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ESSAY

Respecting the Mystery of Constitutional Change

JONATHAN L. MARSHFIELD†

In response to Richard Albert's *Quasi-Constitutional Amendments*,
65 BUFF. L. REV. 739 (2017).

INTRODUCTION

All constitutions experience pressure to change. Evolving social norms, technological advancements, economic fluctuations, and myriad other circumstances put pressure on constitutional rules to be updated or adjusted.¹ The inevitable need for constitutional change is no secret nor a recent realization. As Noah Webster argued in 1787, changes in government are certain because it is impossible to “prevent all changes in the wants, the inclinations, the habits and the circumstances of people.”²

But constitutional systems respond to pressures for

† Associate Professor of Law, University of Arkansas School of Law. I am very grateful to Richard Albert and the *Buffalo Law Review* for inviting me to comment on this important question of constitutional change.

1. See ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 81–83 (2009) (discussing the inevitable pressures for constitutional change); John C. Calhoun, *The Amending Process and the Theory of Concurrent Majorities*, in JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT 79 (1992) (“It is wise, therefore, in every government, and especially in a republic, to provide means for altering, and improving the fabric of government, as time and experience, or the new phases of human affairs, may render proper . . .”) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 679 (Ronald D. Rotunda & John E. Nowak eds., 1987)).

2. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 377 (1998) (quoting Noah Webster, *Government*, AM. MAG. 1, 207 (1787–88)).

change in different ways.³ Some constitutions make formal amendment of the constitution's text relatively easy and politically accessible, which can encourage change through textual amendments.⁴ The Indian Constitution, for example, has been amended more than one hundred times since 1950.⁵ Those amendments address issues ranging from property rights, free speech, social equality, recognition of new states, taxation, official language status, legislative structure, and judicial power (among many others).⁶

In many countries, however, constitutional change occurs informally. Informal change happens when binding constitutional rules are modified without any corresponding alteration to the constitutional text.⁷ This can occur through transformative judicial rulings that alter constitutional meaning, "superstatutes" that are effectively entrenched beyond ordinary politics, and momentous executive actions that disturb constitutional conventions.⁸

In *Quasi-Constitutional Amendments*, Professor Richard

3. Some constitutions do not respond to pressures for constitutional change at all (or at least insufficiently), but this generally contributes to constitutional fatality. ELKINS ET AL., *supra* note 1, at 81–88 (discussing relationship between constitutional flexibility and mortality).

4. See generally Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 936–74 (2014) (describing the structure of amendment rules around the world and discussing relative amendment rates).

5. *The Constitution (Amendment) Acts*, MINISTRY L. & JUST., <http://indiacode.nic.in/coiweb/coifiles/amendment.htm>.

6. See ELKINS ET AL., *supra* note 1, at 140–41, 151–57 (discussing India's amendment procedure and constitutional development). India's frequent use of formal amendment procedures is not unique—many countries around the world experience frequent formal amendment. Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1674–75, 1676 tbl1. (2014).

7. Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38(2) DUBLIN U. L. J. 387, 388–89 (2015) ("An informal [constitutional] change occurs where the enforceable meaning of the constitution changes without altering the constitutional text.").

8. Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 Bos. U. L. REV. 1029, 1062–71 (2014) (describing these and other methods of informal change).

Albert provides an insightful and nuanced description of how constitutional change can occur through an informal process that he calls “quasi-constitutional amendment.”⁹ Quasi-constitutional amendments are “sub-constitutional change[s]” to existing constitutional norms that can become functionally entrenched even though they are formally vulnerable to ordinary statutory repeal or modification.¹⁰ Professor Albert illustrates this phenomenon by reference to the Canadian Bill of Rights and the Regional Veto Law, which were adopted through ordinary legislative processes but have informally achieved constitutional status,¹¹ and Senate reform in Canada, which is an issue of constitutional magnitude that has been addressed through an extra-legal committee.¹²

Although Professor Albert draws on examples from Canada, one of his core insights is that quasi-constitutional amendment is not unique to Canadian constitutionalism.¹³ He finds evidence of similar phenomena in the United States, Australia, and perhaps the United Kingdom.¹⁴ Wherever it manifests, Professor Albert notes a common feature of quasi-constitutional amendment: it is “the result of a self-conscious circumvention of onerous rules of formal amendment in order to alter the operation of a set of existing norms in the constitution.”¹⁵ Professor Albert explains that quasi-constitutional amendments occur because “constitutional actors determine . . . that the current political landscape would frustrate [their] plans for a constitutional

9. Richard Albert, *Quasi-Constitutional Amendments*, 65 *BUFF. L. REV.* 739, 739–40 (2017).

10. *Id.* at 740.

11. *Id.* at 740–41, (discussing the Canadian Bill of Rights); *Id.* at 745–46 (discussing the Regional Veto Law).

12. *See id.* at 748–49 (discussing Senate reform).

13. *Id.* at 743 (“I stress at the outset, however, that this phenomenon of quasi-constitutional amendment is not limited to Canada.”).

14. *Id.* at 743.

15. *Id.* at 741–42.

amendment.”¹⁶ Since formal amendment is too difficult, constitutional actors “resort instead to sub-constitutional means—for instance, legislation or political practice—whose success requires less or perhaps even no cross-party and inter-institutional coordination.”¹⁷ In short, Professor Albert observes that quasi-constitutional amendment is the byproduct of high barriers to formal amendment.

This is surely an accurate and helpful description of how quasi-constitutional amendments originate, but it raises some more general questions about the interaction between formal amendment and informal change that might have more complicated answers. In this Essay, I briefly explore the extent to which high barriers to formal amendment are the driving force behind other informal processes of constitutional change—especially informal change through constitutional litigation.

Conventional theories of constitutional design suggest that informal processes, especially transformative judicial rulings, occur mostly because formal amendment is too difficult.¹⁸ It is commonplace, for example, to attribute informal change under the U.S. Constitution to Article V’s seemingly insurmountable barriers to formal amendment.¹⁹ On these theories, informal change is understood mostly as a byproduct of onerous formal amendment. Consequently, these theories tend to assume that constitutional reformers would prefer formal amendment if it was easier, and that informal processes have nominal independent appeal. In

16. *Id.* at 742.

17. *Id.*

18. Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 *DRAKE L. REV.* 925, 933 (2007) (“The simple point of my hydraulics argument is that an informal amendment process exists because formal amendment is so difficult”); Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 *AM. POL. SCI. REV.* 355, 358 (1994).

19. See Rosalind Dixon, *Updating Constitutional Rules*, *SUP. CT. REV.* 319, 319–20 (2009) (explaining that Article V’s rigidity has rerouted constitutional change into judicial review and “superstatutes”).

other words, informal amendment is viewed as a second-choice alternative to formal amendment.

I am skeptical of these assumptions; at least at the level of generality and universality that they often operate, and especially as they apply to constitutional litigation as a pathway to change. My skepticism is based mostly on anecdotal evidence suggesting that the interaction between formal and informal processes of constitutional change is more complicated and nuanced than these theories suggest.²⁰ There is evidence, for example, that even when formal amendment is cheap and frequent, idiosyncrasies in political culture can drive some constitutional issues towards informal processes.²¹ Japan's experience is suggestive of this.²² Formal amendment is relatively easy under Japan's constitution, but it has never been amended.²³ Instead, significant constitutional change has been attempted through awkward "reinterpretations" of the constitutional text.²⁴ Constitutional age might also play a role. As societies stabilize and prosper under a particular constitution, they might be less inclined to make explicit changes through formal amendment and instead prefer change to occur informally with a stronger appearance of continuity and

20. I have discussed my skepticism and the evidence supporting it in more detail in two recent articles. See Jonathan L. Marshfield, *The Amendment Effect*, 98 BOS. U. L. REV. (forthcoming 2018); Jonathan L. Marshfield, *Courts and Informal Constitutional Change in the States*, 52 NEW.ENG. L. REV. (forthcoming 2017).

21. See Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT'L. J. CONST. L. 686, 699–700 (2015).

22. See *id.* at 689 (describing Japan's "[a]mendment [c]ulture" as "[u]ltra[r]igid").

23. Jonathan L. Marshfield, *Decentralizing the Amendment Power*, 19 LEWIS & CLARK L. REV. 963, 1018 (2015) (assessing Japan's relative amendment rigidity).

24. See Hajime Yamamoto, *Interpretation of the Pacifist Article of the Constitution by the Bureau of Cabinet Legislation: A New Source of Constitutional Law?*, 26 WASH. U. INT'L L. J. 99, 109–24 (2017).

stability.²⁵

Even if one assumes that barriers to constitutional change are what drive reformers into either formal or informal pathways, conventional theories often oversimplify the salience of these barriers. Studies in this field often use constitutional amendment rates between jurisdictions to identify constitutions with *relatively* high and low barriers to formal amendment. These studies then assume that jurisdictions with higher barriers to formal amendment should experience more informal change and jurisdictions with lower barriers should experience less informal change.²⁶ This, however, is an indirect measure of the most relevant comparison. From the standpoint of a constitutional reformer operating under a particular constitution, the most relevant comparison is between the costs and benefits of informal reform and the costs and benefits of formal amendment *under that constitution*.

If we focus on that comparison, we can imagine scenarios where reformers might elect informal processes over formal amendment even when formal amendment is comparatively easy. An individual suffering the deprivation of a previously unrecognized civil right, for example, might view a transformative court ruling recognizing a new civil liberty in her particular circumstances as a more desirable pathway to change than a generalized formal amendment that is subject to the contingencies of future enforcement discretion and the uncertainties of judicial interpretation in someone else's case. In other words, the forces that act on the pathways of constitutional change can be highly contextual.

Frequent formal amendment might also alter the rules of the game for constitutional reformers. Every new formal

25. See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1460–63 (2001).

26. The classic example of this general methodology is Donald Lutz's 1994 study. Lutz, *supra* note 18, at 358 ("A low amendment rate associated with a long average constitutional duration strongly implies the use of some alternate means of revision to supplement the formal amendment process.").

amendment will create political winners and losers—those who supported the amendment and those who opposed it. If we assume that the losers are unlikely to simply give up after the amendment is adopted, then they are likely to find ways to limit the amendment by influencing how it is enforced and interpreted. This might spawn a series of informal changes that chip away at the amendment's original effect. This in turn can instigate responsive formal amendments. The result of this back-and-forth is an acceleration of formal and informal changes.²⁷

All of these factors (and surely some others) suggest that the interaction between formal and informal processes of constitutional change is complex; perhaps even to the point of being mysterious. It can be hard to predict exactly how constitutional change will percolate through any given set of institutions under any particular set of circumstances. Many forces act on the pathways of constitutional change, and the study of comparative constitutional design should respect and account for this complexity if it hopes to reliably inform the design of amendment processes.

This Essay has three parts. In Part I, I briefly describe prevailing notions regarding the interaction between formal and informal processes of constitutional change. In Part II, I explore some of the underappreciated factors that might act on the pathways of constitutional change. Finally, I conclude by considering what this complexity might mean for the field of comparative constitutional design.

I. THE PREVAILING HYDRAULICS ANALOGY²⁸

In an influential article, Professor Heather Gerken

27. See Gabriel L. Negretto, *Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America*, 46 L. & SOC'Y REV. 749, 756 (2012) (finding evidence of this dynamic in several Latin American countries).

28. This Part is not intended to provide an exhaustive summary of the literature on this subject. It is only meant to illustrate the dominant perspective reflected in much of the literature.

analogized the pathways of constitutional change to the operation of hydraulics.²⁹ In this analogy, pressures for constitutional change push reform towards the least restrictive pathway.³⁰ If formal amendment is easy, reform will likely manifest in changes to the constitutional text.³¹ If formal amendment is onerous, however, change will be re-routed into informal processes.³²

Professor Gerken's article was important because it provided a useful way to think strategically about amendment design. She specifically emphasized that the hydraulics metaphor was helpful in assessing proposed reforms to Article V's amendment process.³³ She argued that proposals to liberalize Article V's strictures must account for the corresponding reduction in informal change that would likely follow.³⁴ In other words, if the pathways of constitutional change are connected like hydraulic chambers, blocking one chamber will necessarily divert the flow of constitutional change towards other less obstructed chambers, and, conversely, unblocking a chamber will necessarily reduce flow through alternative chambers. This analogy is useful from the standpoint of constitutional design because it focuses designers on the normative question of why constitutional change should be directed toward one or another pathway.

Professor Gerken's analogy is likely a very accurate account of constitutional change under the U.S. Constitution. However, as I have noted elsewhere, the

29. Gerken, *supra* note 18, at 927, 933.

30. *Id.* at 937.

31. *See id.*

32. *See id.*

33. *Id.* at 933.

34. *Id.* at 927. ("What I want to suggest . . . is that by blocking most formal amendments, Article V effectively redirects those constitutional energies into different, potentially more productive channels. If there are benefits to channeling constitutional discourse through the informal amendment process, then the case for [liberalized formal amendment] is more complex . . .").

American experience is probably a poor sample from which to extrapolate broader theories regarding the interaction between formal and informal amendment.³⁵ Article V's amendment process is a global outlier and unrepresentative of how most national constitutions structure the amendment power.³⁶ The U.S. Constitution is also an incomplete representation of American public law because it excludes state constitutions, which operate very differently but are essential to the constitutional structure. One would think, therefore, that broader theories of comparative constitutional design would be based on more nuanced and representative ideas.

The dominant view amongst constitutional designers and consultants, however, seems to track Professor Gerken's hydraulics metaphor rather closely. The Institute for Democracy and Electoral Assistance, for example, has issued a "constitution-building primer" addressing the design of formal amendment rules.³⁷ Although the primer references various factors that might affect the trajectory of constitutional change, it concludes that, "[i]n general, the more difficult it is to formally amend the constitution, the more likely it is that adjustments will be made through judicial interpretation."³⁸ Similarly, the Venice Commission's 2009 Report on Constitutional Amendment asserts:

The more difficult it is to amend a given constitution, the more likely it is that calls for change will be channeled into legal action, and the more likely the courts will be to follow such invitations. This will in turn reduce the need for formal amendment. On the other hand, in a system with flexible rules on amendment, the need for dynamic judicial interpretation will be less, and so often also the

35. See Marshfield, *Courts and Informal Constitutional Change*, *supra* note 20, at 19–20.

36. See David S. Law & Mila Versteeg, *The Declining Influence of The United States Constitution*, 87 N.Y.U. L. REV. 762, 807 (2012).

37. INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, CONSTITUTIONAL AMENDMENT PROCEDURES 1 (2014).

38. *Id.* at 13.

legitimacy. The interaction and possible mutual compensation effects between the two are complex, and clearly varies from country to country.³⁹

This general guidance has not been lost to constitution makers around the world. There is mounting evidence that constitutional designers craft flexible amendment procedures with the aspiration of limiting informal processes of constitutional change.⁴⁰

Scholars have also tended to assume a rather generic relationship between formal amendment frequency and informal change. Donald Lutz conducted a well-known study that is illustrative in this regard.⁴¹ Lutz sought to understand how variations in the design of formal amendment rules affect the actual practice of constitutional change.⁴² He aspired “to provide guidelines for constitutional design in any context—guidelines that will allow framers to link the design of a formal amendment process securely to desired outcomes.”⁴³ To do this, Lutz studied amendment rates under all fifty state constitutions as well as thirty national constitutions from high-functioning democracies.⁴⁴

Through his research, Lutz found a correlation between the frequency of formal amendment and certain design features in formal amendment rules.⁴⁵ He also found a correlation between formal amendment frequency and constitutional lifespan.⁴⁶ Lutz did not find, however, any empirical support for the idea that amendment frequency

39. VENICE COMM'N, REPORT ON CONSTITUTIONAL AMENDMENT 22–23 (2009).

40. See Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV. 657, 660 (2016).

41. See Lutz, *supra* note 18, at 356–57.

42. *Id.* at 355.

43. *Id.* at 357.

44. *Id.* at 355, 357.

45. *Id.* at 358.

46. *Id.* at 358.

and informal change are systematically connected in the way suggested by Professor Gerken's hydraulics analogy. He nevertheless concluded that "the lower the rate of formal amendment, the more likely the process [of constitutional change] is dominated by a judicial body."⁴⁷ This conclusion was supported only by an anecdotal "observation that the United States has both a low amendment rate and a judiciary that uses interpretive means to effect constitutional change."⁴⁸ Indeed, subsequent studies have noted that although Lutz hypothesized a negative correlation between formal amendment and informal change, "this proposition is one that we need to take on faith."⁴⁹

In sum, the dominant approach to the relationship between formal amendment frequency and informal change is to assume a rather generic and general inverse relationship between the two. If formal amendment is easy and frequent, informal change is likely minimal and presumed to be unnecessary. Conversely, if informal processes dominate change, this is presumed to be caused by blocked processes of formal amendment. Although these dynamics might explain constitutional change in some countries, they beg for a more critical and nuanced analysis.

II. SOME UNDERAPPRECIATED INFLUENCES ON CONSTITUTIONAL CHANGE

High barriers to formal amendment are surely a relevant factor in understanding how constitutional change is directed, but I am skeptical that it is the only meaningful factor in many constitutional democracies. Constitutional reformers might prefer informal processes of constitutional change for a variety of reasons unrelated (or at least indirectly related) to high barriers to formal amendment. If

47. *Id.* at 365.

48. John Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 *LAW & SOC. INQUIRY* 501, 525 (1997) (critiquing Lutz).

49. *Id.*

this is true, constitutional design strategies need to rely less on a simplistic hydraulics theory of constitutional change and work to demystify the other factors influencing change. In this Part, I suggest a few alternative factors that might be at work in this regard: (1) constitutional maturity and culture; (2) hydraulics from the reformer's perspective; and (3) political strategy.

A. *Constitutional Maturity and Culture*

All else being equal, the pathways of constitutional change might be influenced by a society's constitutional maturity and political culture. David Strauss famously argued that formal amendment is largely irrelevant in "a mature democratic society."⁵⁰ He explained that when democracies are young, formal texts are more important for fostering the rule of law because young democratic societies do not yet have a shared understanding for how to conduct politics.⁵¹ Written texts help develop this trust and public understanding by providing a common point of reference for ordering politics.⁵² By this logic, codification of constitutional law is a high priority in the early stages of a democracy because textual amendments build trust and understanding by making constitutional law explicit.

Conversely, as a society matures around democratic principles, it operates more like parties to a "long-term contractual agreement" where the parties do not require every change in their day-to-day dealings to be put in writing.⁵³ Instead, they develop extra-textual understandings that flow from their frequent and continuous interactions.⁵⁴ Thus, according to Strauss, "in a mature society, people accept the acts of legislatures, courts, and

50. Strauss, *supra* note 25, at 1460.

51. *Id.* at 1462.

52. *Id.* at 1460–61.

53. *Id.* at 1462.

54. *Id.* at 1462.

executive agencies—and the political and non-political acts of their fellow citizens—even when those acts augment or arguably conflict with the foundational text.”⁵⁵

Although I am doubtful of Strauss’s ultimate conclusion that formal amendments are irrelevant, his suggestion that formal amendments become less salient as constitutional democracies mature seems plausible. To be sure, even mature democracies can experience crises that re-invigorate the salience of formal amendments (the Reconstruction Amendments are perhaps an example of this); but it seems plausible that mature constitutional democracies tend to handle more constitutional change through informal processes than do fledgling democracies.

Strauss’s claim is difficult to assess empirically. Amendments to the United States Constitution have certainly decelerated over time.⁵⁶ Other mature democracies, however, display different trends. Norway, for example, has the second oldest national constitution in the world, but there were only two amendments during the constitution’s first thirty-six years.⁵⁷ After those initial decades, Norway’s amendment activity increased and remains at a rather stable rate of about one amendment event every 2.4 years.⁵⁸ Indeed, the longest gap between amendments during that period was nine years and the median gap between amendments was

55. *Id.*

56. Albert, *supra* note 8, at 1045 (“The pace of formal amendment in the United States is decelerating.”). There are, of course, many alternative explanations for this. See Rosalind Dixon, *Partial Constitutional Amendments*, 13 U. PA. J. CONST. L. 643, 651–64 (2011) (explaining that the addition of new states has effectively increased the thresholds for ratification and proposal under Article V).

57. Data for these calculations are from Comparative Constitution Project database. ZACHARY ELKINS ET. AL., *COMPARATIVE CONSTITUTIONS PROJECT: CHRONOLOGY OF CONSTITUTIONAL EVENTS* (2014), <https://www.comparativeconstitutionsproject.org/chronology>. [hereinafter *Chronology of Constitutional Events*].

58. *Id.*

two years.⁵⁹ In any event, Strauss raises the possibility that even if barriers to formal amendment are low, constitutional maturity might foster a general disinterest in formal amendment and a preference for informal processes.⁶⁰

Constitutional culture might also affect the pathways of change. Societies can develop idiosyncratic collective preferences for how they prefer to manage constitutional reform.⁶¹ Japan's experience with formal amendment is suggestive of this phenomenon. The legal barriers to formal amendment of Japan's constitution are relatively low; an amendment can be proposed by a two-thirds majority in both legislative chambers and ratified by a simple majority in a national referendum.⁶² Despite this, Japan has never formally amended its seventy-one-year-old constitution, preferring instead to manage constitutional change through informal processes.⁶³ This is somewhat striking when one considers that other, much younger, constitutions with identical amendment processes have been amended.⁶⁴

Greece and Ireland provide further examples. In Greece, although barriers to formal amendment are relatively high, “[p]ersistent constitutional violations before the enactment of the current Constitution of 1975” have resulted in a strong public preference for “formal constitutional procedure.”⁶⁵ In Ireland, formal amendment is relatively easy, but much

59. *Id.*

60. *Id.*

61. See Ginsburg & Melton, *supra* note 21, at 20–23.

62. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 96, para. 1 (Japan).

63. See ELKINS ET AL., *supra* note 57.

64. Examples of countries with similar amendment procedures include: Peru (seven amendments since adoption in 1993); Albania (two amendment since adoption in 1998), Paraguay (one amendment since adoption in 1992). See ELKINS ET AL., *supra* note 57.

65. Xenophon I. Contiades & Ioannis Tassopoulos, *Constitutional Change in Greece*, in ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA [hereinafter ENGINEERING] 151, 157 (Xenophōn Contiades ed., 2013).

constitutional change has occurred through constitutional litigation.⁶⁶ According to Fiona de Londras and David Gwynn Morgan, the legislature has used flexible amendment rules primarily to review constitutional changes endorsed by the courts and not to affirmatively make changes.⁶⁷ They describe a culture where the legislature defers to the courts to initiate changes through constitutional adjudication, and the legislature then benefits from the opportunity to either gain political support by overriding unpopular judicial changes or avoid direct involvement in controversial issues by allowing the courts to resolve political landmines.⁶⁸ Other examples exist, but the main point is that constitutional culture can sometimes affect the pathways of constitutional change notwithstanding otherwise low barriers to formal amendment.

B. *Hydraulics—but from the Reformer’s Perspective*

Even if we assume that constitutional change will flow toward the least restricted pathway, measuring the costs and benefits of formal and informal change can be tricky. This is because the assessment is most relevant when conducted from the reformer’s perspective and not by comparing amendment rates across jurisdictions. The core idea underlying the hydraulics theory is that change is directed by reformers who select the pathway to change that presents the fewest barriers to their desired outcome. If this is true, then the pathways of constitutional change are highly dependent on the circumstances and objectives of the particular reformer seeking change.

This point is perhaps most relevant to informal change of individual rights through constitutional litigation. It seems plausible that even under the most flexible

66. See Fiona de Londras & David Gwynn Morgan, *Constitutional Amendment in Ireland*, in *ENGINEERING*, *supra* note 65, at 179–80.

67. See *id.* at 186–88.

68. See *id.* at 184.

constitutional texts, reformers seeking change in the area of civil liberties might pursue transformative judicial rulings rather than formal amendments. Changes in civil rights often pit minority groups against a majority refusing to recognize protections for new groups. This dynamic can make formal amendment a risky and difficult business for civil rights reformers, even when barriers to formal amendment are relatively low. Formal change requires the political branches to mobilize around a policy, generalize that policy in constitutional language, and secure popular support for the change. Minority groups seeking protection from majoritarian policies might understandably find these dynamics too costly or even unsurmountable. They might also fear that generalized constitutional language can be easily evaded once implemented by the political branches.

Constitutional litigation, on the other hand, might provide a much more attractive forum for pursuing civil rights change. Courts may be relatively more sympathetic to minority interests because they are generally tasked with checking the political branches through the enforcement of individual rights. Courts are also likely to resolve constitutional issues with sensitivity to the interests of the individual litigants because courts ostensibly aim to adjudicate discrete disputes rather than codify generally applicable rules. This also means that litigants gain the advantage of arguing for the specific relief that they want under their particular circumstances.⁶⁹

These considerations highlight just how contextual the real hydraulics of constitutional change can be. Relatively frequent formal amendment may not reveal the whole picture. Constitutional change is likely directed by factors unique to particular reformers and perhaps the subject-matter of the reform itself.

69. Of course, the reverse is likely true. If courts do not enjoy independence from the political branches or they are not accessible to litigants, constitutional litigation might be too costly as a process of change.

There is some anecdotal evidence to support these ideas. Several European countries that experience frequent formal amendment nevertheless report that changes in constitutional rights tend to occur through constitutional litigation.⁷⁰ Manfred Stelzer has documented this phenomenon in Austria,⁷¹ and Tuomas Ojanen observes something similar in Finland.⁷² Fiona de Londras and David Gwynn Morgan note that although the Irish Constitution is relatively easy to amend, the Irish Supreme Court has been especially active in developing individual rights.⁷³

I have also found evidence of this under state constitutions in the United States. State constitutions are among the most frequently amended constitutions in the world.⁷⁴ On aggregate, current state constitutions have been amended more than 7,400 times.⁷⁵ In a recent study, I compared formal amendments under state constitutions to instances where state high courts independently changed constitutional rules by overruling state constitutional precedent.⁷⁶ I found that on issues related to individual rights, courts were more active in constitutional change than formal amendment processes.⁷⁷ This suggests that changes in constitutional rights might be uniquely suited to informal change through constitutional litigation. More importantly,

70. See Marshfield, *Courts and Informal Constitutional Change*, *supra* note 20, at 20–22 (discussing these examples).

71. See Manfred Stelzer, *Constitutional Change in Austria*, in *ENGINEERING*, *supra* note 65, at 12, 14.

72. See Tuomas Ojanen, *Constitutional Amendment in Finland*, in *ENGINEERING*, *supra* note 65, at 107.

73. See de Londras & Morgan, *supra* note 66, at 183 (noting that the Supreme Court of Ireland has “deduced” “substantial unremunerated personal rights” to the extent of “about 20 aspects of protections of the person and personality, including rights to privacy, to bodily integrity, and freedom from torture.”).

74. Marshfield, *Courts and Informal Constitutional Change*, *supra* note 20, at 4.

75. *Id.*

76. See *id.* at 3–7.

77. *Id.* at 6.

these findings provide indirect support for the idea that the hydraulics of constitutional change are contextual.

C. Political Strategy in a Frequent-Amendment Game

Another underappreciated influence on constitutional change is the effect that frequent formal amendment might have on political strategy. Under prevailing theories, formal and informal change are assumed to be alternative mechanisms for addressing the same pressures for change. The two pathways compensate for each other. Thus, if change occurs through informal methods, then pressures for a related formal change presumably subside. This account makes sense under a rigid constitutional text where formal amendment pathways are blocked. Under those conditions, constitutional change will occur almost exclusively through informal processes without any opportunities for interaction between formal and informal changes.

These two pathways might have a more complicated relationship if formal amendment is frequent. Gabriel Negretto has theorized, for example, that formal and informal methods of constitutional change may actually proliferate each other.⁷⁸ He explains that in a system where the courts have strong powers of judicial review and the constitution is amended frequently, judicial involvement in constitutional change may accelerate as formal amendments increase.⁷⁹ This is because new constitutional provisions will generate more constitutional litigation challenging legislation and executive action. Cases resolving those disputes will likely generate more formal amendments overriding controversial judicial rulings, which will in turn generate a new series of constitutional cases, and so on.

Negretto's proliferation theory aligns with basic political strategy. When opponents of a formal amendment lose, they

78. See Negretto, *supra* note 27, at 761.

79. See *id.* at 750.

will likely pursue their agenda in court by testing the limits of the formal amendment. This will result in courts using their power of judicial review to uphold or strike challenged government action. If proponents of the original amendment are threatened by those rulings, they will likely pursue responsive formal amendments, restarting the process. Because both pathways of constitutional change are open and accessible, they provide a “winners’ forum” and a “losers’ forum” that can perpetuate the debate.

Negretto tested his hypothesis using data from eighteen Latin American countries from 1946–2008, and found support for his theory that formal amendment flexibility can increase informal change through judicial review.⁸⁰ Similarly, in another recent study of state constitutional change in the United States, I found evidence of a catalyzing effect between formal and informal amendment.⁸¹ I discovered that in states with relatively high rates of formal amendment (e.g., California, Texas, Alabama, Oklahoma), courts often remain relatively more active in constitutional change.⁸² These findings support the idea that formal and informal processes of constitutional change are not always mutually exclusive alternatives. They can interact with and catalyze each other—especially in jurisdictions where both pathways to change remain open.

CONCLUSION—IMPLICATIONS FOR CONSTITUTIONAL DESIGN

Constitution makers around the world have embraced the possibility of designing amendment rules that can effectively direct and manage constitutional change. But many mysteries remain. Constitutional change is directed by

80. *Id.* at 774 (“The strength of constitutional adjudication is positively and significantly correlated with the rate of amendments. This provides prima facie evidence that amendments and constitutional adjudication . . . may reinforce or complement each other as means of constitutional adaptation.”).

81. See Marshfield, *Amendment Effect*, *supra* note 20, at 47, Fig. 2.

82. See *id.*

diverse forces that are often underappreciated, highly contextual, and sometimes interactive. Democratic maturity, constitutional culture, and political strategy are just a few of the forces that likely act upon the direction of constitutional change.

The field of constitutional design is united around a core idea: the formal structure of political institutions can influence the actual practice of politics. This idea energizes the study of how best to design constitutions under varying circumstances and given varying objectives. In this regard, the field of constitutional design must respect the understudied influences on constitutional change. In many countries, constitutional change cannot be reliably managed based on a general hydraulics theory. The interaction between formal and informal processes of change demands more rigorous investigation and nuanced conceptualization. There are many mysteries to constitutional change, but they can surely be demystified if we respect the complexity that likely drives the process.