and "from a comparative perspective, the requirements for the ratification of amendments in the U.S. are unusually onerous.").

[21] Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. Rev. 1029 (2014).

[22] Richard Albert, *The Constructive Unamendability of the U.S. Constitution*, N.Y.U. J. Legis. & Pub. Pol'y Quorum (2023), https://nyujlpp.org/quorum/albert-constructive-unamendability-constitution/ [https://perma.cc/XQW6-UQDA].

[23] Note that "extra-legal," as used in this sense, describes any conduct not specifically mentioned in Article V or suggested by it and, therefore, lacking any consequence for the law's recognition of whether an amendment is validly proposed or ratified. Similarly, action taken in one's "non-official capacity," at least here, does not mean "unofficial" conduct or that of state actors in their role as private citizens. Instead, it means any action by a state's public officials that

and their privileged position in our federal system, states are well-situated to employ a range of strategies to help prod national constitutional reform. State lawmakers can promote constitutional amendments by lobbying their national counterparts, for example, seeking to persuade them to introduce and adopt congressional amending resolutions. They can also endorse federal and state legislative candidates for office and campaign for the election of those who vow to support proposal and ratification. And yet another way that states can affect the federal amendment process: by altering their own constitutions. States can modify—and, indeed, have modified—their own charters in ways that aid the cause of constitutional reform nationally. How they do this, specifically with respect to electoral democracy, is the principal focus of this paper. That is, the Article examines how, in the artful phrasing of Miriam Seifter, relatively "small-scale interventions" like state constitutional amendments that alter state election rules "might provide a springboard to larger changes[,]"[24] namely corresponding amendments to the U.S. Constitution.

In so doing, the Article proceeds in three parts. Part I offers theoretical and normative analyses that provide context for the paper, focusing on two critical concepts: constitutional amendment and electoral democracy. They are independent notions, to be sure, and have distinct functions. Whereas the focus of constitutional amendment is the redesign of the basic legal order, electoral democracy is concerned with legitimacy and fairness in foundational election rules. This Part argues that amendment and electoral democracy are both central to our understanding of constitutionalism and that they have a common underlying motivation, suggesting that they are intrinsically related, particularly in the U.S. context.

Following the discussion of how to think about these constitutional amendment and electoral democracy separately and the relationship between them, Part II describes how they materialize in the states and nation. The answer, in a word, differentially. The Constitution not only delegates election administration to the states, but it leaves them with residual authority to structure their own governments generally as they see fit. As a result, states possess immense power to regulate electoral democracy. State charters, in turn, tend to make their commitment to this fundamental concept clear, empowering state officials to promote it, including through their own amendment, revision, and re-constitution. And while amendment and electoral democracy are also important features of the U.S. Constitution, for a variety of reasons, federal officials do not draw on them nearly as freely as do their state counterparts.

Extending the theoretical discussion of constitutional amendment and electoral democracy in Part I and the descriptive assessment in Part II, the final Part introduces the novel concept, "springboard amendment." A springboard amendment is a change to an inferior constitution that informs or helps facilitate similar change in a superior one. The theory presented in Part III

is textually outside the bounds of Article V and, thus, is not of direct legal significance to the enactment of an amendment. In other words, none of this should be read to suggest that states and their lawmakers do or should act illegally or in their private capacity to effectuate federal constitutional change.

[24] Miriam Seifter, *Saving Democracy, State by State?*, 110 Cal. L. Rev. 2069, 2072 (2022).

suggests that this might manifest in two primary ways. First, the substance of reforms in one constitution can provide useful models for those working towards amendment in another, helping them to generate policies worthy of consideration. Second, in building the necessary infrastructure and navigating the political processes required to successfully enact amendments in a lower-order constitution, reformers engage in activity that is also relevant and helpful for the realization amendment in the higher-order charter. At the same time, success in the former endeavor might beneficially gauge broader public receptivity to the latter.[25] The contentions in Part III are then complemented with support from history to illustrate how this can materialize. This final Part highlights three of the most significant electoral democracy reforms made to state constitutions that influenced those enshrined in the federal Constitution and with results that have invariably been in furtherance of electoral democracy. Even still, it acknowledges the possibility to springboard backwards, away from electoral democracy, in ways that can lead to normatively undesirable outcomes. The Article concludes by suggesting that academy can contribute to the project of rebooting federal constitutional reform, including to sustain and deepen electoral democracy throughout the United States, namely by identifying and diagnosing barriers to amendment in the present day and, at the same time, generating ideas that will anchor interventions and prescriptions aimed at mitigating them.

Importantly, this Article does not contend, as some scholars have, that there are alternative formal amendatory routes, i.e. ways to amend constitutional text beyond those clearly set forth in Article V.[26] This project is decidedly less ambitious, taking no position on that far more profound question. Nor does this paper examine in great depth state-driven "constitutional workaround" scenarios, whereby states use their authority under the national charter and their own to effect outcomes that some provision of the Constitution might otherwise seem to preclude.[27] Instead, the Article seeks to examine and embellish on the relatively well-trodden path to federal constitutional amendment that goes through Congress,[28] yet looking at it through the prism of

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[25] Yet a third way in which state constitutional amendments might serve as a springboard is by helping to clarify the meaning of Article V amendments *once they are enacted*, offering a glimpse of how state actors have come to understand and operate under their corresponding provisions. This topic might be ripe for examination, but goes beyond the scope of this paper, which is limited to *ex ante* amendment politics, not constitutional interpretation *ex post*. *See, e.g.*, Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. Cal. L. Rev. 323 (2012) (arguing that in certain instances where the underlying controversies stem from analogous provisions, federal courts interpreting the Constitution should examine state constitutional law).

[26] *See, e.g.*, Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988) (suggesting that the Constitution might be amended through national popular referenda).

[27] Mark Tushnet, *Constitutional Workarounds*, 87 Tex. L. Rev. 1499 (2009). The Article does discuss constitutional workarounds to the extent that springboard amendments can emerge from workaround strategy. *See infra* Part III (discussing the direct election of senators).

[28] This is simply to say that Congress is the gatekeeper in either of its formal amendatory roles because it is tasked with proposing amendments for the states' approval and issuing a convention call upon receipt of a sufficient number of Article V applications. The following analysis of the states' informal role in amendments through activities like providing models for reforms and pressuring for their adoption at the national level assumes that Congress maintains that

state constitutionalism in the hopes of broadening the notion of "cooperative federalism."[29] Whether or not it is "unfortunate[,]"—and I suspect that it is—most legal academics would agree that "the focus of scholarship has centered on the national constitution and national amendment at the expense of the rich amendment tradition at the state level."[30] This Article seeks to augment that rich, oft-ignored tradition by spotlighting states and their charters, recasting them as actors intimately entangled with other integral features of the larger American constitutional tradition.[31] Thus even as it acknowledges that "[l]ooking to state experiences is important in its own right, to give an often under-appreciated source of law and rights its due[,]" this paper nevertheless contends that "state constitutions can also sharpen our understanding of both the challenges and potential opportunities for federal constitutional reform."[32]

I. Constitutional Amendment and Electoral Democracy in the United States

Implicit to constitutional theory and practice are countless ideas, but two—constitutional amendment and electoral democracy—are so central that they stand out among the rest. Amendment is vital to constitutional democracies, where "the people govern through their representatives, but there are limits as to what a popular government may do[,]"[33] because it provides for change to the underlying legal regime. Indeed, the notion of amendment and the articulated means for achieving it are said to "hold special status" in a constitutional democracy, as "they legitimize higher and ordinary law as derived from the consent governed."[34] The other concept, electoral democracy, concerns the rules and processes that govern elections and contests for political office. Though legal scholars have explored the subject far less than constitutional amendment, electoral democracy is likewise "an indispensable part of a legitimate political system"—and so much so that the claim "is usually

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important gatekeeping function. In other words, for formal amendment, Congress will always be at least a mediating body.

[29] Heather K. Gerken, *Our Federalism(s)*, 53 Wm. & Mary L. Rev. 1549, 1556–57 (2012) (describing "cooperative federalism" as a phenomenon "in which the states and federal government regulate together, with states implementing federal policy[,]" while clarifying that under such "regimes, states draw their power from their position as federal servants, not separate sovereigns.").

[30] Peter J. Galie & Christopher Bopst, *Changing State Constitutions: Dual Constitutionalism and the Amending Process,* 1 Hofstra L. & Pol'y Symposium 27 (1996).

[31] *See* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. Chi. L. Rev. 1641, 1643 (2014) (arguing that despite any exceptionalism of the federal Constitution, "American constitutionalism is not confined to the text of the federal Constitution, nor to the ideas and practices associated with it.").

[32] Alicia Bannon, *Learning from State Constitutional Amendments*, N.Y.U. J. Legis. & Pub. Pol'y Quorum (2023), https://nyujlpp.org/quorum/bannon-learning-from-state-constitutional-amendments/ [https://perma.cc/BA7H-N49Q].

[33] Miguel Schor, *Constitutional Democracy and Scholarly Fashions*, 68 Drake L. Rev. 359, 360 (2020).

[34] Richard Albert, Constitutional Amendments: Making, Breaking, and Changing Constitutions 3 (2019).

taken for granted."[35] Neither concept should be taken for granted, however. Examining these notions in turn, this Part argues that they function separately in unique, albeit parallel ways, making each an essential pillar of constitutionalism, all the while working in tandem as the scaffolding for constitutional democracy.

A. Constitutional Amendment

In constitutional democracies, the provision for amendment is fundamental.[36] Its mere insertion in a governing charter suggesting "that the document is not yet finished,"[37] constitutional amendment is society's basic, non-violent means for reforming its organic law, tantamount to a domesticated revolution.[38] In the most technical sense, as scholar Richard Albert notes, an amendment refers to a "correction"—an alteration to fix flaws or errors, remediate oversights or omissions, or bridge design gaps—"to better achieve the purpose" and "advance[ ] the meaning of the constitution as it is presently understood."[39] The term has much broader connotations, however. Used more colloquially, amendment simply implies some measure of "ameliorisation"[40] and can account for any of the various "forms of constitutional change" including those that are more "radical or all-encompassing."[41] It is the characteristic

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[35] Bo Rothstein, *Creating Political Legitimacy: Electoral Democracy Versus Quality of Government*, 53 Am. Behavioral Scientist 311, 314 (2009). While agreeing it is essential to political legitimacy, Rothstein nevertheless calls electoral democracy "highly overrated," arguing that it cannot "serve as *the* main pillar for creating political legitimacy." *Id.* at 313–14 (emphasis added).

[36] Ryan D. Doerfler & Samuel Moyn, *The Constitution Is Broken and Should Not Be Reclaimed*, N.Y. Times (Aug. 19, 2022), https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html [https://perma.cc/ZAF8-KFDF] ("The idea of constitutionalism is that there needs to be some higher law that is more difficult to change than the rest of the legal order."); Richard Albert, et al., *Which Constitutional Provisions Are Most Important?*, 1 European J. of Empirical Legal Stud. 19, 32 (2024) ("Constitutional amendment, then, is one of the most high-stakes provisions in constitution-making, according to the experts.").

[37] Donald S. Lutz, *The United States Constitution at an Incomplete Text*, 496 An. Am. Acad. of Pol. & Soc. Sci. 23, 25 (1988).

[38] Albert, *supra* note 34, at 47 ("Codifying the rules of formal amendment in a constitutional text provides a roadmap for making constitutional changes . . . without having to . . . take up arms.")

[39] Richard Albert, *Constitutional Amendment and Dismemberment*, 43 Yale J. of Int'l L. 1, 3 (2018).

[40] Mortimer N. Sellers, *Formal and Informal Constitutional Amendment*, 50 General Reports of the XXth General Congress of the International Academy of Comparative Law - Global Studies in Comparative Law 493, 494 (2020).

[41] Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, *in* Comparative Constitutional Law 96 (Tom Ginsburg & Rosalind Dixon eds., 2011). In contemporary scholarship, many, like Richard Albert, rightfully use the term "amendment" narrowly, roughly to describe "a formal constitutional change occurring within the existing presuppositions of the constitution and whose outcome fits comfortably within its established framework," which may also "be understood as an effort to continue in the path of the constitution-making project that began at the founding moment." Richard Albert, *Amendment and Revision in the Unmaking of Constitutions*, *in* Comparative Constitution Making (David Landau & Hanna Lerner eds., 2019) [hereinafter *The Unmaking of Constitutions*]. Indeed, "some constitutional amendments are not amendments at all," but "self-conscious efforts to repudiate the essential characteristics of the constitution and to destroy its foundations." Albert, *supra* note 39, at 3. But constitutional reform is not black and white. "Many state constitutions, for example, create a distinction between a constitutional 'amendment' and a constitutional 'revision,'

notion of "change," then, that is chief among constitutional amendment's most important functions; it empowers political communities to adapt their charter to changing conditions by revisiting and modifying the rules, institutional arrangements, and other entrenched terms that authorize and constrain official power. Constitutional amendment, to this end, suggests a commitment to popular sovereignty, democratic renewal, and civic vitality. In facilitating the adjustment, revision, or overhaul of a society's most elemental legal commitments and structural foundations without recourse to bloody conflict, amendment sustains a modern people by promoting self-government and engaging them in ways that can temper the dead hand rule of earlier generations, ultimately infusing the legal and political order with greater democratic purchase.

In societies like the United States, where written or codified charters predominate, amendment might be conceived of in two broad categories, formal and informal.[42] Formal amendment accords with the traditional understanding of the notion, coming into existence when political actors satisfy specified,

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with the latter representing a more fundamental form of constitutional change." Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 Geo. Wash. L. Rev. 438, 444 (2018). Yet, there is a blurry line between the varying degrees of reform that lie on the spectrum of formal constitutional change. *See, e.g.*, Albert, *The Unmaking of Constitutions* ("Even at its best, however, the distinction between amendment and revision is unclear."); Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 Tex. L. Rev. 1517, 1521 (2009) (arguing that state constitutionalism lacks a "'bright line' [to] separate[ ] revisions from amendments"); *see also* William B. Fisch, *Constitutional Referendum in the United States of America*, 54 Am. J. Comp. L. 485, 500 (2006) (Noting a distinction between "quantitative revision," which relates to "the number and variety of changes effected" and "qualitative revision," which considers "the fundamental nature of a single change" and its ability to "affect[ ] the nature of our basic governmental plan."); Versteeg & Zackin, *supra* note 31, at 1673 ("the distinction between amendment and replacement is not always a meaningful one."). Notably, however, Article V of the U.S. Constitution establishes the permissible routes to (and imposes strictures on) "Amendments to th[e] Constitution" broadly and does not distinguish the idiosyncratic types of reform. Richard Albert, *America's Amoral Constitution*, 70 Am. U. L. Rev. 773, 785 (2021) (herein after "America's Amoral Constitution") ("For the Framers, there would be no methodological distinction among amending the Constitution, revising the frame of government, and reinventing America."); *see* U.S. Const. art. V. The significance of these variants of reform for American constitutionalism should not be minimized. At the state level, there are crucial doctrinal—and thus practical—nuances that differentiate "amendment" from "revision," for example, the latter of which tends to consist of changes that are more comprehensive in scope and come about through heightened procedures that are more participatory and democratic. *See, e.g.*, Cal. Const. art. XVIII; Dixon & Landau, *supra*, at 444–45. Indeed, state courts have rendered purported amendments invalid on the theory that they, in effect, constituted revision, whereas the U.S. Supreme Court has dismissed such claims. But even as these and other differences in terminology have important implications in a range of contexts, their connotations are of little import for the immediate discussion because this Article examines dimensions of the interplay between Article V amendment and the whole of its state-level counterpart, which consists of any and all textual reforms to state charters. Thus, as employed in this Article, the terms "amendment," "revision," and those of a similar nature are used interchangeably, and are meant to encapsulate the full menu of mechanisms leading to formal constitutional reform, be they amendment properly described, revision, or even wholesale overhaul and reconstitution.

[42] Among the varied conceptual ways that constitutional theory divides states is between those governed by written constitutions and those governed by unwritten constitutions. While constitutional states may theoretically exist at these poles, in practice, they are governed by higher laws that fall somewhere on the spectrum of writtenness. For a useful discussion that reframes this written-unwritten duality in terms of single-text constitutions and multi-text constitutions, see Richard Albert, *Multi-Textual Constitutions*, 109 Va. L. Rev. 1629 (2023).

usually heightened procedures for modifying constitutional language.[43] When successful, a formal amendment augments—or at least alters—the composition of the words that comprise the actual charter.[44] Informal amendment, on the other hand, encompasses acts that result in the "alteration of constitutional meaning [but] in the absence of textual change."[45] No less an important means of "higher lawmaking,"[46] informal amendment can materialize through extraordinary government acts lacking textual designation as a means to amendment like the issuance of watershed judicial opinions[47] and the enactment of other political paradigm shifting measures, whether stemming from the conduct of the legislature[48] or the executive.[49] Notwithstanding their crucial differences, however, formal and informal amendments seek the same end: to supplant framework and other core constitutional understandings with political and legal innovations supported by a legitimating claim to higher

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[43] Marcia Lynn Whicker, Ruth Ann Strickland, & Raymond A. Moore, *The Constitution Under Pressure: The Amendment Process*, 15 J. Pol. Sci. 60, 60 (1987); *see also* Sellers, *supra* note 40, at 494–95 ("Formal constitutional amendment is amendment according to the declared rules or announced structures of the system itself.").

[44] Notably, "augment" is correct with respect to the U.S. Constitution in particularly because of an early decision to append changes to the original document rather than actually replace provisions that have been superseded. Kowal & Codrington, *supra* note 11, at 47–48. Other regimes, including some of the states, permit for amendments to be incorporated more directly into the body of the document. The enactment of Amendment 4 in Alabama makes that state a notable example of such regime. Recently approved by voters, the measure mandates that the state's constitution be consolidated, reorganized, and stripped of racist language among other things. Brian Lyman, *Amendment 4 Passes; Would Start Process of Removing Racist Language from Alabama Constitution*, Montgomery Advertiser (Nov. 3, 2020), https://www.montgomeryadvertiser.com/story/news/2020/11/03/amendment-4-passes-would-allow-purge-racist-constitutional-language/6121309002/ [https://perma.cc/W2KA-QP6U].

[45] Gerken, *supra* note 7, at 930; *see also* Sellers, *supra* note 40, at 495 ("Informal constitutional amendment is constitutional amendment by any other means, uncontemplated by, unstated by, or contrary to the declared rules or announced structures of the legal system being modified."); Richard Kay, *Formal and Informal Amendment of the United States Constitution*, 66 Am. J. Comp. L. 243, 260 (2018) (describing informal amendments as those changes to constitutional meaning that have "emerged from political and judicial processes that are difficult to justify by reference to any positive law."); Jonathan L. Marshfield, *Respecting the Mystery of Constitutional Change*, 65 Buff. L. Rev. 1057, 1058 (2017) ("Informal change happens when binding constitutional rules are modified without any corresponding alteration to the constitutional text.").

[46] Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L.J. 1013, 1022 (1984) [hereafter *Discovering the Constitution*]; Bruce A. Ackerman, We the People: Foundations 285 (1991).

[47] Emmett Macfarlane, *Judicial Amendment of the Constitution*, 19 Int'l J. Const. L. 1894, 1896 (2021) ("[A] judicial amendment of the constitution to occur, the resulting constitutional change (via addition, removal, or modification) must neither be a plausible interpretation of the existing text nor consistent with reasonable understandings of its purpose or the intent of the framers."); Eric J. Segall, *Constitutional Change and The Supreme Court: The Article V Problem*, 16 U. Pa. J. Const. L. 443, 445 (2013) (arguing that "the [U.S. Supreme] Court has improperly amended the Tenth and Eleventh Amendments without going through the required Article V procedures.").

[48] *See generally* William Eskridge Jr. & John A. Ferejohn, *Super-Statutes*, 50 Duke L.J. 1215 (2001).

[49] *See* Strauss, *supra* note 8, at 1471, 1472–73 (2001) ("The expansion of the power of the President, especially in foreign affairs, is another constitutional change that occurred without a formal amendment," and "[n]o constitutional amendment authorized either the expansion of the federal bureaucracy or the creation of the administrative state," which "is now a permanent part of our system.").

authority.[50] In the case of formal amendment, this is accomplished through compliance with a set of publicly available procedures for hardwiring new ground rules, ultimately reconfiguring political arrangements and establishing legal principles in ways that are broadly comprehensible to the people. Decidedly less fixed, and sometimes emerging by stealth,[51] informal amendment materializes when government acts—typically backed by an appeal to prevailing constitutional text, but certainly paramount norms and ideals—renovate the foundation of the unwritten constitutional order.[52]

That defining feature, that is the ability (or not) to effect textual alteration, makes formal amendments not just more durable than their non-enshrined counterparts, but generally prone to more favorable reception.[53] In terms of substance, one mode is no more or less immune from critique than the other. Yet formal amendments tend to be far less vulnerable to criticism on two important and interrelated grounds, procedural and democratic. First, given their colorable claim of adherence to pre-established processes, formal amendments are typically acknowledged as valid enactments[54]—even if not always embraced by the public.[55] Informal amendments, by definition, dispense with the fixed rules for constitutional change, however. As a result, their legitimating force cannot be adherence to procedures agreed upon prior to the reform act itself, but invocation of some constitutional text or transcendent

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[50] *See* Sellers, *supra* note 40, at 496 ("Whether we seek to change the written constitution, the interpretation of the constitution, the culture of constitutional legality, or the effectiveness of its operation, we claim to do so in pursuit of justice. We claim to amend constitutions in order to secure just laws, to maintain just institutions, to interpret the laws justly, or to develop a culture that supports justice and a just society for all.").

[51] *See generally* Richard Albert, *Constitutional Amendment by Stealth*, 60 McGill L. J. 673 (2015).

[52] *See* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 Stan. L. Rev. 703, 709, 716 (1975) (implicitly making the claim that the Article V amendment process cannot be the "exclusive method of adopting constitutional values to changing times" given that "written constitutions [cannot] completely codify the higher law.").

[53] Craig Martin, *The Legitimacy of Informal Constitutional Amendment and the "Reinterpretation" of Japan's War Powers*, 40 Fordham Int'l L.J. 427, 446 (2017) ("critics . . . squarely deny that informal amendments can ever be legitimate at all"); *see also* Kay, *supra* note 45, at 267 (noting the existence of "questions about whether or not judicial interpretation is a legitimate alternative method of constitutional change."); Segall, *supra* note 47, at 445 (arguing that because our judicial supremacist "system anticipates [some] changes," the "[Supreme] Court does not [necessarily] improperly contravene Article V" when shifting doctrine and altering precedent significantly, while nonetheless "contend[ing] that the Court has improperly amended the Tenth and Eleventh Amendments without going through the required Article V procedures."); David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 Iowa L. Rev. 1 (1990) (disclaiming all extra-textual theories of constitutional amendment).

[54] Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 Harv. L. Rev. 1787, 1806 n.66 (2005) ("Amendments to the Constitution may thus be valid because they are adopted the standards prescribed by Article V . . . .").

[55] *See, e.g.*, Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 997 (2002) ("By the end of the campaign, with ratification of the Nineteenth Amendment imminent, antis began to argue that the Nineteenth Amendment itself was unconstitutional on federalism grounds, a claim they litigated all the way to the Supreme Court."); Arthur W. Machen, *Is the Fifteenth Amendment Void?*, 23 Harv. L. Rev. 169 (1910) ("The Fifteenth Amendment amounts to a compulsory annexation to each state that refused to ratify it of a black San Domingo within its borders. It is no less objectionable than the annexation of the San Domingo in the Spanish main."); M. F. Morris, *The Fifteenth Amendment to the Federal Constitution*, 189 note Am. Rev. 82 (1909) (arguing that the measure should be deemed "a nullity").

values not heretofore commonly understood as authorizing constitutional change. Such novel grounding for the authority to alter constitutions, combined with the facts that such changes often stem from the conduct of actors not officially delegated the amendment power and that the contours of the reform tend to be substantively blurry, forms the core of the criticism of informal amendment from democratic theory.[56]

Yet another consequence of informal amendment—and the basis for the second related major critique—is that "meaningful constitutional debate gets funneled into the federal courts" or other entities not formally sanctioned to facilitate fundamental political and legal change.[57] Beyond simply disregarding the established rules for amendment then, the paths to informal amendment can restrict participation in what was set out to be a broadly deliberative process, thereby depriving the people of their basic right to contribute to vital decision making. As a result of the procedural bypass that limits deliberation and cabins popular input, informal amendments are more prone to condemnation by officials. Indeed, "it is hard for judges" and other officials "to define the precise content of informal amendments and even harder . . . to acknowledge their existence."[58] Government actors are thus more inclined to emblazon such non-text altering constitutional victories with an asterisk and harbor sentiments that they are justified in ignoring the reforms.

To be sure, both formal and informal amendments are integral to modern constitutions and the democracies that they govern. Each is an essential product in the "hydraulics" theory of constitutional change. In democratic states, the theory holds, societal pressures urging basic governmental reforms do not simply dissipate into political entropy but, instead, are redirected through alternate conduits.[59] Taken to its extreme, then, the hydraulics theory would suggest that "[i]f a formal amendment process were unavailable . . . our system would develop some other way of settling these issues," namely informal amendment.[60] It is therefore unsurprising that scholars have found an inverse relationship between the two; infrequent formal amendment—generally stemming from the difficulty of meeting compliance with stringent and onerous prescribed procedures—tends to be correlated with an increase in informal amendment activity.[61]

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[56] *See, e.g.*, Raoul Berger, *Ronald Dworkin's The Moral Reading of the Constitution: A Critique*, 72 Ind. L. J. 1099, 1111 (1997) ("It needs no argument that judges are not authorized, in the words of *Marbury v. Madison*, to 'alter' the Constitution."). Of course, as a descriptive matter, they do. *But see* Jonathan L. Marshfield, *The Amendment Effect*, 98 B.U. L. Rev. 55, 61 note 19 (2018) ("legitimate constitutional change need not occur solely through formal amendment processes.").

[57] Aziz Rana, *A Simplified Congressional Amendment Process*, LPE Blog (Jan.10, 2022), https://lpeproject.org/blog/new-year-new-amendments/ [https://perma.cc/F4XQ-2JNQ].

[58] Gerken, *supra* note 7, at 929.

[59] *Id.*

[60] Strauss, *supra* note 8, at 1461; *see id.* (arguing that "it seems reasonable to conjecture that, if there were no formal amendment process at all, the courts would allow Congress greater power to act in areas in which the national consensus was strong.").

[61] Lutz, *supra* note 20, at 362. Notably, one scholar responds to this finding with the contention that informal amendment of state constitutions also occurs with some frequency even though they are relatively easier to amend through formal means. Michael Besso, *"Constitutional Amendment Procedures and the Informal Political Construction of Constitutions,"* 67 J. Politics 69,

The relationship between formal and informal amendment thus suggests that neither is an adequate substitute for the other. Formal amendment is necessary in light of the obstacles to governance erected by constitutional provisions, the text of which is neither easily circumnavigated nor capable of being applied in unconventional ways.[62] No non-citizen or person under the age of thirty-five years can serve as the president of the United States,[63] for example, because "[w]hen the text is relatively rule-like, concrete and specific, the underlying principles cannot override the textual command."[64] Likewise, the elevated consensus requirements that underlie their predetermined and publicly knowable procedural thresholds imbue formal amendments with virtually unquestionable legitimacy[65] and a common respect that is only bolstered by their relative permanence. Offsetting the utility of formal amendment, however, are linguistic constraints[66] and various practical considerations that limit what can reasonably be included in a constitution. Moreover, attaining the heightened level of agreement necessary to enshrine new reforms can be exceedingly rare, especially in large and diverse countries. Thus, the pragmatic significance of the far "less romantic" informal amendment:[67] even if its value is context dependent, it undisputably has value.

"The inevitability of change touches law as it does every aspect of life[,]" Justice Lewis Powell once argued.[68] "But stability and moderation are uniquely important to the law."[69] Though he made the assertion in the context of another vexing constitutional concern, it nonetheless captures a fundamental for understanding amendment: The ability to alter one's governing charter is a

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83–84 (2005) ("Significant informal political construction [roughly informal amendment] of constitutions does take place in the states, then, despite the fact that the amendment procedures for these constitutions are significantly less burdensome than are the procedures for federal constitutional amendment.").

[62] Levinson, *supra* note 14, at 160 ("Clever adaptive interpretation is not always possible, however, and Article V has made it next to impossible to achieve such adaptation where amendment is thought to be necessity.").

[63] U.S. Const. art. II, § 1, cl. 5.

[64] Jack Balkin, *Abortion and Original Meaning*, 24 Const. Comment. 291, 304 (2007).

[65] Richard Fallon provides a useful framework for thinking about and assessing the types of legitimacy that might implicated by formal and informal amendment. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 Harv. L. Rev. 1787 (2005). Because "*legal* legitimacy of governmental actions will typically depend on their conformity with constitutional norms," formal amendment is likely more legitimate than informal amendment in that regard. *Id.* at 1806 n.66 (emphasis added). When legitimacy is conceived of "in *sociological* terms," formal amendment may still be the more legitimate of the two but there may be greater parity between them because "the relevant public" may consider either to be "justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward." *Id.* at 1795 (emphasis added). Finally, "[w]hen the term legitimacy is used in a *moral* sense," the legitimacy of formal versus informal amendment is likely dependent on the substance of the measure because that metric "is a function of moral justifiability or respect-worthiness." *Id.* at 1796 (emphasis added). Many thanks to Richard Albert for suggesting reference to this framework.

[66] Though still important, language restrictions are less of a concern for informal amendments because, even as they alter "the constitution[] in practice," they do so by revisiting "the settled understandings that have developed alongside the text" of a constitution, not its actual provisions. Strauss, *supra* note 8, at 1505.

[67] *Id.*

[68] Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 Wash. & Lee L. Rev. 281, 289 (1990) (arguing the necessity of stare decisis while suggesting there are reasons to occasionally depart from precedent).

[69] *Id.*

core feature of a constitutional democracy, but the legitimacy of such change is a function of many things, among which is adherence to widely known rules and agreed upon conventions that seek steadiness even amidst broader social and political upheaval. It is for this reason that formal and informal means of amendment exist—far from supplanting each other—as a complementary pair, each with its unique advantages and disadvantages.

B. Electoral Democracy

Notwithstanding its fairly straightforward etymology, the notion that we refer to as democracy is both multifaceted[70] and extremely imprecise.[71] What exactly delimits "rule of the people" is long-contested[72] and, at the same time, evolutionary.[73] Scholars often conceive of the term democracy as one possessing "a variety of potential meanings[,]"[74] and, at the same time, they tend to concede that none of its meanings is "simple to grasp or define." Thus, even where there is considerable agreement as to the most essential elements of democracy, there is also ample room for dispute about "which factors [to] emphasize."[75]

For example, political scientist Robert Dahl's theory of democracy emphasizes five core elements.[76] Crucially, however, Dahl contends that those basic criteria can never be met in all respects, leading him to conclude that in practice, democracy is best approximated by a "polyarchy," or system under

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[70] Burt Neuborne, *Making the Law Safe for Democracy: A Review of "The Law of Democracy Etc."*, 97 Mich. L. Rev. 1578, 1578 (1999) ("A functioning democracy is, after all, the sum of crucial components—free speech, political equality, liberty, toleration, empathy, self-interest, efficiency, and much more.").

[71] Gabriel Negretto, *Constitution-making and Liberal Democracy: The Role of Citizens and Representative Elites*, 18 Int'l J. of Const. L. 206, 216 (2020) ("It is, of course, difficult to define exactly when a democracy is established or consolidated . . . ."); Amnon Rubinstein & Yaniv Roznai, *The Right to a Genuine Electoral Democracy*, Minn. J. Int'l L. 143, 145 (2018) (arguing that "[t]he right to democracy" suggests something more than "a collective right of 'a people'—which is inherently vague and difficult to implement . . . .").

[72] *See generally* Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States (2009); Sanford Levinson, Framed: America's 51 Constitutions and the Crisis of Governance (2012) (arguing that democracy is "an essentially contested concept" and "there is no single widely shared notion of the term."); Harry Hobbes, *Democratic Theory and Constitutional Design*, 24 int'l j. on minority & Grp. Rts. 341, 347 (2017) (referring to democracy as "an 'essentially contested concept'") (internal citation omitted); Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 Vand. L. Rev. 769, 804 (2022) ("concepts like 'democracy' . . . are both remarkably abstract and deeply contested.").

[73] Keyssar, *supra* note 72, at xxiii ("The evolution of democracy rarely followed a straight path, and it always has been accompanied by profound antidemocratic countercurrents. The history of suffrage in the United States is a history of both expansion and contraction, of inclusion and exclusion, of shifts in direction and momentum at different places and at different times.").

[74] Russell J. Dalton, Doh C. Shin, & Willy Jou, *Understanding Democracy: Data from Unlikely Places*, 18 J. of Democracy 142, 143 (2007); *see* Nikolas Bowie, *Antidemocracy*, 135 Harv. L. Rev. 160, 164 (2021) ("Even among theorists whose profession requires them to define democracy, there are competing definitions.").

[75] Dalton, Shin, & Jou, *supra* note 74, at 142–43.

[76] Robert A. Dahl, On Democracy 37–38 (1990) (arguing that effective participation, voting equality, enlightened public understanding, collective agenda control, and civic inclusion are essential facets of democracy).

which the many control.[77] Alexander Keyssar, who conceives of "democracy as a project" and "something to be endlessly nurtured and reinforced," also contends that it is "an ideal that cannot be fully realized but can and should always be pursued."[78] In his seminal treatise dedicated to the expansion and contraction of voting rights in the U.S., the historian situates the electoral franchise as chief among democracy's most essential features, while still recognizing that "voting is one of several forms of political participation . . . vital to [its] health."[79] And stressing fundamental traits like dynamism and interpersonality, as well as its acute reliance on collaboration and communication, legal scholar Lani Guinier compares democracy to one of America's great pursuits. Democracy, like jazz, she argues, can be understood as "an evolving experiment in public conversation" that flourishes when "a medley of diverse voices [are] working together."[80] In a recent exploration of antidemocracy, an inverse phenomenon,[81] law professor Nikolas Bowie pointedly highlights the irony: "Americans take pride in calling the United States the oldest existing democracy. But what exactly that means has never been clear."[82] Indeed, in 1989, lore has it, a protester attending the demonstration in Tiananmen Square brandished a sign trenchantly expressing a variation of that sentiment. "I don't know what democracy means," it read, "but I know we need more of it."[83] Such is the interminable complexity of this elemental yet deeply value-laden concept.

Within the broader notion of democracy, moreover, is a subsidiary one: electoral democracy. Electoral democracy pertains to the system of laws instituted to ensure the conduct and legitimacy of society's most consequential political contests. Informing public choice about the "metarules" that establish "a structure for political life,"[84] its ultimate concern is fairness in the processes that dictate who is entrusted to represent the people in official decision-making and assume control over basic government functions. Yet, despite its "central[ity] to [the] historical conceptualization of democracy,"[85] experts on

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[77] Robert A. Dahl, Democracy and Its Critics 223 (1989).

[78] Keyssar, *supra* note 72, at 323.

[79] *Id.* at 321.

[80] Lani Guinier, *More Democracy*, 1995 U. Chi. L. F. 1, 3 (1995) (Guinier nevertheless bemoaned that in the United States, democracy had become more of "a spectator sport," akin to the baseball, the national pastime.).

[81] *Compare* Bowie, *supra* note 74, at 172 (defining antidemocracy as social hierarchies' resistance to "political equality on the ground that popular majorities will use their power to tyrannize political minorities—particularly the minority of the population that owns more property than anyone else," frequently based "on defenses that are themselves incompatible with political equality."), *with, e.g.*, Dahl, *supra* note 77, at 52 (referring to "government by guardianship," where "rulership" is "entrusted to a minority of persons who are specially qualified to govern by reason of their superior knowledge and virtue," the "perennial alternative to democracy" and its "most formidable rival").

[82] Bowie, *supra* note 74, at 164 ("Even among theorists whose profession requires them to define democracy, there are competing definitions.").

[83] *Id.*

[84] Tom Ginsburg, Aziz Z. Huq, & Tarun Khaitan, *The Comparative Constitutional Law of Elections, Parties, and Voting: Introduction*, *in* The Entrenchment of Democracy: The Comparative Constitutional Law of Elections, Parties, and Voting 1 (2024).

[85] Jacob M. Grumbach, *Laboratories of Democratic Backsliding*, 117 Am. Pol. Sci. Rev. 1, 2–3 (2022) (internal citations omitted).

electoral democracy find it likewise difficult to define and, even more, to concretize. Upon reflection, however, its elusiveness is utterly unsurprising. Notwithstanding widespread affection for democracy as the "dominant ideology and preferred form of government around the world,"[86] chasmic philosophical rifts are revealed as the discussion about "an abstract concept of democracy" shifts "to a more specific debate about [] the rules and institutions of a well-functioning electoral democracy."[87]

As there is with democracy, there is an appreciable overlap in what scholars suggest are the characteristic features of electoral democracy. Most fundamentally, political scientists explain, electoral democracy expects for a "political system [to have] elections that are free, fair, and legitimate"[88] and that it maintain "a strong relationship between representation and a fair, open election process."[89] This makes sense even intuitively. Elections that are both "free (without proscriptions) and fair (without open state intervention in favor of the government party)"[90] are significantly more likely to be "meaningful," where meaningfulness implies not simply the existence of rules that create a "genuine possibility of alteration in power,"[91] but also that they operate to confer such power upon those who can be said to "have a legitimate claim to inclusion in the negotiations and deliberations" on core constitutive matters and other state governance functions.[92] Importantly, electoral democracy pays little regard to the more substantive norms and values associated with—or material conditions necessary to—robust, contemporary understandings of democracy, aspects that, for example, presuppose a just political economy.[93] Nor is it intimately concerned with those principles considered integral to

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[86] Kris Dunn & Judd R. Thornton, *Vote Intent and Beliefs about Democracy in the United States*, 4 Party Politics 455, 455 (2018).

[87] Matthew J. Streb, Rethinking American Electoral Democracy: Controversies in Electoral Democracy and Representation 1 (2008); Dunn & Thornton, *supra* note 86 ("[A]lthough the ideological war between democratic and nondemocratic ideologies may be winding down, there is certainly no consensus on the preferred form of subdemocratic ideology.").

[88] Grumbach, *supra* note 85.

[89] Streb, *supra* note 87, at ii.

[90] Negretto, *supra* note 71.

[91] Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. Rev. 78, 88 (2018); *id.* at 89 ("Meaningful elections require a bureaucratic machinery capable of applying rules in a neutral and consistent fashion over an extended territory.").

[92] Negretto, *supra* note 71, at 215; *see also* James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. Pitt. L. Rev. 189, 192 (1990) ("As a result, election laws and procedures necessarily affect the legitimacy of an elected government by determining the extent to which election results accurately reflect the consent of the governed.").

[93] *See, e.g.*, Amy Kapczynski, Aziz Rana, & Robert L. Tsai, *A Democratic Political Economy*, LPE Blog (Jan. 10, 2022), https://lpeproject.org/blog/new-year-new-amendments/ [https://perma.cc/6U4R-NA7Q] ("The premise is that true democracy requires not just equal suffrage, but also a measure of material and social equality, secured by the nature of our political economy."); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. Rev. 669 (2014); Doerfler & Moyn, *supra* note 72, at 800 ("Understood substantively, enabling democratic contestation would justify" interventions that eliminate "formal restrictions on participation" and mitigate "economic realities [that] make it much more difficult for various classes of citizens to take part in the political process.").

classical notions of liberal democracy, like the protection of political speech.[94] Electoral democracy is, instead, conceptually "thinner" or more "minimalist" in nature,[95] even if still immensely robust. Its principal focus is the strength of the principles undergirding the "narrower procedural aspect of democracy,"[96] those broadly considered indispensable to holding elections that will be recognized as authoritative by the governed and regarded as being due basic respect from peer governments.

In a commendable effort to elucidate the idea, political scientist Matthew Streb distills the essential criteria for electoral democracy in a way that is critical for framing the present discussion. He suggests that there are four, all of which "revolve around the concept of 'free and fair elections."[97] Electoral democracy, Streb contends, can be plausibly claimed to exist only where there is: (1) uniform possession of "equal and effective opportunities to vote" and (2) the occurrence of "at least some competitive elections whose outcomes are in doubt before election day,"[98] as well as (3) an earnest "requirement for transparency"[99] and (4) some safeguard or set of them aimed at ensuring "participation [will] not be overly onerous."[100] The rationale for understanding equality, competition, transparency, and participation as the baseline requirements is fairly straightforward. Political equality suggests a societal "commitment that entails both equal access to political institutions by members of the political community and equal treatment of members of the political community by those institutions in turn."[101] Among the premises for the norm is that "the basic obligation[ ] of government is to treat members of the polity as

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[94] *See, e.g.*, Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. Davis L. Rev. 1631, 1634 (2021) ("Freedom of speech is a precondition of a healthy constitutional democracy and its protection of free and fair elections, the right to vote and participate in the political process, due process and equal protection of the law, an independent judiciary, and legal institutions that operate with integrity and in the public interest."); Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 Nw. U. L. Rev. 1053, 1054 (2016) ("Freedom of speech does more than protect democracy; it also promotes a *democratic culture*."); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 Va. L. Rev. 491 (2013) ("[T]here is 'practically universal agreement' that at least one . . . norm [central to the First Amendment] is democracy. In its narrowest but most powerful conception, this core precept recognizes the right of every individual to participate freely and equally in the speech by which we govern ourselves.").

[95] Jørgen Møller & Svend-Erik Skaaning, *Systematizing Thin and Thick Conceptions of the Rule of Law,* 33 Justice System J. 136, 136 (2012).

[96] Rubinstein & Roznai, *supra* note 71, at 167.

[97] Streb, *supra* note 87, at 3. Importantly, the above-listed principles of electoral democracy are interrelated if only because they orient a society towards political equality. *See* Bowie, *supra* note 81, at 168 ("The reason why democracy is commonly associated with particular practices—including competitive elections, consensus, majority rule, universal enfranchisement, deliberation, sortition, political pay, and rotation in office—is because these procedures for making decisions can be justified as pursuing political equality.").

[98] Streb, *supra* note 87, at 3; *see* Huq & Ginsburg, *supra* note 91 ("One cannot have meaningful political competition without the relatively free ability to organize and offer policy proposals, criticize leaders, and secure freedom from official intimidation.").

[99] Streb, *supra* note 87, at 4; *see* Huq & Ginsburg, *supra* note 91, at 89 ("Further, election rules must be clearly announced to the public.").

[100] Streb, *supra* note 87, at 5.

[101] Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 890 (2021).

possessing equal worth and dignity,"[102] so, as a default, it views as suspicious contests in which the value of the vote afforded to some is incommensurate with that exercised by their peers.[103] Electoral democracy likewise embraces the "underlying assumption . . . that greater participation is preferable to less participation in a democracy" such "that the opportunity to vote should be as expansive as possible while still ensuring a fair and efficacious electoral process."[104] Absent valid justification, members of a society are rightly inclined to discount the authoritativeness of elections from which they are excluded or are administered in ways that curtail their opportunities to participate[105] or provide for such opportunities unevenly.[106] Likewise, one rightfully regards as sham elections those that are not competitive in the sense that they present voters with no real alternatives or where electoral design renders winners and losers all but certain,[107] which tends to yield unreasonably wide margins of victory and the continuous reelection of incumbents.[108] And very much the same for contests that are non-transparent, that value of transparency being "a key pillar for a functioning democracy" for its tendency to foster a collective sense of "legitimacy [that] depends on public confidence in the conduct of elections."[109] When, instead, elections are conducted in accordance with rules that are either unknown or unknowable to participants and stakeholders, or

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[102] Katherine Shaw, *Partisanship Creep*, 118 Nw. U. L. Rev. 1563, 1628–29 (2024).

[103] Reynolds v. Sims, 377 U.S. 533, 567 (1964) ("To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote" because "the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives."); Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 Colum. L. Rev. 283, 321 n.156 ("But in a democracy that is committed to the political equality of all citizens, it is difficult to justify the unequal weighting of people's preferences. In theory, if not in fact, everyone is supposed to be equal when votes are cast and public policies are enacted."); Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 Cornell J. L. & Pub. Pol'y 143, 179–80 (2008) ("Laws that draw distinctions between voters regarding the value of their votes . . . call into question the accuracy of the election results and the efficacy of self-governance," which suggest the fundamentality of "equal representation . . . especially because it affects voters directly with respect to their interaction with the political process and ensures the legitimacy of their elected leaders.").

[104] Yasmin Dawood, *The Right to Vote: Baselines and Defaults*, 74 Stan. L. Rev. Online 37, 51 (2022).

[105] *See* Spencer Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 636 (2007) ("Widespread participation furthers democratic legitimacy by producing a government that reflects the will of the people and allowing diverse groups of citizens to hold government officials accountable for their decisions.").

[106] *See, e.g.*, Smith v. Allwright, 321 U.S. 649 (1944) (invalidating the use of white primaries); Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking,* 29 Fla. St. U. L. Rev. 55, 69 (2001) (regarding the white primary cases as revealing the Supreme Court's increasing "unwillingness to legitimize a Southern community's scheme for disfranchising blacks, regardless of how strained the constitutional rationale for invalidating it.").

[107] Huq & Ginsburg, *supra* note 91, at 163 ("[P]erhaps most obviously, democracy relies on the possibility of alternation in power. At one extreme, entrenched one-party regimes cannot be ranked as proper democracies simply because they lack the electoral alternatives to facilitate a meaningful vote.").

[108] Stephanopoulos, *supra* note 103, at 299.

[109] Rebecca Green, *Rethinking Transparency in U.S. Elections*, 75 Ohio St. L. J. 779, 780–81 (2014).

they operate under analogous conditions of opaqueness, the electorate possesses good reason to be wary of assurances of electoral integrity.[110]

It would be quite radical, to be sure, for a society to embrace electoral democracy in its perfect form, and because it is impossible for a legal regime to adhere strictly to its tenets, there is no historical model for such a state. Were it possible to envision a system that maximized the four principles of electoral democracy, moreover, it would nevertheless be difficult to justify its framework operation even under the most open, inclusive, and egalitarian theories of constitutional democracy. Abiding by the values of participation and equality would demand that a system authorize all persons to engage in the electoral processes, as well as a mechanism to ensure that level of engagement, while tolerating no disparity in the weight of any person's vote. Those votes, furthermore, would be cast in contests that were not just completely transparent—with operations and outcomes witnessed by the many and otherwise open to meticulous inspection and public scrutiny—but also supremely competitive, featuring political adversaries representing the entire ideological spectrum and menu of policy positions. Thus, even as a state characterized by maximal equality, participation, competition, and transparency would measure up perfectly, in this context "perfect" alignment with the principles of electoral democracy suggests the Platonic archetype, not the political ideal.[111] In practice, the model legal regime would prescribe and implement rules that account for the principles of electoral democracy in large degree, yet balanced among each other and additional considerations—including historical, cultural, and political imperatives—to suit the unique conditions of a particular society. Proper respect for federalism, for example, might call for some deviation from absolute equality, just as the imposition of age, residency, and other voting requirements that establish one's full membership in a political community may warrant some departure from universal electoral participation. A society might justifiably sacrifice total transparency and unbridled competition respectively, in furtherance of its just aim to minimize, on the one hand, public corruption and self-dealing, and on the other, inefficiency in administration. In pursuit of the paragon form of electoral democracy, then, a state would instantiate perfectly these unalloyed values. Nevertheless, their embodiment to such a degree in practice would not be appropriately suited to the political processes and imperatives of any society.

Importantly, the aforementioned are *minimal conditions* of electoral democracy. The principles may not demarcate completely the outer bounds of electoral democracy, and they are broad enough to accommodate reasonable debate regarding their own contours. Nor can the four critical inputs, independent of government quality as a vital output, guarantee the political

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[110] *Id.* Green notes, however, that "history demonstrates transparency must be carefully calibrated; greater transparency does not always lead to greater legitimacy." *Id.* at 781.

[111] More broadly, that a principle is valuable or even inherent in the notion of electoral democracy, does not mean that its absolutization—especially out of important social and political context—will result in the actualization of a more ideal constitutional democracy.

legitimacy of a constitutional democracy.[112] Constitutionalism thus demands due respect for electoral democracy as a central organizing principle, that it broadly inform the collective exercise of choice and guide the structure and terms of political leadership. At the same time, it acknowledges that equal, open, competitive, and transparent "elections are a necessary but not a sufficient condition for modern democracy" or, in light of various considerations and constraints essential to the function of a constitutional democracy, that free and fair "elections alone are not enough."[113]

Nonetheless, and despite the shortcomings in the admittedly incomplete exposition, the discussion above still provides insight into an otherwise complex but eminently useful theoretical construct. The notion of electoral democracy shapes the judgments that figure into rule development and system design that set out some of the most elemental processes in a constitutional democracy. Critically, its constituent values—equality, participation, transparency, and competition—interact with each other and exogenous factors facilitate the resolution of matters like who may stand for office and who may vote for those candidates; whether votes will be counted and the determination of their value; when, where, and how elections are administered, and by whom; and what comes of disputes over these and related questions as they inevitably arise. For its core role in political society, helping it to structure collective decisionmaking and evaluate official conduct, the concept of electoral democracy contributes immeasurably to democratic theory and constitutional practice.

C. Electoral Democracy and the End of Amendment

As set out above, constitutional amendment and electoral democracy are, separately, critical elements of constitutionalism. Because of the work that they do jointly in a constitutional democracy, however, they make for a vital pair. While they pursue it in different ways, constitutional amendment and electoral democracy have an overlapping purpose of imbuing decisions of the state with credibility by sanctioning them as acts of the people themselves. Expressed in terms of U.S. political and legal thought, they both reflect "the explicit, emphatic embrace of popular sovereignty," a notion that predated the Constitution, yet "emerged more clearly defined as the central principle of American constitutionalism."[114] Amendment and electoral democracy thereby do the heavy lifting to safeguard the privileged position of "We the People" to, in effect, make good on the promise that "the Constitution reflects a theory of popular sovereignty in which governmental legitimacy is based on the consent

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[112] *See generally* Rothstein, *supra* note 35; Richard H. Pildes, *Election Law and Democratic Governance*, *in* The Oxford Handbook of American Election Law 76 (Eugene Mazo ed., 2024). Notwithstanding this concession, one might still find that electoral democracy helps to foster the conditions for government quality. *See, e.g.*, Yasmin Dawood, *The Right to Vote: Baselines and Defaults*, 74 Stan. L. Rev. Online 37, 52 (2022) ("[T]he provision of the right to vote in free and fair elections is a basic requirement of effective democratic government.").

[113] Andreas Schedler, *Elections Without Democracy*, 13 J. Democracy 36, 37 (2002).

[114] Larry D. Kramer, *Foreword: We the Court*, 115 Harv. L. Rev. 5, 47 (2001).

of the governed."[115] A great deal would be lost without these concepts. Indeed, without them, there would be nothing to uphold the pivotal notion that the people rule and that their collective will should be reflected in political decisionmaking. In their absence, it would be difficult to justify society's broad and continued support for ordinary, much less extraordinary, governance.

Significantly, the underlying premise that power is held by the people is itself not without controversy. "There is nothing 'innocent' about a commitment to popular sovereignty," as Sanford Levinson writes,[116] a contention whose bases have been exposed from various perspectives. Popular sovereignty raises concerns for political theory, for example, where it has been characterized as a mere rhetorical flourish or empty stand-in—"a 'glittering generality,' useful, perhaps, as a trope in political mobilization but otherwise of little, if any, utility as a genuine analytical concept."[117] The criticism from theory goes further. Perceiving the notion as untenable and unsalvageable, some maintain that "the doctrine of popular sovereignty cannot be implemented as a mode of political authority for a modern government," and even call for its replacement.[118] Problematic still is how the notion has manifested in history, most notably in the United States. That discipline reveals, on the one hand, the inescapable "denominator problem,"[119] a reference to popular sovereignty's uncertain yet patently exclusive scope such that "We the People" did not just disregard the Indigenous, enslaved, and women,[120] but also free Black men and even white men lacking property.[121] On the other hand, historiography has shown popular sovereignty as proving conceptually ambiguous, amorphous, and even slippery, making it prone to political weaponization. Indeed, during the antebellum era, the period in which the limits of popular sovereignty in the United States was subjected to its greatest test, factions on all sides of the debate about America's peculiar institution invoked the ideal as mantra and justification for their cause because it could accommodate the "divergent views about slavery and the meaning of the Constitution."[122] Further still, are the critiques of popular sovereignty—from the left and the right alike—for how it has come to be understood in constitutional practice. Liberal scholars argue that it is employed to rationalize conservative jurisprudence, serving as "originalism's trump card" by enabling adherents to depict judicial intervention adverse to their position as an "exercise [of] sovereign power without popular consent," tantamount to an illegitimate "usurp[ation]" of "the people's

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[115] Gardner, *supra* note 92, at 200.

[116] Sanford Levinson, *Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program*, 123 Yale L. J. 2644, 2646 (2014).

[117] *Id.* (quoting Ben Tolman, *Sovereignty and Power* 2 (unpublished manuscript)).

[118] Stephen M. Griffin, American Constitutionalism: From Theory to Politics 19–26, 69 (1996).

[119] Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Problem of the Denominator* 65 U. Colo. L. Rev. 749, 750 (1994).

[120] Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 Harv. L. Rev. 1, 2 (1987).

[121] Amar, *supra* note 119.

[122] Christopher Childers, *Interpreting Popular Sovereignty: A Historiographical Essay*, 57 Civil War History 48, 70 (2011).

fundamental right to govern themselves."[123] Conservatives contend that, despite not even being mentioned in the national charter, popular sovereignty has become a prisoner of progressive "historical revisionism," and otherwise reduced to "an overly majoritarian conception."[124] Serious as these indictments are, however, they need not be resolved for the instant discussion. Even if they have merit—and, to varying degrees, they do—popular sovereignty's theoretical, historical, and practical shortcomings do not undermine the fact that it nevertheless has undeniable deep roots in American political thought and was supremely influential in constitutional design.[125]

As indicated above,[126] constitutional amendment and electoral democracy are distinct notions and, given their separate underlying rationales, they can justify divergent results. At first blush, then, it may seem hard to reconcile the claim that popular sovereignty motivates both ideas. This difficulty stems from the very nature of constitutional amendment and electoral democracy as concepts and, to a large extent, more basic definitional misunderstandings about popular sovereignty. With respect to the former, it is inherent that a system seeking to accommodate the "strange bedfellows" of constitutionalism and democracy[127] will exhibit symptoms of some internal tension. The manifestation of collective self-rule under such a regime will incorporate features of constitutionalism, including stability-promoting mechanisms that "preserve certainty and [ ] assure that government and citizen alike may rely upon standards of constant value,"[128] alongside egalitarianism and other values intrinsic to notions of democracy that undergird the default assumption "that all affected individuals are included in the decision-making process on equal terms[,]"[129]—uniting them with traits common to both, including their fidelity

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[123] Andrew Coan, *The Dead Hand Revisited*, 70 Emory L. J. Online 1, 2 (2020).

[124] Henry P. Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 Colum. L. Rev. 121, 121, 130 (1996).

[125] Michael Sant'Ambrogio, *Standing in the Shadow of Popular Sovereignty*, 95 B.U. L. Rev. 1869, 1877 (2015) ("Popular sovereignty has been called a legal fiction. But legal fictions have the power to shape institutions, and popular sovereignty has an impressive resume in this regard.").

[126] *See supra* Sections I.A–B.

[127] Georg Vanberg, *A Square Peg in a Round Hole: Democracy, Constitutionalism, and Citizen Sovereignty*, 18 Geo. J. L. & Pub. Pol'y 655, 656 (2020).

[128] Robert B. McKay, *Stability and Change in Constitutional Law*, 17 Vand. L. Rev. 203, 203 (1963); Dixon & Landau, *supra* note 41, at 476 (suggesting that "stability" can "preserv[e] the value of the constitution as a focal point and precommitment device and perhaps defend[] against forms of constitutional change that pose a threat to the democratic order.").

[129] Angela M. Banks, *Expanding Participation in Constitution Making: Challenges and Opportunities*, 49 Wm. & Mary L. Rev. 1043, 1049 (2008); *see also, e.g.*, James A. Gardner, *The Illiberalization of American Election Law: A Study in Democratic Deconsolidation*, 90 Fordham L. Rev. 423, 435 (2021) ("popular sovereignty—the doctrine that the people of a society are entitled to rule themselves . . . is conventionally associated with . . . a commitment to the fundamental political equality of citizens . . . ."); *id.* at 439 (describing the evolutionary understandings of the Constitution under the Warren Court that embraced "a theory of representative democracy" according to which "all citizens are deemed equal in their entitlement to participate in whatever processes of governance the people collectively decide to adopt.").

to deliberative decisionmaking[130] and some measure of proceduralism.[131] In general, then, constitutional amendment "[b]y design," with its presumption of regime stability, "is not as responsive to temporary changes in sentiment as an election," which tends to "operate through simple majority rule" out of heightened regard for the political equality norm.[132] With respect to the latter, no less important point about meaning, that can be stated succinctly: "Popular sovereignty is not necessarily majority will."[133] As David Dow explains, "[l]aw can come from the people—however understood—without coming from political majorities."[134] And just as "popular sovereignty can be understood as fifty percent plus one, it can also be understood as a plurality, a supermajority, or even the will of an appointed oligarchy of lawmakers."[135] In other words, neither constitutional amendment nor electoral democracy is synonymous with popular sovereignty. Thus, setting out a political order that attempts to privilege the two requires both a recognition of this pervasive definitional misapprehension and some coming to terms with an uneasy kinship that, as their names suggest, will mirror the complex "relationship between constitutionalism and democracy" itself.[136]

A thorough understanding of popular sovereignty undoubtedly "requires a sensitivity that goes beyond an occasional rhetorical nod in opinions,"[137] and its connection to the notions of constitutional amendment and democracy, far greater exploration than what this Paper can devote to it. Yet, one way to frame the relationship is that amendment and electoral democracy each serve as a

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[130] *See, e.g.*, Harry Hobbs, *Democratic Theory and Constitutional Design: Hearing Persistent Electoral Minorities*, 24 Int. J. Minor. Group Rights 341, 345–46 (2017) (characterizing "reasoned deliberation" as a democratic integrated in constitutional regimes to enable the "perspectives and interests of numerical minorities to be heard in the processes of government . . ."); Michael Latner, *Why We Can't Have Nice Things: Equality, Proportionality, and Our Abridged Voting Rights Regime*, 2 Fordham L. Voting Rts. & Democracy F. 33, 57 (2023) ("Popular sovereignty and self-governance require institutions that minimize 'those inequalities that negatively influence an individual's contribution to the collective decision-making process[,]'" as "political equality" is among the "necessary conditions required for democratic deliberation.").

[131] *See, e.g.*, Christopher F. Zurn, *Democratic Constitutional Change: Assessing Institutional Possibilities*, *in* Democratizing Constitutional Law 186 (Thomas Bustamate & Bernardo Gonçalves Fernandes eds., 2016) (articulating a notion of "constitutional democracy" that emphasizes "commitments . . . to democratic processes of constitutional development, adoption and ongoing transformation, and, to a deliberative interpretation of democratic procedures." (italics omitted)); *id.* at 196 (highlighting the norm in constitutional design that establishes "a clear institutional demarcation … between the ordinary exercise of government business through established procedures, and, the people's constituent power of changing the procedures—the fundamental institutions and basic rights protections—that are the procedural warrant for the legitimacy of the outcomes of ordinary political processes."); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 87 (1980) (describing that the U.S. Constitution "is overwhelmingly concerned, on the one hand with procedural fairness in the resolution of individual disputes (process writ small), and on the other with what might capaciously be designated process writ large—with ensuring broad participation in the processes and benefits of government.").

[132] John R. Vile, *Article V: A Still Viable Means of Exercising Tempered Popular Sovereignty*, N.Y.U. J. Legis. & Pub. Pol'y Quorum (2023).

[133] David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 Iowa L. Rev. 1, 13 (1990) (italics omitted).

[134] *Id.*

[135] *Id.* (italics omitted).

[136] Kramer, *supra* note 114, at 15.

[137] *Id.*

means for channeling and actualizing popular sovereignty, but they do so over disparate longitudinal terms. Constitutional amendment seeks to ensure that popular sovereignty prevails over the long term, establishing the metarules and other fundamental terms that govern society's reconsideration of its organic law. Consistent with its varied conceptions, amendment works towards the goal of guaranteeing that, over time, popular expressions of common political values will dictate the core institutional arrangements and basic rules that legitimize government authority. The provision for amendment under the U.S. Constitution accords with the principle of popular sovereignty—even if moderated appreciably to integrate other motivating values like federalism and heightened consensus—authorizing "'We the People'" to act on a collective "desire to change the written Constitution."[138] Indeed, "Article V . . . instantiates popular sovereignty," while at the same time filtrating the expression of that sentiment through terms that require the backing of institutional "supermajorities [] engag[ing] in highly deliberative processes."[139] As for electoral democracy, its paramount objective might be conceived of as guaranteeing that the people rule on a more regular basis. Popular sovereignty thus emerges through the operation of a legal framework that structures political contests so that the people can more frequently see to it that their representatives institute policies in accord with public sentiment of needs and desires.[140] Electoral democracy—and by virtue, popular sovereignty—informs the resolution of questions that fall within scope of the laws of democracy broadly, and election law more specifically, which, in the U.S. context, establishes regulations related to reapportionment[141] and redistricting[142] (including those governing vote

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[138] Vile, *supra* note 132. Importantly, a constitution's amendment process may be designed such that its nod to popular sovereignty is rendered merely rhetorical or wholly lacking. This would occur where that ideal is overborne by what were intended to be moderating forces like federalism, the separation of powers, or the promotion of deliberation or civic virtue. At that point, it would be difficult to conceive of the state as a constitutional democracy because of its charter's comprehensive suppression of popular sentiment (i.e., the capacity for governance of the people) in official decision making. The Articles of Confederation's prohibition of "any alteration at any time . . . unless such alteration be agreed to in a Congress of the United States, and [] afterwards confirmed by the legislatures of every State" is illustrative. Articles of Confederation of 1781, art. XIII (1781). That document, whose preeminent concern was ensuring that "[e]ach state retains its sovereignty, freedom, and independence," *id.* at art. II, shunned any national conception of popular sovereignty, mentioning "the people" only in relation to their status as subjects of the several states. *Id.* at art. IV. Even if under their separate charters individual states were warranted the status of constitutional democracy, the United States of America under the Articles did not, but instead "a firm league of friendship" or confederation of largely autonomous states with a common charter. *Id.* at art. III. This suggests that inherent in a constitutional democracy is *some* democratic theory of amendment.

[139] *Id.*

[140] Gardner, *supra* note 92, at 220–21 (arguing that elections operate as a "System for Discovering Popular Decision," allowing the people "[t]o rule themselves effectively" by choosing "representatives to act for them," who "propose ideas for the people's assent or rejection.").

[141] Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 Wm. & Mary L. Rev. 1921, 1923 (2018) (defining "congressional reapportionment—that is, the process of allocating seats in the House of Representatives among the states.").

[142] Lisa Marshall Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 B.U. L. Rev. 563, 564 (2013) (offering "a technical definition" of redistricting, namely "the redrawing of electoral district boundaries.").

dilution),[143] ballot access,[144] election administration[145] (including questions of vote denial),[146] and the adjudication of electoral contests, among others matters.[147] Unlike the strictures governing the relatively staid amendment process that stem from their tendency to focus on the people as an intertemporal cross-section of the polis, those pertaining to electoral democracy center the people in a more immediate sense, aiming to safeguard their collective, even if relatively unvarnished, circadian rule.

Its force powerfully animating both concepts, popular sovereignty is vitally linked to constitutional amendment and electoral democracy separately. But what is the nature of the relationship between the latter two? The difficulty conceiving of a bona fide modern constitutional democracy without either suggests that amendment and electoral democracy might be thought of in reciprocal terms, with popular sovereignty connecting them jointly. To the extent that electoral democracy is in short supply, a society can institute rules in alignment with its principles by amending its constitution to that effect. By the same token, if a governing charter contains no provision for constitutional amendment, electoral democracy would seem to offer the most apt means for establishing a process for reform that is agreeable, legitimate, and, ideally, normatively desirable. With popular sovereignty, "the cardinal principle of American constitutionalism,"[148] being both innate and integral to the genetic makeup of each, the pursuit of amendment and electoral democracy becomes principally about reestablishing, reasserting, and reinforcing the underlying notion of the people's supremacy over government.

From the perspective of constitutional integrality, the concepts of amendment and electoral democracy are peerless. Yet with each serving as a mode to ensure the legitimacy of government authority—providing for rules and encoding institutional design choices that facilitate and accord with

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[143] *See* Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. Rev. 579, 590 n.53 (2013) ("Vote dilution is when a person or group of persons is permitted to cast ballots, but the ballots are not counted equally with other votes."); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 Mich. L. Rev. 1077, 1098 n.76 (1991) (defining "dilution" as "a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable group to diminish the voting strength of at least one other group.") (internal citation omitted).

[144] "Ballot access" refers to the field of election law that governs "obstacles to electoral candidacy," Gardner, *supra* note 129, at 427, or otherwise regulates the "laws [that] narrow voters' choices." Richard Briffault, *The Contested Right to Vote*, 100 Mich. L. Rev. 1506, 1528 (2002).

[145] *See* Daniel P. Tokaji, *Judicial Review of Election Administration*, 156 U. Pa. L. Rev. 379, 381 (using "the terms 'election administration' and 'election mechanics' . . . interchangeably to describe the set of nuts-and-bolts issues governing how voters are registered, voting is conducted, and votes are counted . . . .").

[146] *See* Nelson, *supra* note 143, at 590 n.53 ("Vote denial occurs when an individual is prevented from casting a ballot because of a law, practice, or procedure that makes it impossible or overly burdensome to do so.").

[147] *See* Joshua A. Douglas, *Procedural Fairness in Election Contests,* 88 Ind. L.J. 1, 4 (2013) (defining "election contest" as an event that is "remedial in nature" occurring "once the election goes past the regular administrative procedures of counting the votes and conducting a recount" whereby "a losing candidate seeks to have the certified result overturned because of an election irregularity").

[148] William J. Watkins Jr., *Popular Sovereignty, Judicial Supremacy, and the American Revolution: Why the Judiciary Cannot be the Final Arbiter of Constitutions*, 1 Duke J. of Const. L. & Pub. Pol'y 159, 161 (2006).

collective self-governance—it is more difficult to situate the two in dominant-subordinate relational terms. At least in theory. Practically, however, the picture looks different. "In a democratic society," it is electoral democracy that governs "the most important constitutional metarules," including those that "concern the principal offices of state, specifying the 'who,' the 'how,' and 'when" of selection of their occupants."[149] Because electoral democracy concerns the essential terms of quotidian political contestation and the most fundamental structural features implicated by a more regular constitutional practice, it is likely of greater practical import. To be sure, evaluating this relationship in superiority-inferiority terms based on their tendency to instantiate popular rule in short-term may seem somewhat incongruous, particularly in U.S. constitutional thought. Where "a [c]onstitution [is] intended to endure for ages to come,"[150] any means of assessment that over-emphasizes time as a metric might prove an inapposite way to measure cosmic significance. But in constitutional democracies, time should not be disregarded so casually.[151] Once constituted and systemically ordered, the endurance of popular government will be intimately tied to its "adapt[ability] to the various crises of human affairs"[152] and similar adverse occurrences that can be exposed at any point, emerging and re-emerging with greater or lesser frequency and in defiance of predictable chronological patterns. It is the principles of electoral democracy that govern an outsized proportion of that constitutional order, and a deficiency therein is prone to have adverse consequences for government legitimacy, with impacts felt both in the short term and, with compounded future effect, over the long term. Itinerance, though in all probability a factor in the weightiness of amendment in constitutionalism, is a feature that makes it less impactful in ordinary practice. For most, then, electoral democracy and its concern with the process and institutional design choices that dictate society's political leadership on a recurrent basis is more consequential than amendment, which, by its nature, tends to a broad swath of constitutive matters on a more sporadic basis.

Even as popular sovereignty bands constitutional amendment and electoral democracy along a spectrum of temporality, there is a limit to the elasticity of its force. A society whose underpinnings stray too far from the precepts of either concept can no longer be considered within the orbit of popular sovereignty or credibly argued to be governed pursuant to the notion of collective self-rule.[153] Perhaps the more useful way to think of the relationship between constitutional amendment and electoral democracy, then, is as one of co-ordinate instrumental value. Amendment should reinforce electoral democracy.[154] It should be used to "emphasize the importance of free elections," namely by "focus[ing] on protecting the 'democratic minimum core'

[149] Ginsburg, Huq, & Khaitan, *supra* note 84, at 1.

[150] McCulloch v. Maryland, 17 U.S. 316, 415 (1819).

[151] *See, e.g.*, Yuvraj Joshi, *Racial Time*, 90 U. Chi. L. Rev. 1625 (2023); Jack M. Balkin, *The Recent Unpleasantness: Understanding the Cycles of Constitutional Time*, 94 Ind. L. J. 253 (2019).

[152] *McCulloch*, 17 U.S. at 415.

[153] *See supra* note 138.

[154] Such co-ordinate value may be bi-directional, at least as a normative matter. That is, there may be a strong claim that the principles of electoral democracy should, to some extent, inform constitutional amendment procedures. This is something I explore in an incipient project.

of constitutional provisions" and recalibrating "those provisions or aspects of the constitutional order that are essential for the preservation of competitive electoral democracy."[155] This is because constitutional rules that accord with the electoral democracy's tenets work in concert to provide the best *procedural* mechanisms for channeling popular sovereignty. Marked by rules substantially grounded in the principles of electoral democracy, a constitution can facilitate the engagement of a people—each of whom is deemed equal—in open, effective, and meaningful electoral processes leading to the selection of official trustees of state power. It fosters basic legitimacy by helping to ensure that the public is represented in government institutions by officeholders who are politically accountable, thereby safeguarding constituents from rule by a class whose authority is rooted in values and norms antithetical to democracy. Constitutional amendment should thus be employed to prescribe and entrench rules further in alignment with the demands of electoral democracy and, within reason, in the clearest possible terms. Said differently, the promotion of electoral democracy is among the chief ends of constitutional amendment.

While this conclusion should not be taken for granted, it should also not be very controversial that shaping basic electoral design in the mold of equality, participation, competition, and transparency is of paramount importance to and a prime reason for the amendment power.[156] The contention recognizes that "close attention to how electoral contestation will unfold" is key to the dynamic processes of civic maintenance and constitutional upkeep.[157] It sees a normative good in periodically revisiting such rules so integral to "the constitution's core task of institutional specification . . . in the context of a democratic order."[158] Tending to a governing charter in ways that account for the imperatives of electoral democracy, moreover, by reorienting fundamental rules towards its tenets, evinces a supreme respect for popular sovereignty and collective self-rule because it offers reassurance in the credibility of government authority immediately and over time, which is essential for the endurance of a constitutional order. Indeed, this Part has shown that drawing on the amendment power to this end accords with classical and contemporary understandings of U.S. constitutionalism. And, as the next Parts argue, their manifestation in the design and evolutionary development of the nation's fifty-one constitutions—those of the states and the nation.

II. Constitutional Amendment and Electoral Democracy in the Nation and States

Core ideals for upholding the value of popular sovereignty, constitutional amendment and electoral democracy have been long associated with, and reemerged as important themes, in American public law and political thought.

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[155] Dixon & Landau, *supra* note 41, at 480.

[156] *Id.* at 487 (suggesting the constitutional design "should take steps to prevent actors from eroding electoral democracy").

[157] Ginsburg, Huq, & Khaitan, *supra* note 84, at 1.

[158] *Id.*

In the Founding Era, the dissolution of colonial legislatures and withholding of permission to hold elections, clear concerns of electoral democracy, were deemed so inimical to the "consent of the governed" that they were featured prominently among the grievances in the Declaration of Independence.[159] With a new governing charter in place two decades later, the nation's first president praised the notion of amendment upon retirement from public office, calling "the right of the people . . . to alter the [ ] constitutions of government . . . by an explicit and authentic act" the very "basis of our political systems."[160] Echoing that sentiment on the eve of the Civil War, a just inaugurated president professed his respect for "the rightful authority of the people over the whole subject" of constitutional reform.[161] Indeed, even "under existing circumstances"—seven rogue states having declared their secession from the Union—Abraham Lincoln relayed to a crowd on the Capitol grounds his inclination to "favor rather than oppose a fair opportunity being afforded the people to" enact an amendment that would not just further entrench the institution of slavery in the Constitution, but make it virtually impossible to eradicate.[162] Yet on the cusp of the Second Founding not four years later, the war-weathered leader was so committed to the notion of "government of the people, by the people, for the people"[163] that he insisted that elections be held in the midst of internecine conflict—and despite fully expecting to suffer electoral defeat.[164]

To be sure, neither constitutional amendment nor electoral democracy has been instituted in the U.S. in accord with the political ideal. Elizabeth Cady Stanton and suffrage advocates in Seneca Falls exposed as much in the middle of the nineteenth century, itemizing the "repeated injuries and usurpations on the part of man toward woman" that reduced women to a state of "absolute despotism" and "absolute tyranny," belying the nation's claims that its authority was rooted in popular sovereignty.[165] Meanwhile, an effort to amend the Constitution to remedy the first of these injuries, that "[h]e has never permitted her to exercise her inalienable right to the elective franchise,"[166] would not ultimately bear fruit for another seven decades.[167] Martin Luther King, Jr. made a pointed reference to that same electoral franchise in 1957, castigating the government's "denial of this sacred right" to Black Americans as "a tragic betrayal of the highest mandates of our democratic traditions" that rendered the nation a "democracy turned upside down."[168] This sentiment was expressed as Southern segregationists in Congress were, almost in split screen,

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[159] The Declaration of Independence para. 2, 7–8 (U.S. 1776).
[160] President George Washington, Farewell Address (Sept. 19, 1796).
[161] President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861).
[162] *Id.*; *see* Kowal & Codrington, *supra* note 11 at 87–90.
[163] President Abraham Lincoln, Gettysburg Address (Nov. 9, 1863).
[164] Joel Achenbach, *The Election of 1864 and the Last Temptation of Abraham Lincoln*, Wash. Post (Sept. 11, 2014), https://www.washingtonpost.com/national/health-science/the-election-of-1864-and-the-last-temptation-of-abraham-lincoln/2014/09/11/e33f99aa-345b-11e4-9e92-0899b306bbea_story.html [https://perma.cc/8ECF-A5WA].
[165] The Declaration of Sentiments (1848).
[166] *Id.*
[167] *See infra* Section III.B.
[168] Martin Luther King, Jr., Give Us the Ballot (We Will Transform the South), Address Delivered at the Prayer Pilgrimage for Freedom (May 17, 1957).

obstructing consideration of a constitutional amendment to outlaw the poll tax, a notorious Jim Crow tool of racial subjugation.[169] History offers countless examples of the nation's partial or delayed embrace of these twin principles, owing to the nature, origins, and development of constitutionalism in the U.S., itself so delicately intertwined with the progressive—yet slow and uneven—evolution of American democracy. Nevertheless, history also reveals that the course of constitutional amendment and electoral democracy has been integral to modernization of U.S. political system.[170] Indeed, over time, these concepts have come to serve as cornerstones of the nation's governmental regimes—the building blocks upon which American political society has been constructed and the pillars that support its continued development.

What does this mean for contemporary American constitutionalism? One need only engage with the text of the U.S. Constitution and its state counterparts at a high level to see some of the ways in which they incorporate amendment and electoral democracy. The section that follows does just that. It illustrates these ideas separately, showing how they materialize in the United States under both the federal Constitution and state charters. In its examination of the principal ways that America's fifty-one constitutions succeed and fail to structure their respective jurisdictions in accord with these core concepts, this section reveals that the notions are manifested differentially, with the state charters privileging them and embracing them more intimately than their federal counterpart.

A. Constitutional Amendment in the Nation and States

Consider, first, constitutional amendment, a "peculiarly American" idea.[171] The sparse text comprising the federal Constitution's amending provision is widely perceived both to be a source of great puzzlement[172] and a reservoir of possibilities.[173] Conceptually, Article V is boundless in potential; the

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[169] Kowal & Codrington *supra* note 11, at 192–94 (describing the yearslong effort to introduce measures to ban the use of the poll tax and stalwart prevention of its consideration, including by Mississippi Senator James Eastland).

[170] *Id.* at 284 (arguing that "[i]t was . . . through periodic infusions of democratic energy channeled through the Article V amendment process[] that the Framers' Constitution became the People's Constitution.").

[171] Lester Bernhardt Orfield, The Amending of the Federal Constitution 1 (1942).

[172] *See generally* David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 Colum. L. Rev. 2317 (2021) (arguing that indeterminacy plagues the text of Article V and corresponding legal development, yielding to procedurally deficient yet authoritative amendments while offering few conclusive answers to an array of related constitutional questions); *see also* Aziz Z. Huq, *The Function of Article V*, 163 U. Pa. L. Rev. 1165, 1176 (2014) (arguing that the Constitution's "survival in light of [textual] rigidity [created by Article V] has puzzled scholars, who have otherwise observed a strong positive correlation between textual inflexibility and constitutional death[,]" a "puzzle [that] cannot be dissolved by recourse to extra textual modalities of amendment.").

[173] America's Amoral Constitution, *supra* note 41, at 785–86 (2021) ("Article V makes dramatic political transformations possible without recourse to arms, just as the Framers accomplished in their own time. It also provides a mechanism to make more targeted changes to the Constitution and the polity . . . . Article V was designed to accommodate all constitutional changes on either extremity of the constitutional spectrum.").

restrictions it imposes on the substance of amendments are co-extensive only with the limits of our constitutional imagination.[174] This is in stark contrast to constitutional practice, however. Navigating Article V is politically treacherous by design because achieving the extraordinary consensus required to successfully traverse any of its four amendatory routes, requiring voting support of supermajorities at both the national and state levels,[175] would be a remarkable feat in even the best of climates.[176] The infrequency with which the political winds are aligned, moreover, has effectively rendered the Constitution "constructively unamendable."[177] The text, Richard Albert observes, is "freely amendable in theory but unamendable in practice."[178] Part of the reason for this is structural, as Rosalind Dixon illustrates, because the "increase in the number of states" over time "has implied a directly proportionate increase in the difficulty of ratifying proposed amendments."[179] For unduly restricting the ability to make modernizing updates, Article V faces no shortage of criticism. One leading scholar has made it his "nominee" for "least favorite constitutional provision,"[180] while another refers to it as the Constitution's "iron cage."[181]

Not so much with state constitutions. They lack the aforementioned dualism that is characteristic of their federal counterpart. Jessica Bulman-Pozen and Miriam Seifter note, "the story of state constitutionalism is a story of continual change."[182] The possibilities for fundamental reform that they *actually* foster are far more extensive.[183] Even as state constitutional amendment procedures may not be completely immune from the critiques lodged at Article V, the differences between them and the federal one are matters of both degree—in orders of magnitude—and kind. This is because comparatively,

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[174] *Id.* at 778 ("When read together, text, theory and history teach us an important truth about the United States Constitution: Article V knows no bounds on the content of the amendments it may be used to make. The Constitution accordingly sees no frontiers, only horizons, which reach as far as the imagination allows."). Importantly, the Article V references two features—Senate representation and the trans-Atlantic slave trade—in a way that make them *seem* insulated from constitutional amendment. The former, however, is merely constructively unamenable; it is theoretically attainable even if not practically. *See id.* at 791–92 (While "conventional wisdom has construed this provision as a substantive prohibition on amendment[,] . . . [t]he better reading, though, is to interpret this restriction as a procedural one."). And while the latter provision has lapsed with time, it is the sole provision that was made truly unamendable. Kowal & Codrington, *supra* note 11, at 25, 29, 79. It is open to debate whether it would have been rendered void by the Thirteenth Amendment. Thus, Article V not only serves as a prism that reveals the prominence of slavery as a foundational national institution (thereby offering some insight into the entrenchment of racism in the United States), but it also raises important theoretical questions about the nature of power and legitimacy in constitutional amendment.

[175] U.S. Const. art. V.

[176] *See generally* Kowal & Codrington, *supra* note 11.

[177] Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 Cal. L. Rev. 2005, 2013 (2022).

[178] *Id.*

[179] Dixon, *supra note* 19, at 653.

[180] Stephen M. Griffin, *The Nominee Is . . . Article V*, 12 Const. Comment. 171, 171 (1995).

[181] Levinson, *supra note* 14, at 165.

[182] Bulman-Pozen & Seifter, *supra* note 101, at 868.

[183] *See id.* at 896 ("At the state level, practices of constitutional revision unite popular authorship with continuous present consent: the people who are currently living under the state constitution remain responsible for that constitution and have a genuine and oft-exercised ability to change it if they no longer endorse its provisions.").

"state constitutions are frequently amended, overhauled, and replaced,"[184] with scholars Mila Versteeg and Emily Zackin calculating that their "median lifespan" is less than a half century.[185] To be sure, state constitutions are not a singular document, and their amending articles are distinct from one another in ways that range from minor to major, nuanced to stark.[186] Thus, with respect to the paths they make available and the level of agreement they demand, some state charters are far more difficult to amend than others. But this caveat should not be overstated. Ultimately, state charters, collectively, evince a receptivity to amendment in ways that the federal Constitution resists.[187]

The available paths to amendment offer a prime example, highlighting sharply the relative difficulty of formal constitutional change. The federal and state charters authorize multiple paths to amendment, but the latter offer more. State legislatures, like their counterpart in Washington, have license to propose constitutional amendments. Yet, whereas under the federal scheme proposing an amendment demands agreement among two-thirds of the voting members of each chamber,[188] every state constitution sets the bar for proposal lower—and typically markedly lower. Among state charters, "the requirements for formal constitutional amendment vary from highly flexible to only moderately difficult," yet the bulk of them "impose either an ordinary majority requirement or a relatively weak supermajority requirement."[189] There is a singular feature, to be sure, that functionally elevates the bar to legislative amendment proposals under state constitutional regimes that does not exist in the federal one: *Some* states demand a proposal be adopted in consecutive legislative sessions.[190] Still, on balance, this rule has proven to be a minor barrier when compared to those that comprise the Constitution's stringent proposal requirements.

Even as the Constitution's amending provision establishes two conduits for proposing reform, Congress has been the exclusive origination point for all twenty-seven amendments. The untold number of flaws with the convention method, Article V's alternative source for proposal, is likely to blame.[191] State charters similarly authorize conventions to spearhead constitutional revision

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[184] Versteeg & Zackin, *supra* note 31, at 1644–45.

[185] *Id.* at 1672.

[186] Bulman-Pozen & Seifter, *supra* note 101, at 865–66 (suggesting that it is possible to "recognize variance across the states—including provisions, histories, and politics that are unique to particular jurisdictions or shared by only a subset of the states" while, nevertheless, drawing some overarching conclusions about state charters); Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 Publius 11, 11 (1982) (referring to state constitutions as composed of "a bundle of compromises [that] reflect the political struggle between representatives of competing conceptions of government within particular states"); *id*. at 14 ("while the American constitutions have had common roots and a commo trunk since 1776, they have branched out in different directions in order to meet the particular needs and wants of each state's interested citizens.").

[187] *See generally* Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 Yale L.J. F. 191 (2023).

[188] U.S. Const. art. V.

[189] Dixon & Landau, *supra* note 41, at 445.

[190] Lutz, *supra* note 20, at 360–61.

[191] Kowal & Codrington, *supra* note 11, at 28, 259–61 (describing the various elements of the convention method that are woefully lacking clarity leading scholars, activists, and even James Madison himself to question the provision for it).

efforts, yet they have actually held them—some two hundred fifty in total[192]—whereas, again, the nation has held none.[193] Furthermore, several state charters mandate that the question of whether to hold a constitutional convention appear on the ballot periodically,[194] a design consistent with Thomas Jefferson's philosophy calling for frequent constitutional reform.[195] And while no state's electorate has voted affirmatively on the question in nearly three decades,[196] the availability of that approach at least gives them the option to amend the constitution through this sort of public assembly.

But then state constitutions establish two other modes for reform not provided for in the federal charter: popular initiatives and commissions. In nearly a dozen and a half states, citizens and organizations can mobilize to get a proposition for constitutional amendment on the ballot.[197] Importantly, the rules vary with respect to matters like the threshold number of signatures[198] and any signature geographic distribution requirement to secure a question's appearance on the ballot.[199] But with just two exceptions—and in the face of overtly partisan efforts to elevate threshold[200]—all of these states require just a simple majority of the voting public to approve initiated constitutional amendments.[201] As for constitutional commissions, Florida is distinctive for having the only charter to authorize this sort of body to craft amendment proposals to be put up for ratification and without the input of a mediating

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[192] John Dinan, *Constitutional Amendment Processes in the 50 States*, State Court Report (July 24, 2023), https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states [https://perma.cc/KU84-8J5P].

[193] Notably, Article V says that Congress "shall" call a convention, indicating the mandatory nature of the action. U.S. Const., art. V. Still, by 1911, enough state legislatures submitted applications to force Congress to call an Article V convention, but Congress never did so. Kowal & Codrington, *supra* note 11, at 137.

[194] John Dinan, *Explaining the Prevalence of State Constitutional Conventions in the Nineteenth and Twentieth Centuries*, 34 J. Pol'y Hist. 297, 310 (2022).

[195] *See* Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), https://founders.archives.gov/documents/Madison/01-12-02-0248 [https://perma.cc/4NPJ-N3U7] ("[N]o society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation . . . . Every constitution then, & every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, & not of right. It may be said that the succeeding generation exercising in fact the power of repeal, this leaves them as free as if the constitution or law had been expressly limited to 19 years only.").

[196] *See* Dinan, *supra* note 194, at 310.

[197] Wilfred U. Codrington III, *Voting Under State Constitutions, in* The Oxford Handbook of American Election Law, *supra* note 112, at 262; Bulman-Pozen & Seifter, *supra* note 187, at 198–99 (listing the states).

[198] Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 Mont. L. Rev. 36, 44 (2003) ("States vary considerably in where they set the [signature] threshold, but no state has ever dispensed with the threshold."); *id.* at 45 ("Typically the number of signatures required to get a constitutional amendment on the ballot is greater" than for a legislative proposal.).

[199] *Id.* at 46 ("Half of the initiative states also require that signatures must meet some kind of geographical distribution requirement, the aim of which is to prevent petitioners from obtaining all their signatures in a few heavily populated urban areas.").

[200] Michael Wines, *Ohio Voters Reject Constitutional Change Intended to Thwart Abortion Amendment*, N.Y. Times (Aug. 8, 2023), https://www.nytimes.com/2023/08/08/us/ohio-election-issue-1-results.html [https://perma.cc/HY9T-WXSC].

[201] Only two of the eighteen states that authorize constitutional initiatives require a supermajority vote for a measure to be enacted. The Florida constitution sets a sixty percent vote threshold and Colorado's, fifty-five percent. Notably, both were changed from a bare majority within the last two decades. Bulman-Pozen & Seifter, *supra* note 187, at 213.

body like the legislature.[202] To be sure, the last two modes are, by no means, the primary paths for amendment in the states. Ballot initiatives account for less than twenty percent of the annual number of amendments, and the Florida commission is used far more sparingly.[203] Yet, both routes have been employed successfully in the past, and neither is available in the federal Constitution.

Following successful proposal, federal and state measures can become valid enactments subject to the terms of ratification set out by their governing charter. Notwithstanding this common requirement, there are still considerable differences among their respective terms for approving proposed amendments. Under the Constitution, either state legislatures or special ratifying conventions—whichever body Congress selects[204]—have discretion to ratify a proposal (or not).[205] (On this back end of the Article V process, the states have had relatively good success; they have exercised the ratifying function on thirty-three occasions in history, all but six of which have resulted in the addition of new constitutional provisions.)[206] Under state constitutions, by contrast, the amendment processes not only engage citizens more directly, but they make it easier to implement their collective will. Virtually every state charter tasks the voting public with approving proposed amendments,[207] whereas Article V makes no provision for such unmediated official participation. In most states, moreover, ratification of constitutional referenda, like initiatives, demands support from a mere voting majority to secure enactment. For an amendment to be ratified under the federal requirement, on the other hand, three-quarters of the states—again, either legislatures or special ratifying conventions—must give their imprimatur to a measure.

As compared to state constitutional amending provisions, the chances for success under Article V's precepts are paltry. The federal amending provision sets out fewer paths to proposal while imposing higher thresholds for both proposal and ratification, thereby establishing more veto points. Nor

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[202] Dinan, *supra* note 192. Notably, this commission must meet every twenty years. Likewise, Florida has a second commission, which also meets every two decades, which is authorized to propose amendments that government tax matters. *Id.*

[203] *Id.*

[204] Among the twenty-seven successful amendments, twenty-six were ratified by the several state legislatures. The Twenty-first Amendment, which repealed the Eighteenth Amendment's ban on "the manufacture, sale, or transportation of intoxicating liquors," was the remaining one. It won ratification in 1933, upon receiving the imprimatur of the thirty-sixth legislatively authorized state convention assembled specifically for the task of considering the repeal of nationwide prohibition. Unlike its state legislative counterpart, the ratification convention route is intended to involve the people directly in constitution-making. Even though they do not sanction or reject amendment proposals to be taken up in conventions, the states are necessary for these assemblies, held within their borders, to come into being.

[205] Finality is a difficult concept in the context of amendment, something illustrated by the proposed Equal Rights Amendment. While 38 states have technically ratified the proposed amendment, procedural questions persist, including whether the ratification deadline is a barrier to its validity and whether state legislatures that have voted to ratify the measure can withdraw that approval. These and other questions are being addressed in both the court, the Congress, and even the executive branch. *See*, *e.g.*, Alex Cohen & Wilfred U. Codrington III, *The Equal Rights Amendment Explained*, Brennan Cntr. (Jan. 23, 2020), https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained [https://perma.cc/ZXN8-FD3B].

[206] Kowal & Codrington, *supra* note 11, at 4.

[207] Constitutional amendment proposals in all states except Delaware require popular approval from voters for enactment. *See* Del. Const. art. XVI, § 1.

does it provide opportunities for direct popular input. The consequences of these differences are staggering. While thousands of amendment proposals have been *introduced* in Congress, in the states, thousands of amendments have been *adopted*.[208] Strikingly, when Congress last proposed an amendment in 1971 to lower the national voting age, most Americans alive today were not even born.[209] The Twenty-Seventh Amendment was the most recent one to be ratified—more than three decades ago—yet it was proposed *more than two centuries ago* with the Bill of Rights.[210] This is far from the case with state constitutions. There is, to reiterate, variation among them. Yet state charters are amended routinely, with several dozen amendments enacted in 2024 election cycle alone.[211] Contrary to the many legal scholars who have long bemoaned the inability to amend the federal Constitution and, therefore, call for an easier process more akin to that in state charters,[212] Bulman-Pozen and Seifter contend that there is an actual *right* to amend state constitutions, which needs to be guarded jealously.[213] If the provisions for amendment say anything about a society, those in state charters convey an openness that the federal one rejects and, relatedly, the federal Constitution deprioritizes popular sentiment in ways that are relatively foreign to state constitutions.[214]

B. Electoral Democracy in the Nation and States

On the question of electoral democracy, its manifestation parallels that of constitutional amendment. Just as state charters prove more receptive to amendment than their federal counterpart, so too do they with respect to electoral democracy. Again, the fact that state constitutions are plural should caution that their provisions regulating electoral democracy differ from one

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[208] John Dinan, State Constitutional Politics: Governing by Amendment in the American States 23–24 (2018).

[209] *See* Jacqueline Howard, *US Population Grows Older, Pushing Median Age to 39, New Census Bureau Data Shows,* CNN (May 25, 2023), https://www.cnn.com/2023/05/25/health/us-population-median-age-39/index.html [https://perma.cc/N2ZZ-N2Q7].

[210] Kowal & Codrington, *supra* note 11, at 244–46 (describing the amendment's long-delayed ratification).

[211] Erin Geiger Smith, Sarah Kessler, & Zoe Merriman, *Voters Across the Country Amend Their Constitutions*, State Court Report (Nov. 8, 2024), https://statecourtreport.org/our-work/analysis-opinion/voters-across-country-amend-their-constitutions [https://perma.cc/3ECB-QDXN].

[212] *See, e.g.*, Rana, *supra* note 57 ("The single best long-term procedural fix would be to simplify the congressional amendment process so that it is in line with how the U.S. states and the rest of the world operate. This approach should go hand in hand with additional pathways for formal change, from an appropriate mechanism for popular initiatives to increased flexibility in the use of conventions.").

[213] Bulman-Pozen & Seifter, *supra* note 187, at 200, 206 (arguing that various provisions of state constitutions that undergird "the people's ability to author and continually revise their fundamental law" are "under attack" by those who oppose the use of amendment to achieve substantive policies that they disfavor).

[214] *See id.* at 193 (noting that under the federal Constitution "rights are commonly understood to protect minority interests from majority excesses," while state constitutions, "because they are committed to active popular sovereignty . . . contain numerous democratic rights—such as the right to amend—that upend familiar federal distinctions").

another.[215] But like the provisions that they make for constitutional amendment, they are more akin to each other than they are to the federal Constitution. Even a cursory examination of state constitutions reveals a level of commitment to electoral democracy that eclipses that of the nation's charter.

A telling—and perhaps the most readily obvious—distinction between the federal and state charters is the sheer amount of ink spilled dedicated to the regulation of electoral democracy. The former devotes fewer words and less space to it than the latter.[216] To the extent that one might take issue with this metric, rightfully contending that a greater *percentage* of the Constitution's text is dedicated to electoral democracy. In addition to being far longer and more legislative in design, state charters include various provisions that are incomparable in scope and specificity, and even lacking a federal corollary.[217] Indeed, the U.S. Constitution does not have articles pertaining to education,[218] taxation and finance,[219] or local governments,[220] which are very common in state constitutions, much less the more obscure ones like those governing public highway systems,[221] constitutional boards and commissions,[222] corporations,[223] and natural resources.[224]

Beyond mere quantity, state constitutional text suggests a greater commitment to electoral democracy qualitatively. State charters are designed to accord with electoral democracy, far more than their federal counterpart, and devote a great deal more attention to articulating its precepts. The electoral democracy provisions of the federal Constitution generally consists of abstract terms,[225] isolated and fleeting phrases,[226] and words that are sometimes convoluted[227] and practically inconsistent.[228] Indeed, at times, the federal provisions undermine electoral democracy's core principles.[229] State constitutions, on the other hand, typically contain an article dedicated entirely to electoral democracy—sometimes multiple articles—that tends to be relatively clear and

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[215] Codrington, *supra* note 197, at 250.

[216] *Id.*

[217] *See generally* Elazar, *supra* note 186, at 15-16; Versteeg & Zackin, *supra* note 31, at 1658–66.

[218] *See, e.g.*, Kan. Const. art. VI.

[219] *See, e.g.*, N.J. Const. art. VIII.

[220] *See, e.g.*, Haw. Const. art. VIII.

[221] *See, e.g.*, Minn. Const. art. XIV.

[222] *See, e.g.*, Ga. Const. art. IV.

[223] *See, e.g.*, Wash. Const. art. XII.

[224] *See, e.g.*, Alaska Const. art. VIII.

[225] *See, e.g.*, U.S. Const. art. IV, § 4 (guaranteeing each state "a Republican Form of Government").

[226] *See, e.g.*, *id.* art. I, § 4 (granting the states and Congress authority over the "Times, Places and Manner" of elections).

[227] *See, e.g.*, *id.* amend. XII (laying out the process for selecting the president); *id.* amend. XIV, § 2 (imposing a sanction of reduced representation in the House of Representatives and Electoral College for denying male citizens the right to vote).

[228] *Compare, e.g.*, *id.* art. I, §§ 2–4 (setting out the qualifications for representatives and senators and, in general, resting the administration of elections with the states), *with id.* art. I, § 5 (making the House and Senate "Judges of the Elections, Returns and Qualifications of [their] own Members").

[229] *See, e.g.*, *id.* amend. XVII (affording each state equal representation in the Senate irrespective of the substantial differences in population).

textually coherent.[230] And in establishing election systems, delineating voting qualifications, and setting out other important election rules, the articles in state constitutions employ the language suggestive of electoral democracy's underlying principles and goals, and often terms that are quite explicit.[231]

Whereas the right to vote is not made explicit in the text of the U.S. Constitution, every state charter expressly acknowledges that its citizens possess this participatory right, with the declaration phrased in affirmative terms in all but one.[232] Moreover, that state-guaranteed right to the franchise is often accompanied by other language that suggests constitutional fealty to electoral democracy, including words and phrases obligating the state to carry out elections that are, in fact, meaningful. Twenty-nine state constitutions clearly mandate that elections be "free," "open," "equal," or "frequent," qualifications that clearly espouse a dedication to electoral democracy's core requirements.[233] Finally, state constitutions, like the U.S. Constitution, outlaw various types of discrimination in elections, promoting political equality, participation, and electoral competition. But those non-discrimination guarantees in several state constitutions are farther reaching, establishing protections for more classes of persons and based on a broader array of traits.[234] In effect, it is state constitutions that offer assurances that American constitutionalism will uphold the fundamentals of electoral democracy, something evidenced by the fact that their text—far more than the text of the federal Constitution—calls for elections characterized by the basic values of substantive equality, competition, transparency, and participation.

To be certain, parts of the Constitution "contemplate some measure of popular participation in selecting the nation's political representatives,"[235] which can be gleaned from those articles providing for elections generally[236] and outlawing discrimination in elections.[237] The document grants Congress broad legislative jurisdiction over elections, moreover, not just to displace all states' regulations over federal contests,[238] but also to uproot discriminatory

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[230] Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 103–05 (2014).

[231] *See, e.g.*, Del. Const. art. I, § 3 ("All elections shall be free and equal."); Mo. Const. art. I, § 25 ("That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."); Cal. Const. art. XXI, § 2(b)(1) ("The [Citizens Redistricting] commission shall conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines."); Ariz. Const. art. IV, pt. 2, § 1 (14)(F) ("To the extent practicable, competitive [electoral] districts should be favored where to do so would create no significant detriment to the other goals.").

[232] Douglas, *supra* note 230, at 101; Codrington, *supra* note 197, at 243–44.

[233] Codrington, *supra* note 197, at 244.

[234] Notably, for example, several state constitutions ban breaking up political subdivisions and splitting up communities of interests in the redistricting process, in effect, a substantive ban on a certain form of discrimination. *See* Samuel S. Wang, Richard F. Ober Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. Pa. J. Const. L. 203, 242-246 (2019); Stephen J. Malone, *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 Va. L. Rev. 461, 466 (1997).

[235] Codrington, *supra* note 197, at 243.

[236] U.S. Const. art. I, §§ 2, 4–5.

[237] *Id.* amend. XV, XIX, XXIV, XXVI.

[238] *Id.* art. I, § 4.

election regimes[239] and compel states to honor the maddeningly vague notion of a republican form of government.[240] In this regard, the Constitution invests federal lawmakers with the awesome prerogative to demand elections that respect the principles of electoral democracy. Yet, there are "large gaps" in the Constitution,[241] particularly with respect to ensuring electoral democracy, gaps that stem from its provision for elections to be principally regulated, administered, and judged sub-nationally. State charters and constitutional officers exercising powers under them ultimately fill those gaps, however, by establishing detailed and elaborate rules for voting and elections.[242] Of course, providing for congressional jurisdiction over elections cannot guarantee that rules will be aligned with the principles of electoral democracy. Merely authorizing a body—itself structured contrary to the principles of electoral democracy[243]—to adopt legislation consistent with that notion offers no assurances. Even more, to the extent it would undermine their ability to retain power, federal lawmakers are not inclined to adopt legislation promoting electoral democracy.[244]

With respect to electoral democracy, then, our national charter contributes far less to American constitutionalism—or more precisely, written constitutionalism—than the states. An important reason for this stems from the scant quantity and the parsimonious nature of its text, alongside the structural design that omits dedicated election officials and precludes direct decision-making and popular participation in governance. Yet another reason is because, as initially conceived, the Constitution largely entrusted the states to envision and organize their institutions and all elections in accord with the ill-defined tenets of republicanism. And another reason still, is that the political offices and bodies that it creates exist *despite* the principles of electoral

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[239] *Id.* amends. XIV, XV, XVI.

[240] *Id.* art. IV.

[241] Codrington, *supra* note 197, at 244 (citing Baker v. Carr, 369 U.S. 186, 244 (1962) (Douglas, J., concurring)).

[242] Codrington, *supra* note 197, at 244. This is not to say that the federal government does not play an important role in elections. It does. Yet its role tends to be more supportive in nature, offering some funding, "coordination[] and information sharing," but "no federal standards for how elections are administered." Grace Gordon, *The Federal Role in U.S. Elections Visualized*, Bipartisan Policy Cntr. (July 24, 2023), https://bipartisanpolicy.org/explainer/visualize-federal-role-elections/ [https://perma.cc/279G-TH3G].

[243] This raises another important point: the national legislature, too, fails to comport with the tenets of electoral democracy. The Senate is patently unequal. Members of Congress's upper house all have political power commensurate with their peers irrespective of their home states' population. This was bad enough in 1789 when the difference in the population among the largest and smallest states was a factor of twelve. But today, with the disparity having grown by a factor of more than sixty-eight today, the magnitude of the problem has increased dramatically. Kowal & Codrington, *supra* note 11, at 17–18. Until the Seventeenth Amendment, it was even more unequal, as it was originally selected by state legislatures, which themselves distributed power unequally and distorted competition because of malapportionment. And though more electorally democratic than the Senate, the House of Representatives breaks with the notion in its own ways. First, each state is afforded at least one representative regardless of population, creating imbalances in the size of the districts that they represent. Those variances were even larger until the 1960s when the Supreme Court intervened to pronounce "one person, one vote" as the new constitutional standard, thereby outlawing gross malapportionment. And today, the composition of the House continues to be shaped by an inequality of a different type as a result of partisan gerrymandering, which also diminishes electoral competition.

[244] Wilfred U. Codrington III, *The Phantasm of Principle*, 111 Ky. L. J. 651, 659 (2023).

democracy, not pursuant to it.[245] Unlike the federal Constitution, whose initial design was intended to temper "the excesses of democracy,"[246] state constitutions encourage them.[247] Importantly, state charters have not always been beacons illuminating the path of electoral democracy.[248] But they embrace the principles of electoral democracy far more than the federal charter. And in amending their state charters in furtherance of this end, the next Part argues, political actors can contribute—and, indeed, have contributed—to also moving the federal Constitution more in that direction.

III. Springboard to Article V

The dual notions of constitutional amendment and electoral democracy are set out above in theoretical and descriptive terms, with Part I explaining each concept and its significance for constitutionalism, and Part II illustrating how they manifest at the national and state levels. That discussion leads

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[245] *See supra* note 243. The other office that it establishes that rejects the tenets of electoral democracy is the presidency. The foundation of the system for selecting the first citizen famously eschews the notion of political equality, even allowing candidates to prevail by securing fewer votes nationally, so long as the distribution of votes is concentrated in enough states where they are afforded disproportionate weight. Moreover, under much of the Constitution's first century—nearly a full one-third of its life—that presidential selection system, the Electoral College, further undermined political equality by overweighting the votes in the southern states where institution of slavery was dominant (and, correspondingly, underweighting votes where the practice had been abolished or was on the wane). As for the value of competition, it, too, is deprioritized. Notwithstanding their supposed wariness of factions, the original Framers amended the presidential selection system in a way that perhaps fosters a competitive two-party system, but stifles competition from those unaffiliated with the major parties. And the contingent election procedure, i.e., that which is triggered when no candidate wins an outright majority of the presidential electors' votes, has the least purchase from the standpoint of electoral democracy. As provided in the Twelfth Amendment, the contingent election provision retains the Electoral College's original feature that wholly rejects political equality by giving each state delegation, despite vast differences in the population they represent, the same amount of power to affect the outcome of the races for president and vice president. At the same time, the reform to the contingent election makes the contests for the nation's highest two offices less competitive—at least in an important respect—by decreasing the number among the pool candidates that members of Congress are authorized to choose. Still, the feature of the Electoral College that has the least democratic purchase is that which authorizes states to choose presidential electors "in such Manner as the Legislature thereof may direct" because the provision theoretically permits a candidate to win no votes nationally and still win the race for the White House. U.S. Const. art. II, § 1, cl. 2. Over time, however, all state legislatures have come to award their share of electors, in some sense, based on the popular vote in their states. *See generally* Wilfred U. Codrington III, *So Goes the Nation: The Constitution, the Compact, and What the American West Can Tell Us About How We'll Choose the President in 2020 and Beyond*, 120 Colum. L. Rev. F. 43 (2020).

[246] Debates on the Constitution (statement of Elbridge Gerry) ("The evils we experience flow from the excess of democracy."); Bulman-Pozen & Seifter, *supra* note 101, at 895 ("Drafters of the 1789 U.S. Constitution were 'alarmed by majoritarian tyranny within the states' and responded to the 'excesses' of American democracy they perceived to be reflected in the first wave of state constitutions."); Gordon S. Wood, Power and Liberty: Constitutionalism in the American Revolution 67 (2021) (Noting the Framers' views with respect to post-revolution governance in America that "[d]emocracy was no solution to the problem; democracy was the problem.").

[247] Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 Duke L. J. 275, 293–94 (2022) ("Whereas the federal constitution self-consciously stymied popular majorities, state constitutions prioritize them."). Elazar, *supra* note 184 at 12 (observing that there is "more emphasis on direct, continuing consent of popular majorities" in state constitutions).

[248] *See infra* Section III.C.

to this final Part, starting with the introduction of a new concept—springboard amendment—to suggest that the two vital pillars of constitutionalism can work together at the *state* level in ways that might facilitate *national* constitutional reform. A springboard amendment is a reform to a subordinate constitution that can influence like change in a superordinate constitution. To be a springboard amendment, therefore, the measure must possess three essential elements: inscription, subsidiarity, and similarity. The reform must first exist textually in the inferior charter, and it must correspond to a provision in the superior one. Importantly, the provisions in charters may not resemble each other lexically. That is, the springboard provision may not have an older *identical* twin in a lower-order constitution, but it will at least have some kinsman in that document—an article, section, or clause that is designed to work towards the same end. This suggests that delimiting the concept can present some difficulty. There is certainly room for debate whether a measure reasonably constitutes a springboard amendment, including whether there is sufficient overlap in between it and another in question. But any blurriness about the outer bounds of the concept does not change the requirement that for an amendment to truly be a springboard, the provision must exist in a constitution lower in hierarchy, serving as a potential for a jump off for the development of an amendment to a superior charter with broader jurisdiction.

Part III draws on this idea of a springboard amendment, as well as the discussion in Parts I and II, to argue that the states can engage in constitutional design in ways that enhance electoral democracy not simply within their borders, but also throughout the nation. Specific to this context, the theory contends that state constitutional reform might facilitate federal reform in at least two critical ways. The more obvious way (given the nature of the springboard amendment) is through ideation and emulation. The state provision can offer a policy model for the new one at the national level, helping federal constitution-makers to address ills similar to those that the state sought to address in enacting its own reform. The other way is through organization and popular appeal. In the effort to achieve state-level constitutional reform, advocates may also make inroads towards realizing desires for parallel changes in the national charter.

The springboard argument does not end there, however. This Part also examines history in an endeavor to show the theory in action. In other words, it goes beyond making theoretical and normative claims about how state constitutional reform might and should promote federal constitutional amendment. It also makes claims regarding how state charter reforms have actually been influential in the Article V process, primarily drawing on the history leading to three of the Constitution's most significant electoral democracy amendments. Of course, historical events are complex, and their impact should not be overstated. So, while the argument should not be understood as asserting the existence of an *exclusive* causal relationship between state and federal constitutional reform, it does suggest the dynamic is more than mere coincidental and, in fact, that the state constitutional change has some influence on analogous later federal reform.

A. Ideation and Emulation

At the amendment proposal stage, the states have two major options to advance their agenda for federal constitutional reform. The first approach accords with their formal power in the amendment process. State legislatures may draw on their constitutionally designated role, invoking the authority granted to them under Article V to make "applications" to Congress.[249] They may, in effect, inform the national legislature of a perceived need for amendment. Or, instead of trying to impel Congress to act through Article V applications, states may pursue another method, part of the springboard approach. Accordingly, state lawmakers revise their own charter, which can illuminate the need for such an amendment at the federal level. A useful analogy to distinguish the paths available to states is the age-old children's game "show and tell." Under the "show" option, which corresponds to the springboard approach, states lead by example, demonstrating their commitment to prudent constitutional reform within their boundaries. Such reform may, in turn, serve as a model for a formal amendment to the Constitution. In submitting Article V applications, other hand, state legislatures opt for the "tell" route. Here, they advise federal lawmakers that the time for constitutional reform is nigh (and, if enough legislatures do so, then Congress is mandated to issue a call for a convention for proposing amendments).[250] This formal "tell" approach, however, suffers from at least three noteworthy problems.

The first is a coordination problem. Inducing a convention call requires sufficient organization and alignment among state lawmakers throughout the country. Short of similar action by two-thirds of the state legislatures, Congress need not act—and corralling thirty-four states to speak in unison on a matter of constitutional import poses a unique challenge in this hyperpolarized era.[251] The second and third problems are legal ones related to the uncertainty of the convention route for proposing amendments. On the one hand, and assuming that procedural and other threshold concerns are resolved, it is not clear that Congress will actually call a convention.[252] Certainly, once in receipt of enough applications, Congress has an obligation to call a convention; Article V uses the operative word "shall," signifying that it imposes

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[249] U.S. Const. art. V.

[250] Of course, show and tell are not mutually exclusive. In fact, as noted herein the "show *and* tell" option is the approach that some states took in the campaign for the direct popular election of U.S. senators. States amended their constitutions to enact what was, in effect, a direct election by the people, while also petitioning Congress for a convention pursuant to Article V to secure the same. *See infra* Section III.B.

[251] Highlighting the difficulty of reaching this threshold is the fact that the current effort for an Article V convention to propose a balanced budget amendment is relying on applications made decades ago. Wilfred Codrington, *A Campaign to Rewrite the Constitution is Underway*, The Hill (Sept. 13, 2018), https://thehill.com/opinion/judiciary/406581-a-campaign-to-rewrite-the-constitution-is-underway/ [https://perma.cc/6XG2-8QR3] ("More than half of these [balanced budget amendment] resolutions date back 30 years or more.").

[252] *See, e.g.*, Richard B. Bernstein & Jerome Agel, Amending America 125 (1993) ("Moreover, even if the required number of states adopted applications for a constitutional convention, the Senate could still block action to call a convention or could interfere with its results.").

a congressional duty.[253] Yet, as suggested by scholars[254] and even the Court itself,[255] most questions that stem from Article V's scant text are not to be resolved by the judiciary, but the overtly political branches, most notably Congress. To that end, it becomes difficult to conceive of an official or body that might force Congress's hand. If, on the other hand, Congress did oblige by calling a convention, there are still no guarantees that, once assembled, the convention would even consider the issues that prompted its call in the first place. For all of the scholarship and commentary discussing the prospect of a "runaway convention," where the agenda or deliberations go far astray of the matters that led to the convention,[256] little attention has been paid to a scenario that might be deemed equally concerning: the failure of delegates to discuss the reform idea that spawned the convention or, indeed, to discuss any ideas at all, much less advance a concrete proposal to the states for ratification.[257]

That leads to the "show" option that corresponds to ideation, the first of the two major ways that state constitutional reform efforts can serve as a springboard to Article V. Through ideation, the more conceptually obvious (or at least more visible) manner by which states can promote federal amendment, states put on a constitutional expo of sorts, amending their charters in new and innovative ways. The generation of new constitutional policy may be emulated by a Congress introducing similar measures as federal amending resolutions. Importantly, the ideas may be emulated in whole or in part. Members of Congress may respond to the concerns that state actors sought to address with an exact replica of a state constitutional provision. Or they might simply borrow certain components of the state's reform—the broader contours of the policy, for example, or one or more discrete elements—to target specific aspects of the substantive concern. In either case, according to the springboard theory, proponents of federal constitutional change have a wealth of ideas from the states' experience available to them, enabling them to mine those charters for new proposals. When state charters are amended, the new provisions can become the antecedents to more expansive constitutional reforms by spawning federal counterparts similar in style and substance.

This ideation and emulation, though which a state constitution offers a template for its federal counterpart, extends from the classical understanding

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[253] U.S. Const. art. V.

[254] *E.g.*, Pozen & Schmidt, *supra* note 172, at 2378 (noting that while the Supreme Court has "adjudicated a number of disputes about the amendment process," it has done so "infrequently," and "has avoided reaching the merits of an Article V dispute for over ninety years."); *id.* ("On account of the underdeterminacy of Article V and the momentousness of formal constitutional change," making it "a strong possibility that significant conflicts over the validity of amendments will arise and yield no clear answers, only 'political questions.'") (citations omitted).

[255] *See, e.g.*, Coleman v. Miller, 307 U.S. 433 (1939) (the validity of a state's ratification raises a political question not suited for the courts, but Congress).

[256] *E.g.*, Sanford Levinson, *Bring On a New Constitutional Convention!*, N.Y.U. J. Legis. & Pub. Pol'y Quorum (2023); Russ Feingold & Peter Prindiville, The Constitution in Jeopardy: An Unprecedented Effort to Rewrite Our Fundamental Law and What We Can Do About It (2022); Kowal & Codrington, *supra* note 11; Paulsen, *supra* note 19.

[257] Note that this might be equally bad (or worse) because it would reveal that the U.S. is, in fact, an ungovernable country. One might rightfully wonder whether, on such a catastrophic failure, the country could proceed with business as usual.

of states as the "laboratories" of constitutional democracy.[258] States operate with an extremely high degree of autonomy in the U.S. system of federalism and are afforded ample flexibility to experiment with their charters. This power is not limitless, of course; it cannot be used in contravention of the Constitution and federal laws, for example,[259] and state charters and political institutions impose their own constraints on constitutional reform. But states' authority in this realm is undoubtedly vast. Even as the most controversial of state constitutional amendments are subjected to legal challenge,[260] most enactments are acknowledged as lawful by default. Thus, state charters might be revised to address their own defects and oversights, adapt to changed conditions, or entrench rules and political arrangements that emerge from contemporary understandings of law and politics. Those reforms, in turn, if deemed wise and suited to a broader swath of the country, can be emulated at the national level.

The shortcoming of the ideation and emulation approach (to the extent that should be characterized as one) is the potential for a policy to be disapproved of or otherwise disregarded. As the gatekeeper to constitutional amendment, Congress is not only empowered to ignore these potential templates for federal change, for the most part it *actually does* just that. The fact that state constitutions are far longer than their federal counterpart means, at a minimum, that most policies contained in them are not emulated in the national charter.[261] Yet the discretion that Congress has to consider measures (or not), much less adopt them (or not) is both inherent in our system of separation of powers, federalism, and the nature of a legislature as a deliberative body, all of which are central to Article V. The drawback is not unique to the springboard theory or any other theory of change, then, but one that exists irrespective of the chosen path to reform.[262]

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[258] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("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 . . . experiments without risk to the rest of the country.").

[259] U.S. Const. art. IV, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."); *New State Ice Co.*, 285 U.S. at 311 ("To stay [state] experimentation . . . is a grave responsibility" as its "[d]enial . . . may be fraught with serious consequences to the nation[,]" but the "Court has the power to prevent an experiment.").

[260] *See*, *e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (invalidating an amendment to Colorado's constitution that would prohibit the extension of protected status for LGBT persons for violating the Fourteenth Amendment's Equal Protection Clause).

[261] Whereas the U.S. Constitution has fewer than 8,000 words, state constitutions average about 39,000 words (and Alabama's has nearly ten times as many). *State Constitution*, Ballotpedia, https://ballotpedia.org/State_constitution [https://perma.cc/6TRA-RUAB] (last updated Jan. 2023).

[262] Nor does that fact that lawmakers may simply reject state constitutional provisions as models need to be conceived of as detracting from the springboard theory. As stated up front, this Article does not advance the springboard theory as providing support for a novel amendment device, legal circumvention, or some other maneuver to achieve formal constitutional change. It merely suggests a manner of working within the existing amendment rules to that end. That is to say, it makes no claim that ideation and emulation is a better way of promoting federal reform, but a strategic way. *See supra* Introduction.

In fact, constitutional ideation and emulation of this sort has taken place throughout U.S. history. It has transpired prominently *among* the states, for example. Scholars have identified and catalogued its frequent occurrence over time, with state constitution-makers engaging in interstate borrowing, in effect, a horizontal model of ideation and emulation.[263] That U.S. state constitutions undergo more "frequent revision and replacement" than the federal one "makes" and, indeed, has made "possible the diffusion of institutional design as states learn from one another."[264] Likewise, and more important for the argument of this Article, state constitutional pressures can exert similar influence vertically by enacting fundamental reforms that percolate upwards. And, indeed, they have. As part of a "reciprocal relationship between state and federal constitutional development," American "constitutions have changed in response to one another."[265] This is seen in, among other things, federal amendment corollaries to earlier revisions to state charters whose primary aim was to advance electoral democracy and entrench rules to bring the political system in greater alignment with its principles.

Consider the Fifteenth Amendment. Before that provision imposed a nationwide prohibition on racial discrimination in voting,[266] several states had already drafted or amended their charters to the same effect. Said another way, the federal constitutional policy of racial equality in voting was not novel when adopted as there was a repository of models available in state constitutions. For one, voting restrictions in earliest charters of Massachusetts,[267] New Jersey,[268] Pennsylvania,[269] and Rhode Island[270] were silent on race, instead the qualifications for their electorate were based on considerations

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[263] Erik J. Engstrom, Matthew T. Pietryka, & John T. Scott, *Constitutional Innovation and Imitation in the American States*, 75 Pol. Research Q. 244 (2022) (employing quantitative analyses to reveal that U.S. state constitutions borrow significantly from each other). *See also* Holly McCammon et al., *How Movements Win: Gendered. Opportunity Structures and U.S. Women's Suffrage Movements*, 1866 –1919, 66 Am. Soc. Rev. 49, 61 (2001) (using quantitative methods to show that, in the context of women's suffrage, "the passage of full, presidential, and primary suffrage in one or more neighboring states significantly encouraged the passage of these types of suffrage in a particular state."); G. Alan Tarr & Robert F. Williams, *Foreword: Western State Constitutions in the American Constitutional Tradition*, 28 N.M. L. Rev. 191, 196 (1998) (arguing that "horizontal federalism has been crucial in state constitution-making[,]" with given that "Western constitutions were influenced by earlier Eastern models, [and] the relationship was reciprocal," particularly during the era of Jacksonian democracy that sought to broaden the franchise for white men); Elazar, *supra* note 184 at 18 (explaining that there are "similarities . . . among various states" and "certain common [constitutional] threads achieved, in part, through borrowings of ideas back and forth.").

[264] Engstrom, Pietryka, & Scott, *supra* note 263, at 245. Importantly, the authors of the study find that a full one-fifth of constitutional text was borrowed from other state constitutions, and the likelihood of interstate borrowing increases with geographical proximity, relative contemporaneity, and partisan similarity. *Id.*

[265] Versteeg & Zackin, *supra* note 31, at 1651.

[266] U.S. Const. amend. XV.

[267] Mass. Const. art. II, § 2 (1790); *id.* amend. art. III (1821).

[268] N.J. Const. art. IV (1776). Notably, New Jersey's constitution originally included no restriction based on sex either. *Id.*

[269] Pa. Const. art. III, § 1 (1790).

[270] R.I. Const. art. II, § 1 (1843).

including net worth, tax payment, and durational residency.[271] Likewise, upon their admission as states, neither Vermont[272] nor Maine[273] forbade Black men from voting, permitting its exercise on non-racial terms. Significantly, on the eve of the Fifteenth Amendment's enactment, a slight majority of the state constitutions authorized voting by Black men.[274] The national trend was not uniformly towards enfranchisement,[275] to be sure, and the former confederate states eliminated their racial qualifications only on compulsion by Congress.[276] But the point stands. Race non-discrimination in voting had its origins in state charters, offering a conceptual model for federal constitutional reformers. Nor, given the Constitution's bifurcated jurisdiction over elections, should this come as a surprise. As Travis Crum contends, it was precisely "[b]ecause the original Constitution entrusted States with the power to set voting qualifications for the federal electorate [that] state constitutions and laws were the battleground for expanding the franchise prior to the Fifteenth Amendment."[277]

Notably, the language that the Fifteenth Amendment uses is quite dissimilar to that contained in the various state constitutions. The provision bans race-based voting discrimination by prohibiting federal and state officials from "den[ying] or abridg[ing]" the franchise on that basis.[278] It takes a markedly different approach from state charters,[279] most of which, when amended, simply dropped the word "white" as a qualification for suffrage.[280] The lack of resemblance, however, is partly due to the disparate manner in which the charters provide for the right to vote; suffrage is an unenumerated right from the perspective of the U.S. Constitution,[281] which is not the case in state charters,

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[271] While New York also permitted men of color to vote, most could not meet constitutionally mandated thresholds for property ownership, tax payment, and residential duration, which was higher than that for white men. N.Y. Const. art. II, § 1 (1821).

[272] Vt. Const. ch. II, § 1 (1793).

[273] Me. Const. art. II, § 1 (1819).

[274] Travis Crum, *The Unabridged Fifteenth Amendment*, 133 Yale L. J. 1039, 1065 (2024) ("Thus, when the lame-duck Fortieth Congress convened to debate the Fifteenth Amendment in early 1869, the United States was evenly divided . . . Seventeen States had enfranchised Black men whereas seventeen States engaged in racial discrimination in voting.").

[275] Stuart M. Blumin, *Making (White Male) Democracy: Suffrage Expansion in the United States from the Revolution to the Civil War*, History Now: J. Gilder Lehrman Inst. Am. Hist. (Summer 2018), https://www.gilderlehrman.org/history-resources/essays/making-white-male-democracy-suffrage-expansion-united-states-revolution [https://perma.cc/4UNP-RE69] (noting that during the early nineteenth century, "black voters in a number of states" were being legally disenfranchised by legislatures and conventions even "as economic qualifications were lowered or removed, [because] larger numbers of black men stood to gain the vote along with previously disenfranchised whites.").

[276] Military Reconstruction Acts (Act of Mar. 2, 1867, ch. 153, 14 Stat. 428; Act of Mar. 23, 1867, ch. 6, 15 Stat. 2; Act of July 19, 1867, ch. 30, 15 Stat. 14; Act of Mar. 11, 1868, ch. 25, 15 Stat. 41); *see also* Kowal & Codrington, *supra* note 11, at 111 ("The Reconstruction Acts resulted in the broadest expansion of the franchise in a generation, since the Jackson Era push to expand the electorate to include white men.").

[277] Crum, *supra* note 274, at 1063.

[278] U.S. Const. art. XV.

[279] Crum, *supra* note 274, at 1072 ("No State used the Fifteenth Amendment's 'deny or abridge' term of art.").

[280] *Id.* at 1067.

[281] Jane S. Schacter, *Unenumerated Democracy: Lessons from the Right to Vote*, 9 U. Pa. J. Const. L. 457, 459 (2007) ("the original Constitution did not independently define or protect voting rights and left matters of the franchise largely in the hands of the state.").

where it is and has been set out in explicit and positive terms.[282] Syntax, then, is among the reasons that would lead federal lawmakers to characterize voting rights protections in the negative (i.e., prohibitions on discrimination) in a way that states could deem unnecessary for their own charters.[283] Indeed, "only a handful of States had adopted anti-discrimination provisions similar to that found in the Fifteenth Amendment."[284]

The Framers of the Fifteenth Amendment cannot be said to have borrowed much from the specific text of state charters. By the same token, however, they did not even borrow from the election-related provisions of the very document they were amending.[285] Instead, faced with the fast-approaching end of the Congress (after which they would lose their supermajority), "Radical Republican" lawmakers intent on securing Black suffrage rights rushed to the legislative finish line having to concede grander ideals and any obsession with the specifics of the text.[286] To this end, there may be "no deep reservoir of state-level analogues that shed light on" the full scope of "the Fifteenth Amendment's *meaning*."[287] But in broad terms, the basic idea is straightforward: the Constitution would no longer countenance laws that made race a qualification for voting.[288] This edict came first, not from above, but below, thus revealing the broader influence of state constitutional reform.

Indeed, most amendments to the Constitution that sought to enhance electoral democracy can be understood through the lens of the ideation and emulation paradigm. The Nineteenth Amendment, the Fifteenth Amendment's corollary that outlaws sex discrimination in voting,[289] initially surfaced in state constitutions.[290] Much the same with the repeal of the poll tax, something that took place in all but five of the states that imposed them[291] prior to the Twenty-fourth Amendment's 1964 prohibition of them in federal

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[282] Crum, *supra* note 274, at 1071–72 ("state-suffrage provisions were framed in the affirmative, conferring the franchise on voters"); Codrington, *supra* note 197, at 244 ("Each of the nation's fifty state charters, moreover, makes clear that its residents possess a right to vote in elections held within its boundaries, and all but one does so directly and affirmatively.").

[283] Principle among those other reasons was a reluctance to deviate from the original federal design that left states with control over elections, which would be too much of "a radical break" for even the "Radical" Republicans. Kowal & Codrington, *supra* note 11, at 113. In fact, the radicals in Congress led by John Bingham did consider including an affirmative right to vote in line with state constitutions, but it was rejected resoundingly and with little debate. *Id.*; Crum, *supra* note 274, at 1092.

[284] Crum, *supra* note 274, at 1072. To be sure, there is at least some overlapping phrasing and use of terminology. For example, the Florida constitution, drafted anew and ratified a year before the Fifteenth Amendment, affirmatively extended the status of "qualified voter" to nonwhite men, but also denied the state legislature the power to disenfranchise "any class of persons, *on account of race, color, or previous condition of servitude* . . . ." Fla. Const. art. XIV, § 1; *id.* art. XVI, § 28 (1868).

[285] Crum, *supra* note 274, at 1129.

[286] Kowal & Codrington, *supra* note 11, at 114–15.

[287] Crum, *supra* note 274, at 1130 (emphasis added).

[288] *But see*, *e.g.*, Giles v. Harris, 189 U.S. 475 (1903).

[289] U.S. Const. amend. XIX.

[290] *See infra* Section III.B.

[291] Kowal & Codrington, *supra* note 11, at 190. The states that retained the practice were Alabama, Arkansas, Mississippi, Texas, and Virginia. Wayne Dawkins, Emanuel Celler: Immigration and Civil Rights Champion 109 (2020); *see also* Keyssar *supra* note 72, at app. tbl.A.10 (listing states that imposed a poll tax as a requirement for voting).

elections,[292] as well as the lowering of the voting age,[293] which Twenty-sixth Amendment accomplished nationwide in 1971.[294] Each had conceptual—even if not textual—analogues in state charters. Likewise, as noted below, states even revised their charters to secure the direct election of their own U.S. senators, action that preceded the policy's universal application with the ratification of the Seventeenth Amendment.[295] In fact, with the exception of the Twelfth and Twenty-third Amendments, every core electoral democracy amendment in the Constitution had predecessors in the states.

Ideation and emulation are important concepts that accord with principles of federalism. In this context, they maintain that states can experiment with innovative constitutional measures, ultimately committing themselves to modernizing reform. Those policies, in turn, become part of the vast menu of options available to federal lawmakers and, if popular enough, they can be enshrined at the national level. Indeed, the notion has proven out. U.S. history is rife with examples of ideation and emulation where the Constitution is formally amended in ways that parallel changes initiated in the states, including those that have bolstered electoral democracy. And though core facets of the springboard theory, ideation and emulation are not the only ones. As the next Section argues, state charter reform can, itself, be instrumental to federal constitutional campaigns in material ways.

B. Organization and Popular Appeal

In amending their constitutions, state-based actors simultaneously generate ideas that can be copied and retrofitted for the U.S. Constitution. But they can also influence federal amendment efforts in ways that go beyond merely providing constitutional policy models. Perhaps even more important is the impact that they can have during the actual campaign stage. Political campaigns aimed at securing state constitutional reform may be helpful for assessing the breadth and depth of support for corresponding federal amendment efforts. They can likewise be instrumental for the national push for similar reform by enhancing political operations and, with them, the prospects that an amendment will gain traction with the wider public. Thus, the actual drive to amend state charters can result in more than a change in state law; it can help gauge broader public receptiveness to similar national reforms while creating the conditions to make it more likely that they will be embraced.

While state constitutions are not nearly as difficult to amend as the federal one, their reform still demands greater unity and consensus than what is

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[292] U.S. Const. amend. XXIV.

[293] Prior to the ratification of the Twenty-sixth Amendment, the Constitutions of four states—Alaska, Georgia, Hawaii, and Kentucky—permitted voting by residents below the age of than the otherwise national standard of twenty-one years old. In Georgia and Kentucky, the voting age was eighteen years old; in Hawaii, nineteen; and in Alaska, twenty. Melanie Jean Springer, *Why Georgia? A Curious and Unappreciated Pioneer on the Road to Early Youth Enfranchisement in the United States,* 32 J. Pol'y Hist. 273, 277, 311 (2020).

[294] U.S. Const. amend. XXVI.

[295] *See infra* Section III.B.

needed to enact ordinary legislation and shape policy through other modes. As such, securing a favorable outcome requires an organized and agile enterprise to foment the heightened popular engagement essential to accomplishing a range of important things associated with successful issue campaigns. Advocates must build a professional operation—something that requires seed money and continued fundraising—to recruit, hire, and retain employees; procure physical space; and pay for essential services and supplies, among other campaign essentials.[296] Organizations need to undertake research and execute strategic communications as part of effective policy and public relations arms if they are to prepare their staff to educate and persuade the public of the prospective reform's benefits. Reformers must also cultivate alliances and maintain coalitions in support of the effort, including partners that can contribute by pressuring lawmakers and other essential actors in the amendment process.[297] The necessities for waging a successful campaign include these components and untold others, all aimed at engendering the broad participation that will foster an environment conducive to reform. Indeed, given the elevated bar and potential procedural hurdles to passage, it is difficult to envision a victorious state amendment effort of consequence in the absence of these operational elements and likewise for federal amendment campaigns.

In fact, the pursuit of the more difficult nationwide goal calls for enhanced sophistication of the political operation, for successfully "enacting a constitutional amendment" typically hinges on a movement's capacity to meet the "oblig[ation] to call so extravagantly upon the political energies of the American people."[298] National campaigns demand considerably more resources than state campaigns as well as better organization because they must reach and win over a more diverse group of stakeholders on a much larger scale. Thus, there are multifarious advantages of having the earlier and concurrent state amendment campaigns. Most obviously, the political operations developed to succeed in the states can be rebooted, readjusted, and redeployed to support

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[296] *See, e.g.*, Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. Pa. L. Rev. 85, 101 (2001) (describing the various activities, e.g., fundraising and staff hiring, that organizations in the environmental movement had to undertake to "shed their amateur structure and image for a more professional look," and be "effective participants in the realm of insider politics,"); Douglas NeJaime, *Constitutional Change, Courts, and Social Movements,* 111 Mich. L. Rev. 877, 897 (2013) (discussing the model of social movement theory whereby "the financial and rhetorical support of elite individuals and organizations aids movement work" and "movement development and success relate to the ability to attract and leverage external resources."); Aaron J. Yarmel, *On Choosing Where to Stand: Selecting a Social Movement Approach,* 47 Soc. Theory & Prac. 425, 434–35 (2021) (describing approaches to social movement fundraising).

[297] Nella Van Dyke & Bryan Amos, *Social Movement Coalitions: Formation, Longevity, and Success*, 11 Socio. Compass 2 (2017) ("The importance of coalitions to social movements is illustrated both by research that documents how coalitions influence success, as well as by social movement theory. Mobilizing large numbers of people and demonstrating widespread support for an issue is one of the few ways social movements exercise power, and coalitions help make this happen. Research provides multiple examples of cases where a movement was unsuccessful because coalitions failed to materialize."). *See also* Virginia Shapiro, *The Power & Fragility of Social Movement Coalitions: The Woman Suffrage Movement to 1870*, 100 B.U. L. Rev. 1557 (2020) (examining the woman suffrage movement in the context of social movement theory to reveal the various coalitional and, therefore, movement challenges).

[298] Ackerman, *Discovering the Constitution*, *supra* note 46, at 1050.

the Article V effort. Residents of a state, moreover, once persuaded of the state-level reform's local salutary effect, may become part of a broader community that is receptive to similar federal proposals. They may even join the campaign, encouraging the enactment of the national reform through grassroots work, lobbying, and other political efforts to attract supporters and to convince lawmakers to support measures, all of which is crucial because a "truly successful [ ] social movement must win over both elite and popular opinion."[299] At the same time, a state's embrace of a reform in its own charter might suggest that the measure has popular appeal, including among the lawmakers tasked with proposal and ratification. The effort to amend state constitutions, then, can establish an internal political infrastructure and environment that can help facilitate the proposal and ratification of federal amendments while, at the same time, serving as a barometer of the reform ideas' broader purchase.

That a state constitutional amendment effort might serve as a rough gauge of a proposal's popularity is illustrated by the activity surrounding the Seventeenth Amendment, which rebuffed the original Framers' decision to charge state legislatures with selecting senators.[300] The direct election of senators had an earlier push, but it was left adrift in the middle of the nineteenth century. Decades later, however, came the more fulsome effort that caught the progressive winds of the late nineteenth and early twentieth centuries.[301] In line with other Progressive Era reforms, the direct election proposal sought to make government work better,[302] specifically by reducing instances of bribery and public corruption in legislative chambers,[303] addressing chronic senate vacancies amidst state legislative gridlock,[304] and redirecting the focus of state legislatures from national policy to pressing state and local matters.[305] The popular election of senators was also in accord with the principles of electoral democracy; it enhanced political equality by endowing individuals with votes equal in weight to their in-state peers and it increased competition and transparency by taking the choice from self-interested state lawmakers. Yet, while

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[299] Jack M. Balkan, *How Social Movements Change (Or Fail to Change) the Constitution: The Case of the New Departure,* 39 Suffolk L. Rev. 27, 36 (2005).

[300] *Compare* U.S. Const. art. I, § 3, *with id.* amend. XVII.

[301] Kowal & Codrington, *supra* note 11, at 136–37; Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 San Diego L. Rev. 671, 705 (1999).

[302] Ronald F. King & Susan Ellis, *Partisan Advantage and Constitutional Change: The Case of the Seventeenth Amendment*, 10 Stud. in Am. Pol. Dev., 69, 72 (1996) ("The Seventeenth Amendment is thus seen as part of the 'quest for the people' associated first with the Populist movement and then with the Progressive. In this approach, direct election of senators fits naturally with such other democratic reforms as the recall, initiative, referendum, short ballot, and popular primary. Moreover, it fits with the movements' charges of a conspiracy of power and wealth that allegedly had entrenched special interests, especially large corporations, in the Senate through the corruption of the state legislatures. Direct election as a mechanism would help sever this link, depriving the machine 'of the advantages it had in checkmating popular control' and making government more 'accessible to the superior disinterestedness and honesty of the average citizen.'").

[303] Codrington, *supra* note 245, at 47–48; Wendy J. Schiller, Charles Stewart III, & Benjamin Xiong, *U.S. Senate Elections Before the 17th Amendment: Political Party Cohesion and Conflict 1871–1913*, 75 J. Pol. 835, 846 (2013); Rossum, *supra* note 301, at 707.

[304] Codrington, *supra* note 245, at 46–47; Rossum, *supra* note 301, at 706–07.

[305] Codrington, *supra* note 245, at 47; Rossum, *supra* note 301, at 707.

the House of Representatives indicated its support for the direct election of senators by passing amending resolutions on several occasions, members of the Senate, whose allegiances were with the very state legislators responsible for their appointment—and the "interests" that supported them—would not consider the reform.[306] In the face of recalcitrance, advocates of reform began pursuing a state-based "show *and* tell" strategy.

The "tell" element of the reform strategy drew on Article V. State legislatures began making applications to Congress for an Article V convention to propose a constitutional amendment that they might eventually ratify themselves.[307] As for the "show" aspect, it entailed the pursuit of constitutional workarounds, including through the enactment of a range of measures resulting in de facto popular for senators in the adopting states.[308] What began as straw polls, sources of information and pressure aimed at persuading state lawmakers to support the most popular Senate choice, soon became legally binding measures, including through legislation and amendments to state charters, to enforce adherence to the public will. Starting with Oregon, "[a]t least three state constitutions explicitly required state legislators to elect the Senate candidate who received the most votes in the primary."[309] Ultimately, the two-prong "show and tell" approach proved effective. State legislatures eventually submitted more applications than what was required for a convention call.[310] Moreover, by the time of the Seventeenth Amendment's proposal, more than fifty percent of the Senate's membership had been directly (i.e., de facto) elected by the people in the states—a change in that chamber's composition that undoubtedly made it easier for the amending resolution to pass the body.[311] More to the point, though, the state constitutional reform helped to reveal the measure's tremendous popularity nationally. "Public opinion" had "taken hold of the subject," a contemporaneous legislative report noted, making "the demand for this change . . . continued and persistent, distinct, pronounced, and imperative[.]"[312] Support for the direct election of senators was "in fact . . . almost unanimous among the great mass of the people,"[313]

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[306] Codrington, *supra* note 245, at 48–49; King & Ellis, *supra* note 302, at 71.

[307] Kowal & Codrington, *supra* note 11, at 137–38; Rossum, *supra* note 301, at 710.

[308] Zachary D. Clopton & Steven E. Art, *The Meaning of the Seventeenth Amendment and a Century of State Defiance*, 107 Nw. L. Rev. 1181, 1190 (2013) ("With respect to political action, for decades it was the states themselves that led the charge for democratically elected senators. States amended their constitutions, passed laws, and adopted practices to sidestep legislative selection of senators. They also pressured Congress to adopt a system for direct senatorial election.").

[309] Strauss, *supra* note 8, at 1498. Indeed, Oregon was the birthplace of the constitutional initiative, having established it 1902. *See* Bulman-Pozen & Seifter, *supra* note 187, at 200. Reflecting on the history, it is less surprising that Oregonians were the leaders in the push for a de facto election for senators, hence the strategy's name, "The Oregon Plan." Codrington, *supra* note 245, at 46–50.

[310] *See supra* note 191. Congress never called for an Article V convention, however, even if it may have succumbed to public pressure by proposing the exact amendment that drove the push for a convention during the Progressive Era.

[311] Strauss, *supra*, note 8, at 1498; Kowal & Codrington, *supra* note 11, at 138 (noting that in addition to senators having been de facto elected by the people, ten Republican senators who opposed reform lost re-election).

[312] S. Rep. No. 61-961 (1911); *see* H. Rep. No. 62-1 (1911).

[313] *Id.*

something shown by the proposal's ratification within a year of adoption, including with the support of those states that had implemented their own measures.[314]

If the efforts to achieve direct senate elections through state constitutions illustrate how a campaign and its ability to gain traction sub-nationally can serve as a proxy for a reform's broader popular appeal, then the push to amend those charters to guarantee women's suffrage highlights the benefits that state-based organization can have on the corresponding federal effort. The ratification of the Nineteenth Amendment in 1920, the capstone of the women's suffrage movement in the United States,[315] was not a foregone conclusion—and certainly not when the efforts to secure it began. Those "fighting for votes for women" waged political war over decades, battling—and often losing—on various constitutional terrains.[316] Though its seeds were sown during the ante-bellum period, an earnest movement first began to target the U.S. Constitution following the Civil War.[317] That early post-war advocacy campaign to secure universal suffrage through Article V notoriously failed women as it came in the evanescent "hour belong[ing] to the negro" during which came the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments.[318] In the wake of that defeat, some advocates continued pressing Congress to introduce a constitutional measure to outlaw sex discrimination in voting. (Congress did so, but it was doomed to fail).[319] Others began pursuing their objective through more confrontational politics, exemplified by the "masses of women attempt[ing] to vote in the elections of 1871 and 1872,"[320] necessarily reorienting suffrage advocates towards the courts. Employing a legal strategy called the "New Departure," they argued that the Fourteenth Amendment among other constitutional provisions *already* contemplated women's suffrage.[321]

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[314] Importantly, while the popular embrace of a state constitutional measure might be a boon for prospects nationally, the inverse is not necessarily true. It should not be taken to suggest that the failure to enact a measure at the state level means that it is unable or unworthy of making it into the federal Constitution. While the story is complex, it should be noted that a lack of popularity in state constitutional campaigns did not tank the Twenty-Sixth Amendment. Though adopted under vastly different circumstances, state efforts to lower the voting age were decidedly less popular than those electoral democracy reforms that preceded it, yet it was eventually adopted. Kowal & Codrington, *supra* note 11, at 214–15.

[315] *But see, e.g.*, Martha S. Jones, *Thick Women and the Thin Nineteenth Amendment*, 20 Geo. J. L. & Pub. Pol'y 1, 2 (2022) (arguing that while "[t]he Nineteenth Amendment permitted Black women to clear one hurdle on their way to the ballot box," the measure that "barred sex as a voting qualification would fail to get her to the polls," thus rendering it "partial, inadequate, and even a failure for many Black women . . . through the twentieth century."); *id.* at 4 (however we may perceive the Nineteenth Amendment today, "its history demands that we contend with how Black women's political thickness kept them outside [its] design and the intent").

[316] Tamar A. Alexanian, *Black Women & Women's Suffrage: Understanding the Perception of the Nineteenth Amendment Through the Pages of the Chicago Defender*, 29 Mich. J. Gender & L. 63, 86 (2022).

[317] Siegel, *supra* note 55, at 968 ("The quest for the vote began in the antebellum era but did not focus on the federal Constitution until the Civil War.").

[318] Wendell Phillips, Address Before American Anti-Slavery Society (May 9, 1865).

[319] Siegel, *supra* note 55, at 970 n.61.

[320] Reva B. Siegel, *The Politics of Constitutional Memory*, 20 Geo. J. L. & Pub. Pol'y 19, 35 (2022).

[321] Balkan, *supra* note 299, at 37; Siegel, *supra* note 55, at 968–76; *see generally* Ellen Carol DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820–1878*, 74 J. Amer. Hist. 836, 852–60 (1987).

But that effort, too, failed. In a loss presaged by the Supreme Court's then-recent decisions in the *Slaughter-House Cases*[322] and *Bradwell v. Illinois*,[323] the justices further limited the Privileges or Immunities Clause, ruling that voting did not fall within its ambit.[324] With that loss in *Minor v. Happersett*, the movement became more dispersive, redirecting its work to target the states.

To be sure, political advocates' strategy to refocus their gaze on state constitutions did not result in massive gains in the short term. Over four decades, between 1870 and 1910, they invested in thirty-three state ballot campaigns, losing all but two.[325] With Wyoming and Utah authorizing suffrage upon admission to the Union, women had full voting rights in just four states, all in the West. (This was, in part, owing to the sparsely populated region's need to attract women,[326] as well as its "more progressive pioneering spirit and the openness of their less-entrenched political parties."[327]) Indeed, there were partial suffrage victories during an exasperating period otherwise characterized by stagnation at the state-level referred to as the "doldrums."[328] Prior to the turn of the century, women won limited suffrage rights in some states, commonly consisting of the right to vote in municipal or school board elections.[329] And over the following half decade, in their determination to build on the "so-called success in the West," advocates were able to more than double the number of full suffrage wins.[330]

Importantly, the ultimate win and the itinerant ones that proceeded it would have been unlikely absent movement organizing. A crucial factor in those successes was the merger of the leading advocacy groups decades earlier to establish the National American Woman Suffrage Association. Starting out as "a loosely run association," under the leadership of Carrie Chapman Catt the NAWSA would grow tremendously to emerge as "an efficient organization" with swelling membership and capital as well as "permanent headquarters in each state."[331] Catt returned to the national campaign following the

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[322] 83 U.S. 36 (1873).
[323] 83 U.S. 130 (1873).
[324] Minor v. Happersett, 88 U.S. 162, 171–75 (1875).
[325] Kowal & Codrington, *supra* note 11, at 149.
[326] *Id.*
[327] Tracy Thomas, *Reclaiming the Long History of the "Irrelevant" Nineteenth Amendment for Gender Equality*, 105 Minn. L. Rev 2623, 2640 (2021). *See id.* ("Other factors contributing to success in the West were the better mobilization of the women's suffrage movements and the social blur between the public and private spheres on the frontier where women were more likely to be active as homesteaders and in higher education."); Elizabeth D. Katz, Sex, Suffrage, and State Constitutional Law: Women's Legal Right to Hold Public Office 33 Yale J. L. & Feminism 110, 136 (2022) ("Women first obtained officeholding rights in the Western Territories, where the combination of less entrenched rules, sparse populations, and political calculations aided women in obtaining both suffrage and officeholding rights."); *see also* Neil S. Siegel, *Why the Nineteenth Amendment Matters Today: A Guide for the Centennial*, 27 Duke J. Gender & Pol'y 235, 250 (2020) ("Beginning with Wyoming Territory in 1869, Western territories and states increasingly sought to entice women living in Eastern states to move west, in part to increase their populations and enhance their chances of obtaining statehood.").
[328] Tracy A. Thomas, *More Than the Vote: The Nineteenth Amendment as Proxy for Gender Equality*, 15 Stan. J. C.R. & C.L. 349, 353 (2020).
[329] Thomas, *supra* note 327, at 2640.
[330] *Id.*
[331] Keyssar, *supra* note 72, at 197; McCammon et al., *supra* note 263, at 51 (noting broadly diffuse state and campus suffrage associations).

doldrums set on executing her "Winning Plan." Leading the NAWSA's more effective operation that had "consolidat[ed] organizational power" of the state campaigns, she oversaw the movement's "concurrent strategy" that called for "accelerated federal lobbying efforts" while redoubling the state-based work underway by steering "state suffrage efforts to only those states where success was likely."[332] Both tactics were aimed at generating interest and political activism in the states most prone to support ratification at the national level.[333] The retooling of the organization converged with several other factors—the suffragists' increasing use of more militant tactics, the nation's participation in World War I, the Eighteenth Amendment's ratification—to ultimately facilitate the Congress's adoption of the amending resolution in June 1919.[334] Buoyed by the "NAWSA's finely honed organization," so "well prepared for the task of navigating the [measure] through state legislatures,"[335] the Nineteenth Amendment was ratified just over a year later.

In the end, the suffragists' early organizing for voting rights under state constitutions paid dividends. The work was slow and painstaking, undoubtedly, but it helped drive states to embrace some measure of sex equality in voting before the nation as a whole. Organizing, in other words, was a key reason why prior to the Nineteenth Amendment's ratification, "women were already voting, in some form, in all but eight states."[336] That progressive, even if unsteady trend of enfranchisement mollified opponents of suffrage along the way, tempering their concerns that it would wreak social and political havoc. With women voting and even holding office, particularly in the West, "Americans saw that the doomsday predictions had no basis in reality."[337] Yet another important byproduct of the peripatetic successes over the years spent targeting state charters was an altered composition of the electorate in some states, increasingly subjecting those lawmakers to accountability with the women in their constituencies and ultimately easing the path to both proposal and ratification. Tellingly, the House of Representatives' vote to propose the constitutional suffrage measure, which marked a reversal in course from the vote three years prior, hinged largely on the support of members who had not only switched their position, but also were representing states that recently embraced full or partial suffrage.[338] Similarly with ratification; there was a clear and unsurprising overlap between the states that ratified the Nineteenth Amendment and those that had already amended their constitutions to extend the franchise to women.[339] In fact, at points there was stark division within the

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[332] Thomas, *supra* note 327, at 2643.

[333] Keyssar, *supra* note 72, at 212.

[334] Kowal & Codrington, *supra* note 11, at 150–52; Keyssar, *supra* note 72, at 174; McCammon et al., *supra* note 263, at 64.

[335] Keyssar, *supra* note 72, at 217.

[336] *Interchange: Women's Suffrage, the Nineteenth Amendment, and the Right to Vote*, 106 J. Am. Hist. 662, 683 (2019).

[337] Siegel, *supra* note 327, at 250.

[338] Keyssar, *supra* note 72, at 216.

[339] *Id.* at 217 ("The amendment was approved with remarkable speed in much of the Northeast and Midwest; the western states, where women already were enfranchised, did not lag far behind."). Importantly, one's support for a measure might reflect their preference for the underlying policy to govern within their state's borders, a principled stance rooted in federalism

movement, with many advocates "favor[ing] a continuation of efforts to alter state constitutions," namely because the "strategy had yielded victories."[340] To be sure, organizing for state constitutional reform did not prevail in all parts of the country. In some states, particularly those in the South, lawmakers voted against suffrage amendments to the state and federal constitution—if they even brought the measures up for a vote at all.[341] And while understandable, the less-than-sunny outlook that pervaded the periods when "defeats were far more common than victories"[342] may have even clouded the view of national progress. In retrospect, as Alexander Keyssar observes, "the first decade of the twentieth century proved to be less a period of failure than of fruitful stock-taking and coalition building," with movement leaders adjusting their tactics and proceeding "to systematize [their] organization."[343]

As illustrated above, activists partake in a range of advocacy and movement building activity to secure state constitutional reforms that also can have a significant, positive impact on a similar federal amendment campaign. From fundraising and constructing an operation to engaging in research and public relations efforts to educating peers about the proposals and recruiting them to the cause, the core political organizing activities align with what also must be done to prevail on a larger scale. Beyond learning from the earlier effort and eliminating redundancies, moreover, capitalizing on the work undertaken to win state charter reform can smooth the path for ratification once corresponding federal amendments are proposed. Stated another way, in strategizing and mobilizing to amend state constitutions, advocates also lay the foundation for corresponding reforms through Article V. And by redeploying the prior state organizational efforts, amendment proponents might stimulate and grow "the kind of widespread support for their Publian pretensions that is required before they can constitutionally speak . . . in the special accents of We the People of the United States,"[344] ultimately yielding a new provision of the nation's Constitution.

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or something akin to it. There is no reason to believe that this is the case here or, in fact, for most electoral democracy reforms. Those desiring such legal change likely want it throughout the country if only because they will directly or indirectly affect the composition and workings of national government. Thus, in the context of the Fifteenth Amendment, Travis Crum calls it "an ironic twist [that] Tennessee was both the only Southern State to enfranchise Black men voluntarily and the sole one to ultimately reject the Fifteenth Amendment's ratification." Crum, *supra* note 274, at 1115.

[340] Keyssar, *supra* note 72, at 212.

[341] *See* Kowal & Codrington, *supra* note 11, at 152–53; Keyssar, *supra* note 72, at 206, 210–11. Unfortunately, racist appeals were employed as a part of some suffragists' tactics to secure victory. *See* Jones, *supra* note 315, at 8 ("The [NAWSA] leadership only grew increasingly committed to courting white southern women and their lawmaker husbands and fathers. In doing so they marginalized, and in some instances wholly jettisoned, Black women and their concerns about the rising tide of Jim Crow oppression and lynching. NAWSA conceded to the logics of white supremacy participating in a post-Civil War reconciliation that was already politically reuniting white men who had clashed in contingents defined by North and South, Union and Confederate."); Kowal & Codrington, *supra* note 11, at 154 (highlighting Catt's message to an audience that "White supremacy will be strengthened, not weakened, by women's suffrage.").

[342] Keyssar, *supra* note 72, at 207.

[343] *Id.* at 202–03.

[344] Ackerman, *Discovering the Constitution*, *supra* note 46, at 1043.

The springboard theory suggests a "full[er] story of the Nineteenth Amendment," then, "paint[ing] a more complex picture of the relationship between federalism and equality."[345] Indeed, that a core electoral democracy reform could progress in such a manner, evolving from a few discrete state-based campaigns to a successful national one, reveals "the potential (albeit contingent) of federalism dynamics to advance the equal citizenship stature of traditionally excluded groups."[346] More importantly, the components of the springboard theory concerned with popular appeal and organization suggest the existence of sub-national model for gauging the desirability for and feasibility of operationalizing a constitutional movement on the scale necessary "to negotiate the obstacle course established on the higher lawmaking track" and secure federal amendment.[347] Strategic and coordinated activism can stoke broader public engagement and otherwise help persuade fellow state residents to support constitutional reform measures, proving that organization and advocacy are instrumental to transforming both the local and national environment in ways that make them more conducive and receptive to similar changes that advance electoral democracy.

C. Spring Back?

Importantly, despite their propensity to be more in alignment with the ideals of electoral democracy, state charters also have the potential to frustrate it. The wide latitude that our unique system affords to states enables them to ratchet voter protections up or down so long as they do not defy prevailing federal law.[348] That state constitutional reform can devolve in this way is not just a theoretical claim but one with gnarling historical roots. At times, state charters have been revised to undermine electoral democracy in ways that even the federal Constitution has resisted. The clearest and most brazen examples of these occurrences come from the Redemption and Jim Crow Eras of the late Nineteenth and early Twentieth centuries, some of which are described below.

Faced with the obstinate Andrew Johnson, a president all-too-forgiving of confederate belligerence, Congress took control of the Reconstruction project that followed the Civil War.[349] Soon thereafter, federal lawmakers began

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[345] Siegel, *supra* note 327, at 250.

[346] *Id.*

[347] Ackerman, *Discovering the Constitution*, *supra* note 46, at 1039–40.

[348] A core principle stemming from the Supremacy Clause is that the U.S. Constitution serves as a backstop to ensure that rights and protections under state constitutional regimes do not fall below a "federal floor." Kermit L. Hall, *Of Floors and Ceilings: The New Federalism and State Bills of Rights*, 44 Fla. L. Rev. 637, 657 (1992) ("Since state courts must always consider the federal floor provided by rights, they necessarily must take account of federal constitutional requirements."). Yet, this section illustrates some of the most flagrant examples when the Constitution went unenforced, thus permitting state constitutional "rights" and "protections" for African Americans to descend into the basement or even lower.

[349] *See generally* W.E.B. Du Bois, Black Reconstruction in America 1860–1880 (1935); *id.* at 280 (calling Andrew Johnson "a thick and thin advocate of universal suffrage in the hands of the laborer and the common man, until he realized that some people actually thought that Negroes were men."); *id.* at 322 (characterizing Johnson as "the tragedy of American prejudice

adopting a spate of legislation aimed at rebuilding the nation—and necessarily the rogue southern states—on a foundation of greater racial and social equality. Among those measures was legislation mandating that region's states to draft their constitutions anew and in integrated conventions, to imbue their governments with republican legitimacy.[350] The result was immense observable progress, with the southern states electing African Americans to a range of state offices and, for the first time, sending Black lawmakers to Congress.[351] The progress was short-lived, however.[352] As the federal government's post-War intervention in the region—military and otherwise—went into retreat, the old guard of the racist southern elite re-emerged to occupy the most integral state and national political leadership offices.[353]

The "redemption" of the South catalyzed among the most significant series of political acts in U.S. constitutional history: the amendment and overhaul of southern state charters—in virtually all-white conventions—to undo the progress from the brief Reconstruction period. Newly empowered, the region's revanchist political leadership revisited a range of constitutional policies, but their most consequential reforms were those governing elections. Their goal was to diminish the political clout of any and all persons and groups that might threaten the "southern way of life"—Republicans, poor white people, "carpetbaggers," and "scalawags." Yet the paramount motivation for the new constitutional regimes was to exclude Black Americans from the franchise, thereby preventing "the possibility of negro rule and negro domination."[354] Indeed, in 1890, Mississippi assembled a constitutional convention "held for no other purpose than to eliminate the nigger from politics," as James K. Vardaman, a delegate to that convening boasted.[355] The convention's target, the future governor and U.S. senator reiterated, was "not the 'ignorant and vicious,' as some of those apologists would have you believe, but the nigger."[356]

The ratification of the Fifteenth Amendment a generation prior established a national racial equality baseline for all elections as well as federal jurisdiction to enforce it, creating a legal obstacle for southern conventions. Vardaman and his regional contemporaries were all-to-cognizant of Constitution's provision purporting to guarantee voting equality notwithstanding one's "race, color, or previous condition of servitude."[357] So rather than enact measures in direct conflict with the Fifteenth Amendment, they devised a

made flesh"); *see also* Kowal & Codrington, *supra* note 11, at 99–108 (describing Johnson's overridden vetoes of congressional civil rights legislation and Johnson's opposition to the Fourteenth Amendment that emerged from the congressional Joint Committee on Reconstruction).

[350] *See supra* note 274.

[351] *See* Kowal & Codrington, *supra* note 11, at 115–16 (for an excerpt from the speech of Hiram Revels, the first ever Black senator, praising the ratification of the Fifteenth Amendment).

[352] *See id.* at 117–18 (for an excerpt from the speech of Blanch Bruce, the second ever Black senator—and the last one until the Civil Rights Era—highlighting the violent re-emergence of white supremacy in the midst of the federal government's retreat from the South and pleading for assistance).

[353] *Id.* at 118–25.

[354] *Id.* at 123.

[355] Neil R. McMillen, Dark Journey: Black Mississippians in the Age of Jim Crow 43 (1990).

[356] *Id.*

[357] U.S. Const. art. XV.

state constitutional reform strategy based on legal circumvention "to entrench white supremacy" throughout the region, which they executed between 1890 and 1908.[358] Carter Glass, a delegate to Virginia's 1901-1902 constitutional convention, characterized the subversive nature of the gathering in sharp terms. The assembly would adopt a new charter for Virginia to reduce the state's Black electorate by "four-fifths," accomplishing:

> [E]xactly [] what the Convention was elected for—to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to elimination of every negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate.[359]

Glass, a future senator and cabinet secretary, explained that his state's convention—like those in the region that preceded it—could skirt the Fifteenth Amendment by adopting measures that technically "discriminate within the letter of the law, and not in violation of the law."[360] The "Mississippi Plan" was as effective as it was odious. By the end of the decade, "scores of onerous and deceptive hurdles were erected to black African American voters and a host of poor white voters from registering and casting ballots."[361] Indeed, the constitution of every former confederate state contained a poll tax provision, while several instituted other preconditions to voting, including literacy tests and extended residency requirements. In six of the states—Alabama, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia—the charter contained each of these three types of voting restrictions, with all but Mississippi's exempting large property owners or those who would have been authorized to vote prior to the Reconstruction Acts.[362] "In the South as a whole," as a consequence, "post-Reconstruction turnout levels of 60-85 percent fell to 50 percent for whites and single digits for blacks."[363]

In the overall strategy to restore white supremacy in the South, constitutional revision was an indispensable tactic, yielding provisions that led to mass disenfranchisement of citizens.[364] Underlying the overhaul, importantly, was a

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[358] Ellen D. Katz, *Enforcing the Fifteenth Amendment*, *in* The Oxford Handbook of the U.S. Constitution 369 (Mark Tushnet, Mark A. Graber, & Sanford Levinson eds., 2015).

[359] Virginia Constitutional Convention (Proceedings and Debates, 1901–1902) at 3076–77 (statement of Carter Glass).

[360] *Id.*

[361] Katz, *supra* note 358.

[362] Keyssar, *supra* note 72, at app. tbls.A.10, A.13, A.14. Notably, there was also a wave of criminal penalties imposed after Reconstruction, often disenfranchising people as a collateral consequence of conviction of "such crimes as vagrancy, living in adultery, and wife beating that were thought to be more commonly committed by" Black people. Hunter v. Underwood, 471 U.S. 222, 223 (1985); Rebecca Harrison Stevens, Meagan Taylor Harding, Joaquin Gonzalez, & Emily Eby, *Handcuffing the Vote: Diluting Minority Voting Power Through Prison Gerrymandering and Felon Disenfranchisement*, 21 St. Mary's L. Rev. on Racial & Soc'l Just. 195, 210, 210 n.83 (2019); *see also* Keyssar, *supra* note 72, at app. tbl.A.15.

[363] Keyssar, *supra* note 72, at 92.

[364] The southern states are said to have demonstrated "a general penchant for changing constitutions," outpacing the states in other regions in this respect, partly owing to "the disruption of constitutional continuity" as "embodied in the constitutional changes of secession, reconstruction, and the restoration of white supremacy." Elazar, *supra* note 186, at 18.

profound rejection of electoral democracy's precepts, with state constitution-makers of the Redemption and Jim Crow Eras expertly crafting their charters to this effect. They enshrined preconditions to voting that most were unable to meet *specifically because they would be unable to meet them*, executing with supreme effectiveness their goal of erecting targeted constitutional barriers to participation while, at the same time, dispensing with Reconstruction's budding commitment to political equality. These constitutions governed states where the overwhelming majority of the nation's African Americans resided—and in some places outnumbered the white population. The "efforts also entrenched one-party Democratic rule and the interests of the party's wealthiest, landowning members,"[365] thus rendering the outcomes of political "contests" readily predictable by all but eliminating real electoral competition. As for transparency, it was practically nonexistent under these regimes, particularly in those states that made voter eligibility contingent on passing a literacy test. The arbitrary nature of the device and the discretion it afforded officials plainly intent on circumscribing the Black electorate provided would-be voters with little insight into the decision-making regarding their qualification and fitness to participate. Electoral democracy, then, was but a faint memory of an ephemeral Reconstruction experiment. And while the Redemption and Jim Crow Eras offer preeminent examples of state constitutional reform efforts aimed at undermining the principles of electoral democracy, it is certainly not the only period. U.S. Sates have revised their constitutions throughout history to frustrate its core tenets. Indeed, analysts argue persuasively that modern attempts to change state constitutions work to the same end, even if they are relatively less efficacious.[366]

These regrettable episodes should come as no surprise in a nation built on racial hierarchies and human exploitation—and even less so in the region where these ideas were perfected and most ubiquitous. Ignominious and, indeed, consequential chapters in history like this certainly offer reason for pause about relying on state constitutions—much less over-relying on them—as a source of inspiration for federal reform. And still, they are not reason to dismiss state constitutions outright. Sidelining state charter reforms over-learns the teachings of the history by suggesting that states were unique in their disregard of electoral democracy while underweighting the valuing of important constitutional constraints like federal supremacy.

To the first point, states were not alone in eschewing electoral democracy following Reconstruction or, said differently, the federal government did not

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[365] Katz, *supra* note 358.

[366] *See, e.g.*, Gary D. Robertson, *Voter ID Proposed Again, This Time As Change To Constitution*, Associated Press (June 7, 2018), https://apnews.com/e2bf336d591e47bf9c5533ebc4e024d1 [https://perma.cc/36GC-HEGV]; April Corbin Girnus, *Proposed Ballot Measures Would Repeal All-Mail Ballots, Create Voter ID Requirement*, Nev. Current (Feb. 1, 2022), https://nevadacurrent.com/2022/02/01/proposed-ballot-measures-would-repeal-all-mail-ballots-create-voter-id-requirement/ [https://perma.cc/TKQ5-H7KC]; Travis Waldron, *Here's What Key Republican Legislatures Are Plotting Next On State Voter Restrictions*, HuffPost (July 17, 2021), https://www.huffpost.com/entry/republican-voting-restrictions-michigan-wisconsin-pennsylvania_n_60f19203e4b00ef8761bb3f2 [https://perma.cc/4TCY-EPX4].

have clean hands.[367] That state charters could become the legal instruments for the re-ascendance of anti-democracy and gross political (as well as civil and social) iniquities after the Civil War was, from a macro level, an unfortunate downside of the Reconstruction Framers' decision not to overhaul states' power over elections. Not only did they elect against extensive nationalization of elections, rejecting proposals that might "disrupt a core feature of the original Constitution"[368] (thereby leaving states with election jurisdiction similar to what they possessed during the antebellum period), the fortieth Congress actively voted down decidedly broader anti-discrimination measures, including models that may have interdicted some of the Redemption constitutions' provision most repugnant to electoral democracy.[369] Furthermore, the legislatures and conventions that so undermined electoral democracy by enshrining insidious laws in their state constitutions were capable of and effective in the task only because the federal government shirked its own duties. In completing the withdrawal of military troops from the South,[370] failing to adopt bolder election legislation,[371] and declining to enforce the Constitution's clear mandate,[372] among other post-Reconstruction blunders, each branch of the federal government retrenched to some extent, thereby permitting rogue southern politicians to dominate constitutional practice. In effect, the federal government was complicit in the South's conduct for "displaying remarkable indifference to blatant violations of the Fifteenth Amendment."[373] The promise of state constitutions is invariably tied to the efficacy of the federal Constitution that establishes and enforces the outer limits of their power. Yet during the post-Reconstruction Era, neither state charters of that region nor the federal one—at least as enforced—could be considered paragons of virtue, much less electoral democracy.

Relatedly and perhaps more importantly, there is no mandate for would-be federal constitution makers to embrace such iniquitous reforms. State constitutions, definitionally, have limited jurisdictional reach; though binding and supreme in corresponding state boundaries, outside of them, their provisions have diminished, often merely persuasive authority. Even as they can and do

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[367] *See supra* note 288.

[368] Kowal & Codrington, *supra* note 11, at 117.

[369] *See, e.g.*, Cong. Globe, 40th Cong., 3d Sess. at 728 (House of Representatives rejecting a proposal that included a ceiling on residency requirements for voting, while also outlawing discrimination based on "race, color, [] previous condition of slavery," "educational attainments [and] the possession or ownership of property."); *id.* at 1014, 1026 (Senate rejecting a proposal that would have banned voting and officeholding qualifications that discriminate "on account of race, color, nativity, property, education, or religious belief.").

[370] Wilfred Codrington III, *The Electoral College's Racist Origins*, The Atlantic (Nov. 16, 2019) ("The decision to remove soldiers from the South led to the restoration of white supremacy in voting through the systematic disenfranchisement of black people, virtually accomplishing over the next eight decades what slavery had accomplished in the country's first eight decades.").

[371] *See* Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 Yale L. J. F. 171, 182–83 (2019) (describing Congress's failure to adopt the "Lodge Force Act," which would have been a follow-up to earlier measures enacted to enforce the Fifteenth Amendment).

[372] *See, e.g.*, Giles v. Harris, 189 U.S. 475, 482 (1903) (affirming the Alabama supreme court decision that sanctioned election officials' refusal of Jackson Giles's "registration as a voter … arbitrarily on the ground of his color[,] together with large numbers of other duly qualified negroes, while all white men were registered.").

[373] Katz, *supra* note 358, at 365.

provide models for constitutional reform, it remains up to a broader swath of actors—most of whom reside outside of any single state—to decide if they are worthy of emulation at the federal level. In other words, we rely on elected officials to exercise judgment in resolving whether to follow in the political steps of any particular state or set of them and to what extent. And, in fact, officials have made reasonably good decisions in this regard, something evidenced by the amendments that have been adopted[374] and rejected.[375] Notwithstanding their enactment at the state-level, the illiberal reforms from the Redemption and Jim Crow Eras that have muddied state charters and polluted the larger reservoir of constitutional policymaking have never been appropriated for the U.S. Constitution. Indeed, the thrust of formal constitutional change has been notably progressive,[376] with Article V having been employed in ways that only enhance electoral democracy.

State constitutional reform is a fact of history, and the U.S. experience is replete with examples proving the point. States have amended their charters thousands of times—eclipsing the number of corresponding changes in the federal Constitution—and sometimes in ways that have been questionable or categorically vile. Yet there are also upsides to examining the ways that states have used their authority to revise their charters, and they seem to outweigh the downsides.[377] In amending their constitutions, states have also made policy choices leading to reforms that have improved election laws significantly. Facing organized pressure from a galvanized public and popular campaigns, state lawmakers have revisited fundamental decisions implicating the principles underlying elections and related governance to propel state constitutions—and nudge their federal counterpart—in a direction far more consistent with the principles of electoral democracy. State actors are, thus, advised to act on their authority to amend their own constitutions, but to do so thoughtfully, cognizant that such exercises of constitutive power, as the springboard theory contends, have the potential to shape national constitutional change.

Conclusion

In light of the foregoing, an amendment to my prior statement is in order. The claim that the U.S. at present has a "deficient constitutional culture"

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[374] This, of course, excludes the never-ratified Corwin Slave Amendment, which lawmakers proposed at the last minute to stave off the Civil War. *See* Kowal & Codrington, *supra* note 11, at 87–90 (describing the measure and the circumstances leading to its proposal).

[375] *Id.* at 151 (describing the rejection of a measure that would, in explicit terms, couple the resolution adopting the Nineteenth Amendment with one repealing the Fifteenth Amendment); Taunya Lovell Banks, Commemorating the Forgotten Intersection of the Fifteenth and Nineteenth Amendments, 94 St. John's L. Rev. 899, 918–20 (2020) (describing one of several instances in which Congress rejected a "race rider," which would have added to the resolution adopting the Seventeenth Amendment an implicit authorization for states—and the South in particular—to conduct their elections in accord with white supremacist values).

[376] *See* Kowal & Codrington, *supra* note 11, at 6 (introducing a book that tells "the story of how We the People have improved our nation's structure and expanded our democracy during eras of transformational social change.").

[377] Elazar, *supra* note 186 at 11 ("State constitutions [] have been studied almost exclusively from a reformist perspective—to recommend the elimination of presumed deficiencies.").

that fails to incite innovative formal constitutional change is only partially true.[378] Like countless others, this assertion about American constitutionalism focused too intently on the national charter. Formal amendment activity is constantly underway in this country—we just tend to look for it in the wrong places. Looking in the right places, however, one sees a far more robust and active culture concentrated in the states. It is that aspect of U.S. constitutional culture that, far more than the one centered on the national charter, makes electoral democracy an integral component—usually for better, but sometimes for worse. And as this Article argues, that subculture focused on amending state charters might help reinvigorate the stilted one centered on the national document.

The springboard theory suggests the existence of an understated role for state actors in constitutional practice. Alongside their efforts to wreak internal state improvements through relatively easier constitutional amendment processes, they can also inform, inspire, and instigate the pursuit of federal analogues. As this Article notes up front, however, the theory is an incomplete one. A key part of the reason for this is that while springboarding can help facilitate constitutional amendment at the national level, it is not, in and of itself, sufficient to induce that type of reform. Particularly given the constraints of Article V, a panoply of exogenous forces must be in alignment for amendment to materialize, conditions that "tend to reveal themselves in the leadup to and during periods of amendment, and [whose] convergence has historically boded well for the prospect of constitutional change."[379] That state experimentation to alleviate frustration with the national constitutional order is among these conditions nonetheless provides support for the springboard theory.[380] It suggests that the states and the manner in which their citizens engage with their charters are also important, if more concealed, components in the hydraulics of American constitutional change.[381] In reforming any state constitution, those subject to it lift a small but integral valve, leading to the release of local political pressures. But in altering the foundational rules and government arrangements of their own states, the American people can improve the flow of politics by removing some of the blockage in existing channels necessary for reform. The springboard theory contributes to this greater paradigm, as history shows, including with respect to instilling the values of electoral democracy. Even as the core of the Constitution's electoral design remains intact, state measures to improve their own electoral democracy concerns helped to lay the foundation for a large share of the federal amendments that have done the same. Those federal reforms, in turn, prove that "there may be contemporary models of truly well-governed states[.]" [382] The existence of

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[378] Codrington, *Move to Amend*, *supra* note 14.

[379] *Id.*

[380] Kowal & Codrington, *supra* note 11, at 277–80. Other factors include broadly reviled Supreme Court decisions, seismic social changes and mobilized popular responses to them, conditions of war and insecurity, and extreme political polarization. *Id.* at 264–83.

[381] *See generally* Robinson Woodward-Burns, Hidden Laws: How State Constitutions Stabilize American Politics (2021).

[382] Levinson, *supra* note 72, at 30.

state charters as potential springboards might offer a small measure of encouragement for those desiring and working towards Article V change today. But, at a minimum, it can—and should—help to foster and structure a more productive discussion about national constitutional amendment in the contemporary era.

Importantly, the academy and its membership are not excluded from the host of institutions and actors whose input is necessary to this dialogue and the broader effort to refamiliarize the American people with the constitutional amendment power, including as a means to ensconcing in the principles of electoral democracy in the federal charter. (Indeed, in the past legal scholarship has played a pivotal role in the project of constitutional reform.)[383] The academic community has ample resources at its disposal, including the substantive expertise, research training, and other skills that make its membership particularly well-suited to conduct the sorts of rigorous examination aimed at diagnosing present impediments to amendment and the analytical testing key to prescriptions that may help to obviate or mitigate them. Employing these and other tools, scholars might proceed with their exploration into the barriers to reform along at least three general lines of inquiry, some of which might benefit from drawing on the experience with state constitutions.

The first would focus on structural aspects of the Constitution that contribute to the unamendability narrative, which is principal among the aspects that render the document quite exceptional according to both domestic and global standards.[384] Relevant inquiry would have scholars probing design choices and similar components of constitutionalism that erect excessive hurdles to amendment and lessen the possibility of meeting success. Chief among these choices, of course, is the federal charter's double supermajority requirements for proposing and ratifying amendments, which make it far more difficult to change than state constitutions. With research capturing the increased difficulty of amendment over time,[385] scholarship might endeavor to find ways to offset the denominator problem caused by national expansion. Projects might explore the metes and bounds of U.S. statehood, including the history and mechanics of new admission to game out its potential today. They could generate modern interest in possibilities not previously used—whether formal ones like Article V conventions,[386] or unofficial ones akin to advisory

[383] *See, e.g.*, Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91 (1966); John D. Feerick, *Vice Presidential Succession: In Support of the Bayh-Cellar Plan*, 18 S.C. L. Rev. 226 (1966); Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII* , 34 Geo. Wash. L. Rev. 232 (1965); John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 Fordham L. Rev. 73 (1963); John R. Dos Passo, *The Negro Question*, 12 Yale L.J. 467 (1903) (calling for the repeal of the Fifteenth Amendment).

[384] *See, e.g.*, Versteeg & Zackin, *supra* note 31.

[385] Dixon, *supra* note 20, at 653 (explaining that the admission of new states has, over time, resulted in "a directly proportionate increase in the difficulty of ratifying proposed amendments," noting one estimate finding that "the functional equivalent to the 75% super-majority requirement adopted by the framers would in fact now be as low as 62%.").

[386] *See, e.g.*, David Pozen, *The Common Law of Constitutional Conventions*, 112 Cal. L. Rev. 2213 (2024) (arguing for an exploration into the principles and procedures that governed state constitutional conventions, what he calls "the common law of constitutional conventions," as a foundation for Article V convention rules); Sanford Levinson, *Article V After 203 Years: Time for*

commissions and citizen assemblies[387]—that might promote sober deliberation and yield consensus on some points. Or they might continue and broaden the research into the feasibility and legitimacy of achieving partial or substantial compliance,[388] testing how forgiving our political and legal system can be.

If the first major line of inquiry concerns questions that go to the feasibility of amending the Constitution, the second might consider those regarding the national propensity to support or oppose amendment efforts and factors explaining any such predispositions. It might elicit important data and other findings pertaining to non-structural barriers, including political psychology phenomena at the micro or macro level leading to sentiments that reform is unnecessary, unwise, or undesirable. For example, can the nation's piecemeal approach to constitutionalizing protections for its most visible minorities and targeted groups engender a false or premature sense of collective success, satisfaction that, paradoxically, fosters a political environment hostile to amendment? Might the uncertainties of amendment politics, together with the threat of partisan retaliation, breed widespread ambivalence to reform for fear of spiraling or a race to the constitutional bottom?[389] Or does the admittedly difficult amendment procedure become even more difficult because of our collective inertia and exaggerated sense its impossibility?[390] Scholarship examining the other side of that non-structural coin would investigate the existence and even prominence of an aversion to reform rooted in faith alone, or similarly uncritical and unjustified beliefs about the Constitution's omniscience. Veneration[391] and idolatry[392] have notably been cited as impediments to federal constitutional reform, factors that seem to have far less salience when state charters are at issue. If the root of the documents being held in disparate esteem is a form of framer worship uniquely associated with the authors of federal charter, it is conceivable that rigorous exposition on the fallibility of the Constitution's framers or in-depth historical study that expands the narrative pool of legitimate framers could help lessen the intensity of this perception of the national charter as sacrosanct. Learning the causes of such

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a Tune-Up, 67 Drake L. Rev. 914 (2019) (calling for an Article V convention); Sanford Levinson, *What Do We Talk About When We Talk About the Constitution?*, 91 Tex. L. Rev. 1119, 1138 (2013) (lamenting the absence of any "serious conversation at all taking place at the national level about any kind of serious constitutional reform[,]" including through "a new constitutional convention.").

[387] *See, e.g.*, Julie C. Suk, *Opening the Paths of Constitutional Change*, 61 Democracy: J. Ideas (2022) (suggesting that citizens' assembly, which have been used around the world, be incorporated into the process of constitutional amendment).

[388] *See, e.g.*, Dixon, *supra* note 20; Pozen & Schmidt, *supra* note 172.

[389] *See, e.g.*, Sullivan, *supra* note 2.

[390] *See, e.g.*, Vicki C. Jackson, *The (Myth of Un)Amendability of the U.S. Constitution and the Democratic Component of Constitutionalism*, 13 Int'l J. Const. L., 575 (2015).

[391] *See* Albert, *supra* note 42, at 1685 (defining constitutional veneration as "admiring" and "honoring" a constitution in "overabundance," wherein one's "affection … entails blind faith and an impulsive attachment to it."); *see also* Cristopher T. Dawes & James R. Zink, *Is "Constitutional Veneration" an Obstacle to Constitutional Amendment?* 9 J. Experimental Pol. Sci. 395 (2022); Sanford Levinson, *"Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment*, 21 Tex. Tech L. Rev. 2443 (1990).

[392] *See, e.g.*, Brian Christopher Jones, *Forms of Constitutional Idolatry*, Balkinization (May 22, 2020), https://balkin.blogspot.com/2020/05/forms-of-constitutional-idolatry.html [https://perma.cc/3XNM-R5BG].

contrasting perceptions might provide some nuanced understanding of these and other phenomena in constitutional culture that make the country psychologically more apathetic or hesitant to reform. That knowledge, in turn, may generate new strategies to shift the national psyche away from such resistance.

Attendant to the broad courses of inquiry into structural and behavioral barriers to amendment is a final one, whose lines of questioning have strong normative implications and generate answers more prescriptive in nature. Exploration in this realm of amendment research will probe the societal impact of potential reforms to determine if it would be beneficial to amend the document and if so, the ways to maximize that value. The need for scholarship that evaluates the quality, efficacy, and benefits of amendment in general or proposes substantive ideas for such assessment might, in some ways, be seen as hasty and non-sequential logically; it may seem to put the metaphorical cart before the horse on the view that its utility is limited in a world where the path to amendment is occluded. But it is reasonable to surmise that such value-laden inquiries are themselves related to questions of constitutional stasis because they are intimately tied to both the actual ability (or not) to amend the document and the nation's psychic disposition in favor or against amendment. Indeed, the country might be more psychically inclined to amend if it perceived the baseline—the document as written and applied today—as normatively faulty due to its errors, oversights, and core misconceptions. Likewise, surmounting the structural hurdles in place to meet compliance with amendment rules necessarily requires proposals with broad popular appeal, ostensibly owing to their positive normative implications and expected results. This suggests that substantive amendment proposals are an important part of the equation; it would be imprudent to disregard them because they are intrinsically related to structural and psychological impediments. Scholarly resources, therefore, should also be devoted to gaming out and otherwise testing macro policy alternatives, developing conceptual frameworks to guide amendment design, and ultimately drafting constitutional language. And, of course, deeper engagement with the study of state constitutional reform can yield fruitful insights important to these and other issues.

In the volumes-long saga that is the story of U.S. constitutional change, then, springboards fit in closer to the introduction than the conclusion. A component of the theory emphasizes the utility of state charters as providing models for prospective reforms to the federal Constitution. But the templates that they offer are not enough. Under nonideal conditions, they are of more limited in their ability to effect comparable reform at the national level. If the ideation stage is principally crucial to ensuring that policies are ready when the time is right (and, perhaps, helping to hasten that timeframe), it is the other aspect of the springboard theory—the organization—that plays the larger role in expediting the clock. As I have suggested elsewhere, the organization component is a key variable in "the constitutional corollary to Newton's first law of motion, which holds that an object at rest will remain at rest until acted upon by some external force," and "[i]n the context of amendment, social movements with a constitutional agenda comprise one of those critical outside

forces."[393] The springboard theory thus acknowledges that, beyond simply engaging in constitutional policy development in the states, "the American people must [also] move to amend."[394]

Undoubtedly this will take some time, because such "[d]ecisions by the People occur rarely, and under special constitutional conditions," as Bruce Ackerman explains.[395] An antecedent to earning the legitimate "authority to enact its proposals into the nation's higher law, a political movement must, first, convince an extraordinary number of its fellow citizens to take its proposed initiative with a seriousness that they do not normally accord to politics" and, ultimately, persuade those "Americans to support transformative initiatives as their merits are discussed, time and again, in the deliberative fora provided by the dualist constitutional order for this purpose."[396] Daunting a task as that may be, it is an essential one if we are to improve the national Constitution, including in ways that bolster electoral democracy. Yet the undertaking may be made ever-so-simpler if the work is not considered as a singular endeavor, but is approached strategically, including by leveraging the insights gained from the states' experiences with constitutional reform along the way.

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[393] Codrington, *supra* note 14.
[394] *Id.*
[395] Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L. J. 453, 461 (1989).
[396] *Id.*