

THE HYDRAULICS OF CONSTITUTIONAL REFORM: A SKEPTICAL RESPONSE TO *OUR UNDEMOCRATIC CONSTITUTION*

*Heather K. Gerken**

TABLE OF CONTENTS

I. Introduction	925
II. The Process of Informal Constitutional Amendment.....	929
III. The Benefits of Informal Amendment	933
A. Common Threads in the Literature	934
B. The Ongoing Contestability of Constitutional Law	937

I. INTRODUCTION

Sandy Levinson’s latest book, *Our Undemocratic Constitution*¹ reveals Levinson at his most provocative and engaging. We are trapped, he tells us, in the “iron cage” of Article V. Our Constitution is in desperate need of amendment due to structural flaws that are hard-wired into the text of the Constitution.² In order to avert the many crises Levinson describes, we must hold a constitutional convention.³

Though the bulk of the book is devoted to what Levinson has elsewhere termed “constitutional stupidities,”⁴ Levinson’s real quarrel is

* Professor of Law, Yale Law School. A.B., Princeton University, 1991; J.D., University of Michigan, 1994. Many thanks to Bruce Ackerman, Jack Balkin, Daryl Levinson, Reva Siegel, and Adrian Vermeule for helpful comments and suggestions. Excellent research assistance was provided by Sarah Burg, Elyse Cowgill, Scott Grinsell, Matthew McKenzie, and Jennifer Nou.

1. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006).

2. *See id.* at 167–68 (summarizing the constitutional provisions that Levinson argues are undemocratic).

3. *Id.* at 173–75.

4. CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N.

with Article V, which he argues “brings us all too close to the Lockean dream (or nightmare) of changeless stasis.”⁵ The book is replete with references to Article V as a “cage,”⁶ even an “iron cage—with its almost kryptonite-like bars.”⁷ When one reads the book, especially its mournful concluding chapter admitting that little can be done,⁸ it is hard to escape the conclusion that if we loaned Levinson a constitutional eraser, Article V would instantly disappear. If I am overreading Levinson, then at the very least I take it that he wants to do anything possible to make constitutional conventions easier to hold, whether that means developing a tradition of having regular constitutional conventions, as Jefferson proposed,⁹ or loosening what are conventionally perceived as the strictures of Article V.¹⁰

The usual rejoinder to supporters of the Jeffersonian model is that, despite Article V, the Constitution has proved remarkably adaptive over the years due to the “informal amendment process”—the many ways in which the judicial and political process interact to forge constitutional meaning. Levinson, however, is too sly an academic fox to ignore this obvious move, so he limits his claims to what he identifies as the all-but-immutable portions of the Constitution’s text: Article II, life tenure for federal judges, the allocation of senatorial seats, the Electoral College.¹¹ For these provisions, Levinson tells us, the informal amendment process is off the table.¹² And if we agree with Levinson’s case against these immutable provisions, how could we possibly resist his call for formally amending the Constitution?

What I want to suggest in this Article is that Levinson cannot take the

Eskridge, Jr. & Sanford Levinson eds., 1998).

5. LEVINSON, *supra* note 1, at 21.

6. *See, e.g., id.* at 20.

7. *Id.* at 165.

8. *Id.* at 167–80.

9. *Id.* at ix (quoting Letter from Thomas Jefferson to Samuel Kercheral (July 12, 1816), in *THE PORTABLE THOMAS JEFFERSON 1397–1402* (Merrill D. Peterson ed., 1979)); *id.* at 17 (arguing that the book “is written in a Jeffersonian vein”).

10. *Id.* at 177 (endorsing Akhil Reed Amar’s argument that a constitutional convention would be binding if its proposals were ratified by a national referendum). Amar’s argument is laid out in Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *COLUM. L. REV.* 457 (1994) and Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 *U. CHI. L. REV.* 1043 (1988).

11. *See* LEVINSON, *supra* note 1, at 167–68 (listing the author’s principal grievances with the Constitution).

12. *Id.* at 23.

informal amendment process off the table so easily. The problem with Levinson's argument is that it ignores the ways in which the informal amendment process is *linked* to the formal amendment process. Eliminating the "kryptonite-like bars" of Article V might well undermine the informal amendment process in ways we would find significant if we are fans of the latter.

The argument rests on a hydraulics metaphor. If we assume there exists an impulse for constitutional reform, Levinson's argument could not be more straightforward. Article V has blocked our constitutional reform energies, preventing their release, and he wants to throw open the gate and allow those impulses to take their most natural path—formal constitutional amendment. What I want to suggest, in contrast, is that by blocking most formal amendments, Article V effectively redirects those constitutional energies into different, potentially more productive channels.¹³ If there are benefits to channeling constitutional discourse through the informal amendment process, then the case for a constitutional convention is more complex than Levinson presents.

This is not, then, an argument about the unexpected consequences of tinkering with the constitutional text;¹⁴ for these purposes I am willing to stipulate that all the fixes Levinson seeks will emerge from his imagined

13. Donald Lutz has found modest indirect evidence for the idea that a difficult formal amendment process is correlated with an informal process of revision dominated by the judiciary. Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355 (1994); see also Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law* 19 (Univ. of Chi. Pub. Law & Legal Theory, Working Paper No. 73, 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=590341 ("The alternative to constitutional amendment is not, as generic arguments often imply, a stable subconstitutional order; the alternative is continual judicial updating of the Constitution through flexible common law constitutionalism"); *id.* at 24 ("the amendment process" and "judge-made constitutional law" are "at least partial substitutes").

14. Adrian Vermeule has questioned whether Levinson's imagined constitutional convention would succeed. He notes that many of the constitutional provisions Levinson wishes to amend represent strategies to offset other problems that Levinson identifies and asks whether one can reasonably expect a first-best constitutional scheme to emerge from a convention. Adrian Vermeule, *Second-Best Democracy*, 1 HARV. L. & POL'Y REV. (Online) (Dec. 4, 2006), http://www.hlpronline.com/2006/11/vermeule_01.html. For a good example of this line of argument generally, see Kathleen M. Sullivan, *What's Wrong with Constitutional Amendments?*, in GREAT AND EXTRAORDINARY OCCASIONS: DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE 39 (1999). For a critique of the generic argument, see Vermeule, *supra* note 13, at 18–39.

constitutional convention. This is not an argument designed to resist Levinson's central premise;¹⁵ like Levinson's thesis, my argument begins with the assumption that some parts of the Constitution—though perhaps not the ones he identifies¹⁶—are all but impossible to change save through formal amendment. Nor is this an effort to quibble with Levinson's claims about the problems with the current scheme, though I have quibbles aplenty. The point of this Article is simply that, even taking Levinson's arguments on their own terms, Levinson does not give us a full accounting of the costs of his proposal—those that stem from redirecting our reform impulses into formal rather than informal channels. And because there are many things we might like about the process of informal constitutional amendment—including the fact that it helps ensure the ongoing contestability of constitutional law—Levinson's omission is worth noting.

Put more simply, despite the existence of a constitutional text, a surprising amount of American constitutionalism bears a close resemblance to Great Britain's textless constitutionalism.¹⁷ For those instances when it does not—when a textual commitment makes it difficult for constitutional meaning to adapt—Levinson suggests we turn to the French model, which involves semi-regular constitutional redrafting. What I suggest here is that if we think there is anything to admire in the British process, moving to the French model may undermine it.

One caveat is in order. What I offer here is not only an abbreviated sketch of the values associated with the informal amendment process, but a utopian one. Because Levinson has offered us a utopian vision about the way the formal amendment process will work, I sketch the opposite extreme. My point, of course, is not that my utopian vision is the right one (or that its non-ideal version is superior in practice to a non-ideal formal amendment process).¹⁸ I simply want to suggest that the truth lies somewhere in between our two accounts.

15. David Strauss has certainly made a strong case for rejecting this premise. See, e.g., David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001). But see Vermeule, *supra* note 13, at 53–54 (“Amendments can and often do sharply constrain interpretation within certain boundaries”) (citation omitted).

16. I suspect, for instance, that Article II is general enough to be susceptible to informal amendment strategies.

17. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (discussing the prevalence of extra-constitutional principles in American constitutionalism).

18. For an example of this type of comparative assessment see Vermeule, *supra* note 13 (comparing formal amendments to judicial updating).

Part I explains what I mean by the phrase “informal amendment process.” Part II sketches a few reasons why we might value the informal amendment process, dwelling in particular on the fact that it helps ensure the ongoing contestability of constitutional law. Because it is hard for judges to define the precise content of informal amendments and even harder for judges to acknowledge their existence, informal amendments occupy an odd constitutional status. They make it hard for anyone to claim access to an authentic account of constitutional meaning. Informal amendments thus “problematize” constitutional debates in the same way that Bruce Ackerman claims that the separation of powers “problematizes” representation.¹⁹ Just as the existence of other representative institutions makes it difficult for any branch to claim to be the authentic voice of the People, so too do the vagueness and quasi-illicit status of informal amendments make it difficult for anyone to claim unique access to the “right” understanding of the Constitution. And we might value the fact that constitutional law remains contested and contestable for many reasons, including some that ought to appeal to Levinson himself.

II. THE PROCESS OF INFORMAL CONSTITUTIONAL AMENDMENT

Anyone who was awake in law school is aware that constitutional meaning has evolved over time even as the text has not. The most widely recognized means for effecting that change is, of course, judicial interpretation. While there has long been a merry war between protagonists of the “living Constitution” and self-described “originalists” as to whether it is legitimate for constitutional meaning to evolve this way,²⁰ I take it that no one doubts that it has done so.

In recent years,²¹ we have seen the emergence of more ambitious and complex accounts of what I refer to as “the informal amendment process”—the alteration of constitutional meaning in the absence of textual change.²² While it is exceedingly difficult to divide this work into neat

19. See *infra* text accompanying notes 76–77.

20. It would, of course, be impossible to do justice to this long-standing debate in a footnote. For a useful primer, see Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998).

21. “Recent” is a relative term, as several scholars have traced these movements at least back to Karl Llewellyn. See, e.g., Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. (forthcoming Dec. 2007).

22. Only some of this work is explicitly devoted to the informal amendment process. The work of Reva Siegel and Robert Post, cited *infra* notes 26 & 27, for instance, focuses on the ways social movements and other socio-political forces shape constitutional culture, a question that may or may not involve informal amendment.

categories,²³ these accounts go beyond the notion that the Constitution must be updated by judges to keep pace with current events, which is the premise underlying much work on the “living Constitution.” Though these scholars generally acknowledge a judicial role, they suggest that the evolution of constitutional meaning is a richer, more complex project than one in which judges self-consciously adapt broad constitutional mandates to new circumstances. On many of these accounts, while judges often acquiesce to or unconsciously incorporate constitutional change, the real work of amendment is done largely by nonjudicial actors.

Bruce Ackerman’s notion of “constitutional moments” is the best known account of the informal amendment process.²⁴ But competing examples abound in the work of Bill Eskridge and John Ferejohn,²⁵ Reva Siegel,²⁶ Robert Post,²⁷ Larry Kramer,²⁸ Jack Balkin,²⁹ Neal Devins and

For a useful discussion of this distinction, see Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 302–03 (2001) [hereinafter Siegel, *Text in Contest*].

23. The rough dividing line I have in mind is something like this: The “living Constitution” scholars tend to focus mostly on the courts and imagine that judges will self-consciously update the Constitution in light of evolving societal norms. Scholars of the “informal amendment process” envision a process that is generally less court-centered, and their treatment of the judicial role tends to be heavily dependent on sociological, social-psychological, or hermeneutic accounts. Even with this rough cut it would be difficult to place scholars neatly in one camp or another, and there are certainly other useful ways to describe the differences in these two lines of scholarship. Levinson himself, for instance, offers a distinction between “interpretation” and “amendment,” while “cheerfully conced[ing] serious doubt that anyone can supply formal criteria by which to distinguish the two.” Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change, in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 13, 33 (Sanford Levinson ed., 1995). Similarly, Keith Whittington maps constitutional deliberation along a continuum that includes interpretation, construction, and creation. KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 4 (1999).

24. See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*]; Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007).

25. William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

26. See, e.g., Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003) [hereinafter Post & Siegel, *Legislative Constitutionalism*]; Robert C. Post & Reva B. Siegel, *Protecting the*

Louis Fisher,³⁰ Stephen Griffin,³¹ Mark Tushnet,³² Barry Friedman,³³ and Sandy Levinson himself,³⁴ just to name a few of the most influential scholars to have written in this area.³⁵ We even see discussions of the

Constitution from the People: Juricentric Restrictions on Section Five Power, 78 IND. L. J. 1 (2003); Robert C. Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash* (42 HARV. C.R.-C.L. L. REV., Working Paper No. 131, forthcoming 2007), available at http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=990968 [hereinafter Post & Siegel, *Roe Rage*]; Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323 (2006) [hereinafter Siegel, *de facto ERA*]; Siegel, *Text in Context*, *supra* note 22, at 302–03.

27. See, e.g., Robert C. Post, *The Supreme Court, 2000 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2002); see also sources cited *supra* note 26.

28. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959 (2004) [hereinafter Kramer, *Circa 2004*].

29. See, e.g., Jack M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935 (1995) (reviewing CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993)); Jack M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998); Jack M. Balkin & Sanford V. Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State* (Yale Law Sch., Working Paper No. 120, 2006), available at http://ssrn.com/sol3/papers.cfm?abstract_id=930514 [hereinafter Balkin & Levinson, *Processes*]; Jack M. Balkin, *Respect-Worthy: Frank Michelman and the Legitimate Constitution*, 39 TULSA L. REV. 485 (2004) [hereinafter Balkin, *Respect-Worthy*]; Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001) [hereinafter Balkin & Levinson, *Constitutional Revolution*]; Balkin & Siegel, *supra* note 26.

30. See, e.g., NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* (2004).

31. See, e.g., STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* (1996).

32. See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) [hereinafter TUSHNET, *AWAY FROM THE COURTS*]; MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003) [hereinafter TUSHNET, *CONSTITUTIONAL ORDER*].

33. Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003); Friedman & Smith, *supra* note 20.

34. See sources cited *supra* note 29.

35. For these purposes, I exclude the work of scholars like Robin West, who shares many of the commitments of the scholars above but resists the normative claim that we should frame important moral debates in constitutional terms. See, e.g., Robin West, *Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel*, 94 CAL. L. REV. 1465 (2006) [hereinafter West, *Constitutional Culture*]; Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127 (2006).

informal amendment process in the work of scholars like Keith Whittington,³⁶ who began his career writing about originalism;³⁷ David Strauss,³⁸ whose emphasis on the judicial role in changing constitutional meaning distances him from many of the authors cited above; and Akhil Amar,³⁹ well known for his “intratextualist” approach.⁴⁰ Perhaps signaling that the end of the world is nigh, even Ernie Young—a self-proclaimed member of the “law and law” movement—is publishing a piece on “The Constitution Outside the Constitution” in the *Yale Law Journal* this fall.⁴¹

It is, of course, terribly imprecise to lump all of these ideas into a single category given the marked differences among them. While virtually all of the scholarship on the informal amendment process focuses on the complex interaction between popular energies and institutional actors, the work is differently inflected. Some of this scholarship places emphasis on the role of the people, particularly the role of social movements, in changing constitutional meaning;⁴² other work highlights the role institutions and elites play in shaping our understanding of the Constitution.⁴³ Some of this work is primarily descriptive;⁴⁴ other work has a substantial normative component.⁴⁵ Some of this work retains the focus

36. Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002) [hereinafter Whittington, *Extrajudicial Interpretation*]; WHITTINGTON, *supra* note 23.

37. KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999).

38. Strauss, *supra* note 15; Strauss, *supra* note 17. Strauss is often excluded from this cohort because he emphasizes the judicial role in shaping constitutional meaning, whereas most of the other scholars in this cohort tend to downplay or resist that role. See, e.g., Siegel, *Text in Contest*, *supra* note 22, at 297–301. Strauss’s analysis of the relationship between socio-cultural change and judicial incorporation is what matters for these purposes, however, and this scholarly division about the precise nature of the judicial role is a subsidiary issue.

39. In addition to his well-known work on amendment outside of Article V—see sources cited *supra* note 10—Amar is in the process of writing a book entitled *America’s Unwritten Constitution: Between the Lines and Beyond the Text*.

40. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

41. Young, *supra* note 21. Young’s project is quite different from many of those identified above. He defines the Constitution in functional rather than formal terms, decoupling the Constitution’s entrenchment function for its constitutive and rights-conferring functions. *Id.*

42. See, e.g., sources cited *supra* notes 26–27.

43. See, e.g., sources cited *supra* note 24.

44. See, e.g., Balkin & Levinson, *Constitutional Revolution*, *supra* note 29; Siegel, *de facto ERA*, *supra* note 26.

45. See, e.g., sources cited *supra* notes 24–25. Some authors have written in

on courts that was the hallmark of earlier scholarship on the “living Constitution,”⁴⁶ whereas others reject this perspective as “juricentric.”⁴⁷ Some of this work is devoted to a different conversation than this one: much of this work focuses on whether the Court should be the exclusive interpreter of the Constitution.⁴⁸

For these purposes, however, what matters is that: (1) these disparate accounts are united by a view that constitutional change often does take place outside of Article V; and (2) there are enough common descriptive threads within this body of scholarship that we can generalize a bit about what the informal amendment process looks like in practice.

III. THE BENEFITS OF INFORMAL AMENDMENT

Once we have a sense of what the informal amendment process involves, we can turn to this Article’s central thesis about the relationship between the formal and informal amendment processes. The simple point of my hydraulics argument is that an informal amendment process exists because formal amendment is so difficult. If we could simply rewrite the Constitution whenever we thought circumstances demanded a change, why would we bother with the difficult and complex task of doing so through informal means? Levinson, of course, acknowledges the existence of the informal process but never considers the causal relationship between his main complaint—the blockage of the formal process—and the prevalence of the informal process.⁴⁹ If Levinson succeeds in what I take to be his real task—making the constitutional convention a more routine or easier path for constitutional change—I suspect we will see less political energy devoted to informally amending the Constitution. And if there is reason to value informal outlets over the formal one, then Levinson has not offered us a full accounting of the costs and benefits of his approach. For this reason, even someone who agrees with Levinson’s arguments on the immutable portions of the Constitution might not think that the formal amendment game is worth the candle.

both veins. Compare TUSHNET, *AWAY FROM THE COURTS*, *supra* note 32, with TUSHNET, *CONSTITUTIONAL ORDER*, *supra* note 32.

46. The work of David Strauss fits in this category. See *supra* notes 15, 17.

47. See, e.g., Siegel, *Text in Contest*, *supra* note 22, at 299.

48. See *discussion supra* notes 38. For an elegant synthesis of this line of scholarship, see Kramer, *Circa 2004*, *supra* note 28.

49. Levinson recognizes a link between the two, arguing that the informal amendment process has arisen in response to the difficulties involved in formal amendment, but otherwise does not dwell on the informal amendment process or the effects his proposals might have upon it. LEVINSON, *supra* note 1, at 164.

Having already indulged in some egregious lumping by grouping these varied accounts of informal amendment together under a single heading, let me offer a few equally egregious generalizations about why we might value that process and thus lose something important should we heed Levinson's prescriptions. It would, of course, be impossible to describe all of the costs and benefits of informal amendment in a full-blown article, let alone a short commentary. For this reason, I am merely going to sketch two major sets of reasons the literature already offers as to why we might value the informal amendment process in Part II.A. and then speculate as to one underappreciated reason for valuing it in Part II.B.

Before turning to these arguments, let me emphasize again that many important distinctions will necessarily be ignored or elided in the brief analysis that follows. For instance, we might think that the claims below are more or less convincing for those parts of the Constitution dealing with rights rather than structure or standards rather than rules. Or we might prefer some paths for informal amendment over others—for instance, we might disfavor judicial appointments as a strategy for change, or we might prefer informal amendments that are effected primarily through representative/law-making institutions rather than professionalized/law-interpreting ones. These and other debates have been canvassed elsewhere in detail and I do not address them here.

A. *Common Threads in the Literature*

One obvious reason that we might value the informal amendment process is that constitutional meaning emerges out of a dialogic process that involves popular mobilization and interinstitutional debate. Informal amendments are unlikely to stick, of course, without such a process.⁵⁰ It is thus not surprising that institutional conflict and popular mobilization are central to many accounts of the informal amendment process. For instance, Bruce Ackerman's account of constitutional moments famously requires a clash among national institutions to tee up an issue, followed by a national election to serve as a referendum on it.⁵¹ Bill Eskridge and John Ferejohn, who have argued that constitutional meaning is shaped by what

50. Cf. WHITTINGTON, *supra* note 23, at 219–23.

51. See ACKERMAN, TRANSFORMATIONS, *supra* note 24, at 20 (arguing that the informal amendment process involves five steps: “Constitutional Impasse → Electoral Mandate → Challenge to Dissenting Institutions → Switch in Time → Consolidating Election”). Ackerman has now restated that test in the more general terms of “signaling, proposing, triggering, ratifying, and finally consolidating”. Ackerman, *The Living Constitution*, *supra* note 24, at 1762.

they term “super-statutes,”⁵² note that they are generated by a “long deliberative history, repeated endorsement by differently constituted legislatures, multiple opportunities for critique and public feedback,” and “strong connection to the people and popular needs.”⁵³

Similarly, if one looks to the work analyzing the ways in which social movements shape constitutional meaning, we see a process that involves many people hashing out these questions in many institutional contexts. Siegel, for instance, insists that the “field of constitutional culture” includes “the formal and informal interactions between citizens and officials that guide constitutional change,” including “lawmaking and adjudication, confirmation hearings, ordinary legislation, failed amendments, campaigns for elective office, and protest marches.”⁵⁴ Balkin and Levinson describe the role that parties play in helping to “collect, filter, co-opt and accumulate the constitutional beliefs and aspirations of the party faithful, of prospective voters, and, perhaps equally crucially, of social movements.”⁵⁵

A second reason one might prefer informal to formal amendment is that change takes place through the process of accretion, an idea nicely captured by Barry Friedman and Scott Smith’s metaphor of the “sedimentary constitution.”⁵⁶ Change is recorded over time and across factual scenarios instead of encapsulated within a thin textual reference. For instance, Siegel and Post detail the ways in which movements and counter-movements interact over time to forge constitutional meaning.⁵⁷ Jack Balkin and Levinson criticize Ackerman’s idea of constitutional moments and argue that a constitutional revolution can be effected over

52. A “super-statute,” write Eskridge and Ferejohn, is “a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does ‘stick’ in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law” Eskridge & Ferejohn, *supra* note 25, at 1216. According to Eskridge and Ferejohn, “super-statutes” should enjoy a “quasi-constitutional status.” *Id.* at 1274.

53. *Id.* at 1273, 1276; *see also* Friedman & Smith, *supra* note 20, at 63–66.

54. Siegel, *de facto ERA*, *supra* note 26, at 1324–25; *see also* Balkin & Siegel, *supra* note 26, 946–50.

55. Balkin & Levinson, *Constitutional Revolution*, *supra* note 29, at 1077; *see also* Balkin & Levinson, *Processes*, *supra* note 29, at 109–12 (describing other institutional channels in which constitutional meaning is shaped).

56. Friedman & Smith, *supra* note 20, at 6; *see also* WHITTINGTON, *supra* note 23, at 314–15; Strauss, *supra* note 15.

57. *See, e.g.*, Siegel, *de facto ERA*, *supra* note 26; Post & Siegel, *Roe Rage*, *supra* note 26.

many years through “partisan entrenchment.”⁵⁸ In arguing that their account of “super-statutes” is more normatively attractive than Ackerman’s constitutional moments thesis, Eskridge and Ferejohn claim that “[a] super-statute is not a moment, nor is it even a series of moments. Rather, it is a continuing process of deliberation, consensus-building as to some issues, conflict as to other issues.”⁵⁹ Similarly, David Strauss—also distinguishing himself from Ackerman—argues that “[t]he people rule not through discrete, climactic, political acts like formal constitutional amendments, but in a different way—often simply through the way they run their nonpolitical lives, sometimes combined with sustained political activity spread over a generation or more.”⁶⁰

Many of these scholars contrast their approaches with Ackerman’s theory of constitutional moments. But even Ackerman’s constitutional moments require debate to take place over an extended period of time. “[P]opular sovereignty,” he writes, “is not a matter of a single moment; it is a sustained process that passes through a series of stages—from the signaling phase through culminating acts of popular decision to consolidation.”⁶¹ Informal amendment thus shares some of the strengths commonly attributed to common law judging, such as those having to do with contextualized decisionmaking and repeat encounters with a similar problem over time.

One might well argue that at least some of these values could emerge from the Article V process itself. Indeed, John Ferejohn and Larry Sager praise the Article V process on some of these grounds:

[T]he effort to mobilize geographically far-flung majorities [to amend the constitution] will require a sustained effort over a substantial period of time. The effort to court support or opposition in diverse political environments will select arguments most likely to succeed in those environments. The diversity of perspective thus inspired will, it can reasonably be hoped, deepen the national debate by pushing toward grounds of abstract principle and away from more particularistic considerations.⁶²

58. Balkin & Levinson, *Constitutional Revolution*, *supra* note 29, at 1066–78, 1082.

59. Eskridge & Ferejohn, *supra* note 25, at 1271.

60. Strauss, *supra* note 15, at 1505; *see also* Strauss, *supra* note 17, at 905.

61. Ackerman, *The Living Constitution*, *supra* note 24, at 1807.

62. John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1957–58 (2003); *see also* Vermeule, *supra* note 13, at 47–49. Indeed, Ferejohn and Sager draw an explicit connection between their account and that of

Amendment through the Article V process, however, is not what Levinson really wants.⁶³ And if, consistent with Levinson's proposal, we create an amendment process that makes it easier to fix the Constitution, the hydraulics of constitutional reform will redirect our energies through that easy-to-traverse formal process rather than arduous informal paths that have arguably channeled the bulk of constitutional change during the last century.

B. *The Ongoing Contestability of Constitutional Law*

Finally, even if Levinson could concoct a formal amendment process that was as normatively attractive as the informal amendment process along the lines sketched above, there may nonetheless be something distinctive about the informal amendment process that we might regret losing. In this regard, let me speculate as to one final reason we might value informal over formal amendments that holds even if Levinson's new and improved Article V can offer us many of the same benefits that the informal amendment process now provides: an informally amended Constitution ensures the ongoing contestability of constitutional law.⁶⁴

The ongoing contestability of constitutional law stems from the combined effect of two oddities that the informal amendment process generates. The first oddity is that informal amendments are exceedingly hard to define. One of the central problems for those scholars developing a normative account of the informal amendment process—those who want to entrench a particular commitment against ordinary political change—is identifying a “rule of recognition.”⁶⁵ If amendment takes place informally

Ackerman, Ferejohn & Sager, *supra* at 1958.

63. See *supra* text accompanying notes 4–12.

64. In his thought-provoking book, Michael Seidman has argued in favor of an “unsettled Constitution” and has detailed why we ought to value constitutional law's ability to upset political settlements. See L. MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* (2001). Although I suspect he thinks there is less constitutional “settlement” than I do, see *id.* 86–108, several of the arguments discussed below limn themes similar to those developed in his book. For other analyses of these themes, see Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Glenn H. Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110, 112–15 (1991); *infra* text accompanying notes 79–90. For a thought-provoking exchange on the relationship between constitutional disagreement and constitutional legitimacy, compare Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 FORDHAM L. REV. 345 (2003) with Balkin, *Respect-Worthy*, *supra* note 29.

65. See, e.g., ACKERMAN, *TRANSFORMATIONS*, *supra* note 24, at 91; Eskridge & Ferejohn, *supra* note 25, at 1266, 1275–76.

and is not embodied in an agreed-upon textual reference, how do we figure out the difference between an enduring shift in constitutional meaning and the product of ordinary politics?

Moreover, even if we can identify when an amendment has occurred, it is still difficult to know the precise content of the amendment. The kinds of constitutional commitments created by the informal amendment process may be quite difficult to distill into thin textual references.⁶⁶ For instance, if we think that the New Deal represented a constitutional moment, how precisely would we reduce the “New Deal deal” into few sentences?⁶⁷ At least on most accounts, informal amendments involve many authors engaged with many facts giving many reasons. We may even do an injustice to our constitutional commitments if we reduce them to what one of my colleagues has termed “lapidary constitutional amendments that state formulae.”⁶⁸

The second oddity about informal amendments is that constitutional meaning routinely changes, yet common understandings of the Constitution remain tied to the idea of a fixed text. The root cause of this oddity is the source of the hydraulics process itself: the rigidity of Article V makes the text seem inalterable (and thus sacred) while ensuring that the text matters a great deal less than one might think.⁶⁹

66. Cf. Vermeule, *supra* note 13, at 22.

67. See, e.g., Strauss, *supra* note 15, at 1504 (“[T]hese forms of popular rule . . . do not provide a canonical text to be scrutinized and interpreted.”). To be fair to several of the authors lumped herein, I should emphasize again that many consider their claims to be descriptive, not normative, and thus have no need to devise a rule of recognition. See, e.g., *supra* note 44 and accompanying text; Siegel, *de facto ERA*, *supra* note 26, at 1328 (“The account this Lecture offers is positive, not normative. The Lectures considers how movements can change the Constitution’s meaning outside Article V—not whether they should.”). Others privilege functional over formal analysis and thus can similarly dispense with a rule of recognition. See, e.g., Young, *supra* note 21.

68. Thanks to Bruce Ackerman for suggesting this formulation. *But see* Vermeule, *supra* note 13, at 22 (arguing that there are costs to what he terms a “prolix informal constitutional code” and insisting that “[a] complex society will produce complex constitutional law; the only real question is whether it is good to outsource constitutional complexity from the amendment process to the adjudicative process.”).

69. Cf. Friedman & Smith, *supra* note 20, at 45 (“The struggle over the question of when and whether the Constitution may be ‘amended’ outside of Article V betrays the great force that the ‘written-ness’ of our Constitution has upon our interpretation of it.” (footnote omitted)). Based on his comparative empirical work on the amendment process, Donald Lutz hints that there may be a relationship between these two phenomena. He notes that “the length of a constitution and the difficulty of amendment may be related to the relative presence of an attitude that views the

It is easy to see the dilemma that this phenomenon poses for judges. If, as Ernie Young observes, the idea of an unchanging constitutional text “contribute[s] to the almost mystical pull that the Constitution exerts on most Americans,”⁷⁰ even judges who are self-consciously trying to incorporate informal amendment can give them only begrudging acceptance.⁷¹ Indeed, precisely because the popular conception of constitutional interpretation is that it is a text we are expounding, judges often incorporate informal amendments into judicial decisions quietly and without acknowledgment, as if (as many maintain) the process of doing so is illicit.

The quasi-illicit status of constitutional amendment, combined with the difficulties inherent in devising a rule of recognition for informal amendments, means that informal amendments occupy an exceedingly odd status in our constitutional discourse. Judges are a bit embarrassed about acknowledging informal amendments, and it is hard to figure out their precise content.

One might wonder at this stage of the argument what, precisely, these claims have to do with my goal of sketching the affirmative case for the informal amendment process. What, after all, can be said in favor of vaguely defined amendments that are imported begrudgingly into constitutional analysis? Are these not the reasons we ought to prefer formal, textual changes to informal amendments?⁷²

Perhaps. But the combined effect of these two oddities upon our constitutional discourse is that they ensure the ongoing contestability of constitutional law.⁷³ An informal amendment process like our own makes

constitution as a higher law rather than as a receptacle for normal legislation” and that “the great difficulty faced in amending the U.S. Constitution” might lead to greater reliance on judicial review as an informal amendment strategy. Lutz, *supra* note 13, at 364.

70. Young, *supra* note 21.

71. On some accounts, of course, culture influences judges in ways that prevent a judge from being aware of the incorporation process.

72. Though Levinson does not engage with this precise question, he does note that the central problem with the informal amendment process is its lack of transparency. LEVINSON, *supra* note 1, at 164.

73. The idea that the ongoing contestability of constitutional law is a good thing runs contrary, of course, to a deeply felt and widely supported view in the academy about “the settlement function of the law.” For the leading exposition, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997). Witness, for instance, the skirmish over this issue that has taken place in the debate over judicial supremacy. Even those who wish to challenge judicial supremacy tend to take a defensive posture about settlement

it quite difficult for anyone to claim access to an authentic account of constitutional meaning. Not only do informal amendments all but defy efforts to pin down their meaning, but their quasi-illicit constitutional status means that judges are reluctant to acknowledge them even when we can discern their basic outlines. The result is that it is very hard for anyone credibly to claim unique access to the right answer.

Put differently, as the very premise of Levinson's argument suggests, whether or not rights are trumps, clear textual commitments tend to be.⁷⁴ The further we travel down Levinson's path—the more often we pin down precisely what kind of constitutional bargain is struck—the less contestation we will have over constitutional meaning. The informal amendment process is a settlement of sorts, at least on most accounts. But the settlement seems likely to be contestable around the edges, precisely because it is so difficult to discern its contours. (One might argue that this is equally true of general textual references,⁷⁵ but I assume here that an easier formal amendment process will result in a series of narrowly drawn constitutional fixes rather than a large increase in general textual commitments—that is, I anticipate a revised Constitution that looks more like a statute than a Bill of Rights). When one adds to the mix the fact that these ill-defined constitutional moments are difficult to acknowledge, we have a constitutional discourse that makes it hard to make a credible claim of certainty.

In this fashion, informal amendments generate the juridical cognate to Bruce Ackerman's claim that the separation of powers "problematizes representation."⁷⁶ In Ackerman's view, the fact that the House, the Senate, and the Presidency represent the people in different ways prevents any branch from claiming to be the authentic voice of the People.⁷⁷

rather than offering a full-throated cry for the virtues associated with its absence. See, e.g., Kramer, *Circa 2004*, *supra* note 28, at 987–90; Whittington, *Extrajudicial Interpretation*, *supra* note 36, at 786–808. But see sources cited *supra* note 62; *infra* note 79–90.

74. Adrian Vermeule agrees as to the empirics but disagrees as to whether this might be a virtue. See Vermeule, *supra* note 13, at 49, 53. For an argument from a scholar with quite different sensibilities from Vermeule's that also suggests the costs associated with this idea, see West, *Constitutional Culture*, *supra* note 35, at 1483.

75. See Strauss, *supra* note 17, at 912.

76. ACKERMAN, FOUNDATIONS, *supra* note 24, at 181–86. For an insightful paper suggesting that representative government itself prevents such claims, see Bryan Garsten, Representative Government and Popular Sovereignty, in REPRESENTATION AND POPULAR RULE (Shapiro et al. eds., forthcoming 2008) available at http://www.brown.edu/Research/ppw/files/Rep_%20Govt_&_Pop_Sov.pdf.

77. ACKERMAN, FOUNDATIONS, *supra* note 24, at 184–86.

Informal amendments similarly problematize constitutional discourse. The temptation to claim unique access to constitutional meaning will always be strong.⁷⁸ But in the vast area governed by informal amendments, even judges willing to admit that informal amendments occur will find it difficult to pin down precisely what they mean. Credible claims of certainty are thus hard to come by for informal amendments. And that means that much of constitutional law will remain contested and contestable.

There are also reasons one might value the ongoing contestability of constitutional law. One might value it because we believe in a minimalist approach to judging that leaves as much room as possible for democratic debate⁷⁹ or experimentation.⁸⁰ We might value the ongoing contestability of constitutional law because we are as suspicious about claims about what the Constitution says⁸¹ as we are about claims about what the People want.⁸² We might simply subscribe to an agonistic conception of politics.⁸³

One of the most intriguing reasons for valuing the ongoing contestability of constitutional law is the possibility that it creates space for citizens to participate in shaping constitutional meaning. In the words of Reva Siegel, “a system that permanently resolves the Constitution’s meaning risks permanently estranging groups in ways that a system enabling a perpetual quest to shape constitutional meaning does not.”⁸⁴

78. See, e.g., WHITTINGTON, *supra* note 23, at 213 (concluding from a set of historical case studies that there “was always an advantage in claiming to be an advocate of true constitutional meaning.”).

79. See, e.g., CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–23 (1999) (making the case for minimalist judicial decisionmaking on several related grounds). Sunstein summarizes this approach as “leaving as much as possible undecided.” *Id.* at 3.

80. See, e.g., Whittington, *Extrajudicial Interpretation*, *supra* note 36, at 791 (“It is sometimes better for constitutional rules to be relatively unsettled because it can foster socially beneficial experimentation and allow political diversity.”).

81. Mark Tushnet’s work, for instance, is informed by this sensibility. See TUSHNET, CONSTITUTIONAL ORDER, *supra* note 32, at ix (acknowledging its influence upon his work).

82. Cf. ACKERMAN, FOUNDATIONS, *supra* note 24, at 184–86.

83. See, e.g., HANNAH ARENDT, THE HUMAN CONDITION (1958); BONNIE HONIG, POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS (1993); CHANTAL MOUFFE, DELIBERATIVE DEMOCRACY OR AGONISTIC PLURALISM (2000).

84. Siegel, *de facto ERA*, *supra* note 26, at 1328. Siegel and Robert Post have recently proposed a framework for thinking about “how our constitutional order actually negotiates the tension between the rule of law and self-governance,” using *Roe* as a case study for analyzing how various practices “facilitate an ongoing and continuous communication between courts and the public.” Post & Siegel, *Roe Rage*,

Similarly, Friedman and Smith argue that the “contestability of [constitutional] history . . . may represent an essential element of nation-shaping. The very process of telling the story, of disagreeing about it, of emphasizing one piece or another . . . is what the Constitution is about.”⁸⁵ So, too, Jack Balkin suggests that “[t]he fact that people have their own interpretations of what the Constitution means, and the fact that the political system is full of dissensus and disagreement is actually necessary to the achievement of a legitimate constitutional system.”⁸⁶ And Michael Seidman argues that a Constitution that can be used to upset political settlements ensures there are “no permanent [political] losers” and “provides citizens with a forum and a vocabulary that they can use to continue the argument.”⁸⁷ “Even when they suffer serious losses in the political sphere, citizens will have reason to maintain their allegiance to the community,” he writes, “not because constitutional law settles disputes but because it provides arguments, grounded in society’s foundational commitments, for why the political settlement they oppose is unjust.”⁸⁸

These evocative suggestions return us to the book at hand, or at least its author. This work is, at bottom, about the ways in which citizens maintain their constitutional faith,⁸⁹ and it suggests that a final reason why we might value the ongoing contestability of constitutional law is that we are in basic agreement with Sandy Levinson. The process of informal amendment produces many of the things that Levinson values in a constitution. That is, at least, one way to read his most beautiful book, *Constitutional Faith*.⁹⁰ Because it is unavailable for some small portion of the Constitution, Levinson tells us to ease the formal amendment process. But that choice may, in the long run, eliminate what some of us, Levinson included, might value most highly about the way our constitution changes.

supra note 26, at 9, 62.

85. Friedman & Smith, *supra* note 20, at 84–85.

86. Balkin, *supra* note 29, at 509.

87. SEIDMAN, *supra* note 64, at 8.

88. *Id.*

89. See, e.g., Post & Siegel, *Legislative Constitutionalism*, *supra* note 26, at 16.

90. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988). Levinson identifies himself as a “Catholic” on the source of legal authority (thus subscribing to a view that constitutional authority does not derive from the text of the Constitution alone) and as a “Protestant” on the locus of interpretive authority (a view that the Court is not the sole interpreter of the Constitution). *Id.* at 209 n.161; see generally *id.* at 47–53. The informal amendment process, of course, resonates deeply with Levinson’s Catholic-Protestant commitments. Cf. Balkin, *Respect-Worthy*, *supra* note 29.

2007] *A Skeptical Response to Our Undemocratic Constitution* 943

That, it seems, is the quandary that Levinson's challenging and engaging book squarely presents. It may not change Levinson's ultimate answer, but it seems to be a better accounting of what is at stake.