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THE EXPRESSIVE FUNCTION OF CONSTITUTIONAL AMENDMENT RULES

*Richard Albert**

The current scholarly focus on informal constitutional amendment has obscured the continuing relevance of formal amendment rules. In this article, I return our attention to formal amendment in order to show that formal amendment rules—not formal amendments but formal amendment rules themselves—perform an underappreciated function: to express constitutional values. Drawing from national constitutions, in particular the Canadian, South African, German, and United States constitutions, I illustrate how constitutional designers may deploy formal amendment rules to create a formal constitutional hierarchy that reflects special political commitments. That formal amendment rules may express constitutional values is both a clarifying and a complicating contribution to their study. This thesis clarifies the study of formal amendment rules by showing that such rules may serve a function that scholars have yet to attribute to them; yet it complicates this study by indicating that the constitutional text alone cannot prove whether the constitutional values expressed in formal amendment rules represent authentic or inauthentic political commitments.

L'accent académique actuel sur l'amendement informel d'une constitution a obscurci la pertinence continue de la procédure formelle d'amendement. Dans cet article, je rapporte notre attention sur l'amendement formel pour montrer que la procédure formelle (non pas la modification, mais la procédure elle-même) remplit un rôle sous-évalué : l'expression des valeurs constitutionnelles. En m'appuyant sur des constitutions nationales, en particulier celles du Canada, de l'Afrique du Sud, de l'Allemagne et des États-Unis, je démontre que les auteurs insèrent parfois des règles formelles d'amendement pour créer une formelle hiérarchie qui reflète des engagements particuliers de nature politique. L'expression possible des valeurs constitutionnelles faite par des règles formelles d'amendement est une contribution qui clarifie et complique leur étude. Cette conclusion clarifie l'étude des règles formelles d'amendement en montrant que de telles règles peuvent servir à une fonction que les érudits n'y ont pas encore attribué. Cependant, elle complique cette étude en indiquant que le texte constitutionnel seul est incapable de prouver si les valeurs constitutionnelles exprimées dans les règles formelles d'amendement représentent des engagements de nature politique, qu'ils soient authentiques ou inauthentiques.

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Introduction

Formal constitutional amendment rules are largely corrective. Recognizing that a deficient constitution risks building error upon error until the only effective repair becomes revolution,[1] constitutional designers entrench formal amendment rules that can be used to peacefully correct the constitution's design.[2] Fixing defects is therefore an essential function of formal amendment rules. Political actors generally deploy formal amendment rules to "amend" a constitution—from the Latin verb "emendare"—in order to "free [it] from fault" or to "put [it] right."[3] Yet formal amendment rules do more than entrench a procedure for perfecting apparent imperfections in the written constitution: they may also serve the underappreciated function of expressing constitutional values.

Much of the current scholarship on constitutional amendment explores *informal* amendment.[4] This focus, while important, has obscured the continuing relevance of formal amendment rules. Consider formal and

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1 Karl Loewenstein, "Reflections on the Value of Constitutions in Our Revolutionary Age" in Arnold J Zurcher, ed, *Constitutions and Constitutional Trends Since World War II* (New York: New York University Press, 1951) 191 at 215.

2 John W Burgess, *Political Science and Comparative Constitutional Law I: Sovereignty and Liberty* (Boston: Ginn & Co, 1893) at 137.

3 Bryan A Garner, *Modern American Usage*, 3d ed (New York: Oxford University Press, 2009) at 41.

4 An informal amendment occurs "when political norms change, or courts (possibly responding to political pressures) 'interpret' or construct the constitution so as to bring it in line with policy preferences" (Tom Ginsburg & Eric A Posner, "Subconstitutionalism" (2010) 62:6 Stan L Rev 1583 at 1600). There is vast body of scholarship on informal amendment. See e.g. Bruce Ackerman, *We the People 1: Foundations* (Cambridge: Belknap Press, 1991) at 266; Bruce Ackerman, *We the People 2: Transformations* (Cambridge: Belknap Press, 1998) at 383–420; Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Kingston: McGill-Queen's University Press, 1994) at 260–305; David A Strauss, *The Living Constitution* (New York: Oxford University Press, 2010) at 120–39; Charlie Jeffery, "Dimensions of Constitutional Change: Germany and the United Kingdom Compared" in Arthur B Gunlicks, ed, *German Public Policy and Federalism: Current Debates on Political, Legal, and Social Issues* (New York: Berghahn Books, 2003) 197 at 203; Stephen M Griffin, "Constituent Power and Constitutional Change in American Constitutionalism" in Martin Loughlin & Neil Walker, eds, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (New York: Oxford University Press, 2007) 49 at 52–61; see also SN Ray, *Modern Comparative Politics: Approaches, Methods and Issues*, 3d ed (Delhi: Prentice-Hall of India, 2004) at 117–31 (discussing formal and informal amendment in comparative perspective); Brannon P Denning, "Means to Amend: Theories of Constitutional Change" (1997) 65:1 Tenn L Rev 155 at 180–209 (surveying theories of informal amendment); Heather K Gerken, "The Hydraulics of Constitutional Reform: A Skeptical Response to *Our Undemocratic Constitution*" (2007) 55:4 Drake L Rev 925 at 929–33 (cataloguing recent scholarship on informal constitutional amendment); see generally Sanford Levinson, ed, *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton: Princeton University Press, 1995) (compiling essays on constitutional change, both formal and informal) [Levinson, *Responding*].

informal amendment practices in the United States. Today it is difficult,[5] if not virtually inconceivable,[6] to gather the supermajorities needed to formally amend the United States Constitution pursuant to Article V.[7] That there have been only twenty-seven textual additions to the Constitution since 1789—and of those, ten were packaged as the Bill of Rights—reveals just how rarely political actors have resorted to the constitution's formal amendment procedures.[8] Spurred by the difficulty of constitutional change through Article V,[9] political actors have innovated alternative methods to keep current the centuries-old constitution.[10] Today, informal amendment prevails so predominantly over formal amendment that Article V amendments have been described as irrelevant.[11] But while Article V amendments may perhaps be irrelevant, Article V itself is not.

Like other formal amendment rules, Article V entrenches special political commitments. We can discern from Article V's equal suffrage clause,

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5 See Barry Friedman & Scott B Smith, "The Sedimentary Constitution" (1998) 147:1 U Pa L Rev 1 at 45; David E Kyvig, "Arranging for Amendment: Unintended Outcomes of Constitutional Design" in David E Kyvig, ed, *Unintended Consequences of Constitutional Amendment* (Athens: Univeristy of Georgia Press, 2000) 9 at 10–11.

6 See Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)*, 2d ed (New York: Oxford University Press, 2006) at 21; Stephen M Griffin, "The Nominee is ... Article V" (1995) 12:2 Const Commentary 171 at 172.

7 US Const art V:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

8 See William B Fisch, "Constitutional Referendum in the United States of America" (2006) 54:4 Am J Comp L (supplement) 485 at 490–91.

9 See e.g. William E Scheuerman, "Constitutionalism in an Age of Speed" (2002) 19:2 Const Commentary 353 at 374–75; Donald S Lutz, "Toward a Theory of Constitutional Amendment" (1994) 88:2 Am Pol Sci Rev 355 at 364.

10 See Adam M Samaha, "Dead Hand Arguments and Constitutional Interpretation" (2008) 108:1 Colum L Rev 606 at 618.

11 See generally David A Strauss, "The Irrelevance of Constitutional Amendments" (2001) 114:5 Harv L Rev 1457 at 1460.

as well as its reference to the importation[12] and census-based taxation[13] clauses, that federalism is an historically important constitutional value in the United States. Germany's formal amendment rules similarly reflect that state's constitutional values—specifically the value of human dignity, which is absolutely entrenched against formal amendment in the German Basic Law.[14] We may also look to the Canadian and South African constitutions for evidence that formal amendment rules express constitutional values. Much like the formal amendment rules in the United States Constitution and the German Basic Law, the design of these rules in the Canadian and South African constitutions is more than simply corrective. As I will show,[15] their formal amendment rules entrench a constitutional hierarchy that reflects a rank-ordering of constitutional values.[16]

In this article, I advance the scholarship on constitutional amendment by showing that formal amendment rules—not formal amendments, but the rules pursuant to which formal amendments themselves are made—express constitutional values. My thesis is neither that formal amendment rules *always* express constitutional values nor that designers necessarily intend formal amendment rules to serve this function. It is instead that formal amendment rules are *one* of the sites where constitutional designers may express a polity's constitutional values, both internally to the persons who are nominally or actually bound by its terms, and externally to the larger world. This article generates a research agenda for further inquiry into the use of formal amendment rules to express values.

This is a useful contribution to the study of formal amendment because it both clarifies and complicates their study. It clarifies it by demonstrating that formal amendment rules serve the underappreciated function of expressing constitutional values; yet it also complicates it by stressing that it is not always clear whether the constitutional values entrenched in formal amendment rules express authentic or inauthentic po-

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12 "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person" (US Const, *supra* note 7, art I, s 9).

13 "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken" (*ibid*).

14 *Basic Law for the Federal Republic of Germany*, 1949, translated by U.S. Department of State, arts 1(1) ("the dignity of man shall be inviolable"), 79(3) (absolutely entrenching article 1(1) against formal amendment) [*Basic Law*].

15 See Parts II–III, below.

16 See *Constitution Act, 1982*, ss 38–49, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*]; *Constitution of the Republic of South Africa, 1996*, No 108 of 1996, s 74 [*Constitution of South Africa*].

litical commitments. This has important implications for constitutional design.

I begin, in Part I, by identifying and explaining the functions scholars have generally attributed to formal amendment rules; I show that none of these functions fully accounts for the expressive nature of formal amendment rules. In Part II, I draw from a number of national constitutions, including the constitutions of Canada and South Africa, to illustrate how formal amendment rules may entrench and express constitutional values by creating a formal constitutional hierarchy. Part III confronts an analytical difficulty: the values that constitutional designers choose to entrench in formal amendment rules may reflect either actual or inauthentic political commitments. Using the German Basic Law as a model, I explain how we may discern whether entrenched constitutional values represent authentic political commitments. I suggest that the authenticity of the constitutional values entrenched in Germany's formal amendment rules derives from their validation by the Constitutional Court, their centrality to German political culture, and their entrenchment in the Basic Law. I conclude with additional thoughts for deepening the comparative study of formal amendment rules.

I. The Functions of Constitutional Amendment Rules

Few tasks in constitutional design are more important than structuring formal amendment rules.[17] Scholars have attributed several functions to formal amendment rules. Scholars generally understand these rules as managing political action and regulating constitutional change: "Amending formulas set up mechanisms that endeavor to tame constitutional actors and encapsulate the relationship between the constitution and the passage of time."[18] More specifically, formal amendment rules are said to distinguish a constitution from ordinary law, to structure the formal amendment process, to "precommit"[19] future political actors, and to facilitate improvements or corrections to the constitutional text.[20] They also heighten public awareness, check political branches, promote democracy,

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[17] See Sanford Levinson, "Designing an Amendment Process" in John Ferejohn, Jack N Rakove & Jonathan Riley, eds, *Constitutional Culture and Democratic Rule* (Cambridge: Cambridge University Press, 2001) 271 at 275.

[18] Xenophon Contiades & Alkmene Fotiadou, "Models of Constitutional Change" in Xenophon Contiades, ed, *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (New York: Routledge, 2013) 417 at 431.

[19] See Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge: Cambridge University Press, 2000).

[20] See Part I.A, below.

and pacify constitutional change.[21] Formal amendment rules do indeed serve each of these functions, as I will explain in this Part. But they should also be understood as one of several sites where constitutional designers may entrench and thereby express constitutional values. None of the functions scholars have attributed to them adequately reflects this expressive role.

A. Why Entrench Formal Amendment Rules?

First, as a basic matter, formal amendment rules distinguish constitutional text from ordinary legislation. Whereas laws are ordinarily subject to repeal or amendment by a simple legislative majority, a constitutional text is often subject to a higher threshold for alteration.[22] This higher threshold could be approval by a legislative or popular supermajority, and it sometimes requires both.[23] More demanding procedures for formal amendment reflect both the relatively higher significance afforded to constitutions over laws and the view that ordinary law is derivative of constitutional law.[24] However, designing formal amendment rules so as to retain a constitution's distinction from ordinary law may be easier said than done, because it requires pinpointing precisely the right level of amend-

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21 *Ibid*.

22 See András Sajó, *Limiting Government: An Introduction to Constitutionalism* (New York: Central European University Press, 1999) at 39–40; Carl Schmitt, *Constitutional Theory*, ed and translated by Jeffrey Seitzer (Durham: Duke University Press, 2008) at 71–72; Edward Schneier, *Crafting Constitutional Democracies: The Politics of Institutional Design* (New York: Rowman & Littlefield, 2006) at 222. Although constitutions are generally subject to higher thresholds for repeal or formal amendment than are ordinary laws, it is nonetheless possible to make it feasible to repeal constitutions by simple majority vote, just as ordinary laws may themselves be entrenched against repeal by simple majority vote. See Larry Alexander, "Constitutions, Judicial Review, Moral Rights, and Democracy: Disentangling the Issues" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (New York: Cambridge University Press, 2008) 119 at 120.

23 See Jan-Erik Lane, *Constitutions and Political Theory*, 2d ed (Manchester: Manchester University Press, 2011) at 41. Formal amendment rules may also be designed to deny popular majorities the power of constitutional amendment by conferring that power exclusively upon political actors. See Joel I Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (London, UK: Routledge, 2012) at 4. Formal amendment rules may similarly be designed to prevent fleeting majorities from making significant constitutional changes. See Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Carlton, Austl: Melbourne University Press, 1988) at 381.

24 See Donald S Lutz, "Toward a Theory of Constitutional Amendment" in Levinson, *Responding*, *supra* note 4, 237 at 240 [Lutz, "Theory"].

ment difficulty.[25] The higher the frequency of formal amendment, the more the constitution may seem like an ordinary law.[26]

Second, scholars have observed that formal amendment rules structure the process by which political actors change the text and meaning of a constitution. Formal amendment rules provide a legal and transparent framework within which to alter the constitution,[27] whereas informal amendment occurs arguably pursuant to extralegal procedures.[28] To call informal amendment extralegal is not to make a claim about its legitimacy. As Bruce Ackerman has argued, there exist informal—though nonetheless proper—procedures beyond those expressly detailed in Article V to amend the United States Constitution.[29] To describe informal amendment procedures as "extralegal" and formal amendment rules as "legal" is therefore only to highlight that informal amendment procedures are not outlined in a constitutional text, in contrast to formal amendment rules, which are entrenched within it.

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[25] See John R Vile, *Contemporary Questions Surrounding the Constitutional Amending Process* (Westport, Conn: Praeger, 1993) at 2; Leslie Wolf-Phillips, "Introduction" in Leslie Wolf-Phillips, ed, *Constitutions of Modern States: Selected Texts and Commentary* (New York: Praeger, 1968) at xxv.

[26] See Kathleen Sullivan, "Constitutional Amendmentitis", online: (1995) The American Prospect at 22–23 <www.prospect.org>.

[27] See Vivien Hart, "Democratic Constitution Making", online: (2003) 107 United States Institute of Peace Special Report 1 at 4.

[28] See Rosalind Dixon & Richard Holden, "Constitutional Amendment Rules: The Denominator Problem" in Tom Ginsburg, ed, *Comparative Constitutional Design* (New York: Cambridge University Press, 2012) 195 at 195. Akhil Amar has argued that Article V of the United States Constitution does not provide the only way to formally amend the text. His argument—that a majority of Americans may, by referendum, amend the Constitution—is a novel view on extralegal, yet nonetheless formal, constitutional amendment. See Akhil Reed Amar, "Philadelphia Revisited: Amending the Constitution Outside Article V" (1988) 55:4 U Chicago L Rev 1043 at 1060.

[29] Bruce A Ackerman, "Transformative Appointments" (1988) 101:6 Harv L Rev 1164 at 1179; see also sources catalogued in Levinson, *Responding*, *supra* note 4 (compiling sources on informal amendment in both the United States and elsewhere). For critiques of Ackerman's theory of informal amendment, see e.g. James E Fleming, "We the Unconventional American People" (1998) 65:4 U Chicago L Rev 1513; Michael J Klarman, "Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments" (1992) 44:3 Stan L Rev 759; Larry Kramer, "What's a Constitution for Anyway? Of History and Theory, Bruce Ackerman and the New Deal" (1996) 46:3 Case W Res L Rev 885; Gerald N Rosenberg, "The Unconventional Conventionalist" (1999) 2:2 Green Bag (2d) 209; Frederick Schauer, "Deliberating About Deliberation" (1992) 90:6 Mich L Rev 1187; Suzanna Sherry, "The Ghost of Liberalism Past" (1992) 105:4 Harv L Rev 918; Laurence H Tribe, "Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation" (1995) 108:6 Harv L Rev 1221.

Third, formal amendment rules precommit future political actors to the entrenched choices of the constitution's authors. The strongest "precommitment" device is a subject-matter restriction on formal amendment, which constitutional designers entrench to privilege something in the constitutional design by making it unamendable.[30] To borrow from Sanford Levinson, a formally unamendable constitution would reflect constitutional designers' "inordinate confidence in their own political wisdom coupled perhaps with an equally inordinate lack of confidence in successor generations."[31] Constitutional designers may also distrust political actors and consequently create formal amendment rules to limit their future choices.[32] Lawrence Sager makes plain this connection between precommitment and distrust, arguing that constitutional designers make constitutions difficult to amend because "[w]e trust ourselves, perhaps, but not those who will succeed us in stewardship of our political community."[33] The most important devices to foster precommitment, according to Jon Elster, are supermajorities and delays.[34]

Fourth, scholars have explained that formal amendment rules offer a way to improve the design of a constitution by correcting the faults that time and experience reveal. Brannon Denning and John Vile have made this point persuasively:

> If the nation is to continue with a written constitution that contains the specificity of some of the provisions of the existing document, there will be times when, absent flagrant disregard for constitutional language, some amendments will be required as defects become apparent, or changes are desired.[35]

Amendment procedures allow political actors to respond to the changing political, social, and economic needs of the political community[36]—needs

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30 See Jon Elster, "Constitutionalism in Eastern Europe: An Introduction" (1991) 58:2 U Chicago L Rev 447 at 471.

31 Sanford Levinson, "The Political Implications of Amending Clauses" (1996) 13:1 Const Commentary 107 at 112 [Levinson, "Amending Clauses"].

32 See Donald J Boudreaux & A C Pritchard, "Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process" (1993) 62:1 Fordham L Rev 111 at 123–24.

33 Lawrence G Sager, "The Birth Logic of a Democratic Constitution" in Ferejohn, Rakove & Riley, *supra* note 17, 110 at 124.

34 Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge, UK: Cambridge University Press, 2000) at 104.

35 Brannon P Denning & John R Vile, "The Relevance of Constitutional Amendments: A Response to David Strauss" (2002) 77:1 Tul L Rev 247 at 275.

36 See Gabriel L Negretto, "Toward a Theory of Formal Constitutional Change: Mechanisms of Constitutional Adaptation in Latin America" in Detlef Nolte & Almut Schil-

that the governing constitution may inadequately serve, whether as a result of suboptimal constitutional design or new social circumstances.[37] Formal amendment rules therefore operate against the backdrop of human error and exist to redress shortcomings in the design of the constitution itself.[38]

Formal amendment rules also heighten public awareness and deliberation. They invite political actors to debate and negotiate publicly about what they believe best serves the common interest, and they "ensure that society acts on well-founded and stable expectations about the consequences" of amending a constitution.[39] Formal amendment rules, which commonly require some form of supermajority action, "promote careful consideration of the issues ... by forcing those in favor of a particular proposition to persuade a larger segment of the population."[40] Therefore, for Donald Lutz, formal amendment rules are means "[t]o arrive at the best possible decisions in pursuit of the common good under a condition of popular sovereignty."[41] The product of this public deliberation—a formal amendment inscribed in the text of a constitution—in turn makes possible the publication and reinforcement of constitutional norms. Formal amendment, write Denning and Vile, "undeniably changes the Constitution in one significant respect: it adds language to the Constitution."[42] As a result, "[t]he publicity accompanying the change may, in fact, increase public expectations that the change will be honored by the other branches [of government], raising the costs of evasion or under-enforcement."[43]

Sixth, formal amendment rules also act as a check between branches of government. They give political actors a mechanism to revise the informal constitutional amendments entrenched by courts of last resort in

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ling-Vacaflor, eds, *New Constitutionalism in Latin America: Promises and Practices* (Farnham, UK: Ashgate, 2012) 51 at 52.

37 See Raymond Ku, "Consensus of the Governed: The Legitimacy of Constitutional Change" (1995) 64:2 Fordham L Rev 535 at 542.

38 See Bjørn Erik Rasch & Roger D Congleton, "Amendment Procedures and Constitutional Stability" in Roger D Congleton & Birgitta Swedenborg, eds, *Democratic Constitutional Design and Public Policy: Analysis and Evidence* (Cambridge, Mass: MIT Press, 2006) 319 at 326.

39 *Ibid* at 327.

40 Ku, *supra* note 37 at 571.

41 Lutz, "Theory", *supra* note 24 at 239–40.

42 Denning & Vile, *supra* note 35 at 279.

43 *Ibid*.

the course of constitutional interpretation.[44] Rosalind Dixon observes that formal amendment rules allow political actors both to move courts toward new constitutional interpretations and to trump courts' constitutional judgments.[45] Interestingly, however, formal amendment rules may also have the opposite effect depending on their rigidity. The more exacting the process of consummating a formal amendment, the more insulated from reversal by amendment the judiciary's constitutional judgments become; conversely, the less burdensome the formal amendment process, the greater the power held by political actors to shape and reshape constitutional meaning.[46] The durability of judicial judgments is therefore directly proportional to the rigidity of formal amendment.

Scholars have also pointed to the democracy-promoting function of formal amendment rules. The right to amend a constitution is, above all, a right to democratic choice. Perhaps most prominently on this point, Jed Rubenfeld has argued that "[t]he very principle that gives the [US] Constitution legitimate authority—the principle of self-government over time—requires that a nation be able to reject any part of a constitution whose commitments are no longer the people's own."[47] Rubenfeld concludes that "[t]hus written constitutionalism requires a process not only of popular constitution-writing, but also of popular constitution-rewriting."[48] In addition to promoting the majoritarian bases of democracy, formal amendment rules may also promote the substantive dimensions of democracy, namely its counter-majoritarian and minority-protecting purposes. As Roger Congleton explains, formal amendment rules "support the rule of law insofar as constitutional stability is increased and/or minority protections are enhanced."[49]

Finally, scholars also interpret formal amendment rules as making possible sweeping but non-violent political transformations. This pacifying function is perhaps best articulated by Walter Dellinger, who posits that

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[44] See Andrée Lajoie & Henry Quillinan, "Emerging Constitutional Norms: Continuous Judicial Amendment of the Constitution—The Proportionality Test as a Moving Target" (1992) 55:1 L & Contemp Probs 285 at 285.

[45] Rosalind Dixon, "Constitutional Amendment Rules: A Comparative Perspective" in Tom Ginsburg & Rosalind Dixon, eds, *Comparative Constitutional Law* (Cheltenham, UK: Edward Elgar, 2011) 96 at 98.

[46] Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press, 1999) at 228–30.

[47] Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (New Haven: Yale University Press, 2001) at 174.

[48] *Ibid.*

[49] Roger D Congleton, *Perfecting Parliament: Constitutional Reform, Liberalism, and the Rise of Western Democracy* (New York: Cambridge University Press, 2011) at 287.

the Article V amendment process in the United States Constitution "represents a domestication of the right to revolution."[50] Entrenching the rules of formal amendment in a constitutional text provides a roadmap for effecting constitutional changes that range from modest to major, without having to write an entirely new constitution, resort to irregular methods of constitutional renewal, or take up arms. In the United States at the Federal Convention of 1787, George Mason echoed this very point, recognizing that constitutional amendments would be inevitable but that "it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence."[51] This function fosters a higher probability of constitutionally continuous—rather than constitutionally discontinuous[52]—change under formal amendment rules. As Dixon explains, formal amendment rules "increase the chances that such change will occur (at least more or less) within existing constitutional frameworks, rather than via processes of whole-scale constitutional revision or overthrow."[53]

B. Values in the Constitutional Text

Formal amendment rules certainly do serve each of the eight functions that scholars have attributed to them. But they also have an additional function: to express constitutional values. Although some have suggested or recognized this claim, none has yet to fully develop the thesis that formal amendment rules either expressly declare or more subtly signal constitutional values. Samuel Finer, Vernon Bogdanor, and Bernard Rudden make this point most directly when they state in their important comparative study of constitutions that formal amendment rules "may express basic values."[54] But these scholars mention this only in passing, without further development, and only in reference to unamendable constitutional provisions. As I will show in the pages to follow, unamendable provisions

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50 Walter Dellinger, "The Legitimacy of Constitutional Change: Rethinking the Amendment Process" (1983) 97:2 Harv L Rev 386 at 431.

51 Max Farrand, ed, *The Records of the Federal Convention of 1787*, revised ed (New Haven: Yale University Press, 1966) vol 1 at 203.

52 Constitutional change is continuous where it occurs under the authority of the existing constitution and does not result in a new regime; in contrast, constitutional change is discontinuous where it does not occur under this authority. See Peter Suber, *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, and Change* (New York: Peter Lang, 1990) at 18.

53 Dixon, *supra* note 45 at 97.

54 SE Finer, Vernon Bogdanor & Bernard Rudden, *Comparing Constitutions* (Oxford: Clarendon Press, 1995) at 13.

are not the only formal amendment rules that may express constitutional values.[55]

Stephen Holmes and Cass Sunstein have made a similar observation. In their constitutional design scholarship advising new democracies how to structure their formal amendment rules, they explore both the tension between liberalism and democracy in designing formal amendment rules and the consequences for democracy of adopting stringent formal rules. Holmes and Sunstein argue that the procedures used to formally amend a constitution "[shed] light on the variety of theories underlying different liberal democracies."[56] They conclude that formal amendment rules "[help] us identify the broad norms and basic commitments behind the constitutional fine print."[57]

Others have suggested more indirectly that formal amendment rules may be used to express constitutional values. Levinson, for example, has observed that Article V of the United States Constitution "varies the difficulty of the amendment process with the perceived importance of given issues," referring specifically to the equal suffrage clause.[58] For their part, Denning and Vile have developed the notion of "[t]he [p]ublicity [f]unction of [w]ritten [a]mendments."[59] But their focus has been on formal amendments themselves, not on the rules for their entrenchment. Dixon has noted that "various countries have established various distinct tracks for constitutional amendment that vary according to the subject-matter of a proposed amendment," with specific reference to India and South Africa.[60] But these scholars have yet to explain and illustrate *how* formal amendment rules may actually express constitutional values.

Constitutional scholars have long argued, however, that *constitutions* may serve an expressive function. Some constitutions are written to reflect the meta-constitutional norms that bind a constitutional community and distinguish *this* particular community from others. Mark Tushnet explains that constitutions, both in their entrenched institutional arrangements and in the doctrines that emerge from their interpretation, "are ways in which a nation goes about defining itself."[61] As Tom Ginsburg has

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[55] See Part II.C, below.

[56] Stephen Holmes & Cass R Sunstein, "The Politics of Constitutional Revision in Eastern Europe" in Levinson, *Responding*, *supra* note 4, 275 at 278–79.

[57] *Ibid* at 279.

[58] Levinson, "Amending Clauses", *supra* note 28 at 122.

[59] Denning & Vile, *supra* note 35 at 279.

[60] Dixon, *supra* note 45 at 103.

[61] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008) at 12.

observed, "[i]n some polities, constitutions reflect and sometimes even create a shared consciousness, and so overcome regional or ethnic divisions."[62] He adds that "[t]he symbolic or expressive function of constitutions emphasizes the particularity of constitution-making. It is We the People that come together, and so the constitution embodies our nation in a distinct and local way different from other polities."[63] Constitutions may therefore express values with the aspirational or functional purposes of self-definition and nation building.[64]

Constitutions may also express values without exerting any immediate or perceptible legal effect. Sunstein has observed that constitutional provisions make statements about a nation's objectives and aspirations, and that some may attribute significance to such statements even if the consequences of those statements are unclear.[65] He cites as an example an anti-discrimination norm upon which a society might insist "for expressive reasons even if [that society] does not know whether the law actually helps members of minority groups." He continues:

> The point bears on the cultural role of law, adjudication, and even of Constitutional Court decisions. When the Court makes a decision, it is often taken to be speaking on behalf of the nation's basic principles and commitments. This is a matter of importance quite apart from consequences, conventionally understood.[66]

Expression, then, is distinct from prohibition or authorization.

The values of a constitution reflect what Gary Jacobsohn calls the constitution's identity.[67] To discern a constitution's identity, the first though not the *only* place to look is its text.[68] The "writtenness"[69] of a constitution

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62 Tom Ginsburg, "Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law" in Susan Rose-Ackerman & Peter L Lindseth, eds, *Comparative Administrative Law* (Cheltenham: Edward Elgar, 2010) 117 at 118.

63 *Ibid*.

64 But see Sanford Levinson, "'The Constitution' in American Civil Religion" [1979] Sup Ct Rev 123 (questioning whether the United States Constitution can serve as a source of national unity: "[i]t is ironic that a culture which has experienced a centuries-long 'melancholy, long-withdrawing roar' from religious faith can believe so blithely in the continuing reality of a collectivity of citizens organized around a constitutional faith" at 150–51).

65 Cass R Sunstein, "On the Expressive Function of Law" (1996) 5:1 E Eur Const Rev 66 at 67.

66 *Ibid*.

67 Gary Jeffrey Jacobsohn, *Constitutional Identity* (Cambridge, Mass: Harvard University Press, 2010) at 348.

68 See *ibid*.

serves in part to codify a society's fundamental ideals and structures;[70] but their codification and attendant interpretation need not remain static: they may change over time.[71] This is to be expected since, as Mary Ann Glendon has explained in her comparative study of abortion and divorce, "law, in addition to all the other things it does, tells stories about the culture that helped to shape it and which it in turn helps to shape: stories about who we are, where we came from, and where we are going."[72] These stories, which we may broadly understand as representing the values held within a community, "seem to have a powerful influence not only on how legal norms are invented and applied within that system, but on how facts are perceived and translated into the language and concepts of the law."[73] To deconstruct the metaphor, the values expressed by and in law filter throughout the legal system.

II. Constitutional Values and Formal Amendment Rules

Constitutional values are the foundation of any constitutional regime. They help us rank the regime's rules, principles, and institutional arrangements relative to each other in a hierarchical order.[74] They inform the choices political actors make and how judges interpret the constitution, and they may also reflect how a regime defines itself, both internally and externally. Constitutional values are the equivalent of a trump card in constitutional adjudication: where a constitutional value is set against a non-constitutional value, the constitutional value will prevail in a conflict against the non-constitutional value of efficiency. Constitutional values may moreover be both preservative and aspirational: they may seek to preserve something about the structure of the state—for instance, federalism or republicanism—just as they may aspire to an ideal that is im-

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69 See Andrew B Coan, "The Irrelevance of Writtenness in Constitutional Interpretation" (2010) 158:4 U Pa L Rev 1025.

70 See Thomas C Grey, "The Constitution as Scripture" (1984) 37:1 Stan L Rev 1 at 16.

71 For a discussion of the evolution of the United States Constitution as a symbol since its adoption, see Max Lerner, "Constitution and Court as Symbols" (1937) 46:8 Yale LJ 1290 at 1294–1305.

72 Mary Ann Glendon, *Abortion and Divorce in Western Law* (Cambridge, Mass: Harvard University Press, 1987) at 8.

73 *Ibid*.

74 See Walter F Murphy, "*Slaughter-House*, *Civil Rights*, and Limits on Constitutional Change" (1987) 32 Am J Juris 1 at 22.

perfectly attainable but nonetheless deemed worth pursuing—for example, liberty or equality.[75]

A. Creating a Constitutional Hierarchy

Constitutional values are contestable, however, for at least two reasons. First, the content of constitutional values may be contested because they are commonly stated at a high level of generality. This invites competing interpretations of such values as justice, fairness, or the rule of law.[76] Second, the actual identity of constitutional values may be contested because it is unclear how we are to identify which values do, or should, prevail in a constitutional community where those values are not expressly identified in a constitutional text.[77] Were it even possible to agree on a set of values, the challenge of mediating among them would remain. Where one value collides with another, the governing one may be difficult to predict without reference to an authoritative predetermined hierarchy of values, whether formally or informally entrenched.

Constitutional theory can help create a hierarchy of constitutional values. Consider the United States Constitution, a document whose text nowhere expressly declares which values hold greater significance than others. Given the Constitution's indeterminate text, how are we to identify the values that have precedence within it? Walter Murphy has developed one theory, among several possibilities, to rank-order the constitutional values in the United States Constitution. He begins by acknowledging the difficulty of ranking its values:[78] "At the root of the problem is that the American Constitution—like all such charters—tries to foster not one or two but a whole cluster of values."[79] But Murphy posits that in light of the evolution of the American polity since its founding, there is one value that is "most fundamental" among the Constitution's substantive values: human dignity.[80] With human dignity identified as the US Constitution's

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[75] Cass Sunstein borrows from Lawrence Lessig in his discussion of preservative and transformative constitutions. See Cass R Sunstein, *Designing Democracy: What Constitutions Do* (New York: Oxford University Press, 2001) at 67–68.

[76] See Richard A Primus, "When Should Original Meanings Matter?" (2008) 107:2 Mich L Rev 165 at 172–73.

[77] *Ibid* at 173–74.

[78] See Walter F Murphy, "The Art of Constitutional Interpretation: A Preliminary Showing" in M Judd Harmon, ed, *Essays on the Constitution of the United States* (Port Washington: Kennikat Press, 1978) 130 at 147.

[79] *Ibid*.

[80] *Ibid* at 156.

core substantive value, we can then proceed to rank order the others by inquiring which are more or less consonant with serving human dignity.[81]

In addition to constitutional theory, constitutional interpretation can also help shape a hierarchy of values. Where the constitutional text does not entrench a formal hierarchy, courts may generate an informal one by way of constitutional interpretation, as constitutional interpretation inevitably compels judges to balance or reconcile competing claims. For example, a court could interpret a constitutional provision as being immune from legal challenges alleging a violation of a protected right or liberty, thereby conferring upon that provision a special status, perhaps as a result of historical circumstance (this is what the Supreme Court of Canada has done with respect to section 93 of the *Constitution Act, 1867*).[82] Alternatively, a court could, through interpretation, create a hierarchy by adjudicating a dispute that requires the court to balance competing rights that collide.[83] When two or more rights and interests intersect, courts must determine which prevails over the other given the particular facts of

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[81] See Walter F Murphy, "An Ordering of Constitutional Values" (1980) 53:2 S Cal L Rev 703 at 754.

[82] See *Adler v Ontario*, [1996] 3 SCR 609 at 640–41, 140 DLR (4th) 385 [*Adler*]. *Adler* concerned the modern application of a founding arrangement requiring Quebec to protect the rights of its Protestant religious minority and Ontario to protect those of its Roman Catholic religious minority. The arrangement, which was entrenched in section 93 of Canada's *Constitution Act, 1867* ((UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*]), required Quebec to fund Protestant religious schools and Ontario to fund Roman Catholic religious schools. Three groups of plaintiffs challenged the constitutionality of section 93. They argued that it violated the constitutional freedoms of conscience and religion as well as the right to equality—entrenched in the more recent *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, *supra* note 16)—insofar as it mandated the funding of religious schools for these religious minorities to the exclusion of mandatory funding for other religious faiths. In reaching its decision, the Supreme Court explained that "[s]ection 93 is the product of an historical compromise which was a crucial step along the road leading to Confederation" and that "[w]ithout this 'solemn pact', this 'cardinal term' of Union, there would have been no Confederation" (*Adler*, *supra* note 78 at 640). The Court interpreted section 93 as effectively immune from constitutional challenges based on the freedoms of conscience and religion as well as on the right to equality: "[a]s a child born of historical exigency, s. 93 does not represent a guarantee of fundamental freedoms" (*ibid*). *Adler* therefore exempts section 93 from constitutional challenge. It would be inaccurate to describe section 93 as trumping all other constitutional provisions, however; it is more accurate to regard section 93 having a status equal to the rights entrenched in the *Charter*.

[83] All constitutional courts engage in this form of balancing—which is commonly referred to as a proportionality analysis—whether the items to be balanced are rights, liberties, constitutional arrangements or structures, national values, or otherwise. See e.g. David M Beatty, *The Ultimate Rule of Law* (New York: Oxford University Press, 2004) (observing and theorizing the ubiquity of proportionality analysis in constitutional courts).

the case. As courts resolve more cases like these, an informal constitutional hierarchy emerges among those rights and interests.

For example, in the absence of a textually explicit hierarchy of values in the United States Constitution, US constitutional law has created an informal hierarchy of values through the Supreme Court's constitutional interpretation. Over the course of American constitutional history, the Supreme Court of the United States has made judgments about which rights, rules, principles, and structures are worthy of greater protection than others. Whether the context has been balancing one right against another, assessing the constitutionality of state action, or simply interpreting the constitutional text, the Supreme Court has effectively rank-ordered US constitutional provisions along a scale of relative importance. The Court's informal constitutional hierarchy is flexible, subject to revision by subsequent interpretation, and not entrenched against amendment; it is the product of dynamic interpretation, not of fixed constitutional design at the time of the Constitution's drafting. But it is nevertheless an authoritative declaration of values. In this way, the difficulty of using Article V to formally amend the US Constitution is mitigated by the Supreme Court's ability to informally order and reorder the hierarchy of constitutional values.

The US Supreme Court's informal hierarchy is reflected in its tripartite sequence of scrutiny applied to evaluating the constitutionality of state action: rational basis, intermediate, and strict scrutiny. As Richard Fallon has observed, these scrutiny tests emerged as a result of "the Supreme Court's solidifying commitment to a jurisprudential distinction between ordinary rights and liberties, which the government could regulate upon the showing of any rational justification, and more fundamental or 'preferred' liberties entitled to more stringent judicial protection."[84] The Court has traditionally reserved strict scrutiny—the most stringent level of skepticism shown to a government decision—for state action that is alleged to compromise, among others, racial equality,[85] political rights,[86] and fundamental freedoms.[87] The second highest level of scrutiny—

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84 Richard H Fallon, Jr., "Strict Judicial Scrutiny" (2007) 54:5 UCLA L Rev 1267 at 1285.

85 See e.g. *Adarand Constructors v Pena*, 515 US 200, 115 S Ct 2097 (1995) (holding that all racial classifications must be subject to strict scrutiny).

86 See e.g. *Citizens United v Federal Election Commission*, 558 US 310, 130 S Ct 876(2010) (right to political speech); *Tashjian v Republican Party of Connecticut*, 479 US 208, 107 S Ct 544 (1986) (right to association); *Kramer v Union Free School District No 15*, 395 US 621, 89 S Ct 1886 (1969) (right to vote).

87 See e.g. *Saenz v Roe*, 526 US 489, 119 S Ct 1518 (1999) (right to travel); *Church of the Lukumi Babalu Aye v Hialeah (City of)*, 508 US 520, 113 S Ct 2217 (1993) (freedom of religion).

intermediate scrutiny—has been applied to a category of rights and statuses that includes gender discrimination,[88] illegitimacy,[89] and commercial speech.[90] The US Supreme Court applies the lowest level of scrutiny—rational basis—to whatever does not fall within either strict or intermediate scrutiny.[91] The Court's scrutiny standards therefore express the relative standing of constitutional values by creating an informal hierarchy ordering rights and status along an ascending scale of importance.[92]

In addition to constitutional theory and constitutional law, constitutional design offers another way to establish a hierarchy of values. In contrast to the informal hierarchy that develops through judicial interpretation, constitutional design can create a more formal hierarchy in three principal ways. First, constitutional designers may express values in the constitution's preamble. As Levinson explains, preambles sometimes convey a "commitment to some scheme of universal values."[93] Preambles often invoke such lofty ideals as justice,[94] liberty,[95] and democracy.[96] Although these values are often stated a high level of generality that could render them content-less, recent scholarship shows that rights and prin-

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88 See *United States v Virginia*, 518 US 515, 116 S Ct 2264 (1996); *Craig v Boren*, 429 US 190, 97 S Ct 451 (1976).

89 See *Clark v Jeter*, 486 US 456, 108 S Ct 1910 (1988); *Lalli v Lalli*, 439 US 259, 99 S Ct 518 (1978).

90 See *Central Hudson Gas & Electric Corp v Public Service Commission of New York*, 447 US 557, 100 S Ct 2343 (1980); *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc*, 425 US 748, 96 S Ct 1817 (1976).

91 See e.g. *New York City Transit Authority v Beazer*, 440 US 568, 99 S Ct 1355 (1979); *Railway Express Agency v New York*, 336 US 106, 69 S Ct 463 (1949). But note that there are effectively two levels of rational basis review, one deferential and the other more rigorous. See Kenji Yoshino, "The New Equal Protection" (2011) 124:3 Harv L Rev 747 at 759–60.

92 See Calvin Massey, "The New Formalism: Requiem for Tiered Scrutiny?" (2004) 6:5 U Pa J Const L 945 at 992–94.

93 Sanford Levinson, "Do Constitutions Have a Point?: Reflections on 'Parchment Barriers' and Preambles" (2011) 28:1 Social Philosophy & Policy 150 at 177.

94 See e.g. *Constitution of the Republic of Angola*, 2008, preamble; *Constitution of the Republic of Paraguay, 1992*, No 63 of 1992, translated by Maria de Carmen Gress, preamble; *Constitution of the Bolivarian Republic of Venezuela, 1999*, translated by Ministry of Communication and Information of the Bolivarian Republic of Venezuela, preamble.

95 See e.g. *Constitution of the Republic of Cuba, 1976*, translated by Anna I Vellvé Torras, preamble [*Constitution of Cuba*]; *Constitution de la République française 1958*, JO, 5 October 1958 9151, preamble; *Constitution of Morocco, 2011*, translated by Jefri J Ruchti, preamble.

96 See e.g. *Constitution fédérale de la Confédération suisse, 1998*, preamble; *Constitution of the Republic of Uzbekistan, 1992*, preamble; *Constitution of the Republic of Zambia, 1991*, No 1 of 1991, as amended by *Constitution of the Republic of Zambia Act*, No 18 of 1996, preamble [*Constitution of Zambia*].

ciples listed in a constitution's preamble are increasingly interpreted as justiciable.[97]

Second, designers may choose to express values elsewhere in the text of the constitution. For instance, the South African constitution opens, after its preamble, with a declaration that the state is founded on a series of values including human dignity, equality, non-racialism, non-sexism, the rule of law, and multi-party democratic government.[98] Spain likewise expressly states values in the text of its constitution outside the preamble, entrenching the statement that "Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system."[99] Kazakhstan also follows this model, stating after the preamble of its constitution that "[t]he Republic of Kazakhstan proclaims itself a democratic, secular, legal and social state whose supreme values are the individual, his life, rights and freedoms."[100]

B. Constitutional Values and Constitutional Hierarchy

Constitutional designers may also entrench and therefore express constitutional values in a third way: in their design of formal amendment rules. When constitutional designers entrench these rules, they may be electing more than a formal amendment procedure; they may be choosing deliberately to identify special political commitments. Formal amendment rules should consequently be seen as a third site where constitutional designers may establish and express a formal hierarchy of values. I use the word *may* to stress that formal amendment rules are only sometimes intended to express values. The point is therefore a modest one. It is not that *all* formal amendment rules *always* convey constitutional values; instead, formal amendment rules are one of many sites within a constitutional order for entrenching values and communicating them both internally (within the constitutional community) and externally (beyond its borders). While all constitutional provisions express some form of both substantive and procedural values, insofar as they are the product of negotiation and often partisan political contests about how to govern a constitutional community, I am focusing on a relatively narrow dimension of

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[97] See Liav Orgad, "The Preamble in Constitutional Interpretation" (2010) 8:4 International Journal of Constitutional Law 714 at 738.

[98] See *Constitution of South Africa, supra* note 16, s 1.

[99] *Constitution of Spain, 1978*, as amended to 1992, translated by Comparative Constitutions Project, s 1.

[100] *Constitution of the Republic of Kazakhstan, 1995*, as amended to No 403-IV of 2011, translated by the Constitutional Council of the Republic of Kazakhstan, art 1(1).

constitutional design: the values expressed by the text of formal amendment rules.

With this in mind, consider three provisions—A, B, and C—in a hypothetical written federal constitution currently in draft, prior to its ratification, at a constitutional convention today. Assume that the constitutional designers create three different thresholds for formal amendment and that they make A subject to formal amendment by the lowest of the three formal thresholds: simple majority agreement in both houses of the national legislature and simple majority approval from the sub-national legislatures. The constitutional designers choose to require a higher threshold to formally amend B: supermajority in both houses and supermajority approval from the sub-national legislatures. The designers then subject C to the highest amendment threshold: supermajority agreement in both houses of the national legislature, supermajority approval from the sub-national legislatures, and a national referendum ratified by majority vote.

We can draw four interdependent conclusions about the constitutional designers' choices with respect to A, B, and C in this hypothetical constitutional design. First, we can conclude that the designers understand A, B, and C as qualitatively different from one another in some respect. Second, we can deduce that the designers wish to find a mechanism by which to validate these perceived qualitative differences. Third, we can recognize that the designers wish to convey their validation of these known differences by entrenching them somewhere in the constitutional text. More specifically, fourth, we can conclude that the designers have identified the rules of formal amendment as one place within the constitution in which they can validate, by way of escalating entrenchment, these known differences among A, B, and C.

This deliberate choice to vary the level of difficulty for formally amending A, B, and C could reflect one of three conclusions. These conclusions are not mutually exclusive and are closely related; yet it is important to distinguish them analytically, even though they may overlap. First, the choice to make one constitutional provision subject to a higher formal amendment threshold could represent a political bargain entered into by the constitutional designers for the sake of ratifying an otherwise "unratifiable" constitution. This possibility is illustrated by the equal suffrage clause in the United States Constitution,[101] which requires a higher amendment threshold for changing a state's voting power in the Senate than is required for amending anything else.[102] The clause was a "consti-

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[101] See US Const, *supra* note 7, art V.

[102] Another example of an absolutely necessary compromise provision in the US Constitution is the temporary entrenchment of the slave trade, as Ozan Varol explains in his

tutional essential"[103] to the adoption of the US Constitution; smaller states worried that without its protection, the larger, more populous states would overrun their interests.[104] Madison explained that the clause "was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the Legislature; and was probably insisted on by the States particularly attached to that equality."[105] Entrenching this heightened formal amendment protection was therefore a condition precedent to the Union.[106]

The different thresholds for formally amending A, B, and C could also reflect the concern that future generations of political actors will be tempted to act in their self-interest by seeking to amend certain power-conferring constitutional provisions. The Honduran constitution illustrates such a concern. That constitution's designers thought it necessary, given the nation's history, to entrench presidential term limits against formal amendment;[107] accordingly, the constitutional text designates the presidential term limit provision as unamendable.[108] The durability and legitimacy of this rule were recently tested when then-President Manuel Zelaya proposed a national referendum on amending the term limit prohibition.[109]

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study of temporary constitutions. See Ozan O Varol, "Temporary Constitutions" 102 Cal L Rev [forthcoming in 2014] at 40–42.

[103] Douglas G Smith, "An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution" (1997) 34:1 San Diego L Rev 249 at 322.

[104] Roger Sherman argued that "each State ought to be able to protect itself: otherwise a few large States will rule the rest" (Farrand, ed, *supra* note 51 at 196). Sherman also suggested that "[t]he smaller States would never agree to the plan on any other principle (than an equality of suffrage in this branch[)]" (*ibid* at 201).

[105] James Madison, "The Federalist No. 43," in Jacob E Cooke, ed, *The Federalist* (Middletown: Wesleyan University Press, 1961) 288 at 296.

[106] After several debates on the matter, the equal suffrage clause was adopted without opposition. See Farrand, ed, *supra* note 51 at 505–09.

[107] See Teresa Stanton Collett, "Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments" (2010) 41:2 Loy U Chi LJ 327 at 345–46.

[108] See *Constitution of the Republic of Honduras, 1982*, No 131 of 1982, arts 239 (establishing one-term rule), 374 (entrenching article 239 against formal amendment).

[109] For a discussion and analysis of this episode, see e.g. Frank M Walsh, "The Honduran Constitution is Not a Suicide Pact: The Legality of Honduran President Manuel Zelaya's Removal" (2010) 38:2 Ga J Int'l & Comp L 339; Doug Cassel, "Honduras: *Coup d'Etat* in Constitutional Clothing?—Revision", online: (2009) 13:9 ASIL Insights <www.asil.org/insights091015.cfm>; William Ratliff, "Understanding the Mess in Honduras" *Forbes* (28 September 2009), online: Forbes <www.forbes.com/2009/09/28/honduras-zelaya-insulza-opinions-contributors-william-ratliff.html>; Elisabeth Malkin,

The choice to vary the level of amendment difficulty among A, B, and C could also reflect a third conclusion, which is the one that will occupy the remainder of this article. The different thresholds for formally amending A, B, and C could reflect a considered judgment about their relative importance. On this theory, to require a more demanding formal amendment threshold for C than for B, and likewise for B than for A, is to declare that C is the most important provision among the three, followed by B, and finally by A. What results from this constitutional design, then, is a formal constitutional hierarchy that identifies the principles, rules, rights, or structures that constitutional designers wish to privilege.[110]

C. Constitutional Hierarchy in Formal Amendment Rules

Constitutional values may therefore be ordered in a constitutional hierarchy in the design of formal constitutional amendment rules. In this section, I will demonstrate how constitutional hierarchies may emerge from four different designs of these rules: (1) an escalating structure of formal amendment rules, as exhibited by the Canadian, South African, Ghanaian, Nigerian, and Indian constitutions; (2) subject-matter restrictions, as demonstrated by the Cuban, Afghan, and Brazilian constitutions; (3) an escalating structure of formal amendment rules alongside subject-matter restrictions, with reference to the Ukrainian constitution; and (4) a non-escalating structure of formal amendment rules alongside subject-matter restrictions, as seen in the Cameroonian and Portuguese constitutions. I note at the outset that we should not attribute the intention to express a relative ordering of constitutional importance to all constitutional hierarchies. As I have stressed above, the entrenchment of a formal constitutional hierarchy can reflect one or more motivations, namely political bargaining, a defense against self-dealing, and the expression of values; it often reflects some combination of these three.

Consider first the Canadian *Constitution Act, 1982*. Its text creates five escalating tiers of entrenchment with different procedures to formally amend the constitution, each imposing higher and still higher thresholds

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"Honduran President Is Ousted In Coup" *New York Times* (29 June 2009), online: New York Times <www.nytimes.com>.

[110] I am grateful to Tom Ginsburg for the point that measuring amendment difficulty is challenging. For example, it is difficult to assess whether achieving a majority in a national referendum is harder than achieving a supermajority in a bicameral legislature. But when escalating amendment thresholds are cumulative rather than simply dissimilar, one can posit that each increasing threshold will be harder to achieve than the previous threshold.

for altering certain constitutional provisions.[111] The first is known as the general amendment procedure, under which a formal amendment requires resolutions from both the House of Commons and the Senate as well as resolutions from at least two-thirds of the provinces representing at least half of the total provincial population.[112] This procedure is the Canadian constitution's default rule for formal amendment: unless otherwise specified, all formal amendments must be achieved using the general amendment procedure. The constitution also specifies that certain items—namely provincial representation in the Senate, senatorial powers and elections, and the creation of new provinces–are amendable only through the general amendment procedure.[113]

The second amendment procedure is more stringent than the general procedure, requiring unanimous agreement among both houses of Parliament and each provincial legislature.[114] It applies to five expressly designated matters: (1) the monarchy and its representation in Canada; (2) provincial representation in the House of Commons; (3) the use of English and French, subject to the bilateral/multilateral procedure discussed below; (4) the composition of the Supreme Court of Canada; and (5) the formal amendment procedures themselves.[115] The third bilateral/multilateral

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[111] See *Constitution Act, 1982*, *supra* note 16, ss 38–49. Some scholars interpret Canada's formal amendment rules as consisting of seven different procedures. See e.g. James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Ottawa: Canada Communication Group, 1996) at 69; Tsvi Kahana, "Canada" in Dawn Oliver & Carlo Fusaro, eds, *How Constitutions Change: A Comparative Study* (Portland: Hart Publishing, 2011) 9 at 25. But as Hurley concedes, "[o]pinions may vary, however, on the precise number of procedures" (Hurley, *supra* note 111 at 69). I agree with Peter Hogg's interpretation that there are five formal amendment procedures. See Peter W Hogg, "Formal Amendment of the Constitution of Canada" (1992) 55:1 Law & Contemp Probs 253 at 257.

[112] See *Constitution Act, 1982*, *supra* note 16, s 38(1). A province may opt out of a constitutional amendment passed using the general procedure in certain circumstances. See *ibid*, s 38(3).

[113] *Ibid*, s 42(1):

> An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1): (*a*) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada; (*b*) the powers of the Senate and the method of selecting Senators; (*c*) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators; (*d*) subject to paragraph 41(*d*), the Supreme Court of Canada; (*e*) the extension of existing provinces into the territories; and (*f*) notwithstanding any other law or practice, the establishment of new provinces.

[114] *Ibid*, s 41.

[115] *Ibid*.

procedure, in contrast, is less exacting than the general formula. Under this procedure, resolutions from both houses of Parliament and from the legislature(s) of an affected province are necessary for amendments relating to the alteration of boundaries between provinces, the use of English or French within a province, or any other matter applying to some but not all provinces.[116]

The fourth and fifth procedures—the federal unilateral procedure and its provincial unilateral equivalent—are even less exacting than the bilateral/multilateral procedure. The federal unilateral procedure authorizes the national Parliament to formally amend the Constitution by passing a law.[117] This procedure applies only to matters relating to the executive government or the houses of Parliament, and excludes those matters concerning executive government and the national legislature that are expressly keyed to higher amendment thresholds.[118] The provincial unilateral procedure authorizes provincial legislatures to formally amend their own constitutions by passing a law.[119] This procedure applies to all provincial matters except those specifically assigned higher amendment thresholds.[120]

It is possible to conceptualize these amendment procedures along an ascending scale of difficulty. Each procedure adds an additional hurdle before political actors may consummate a formal amendment. (For the moment, let us set aside the provincial unilateral amendment procedure because it applies only to amendments of a provincial, not the national, constitution, although we should understand a provincial constitution to incorporate parts of the written and unwritten constitution of Canada, and

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[116] *Ibid*, s 43:

> An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including (*a*) any alteration to boundaries between provinces, and (*b*) any amendment to any provision that relates to the use of the English or the French language within a province, may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

[117] "Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons" (*ibid*, s 44).

[118] *Ibid*. In a current project related to the recent Senate Reference, I am developing the argument that Canada's escalating design of formal amendment rules are more complicating than clarifying.

[119] "Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province" (*ibid*, s 45).

[120] *Ibid*.

likewise the written and unwritten constitution of Canada incorporates within it parts or all of each of the provincial constitutions.) The procedures along each threshold are cumulative; each one incorporates the lower threshold in some manner. The lowest level of amendment—the federal unilateral procedure—requires simple majorities in each of the two houses of Parliament.[121] The next highest threshold—the bilateral/multilateral procedure—demands both the requirements of the federal unilateral procedure and a resolution from the affected province(s).[122] The general formula is the third highest threshold; it requires both the agreement of the two houses of Parliament and the consent of seven of the ten provinces representing at least fifty per cent of the provincial population.[123] Finally, the unanimity requirement is the hardest one of all, requiring both houses of Parliament and each of the ten provinces to agree.[124]

These escalating tiers of formal entrenchment may signal constitutional designers' intent to match the level of formal amendment difficulty to the significance of the role the designated provision occupies, either functionally in the constitutional regime or symbolically in the constitutional text.[125] For Stephen Scott, the multiple formal amendment procedures should be seen as "standing in a hierarchy, so that the former stands to the latter as the 'more difficult' to the 'less difficult'"—with Scott referring to the more comprehensive and less comprehensive procedures, respectively.[126] Peter Hogg observes that the highest level of formal entrenchment in the Canadian constitution—the unanimity procedure—applies to the most important matters, what he calls "specially entrenched" provisions that are have national significance: "The five listed topics are specially entrenched because they are deemed to be matters of national significance which should not be altered over the objection of even one province."[127] Walter Dellinger makes a similar observation, noting that Canada's formal amendment rules provide "special protection to

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121 *Ibid*, s 44.

122 *Ibid*, s 43.

123 *Ibid*, s 38(1). Territorial population does not appear to count toward national population. See *ibid*, s 38(2).

124 *Ibid*, s 41.

125 I am currently completing a paper in which I explore the origins and evolution of Canada's formal amendment rules. This paper will show that although the design of Canada's escalating amendment rules were intended to express values along a constitutional hierarchy, their design was also constrained by constitutional history in important ways that have yet to be explored.

126 Stephen A Scott, "Pussycat, Pussycat or Patriation and New Constitutional Amendment Processes" (1982) 20 UWO L Rev 247 at 304.

127 Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2012) at 4–25.

certain very fundamental matters," distinguishing the highest amendment threshold from the lower ones.[128] Escalating amendment thresholds may therefore be deployed, as they have been in Canada, to make it harder to amend special constitutional provisions, though they may also be the result of a political bargain or a defense against self-interest, as discussed above.

The South African constitution's escalating tiers of formal amendment are similar to those in Canada's *Constitution Act, 1982*. The South African constitution entrenches three amendment procedures which, like the formal amendment thresholds in the Canadian constitution, may each be used to amend a limited universe of constitutional provisions. Take the most demanding formal amendment procedure. It requires approval by three-quarters of South Africa's National Assembly and two-thirds of its National Council of Provinces, and it must be used for any formal amendment to the constitution's declaration of values and to this amendment formula.[129] The mid-level formula calls for a lower threshold—two-thirds approval in the National Assembly and two-thirds approval in the National Council of Provinces—and applies to any formal amendment to the Bill of Rights, the National Council of Provinces, and provincial matters.[130] The least demanding formula requires only two-thirds approval in the National Assembly and is to be used for formal amendments to all other constitutional matters.[131] What results from these escalating thresholds of formal amendment is a constitutional hierarchy, with South Africa's stated constitutional values and the formal amendment procedures at the top, the Bill of Rights and provincial matters in the middle, and all other constitutional provisions below.

A similar hierarchy is observable in other constitutions that entrench escalating thresholds of formal amendment. In the Ghanaian constitution, formally amending certain provisions, for example the constitution's pro-

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[128] Walter Dellinger, "The Amending Process in Canada and the United States: A Comparative Perspective" (1982) 45:4 Law & Contemp Probs 283 at 300.

[129] *Constitution of South Africa*, *supra* note 16, s 74(1). The constitution's statement of constitutional values proclaims that

> [t]he Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness (*ibid*, s 1).

[130] *Ibid*, s 74(2).

[131] *Ibid*, s 74(3).

tections for fundamental rights and freedoms,[132] requires a very high threshold of agreement: there must be a proposal in Parliament and consultation with the Council of State, followed by a referendum with at least forty per cent popular participation and three-quarters approval, ratification by Parliament, and assent from the President.[133] In contrast, another group of constitutional provisions, for instance the provision authorizing the President to appoint the Chief of Defense Staff of the Armed Forces,[134] may be amended by a moderately less onerous process requiring a proposal in Parliament, consultation with the Council of State, two successive votes of two-thirds approval in Parliament, and the President's assent.[135] The Ghanaian constitution thus has a two-tier hierarchy that sets fundamental rights and freedoms apart from other provisions.

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[132] *Constitution of the Republic of Ghana, 1992*, arts 12–33 [*Ghanaian Constitution*].

[133] *Ibid*, art 290. Fundamental rights and freedoms are considered "entrenched" in the *Ghanaian Constitution*. The following procedures govern the formal amendment of "entrenched" provisions:

> (2) A bill for the amendment of an entrenched provision shall, before Parliament proceeds to consider it, be referred by the Speaker to the Council of State for its advice and the Council of State shall render advice on the bill after thirty days after receiving it.
>
> (3) The bill shall be published in the *Gazette* but shall not be introduced into Parliament until the expiry of six months after the publication in the *Gazette* under this clause.
>
> (4) After the bill has been read the first time in Parliament it shall not be proceeded with further unless it has been submitted to a referendum held throughout Ghana and at least forty percent of the persons entitled to vote, voted at the referendum and at least seventy-five percent of the persons who voted cast their votes in favour of the passing of the bill.
>
> (5) Where the bill is approved at the referendum, Parliament shall pass it.
>
> (6) Where a bill for the amendment of an entrenched provision has been passed by Parliament in accordance with this article, the President shall assent to it (*ibid*, arts 290(2)–(6)).

[134] *Ibid*, art 212(1).

[135] *Ibid*, art 291. The following procedures govern the formal amendment of "non-entrenched" provisions:

> (1) A bill to amend a provision of this Constitution which is not an entrenched provision shall not be introduced into Parliament unless—
>
> (a) it has been published twice in the *Gazette* with the second publication being made at least three months after the first; and
>
> (b) at least ten days have passed after the second publication.
>
> (2) The Speaker shall, after the first reading of the bill in Parliament, refer it to the Council of State for consideration and advice and the Council of State shall render advice on the bill within thirty days after receiving it.

Likewise, under the Nigerian constitution, there is a difference in thresholds for formally amending different provisions: the Nigerian constitution has a similar two-tier hierarchy that results from its escalating model of formal amendment. At the higher threshold, a formal amendment requires four-fifths approval in both houses of the national legislature as well as two-thirds approval from all sub-national legislatures. This threshold applies to provisions concerning fundamental rights, the creation of new sub-national units, adjustments to territorial boundaries, and the formal amendment rules themselves.[136] Other constitutional provisions may be formally amended with a lower threshold requiring two-thirds approval in both houses of the national legislature and two-thirds approval among sub-national legislatures.[137]

The Indian constitution also entrenches two amendment thresholds. The higher threshold applies exclusively to specifically designated provisions, while the lower threshold applies to all others. The lower threshold requires either house of the national legislature to propose an amendment, each house to pass it by a supermajority, and the President to assent to it.[138] All constitutional provisions are subject to this rule of formal

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> (3) Where Parliament approves the bill, it may only be presented to the President for his assent if it was approved at the second and third readings of it in Parliament by the votes of at least two thirds of all the members of Parliament.
>
> (4) Where the bill has been passed in accordance with this article, the President shall assent to it (*ibid*).

[136] *Constitution of the Federal Republic of Nigeria, 1999*, No 27 of 1999, s 9(3):

> An Act of the National Assembly for the purpose of altering the provisions of this section, section 8 or Chapter IV of this Constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all the members of each House, and also approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.

[137] *Ibid*, s 9(2):

> An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.

[138] See *Constitution of the Sovereign Democratic Republic of India, 1950*, art 368(2):

> An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and

amendment unless they concern the formal amendment rules themselves, the presidential electoral college, Union courts, federalism, or the relative powers of the national and sub-national governments. Where an amendment relates to these subjects, the Indian constitution requires an additional voting procedure prior to the President's assent: at least half of the sub-national legislatures must ratify the amendment.[139] Just as the Indian constitution suggests through its entrenchment of formal amendment rules that certain provisions may be more highly valued or more politically salient than others, so do the Canadian, South African, and Nigerian constitutions.

We can likewise discern a constitutional hierarchy in subject-matter restrictions on formal amendment rules. When a constitutional text distinguishes one provision from another by expressly designating one of them as impervious to the formal amendment rules that apply to the other, one possible message both conveyed and perceived is that one of the two provisions is more highly valued. The degree to which a constitutional provision is insulated from formal amendment and from the unpredictability of constitutional politics is in this case a proxy for preference. The stricter its entrenchment, the higher the constitutional worth of a given provision. Absolute entrenchment against formal amendment is thus the strongest statement of a provision's value.[140]

To illustrate the point, consider a few examples of these subject-matter restrictions. The Cuban constitution absolutely entrenches socialism against formal amendment. The text states that socialism "is irrevo-

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> upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:
>
> Provided that if such amendment seeks to make any change in—
>
> (*a*) Article 54, Article 55, Article 73, Article 162 or Article 241, or
>
> (*b*) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
>
> (*c*) any of the Lists in the Seventh Schedule, or
>
> (*d*) the representation of States in Parliament, or
>
> (*e*) the provisions of this Article,
>
> the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States specified in Parts A and B of the First Schedule by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

139 *Ibid.*

140 See Miriam Galston, "Theocracy in America: Should Core First Amendment Values be Permanent?" (2009) 37:1 Hastings Const LQ 65 at 115.

cable, and Cuba will never go back to capitalism."[141] For Afghanistan, the similarly situated value is Islam: the Afghan constitution declares that "[t]he principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended."[142] And in Brazil, federalism occupies the privileged position that socialism and religion occupy in Cuba and Afghanistan, respectively, insofar as its constitutional text states that "[n]o proposed constitutional amendment shall be considered that is aimed at abolishing ... the federalist form of the National Government."[143] These content restrictions on the operation of formal amendment rules tell us just how much socialism, religion, and federalism matter in Cuba, Afghanistan, and Brazil. Constitutional designers regarded these principles as so important as to disable the formal amendment rules against them altogether.

A constitutional hierarchy can also emerge concurrently from the combination of formal amendment rules and subject-matter restrictions. Consider the Ukrainian constitution, a text that entrenches subject-matter restrictions alongside escalating tiers of formal amendment. The Ukrainian constitution's designers set apart three items from others—human rights and freedoms, national independence, and territorial integrity—by designating them as formally unamendable.[144] Visually, we can place these unamendable provisions at the summit of the constitutional hierarchy. At the intermediate level of the hierarchy of importance, we can place the Ukrainian constitution's statement of general principles, its rules for elections and referenda, and the formal amendment rules themselves, for which the constitution requires a proposal by either the President or two-thirds of the national legislature, adoption again by a two-thirds vote in the national legislature, and ratification via national referendum.[145] Finally, the remaining constitutional provisions sit at the low-

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[141] *Constitution of the Republic of Cuba 1976, Codification of 2003*, translated by Anna I Vellvé Torras & William S Hein & Co, Inc, s 3.

[142] *Constitution of the Islamic Republic of Afghanistan*, 2004, translated by Comparative Constitutions Project, art 149 [*Constitution of Afghanistan*].

[143] *Constitution of the Federative Republic of Brazil*, 1988, translated by Comparative Constitutions Project, art 60(4)(1).

[144] See *Constitution of Ukraine*, 1996 ("[t]he Constitution of Ukraine shall not be amended, if the amendments foresee the abolition or restriction of human and citizens' rights and freedoms, or if they are aimed toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine," art 157).

[145] *Ibid*, art 156:

> A draft law on introducing amendments to Chapter I—"General Principles," Chapter III—"Elections. Referendum," and Chapter XIII—"Introducing Amendments to the Constitution of Ukraine," is submitted to the Verkhovna Rada of Ukraine by the President of Ukraine, or by no less than two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine, and on the

est level of Ukraine's constitutional hierarchy, for which formal amendment is possible by the lower of the two amendment thresholds: proposal by either the President or one-third of the national legislature, adoption by a majority of the national legislature, followed by a subsequent two-thirds vote in the national legislature.[146]

A hierarchy of values likewise emerges when a constitutional text combines a non-escalating structure of formal amendment alongside subject-matter restrictions. For example, the Portuguese constitution entrenches content restrictions alongside a single procedure for formal amendment. The result is a two-tier constitutional hierarchy pursuant to which most provisions are subject to the constitution's single amendment formula, which requires two-thirds approval from the national legislature.[147] The more valued provisions are designated as unamendable and are therefore immune from this procedure. Consider also the Cameroonian constitution, which entrenches general formal amendment procedures applicable to all of the constitutional provisions *except* four principles expressly designed as formally unamendable:[148] republicanism, na-

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> condition that it is adopted by no less than two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine, and is approved by an All-Ukrainian referendum designated by the President of Ukraine.

[146] *Ibid*, art 155:

> A draft law on introducing amendments to the Constitution of Ukraine, with the exception of Chapter I—"General Principles," Chapter III—"Elections. Referendum," and Chapter XIII—"Introducing Amendments to the Constitution of Ukraine," previously adopted by the majority of the constitutional composition of the Verkhovna Rada of Ukraine is deemed to be adopted, if at the next regular session of the Verkhovna Rada of Ukraine, no less than two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine have voted in favour thereof.

[147] *Constitution of the Portuguese Republic, 1976* ("[c]hanges in the Constitution shall be approved by a majority of two-thirds of the members of the Assembly present," art 286(2)).

[148] See *ibid*, art 63:

> (1) Amendments to the Constitution may be proposed either by the President of the Republic or by Parliament.
>
> (2) Any proposed amendment made by a member of Parliament shall be signed by at least one-third of the members of either House.
>
> (3) Parliament shall meet in congress when called upon to examine a draft or proposed amendment. The amendment shall be adopted by an absolute majority of the members of Parliament. The President of the Republic may request a second reading; in which case the amendment shall be adopted by a two-third majority of the members of Parliament.
>
> (4) The President of the Republic may decide to submit any bill to amend the Constitution to a referendum; in which case the amendment shall be adopted by a simple majority of the votes cast.

tional unity, territorial integrity, and democracy.[149] Cameroon's hierarchy of constitutional values therefore consists of two tiers: the subject-matter restrictions are on top, and the freely formally amendable provisions are on the bottom.

III. The Authenticity of Formal Entrenchment

The values that constitutional designers choose to entrench in formal amendment rules may reflect either actual or inauthentic political commitments. Where constitutional designers entrench values in order to obscure contrary or ignoble political commitments, the disjunction between the constitutional text and political reality becomes problematic, both for the study of constitutional design and more immediately for those to whom the constitution applies. But to the extent that entrenched values accurately represent the intent or aspiration of constitutional designers, perception and reality mutually reinforce each other in the constitutional text's declaration of values. In this Part, I will illustrate how the purpose and perception of constitutions and formal amendment rules may diverge. I will also demonstrate how we can evaluate the authenticity of the constitutional values entrenched in formal amendment rules. As will become evident, the task is not an easy one, as it requires inquiry into text, law, and culture. My subject will be the German Basic Law, though the Canadian constitution could serve just as well.[150]

A. Purpose and Perception

Where constitutional designers entrench values in the constitutional text, we may consider these values *authentic* if the designers intended them to guide successor political and judicial actors in legislative and executive action and in judicial interpretation. On the other hand, where de-

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[149] *Constitution of the United Republic of Cameroon, 1972* ("[n]o procedure for the amendment of the Constitution affecting the republican form, unity and territorial integrity of the State and the democratic principles which govern the Republic shall be accepted," art 64).

[150] In a current project, I am doing just that. I am deconstructing and evaluating the design of formal amendment rules in Canada. I will build on the work of Canadian scholars who have suggested that Canada's escalating formal amendment rules reflect special political commitments. See Hurley, *supra* note 111; Jacques-Yvan Morin & José Woehrling, *Les constitutions du Canada et du Québec: du régime français à nos jours*, t 1–2, 2d ed (Montreal: Éditions Thémis, 1994); Benoît Pelletier, *La modification constitutionnelle au Canada* (Scarborough: Carswell, 1996); Benoît Pelletier, "Les modalités de la modification de la Constitution du Canada" (1999) 33 RJT 1; Peter Oliver, "Canada, Quebec, and Constitutional Amendment" (1999) 49:4 UTLJ 519; José Woerhling, "Les aspects juridiques de la redéfinition du statut politique et constitutionnel du Québec" (1991–1992) 7:1 RQDI 12.

signers entrench values but neither have emotional vulnerability to them nor intend those values to influence successor actors,[151] we may presume that those entrenched values are inauthentic. This presumption may be rebutted with evidence that successor political and judicial actors have subsequently adopted these entrenched values as binding or guiding their conduct. The authenticity of entrenched values, however, is neither immediately nor entirely clear from a constitutional text.

That written constitutions sometimes exhibit a disjunction between purpose and perception is a common critique of the study of formal constitutions.[152] As David Law and Mila Versteeg have conceded in their own work on formal constitutions, "[s]ome may object that formal constitutions are not worth studying because what is on paper does not necessarily translate into practice."[153] We need not look further than the Kremlin's 1936 *Constitution of the Union of Soviet Socialist Republics* to see just

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[151] See Samuel Scheffler, *Equality and Tradition: Questions of Value in Moral and Political Theory* (New York: Oxford University Press, 2010) at 29.

[152] See e.g. George C Guins, "Towards an Understanding of Soviet Law" (1955) 7:1 Soviet Studies 14 at 18–23 (explaining why one cannot understand Soviet law by reading the Soviet Constitution); AE Dick Howard, "The Essence of Constitutionalism" in Kenneth W Thompson & Rett R Ludwikowski, eds, *Constitutionalism and Human Rights: America, Poland, and France* (London: University Press of America, 1991) 3 (describing some constitutions as "worthless scraps of papers" at 4); "Counterinsurgency and Constitutional Design", Note, (2008) 121:6 Harv L Rev 1622:

> A façade constitution can declare aspirational principles and adopt power structures for government, but such provisions and principles are ineffective and potentially delegitimized because they are not followed in practice. Many African constitutions, for example, were not tailored to their social context and were either ignored or manipulated, thereby undermining constitutionalism and the rule of law (*ibid* at 1632 [footnote omitted]).

See generally Linda Camp Keith, "Constitutional Provisions for Individual Human Rights (1977–1996): Are They More Than Mere 'Window Dressing?'" (2002) 55:1 Political Research Quarterly 111 (finding some, though not clearly conclusive, statistical evidence that certain constitutional provisions sometimes matter to the behaviour of states with respect to human rights). The study of formal constitutions is nonetheless important. As Beau Breslin has argued, the constitutional text as a unique collection of words, aspirations, objectives, and fundamental law is worthy of scholarly attention (Beau Breslin, *From Words to Worlds: Exploring Constitutional Functionality* (Baltimore: Johns Hopkins University Press, 2009) at 8–9).

[153] David S Law & Mila Versteeg, "The Evolution and Ideology of Global Constitutionalism" (2011) 99:5 Cal L Rev 1163 at 1169. Law and Versteeg rebut this criticism, conceding that although "[s]ometimes, constitutions neither constrain nor even describe the actual operation of the state," these are the very reasons we should study them: first, "[t]o recognize that some constitutions are shams merely begs a host of further questions, none of which can be tackled without a systematic understanding of what the world's constitutions actually say" and, second, "[i]t is one thing to observe that formal or 'large-C' constitutions can diverge from actual or 'small-c' constitutional practice; it is another thing to know when and in what ways they diverge" (*ibid* [footnote omitted]).

how widely political practice may diverge from the constitutional text.[154] For political theorist Benjamin Barber, the Soviet constitution was merely a smokescreen: although it appeared from its words to be "the world's most effusively rights-oriented constitution" in an "unprecedented fortress of human liberty," the truth was plainly the opposite.[155]

This disjunction between purpose and perception is what Jan-Erik Lane calls the gulf between the formal written constitution and the real political constitution.[156] Lane acknowledges that no regime successfully fulfills the entirety of its written constitutional commitments, but that some do better than others: "No state lives one hundred per cent in accordance with its written documents."[157] It is the size of the gulf between the codified constitution and the political constitution that matters in assessing how well or poorly a regime measures up to its formally entrenched commitments. An authoritarian state would likely exhibit much greater dissonance between its written and political constitutions than a democratic one, which is more likely to aspire to harmonize the two. As Lane writes:

> [I]n dictatorships and authoritarian states there is typically a tremendous distance between the formal constitution and the real constitution. Often such states enact a constitutional document which has no connection whatsoever to institutional practices in the country. It is only a camouflage constitution.[158]

David Law explains that camouflage constitutions serve a number of ulterior motives, including gaining credibility in the international community or securing foreign investment.[159]

The problem, posits William Andrews, is that over the course of the nineteenth and twentieth centuries, written constitutionalism became

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154 See *Constitution (Fundamental Law) of the Union of Soviet Socialist Republics, 1936*.

155 Benjamin R Barber, "Constitutional Rights—Democratic Instrument or Democratic Obstacle?" in Robert A Licht, ed, *The Framers and Fundamental Rights* (Washington, DC: AEI Press, 1992) 23 at 30.

156 Lane, *supra* note 23 at 45.

157 *Ibid*.

158 *Ibid*.

159 David S Law, "Constitutions" in Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (New York: Oxford University Press, 2010) 376 at 380. Qianfan Zhang has discussed the related reasons why China continues to maintain a camouflage constitution. See Qianfan Zhang, "A Constitution Without Constitutionalism? The Paths of Constitutional Development in China" (2010) 8:4 International Journal of Constitutional Law 950 at 952–56.

synonymous with democracy.[160] "Documentary Constitutions," he writes, "have come to be identified with constitutionalism."[161] Authoritarian regimes have taken advantage of this positive identification, exploiting what Giovanni Sartori calls the "favorable emotive properties" of the word "constitution".[162] Sartori describes the phenomenon in greater detail:

> [T]he political exploitation and manipulation of language takes advantage of the fact that the emotive properties of a word survive—at times for a surprisingly long time—despite the fact that what the word denotes, *i.e.*, the 'thing,' comes to be a completely different thing.[163]

Equating constitutions with constitutionalism was and remains problematic because authoritarian regimes take advantage of that association to hide behind a strategically drafted democracy-embracing constitutional text that appears consistent with constitutionalism but really is only a façade. As Andrews explains, "many regimes in the world today have Constitutions without constitutionalism. Tyrants, whether individual or collective, find that Constitutions are convenient screens behind which they can dissimulate their despotism."[164]

Formal amendment rules in constitutional texts are equally susceptible to authoritarian commandeering. Insofar as formal amendment rules reflect the usually unstated value of sovereignty,[165] the rules are a profitable and inexpensive site where authoritarian regimes may express inauthentic values while securing for themselves the goodwill that may come from their public, even if dishonest, association with democratic ideals. Examples abound of suspicious constitutional entrenchment. When we read the Russian Federation's constitution, which entrenches an escalating scale of formal amendment that makes it comparatively more difficult

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[160] William G Andrews, *Constitutions and Constitutionalism*, 2d ed (New York: D Van Norstand Company, 1963) at 22.

[161] *Ibid.*

[162] Giovanni Sartori, "Constitutionalism: A Preliminary Discussion" (1962) 56:4 Am Polit Sci Rev 853 at 855.

[163] *Ibid.*

[164] Andrews, *supra* note 160 at 22–23. For a useful, though perhaps controversial, illustration of how authoritarian states behave undemocratically despite purporting to respect democracy, see Kenneth Roth, "Depots Masquerading as Democrats" in *World Report* (2008), online: Human Rights Watch <www.hrw.org/sites/default/files/reports/wr2k8_web.pdf>.

[165] See e.g. Claude Klein & András Sajó, "Constitution-Making: Process and Substance" in Michel Rosenfeld & András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 419 at 438; Michel Troper, "Sovereignty" in Rosenfeld & Sajó, *ibid*, 350 at 363–65.

to amend civil and political rights,[166] we should therefore ask whether this special entrenchment actually expresses an authentic political commitment to protect these rights. This question should also arise when we read the Zambian constitution, which does the same with respect to its own fundamental rights and freedoms.[167] Similar questions may be asked of the formal amendment rules in Bangladesh,[168] Belarus,[169] Ethiopia,[170] or Singapore,[171] among many others.[172] The best answer is to always take a skeptical posture to any special or absolute entrenchment of constitutional values, and to evaluate whether the formally entrenched value aligns in reality with constitutional practice.

One of the weaknesses of entrenching values in formal amendment rules therefore doubles as the biggest weakness of written constitutions: their democratic commitments on parchment sometimes conceal undemocratic practices in reality.[173] Walter Murphy cautions us against supposing that constitutions necessarily bind political actors, because "[t]o think that words can constrain power seems foolish."[174] Constitutional commitments, after all, are but words on paper—and to borrow again from Law and Versteeg, "sometimes, constitutions lie."[175] Law and Versteeg have shown that constitutions often promise more than they deliver, not only for illegitimate reasons associated with authoritarian regimes that find shelter under the cover of constitutionalism, but also for legitimate budgetary limitations that, despite good intentions, make it difficult to honour

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166 *Constitution of the Russian Federation*, 1993, translated by Comparative Constitutions Project, arts 134–37.

167 *Constitution of Zambia*, *supra* note 96, s 79.

168 See *Constitution of the People's Republic of Bangladesh*, 1972, s 142.

169 See *Constitution of the Republic of Belarus*, 1994, ss 146–49.

170 See *Constitution of the Federal Democratic Republic of Ethiopia*, No 1 of 1995, arts 104–05.

171 See *Constitution of the Republic of Singapore, 1963*, No 1493 of 1963 (1999 Rev Ed), art 5.

172 See e.g. *Political Constitution of the Republic of Guatemala, 1985*, as amended by *Legislative Accord* No 18-93 of 1993, translated by Luis Francisco Valle Velasco, arts 277–80; *Iraqi Constitution*, 2005, art 126; *Constitution of the Republic of the Union of Myanmar, 2008*, arts 433–36; *Constitution of the Republic of Rwanda*, No 42 of 2003, art 193; *Constitution of Sierra Leone, 1991*, No 6 of 1991, art 108.

173 For contemporary illustrations, see David Landau, "Abusive Constitutionalism" (2013) 47 UC Davis L Rev [forthcoming].

174 Walter Murphy, "Constitutions, Constitutionalism, and Democracy" in Douglas Greenberg et al, eds, *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993) 3 at 7.

175 David S Law & Mila Versteeg, "Sham Constitutions" (2013) 101:4 Cal L Rev 863 at 865 [Law & Versteeg, "Sham Constitutions"].

constitutionally entrenched socio-economic rights.[176] The former, however, are examples of "sham constitutions" because they knowingly and purposely fail to live up to the commitments they have publicly undertaken.[177]

Some sham constitutions proclaim a commitment to human rights in their formal amendment rules, yet political actors do not conform their conduct to those commitments; such commitments therefore reflect an inauthentic expression of values. Although in these states, subject-matter restrictions purport to prohibit formal amendments to the human rights protections inscribed in their constitutions, political practice belies the textual respect for human rights. For instance, Afghanistan, Algeria, the Central African Republic, and Chad all entrench subject-matter restrictions on formal amendment to fundamental rights and freedoms, purporting to express the state's commitment to these rights.[178] But these four constitutional regimes appear in Law and Versteeg's "hall of shame", a list of the twenty-five worst sham constitutions that "combine far-

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[176] *Ibid* at 868.

[177] *Ibid* at 865.

[178] See *Constitution of Afghanistan*, *supra* note 142, art 149:

> The principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended. Amending fundamental rights of the people shall be permitted only to improve them. Amending other Articles of this Constitution, with due respect to new experiences and requirements of the time, as well as provisions of Articles 67 and 1 Hundred 46 of this Constitution, shall become effective with the proposal of the President and approval of the majority of National Assembly members;

Constitution of Algeria, 1996, No 96-438, art 178:

> No constitutional revision may infringe on:
>
> 1. the Republican character of the State.
>
> 2. the democratic order based on plural parties.
>
> 3. Islam, as the religion of the State.
>
> 4. Arabic, as the national and official language.
>
> 5. the fundamental freedoms, on the rights of man and the citizen.
>
> 6. the integrity and unity of the national territory.

See also *Constitution of the Central African Republic, 2004*, translated by Jefri J Ruchti ("[e]xpressly excluded from revision are: the republican and secular form of the State; the number and duration of presidential mandates; the conditions for eligibility; the incompatibilities to the functions of Head of State; the fundamental rights of the citizen," art 108); *Constitution of the Republic of Chad, 1996*, as amended to 2005, translated by Jefri J Ruchti ("[n]o procedure of revision may be engaged or pursued when it infringes: the integrity of the territory, the independence, or the national unity; the republican form of the State, the principle of the separation of powers and secularity; the freedoms and fundamental rights of citizens; the policy [of] pluralism," art 223).

reaching promises with relative little respect for rights in practice."[179] These constitutional regimes benefit from the goodwill of the uninformed, who read the regimes' respective constitutional texts believing that the texts reflect reality.

Another more recent example of an inauthentic expression of constitutional values is evident in the constitution of the Democratic Republic of the Congo.[180] Drafted by members of the current president's then-transitional government,[181] the constitution's formal amendment rules designate several matters—including republicanism, universal suffrage, and representative government—as formally unamendable,[182] and they prohibit formal amendments that have the effect of diminishing human rights and liberties.[183] We can suspect, however, that the Congo's governing political class is not truly committed to these values,[184] given the state's low ranking as an authoritarian regime in the Economist's *Democracy Index*.[185] That the governing class in the Democratic Republic of the Congo does not appear to conform its conduct to the values entrenched in the constitution's formal amendment rules suggests that it exploits the entrenchment of these values largely for public relations purposes.

Truly democratic and sham constitutions fall on the extremes of the constitutional spectrum. Both are relatively easy to recognize, particularly when compared to the vast number of middle-range regimes whose combination of constitutional text, institutional structures, political practices,

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179 Law & Versteeg, "Sham Contsitutions", *supra* note 175 at 899.

180 *Constitution of the Democratic Republic of Congo, 2006*, as consolidated to No 11/002 of 2011, translated by Jefri J Ruchti [*Constitution of DRC*].

181 "DR Congo Backs New Constitution" (12 January 2006), online: BBC News Service <news.bbc.co.uk>.

182 See *Constitution of DRC*, *supra* note 180, art 220.

183 *Ibid*.

184 The current president warned at the time of the referendum held to ratify the new constitution that rejecting it would have "catastrophic" consequences for peace in the country. See "A Ray of Hope in the Heart of Africa" (19 December 2005), online: The Economist <www.economist.com>. It appears that the constitution was ratified by an overwhelming supermajority because of citizens' wish to make peace, to rebuild, and to combat their own "war wariness" rather than their broad popular involvement in the process of constitution-making. See James Thuo Gathii, "Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya" (2008) 49:4 Wm & Mary L Rev 1109 at 1123–24.

185 See The Economist Intelligence Unit, *Democracy Index 2012: Democracy at a Standstill* (2013) at 8, online: The Economist <www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy-Index-2012.pdf&mode=wp&campaignid=DemocracyIndex12>. The Democratic Republic of the Congo ranks 159 out of the world's 167 countries on such democratic measures as electoral process and pluralism, the functioning of government, and civil liberties (*ibid*).

and civil society make it difficult to categorize their constitutions as clearly democratic or clearly sham. For these regimes, the inquiry into the authenticity of the values expressed in their formal amendment rules requires an analysis of the constitutional text, an evaluation of its interpretation by political actors, and an assessment of whether the entrenched constitutional values align with the political culture. This inquiry cannot yield a quick answer, but it is likely to produce the correct one.

B. Designing Constitutional Values

Few would contend that a constitutional text can on its own transform a political culture indisposed to the rules the text enshrines and averse to the values it proclaims. Despite the problematic divergence between constitutional entrenchment and political commitment, the expressive function of written constitutions—and of formal amendment rules more specifically—may nevertheless hold promise for helping to align constitutional text with political practice. As James Madison suggested, although "[i]t may be thought that all paper barriers against the power of the community are too weak to be worthy of attention," the rules and values entrenched in a written constitution may "have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community."[186] Perhaps the strength of this tendency may be measured only retrospectively, since the future success of a constitution cannot reliably be known at its drafting. The best hypothesis is that constitutions and the values entrenched within their formal amendment rules are only as strong as their commitment to culturally specific and socially relevant values.[187]

The expressive function of constitutional amendment rules has important implications for constitutional interpretation. The task of interpreting entrenched values need not commit us to a particular technique of interpretation, be it originalism, living constitutionalism, or another method. As I have written elsewhere, formal amendment rules may be both preservative and transformational: they may seek "to preserve something thought to be distinctive about, or fundamentally constitutive of, the state and its people,"[188] or they may "repudiate the past by setting the state on a new course."[189] We may therefore interpret an entrenched value from an originalist perspective consistent with preservative entrench-

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[186] US, *Annals of Cong*, vol 1, at 455 (8 June 1979).

[187] HWO Okoth-Ogendo, "Constitutions Without Constitutionalism: Reflections on an African Political Paradox" in Greenberg et al, *supra* note 171, 65 at 68.

[188] Richard Albert, "Constitutional Handcuffs" (2010) 42:3 Ariz St LJ 663 at 678.

[189] *Ibid* at 685.

ment, which "aims to freeze a distinctly historical conception of the state,"[190] or we may alternatively rely on the theory of living constitutionalism to construe the entrenched value as being consistent with transformative entrenchment, which reflects "more of an aspiration than a concretized reality" and a "forward-looking project" that is open to evolving social and political norms.[191]

The interpretation of constitutional values is therefore not necessarily time-bound: it may be a time-specific inquiry that compels the interpreter to take the perspective of the authoring generation, but it may also be free of temporal constraints. The inquiry may create what Gadamer describes as a hermeneutical circle, which entails an interpretation that is "neither subjective nor objective, but describes understanding as the interplay of the movement of tradition and the movement of the interpreter."[192] This interpretation "proceeds from the communality that binds us to the tradition," tradition being "not simply a precondition into which we come, but we produce it ourselves, inasmuch as we understand, participate in the evolution of tradition and hence further determine it ourselves."[193] As I suggest below, the German Constitutional Court's interpretation of the formal amendment rules in the Basic Law exhibits elements of both historicism and hermeneutics, of originalism and living constitutionalism. It is thus a feature, not a limitation, of my account of the expressive function of formal amendment rules that there are continuities between the contestability of constitutional interpretation in general and of the values entrenched in formal amendment rules more specifically.

The modern constitutional experience in Germany shows how political culture aligns with the values entrenched in formal amendment rules. The Basic Law's formal amendment rules entrench and express the constitutional value of human dignity: the text states in the first section of Article 1 that "the dignity of man shall be inviolable," and adds that "[t]o respect and protect it shall be the duty of all state authority."[194] The rest of the article stresses the importance of human dignity: "The German people therefore acknowledges inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world,"[195] and "[t]he following basic rights shall be binding as directly valid law on legis-

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[190] *Ibid* at 678.

[191] *Ibid* at 685.

[192] Hans-Georg Gadamer, *Truth and Method*, ed and translated by Garrett Barden & John Cumming (New York: Crossroad, 1988) at 261.

[193] *Ibid*.

[194] *Basic Law*, *supra* note 14, art 1(1).

[195] *Ibid*, art 1(2).

lation, administration and judiciary."[196] Article 1 is entrenched as a subject-matter restriction on formal amendment, meaning that it is expressly shielded from the Basic Law's formal amendment procedures: "An amendment to this Basic Law by which the organization of the Federation into Laender, the basic co-operation of the Laender in legislation or the basic principles laid down in Articles 1 and 20 are affected, shall be inadmissible."[197]

In contrast to the inauthentic political commitments entrenched and expressed only for show in sham constitutions, the Basic Law's commitment to human dignity is authentic. This authenticity derives from two principal sources: the Basic Law's design and its interpretation. First, as I discuss below, the Basic Law's drafters intended to make human dignity its primary constitutional value. The entrenchment of human dignity as a subject-matter restriction was meant to be an actual constraint on governmental conduct and was designed to convey its importance both internally to the persons bound by the Basic Law and externally to the wider world. Second, as I also describe below, the Federal Constitutional Court has interpreted Article 1's human dignity provision as reflecting the Basic Law's most important constitutional value.

The Basic Law can be understood only in its historical context. As Christian Walter has observed, "[e]ach constitutional document reflects the preoccupations of the time of its adoption."[198] The Basic Law is no different. Under the leadership of Konrad Adenauer, the Parliamentary Council made it a point to pass the Basic Law on May 8, 1949, both to mark the collapse of the Third Reich four years earlier on May 8, 1945, and to signal the beginning of a new constitutional regime.[199] Adenauer's statement at the signing and proclamation of the Basic Law echoes this theme of a new beginning: "Today a new chapter is being opened in the ever-changing history of the German people. ... Those who have witnessed the years since 1933 and the total breakdown in 1945 ... are with some emotion conscious of the fact that today ... a new Germany is being created."[200] The Basic Law showed how different Germany might become.

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[196] *Ibid*, art 1(3).

[197] *Ibid*, art 79(3).

[198] Christian Walter, "Human Dignity in German Constitutional Law" in European Commission for Democracy Through Law, *The Principle of Respect for Human Dignity* (1998), online: <www.venice.coe.int/webforms/documents/CDL-STD(1998)026-e.aspx>.

[199] Ernst Benda, "The Protection of Human Dignity (Article 1 of the Basic Law)" (2000) 53:2 SMU L Rev 443 at 445.

[200] "Document 7: The Signing and Proclamation of the Basic Law (Grundgesetz), 23 May 1949" in Carl-Christoph Schweitzer et al, eds *Politics and Government in Germany, 1944–1994: Basic Documents* (Providence: Berghahn Books, 1995) 17 at 17.

Rights protections formed the core of the new constitutional regime. The Basic Law, writes Werner Heun, "was intended to avoid a repetition of these experiences especially by emphasizing fundamental rights and assigning extended powers to a Constitutional Court."[201] The Parliamentary Council inserted the unamendable provisions into the Basic Law to help guard against the failures of the Weimar constitution, which had failed to curb abuses of power and constrain government conduct.[202] As Gregory Fox and Georg Nolte have written, the Basic Law's framers

> reasoned that if such a clause had been present in the Weimar constitution, Hitler would have been forced to violate the constitution openly before assuming virtually dictatorial power. They concluded that given the traditional orderly and legalistic sentiment of the German people, this might have made a difference.[203]

The Basic Law thus became the first German constitution to entrench rights for citizens and also to require the state to defend those rights against violation.[204] It is founded on rights and rooted "in the experience and in the memory of the holocaust, the war, and the liberation from unprecedented dictatorship, ending inhumanity and tyranny by the notion of freedom and self-determination."[205] The Parliamentary Council was clear: fundamental rights would be central, not peripheral, to the Basic Law, and human dignity would permeate all fundamental rights.[206]

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[201] Werner Heun, *The Constitution of Germany: A Contextual Analysis* (Portland: Hart Publishing, 2011) at 23.

[202] Hannes Rösler, "Harmonizing the German Civil Code of the Nineteenth Century with a Modern Constitution—The Lüth Revolution 50 Years Ago in Comparative Perspective" (2008) 23 Tul Eur & Civ L 1 ("[t]he Germans realized that the rise to power of the Nazis could be blamed to a certain degree—among many destabilizing social, political, and economic reasons—on the construction of the Weimar Constitution of August 11, 1919" at 4 [footnotes omitted]). Though the Parliamentary Council may have attributed part of the blame to the Weimar Constitution, the structure of Weimar Constitution was not unsound. See Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (New York: New York University Press, 1994) at 129. The rise of National Socialism was something that perhaps no constitutional structure could have withstood. See Rosemary HT O'Kane, *Paths to Democracy: Revolution and Totalitarianism* (London: Routledge, 2004) at 89–112, 131–49.

[203] Gregory H Fox & Georg Nolte, "Intolerant Democracies" (1995) 36:1 Harv Int'l LJ 1 at 19 [footnote omitted].

[204] See Dennis L Bark & David R Gress, *A History of West Germany: From Shadow to Substance 1945–1963* (Cambridge: Basil Blackwell, 1989) at 225.

[205] Helmut Goerlich, "Fundamental Constitutional Rights: Content, Meaning and General Doctrines" in Ulrich Karpen, ed, *The Constitution of the Federal Republic of Germany: Essays on the Basic Rights and Principles of the Basic Law with a Translation of the Basic Law* (Baden-Baden: Nomos Verlagsgesellschaft, 1988) 45 at 46.

[206] See Christian Starck, "Constitutional Definition and Protection of Rights and Freedoms" in Christian Stark, ed, *Rights, Institutions and Impact of International Law Ac-*

The origin of the Basic Law's absolute entrenchment of human dignity therefore lies in the intent to break from Germany's recent past.[207] The framers of the Basic Law entrenched human dignity as unalterable and thereby identified it as the most fundamental constitutional rights protection in response to Germany's prior regime, under which human dignity "had been utterly trampled by the Nazis."[208] The Nazi regime had emphasized the primacy of the state, subordinated the individual, and attributed no intrinsic worth to the individual outside of her interaction with the state or other individuals. "The state did not exist for the citizens' sake,"[209] according to Craig Smith and Thomas Fetzer; "to the contrary, the citizens existed for the sake of the state. This exaltation of the people collectively, in the form of the state, combined with the denial of individual worth to justify Nazi tyranny ideologically."[210] But the Basic Law's entrenchment of human dignity "signaled an unequivocal break with Nazi ideology by strongly countering the core Nazi presumption of the individual's lack of independent worth."[211] Making human dignity unamendable conveyed the message that the individual is "unequivocally superior to the state; the Federal Republic exists for the sake of its citizens rather than vice versa."[212] Absolute entrenchment expressed a special commitment to respecting individual worth.[213]

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cording to the German Basic Law: The Contributions of the Federal Republic of Germany to the Second World Congress of the International Association of Constitutional Law (Baden-Baden: Nomos Verlagsgesellschaft, 1987) 19 at 22.

207 Yet there is an uncomfortable irony in the origin of the Basic Law's absolute entrenchment of human dignity: its intellectual inspiration came from German constitutional theorist and Nazi Party member, Carl Schmitt. See Ulrich K Preuss, "The Implications of 'Eternity Clauses': The German Experience" (2011) 44:3 Isr L Rev 429 at 439. For Schmitt's explanation and defense of this exception to the rule of majoritarian democracy, see Carl Schmitt, *Legality and Legitimacy*, ed and translated by Jeffrey Seitzer (Durham: Duke University Press, 2004) at 39–48.

208 David P Currie, *The Constitution of the Federal Republic of Germany* (Chicago: University of Chicago Press, 1994) at 11.

209 Craig T Smith & Thomas Fetzer, "The Uncertain Limits of the European Court of Justice's Authority: Economic Freedom Versus Human Dignity" (2004) 10:3 Colum J Eur L 445 at 449.

210 *Ibid*.

211 *Ibid* at 450.

212 *Ibid*.

213 On this point, it is important to note the difference in entrenchment between the Basic Law and the Draft Basic Law from 1948. The Draft Basic Law not absolutely entrench human dignity. Article 1(1) stated that "the dignity of man is under the protection of the state," but there was no corresponding immunization of this clause from formal amendment. The closest parallel appears in Article 20(b): "As far as a fundamental right may be restricted in accordance with the provisions of this Basic Law, its substance may not be touched." This may be interpreted as a special protection for funda-

The absolute entrenchment of human dignity has consequently created absolute boundaries to circumscribe state power. Human dignity today stands at the top of Germany's constitutional hierarchy. As Donald Kommers explains, human dignity is "the highest value of the Basic Law, the ultimate basis of the constitutional order, and the foundation of guaranteed rights."[214] It is, in the words of Edward Eberle, the "architectonic principle of the German legal system."[215] In the leading English study of the Basic Law, Kommers and Russell Miller write that the Basic Law "has placed human dignity at the core of its value system,"[216] and note that the Basic Law's human dignity clause "expresses the highest value of the Basic Law, informing the substance and spirit of the entire document."[217] The Basic Law has expressed the state's commitment to human dignity as its most important value both through the symbolism of its entrenchment and likewise by the effect of its entrenchment,[218] which is enforced by courts endowed by the Basic Law with the power to review governmental conduct.[219]

C. Interpreting Constitutional Values

The consequence of entrenching human dignity absolutely against amendment was predictable: entrenchment granted the judiciary the power to interpret the meaning of this value. As Melissa Schwartzberg

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mental rights but it is not as strong as what appears in the adopted Basic Law. The Draft Basic Law did, however, include special formal amendment rules for federalism. The basic formal amendment formula required two-thirds approval from both the Bundestag and the Bundesrat in Article 106(2). This was supplemented in Article 106(3) by a rule that permitted a one-quarter of the Bundestag and one-quarter of the Bundesrat to demand the amendment be ratified in a referendum by two-thirds of all voters and by a majority of voters in a majority of the Länder. The federalism exception appeared in Article 107: "A law by which the federal structure is essentially changed requires, in addition to the requirements of Article 106, a three-quarters majority in the Bundesrat." See Civil Administration Division, Office of Military Government for Germany (US), *Draft Basic Law: Passed in First Reading in Nov/Dec 1948*, (15 January 1949) at 6, 25, 90–91.

[214] Donald P Kommers, "German Constitutionalism: A Prolegomenon" (1991) 40:3 Emory LJ 837 at 855.

[215] Edward J Eberle, "The German Idea of Freedom" (2008) 10:1 Or Rev Int'l L 1 at 5.

[216] Donald P Kommers & Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3d ed (Durham: Duke University Press, 2012) at 44.

[217] *Ibid* at 355.

[218] See Georg Ress, "The Constitution and the Requirements of Democracy in Germany" in Christian Starck, ed, *New Challenges to the German Basic Law: The German Contributions to the Third World Congress of the International Association of Constitutional Law* (Baden-Baden: Nomos Verlagsgesellschaft, 1991) 111 at 117–18.

[219] See *Basic Law*, *supra* note 14, art 19(4).

has argued, "when constitutional provisions are made unamendable and constitutional courts have final authority over the interpretation of such provisions, entrenchment does not actually inhibit alterations,"[220] but rather "shifts the locus of change—and the power to determine the legitimate scope of mutability—away from legislatures and toward the court."[221] The German Constitutional Court has used this power to interpret the human dignity provision as the Basic Law's supreme value,[222] calling it "the highest constitutional principle" in the Basic Law.[223] Insofar as this interpretation conforms to the constitutional design of the Basic Law, it is unproblematic for the Court to make such pronouncements. Nonetheless, scholars and even judges themselves acknowledge the vast discretionary power that the absolute entrenchment of an open-textured provision like human dignity has conferred upon the Constitutional Court.[224]

Theoretically, its absolute entrenchment exempts human dignity from the balancing to which other rights are subject when they clash with competing rights. But in practice, the Constitutional Court has interpreted human dignity as permitting government action that justifiably violates this value and as prohibiting governmental action that unjustifiably violates it.[225] The distinction therefore turns on the extent to which the Court is persuaded to accept the justification. The Constitutional Court has generally read the human dignity protection alongside the Basic Law's pro-

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[220] Melissa Schwartzberg, *Democracy and Legal Change* (Cambridge: Cambridge University Press, 2007) at 184.

[221] *Ibid*.

[222] Giovanni Bognetti, "The Concept of Human Dignity in European and US Constitutionalism" in Georg Nolte, ed, *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005) 85 at 93.

[223] *Eppler Case* (1980), 54 BVerfGE 148, in Kommers & Miller, *supra* note 216 at 406–07.

[224] See e.g. Donald P Kommers, "The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?" (1994) 10 J Contemp Health L & Pol'y 1 ("[t]he German Court has also declared that these objective values arrange themselves in a hierarchy. This can only mean that the Court itself does the arranging" at 9); Kommers & Miller, *supra* note 216 ("[j]ustice Wolfgang Zeidler, a former president of the Federal Constitutional Court, [states] ...Whoever controls the [meaning of the] order of values, ... controls the constitution" at 373 [footnotes omitted]). See Marc Chase McAllister, "Human Dignity and Individual Liberty in Germany and the United States as Examined Through Each Country's Leading Abortion Cases" (2004) 11:2 Tulsa J Comp & Int'l L 491 ("[w]ith strong powers of judicial review, the Supreme Court of the United States and Germany's Federal Constitutional Court have a great deal of control over the meaning of their respective constitutions, and individual liberty in America and human dignity in Germany are their primary interpretative tools" at 492 [footnotes omitted])

[225] See Christoph Möllers, "Democracy and Human Dignity: Limits of Moralized Conception of Rights in German Constitutional Law" (2009) 42:2 Isr LR 416 at 423–24.

tections for liberty and equality, enshrined in Articles 2[226] and 3,[227] respectively.[228] As Kommers and Miller write, "the relationships among Articles 1, 2, and 3 are symbiotic."[229] They continue:

> Their provisions nourish and reinforce once another [and] the human dignity, liberty, and equality clauses inform the meaning of other constitutional values just as these other values infuse the meaning and limit the reach of the rights guaranteed by these three fundamental articles.[230]

Several Constitutional Court cases exhibit the significance of human dignity in German constitutional law.

In the early *Microcensus Case*, the Constitutional Court was asked to rule whether the compulsory disclosure of private vacations and recreational trips in a federal census violated the Basic Law's human dignity protection.[231] The Court concluded that they did not.[232] Balancing the privacy of the individual under Article 2 with the state's responsibility to govern responsibly, the Court recognized that the pressure of general public compliance could conceivably inhibit an individual's private personal sphere.[233] But the balance here favoured the state's census inquiries, both because the inquiries preserved the respondents' anonymity and did not compel persons to disclose intimate personal details, and because individ-

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[226] *Basic Law*, *supra* note 14, art 2:

> (1) Everyone shall have the right to free development of his personality, insofar as he does not infringe the rights of others or offend against the constitutional order or the moral code.
>
> (2) Everyone shall have the right to life and physical inviolability. The freedom of the individual shall be inviolable. These rights may be interfered with only on the basis of a law.

[227] *Ibid*, art 3:

> (1) All men shall be equal before the law.
>
> (2) Men and women shall have equal rights.
>
> (3) No one may be prejudiced or privileged because of his sex, descent, race, language, homeland and origin, faith or his religious and political opinions.

[228] Kommers & Miller, *supra* note 216 at 355.

[229] *Ibid*.

[230] *Ibid*.

[231] *Ibid* at 356 (translating the *Microcensus Case* (1969), 27 BVerfGE 1).

[232] *Ibid* at 357.

[233] *Ibid*.

uals have a social responsibility to respond to such inquiries, which are necessary for government planning and operations.[234]

In the course of upholding the government's census inquiries, the Court discussed the human dignity provision. The Court asserted that "[h]uman dignity is at the very top of the value order of the Basic Law."[235] Human dignity means that "every human being is entitled to social recognition and respect in the community";[236] the state must treat persons as something more than "mere objects".[237] An individual cannot be required "to record and register all aspects of his or her personality, even though such an effort is carried out anonymously in the form of a statistical survey; [the state] may not treat a person as an object subject to an inventory of any kind."[238] Within an individual's private personal sphere, she is "her own master."[239]

The *Lifetime Imprisonment Case* is another prominent human dignity case in which a drug dealer killed an addict who had threatened to expose the dealer's criminal acts.[240] The trial court ruled that the German Penal Code, which set out a mandatory penalty of life imprisonment for killing another to conceal criminal activity, ran counter to Article 1's human dignity protection.[241] This court held that punishing a person with a life sentence with no possibility of returning to society would amount to treating that person as mere object, and would therefore violate the state's responsibility to respect every person's human dignity—a responsibility that extends even to a criminal.[242] The Constitutional Court was then asked to review the trial court's judgment.

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[234] *Ibid* at 356–57.

[235] *Ibid* at 356.

[236] *Ibid*.

[237] *Ibid*. The Constitutional Court is very serious about not treating persons as objects. In a later case implicating the human dignity protection, the Court ruled unconstitutional the use of a polygraph in a criminal matter. As Kommers and Miller write, "[t]o elicit the truth by attaching persons to a machine, said the Court, is to regard them as objects and not as human begins capable of telling the truth through ordinary questioning" (*ibid* at 363).

[238] *Ibid* at 356.

[239] *Ibid*.

[240] *Ibid* at 363 (translating the *Life Imprisonment Case* (1977), 45 BVerfGE 187).

[241] *Ibid*. Capital punishment was not an option; it is prohibited in the *Basic Law* (*supra* note 14, art 102).

[242] Kommers & Miller, *supra* note 216 at 363.

The Court ruled that life imprisonment violates human dignity where the evidence suggests that a prisoner can be rehabilitated.[243] The Court began with Article 2(2) of the Basic Law, which authorizes Parliament to limit an individual's right to personal freedom.[244] The Court wrote, however, that this parliamentary power is itself limited, most notably by the inviolability of human dignity, which the Court again called "the highest value of the constitutional order."[245] The Court stressed that "[t]his means that the state must regard every individual within society with equal worth"[246] and reiterated that "[i]t is contrary to human dignity to make persons the mere tools of the state."[247] The Court connected the risk of treating a person as an object with the punishment of lifetime imprisonment: "[T]he state cannot turn the offender into an object of crime prevention to the detriment of his or her constitutionally protected right to social worth and respect" because "it would be intolerable for the state forcefully to deprive [persons of their] freedom without at least providing them with the chance to someday regain their freedom."[248]

The meaning of the Basic Law's human dignity provision becomes clearer with this case. The state is not forbidden from sentencing a convicted criminal to life imprisonment, but if the state imposes this penalty, it assumes the responsibility to work toward rehabilitating the prisoner and helping him re-enter society:

> Regarding those prisoners under life sentences, prisons also have the duty to strive toward their resocialization, to preserve their ability to cope with life and to counteract the negative effects of incarceration and the destructive changes in personality that accompany imprisonment.[249]

This responsibility flows from the Basic Law's human dignity protection: "This task finds its justification in the constitution itself; it can be inferred from the guarantee of the inviolability of human dignity within the meaning of Article 1(1) of the Basic Law."[250] The Court understood this duty to rehabilitate as interconnected with Article 1 insofar as "rehabilitation is constitutionally required in any community that establishes human digni-

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243 *Ibid* at 367.

244 *Ibid* at 364.

245 *Ibid*.

246 *Ibid*.

247 *Ibid*.

248 *Ibid*.

249 *Ibid* at 366.

250 *Ibid*.

ty as its centerpiece and commits itself to the principle of social justice."[251] What appears to underpin the inviolability of human dignity is the rejection of persons as objects.

Perhaps the most useful case to demonstrate the Basic Law's hierarchy of constitutional values is the 1975 *Abortion I Case*.[252] The subject of the case was section 218a of the *Abortion Reform Act* of 1974, which removed criminal prohibitions on abortion provided that the procedure was performed by a licensed physician on a consenting woman during the first twelve weeks of pregnancy.[253] Criminal penalties continued to apply for other abortions procured after the third month of pregnancy, with the exception of those pregnancies resulting from rape or incest or those terminated on medical advice.[254] The new law also required a woman to consult with a physician or a counseling agency about assistance available to pregnant women, mothers, and children.[255] Several members of the German Bundestag (the national lower house) as well as a number of German states petitioned the Constitutional Court to review whether the new law violated Article 1's human dignity provision and Article 2's right to life provision, among other constitutional rights.[256] This compelled the Court to weigh the competing rights of the mother and the fetus, whose developing life the Court noted is protected by Article 2(2) of the Basic Law.[257]

Relying on the Basic Law's ordering of values to reach is decision, the Constitutional Court found the new abortion law incompatible with the fetus's human dignity and right to life.[258] It stated, before reaching the merits of the case, that its deliberation "demands a total view of the constitutional norms and the hierarchy of values contained therein."[259] Recognizing the importance of the case, the Court added that "[t]he gravity and seriousness of the constitutional questions posed become clear if it is considered that what is involved here is the protection of human life, one of the central values of every legal order."[260] The Court stressed that its task was not to judge the new abortion law against the values established

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251 *Ibid*.

252 *Ibid* at 374 (translating the *Abortion I Case* (1975), 39 BverfGE 1).

253 *Ibid*.

254 *Ibid*.

255 *Ibid*.

256 *Ibid*. The *Basic Law*'s right to life provision holds that "[e]veryone shall have the right to life and physical inviolability" (*Basic Law*, *supra* note 14, art 2(2)(1)).

257 *Ibid* at 376–77.

258 Kommers & Miller, *supra* note 216 at 374.

259 *Ibid* at 374.

260 *Ibid*.

under another country's constitution but rather against the values entrenched in the German Basic Law.[261] The Court ultimately held that the law "is void insofar as it exempts termination of pregnancy from punishment in cases where no reasons exist which—within the meaning of the [present] decisional grounds—have priority over the value order contained in the Basic Law."[262]

Constitutional history played a significant part in the Court's judgment. The Court explained that the Basic Law's entrenchment of the right to life was the result of the destruction of life that Germany had seen in its past:

> [T]he categorical inclusion of the inherently self-evident right to life in the Basic Law may be explained principally as a reaction to the 'destruction of life unworthy to live,' the 'final solution,' and the 'liquidations' that the National Socialist regime carried out as governmental measures.[263]

Under the Basic Law, the right to life affirms

> the fundamental value of human life and of a state concept that is emphatically opposed to the views of a political regime for which the individual life had little significance and that therefore practiced unlimited abuse in the name of the arrogated right over life and death of the citizen.[264]

The Court therefore contrasted the Weimar constitution and the regime that followed it with the Basic Law and the new regime that it sought to create.

Noting that the Basic Law is clear in its language that *everyone* shall have the right to life—with no "delimitation of the various developmental stages of human life"[265]—the Court affirmed that the right extends to the unborn, or what the Court called developing life.[266] The Court then tied the right to life to human dignity, explaining that the obligation to protect the right to life follows from Article 1: "Wherever human life exists, it merits human dignity; whether the subject of this dignity is conscious of it and knows how to safeguard it is not important. The potential capabilities inherent in human existence from its inception are adequate to merit human dignity."[267] Yet the Court also acknowledged that the state has an

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[261] *Ibid.*

[262] *Ibid.*

[263] *Ibid.*

[264] *Ibid.*

[265] *Ibid.*

[266] *Ibid* at 375–76.

[267] *Ibid* at 376.

obligation to protect the life of the mother and that the mother's pregnancy exists within her private personal sphere: "The obligation of the state to take the developing life under its protection also exists in principle with regard to the mother. ... Pregnancy belongs to the intimate sphere of the woman that is constitutionally protected by Article 2 (1) in conjunction with Article 1 (1) of the Basic Law."[268] It is at this point that the Court invoked the hierarchy of constitutional values to resolve the collision between the rights of the developing life and the rights of the mother.

The Constitutional Court saw the conflict of rights as inhospitable to any compromise: "No compromise is possible that would both guarantee the protection of the unborn life and concede to the pregnant woman the freedom of terminating the pregnancy because termination of pregnancy always means destruction of the prenatal life."[269] In choosing which of these two rights to privilege, the Court felt itself bound to use the human dignity provision as its guide: "In the ensuing balancing process, 'both constitutional values must be perceived in their relation to human dignity as the center of the constitution's value system.'"[270] As a result, the Court elevated the right of the fetus over the right of the mother. In the Court's view, whereas prohibiting abortion only impairs a woman's right to self-determination, abortion destroys life: "When using Article 1 (1) as a guidepost, the decision must come down in favor of the preeminence of protecting the fetus's life over the right of self-determination of the pregnant woman."[271] Although the Court conceded that "[p]regnancy, birth, and child-rearing may impair the woman's right of self-determination and the right to many personal developmental potentialities,"[272] it held as determinative that "[t]he termination of pregnancy, however, destroys prenatal life."[273] The difference between the impairment of human dignity and its destruction was therefore great enough to tilt the Court toward protecting the right of the fetus.

As a final illustration of how the Constitutional Court has interpreted the Basic Law's inviolable human dignity provision, consider the more recent *Aviation Security Act Case*.[274] The case arose out of the *Aviation Security Act*, which Germany adopted in the aftermath of the terrorist at-

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[268] *Ibid*.

[269] *Ibid*.

[270] *Ibid* (quoting the *Abortion I Case* (1975), 39 BverfGE 1).

[271] *Ibid* at 377.

[272] *Ibid*.

[273] *Ibid*.

[274] *Ibid* at 396 (discussing and translating in part the *Aviation Security Act Case* (2006), 115 BVerfGE 118).

tacks of September 11, 2001 in the United States.[275] The law authorized the German Minister of Defence, with the consent of the Minister of the Interior, to order the armed forces to shoot down a commercial aircraft thought to be hijacked in order to be used as a weapon against civilian targets.[276] The Constitutional Court found the law unconstitutional on several grounds, notably because it would "deprive passengers and crew of their right to self-determination and thus make them 'mere objects of the state's rescue operation for the protection of others.'"[277]

The Constitutional Court's refusal to authorize the state to treat a plane's passengers as objects recalled its earlier decisions in the *Microsensus Case* and the *Life Imprisonment Case*. As Kommers and Miller explain, the Court stated that "killing may not be employed as a means to save others, for human lives may not be disposed of 'unilaterally by the state' in this way, even on the basis of a statutory authorization."[278] The Court ultimately held that "an aircraft may not be shot down—and there is no constitutional state duty to shoot it down—simply because it may be used as a weapon to extinguish life on the ground, particularly since the ensuing loss of life would not bring an end to the body politic or the constitutional system."[279] The Court again referred to the pre-eminence of human dignity as a constitutional value: "Human life is intrinsically connected to human dignity as a paramount principle of the constitution and the highest constitutional value."[280]

These four leading cases on Germany's inviolable human dignity provision illustrate the authenticity of the political commitments entrenched in the Basic Law's formal amendment rules, insofar as the entrenched value aligns with its interpretation and enforcement by political actors. Yet the constitutional design of the Basic Law and its interpretation by the Constitutional Court cannot, on their own, fully explain the alignment between German political culture and the entrenched constitutional value of human dignity. The Basic Law's design and its interpretation have certainly contributed to the process of "sowing and growing" the constitutional value of human dignity;[281] yet the legislature's deference to the

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[275] *Ibid*.

[276] *Ibid*.

[277] *Ibid* (quoting the *Aviation Security Act Case* (2006), 115 BVerfGE 118, 154).

[278] *Ibid* at 397.

[279] *Ibid*.

[280] *Ibid*.

[281] Eckart Klein, "Human Dignity in German Law" in David Kretzmer & Eckart Klein, eds, *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) 145 at 159.

Court has also helped, particularly where the Court has invalidated legislation on the basis of the human dignity provision and the legislature has responded by re-passing the law into conformity with the Court's recommendations.[282] Germans themselves have also accepted as worthy and legitimate the absolute entrenchment of human dignity, as I discuss below.

The German Basic Law recently marked its sixtieth anniversary. On that occasion, German constitutional theorist Matthias Mahlmann offered his reflections, calling the Basic Law "a resilient constitution" and "a remarkable success" and noting proudly that "[s]ome aspects of the Basic Law have even become a kind of attractive export article not accounted for in Germany's foreign trade balance, but nevertheless of considerable importance."[283] Mahlmann's analysis underscored the importance of the Basic Law's human dignity protection, which, in his view, has come to define the Basic Law in the public perception:

> The norm, however, that most characterizes the Basic Law in the public perception and in scholarly reflection is the guarantee of human dignity. This particular role is, to a large degree, a consequence of the German past. Nazism still legitimizes the guarantee of human dignity today by the abominable, vivid barbarism of its negation. The guarantee of human dignity formulates, however, not only the desire to refrain from fathoming yet another time a moral abyss, but a promise as well: the perspective to create a legal order that embodies principles of human dignity not only through the absence of misdeeds, but also through legally institutionalized structures of a republican culture of respect.[284]

The concept of human dignity has risen in public esteem as it has been applied across more spheres of German life. George Fletcher states the point: "When the German Basic Law of 1949 declares human dignity to be the foundational value of the constitution, the implications run through all relationships that may come into being."[285] Not only does human dignity prescribe or proscribe state action, it also influences private action. The Constitutional Court has emphasized this point when explaining that the Basic Law entrenches an "objective order of values."[286] For the Court, the

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[282] One of the most prominent examples is the 1976 *Abortion Reform Act*, passed in the aftermath of the *Abortion I Case*. See Kommers & Miller, *supra* note 216 at 384–85.

[283] Matthias Mahlmann, "The Basic Law at 60—Human Dignity and the Culture of Republicanism" (2010) 11:1 German Law Journal 9 at 9.

[284] *Ibid* at 10 [footnotes omitted].

[285] George P Fletcher, *Our Secret Constitution: How Lincoln Redefined American Democracy* (New York: Oxford University Press, 2001) at 216.

[286] Kommers & Miller, *supra* note 216 at 444 (translating the *Lüth Case* (1958), 7 BverfGE 198).

Basic Law "is not a value-neutral document."[287] It is a value-laden text whose purpose is to protect rights in all spheres: "This value system, which centers upon dignity of the human personality developing freely within the social community, must be looked upon as a fundamental constitutional decision affecting all spheres of law, both public and private."[288] The Basic Law's constitutional hierarchy thus creates a value system extending beyond the public sphere: "Every provision of private law must be compatible with this system of values, and every such provision must be interpreted in its spirit," declared the Court in the pivotal 1958 *Luth Case*.[289]

The application of the Basic Law's constitutional provisions to the private sphere has been called the *third party effect* doctrine.[290] Under this doctrine, the Constitutional Court interprets and applies the values of the Basic Law in such a way that vindicates those values, whether the matter is constitutional or civil.[291] Frank Michelman calls this the "double aspect" of the Basic Law's rights protections:

> As specifically worded guarantees ('subjective rights'), they obligate only the state and its officials. These clauses also, however, speak—as a 'fundamental constitutional decision' of the German people—for a set of underlying values and principles, an 'objective value system' for the whole of German civic life.[292]

Michelman adds that "the Basic Law's value-orderings must, accordingly, 'influence the civil law' throughout, obligating ordinary judges to construe and apply the background-law provisions of the Civil Code always 'in its spirit' and never 'in contradiction with' it."[293] This language tracks the Court's own; the Court has stated that "[t]his system infuses specific constitutional content into private law, which from that point on determines

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287 *Ibid.*

288 *Ibid.*

289 *Ibid.*

290 See e.g. Edward J Eberle, "Equality in Germany and the United States" (2008) 10:1 San Diego Int'l LJ 63 at 97; Stephen Gardbaum, "The Myth and the Reality of American Constitutional Exceptionalism" (2008) 107:3 Mich L Rev 391 at 433; Christian Starck, "Human Rights and Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court" in Daniel Friedmann & Daphne Barak-Erez, ed, *Human Rights in Private Law* (Portland: Hart Publishing, 2001) 97 at 97.

291 See Edward J Eberle, "Public Discourse in Contemporary Germany" (1997) 47:3 Case W Res L Rev 797 at 813–16.

292 Frank I Michelman, "The Interplay of Constitutional and Ordinary Jurisdiction" in Ginsburg & Dixon, *supra* note 25, 278 at 289.

293 *Ibid.*

its interpretation."[294] It is important to note, however, that this doctrine does not contemplate the application of the Basic Law's rights protections directly to private individuals, but only indirectly, through the Basic Law's application to private law.[295]

The constitutional value of human dignity therefore derives its force from its entrenchment in the Basic Law, its interpretation by the Constitutional Court, and its centrality to German political culture. The late German political theorist observed that modern Germany has become, "not only by the rules of its constitution but also in the reality of its constitutional life ...[,] a state which has taken seriously its obligations to create favorable external conditions for its citizens to achieve a life in conformity with human dignity."[296] That Germany's highest constitutional value is ordered objectively means that it is legally binding upon the entire constitutional community.[297] As Stéphanie Hennette-Vauchez writes, "[t]his objective nature is crucial to securing the success of the principle of human dignity. In fact, such objectivity reinforces considerably its actual normative strength."[298] This transformation of the Basic Law's normative aspirations from subjective to objective values is critical to understanding how the values entrenched in the Basic Law's formal amendment rules have become and have since remained authentic political commitments.

Conclusion

Formal amendment rules do more than serve a corrective purpose. Constitutional designers may entrench formal amendment rules not only to serve the conventional functions scholars attribute to these rules—to distinguish the constitution from ordinary law, to structure the formal amendment process, to precommit political actors, to make improvements or corrections, to heighten public awareness, to check political branches, to promote democracy, and to pacify constitutional change—but also to

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[294] Kommers & Miller, *supra* note 216 at 444 (translating the *Lüth Case* (1958), 7 BverfGE 198).

[295] See Greg Taylor, "The Horizontal Effect of Human Rights Provisions, the German Model and Its Applicability to Common-Law Jurisdictions" (2002) 13:2 King's College Law Journal 187 at 200.

[296] Kurt Sontheimer, "Principles of Human Dignity in the Federal Republic" in Paul Kirchhof & Donald P Kommers, eds, *Germany and its Basic Law: Past, Present, and Future—A German–American Symposium* (Baden-Baden: Nomos Verlagsgesellschaft, 1993) 213 at 216.

[297] See Stéphanie Hennette-Vauchez, "A Human *Dignitas*? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence" (2011) 9:1 International Journal of Constitutional Law 32 at 44.

[298] *Ibid* at 43.

express constitutional values. Constitutional designers may entrench and thereby express special political commitments in the rules that govern how the constitutional text is formally amended, for example through the creation of escalating or non-escalating amendment procedures or subject-matter restrictions.

That formal amendment rules may express constitutional values is both a clarifying and a complicating contribution to the study of such rules. It is clarifying insofar as it illuminates a function of the rules that scholars have yet to fully explain and illustrate, but it is complicating since we cannot know from text alone whether the values entrenched in formal amendment rules reflect authentic or inauthentic political commitments. We must therefore take a skeptical posture to any special or absolute entrenchment of constitutional values and inquire whether these formally entrenched values align in reality with a state's political culture. We have seen with respect to the values entrenched in the Basic Law's formal amendment rules, for example, that German constitutional entrenchment aligns strongly with Germany's political culture. This alignment appears attributable largely to the Basic Law's constitutional design and its interpretation, as well as to the popular legitimacy of the Basic Law's absolute entrenchment of human dignity.

There remains much to study about the expressive function of formal amendment rules. The field of comparative constitutional law could benefit from jurisdiction-specific case studies on the concordance between the values entrenched and expressed in formal amendment rules and those recognized by political actors and citizens. There are also important questions about the strategic, historical, and local reasons why constitutional designers choose to entrench certain constitutional values instead of others. It may additionally be useful to inquire into the degree to which the values entrenched in formal amendment rules are actually vindicated in the judgments of national courts of last resort, to the extent that those values are even justiciable. These and other inquiries into the study of formal amendment rules hold promise for enriching the study of comparative constitutional law and constitutional design.