

2018

The Amendment Effect

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Jonathan L. Marshfield, *The Amendment Effect*, 98 B.U. L. Rev. 55 (2018)

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THE AMENDMENT EFFECT

JONATHAN L. MARSHFIELD*

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* Associate Professor, University of Arkansas School of Law. I am grateful for helpful suggestions from Richard Albert, Sharon Foster, William Foster, Sara Gosman, Amanda Hurst, Jill Lens, Roger Michalski, Melissa Mortazavi, Tiffany Murphy, Susannah Pollvogt, Joshua Sellers, and Jordan Woods. I am especially thankful for comments and guidance from Justin Chimka regarding the quantitative portions of this article. I am also grateful for helpful comments from my colleagues at the University of Arkansas School of Law who participated in our 10-10-10 scholarly series, the members of our Junior Scholars Roundtable, and the participants at the University of Oklahoma College of Law faculty workshop. I am deeply indebted to Taylor Bish, Joshua Eide, Christopher Hussein, Zachary Sellers, Lucas Sheets, Ryan Smith, and See Yang for their many hours of excellent research assistance.

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When U.S. Supreme Court Justices decide a constitutional issue, are they affected by the fact that the Constitution is extraordinarily hard to amend? Many Americans and prominent scholars believe that Article V's arduous amendment procedures embolden the Justices because they know that unpopular constitutional rulings are unlikely to be displaced by responsive amendments. This is surely true to a degree. The Supreme Court has all but admitted that it takes more liberty in overruling constitutional precedent because of Article V's rigidity. But scholars and constitutional designers have used the American experience to develop more universal theories of constitutional design. These theories posit that flexible amendment rules generally restrain courts and onerous amendment rules generally empower courts. Political actors around the world and within the American states have relied on these ideas in designing their constitutions. They also animate calls for reforming Article V. It is remarkable, therefore, that these ideas have not been fully theorized nor systematically tested.

This Article fills that void. It organizes existing scholarship around a focused and coherent theory explaining why judges might be influenced by amendment frequency when deciding constitutional cases. It then presents findings from a systematic empirical study testing that theory. The empirical study draws on an original, hand-coded dataset of 5445 supreme court opinions from all fifty states. Because state constitutional amendment rates vary widely, this dataset provides a meaningful opportunity to analyze how judges practice judicial review when operating under constitutions of varying degrees of flexibility. The findings suggest that prevailing theories fail to accurately describe the relationship between judicial review and amendment frequency. Many states with high amendment rates also experience high rates of judicial activism, and many states with low amendment rates experience low rates of judicial activism. After accounting for other influences on judicial decision-making (such as methods of judicial selection and retention, docket size, etc.), the data suggest a surprising curvilinear relationship between amendment frequency and judicial activism. In other words, there is a tipping point where judicial activism begins to accelerate as amendment frequency increases. Contrary to prevailing theories, high amendment rates are reliably associated with high rates of judicial activism. This finding has significant implications for constitutional design around the world because it suggests that there may be a cap on how flexible a constitution should be for purposes of controlling the practice of judicial review.

INTRODUCTION

Scholars of comparative constitutional law routinely identify the U.S. Supreme Court as one of the most activist courts in the world, even going so far as to call it the head of an “imperial judiciary.”¹ These characterizations are often based on the perception that the Court decides constitutional cases with “little fear of correction by constitutional amendment.”² Indeed, it is commonplace in constitutional scholarship to identify Article V’s rigidity as a cause of the Court’s relative activism.³

This assessment is surely true to some degree. The Court itself has suggested that it takes more liberty in overruling constitutional precedents because formal amendments are “practically impossible.”⁴ But constitutional designers have

¹ See AREND LIJPHART, PATTERNS OF DEMOCRACY 226 (1999) (ranking United States Supreme Court, German Constitutional Court, and Supreme Court of India as most activist courts from sample of thirty-six high performing democracies). See generally MATTHEW J. FRANCK, AGAINST THE IMPERIAL JUDICIARY: THE SUPREME COURT VERSUS THE SOVEREIGNTY OF THE PEOPLE (1996) (exploring Supreme Court’s imperial role as final constitutional interpreter and Justices’ connected ability to act as “statesmen” in using constitutional rulings to solve political or social problems).

² John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1961 (2003) (“[T]he Supreme Court, for a complex set of reasons substantially attributable to Article V, does its work with little fear of correction by constitutional amendment.”); see, e.g., LIJPHART, *supra* note 1, at 229 fig. 12.1 (associating strong judicial review in United States with “constitutional rigidity”). There are, of course, indirect ways that the Court’s power of judicial review can be “checked” by Congress and the President. See Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 313-14 (2005) (explaining that literature proving that Court is influenced by indirect congressional curbing involves so-called separation-of-powers games).

³ See, e.g., Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 ARK. L. REV. 217, 224 (2016) (“[The] decelerating pace of formal amendment is paired with a modern fact of constitutional law in the United States: constitutional change today occurs ‘off the books.’”); Stephen M. Griffin, *The Nominee is . . . Article V*, 12 CONST. COMMENT. 171, 172 (1995) (“Most commentators would concede that the Constitution has changed a great deal through non-Article V means, primarily judicial interpretation.”). David Strauss has argued that Article V is essentially irrelevant to processes of constitutional change in the United States because the Court has brought about many meaningful substantive changes through, among other things, the power of judicial review. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1459 (2001).

⁴ This argument was famously set out by Justice Brandeis in his dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-07 (1932) (Brandeis, J., dissenting), and the Court later endorsed it in *Smith v. Allwright*, 321 U.S. 649, 665 (1944). See generally Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 727 (1999) (describing Justice Brandeis’s dissent and arguing that, at that time, Court treated constitutional precedent same way it treated nonconstitutional precedent). It should be noted that the Court has also suggested that Article V bolsters the Court’s power of judicial review because it is the Court’s obligation to ensure that Congress,

used the American experience to develop more universal theories of constitutional design.⁵ These theories posit that difficult amendment processes will generally result in more active judiciaries and that flexible amendment rules will generally work to restrain judges.⁶

This general premise has come to dominate contemporary constitutional design strategy. The Institute for Democracy and Electoral Assistance, for example, has issued “constitution-building primers” focused on designing amendment procedures.⁷ One of these primers advises constitutional designers that, “in general, the more difficult it is to formally amend the constitution, the more likely it is that adjustments will be made through judicial interpretation.”⁸

the President, and the states do not rewrite the Constitution outside of the Article V process. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 529 (1997) (in ruling that Congress did not have power to enact provisions of Religious Freedom Restoration Act, Justice Kennedy wrote for Court: “Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V”); *Reid v. Covert*, 354 U.S. 1, 17 (1957) (“In effect, such construction would permit [presidential] amendment of that document in a manner not sanctioned by Article V.”). This argument assumes that political actors can realistically utilize Article V to bring about change. In any event, under either approach, the availability or impossibility of amendment seems to influence the Court’s decision-making.

⁵ The classic example is Donald S. Lutz’s 1994 article, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 357 (1994) (developing “theory that includes the American version [of amendment] but also provides the basis for analyzing any version of constitutional amendment” (emphasis added)). For an assessment of Lutz’s article arguing that it relies solely on the U.S. experience for several key points, see John Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 LAW & SOC. INQ. 501, 501-30 (1997) (reviewing Lutz’s article and noting that it relies heavily on evidence and perspectives from United States). Lutz’s 1994 article was included (with minor updates) in his book, DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 145-82 (2006).

⁶ *See* Bjørn Erik Rasch & Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, in DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY: ANALYSIS AND EVIDENCE 319, 340-41 (Roger D. Congleton & Birgitta Swedenborg eds., 2006); *see also* LUTZ, *supra* note 5, at 148; Ferejohn, *supra* note 5, at 504.

⁷ INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, CONSTITUTIONAL AMENDMENT PROCEDURES (2014). The primer is “intended to assist in-country constitution-building or constitutional reform processes.” *Id.* at 1.

⁸ *Id.* at 13. The Venice Commission’s Report on Constitutional Amendment provides similar guidance:

The more difficult it is to amend a given constitution, the more likely it is that calls for change will be channelled into legal action, and the more likely the courts will be to follow such invitations. This will in turn reduce the need for formal amendment. On the other hand, in a system with flexible rules on amendment, the need for dynamic judicial interpretation will be less, and so often also the legitimacy. The interaction and possible mutual compensation effects between the two are complex, and clearly varies from country to country.

Donald Lutz's seminal work also theorizes that a low formal amendment rate empowers the judiciary to "dominate[]" the "process of [constitutional] revision" and dispense with "theories of strict construction."⁹

More importantly, however, there is evidence that constitution makers around the world have actually used these ideas when designing amendment rules.¹⁰ Records from early-twentieth-century state constitutional conventions in the United States show that several states made their amendment procedures more flexible based on the assumption that this would restrain judges.¹¹ Similarly, constitutional designers in continental Europe and Latin America during the twentieth century appear to have eased amendment procedures with the hope of "curtail[ing] judicial discretion."¹² Recent calls for reform of the U.S.

EUR. COMM'N FOR DEMOCRACY THROUGH LAW (VENICE COMM'N), REPORT ON CONSTITUTIONAL AMENDMENT 22-23 (2009).

⁹ Lutz, *supra* note 5, at 358, 365 (theorizing these relationships and finding only "indirect evidence" for proposition that infrequent formal amendment correlates with judicial dominance and no evidence that courts dispense with methods of strict construction when operating under hard-to-amend constitutions).

¹⁰ Historically, it seems that these ideas germinated from grassroots constitutional reforms rather than academic influence. See Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV. 657, 657-58 (2016) (noting that most constitutional theory literature emphasizes that "successful constitutions must not only constrain those in power, but must do so over long time horizons," but finding that this "does a poor job of depicting most other national democratic constitutions, or even U.S. state constitutions"). Indeed, the theory of constitutional design has lagged behind the practice of constitutional design. See *id.* at 671-72. Nevertheless, constitutional reformers were initially attracted to flexible amendment procedures because they thought that frequent amendment could constrain officials. See *id.* at 658.

¹¹ See JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 37 (2009) (quoting progressive-era debate at Kentucky Constitutional Convention: "Experience teaches that when Constitutions are too difficult to amend, they will be changed in spite of written restrictions"); *id.* at 48-51 (noting that amendment procedures were changed to be easier to amend in part because judges were "creating novel interpretations . . . to overturn popular legislation" and stating "Delegates also expected that the mere presence of a more flexible amendment procedure would influence judicial behavior by permitting well-intentioned judges to play a reduced role in updating constitutional provisions. The idea was that certain judges had taken an active role in constitutional interpretation in part as a consequence of the rigidity of the constitutional amendment process. These judges believed, understandably, that they alone were in a position to perform the necessary updating of constitutional doctrines.").

¹² See Versteeg & Zackin, *supra* note 10, at 668-71 (discussing constitutional specificity and flexibility as design strategies intended to restrain judges, arguing that constitution-makers in twentieth century Europe adopted detailed constitutions and flexible amendment procedures to "subject courts to popular control," and finding that constitutional revision in early twentieth century Latin America incorporated flexible amendment procedures to constrain courts).

Constitution have also focused on easing Article V's requirements as a strategy to enhance Supreme Court accountability.¹³ Indeed, scholars have found that the dominant trend in contemporary constitutional design is to craft flexible amendment rules with the goal of restraining courts and other officials.¹⁴

The real-world traction of these design strategies is striking because there has been no systematic empirical investigation of the relationship between amendment frequency and the practice of judicial review.¹⁵ To be sure, there is anecdotal evidence that courts consider amendability when deciding constitutional cases.¹⁶ It is relatively common for state courts, for example, to point to amendment frequency as a reason to exercise judicial restraint.¹⁷ And,

¹³ See Jack W. Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights*, 78 NOTRE DAME L. REV. 171, 180 (2002) (summarizing reform proposals aimed at restraining Court's power of judicial review). Sanford Levinson has suggested that Article V should be liberalized because its current rigidity reduces healthy incentives for accountability and transparency by the Supreme Court as well as other branches of government. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 164-65 (2006) (describing Article V as "iron cage"). Concerns about the institutional design of the Supreme Court and judicial accountability are not new. See Teresa Stanton Collett, *Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments*, 41 LOY. U. CHI. L.J. 327, 329-30 (2010) (arguing that people have voiced these concerns since nation's beginning). During the Founding Era, Anti-Federalists argued that the Constitution's design would result in a Supreme Court prone to lawlessness because it was without any check on its authority. See Brutus, XV, N.Y. JOURNAL, Mar. 20, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 437, 438-39 (Herbert J. Storing ed., 1981) (contrasting Supreme Court's unchecked authority with English courts' legislative supervision); Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 TUL. L. REV. 247, 276 (2003) (arguing that Article V serves valuable "checking function" on Supreme Court although it is used infrequently).

¹⁴ See Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1680 (2014) ("[C]onstitutional flexibility appears to be the prevailing design strategy around the world. What is more, constitutional flexibility, under some circumstances, can be a rational strategy to reduce agency costs."); Versteeg & Zackin, *supra* note 10, at 671.

¹⁵ See Ferejohn, *supra* note 5, at 525 (lamenting lack of empirical evidence on this issue); Versteeg & Zackin, *supra* note 10, at 671 (noting that their research does not "evaluate the postadoption effects of this design").

¹⁶ See Jonathan L. Marshfield, *Amendment Creep*, 115 MICH. L. REV. 215, 243-49, 261-63 (2016) (collecting state and federal cases where courts explicitly mention amendment rules in deciding whether to change constitutional status quo).

¹⁷ See, e.g., *Hill v. State*, 659 So. 2d 547, 554 (Miss. 1995) (Lee, J., dissenting) ("If the people of Mississippi wish to provide convicted capital murderers with such a constitutional right, then the citizens of this State, and not this Court, should amend our constitution through the democratic process as has been done on many occasions."); *McFarland v. Barron*, 164 N.W.2d 607, 615 (S.D. 1969) (Biegelmeier, J., dissenting) ("Reasons for liberal and

as noted above, the Supreme Court has justified its more relaxed approach to constitutional precedent by reference to Article V's rigidity.¹⁸ However, there has been no empirical investigation of whether courts are systematically influenced by amendability when deciding constitutional cases.¹⁹ Indeed, John Ferejohn has lamented that although it seems intuitive to assume that amendment frequency has some systemic effect on courts, "this proposition is one that we need to take on faith."²⁰ We simply do not know to what extent amendment frequency actually restrains or empowers judges regarding constitutional adjudication.

The dearth of empirical scholarship may be partly caused by the difficulty in gathering reliable data on courts' constitutional "activism."²¹ Although there is

broad interpretations of the national constitution are not persuasive as to our state constitution. The people have amended it and approved incurring added debt when they deemed it necessary or desirable; in two instances they approved incurring debts of six (1920) and thirty million dollars (1948). These actions confirm the observations made in the constitutional convention debates in support of this limitation *that our constitution was easily amended.*" (emphasis added); *Ex parte Lewis*, 219 S.W.3d 335, 375 n.14 (Tex. Crim. App. 2007) (Cochran, J., concurring) ("If a state's citizens perceive the need for expanded constitutional protection beyond that found in the federal constitution, they—the citizens—can amend their constitution to provide those protections.").

¹⁸ See *supra* note 4 and accompanying text; see also Marshfield, *supra* note 16, at 249-52 (discussing Court's use of Article V in this regard).

¹⁹ There is, of course, a tome of literature on the relationship between formal and informal methods of constitutional change. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 15-26 (1998) (arguing that constitutional change can occur through constitutional moments of institutional conflict without any formal change to constitutional text); Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 *DRAKE L. REV.* 925, 929 (2007) (discussing complex relationship between formal constitutional amendment and informal amendment through judicial interpretation); Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 37, 54 (Sanford Levinson ed., 1995) (explaining that binding constitutional rules can be changed informally); Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 *COLUM. L. REV.* 606, 612, 616-24 (2008) (discussing Article V as "potentially optimal outlet for constitutional change"). As relevant here, this literature emphasizes that legitimate constitutional change need not occur solely through formal amendment processes and that judicial review can operate to informally amend a constitution. See Griffin, *supra*, at 54. However, this literature does not focus on how formal amendment frequency influences judicial decision-making or how to measure that impact, which is my focus here.

²⁰ Ferejohn, *supra* note 5, at 525.

²¹ In this context, I use "judicial restraint" to refer to opinions that resolve constitutional disputes by ostensibly applying existing constitutional rules, and I use "judicial activism" to refer to opinions that change constitutional rules by *explicitly* departing from existing constitutional doctrine. STEFANIE A. LINDQUIST & FRANK B. CROSS, *MEASURING JUDICIAL*

much easy-to-collect data regarding constitutional amendment rates across jurisdictions (especially state constitutions in the United States),²² there has been no effort to gather corresponding data on courts' constitutional rulings.²³ This lack of data has precluded investigation into whether variations in amendment frequency across jurisdictions influence the practice of judicial review.

This article addresses that void. It presents findings from an original dataset of hand-coded judicial opinions from all state high courts in the United States. Specifically, my dataset captures all opinions from high courts in all fifty states between 1970 and 2004 where a court actively changed constitutional law by explicitly overruling existing constitutional precedent.²⁴ I focus on cases that overturn constitutional precedent because political scientists have identified overruling behavior as one reliable indicator of judicial activism.²⁵ Because state

ACTIVISM 121-22 (2009) (describing judicial adherence to constitutional precedent in similar terms and noting that empirical studies of judicial activism are hard to conceptualize and that data regarding judicial activism is difficult to gather).

²² The Council for State Governments, for example, publishes amendment-rate data annually for all states. See John Dinan, *State Constitutional Developments in 2014*, in 47 COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 3, 11-12 tbl.1.1 (2015) (listing number of amendments for all extant state constitutions).

²³ There has been data gathered regarding the frequency and nature of Supreme Court constitutional rulings. See THOMAS HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT 9-13 (2006) (summarizing scholarship on Supreme Court decision-making and authors' empirical research into Supreme Court precedent). However, these data alone are largely unhelpful in studying the relative effect of amendability because they provide only one point of reference for amendability: the U.S. Constitution.

²⁴ The data are fully described in Section III.A and Appendix D. Significantly, my data exclude cases where the court overruled constitutional precedent because of an intervening statute, federal court ruling, or constitutional amendment that undermined prior precedent. Thus, my data capture only instances of independent overruling by courts. This enhances the data's reliability as an indicator of judicial activism. It should also be noted that my data capture opinions from all fifty-two state courts of last resort (Oklahoma and Texas have separate high courts for criminal and civil matters).

²⁵ See LINDQUIST & CROSS, *supra* note 21, at 44. I explain the strengths and weaknesses of using overruling behavior as a measure of judicial activism in Section II.C. It is worth noting here, however, that overruling behavior is an admittedly underinclusive measure of instances where courts have changed constitutional rules or been active in their application of a constitution. See *id.* (noting that law cannot always be easily reduced into quantitative metric and that judicial activism cannot be easily measured). Courts can depart from existing constitutional doctrine without explicitly overruling prior precedent by, for example, recognizing new constitutional rights that courts have not previously rejected. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 n.2 (1932) (Brandeis, J., dissenting) (explaining that significant changes in constitutional doctrine can occur without explicit overruling). Nevertheless, due to the difficulty in systematically and reliably identifying such rulings, political scientists and legal scholars recognize overruling behavior as one reliable indicator of judicial activism, and I adopt it as my measure here. See LINDQUIST & CROSS, *supra*

constitutional amendment rates vary significantly between states, my data provide a meaningful opportunity to study the extent to which amendment frequency may systematically restrain or embolden judges.²⁶

To conduct this study, I first organize the existing constitutional-change scholarship around a more focused and coherent theory of why judges might behave differently when deciding constitutional cases under a rigid constitution than under a flexible constitution. Drawing on the assumptions of “strategic analysis” (a rational-choice approach to judicial decision-making),²⁷ I argue that prevailing theories are best understood as claiming that judges might be affected by amendment frequency because: (1) amendments may be frequent enough that judges anticipate an override threat to unpopular rulings (or infrequent enough that they appreciate the absence of an override threat); (2) pressure for constitutional change is great enough that courts anticipate political destabilization if change does not occur through judicial review; and (3) amendments are frequent and detailed enough to signal popular preferences to judges, which raises the costs of making unpopular rulings.²⁸

With this theoretical framework in mind, I analyze my data for evidence that courts might be affected by amendment frequency. Under conventional theories, one would expect to find an inverse relationship between amendment frequency and judicial activism.²⁹ In other words, high amendment rates should be correlated in some way with low rates of judicial activism, and vice versa.

note 21, at 121-32 (using data from Supreme Court opinions explicitly overruling prior precedent as “baseline measure of activism.”).

²⁶ State constitutions are a particularly good sample from which to test this hypothesis because amendment rates vary greatly between states. *See* Dinan, *supra* note 22, at 11 tbl.1.1 (listing amendment data for all state constitutions). Vermont, for example, has amended its constitution only 54 times since it was adopted in 1793, resulting in an average of only one amendment every four years. *See id.* Alabama on the other hand, has amended its constitution more than 267 times since it was adopted in 1901 (excluding many local amendments), resulting in an average of more than nine amendments every four years. *See id.* at 11-12 tbl. 1.1. Between these two extremes, there is great variety in state amendment frequency. The median amendment rate is four amendments every four years and the average amendment rate is just over five amendments every four years. *See id.* at 11-12 tbl. 1.1. The contemporaneous diversity in amendment frequency allows for the collection of meaningful longitudinal data.

²⁷ *See* Lee Epstein & Tonja Jacobi, *The Strategic Analysis of Judicial Decisions*, 6 ANN. REV. L. & SOC. SCI. 341, 342-52 (2010).

²⁸ I explain these hypotheses in Part II. My theoretical framework is a significant advancement on current theories, which touch on many of these ideas but are frustratingly vague and simplistic. However, I do not contend that my framework captures all of the ways that amendment frequency might influence judicial review. Rather, my claim is that when existing theories are viewed from the standpoint of strategic analysis, it is possible to articulate more precise theories of how judges might be affected by amendment frequency.

²⁹ *See* LUTZ, *supra* note 5, at 145-47 (describing relationship in roughly these terms).

My data suggest that the relationship is more complicated than this. I find that many states defy the traditional view. Alabama, California, Oklahoma, and Texas, for example, all display relatively high amendment rates and incredibly high rates of judicial activism.³⁰ On the other hand, Indiana, Iowa, Vermont, and Wyoming all have very old constitutions with relatively low rates of amendment and judicial activism.³¹ Overall, my data suggest that prevailing theories are oversimplified and they have not identified the true relationship between amendment frequency and judging, if there even is a discernable systemic relationship. Indeed, when looking at my data as a whole, the correlation between amendment frequency and judicial activism shows a statistically significant positive correlation, where judicial activism increases slightly as amendment frequency increases.³²

To better understand that relationship, I regressed my data over amendment-rate data and a series of control variables.³³ The regression results show a statistically significant nonlinear relationship between judicial activism and amendment frequency.³⁴ Specifically, the results show that although high amendment rates are reliably associated with lower rates of judicial activism, there is a tipping point where extremely high amendment rates are associated with accelerating judicial activism.³⁵ This suggests that there may be limits on

³⁰ See *infra* Section III.B.2 (illustrating my findings, in Figure 2, regarding relationship between amendment frequency and rate of overturning constitutional precedent). Appendix A contains average annual amendment rates and average rate of overruling constitutional precedent for each state. See *infra* Appendix A.

³¹ See *infra* Section III.B.2.

³² See *infra* Section III.B (illustrating this correlation in Figure 3; although the correlation is positive (0.54) and statistically significant ($p=0.0002$), the r-squared for the fitted line using linear regression is low (0.29)).

³³ I replicate a negative binomial regression model (with both fixed and random effects for the states) used by political scientists and legal scholars to separately identify reliable predictors of judicial overruling behavior. See Stefanie A. Lindquist, *Stare Decisis as a Reciprocity Norm*, in WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE 173, 183 (Charles G. Geyh ed., 2011) (using negative binomial regression model with fixed effects for states to predict overruling events by state courts); see also Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules: The Denominator Problem*, in COMPARATIVE CONSTITUTIONAL DESIGN 195, 202 (Tom Ginsburg ed., 2012) (using negative binomial regression model to predict amendment events by states). Section III.B explains my use of the model in detail.

³⁴ See *infra* Section III.B.2.

³⁵ See *infra* Section III.B.1. Figure 4 (fixed effects) and Figure 5 (random effects) display this relationship graphically based on predictions while holding all other variables at their means. See *id.* The results from the fixed effects model predict that when amendment rates surpass approximately 4.2 amendments per year, judicial activism accelerates. See *id.* The random effects model predicts that judicial activism accelerates when amendment rates surpass approximately 3.4 amendments per year. See *id.* The confidence intervals on these

the use of frequent formal amendment to “check” the judiciary. My regression also reveals that several other variables are reliably associated with judicial overruling of constitutional precedent, including whether judges are elected in a partisan election, whether there is a significant ideological shift on the court, and whether there is a significant ideological gap between the median judge on the court and the median voter.³⁶

Further research will surely be necessary before finalizing these conclusions or attempting to extend them to other constitutional systems, especially in view of the many different forms of judicial review around the world and a host of other significant contextual factors.³⁷ Nevertheless, these findings provide an important step forward in understanding the real effect of formal amendment on judicial decision-making. They suggest that designing amendment rules is more complicated than previously thought and that the restraining effects of frequent amendment may have limits.

In suggesting these conclusions from the data, I do not make any normative claims about the virtues or vices of using formal amendment to affect judicial decision-making. Nor do I make any normative claims about the appropriate balance between formal amendment and informal processes of constitutional change. My more modest goal is to shed light on how amendment frequency and judicial decision-making may interact. My hope is that this information will spur further empirical inquiry that can more accurately and reliably assist constitutional designers in crafting amendment rules that suit myriad circumstances and achieve diverse objectives.

This Article has four parts. Part I provides a brief background on strategic theories of judging. Part II presents current hypotheses regarding the relationship between amendability and judicial review and argues that these theories are best understood as a strand of strategic analysis. Part III presents my empirical methodology in creating an original dataset to test the prevailing hypotheses. Part III also presents my empirical findings and demonstrates that my data tend to contradict prevailing assumptions by identifying a curvilinear relationship between amendment frequency and judicial involvement in constitutional change. Finally, Part IV explores possible explanations for this relationship and considers what my findings might mean for the field of constitutional design.

I. “STRATEGIC ANALYSIS” THEORIES OF JUDGING

Judicial decision-making is an intriguing and complex phenomenon. Recent decades have seen a “tsunami” of scholarship aimed at explaining how and why

predictions are rather large, but they nevertheless provide some indication of the complicated relationship between formal amendment frequency and the practice of judicial review.

³⁶ See *infra* Section III.B.2 tbl. 1, 2.

³⁷ See generally Mark V. Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781 (2003) (describing strong- and weak-form judicial review and variations within these forms).

courts reach their decisions.³⁸ In this Part, I describe what has become the dominant approach to the study of judging: strategic analysis.³⁹ I first describe the core theoretical assumptions that characterize strategic analysis.⁴⁰ I then summarize key empirical findings testing whether judges are impacted by the possibility that other political actors will override or disregard their rulings. In the sections that follow, I argue that prevailing hypotheses about the relationship between amendment frequency and judicial review are best understood as an undertheorized and untested strand of strategic analysis.⁴¹

A. *Theoretical Assumptions of Strategic Analysis*

The traditional legal account of judicial decision-making suggests that judges “apply legal rules through methods that are objective, impersonal, and politically neutral.”⁴² On this account, legal rules, logic, and case-specific evidence drive outcomes.⁴³

³⁸ Epstein & Jacobi, *supra* note 27, at 342. *See generally, e.g.*, LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998) (arguing that judges’ decisions are motivated by strategy, not just political preferences); WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964) (setting out strategic model of judicial decision-making); Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, 53 *POL. RES. Q.* 625, 625-61 (2000) (describing “strategic revolution” and recounting its history as intellectual phenomenon).

³⁹ *See* Epstein & Knight, *supra* note 38, at 625 (explaining that increasingly more scholars are using strategic analysis to understand law and courts).

⁴⁰ For this summary, I rely on the excellent overview of the field provided by Lee Epstein and Tonja Jacobi. *See* Epstein & Jacobi, *supra* note 27, at 342-45.

⁴¹ There are important criticisms of strategic analysis, and alternative theories to explain judicial behavior (such as the attitudinal approach). *See generally, e.g.*, JEFFERY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993). It is not my purpose here to defend strategic analysis as the best approach to understanding judicial decision-making. My more modest claim is that existing hypotheses regarding the relationship between formal amendment and judicial review are best understood as forms of strategic analysis, and, therefore, it is appropriate to test them using empirical models designed to test analogous strategic theories.

⁴² Epstein & Jacobi, *supra* note 27, at 343; *see also* Charles G. Geyh, *So What Does Law Have to Do with It?*, in *WHAT’S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT’S AT STAKE I*, 7-8 (Charles G. Geyh ed., 2011) (arguing that scholars have reached relative consensus that both law and politics influence judges’ decisions while disagreeing as to degree to which law influences them).

⁴³ *See* Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 *DUKE L.J.* 1895, 1905-07 (2009).

Most scholars now recognize, however, that the reality of judging is more complicated.⁴⁴ Judges do not decide cases algorithmically or in isolation from other relevant actors.⁴⁵ Judging is often affected by institutional constraints that are not particular to the case at hand. A trial court might, for example, be affected by the likelihood of being overruled by a higher court.⁴⁶ A majority on an appellate court might limit the scope of their ruling to maintain the necessary majority. And the Supreme Court might avoid issues where it is vulnerable to executive or legislative overrides.⁴⁷ All of these institutional considerations (and many more) can impact how judges decide cases.

“Strategic” analysis seeks to account for those potential impacts by theorizing and testing possible institutional influences on judging.⁴⁸ To do this, strategic analysis applies a strand of rational choice theory that assumes judges are goal-orientated rational actors who operate in an “interdependent decision-making context.”⁴⁹ Stated simply, strategic analysis assumes that judges strive to render decisions that are both consistent with their ideological preferences,⁵⁰ and likely

⁴⁴ See Epstein & Jacobi, *supra* note 27, at 342-43 (noting that strategic criticism of traditional approach is commonplace); Geyh, *supra* note 42, at 8 (summarizing state of current scholarship).

⁴⁵ See Lee Epstein, William M. Landes & Richard Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 101-03 (2011) (describing self-interested judicial model in which judges consider factors such as their reputation in deciding cases); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 1-4 (1993) (arguing that judges make decisions that maximize their own utility, which includes income, leisure, and judicial voting).

⁴⁶ See, e.g., Kirk A. Randazzo, *Strategic Anticipation and the Hierarchy of Justice in U.S. District Courts*, 36 AM. POL. RES. 669, 669-71 (2008) (finding evidence that federal district court judges are influenced by fear of being overruled).

⁴⁷ See generally H.W. PERRY, JR., *DECIDING TO DECIDE, AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1994) (explaining how Supreme Court Justices use certiorari process to maneuver strategically to influence merits of cases); Mario Bergara, Barak Richman & Pablo T. Spiller, *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 28 LEG. STUD. Q. 247, 247-48 (2003) (exploring influence of congressional preferences on Supreme Court).

⁴⁸ Epstein & Jacobi, *supra* note 27, at 345-46.

⁴⁹ *Id.* at 343.

⁵⁰ “Ideological preferences” refers to the judge’s sincere belief about how a case should be decided. *Id.* Strategic analysis does not assume any particular legal or judicial philosophy. Some judges may adhere to a strict “rule of law” approach. Other judges may prefer a more liberal judicial philosophy. Strategic analysis assumes only that all judges, regardless of judicial philosophy, are affected by institutional considerations when finalizing their decisions and that they seek to maximize their ideological preferences through the resolution of cases. See *id.* at 344.

to be honored and followed by other political actors.⁵¹ Strategic analysis is grounded in the idea that judges are concerned with how their rulings will be treated by other political actors.⁵² Not only do judges want to decide cases correctly, they also want to maximize the likelihood that other actors will comply with their rulings.⁵³

Strategic analysis further assumes that to maximize compliance, “judge[s] must attend to the preferences and likely actions of members of the elected branches who could override or otherwise thwart their decisions.”⁵⁴ In other words, judges gravitate towards choices that other political actors will respect, and judges avoid choices that other actors will likely thwart, while also seeking outcomes that are most consistent with their ideological preferences. This is why judges are likely affected by how reviewing courts may treat their opinions on appeal,⁵⁵ how colleagues may react to their votes,⁵⁶ how likely a governor or president is to implement a ruling,⁵⁷ or how likely the legislature is to override a decision.⁵⁸

From these basic assumptions, scholars have theorized and tested a variety of institutional constraints that appear to impact judicial decision-making.⁵⁹ At the Supreme Court, for example, there is evidence that Justices vote on the threshold issue of whether to grant certiorari based, in part, on whether they believe that a

⁵¹ *Id.* at 344. In economic terms, judges are assumed to be “utility-maximizing” rational actors. *Id.* at 345.

⁵² *Id.* at 344. In this respect, it is distinguishable from other “realist” approaches to judging, such as the attitudinal model. *Id.* at 343.

⁵³ *Id.* at 344 (“[T]he desire to issue efficacious decisions—those that reflect the judge’s political values and that other actors will respect and with which they will comply—remains the primary motivation in most strategic analyses.”).

⁵⁴ *Id.* at 351 (discussing this strategy and noting that it may be unnecessary under certain conditions).

⁵⁵ See Max M. Schanzenbach & Emerson H. Tiller, *Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J.L., ECON. & ORG. 24, 25 (2007) (theorizing that federal district court judges make sentencing choices while keeping in mind reaction of court supervising attendant appeal).

⁵⁶ Epstein & Jacobi, *supra* note 27, at 343-44 (posing illustration of this dynamic).

⁵⁷ The dynamics in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), are a classic example of this. As Emily Berman has observed, “the genius of Chief Justice John Marshall in *Marbury v. Madison* is that he established the power of judicial review without provoking a confrontation with the Jefferson Administration—a confrontation the court was sure to lose.” Emily Berman, *Quasi-Constitutional Protections and Government Surveillance*, 2016 BYU L. REV. 771, 826.

⁵⁸ See Bergara, Richman & Spiller, *supra* note 47, at 267 (finding evidence that Supreme Court reacts to fear of congressional override); Anna Harvey & Barry Friedman, *Ducking Trouble: Congressionally Induced Selection Bias in the Supreme Court’s Agenda*, 71 J. POL. 574, 574 (2009).

⁵⁹ See Epstein & Jacobi, *supra* note 27, at 345.

majority of the Court will side with them on the merits if certiorari is granted.⁶⁰ It appears that when Justices suspect that they are not in the majority, they often vote to deny certiorari even if they disagree with the merits of the decision below and would otherwise like to hear the case (the so-called “defensive denial”).⁶¹ Conversely, when Justices suspect that they are in the majority, they often vote to grant certiorari even if they agree with the decision below (the so-called “aggressive grant”).⁶²

Judges can also act strategically by deciding cases with an eye towards the broader, long-term policy implications of their opinions. Tonja Jacobi has argued, for example, that Chief Justice John Roberts’s decision in *National Federation of Independent Businesses v. Sebelius*⁶³ (the Affordable Care Act case) was a strategic choice aimed at effectuating broader doctrinal change in the Court’s Commerce Clause jurisprudence.⁶⁴ According to Jacobi, Chief Justice Roberts agreed to uphold the individual mandate under Congress’s taxing and spending power primarily because that choice enabled him to cobble together a majority of Justices who agreed that the mandate was unconstitutional under Congress’s Commerce Clause power.⁶⁵

These are only two of many examples of the strategic approach to judging. Scholars have used strategic analysis to theorize and test myriad other institutional factors affecting judicial decision-making.⁶⁶ It is not my purpose to summarize all the literature. It is sufficient here to emphasize that strategic analysis assumes that judges are affected by how others will likely react to their decisions, and they favor outcomes that will maximize their preferences.⁶⁷

There is, however, one particular strand of strategic scholarship that deserves more discussion and to which I now turn. Various scholars have investigated the

⁶⁰ See PERRY, *supra* note 47, at 45; Epstein & Jacobi, *supra* note 38, at 346.

⁶¹ Epstein & Jacobi, *supra* note 27, at 346.

⁶² See *id.* (explaining that Justices who vote for “aggressive grant” do so with intention of giving ruling effect of Supreme Court affirmance).

⁶³ 567 U.S. 519 (2012).

⁶⁴ Tonja Jacobi, *Obamacare as a Window on Judicial Strategy*, 80 TENN. L. REV. 763, 763-76 (2013).

⁶⁵ *Id.* at 765-66 (“In a case that upheld congressional action, Roberts managed to forge an opinion that dramatically read down both of Congress’s two main avenues of regulatory power—the Commerce Clause and the Taxing and Spending Powers.”).

⁶⁶ Scholars have tested, for example, whether judges act strategically to limit their own workload to a level comparable to their pay. See Posner, *supra* note 45, at 10; see also LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 92-95 (John Aldrich et al. eds., 1997).

⁶⁷ It is important to note that strategic analysis does not necessarily assume that judges consciously and deliberately consider institutional factors. Strategic analysis is not predicated on the self-awareness of any particular judge. Rather, it assumes that the judicial function inherently lends itself to these considerations, which themselves may be institutionalized in judicial culture, custom, and practice.

extent to which judges are affected by the possibility that higher courts or other branches of government will override their rulings.⁶⁸ I explore those theories and findings in more detail because strategic “override” theories are very similar to prevailing hypotheses about the relationship between amendability and judicial review.

B. *Strategic Override Theories*

Few institutional constraints are more intuitive than the threat of overruling or thwarting a judicial opinion. It is understandable, for example, that trial judges want to avoid reversal by a higher court. Similarly, it is understandable that judges strive for opinions that will not be invalidated or side-stepped by the legislature or the executive. This is not to say that judges always avoid decisions that increase the risk of override. Indeed, it is possible that judges could disregard the likelihood of reversal or override because of other strategic concerns.⁶⁹

Nevertheless, strategic scholars “almost uniformly” assume that judges seek to minimize overrides as a way of furthering their ideological preferences.⁷⁰ Although override theories vary, they share a common logic and set of assumptions: (1) judges have sufficient information to accurately anticipate how potential override actors are likely to respond to a ruling; and (2) when judges anticipate an override, they act strategically to minimize its likelihood while still pursuing outcomes that maximize consistency with their ideological preferences.⁷¹

To illustrate how an override theory might play out, imagine a judge faced with three reasonable interpretations of an ambiguous statutory provision: A, B, and C.⁷² The judge sincerely believes that interpretation A is the proper outcome, but she knows that it conflicts with the strong preferences of the current legislature, which has the power to change the statute. The judge is less keen on interpretation B, but it is mostly consistent with the judge’s preferred outcome and it is closer to the legislature’s current preferences. The judge completely

⁶⁸ See Epstein & Jacobi, *supra* note 27, at 349-53.

⁶⁹ See Mark Walsh, *A Sixth Sense: 6th Circuit Has Surpassed the 9th as the Most Reversed Appeals Court*, ABA JOURNAL (Dec. 2012), http://www.abajournal.com/magazine/article/a_sixth_sense_6th_circuit_has_surpassed_the_9th_as_the_most_reversed_appeal/ [https://perma.cc/5N43-5XEL] (quoting Sixth Circuit Judge Gilbert S. Merritt, a “noted liberal,” as saying that reversal by conservative Supreme Court could be “badge of honor”).

⁷⁰ See Epstein & Jacobi, *supra* note 27, at 350.

⁷¹ See *id.* at 352 (explaining that courts react to potential overrides with “rational anticipation followed by, if necessary, sophisticated behavior”).

⁷² This illustration is based loosely on the formal model developed by William Eskridge, Jr. See William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613, 643-50 (1991); see also Epstein & Jacobi, *supra* note 27, at 353.

disagrees with interpretation C, but it squarely aligns with the legislature's current preferences. Under these conditions, a strategic judge is likely to choose interpretation B because it is the most consistent with the judge's preferences and also the least likely to provoke an override by the legislature, which would result in something close to interpretation C—the worst substantive outcome for the judge. Thus, the judge chooses option B to maximize both the substance and effect of her ruling. Similar theories based on principal-agent theory apply to how judges may assess the risk of reversal on appeal.⁷³

Another version of strategic override theory posits that judges mitigate the effects of potential thwarting by issuing vague opinions.⁷⁴ On this account, when judges anticipate that other political actors might refuse to comply with a ruling, they avoid issuing clear opinions that would draw attention to obvious noncompliance.⁷⁵ Instead, judges protect their authority by issuing vague opinions that nevertheless retain the core of their ideological preferences (albeit at higher levels of generality and abstraction).⁷⁶ Although the vagueness enables override actors to more easily side-step the ruling, the judge is spared the high cost to her reputation and power that would follow from outright defiance.⁷⁷ A similar (but more extreme) strategy is for judges to avoid decisions altogether if they anticipate a high probability of an override.⁷⁸

Empirical studies have generally confirmed that judges in fact use these strategies to limit the risk of override.⁷⁹ For example, a 2008 study analyzed 5600 federal trial court opinions from 1925 to 1996 to determine whether trial judges “anticipate responses by appellate panels and condition their decisions based on these expectations[.]”⁸⁰ The study found strong evidence that in many areas of law “federal trial judges anticipate . . . negative response[s] on appeal” when they perceive that an appellate panel is likely more liberal or more conservative than their own ideology.⁸¹ An ideological disparity causes district judges to anticipate an override, and consequently, to “curtail” expression of

⁷³ See, e.g., Epstein & Jacobi, *supra* note 27, at 350.

⁷⁴ Jeffrey K. Staton & Georg Vanberg, *The Value of Vagueness: Delegation, Defiance, and Judicial Opinions*, 52 AM. J. POL. SCI. 504, 505-07 (2008).

⁷⁵ *Id.* at 505.

⁷⁶ *Id.*

⁷⁷ *Id.* at 504 (“Vague rulings decrease the likelihood of compliance . . .”); *id.* at 505 (“Vagueness can serve important political purposes in the relations between courts and other policy makers.”).

⁷⁸ Epstein & Knight, *supra* note 38, at 628.

⁷⁹ See Epstein & Jacobi, *supra* note 27, at 349-53.

⁸⁰ Randazzo, *supra* note 46, at 677-78.

⁸¹ *Id.* at 678-79 (using index of judicial ideology to measure disparity in ideology between court of appeals panel and district judge).

their own ideological preferences to avoid provoking reversal.⁸² Other studies regarding criminal sentencing by federal trial judges have found that trial judges are less likely to depart from sentencing guidelines, exposing them to greater scrutiny on appeal, when they anticipate an appellate panel that is misaligned with their own preferences.⁸³

Many studies investigating the effect of Supreme Court review reach similar conclusions.⁸⁴ A 2010 study found evidence that court of appeals judges anticipate Supreme Court review and conform their decisions to those expectations.⁸⁵ Appeals court judges are much more likely to treat Supreme Court precedent favorably if, for example, the judges perceive the precedent to be consistent with the Supreme Court's current configuration and preferences.⁸⁶ Conversely, appeals court judges are more likely to distinguish or criticize Supreme Court precedent if they perceive the precedent to be out of step with the Court's current preferences.⁸⁷

Empirical studies have also confirmed that judges react to anticipated overrides or sidestepping by Congress and the President.⁸⁸ In a seminal 2003 study, researchers found that when interpreting federal statutes between 1947 and 1992, the Supreme Court reliably "adjust[ed] its decisions to presidential and congressional preferences" when there was an anticipated conflict between the Court and the other branches.⁸⁹ Various subsequent studies have confirmed this core finding.⁹⁰ Perhaps most significantly, the Supreme Court has shown a tendency to use restraint in exercising the power of judicial review when there is an ideological gap between itself and the House, Senate, the President.⁹¹

⁸² *Id.* at 669 (discussing how this practice occurs primarily in civil liberties and economic cases but not in criminal cases).

⁸³ Schanzenbach & Tiller, *supra* note 55, at 25-26 (using Democrat/Republican appointment of judges and assumptions of political party preferences on criminal sentencing to identify preference alignment); *see also* Epstein & Jacobi, *supra* note 27, at 350.

⁸⁴ *See* Epstein & Jacobi, *supra* note 27, at 350-51 (citing Giles et al., *The Etiology of the Occurrence of En Banc Review in the U.S. Court of Appeals*, 51 AM. J. POL. SCI. 341, 349-63 (2007); Jeffrey A. Segal, Chad Westerland & Stefanie A. Lindquist, Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model, 2nd Annual Conference on Empirical Legal Studies Paper (July 4, 2007)).

⁸⁵ Chad Westerland et al., *Strategic Defiance and Compliance in the U.S. Courts of Appeals*, 54 AM. J. POL. SCI. 891, 891-95 (2010).

⁸⁶ *Id.* at 901-02.

⁸⁷ Epstein & Jacobi, *supra* note 27, at 350-51.

⁸⁸ Bergara, Richman & Spiller, *supra* note 47, at 248-50.

⁸⁹ *See id.* at 247.

⁹⁰ *See* Epstein & Jacobi, *supra* note 27, at 354 (noting that "even Segal has (partially) conceded the point" (citing Segal, Westerland & Lindquist, *supra* note 84)).

⁹¹ Jeffrey A. Segal, Chad Westerland & Stefanie A. Lindquist, *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J.

Finally, there is evidence that Supreme Court Justices also use the certiorari process to avoid taking cases that would result in decisions at odds with congressional preferences because Justices fear thwarting actions by Congress.⁹²

In sum, there is strong evidence that judges anticipate and react to override threats from reviewing courts as well as other branches of government. Judges have developed a variety of strategies to manage override threats, but the evidence suggests that judicial decision-making is affected by the risk of override.

II. THEORIZING THE EFFECT OF AMENDMENT ON JUDICIAL REVIEW

If judges are influenced by institutional constraints, and override threats in particular, it is somewhat surprising that scholars of strategic analysis have not examined whether constitutional amendments present an override risk that judges anticipate and avoid. This may be because most strategic scholarship focuses on the federal judiciary where the threat of an amendment override is highly improbable.⁹³ Nevertheless, comparative constitutional scholars frequently assert that a constitution's relative amendability impacts judicial decision-making.⁹⁴ In this Section, I explore these assertions and argue that they represent an undertheorized and untested version of strategic analysis. By recasting these theories in accordance with the assumptions and logic of strategic analysis, I articulate a more precise model of the relationship between amendment and judicial review.

I first describe the basic legal parameters that frame the relationship between formal amendment and judicial review. I then present the prevailing theories from comparative constitutional scholars regarding the presumed interaction between amendment and judicial review. I conclude by suggesting a more focused account of the relationship between formal amendment and judicial review that is informed by strategic analysis.

A. *Legal Framework*

There are three legal constraints that structure prevailing hypotheses about the relationship between amendment frequency and judicial decision-making: (1) the doctrine of judicial review, (2) the principle of amendment supremacy, and (3) the structure and operation of formal amendment rules. I briefly discuss each of these before analyzing the prevailing constitutional design theories that draw

POL. SCI. 89, 90 (2011); *see also* Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 973 (2009).

⁹² Harvey & Friedman, *supra* note 58, at 589-90.

⁹³ *See* Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1633 (2010) (noting that most strategic scholarship focuses on federal cases).

⁹⁴ *See infra* Section II.B.

on these constraints to explain the relationship between formal amendment and judicial review.

1. Judicial Review

At its core, judicial review is the power of courts to strike down legislation or government action that is inconsistent with the Constitution.⁹⁵ In its traditional form, judicial review gives courts final say regarding the meaning and application of existing constitutional provisions.⁹⁶ This, of course, was the spirit behind Chief Justice John Marshall's famous declaration in *Marbury v. Madison*, that "[i]t is emphatically the province and duty of the judicial department to say what the law is."⁹⁷ Judicial review establishes courts as the supreme adjudicators of constitutional meaning.⁹⁸

Although judicial review has its origins in American revolutionary political thought,⁹⁹ the doctrine is now deeply embedded in constitutional design and practice around the world.¹⁰⁰ Indeed, the vast majority of contemporary constitutional democracies now practice judicial review in some form.¹⁰¹ That is, most constitutional democracies entrust judges with the power of finally resolving disputes regarding the meaning and application of existing constitutional provisions.¹⁰²

⁹⁵ Tom Ginsburg, *The Global Spread of Constitutional Review*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 81, 81 (Keith Whittington & Daniel Keleman eds., 2008).

⁹⁶ See generally Tom S. Clark, *Judicial Review*, in THE OXFORD HANDBOOK OF THE LAW AND JUDICIARY 271 (Lee Epstein & Stefanie Lindquist eds., 2017) (providing very helpful and insightful overview of judicial review); see also Tushnet, *supra* note 37, at 2784.

⁹⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁹⁸ See Clark, *supra* note 96, at 274.

⁹⁹ See Ginsburg, *supra* note 95, at 81 (discussing how few countries explicitly included judicial review in their constitutions prior to World War II).

¹⁰⁰ See David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 793 (2012) ("In 1946, only 25% of all constitutions explicitly provided for judicial review; by 2006, that proportion had increased to 82%."). The Constitution of the Netherlands is a notable exception—it explicitly prohibits judicial review. GW. [Constitution] art. 120 ("The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.").

¹⁰¹ Law & Versteeg, *supra* note 100, at 793-95. Law and Versteeg distinguish between American judicial review and European judicial review. *Id.* The salient differences are that the American version involves courts of general jurisdiction that decide constitutional issues only in the context of an actual dispute between interested parties (case or controversies). *Id.* European review involves constitutional review by specialized constitutional courts and also, sometimes, the resolution of constitutional issues in advance of any actual dispute between parties (sometimes even before challenged legislation is enacted). See *id.* at 794-95. In both versions, however, courts have final say regarding constitutional meaning and application.

¹⁰² There are many variations on how judicial review is practiced around the world. See Clark, *supra* note 96, at 272 (discussing how France and much of Latin America view

There are a few exceptions. Canada, New Zealand, and the United Kingdom have recently pioneered a new form of judicial review that allows legislatures to effectively invalidate (at least temporarily) constitutional rulings by courts.¹⁰³ Under this so-called weak-form of judicial review, procedures exist for “ordinary legislative majorities [to] displace judicial interpretations of the constitution”¹⁰⁴ by declaring those rulings to be ineffective. Although the procedures can be complex and nuanced, the basic idea is to allow for a legislative override of the judiciary’s constitutional rulings.¹⁰⁵ Despite this pioneering development in constitutional design, there is evidence that the legislative override is rarely used, especially in Canada.¹⁰⁶ The override’s disuse raises questions about the real significance of weak-form judicial review in constitutional systems around the world. In any event, with the exception of these few weak-form jurisdictions that may or may not practice a modified version of judicial review, the dominant approach to judicial review continues to entrust courts with the final say regarding constitutional meaning and application.

Despite its prevalence around the world, there are well-known concerns with judicial review, especially in its traditional “strong form.”¹⁰⁷ Chief among them is the worry that judges with “attenuated democratic pedigree” should not be empowered to “displace decisions taken by bodies with stronger democratic”

judicial review differently than United States). Some countries entrust all judges of general jurisdiction with the power to resolve constitutional disputes, while some countries have created special constitutional courts to hear constitutional cases. *Id.* Some countries have created writs (or causes of action) that allow individuals to appeal directly to courts regarding individual constitutional violations. *See id.* (discussing France’s demanding procedural test for who can bring constitutional challenges).

¹⁰³ *See* Tushnet, *supra* note 37, at 2784-86; *see also* Rosalind Dixon, *Weak-Form Judicial Review and American Exceptionalism*, 32 OXFORD J. LEGAL STUD. 487 (2012) (arguing that new broad powers given to legislatures have had little effect on countries’ power of judicial review as it has rarely, if ever, been used).

¹⁰⁴ *See* Tushnet, *supra* note 37, at 2786 (“[T]he mark of weak-form review is that ordinary legislative majorities can displace judicial interpretations of the constitution in the relatively short run.”).

¹⁰⁵ *See* Lorraine Eisenstat Weinrib, *Learning to Live with the Override*, 35 MCGILL L.J. 541-71, 543 (1990) (describing Canada’s experience with this form of judicial review); *see also* STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* 9 (David Dyzenhaus et al. eds., 2012) (discussing how certain political figures in Canada have vowed never to use legislative override).

¹⁰⁶ *See* Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMP. L. 641, 669-73 (recounting declining use of legislative override in Canada and suggesting that it may have fallen into desuetude).

¹⁰⁷ *See* Zackin & Versteeg, *supra* note 10, at 659.

pedigrees.¹⁰⁸ To the extent democratic governance prioritizes decisions that are responsive to popular will, judicial review could undermine democratic governance by empowering judges to invalidate popular legislation.¹⁰⁹ A related concern is that judges may be especially tempted to abuse the power of judicial review because it places courts above other branches of government and thereby eliminates important checks on judicial overreaching.¹¹⁰ As explained below, these “agency” concerns animate some of the existing theories regarding the effect of amendment difficulty on judicial review.

2. Amendment Supremacy

When courts exercise the power of judicial review and invalidate a law as unconstitutional, they declare that law to be in conflict with a provision or principle contained in or emanating from the Constitution. This means that the court’s power to invalidate the law is entirely derivative of the Constitution’s content. That is, if the Constitution did not conflict with the challenged law, the court would have no authority to invalidate it. The important implication of this is that if the Constitution is formally amended to resolve the conflict, then the court’s ruling is necessarily undone.¹¹¹ In that scenario, the amendment supersedes the court’s prior ruling and the court must honor the amendment.¹¹² Obviously, there can be ambiguities in determining whether an amendment conflicts with a prior ruling, but amendment supremacy is a basic principle of constitutional law recognized by courts.¹¹³

In *Chisholm v. Georgia*,¹¹⁴ for example, the U.S. Supreme Court held that Article III of the Constitution abrogated state sovereign immunity and granted

¹⁰⁸ See Tushnet, *supra* note 37, at 2786 (explaining that weak-form review responds to this concern); see also Barry Friedman, *The History of the Countermajoritarian Difficult, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 335 (1998) (describing counter majoritarian problem). There are other concerns with judicial review. Jeremy Waldron has argued, for example, that courts are not especially good institutions for resolving rights issues. See generally Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

¹⁰⁹ See Zackin & Versteeg, *supra* note 10, at 659.

¹¹⁰ For the classic expression of this concern, see generally James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893-94).

¹¹¹ For a historical discussion of this principle and its theoretical significance, see WALTER F. DODD, *STATE GOVERNMENT* 138-39 (2d ed. 1928).

¹¹² Amendment supremacy is, of course, derivative of the more general rule that constitutional law is supreme and trumps all other forms of law. See Jonathan L. Marshfield, *Models of Subnational Constitutionalism*, 115 PENN ST. L. REV. 1151, 1161-63 (2011) (discussing constitutional entrenchment and supremacy in context of constitutional design).

¹¹³ See, e.g., John Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 1026-30 (2007) (collecting cases that affirmed doctrine of amendment supremacy).

¹¹⁴ 2 U.S. (2 Dall.) 419 (1793).

federal courts jurisdiction to decide cases brought by private citizens against a state.¹¹⁵ The Eleventh Amendment was adopted soon thereafter, and it provides that the “judicial power of the United States shall not be construed to extend to any suit . . . against one of the United States by citizens of another state”¹¹⁶ Following ratification of the Eleventh Amendment, the Supreme Court has unequivocally acknowledged that the Eleventh Amendment “eliminates the basis for our judgment in . . . *Chisholm v. Georgia*.”¹¹⁷ State courts have also frequently recognized and followed the principle of amendment supremacy,¹¹⁸ as have foreign courts.¹¹⁹

For present purposes, the doctrine of amendment supremacy means that despite the awesome power of judicial review, courts can be “overruled” on constitutional issues, *and they know it*.¹²⁰ This constraint can impact judicial decision-making in a variety of ways (which I discuss below).

¹¹⁵ *Id.* at 425.

¹¹⁶ U.S. CONST. amend. XI.

¹¹⁷ *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011). In addition to *Chisholm* and the Eleventh Amendment, there have been at least two other instances where Article V was used to trump constitutional rulings by the Supreme Court. The Sixteenth Amendment, which allows Congress to levy an income tax without apportioning it among the states, was in direct response to the Court’s ruling in *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 607 (1895) (invalidating tax on municipal bonds because it equates to taxing power of states’ instrumentalities to borrow money). U.S. CONST. amend. XVI. The Twenty-sixth Amendment, which ensured that anyone over the age of eighteen could vote, was in response to the Court’s holding in *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (holding that Congress “cannot set the voting age in state and local elections”). U.S. CONST. amend. XXVI. For further discussion on this point, see generally Richard Albert, *How a Court Becomes Supreme*, 77 MD. L. REV. (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2975832. As Albert notes, another more complicated example is how the Thirteenth and Fourteenth Amendments undid *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857). Albert, *supra*, at 3, n.6.

¹¹⁸ *A.E. v. State*, 743 P.2d 1041, 1045 (Okla. 1987) (“An amendment supersedes law existing prior to its enactment.”); *People ex rel. Williams Eng’g & Contracting Co. v. Metz*, 85 N.E. 1070, 1074 (N.Y. 1908) (“We uphold the statute simply because the people have so amended the Constitution as to permit such legislation. The command of the people made in the form prescribed by law must be enforced by the courts.”).

¹¹⁹ See MAARTJE DE VISSER, CONSTITUTIONAL REVIEW IN EUROPE 356-60 (2013) (collecting cases from Europe where courts have acknowledged constitutional amendments that effectively overruled prior court decisions).

¹²⁰ See, e.g., *A.E.*, 743 P.2d at 1045 (acknowledging that, in prior case, Oklahoma overrode Supreme Court’s state law holding by amending its constitution). Courts do have tools to strike back at responsive amendments. They generally have the authority to declare amendments unconstitutional for failure to comply with amendment procedures. See WALTER FAIRLEIGH DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 236 (1910); G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 26-27 (1998); cf. generally YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS (2017) (explaining that some

3. Formal Amendment Flexibility

The last relevant legal constraint is the structure and operation of amendment rules. The key principle here is that constitutions have different degrees of formal amendability.¹²¹ Some constitutions are very easy to amend, others are very difficult, and others lie somewhere in-between.¹²² The relative flexibility of a constitution can be hard to assess, but scholars generally recognize that constitutional flexibility is affected by both the structure of formal amendment rules and the political culture within which the rules exist.¹²³ I discuss both in turn before discussing recognized methods for measuring relative constitutional flexibility.

Although all extant national constitutions contain explicit rules for formal amendment, there is great complexity and diversity in how constitutions structure the amendment power.¹²⁴ For example, amendment procedures can require special legislative majorities, ratification by both chambers of bicameral legislatures, approval by subnational units (such as states, provinces, or regions), and public referenda, sometimes with special majority requirements.¹²⁵ A few countries even require their legislatures to vote on proposed amendments, then hold an election, and then vote on the amendments again.¹²⁶ Adding to the complexity, many countries provide more than one pathway to amendment by allowing various different actors to initiate or ratify amendments, and some countries distinguish between amendments and constitutional revisions.¹²⁷ A

courts will invalidate procedurally perfect amendments by invoking doctrine of unconstitutional amendment, which allows judges to review and invalidate amendments based on their content).

¹²¹ See generally Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 972 (2014) (comparing formal amendment rules in high performing, democratic countries).

¹²² See *id.*; Versteeg & Zackin, *supra* note 14, at 1672-75 (illustrating relative amendment rates).

¹²³ See Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT'L J. CONST. L. 686, 699-701 (2015) (providing examples of countries where political barriers to amending constitutions exist); Versteeg & Zackin, *supra* note 10, at 661 (noting that formal amendment rules are “mediated so dramatically by political culture”).

¹²⁴ See LUPHART, *supra* note 1, at 218 (stating that “[d]emocracies use a bewildering array of devices” for amendment).

¹²⁵ *Id.*

¹²⁶ See, e.g., Wim J.M. Voermans, *The Constitutional Revision Process in the Netherlands*, in ENGINEERING CONSTITUTIONAL CHANGE 261, 261 (Xenophon Contiades ed., 2013) (explaining that Dutch constitution fits this description).

¹²⁷ See LUPHART, *supra* note 1, at 218-23 (describing different types of legislative votes and referendums).

few countries also place subject-matter restrictions on certain amendment pathways or declare particular provisions to be unamendable.¹²⁸

Despite these complexities, various scholars have attempted to classify amendment procedures to compare the relative rigidity of constitutions. Arend Lijphart, for example, identified four amendment categories in order from least to most rigid: (1) approval by ordinary legislative majorities, (2) approval by two-thirds legislative majorities, (3) approval by less than a two-thirds majority but more than an ordinary majority (“for instance, a three-fifths parliamentary majority or an ordinary majority plus a referendum”), and (4) approval by more than a two-thirds majority (“such as a three-fourths majority or a two-thirds majority plus approval by state legislatures”).¹²⁹

As Richard Albert has observed, Lijphart’s categories are helpful but significantly oversimplified.¹³⁰ They fail to account for myriad important nuances in constitutional amendment rules that might affect overall constitutional rigidity.¹³¹ Indeed, the “steps to passage” of a constitutional amendment vary greatly, and it is hard to know which procedures are more difficult than others.¹³² As Tom Ginsburg and James Melton have observed, “it is difficult to evaluate whether a constitution that requires a 2/3 vote of the legislature to amend the constitution is more or less flexible than one that requires an ordinary legislative majority with subsequent referendum by the public.”¹³³ Constitutions with multiple amendment pathways further complicate comparisons of rigidity.¹³⁴ Constitutions with unamendable provisions or subject-matter specific rules for amendment add an additional complexity to the rigidity calculus.¹³⁵ All of these variations in the structure of formal amendment

¹²⁸ See Albert, *supra* note 121, at 950-52 (reporting subject-matter restrictions in constitutional amendment procedures around the world).

¹²⁹ LIJPHART, *supra* note 1, at 218-19. For an alternative catalogue of amendment procedures, see EDWARD SCHNEIER, CRAFTING CONSTITUTIONAL DEMOCRACIES: THE POLITICS OF CONSTITUTIONAL DESIGN 222-25 (2006).

¹³⁰ See Albert, *supra* note 121, at 918-20.

¹³¹ *Id.*

¹³² Ginsburg & Melton, *supra* note 123, at 692. *But see* LUTZ, *supra* note 5, at 167-68 (developing index for estimating relative difficulty of amendment processes).

¹³³ Ginsburg & Melton, *supra* note 123, at 692 (discussing difficulty of comparing procedural arrangements’ flexibility *ex ante*).

¹³⁴ See, e.g., LA CONSTITUTION COMORIENNE [CONSTITUTION] Dec. 23, 2001, tit. VIII, art. 42 (Comoros). (“The initiative of revision of the Constitution belongs concurrently to the President of the Union and to at least one-third of the members of the Assembly of the Union.”); see also Ginsburg & Melton, *supra* note 123, at 693 (discussing Finland as example of alternative paths).

¹³⁵ See Ginsburg & Melton, *supra* note 123, at 693 (providing examples of countries that have these amendment procedures in place).

rules make it very difficult to assess the overall relative difficulty of formal amendment procedures.¹³⁶

Political culture also likely influences constitutional flexibility. The classic example is Japan.¹³⁷ The amendment rules under Japan's constitution impose relatively low thresholds: amendments can be initiated by a two-thirds vote in both legislative chambers and ratified by majority vote in a national referendum.¹³⁸ Despite this relatively easy amendment process, Japan has never amended its constitution, but other countries with similar amendment rules have amended their constitutions multiple times over shorter periods.¹³⁹ Thus, as Tom Ginsburg and James Melton have concluded, every society seems to have a "set of shared attitudes about the desirability of amendment" that is "independent of the substantive issue under consideration and the degree of pressure for change."¹⁴⁰ Those attitudes create a "baseline level of resistance to formal constitutional change" that affects amendment rates independent of the formal processes for amendment.¹⁴¹

Because of the influence of political culture on formal amendment flexibility, many empirical scholars recognize that constitutional flexibility should not be measured solely by reference to the structure of formal amendment rules.¹⁴² A better measure of constitutional flexibility is a constitution's actual amendment rate because this presumably captures both the formal barriers to amendment contained in the amendment rules as well as cultural attitudes regarding formal amendment.¹⁴³

But counting amendments across constitutional systems presents its own difficulties:

¹³⁶ *But see* Albert, *supra* note 121, at 913-14 (offering sophisticated catalogue of amendment categories that account for many of these variations).

¹³⁷ *See* Versteeg & Zackin, *supra* note 10, at 661.

¹³⁸ Nihonkoku Kenpō [KENPŌ] [CONSTITUTION], art. 96 (Japan); *see also* Versteeg & Zackin, *supra* note 10, at 661 (explaining that this is low threshold).

¹³⁹ *See* Versteeg & Zackin, *supra* note 10, at 661. Examples of countries with similar amendment procedures include: Albania (one amendment since adoption in 1998), Paraguay (one amendment since adoption in 1992), and Peru (six amendments since adoption in 1993). *See* Schneider, *supra* note 129, at 224-25 (outlining procedures).

¹⁴⁰ Ginsburg & Melton, *supra* note 123, at 697; *see also* Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, in *COMPARATIVE CONSTITUTIONAL LAW* 96, 107 (Tom Ginsburg & Rosalind Dixon eds., 2011) ("Popular attitudes toward a constitution . . . have a clear potential to influence the practical difficulty of constitutional amendment.").

¹⁴¹ *See* Ginsburg & Melton, *supra* note 123, at 699.

¹⁴² *See, e.g.,* Versteeg & Zackin, *supra* note 10, at 661 (explaining that formal amendment rules "are mediated so dramatically by political norms").

¹⁴³ *See, e.g., id.*

Sometimes amendments are adopted as a “package,” which can increase the total number of constitutional amendments even though the system experienced only one true amendment “event.” The adoption of the Bill of Rights in the United States illustrates this. Some amendments are also adopted pro forma because they make relatively minor changes to the text, which raises questions regarding whether they should be included equally in the constitution’s true amendment “count.”¹⁴⁴

To address these issues, some empirical studies calculate amendment rates based on the number of years that a constitution was amended rather than the number of actual amendments,¹⁴⁵ but this is far from a perfect approach. Sometimes constitutions experience multiple changes at the same time that should be independently counted, and counting only amendment years can omit these changes.¹⁴⁶

In any event, it is clear that constitutions vary in their degree of formal amendment flexibility, and amendment rates (of some kind) are a recognized measure of that flexibility.¹⁴⁷

B. *Existing Theories Regarding Amendment Difficulty and Judicial Review*

In view of the above legal framework, constitutional design scholars have articulated at least three theories for why they believe amendment difficulty likely impacts judicial restraint. I explore each of these and argue that they are, in fact, an undertheorized and untested strand of “strategic analysis.” I then

¹⁴⁴ Jonathan L. Marshfield, *Decentralizing the Amendment Power*, 19 LEWIS & CLARK L. REV. 963, 1016-17 (2015) (footnotes omitted) (citing Harry L. Witte, *Rights, Revolution, and the Paradox of Constitutionalism: The Processes of Constitutional Change in Pennsylvania*, 3 WIDENER J. PUB. L. 383, 396 (1993) (describing Bill of Rights as effectively one amendment event); Law & Versteeg, *supra* note 100, at n.87; Rasch & Congleton, *supra* note 6, at 333). This issue also arises when a constitutional law is adopted that makes a series of changes to the text in order to achieve a singular change in the overall constitutional system. *See, e.g.*, Constitution Seventeenth Amendment Act of 2012 (S. Afr.) (making various textual changes to constitution to effectuate singular purpose of reorganizing judiciary). If these textual changes are counted individually, the amendment rate is artificially inflated. *See id.*

¹⁴⁵ *See, e.g.*, Dixon & Holden, *supra* note 33, at 195; Versteeg & Zackin, *supra* note 10, at 661; *see also* ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 102 n.8 (2009) (“Years, as opposed to number, of amendments is probably the best way to validate amendment flexibility, because amendments (such as the first ten in the United States) are often passed in clusters with similar levels of support across items in the cluster.”). There are alternative approaches. Lutz famously created an index of amendment difficulty. Lutz, *supra* note 5, at 10-16; *see also* Ginsburg & Melton, *supra* note 123, at 698 (tabulating various approaches to measuring amendment difficulty).

¹⁴⁶ As explained below, there is good reason to believe that this happens frequently in the amendment of state constitutions.

¹⁴⁷ *See* Lutz, *supra* note 5, at 355 (emphasizing that amendment rates and not number of amendments is key indicator).

consolidate these theories into a series of hypotheses framed from the perspective of strategic analysis so as to capture more concretely why current theories expect an inverse relationship between amendment frequency and judicial activism.

1. The “Hydraulics” Theory¹⁴⁸

Drawing on descriptive accounts of constitutional change in the United States, scholars have suggested that rigid constitutional texts put pressure on courts to bring about constitutional change through judicial review.¹⁴⁹ Because these theories grow out of the American experience, I first summarize descriptive theories regarding U.S. constitutional change and then examine how those theories have been extrapolated into general theories of constitutional design.

The Framers of the U.S. Constitution very likely believed that constitutional change should occur exclusively through the formal amendment procedures outlined in Article V.¹⁵⁰ However, as pressure for constitutional change mounted, and Article V became increasingly unworkable, political actors found other ways to reform constitutional rules.¹⁵¹ Bruce Ackerman has argued, for example, that as early as 1860 constitutional change began to shift away from Article V and toward informal processes.¹⁵² Indeed, I suspect that most scholars

¹⁴⁸ I hijack this description from Heather K. Gerken’s important article, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, *supra* note 19.

¹⁴⁹ See Albert, *supra* note 3, at 224 (“[T]his decelerating pace of formal amendment is paired with a modern fact of constitutional law in the United States: constitutional change today occurs ‘off the books.’” (citation omitted)); Griffin, *supra* note 3, at 172 (“Most commentators would concede that the Constitution has changed a great deal through non-Article V means, primarily judicial interpretation.”). The U.S. experience has been used to support or explain broader applications of this principle. See, e.g., Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in *RESPONDING TO IMPERFECTION* 275, 276-80 (Sanford Levinson ed., 1995) (exploring how some lessons from U.S. experience with Article V might inform constitution making in Eastern Europe in 1990s); see also, e.g., LJPHART, *supra* note 1, at 228-29 (discussing relationship between constitutional rigidity and judicial review).

¹⁵⁰ See Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1030 (2014) (arguing that this formalist interpretation no longer exists). Indeed, Richard Albert has pointed out that this was the “settled” position during the early years of the republic. *Id.* (citing Harry Pratt Judson, *The Essentials of a Written Constitution*, in 4 UNIV. OF CHI., THE DECENNIAL PUBLICATIONS 313, 320 (1903)).

¹⁵¹ See *id.*; Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165, 1180-85 (2014) (providing helpful summary of literature on “informal amendment solution”).

¹⁵² Bruce A. Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013, 1065 (1984).

now agree that federal constitutional change occurs mostly through informal processes and not through Article V amendments.¹⁵³

The primary reasons for this shift toward informal amendment processes are Article V's arduous amendment requirements.¹⁵⁴ Because the passing of time necessarily brings pressure for constitutional reform, and because Article V's amendment rules make formal amendment an unrealistic option for addressing those needs,¹⁵⁵ political actors have found other ways to secure necessary constitutional change.¹⁵⁶ Judicial review by the Supreme Court has become a dominant force in this regard.¹⁵⁷ As Congress, the President, and the states push the boundaries of old constitutional rules, the Supreme Court is presented with constitutional challenges to those actions. Those cases provide the Court with opportunities to either impede change by enforcing existing constitutional rules or bring about constitutional change by establishing (or at least "ratifying") updated constitutional requirements.¹⁵⁸ Because the Court sees no alternative

¹⁵³ See, e.g., Rosalind Dixon, *Partial Constitutional Amendments*, 13 U. PA. J. CONST. L. 643, 651-64 (2011) (demonstrating empirically that Article V's amendment rules have become more difficult over time because of shifting political majorities, addition of new states, and demographic changes); Griffin, *supra* note 3, at 173.

¹⁵⁴ See Griffin, *supra* note 3, at 172-73 (noting proposed amendments such as 1972 Equal Rights amendment that would have passed if not for requiring supermajority of state legislatures to ratify amendments). Many scholars have identified Article V as containing one of the most rigid amendment rules in the world. See LUTZ, *supra* note 5, at 170 (noting selected cross-national data identified Australia as only country with lower amendment rate than United States); Dixon, *supra* note 153, at 651-64. Article V requires amendments to be initiated by either two-thirds majorities in both houses of Congress or by the states at a convention called by two-thirds of the states. U.S. CONST. art. V. Amendments proposed by either method must then be ratified by three-quarters of the states. *Id.*

¹⁵⁵ See Rosalind Dixon, *Updating Constitutional Rules*, 2009 SUP. CT. REV. 319, 321 ("[C]hanges in social circumstances and understandings over time mean that, from a contemporary perspective, a number of core constitutional rules are now no longer optimal.").

¹⁵⁶ See Bruce A. Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013, 1065-70 (1984) (discussing importance of overwhelming Republican majority elected in 1866 in passing Fourteenth Amendment through de facto constitutional convention).

¹⁵⁷ See Dixon, *supra* note 155, at 319 ("In the United States, the dominant mode of 'updating' constitutional meaning is via a process of judicial interpretation."). Other institutions are involved with informal constitutional change as well. See Huq, *supra* note 151, at 1180-85 (explaining Congress-centered theories of informal constitutional change).

¹⁵⁸ See ELKINS, GINSBURG & MELTON, *supra* note 145, at 163 ("Judicial review (as well as evolution of popular understandings) has provided a mechanism for updating the Constitution, thus ensuring that its allegedly timeless principles are applied to modern realities . . ."); Strauss, *supra* note 3, at 1473 (explaining how Supreme Court rulings can operate as de facto ratification of informal constitutional change). The Court's rulings in *McCulloch v. Maryland*, 17 U.S. 316 (1819), and *Crowell v. Benson*, 285 U.S. 22 (1923), are oft cited examples of this. Strauss, *supra* note 3, at 1473 (noting "it seems fair to say that *Crowell* essentially ratified a fait accompli" and also discussing *McCulloch*). Something similar appears to have occurred

process for bringing about necessary constitutional change, it succumbs to the pressure that has been redirected from Article V to the Court and assumes an active role in constitutional change.¹⁵⁹

Although these explanations are compelling in their efforts to describe constitutional change in the United States, they are mostly descriptive. That is, they do not purport to provide a general theory for the design of amendment rules. Donald Lutz's ground-breaking 1994 article, *Toward a Theory of Constitutional Amendment*, sought to do just that. Lutz took up the task of "developing a theory that includes the American version [of amendment] but also provides the basis for analyzing any version of constitutional amendment."¹⁶⁰ Lutz explained that his intent was "to provide guidelines for constitutional design in any context—guidelines that will allow framers to link the design of a formal amendment process securely to desired outcomes."¹⁶¹ Thus, Lutz's project shifted the study of constitutional change from mostly descriptive accounts of change in the United States to more general theories of constitutional design.

In constructing his theory, Lutz first articulated several hypotheses regarding the design of amendment rules. First, he hypothesized that:

Every political system needs to be modified over time as a result of some combination of (1) changes in the environment within which the political system operates (including economics, technology, foreign relations, demographics, etc.); (2) changes in the value system distributed across the population; (3) unwanted or unexpected institutional effects; and (4) the cumulative effect of decisions made by the legislature, executive, and judiciary.¹⁶²

Second, he reasoned that all constitutions must therefore change or they will die.¹⁶³ He further reasoned that if constitutional change is inevitable, then long-lasting constitutions that are amended infrequently are likely characterized by constitutional change through judicial review.¹⁶⁴ He added: "The more

in state constitutions before the relaxation of amendment rules. See DINAN, *supra* note 11, at 50-51 (explaining state judges' perception of rigid amendment rules).

¹⁵⁹ See DINAN, *supra* note 11, at 50-51.

¹⁶⁰ Lutz, *supra* note 5, at 357 (emphasis added) ("The intent of the analysis is to provide guidelines for constitutional design in any context—guidelines that will allow framers to link the design of a formal amendment process securely to desired outcomes.").

¹⁶¹ *Id.*

¹⁶² *Id.* at 357.

¹⁶³ See *id.* at 357 ("All constitutions require regular, periodic modification, whether through amendment, judicial or legislative alteration, or replacement.").

¹⁶⁴ *Id.* at 358; see also ELKINS, GINSBURG & MELTON, *supra* note 145, at 83 ("[T]he existence of some method for adjustment to changing conditions over time forestalls pressure for more total revision.").

important the role of the judiciary in constitutional revision, the less likely the judiciary is to use theories of strict construction.”¹⁶⁵

Lutz tested some of his claims empirically. Using data from all fifty state constitutions as well as thirty-two national constitutions, he showed that the formal structure of amendment rules impacts amendment frequency.¹⁶⁶ He also found that constitutions tend to survive longer if they are amended at a “moderate rate” and they tend to die sooner if they are amended too frequently or infrequently.¹⁶⁷ He did not, however, gather data or attempt to test whether amendment frequency (or difficulty) actually correlates with higher degrees of judicial activism in bringing about constitutional change.¹⁶⁸ Indeed, subsequent researchers have expressed “disappointment” at the lack of evidence to support this hypothesis, and they have concluded that Lutz’s “argument largely rests on the observation that the United States has both a low amendment rate and a judiciary that uses interpretive means to effect constitutional change.”¹⁶⁹

Subsequent empirical studies of constitutional change have relied on Lutz’s basic assumptions but have not tested whether amendment difficulty has systematic effects on the practice of judicial review. Indeed, prominent empirical studies of constitutional change tend to recognize the role that courts can play in constitutional change but do not seek to measure judicial involvement in constitutional change with great specificity.

For example, in the groundbreaking work *The Endurance of National Constitutions*, Zachary Elkins, Tom Ginsburg, and James Melton study the relationship between constitutional rigidity (among other things) and constitutional endurance.¹⁷⁰ Their study draws on data from 935 constitutions

¹⁶⁵ Lutz, *supra* note 5, at 358. Lutz’s theory was groundbreaking as an attempt to generalize a theory of amendment, but his core hypotheses were obviously derivative of the American experience with Article V. See Ferejohn, *supra* note 5, at 501-03 (making this criticism).

¹⁶⁶ See Lutz, *supra* note 5, at 358-65 (detailing methodology and results of empirical analysis). Lutz’s analysis and findings have been challenged. See Ferejohn, *supra* note 5, at 521-26; Huq, *supra* note 151, 1176-77.

¹⁶⁷ Lutz, *supra* note 5, at 365 (concluding empirical evidence shows that rate between 0.75 to 1.25 amendments per year encourages constitutional longevity).

¹⁶⁸ *Id.* Lutz seems to have found support for this claim by inference from his observation that some constitutions last for long periods of time without many formal amendments. *Id.* Because Lutz assumes that all constitutions must change or die, and because he assumes that constitutional change occurs through either formal amendment or judicial review, he concludes that rigid constitutions affect how courts practice judicial review. *Id.* (“In the absence of further research, there is only indirect evidence for this proposition. Table 6 shows that the lower the rate of amendment, the less the legislature dominates. The executive is usually not a major actor in a formal amendment process, so we are left with the judiciary.”).

¹⁶⁹ See Ferejohn, *supra* note 5, at 525.

¹⁷⁰ See ELKINS, GINSBURG & MELTON, *supra* note 145, at 99-103 (comparing Columbian Constitution’s flexible amendment rules and Article V’s rigid amendment rules).

operating between 1789 and 2006.¹⁷¹ While recognizing the role that judicial review can play in constitutional change, Elkins, Ginsburg, and Melton include only a binary variable for judicial review that captured whether there was a “judicial body entitled to conduct constitutional review.”¹⁷² Their model did not otherwise quantify the impact of judicial review on constitutional change.¹⁷³

Similarly, Arend Lijphart’s seminal study of thirty-six constitutional democracies from 1945 to 1996 recognized that “[t]he impact of judicial review depends only partly on its formal existence and much more vitally on the vigor and frequency of its use by courts.”¹⁷⁴ However, to account for this, Lijphart ranked countries on a four-point scale without much explanation as to how he assigned the points or how he assessed the relative strength of judicial review.¹⁷⁵

There is some oft overlooked anecdotal evidence to suggest that the hydraulics theory is oversimplified. Michael Besso, for example, has found that the states used informal amendment processes to restructure gubernatorial power under state constitutions during the early twentieth century.¹⁷⁶ Besso notes that this is surprising under the prevailing hydraulics theory because, unlike with the Federal Constitution, formal amendment was a realistic pathway for these state constitutional reforms.¹⁷⁷ Gabriel Negretto has reported something similar from

¹⁷¹ *Id.* at 48-51.

¹⁷² *Id.* at 109. Similarly, Law and Versteeg account for judicial review in their comparative study by using a binary variable capturing whether countries use “European model of abstract review by specialized courts” or “American model of concrete review by ordinary courts.” Law & Versteeg, *supra* note 100, at 795-96. Like Elkins, Ginsburg, and Melton, they do not attempt to measure the real impact of judicial review on constitutional change, but only to report its existence in two alternative forms.

¹⁷³ See ELKINS, GINSBURG & MELTON, *supra* note 145, at 126-29 (explaining methodology and approach).

¹⁷⁴ LIJPHART, *supra* note 1, at 225.

¹⁷⁵ See *id.* at 225-28. Lijphart provides no explanation that I can find for this. He seems to have made determinations based on anecdotal secondary sources commenting on each court’s relative activism. See *id.*

¹⁷⁶ See Michael Besso, *Constitutional Amendment Procedures and the Informal Political Construction of Constitutions*, 67 J. POL. 69, 81 (2005) (tracing how various states reorganized state executive power through statutes rather than formal amendment).

¹⁷⁷ See *id.* at 71, 80-83 (noting that four states with similarly difficult amendment procedures chose to reorganize state administrative agencies by statute). Ernest Bartley and James Gardner have also documented anecdotal instances of informal constitutional change in the states that challenge hydraulics theory’s underlying assumptions. See Ernest R. Bartley, *Methods of Constitutional Change*, in STATE CONSTITUTIONAL REVISION 21, 22-23 (W. Brooke Graves ed., 1960) (“[T]here has sometimes been a tendency to ignore interpretation as a medium of state constitutional change.”); James A. Gardner, *Practice-Driven Changes to Constitutional Structures of Governance*, 69 ARK. L. REV. 335, 353-64 (2016) (arguing that informal change through “practice-drive” methods has occurred in New York “on an astonishing scale”).

several Latin American countries.¹⁷⁸ Negretto found that amendment frequency was not an especially reliable indicator of judicial involvement in constitutional change.¹⁷⁹ According to Negretto, the “crucial variables” that better “capture the importance of judicial interpretation as a mechanism of constitutional change are the scope, access, and effects of constitutional adjudication.”¹⁸⁰

Notwithstanding the lack of systematic empirical support for the idea that amendment difficulty has a deep effect on judicial review, the hydraulics theory continues to influence constitutional design. The prevailing design assumption remains that when constitutional provisions are difficult to amend and “constitutional courts have final authority over the interpretation of such provisions, entrenchment does not actually inhibit alterations,” but rather “shifts the locus of change—and the power to determine the legitimate scope of mutability—away from legislatures and toward the court.”¹⁸¹ Indeed, the proliferation of explicitly unamendable provisions in constitutions around the world seems to be partly motivated by the assumption that in making those provisions unamendable, courts will necessarily take up the task of updating those provisions to preserve their relevance.¹⁸²

In sum, the hydraulic theory suggests that low amendment rates over long periods of time empower courts because pressures for constitutional change find an outlet in the courts as the only real avenue for bringing about constitutional change. However, there is an absence of any rigorous systematic testing of this hypothesis.

2. The Principal-Agent Theory

Various scholars have suggested that the amendment power serves a “checking function” on the judiciary because it provides the “people” with the opportunity to override court rulings.¹⁸³ These theories of amendment design are based on principal-agent ideas.¹⁸⁴ Although judicial review is intended to reduce agency costs by empowering courts to enforce constitutional commitments on elected officials,¹⁸⁵ courts can themselves be a source of agency costs if they

¹⁷⁸ See Gabriel L. Negretto, *Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America*, 46 L. & SOC. REV. 749, 761-62 (2012).

¹⁷⁹ See *id.* at 760.

¹⁸⁰ *Id.* at 762.

¹⁸¹ MELISSA SCHWARTZBERG, *DEMOCRACY AND LEGAL CHANGE* 184 (Adam Przeworski ed., 2007).

¹⁸² See *id.* at 185.

¹⁸³ See, e.g., Albert, *supra* note 121, at 913; Denning & Vile, *supra* note 13, at 276 (noting that four of twenty-seven amendments to U.S. Constitution were ratified either to overturn or react to Supreme Court decisions); Dixon, *supra* note 140, at 98.

¹⁸⁴ See Versteeg & Zackin, *supra* note 10, at 660-61 (explaining development of flexible constitutions in terms of principal-agent theory).

¹⁸⁵ See *id.*

divert the power of judicial review for their own purposes or act inconsistently with the people's constitutional preferences. This "rent-seeking" can be especially concerning in the context of judicial review because constitutional rulings are entrenched beyond the realm of ordinary political accountability. Formal amendment can therefore serve a corrective function by establishing a process for the people to correct the court's acts as unfaithful agents.¹⁸⁶ As an extension of this, if amendments are easy to obtain, courts will presumably be more accountable to the people's preferences. Conversely, if amendments are difficult to obtain, courts may be more likely to use judicial review for their own purposes.¹⁸⁷

Proponents of principal-agent theories of amendment design tend to point to anecdotal examples of reprisal amendments to show that the amendment power can check the judiciary.¹⁸⁸ Brannon Denning and John Vile, for example, point out that of the twenty-seven amendments to the U.S. Constitution, "at least four were ratified to overturn, or in reaction to, a specific Supreme Court decision."¹⁸⁹ Similarly, John Dinan has found that states have a long tradition of amending their constitutions in response to unpopular state court rulings.¹⁹⁰ Those "court-

¹⁸⁶ See Dixon, *supra* note 140, at 98 (providing helpful summary of principal-agent ideas as applied to flexible constitutional amendment).

¹⁸⁷ This is not to suggest that the dynamics in overriding a court ruling are simple and easy to predict. In fact, the path to a responsive amendment is very politically risky and, in many instances, might be unlikely. See DE VISSER, *supra* note 119, at 369-72 (describing factors that might influence frequent use of amendment overrides—including difficulty of formal amendment rules). *But see* Holmes & Sunstein, *supra* note 149, at 253 ("If it is easy to amend the Constitution, the stakes of constitutional decision are lowered . . . [which] may embolden the court . . ."); Ferejohn & Sager, *supra* note 2, at 1961 ("[T]he Supreme Court . . . does its work with little fear of correction by constitutional amendment.").

¹⁸⁸ See Denning & Vile, *supra* note 13, at 276.

¹⁸⁹ See *id.* (citing U.S. CONST. amends XI, XIV, XVI, XXVI as responsive to *Oregon v. Mitchell*, 400 U.S. 112, 117-19 (1970) (concluding that Congress could not set a uniform voting age for state elections); *Pollock v. Farmers' Loan & Tr. Co.*, 157 U.S. 429, 558-84 (1895) (holding income tax unconstitutional); *Scott v. Sanford*, 60 U.S. 393, 427 (1851) (concluding that blacks were not, and could never be, citizens of United States); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 425 (1793) (concluding that states could be sued in federal court by citizens of other states, respectively).

¹⁹⁰ Dinan, *supra* note 113, at 1024 (quoting one Progressive Era scholar as saying, "[I]nasmuch as the constitutions of the states are, comparatively speaking, rather easy of amendment, it has frequently happened that subsequent to a decision of a state court that an act of the state legislature is unconstitutional, the state constitution has been so changed as to remove all objections to the passage of the statute from the point of view of the state constitution. The natural result is that the limitations of the state constitutions as interpreted by the state courts are not serious permanent obstacles to social reform, either in the matter of labor legislation, or, indeed, in any other matter in which change is desired." (quoting FRANK J. GOODNOW, *SOCIAL REFORMS AND THE CONSTITUTION* 30 (1911)); see also Versteeg &

constraining” amendments cover a broad range of topics, including civil rights, representation, taxation, and separation of powers issues, among many others.¹⁹¹ Maartje de Visser also identifies various instances across Europe where countries have amended their constitutions specifically to undo constitutional rulings by courts (although the practice seems less prevalent in Europe than in the American states).¹⁹² De Visser also identifies a broad range of issues addressed by amendments overriding court opinions, including federalism (France and Italy), gender equality (France and Italy), criminal procedure (Italy), welfare benefits (Germany), voting (Hungary), and taxation (Hungary).¹⁹³ Additionally, “backlash” amendments are apparently endemic in several Latin American countries.¹⁹⁴

This theory of amendment has significantly influenced the practice of constitutional design around the world.¹⁹⁵ Beginning in the United States in the early twentieth century, state constitutional designers began to react to state judges who had used the power of judicial review to frustrate progressive policy changes by state legislatures.¹⁹⁶ One strategy that these reformers deployed was to relax constitutional amendment rules in order to reign in the power of judicial review.¹⁹⁷ Amendment rules in various state constitutions were redesigned during the Progressive Era to make amendment easier and to curtail so-called “activist judges.”¹⁹⁸

Mila Versteeg and Emily Zackin have identified similar trends in the design of amendment rules for national constitutions around the world.¹⁹⁹ In a recent study, they found that in response to the emergence of constitutional courts and judicial review in Continental Europe, countries relaxed constitutional amendment rules and passed more amendments in an effort to constrain

Zackin, *supra* note 10, 664-66 (explaining that change in amendment flexibility in states was all about accountability to judges).

¹⁹¹ Dinan, *supra* note 113, at 986-89.

¹⁹² See DE VISSER, *supra* note 119, at 24 (discussing French constitutional amendment permitting French Parliament to enact legislation promoting equal access for women to political office); *id.* at 356-67 (describing in detail examples from France, Germany, Hungary, and Italy).

¹⁹³ See *id.* at 350-68.

¹⁹⁴ See Versteeg & Zackin, *supra* note 10, at 671.

¹⁹⁵ See *id.* at 657-66 (explaining how this version of constitutionalism spread over time and has become dominant approach).

¹⁹⁶ See *id.* at 666.

¹⁹⁷ *Id.* at 664.

¹⁹⁸ See DINAN, *supra* note 11, at 48.

¹⁹⁹ See Versteeg & Zackin, *supra* note 10, at 666-68.

courts.²⁰⁰ They found evidence of similar trends in the constitutions of Latin America.²⁰¹

Thus, a dominant theme in contemporary constitutional design is the expectation that flexible and frequent amendment is an effective way to constrain the power of judicial review. Indeed, scholars have identified this as a defining feature of a new model of constitutionalism that emphasizes constitutional flexibility and specificity as a means of controlling agency costs.²⁰²

It is important to note that constitutional design literature often focuses on amendment as a means of constraining courts by invalidating rulings after the time of decision and not necessarily by influencing judicial reasoning at the time of decision. Indeed, some of the design literature suggests that the threat of amendment should not influence judicial independence at the time of decision because judges should strive to engage the legislature and the people in a constructive institutional dialogue, with the judiciary representing an independent voice in that discussion.²⁰³

Implicit in this literature, however, is the suggestion that the use of flexible amendment procedures is intended to adjust the institutional balance of power between the courts and the people (or their representatives). In this sense, there appears to be an expectation that courts will behave differently when applying an easily amended constitution than when they are applying a rigid constitution.

3. The Constrained-Agent Theory

As a variation on the principal-agent theory, some scholars have noted that frequent amendment can constrain judges by limiting their discretion when

²⁰⁰ See *id.* at 668 (identifying Austrian Constitution of 1920 as example of constitution that embraces judicial restraint by structuring supreme court as elective body).

²⁰¹ See *id.* at 669-71 (detecting exponential growth in average word count of Latin American constitutions).

²⁰² See *id.* at 660-61; see also GARDBAUM, *supra* note 105, at 2.

²⁰³ See DE VISSER, *supra* note 119, at 320-30 (discussing dialogue literature in terms of amendment overrides). In *Commonwealth v. O'Neal*, 339 N.E.2d 676, 694 (Mass. 1975), members of the Massachusetts Supreme Judicial Court sparred over whether, in deciding the constitutionality of the death penalty, it was appropriate to consider the likelihood of a responsive constitutional amendment. In rejecting this idea, Justice Tauro wrote:

[T]he fact that the people of California amended their Constitution after the highest court of that State declared the death penalty unconstitutional does not indicate to me that we should not reach and decide a properly presented constitutional issue in accordance with our considered views of the statute and Constitution. It merely indicates the possibility that an amendment to our Constitution may be the popular response to our decision. If this eventuates, so be it. The amendment, and not a judicial anticipation of such a response, is the proper constitutional procedure.

Id. at 692-93.

applying the constitution.²⁰⁴ This can happen in at least two ways. First, frequent amendment can result in more specific content being added to a constitution's text.²⁰⁵ As a constitution becomes more detailed and specific, courts have fewer opportunities to develop policy through ambiguous or vague provisions.²⁰⁶ Thus, rather than exercising judicial review as a necessary consequence of broad open-ended provisions that invite, and perhaps require, judge-made policy, courts mechanically enforce the detailed and specific provisions outlined in the constitution.²⁰⁷ On this theory, one would expect that frequent amendment would result in a more constrained judiciary—at least in the sense that the courts would not be developing new substantive constitutional policy on their own.²⁰⁸ Infrequent amendment, on the other hand, presumably corresponds to a less detailed constitutional text, which requires a more active judiciary to fill in the blanks.

Frequent amendment can also affect courts' policymaking authority by providing courts with information about the people's preferences for constitutional change.²⁰⁹ Rosalind Dixon has described this as the "informational"²¹⁰ or "evidentiary"²¹¹ function of constitutional amendments. On this theory, even when amendments do not directly constrain the court regarding a particular issue, they may provide courts with evidence of "democratic support for constitutional change."²¹² This evidence either nudges

²⁰⁴ See, e.g., Dixon, *supra* note 140, at 108; Versteeg & Zackin, *supra* note 10, at 660-61.

²⁰⁵ Versteeg & Zackin, *supra* note 10, at 660-61.

²⁰⁶ *Id.* at 660 ("By placing a broad range of detailed policies directly in a constitutional text, constitution-makers can attempt to constrain the exercise of political power. In other words, the principal can use a constitutional text to tell its agents exactly what to do and not do."); *id.* at 658 ("Although these flexible constitutions do not entrench commitments over long time horizons, we argue that they are nonetheless attempts to constrain the exercise of political power by leaving empowered actors with fewer choices about which policies to pursue."). This is not always true. Specific provisions can result in more conflicts between provisions, which can empower courts to resolve the conflict and amount to a regift of discretion to courts. See Rosalind Dixon & Tom Ginsburg, *The South African Constitutional Court and Socio-Economic Rights as 'Insurance Swaps,'* 4 CONST. CT. REV. 1, 1-3 (2011) (referencing multiple cases in which judges exercised considerable discretion despite specific constitutional provisions). In this way, specific constitutions might empower courts rather than constrain them.

²⁰⁷ Versteeg & Zackin, *supra* note 10, at 660-61.

²⁰⁸ The judiciary may, however, be "active" in the sense of striking down legislation if the frequent changes in the constitution's text change legislative power.

²⁰⁹ Dixon, *supra* note 140, at 107.

²¹⁰ Dixon, *supra* note 153, at 647-51.

²¹¹ Dixon, *supra* note 140, at 102.

²¹² *Id.* at 99. Dixon has pointed to the adoption of the Fourteenth Amendment and the Supreme Court's subsequent incorporation of the Bill of Rights against the states as an example of the informational, limiting function of amendments. *Id.* at 98-99. In drafting the

the court in a particular direction that is consistent with democratic preferences, or it requires the court to incur costs associated with rejecting expressed democratic preferences.²¹³ In either situation, amendment has an indirect constraining effect on courts. Consequently, one would expect that frequent amendments would result in less active and more restrained courts.

C. *A Strategic Account of Amendment Difficulty and Judicial Review*

Despite their many insights, the above theories fail to articulate a clear and consolidated theory of how amendment difficulty might affect judicial review. These theories have at least three shortcomings that strategic analysis can help address. In this Section, I recast the theories described above in terms of the assumptions and logic of strategic analysis and explain the benefits of this approach.

1. Clarifying the Theory of Constraint or Empowerment

A shortcoming with existing theories is that they fail to recognize that amendability can affect judicial review in at least two different ways. First, amendability might affect a court at the time of decision by altering the institutional constraints facing judges when they decide constitutional cases. Deciding a constitutional case in a system where the constitution is amended very frequently presents judges with a different set of constraints than if they were deciding the same case under a constitution that is very unlikely to be amended.²¹⁴ This, of course, is a claim that overlaps with strategic analysis, and I will refer to this as the “strategic model.”

However, amendability might also affect judicial review in a more formalistic and legal way: by providing an after-the-fact process for changing binding rules set by judicial review. In this scenario, flexible amendment rules can “curb” the power of judicial review in the sense that they enable adjustments to substantive constitutional doctrine. In other words, flexible amendment rules affect the power of judicial review by limiting its substantive scope. Conversely, rigid amendment procedures empower courts by placing fewer limitations on courts. This is a much more concrete and formalistic claim of how amendability can

Fourteenth Amendment to explicitly apply due process and equal protection guarantees against the states, there was evidence of a fundamental shift in power following the Civil War and a new constitutional order that sought to impose meaningful restraints on state authority. *See id.* at 99. This signal from the Fourteenth Amendment set the stage for the incorporation of other rights protections against the states as consistent with the spirit of the Fourteenth Amendment. *Id.*

²¹³ *Id.* at 98-99.

²¹⁴ *See* Ferejohn & Sager, *supra* note 2, at 1961 (making this point regarding Article V and explaining that “Supreme Court . . . does its work with little fear of correction by constitutional amendment”).

affect judicial review. It is concerned with only the array of substantive choices that remain available to courts. I will call this the “substantive model.”²¹⁵

For example, in 2008, the California Supreme Court held that the state’s marriage statute, which limited marriage to heterosexual couples, violated the state constitution’s due process, equality, and liberty guarantees.²¹⁶ Soon thereafter, Californians amended their constitution to provide that “[o]nly marriage between a man and a woman is valid or recognized in California” (Proposition 8).²¹⁷ In 2009, in an opinion upholding the amendment and California’s marriage statute, the California Supreme Court held that as a matter of law the amendment was a specific and permissible carve out from the constitution’s more general equal-protection guarantee, and that the court was unable to hold that equal protection required marriage equality.²¹⁸ Proposition 8 is instructive for present purposes because it illustrates how amendments can “limit” judicial review by establishing substantive constitutional policy without necessarily influencing a court’s reasoning at the time of decision.

The problem with existing theories is that they seem to draw on both the strategic and substantive models without being precise or consistent. Proponents of the hydraulic theory, for example, claim that rigid constitutions expand judicial review because pressures for constitutional change reroute reform through the courts. But what do they mean by this? Do they mean simply that under rigid constitutions more substantive reform occurs through the judiciary than through formal amendment? This would seem to be a rather uninteresting and obvious claim at this point in constitutional theory (especially for purposes of contemporary constitutional design). Rather, it seems that many proponents of the hydraulics theory also claim, to some degree, that rigid constitutions empower courts to be more active in bringing about constitutional change because judicial review is the only (or primary) avenue for constitutional reform.²¹⁹

²¹⁵ By this I do not mean to distinguish between constitutional procedure and substance. I mean to distinguish between how judges assess the constraints on deciding a constitutional case and the actual outcome of constitutional cases. Also, I do not mean to suggest that these two models are mutually exclusive. In fact, they are likely inseparable. For purposes of conceptual clarity (and empirical testing), however, it is important to draw attention to these distinctions.

²¹⁶ *In re Marriage Cases*, 183 P.3d 384, 440 (Cal. 2008). See generally Frederick Mark Gedicks, *Truth and Consequences: Mitt Romney, Proposition 8, and Public Reason*, 61 ALA. L. REV. 337 (2010).

²¹⁷ CAL. CONST. art. I, § 7.5; see also Jonathan L. Marshfield, *Models of Subnational Constitutionalism*, 115 PENN ST. L. REV. 1151, 1197 (2011) (describing Proposition 8 enactment and litigation).

²¹⁸ *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009).

²¹⁹ A related possibility is that pressure for constitutional change legitimates the court’s activist rulings.

Proponents of the principal-agent and constrained-agent theories make similarly ambiguous claims. Do flexible amendment procedures reduce agency costs simply because frequent corrective amendments ensure that the overall substance of constitutional law more closely aligns with popular preferences? Or do flexible amendment procedures reduce agency costs because they promote more faithful actions by judges at the time of decision? Again, the first claim would seem to be rather obvious and uninteresting from the standpoint of contemporary constitutional design. Rather, proponents of these agency theories seem to claim, at least to some degree, that flexible amendment procedures reduce agency costs by affecting how courts behave at the times of decision.²²⁰

Once we recognize that current theories are aimed at strategic theories that explain how courts are affected by amendability at the time of decision, it is possible to articulate a consolidated strategic account of how amendability might influence the practice of judicial review. If we adopt the assumptions of strategic analysis (that judges seek to decide cases in ways that are most aligned with their ideological preferences and followed by other political actors), we might summarize existing theories as making at least the following claims:

- When constitutions are old and are amended infrequently, courts have an incentive to prefer progressive applications of the constitution in order to preserve the stability and legitimacy of the existing constitution, which is necessary for the preservation of their own rulings and ideological preferences. This incentive is lessened when constitutions are young or amended frequently (Hydraulics Theory).
- When constitutions are amended infrequently, judges have less reason to be concerned about a direct override of their rulings even if their own preferences are out of step with legislative or popular preferences. Under these conditions, they may have an incentive to use judicial review to entrench their own ideological preferences (Principal-Agent Theory).
- When constitutions are amended frequently, judges may be influenced by the fear of override, although this may further depend on whether they understand their own ideological preferences to be in conflict with the preferences of override actors, such as legislators and voters. Under these conditions, they may have an incentive to use judicial review in ways that avoid direct conflict with the preferences of override actors (Principal-Agent Theory).
- When constitutions are amended frequently, courts have access to principled information regarding the community's preferences for constitutional change, which can constrain courts by increasing the saliency of acting against those preferences (Constrained-Agent Theory).

²²⁰ It should be noted that some scholars who have written about these agency theories have taken a rather ambivalent approach to whether or not flexible amendment is actually effective in restraining judges. Instead, they point out the constitutional designers increasingly believe that flexible amendment has restraining effects. They are, in other words, descriptive accounts of how constitutional designers are behaving.

Articulating these claims in terms of strategic analysis provides greater clarity for the claims of existing theories. It also sets the stage for more reliable empirical investigation into whether (and under what conditions) amendability affects the practice of judicial review.

2. The Need to Identify Other Meaningful Constraints

Recasting existing theories as a strand of strategic analysis brings its own difficulties. For one thing, it draws attention to the many other institutional constraints that might influence the practice of judicial review besides formal amendment. Existing constitutional design theories tend to have a myopic focus on amendment as the only meaningful influence on the practice of judicial review. There are, however, many institutional factors that might affect how courts apply a constitution. If judges are elected, for example, they might have more immediate backlash concerns besides reprisal amendments. Similarly, the sophistication and relative strength of override actors might influence judges. A nonprofessional legislature, for instance, might not be as adept at skirting court rulings, and a weak executive might not be as threatening to a court.

Additionally, even under rigid constitutions, informal constitutional change might also occur through other institutions besides the judiciary, which can influence a judge's strategy when deciding constitutional cases. John Ferejohn and William Eskridge have argued, for example, that the U.S. Constitution is informally amended by congressional "super-statutes" that Americans endow with quasi-constitutional status.²²¹ Richard Albert has also observed a similar phenomenon in Canada, where the constitution is also exceptionally hard to amend.²²² If pressures for constitutional change are addressed through super-statutes, then pressure on the judiciary to take responsibility for necessary constitutional change may not be as overwhelming as Lutz and others have suggested.

There are many institutional constraints that we can imagine impacting how a judge decides a constitutional case. It is not my purpose to identify all of them here,²²³ but theories regarding the effect of amendability on judicial review must come to terms with the reality of alternative influences.²²⁴ Empirical studies must also make efforts to account for these alternative effects. And constitutional design literature must place the relationship between amendability and judicial

²²¹ William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1230-31 (2001) (arguing that law can attain super-statute status if it substantially alters regulatory baselines, "sticks" in public psyche, and is product of extensive and meaningful deliberation).

²²² See generally Richard Albert, *Quasi-Constitutional Amendments*, 65 BUFF. L. REV. 739 (2017).

²²³ For a slightly more in-depth look at the many forces that can influence whether constitutional change occurs through formal or informal processes, see generally Jonathan L. Marshfield, *Respecting the Mystery of Constitutional Change*, BUFF. L. REV. (forthcoming).

²²⁴ See Ferejohn, *supra* note 5, at 523-24 (making this point in analyzing Lutz's 1994 article).

review in full context rather than describe it in monolithic terms that potentially mislead constitution makers and reformers.

3. Measuring Judicial Activism or Restraint

A strategic account of amendability and judicial review also brings another issue to the forefront that existing theories have obscured. Under a strategic model, measuring the influence of amendability necessarily requires a way to measure judicial restraint or activism. A “substantive model” can demonstrate the effect of amendment on judicial review by assessing how much substantive constitutional doctrine comes from details in a constitution’s text, and how much comes from judicial interpretations of the constitution’s text. Systems with a high proportion of judge-made constitutional law presumably reflect minimal influence of formal amendment. Conversely, systems with a high proportion of constitutional doctrine coming from detailed constitutional amendments reflect the influence of formal amendment.

Strategic models require a more nuanced approach. They must identify some measure of judicial activism in order to assess whether amendment frequency has any effect on that measure. As noted above, however, leading constitutional design scholarship generally sidesteps this issue and accounts for only the existence (without the practice) of judicial review in its various forms.²²⁵ I am unaware of any comparative study that includes rigorous analysis of how courts actually practice judicial review when operating under constitutions of varying flexibility.

Here, strategic analysis research again provides insight. In an important work titled *Measuring Judicial Activism*, Stephanie Lindquist and Frank Cross identify various dimensions of judicial activism that are amenable to quantification.²²⁶ Specifically, they argue that analyzing the frequency with which judges find statutes or executive actions unconstitutional is a reliable measure of at least one dimension of judicial activism.²²⁷ They also argue that the frequency with which judges overturn their own precedent is an especially reliable indicator of judicial activism.²²⁸ They explain that the decision to

²²⁵ As I mention above, Lijphart is an exception to this, but his measure of judicial activism is unclear and seems anecdotal. *See* Lijphart, *supra* notes 174-75 and accompanying text.

²²⁶ LINDQUIST & CROSS, *supra* note 21, at 43. Lindquist and Cross build on a large body of research from strategic scholars that analyze the practice of judicial review by federal courts (mostly the Supreme Court). This scholarship is incredibly helpful and important. *See generally* Barry Friedman, *The Politics of Judicial Review*, 84 TEXAS L. REV. 257 (2005) (summarizing much of this literature). However, because of its focus on federal courts, it has not explored how variations in amendment frequency might be relevant to the practice of judicial review. *Id.* at 313 (discussing various checking effects on Supreme Court’s use of judicial review but admitting that amendment is not one of them).

²²⁷ LINDQUIST & CROSS, *supra* note 21, at 43-44.

²²⁸ *See id.*

overrule precedent requires a court to “lay[] bare the choice to create new law in the face of existing, binding legal rules.”²²⁹ Consequently, it is the “most visible and dramatic instance of interpretative instability.”²³⁰ As explained below, I rely on Lindquist and Cross’s methodology in constructing my measure of judicial activism, especially their conclusion that the frequency of overruling precedent is a meaningful measure of judicial activism and restraint.²³¹

III. TESTING THE EFFECT OF AMENDMENT ON JUDICIAL REVIEW

Existing theories suggest an inverse relationship between amendment frequency and judicial review: as amendment frequency increases, judges are more restrained, and as amendment frequency decreases, judges are more active. In this Section, I test this hypothesis and find that it is oversimplified and partially incorrect.

To test whether amendment frequency is a reliable predictor of judicial activism, I use a regression model designed by scholars of strategic analysis to identify variables that accurately predict when a court will overrule its own precedent.²³² I apply the model to my own original dataset of approximately 5445 hand-coded state supreme court opinions. Because state constitutional amendment rates vary widely, this dataset provides an important opportunity to analyze how judges practice judicial review when deciding cases under constitutions of varying degrees of flexibility.

My findings suggest that the prevailing hypothesis is partially incorrect because although there is a statistically significant relationship between amendment frequency and judicial activism, I find evidence that the relationship is curvilinear, with the highest rates of amendment predicting high rates of

²²⁹ *Id.* at 36.

²³⁰ *Id.* (citing Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 237, 241 (1983)).

²³¹ Lindquist and Cross note that courts can undermine precedent gradually by eroding its “application to future cases,” but those instances are “much harder to identify . . . than outright votes to overturn a precedent, and thus pose a more difficult (and sometimes perhaps insurmountable) empirical task.” *Id.* at 36.

²³² I use essentially the identical model that Lindquist has used to measure judicial activism in state courts. Lindquist, *supra* note 33, at 183 (using court size, selection method, and tenure length as variables); *see also* Stephanie Lindquist, *Judicial Activism in State Supreme Courts: Institutional Design and Judicial Behavior*, 28 STAN. L. & POL’Y REV. 61, 65 (2017). However, Lindquist’s models do not use annual amendment-rate data as an independent control variable and her data do not contain information about whether the court overruled a constitutional or nonconstitutional case. In other words, although her models are well structured for identifying institutional constraints affecting judicial activism in state courts (indeed, I adopt them wholesale here), she did not test for the “amendment effect” because her data did not allow her to do so. My data, therefore, provide the first opportunity to test for the amendment effect.

judicial activism. In other words, the data suggest that there may be a “tipping point” where amendment is so frequent that it loses its constraining effect on judges and may actually facilitate activism. Further, to the extent that my data suggest a linear relationship at all, they indicate a positive linear relationship where judicial activism increases as formal amendment frequency increases. Thus, the relationship between amendment frequency and judicial review seems counterintuitive and more complicated than the simple inverse linear relationship that prevailing theories suggest.²³³

A. *Empirical Methodology and Data Collection*

I focus my inquiry on state constitutions and state supreme court opinions interpreting those constitutions. This sample has at least five advantages. First, there is a large amount of data regarding state constitutions, courts, and politics, which makes rigorous comparative analysis possible. Second, state constitutions exhibit a variety of different formal amendment procedures and a wide but balanced range of amendment rates.²³⁴ Indeed, state constitutions include most of the amendment procedures found in national constitutions around the world, and state amendment rates nicely mirror trends in national constitutional amendment rates worldwide.²³⁵ Thus, at least on the issue of amendability, state constitutions provide a window into worldwide constitutional trends. Third, as noted earlier, state constitution-makers purposefully relaxed amendment rules in many states specifically to control judges, which makes them fitting candidates for this study.²³⁶ Fourth, all states have adopted strong-form judicial review with the same basic parameters.²³⁷ The only minor nuance in this regard is that Nebraska and North Dakota both require a supermajority of justices (all but one) to declare a statute unconstitutional.²³⁸ Finally, state court opinions

²³³ Indeed, my findings also show that several other variables besides amendment frequency reliably predict when a court is likely to overturn a constitutional precedent. These include whether judges are elected or appointed, the court’s ideological configuration, the ideological gap between the court and the citizenry, and the number of judges on the court. In sum, my data suggest that amendment frequency is a reliably predictor of overruling behavior, but that this relationship is complicated and likely impacted by a variety of other factors as well.

²³⁴ For an overview, see DINAN, *supra* note 22, at 11-12 (showing amendment procedures and number of amendments for all extant constitutions).

²³⁵ Versteeg & Zackin, *supra* note 14, at 1688 (placing state amendment rates side by side with foreign constitutional amendment rates and finding strong correspondence).

²³⁶ Versteeg & Zackin, *supra* note 10, at 666.

²³⁷ On the evolution of judicial review in state high courts, see LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS 1-11 (2002); G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES 62-63 (2012) (summarizing state practices for invalidating legislation and recalling judicial decisions).

²³⁸ TARR, *supra* note 237, at 63.

provide an accessible source of information regarding judicial behavior. Opinions by foreign courts can present language, cultural, and expertise barriers that can frustrate reliable comparative analysis.

That said, state constitutions are not a perfect sample. They operate under different constraints than national constitutions, and they contain many eccentricities that can make comparative analysis difficult.²³⁹ Some of these limitations may be relevant to the practice of judicial review.

Tom Ginsburg and Richard Posner have argued that subnational constitutions are fundamentally different than national constitutions because: (1) national constitutions must place limits on theoretically unlimited government power, but subnational constitutions already operate within a legally defined space, (2) there is usually no effective enforcement mechanism operating above a national constitution, but national governments can provide effective monitoring and enforcement mechanisms regarding subnational abuses, and (3) subnational units more readily risk losing citizens to neighboring units.²⁴⁰

Ginsburg and Posner infer from these differences that there is an inevitable disparity in constitutional stability between national and subnational constitutions.²⁴¹ In their view, high agency costs mean that national constitutional constraints must be relatively strong, static, and difficult to change.²⁴² Subnational constitutions, however, can be relatively more fluid because agency costs are lower and any errant experiments will be corrected by national institutions.²⁴³ I have argued elsewhere that this can be a virtue in federal systems with layered constitutional structures because subnational constitutions provide a safe place for constitutional development and experimentation.²⁴⁴

These considerations might affect how state courts interpret and apply their constitutions. State judges may recognize that their state constitutions operate under the bulwark protections and grounding stability of the Federal Constitution. This could influence their practice of judicial review in ways that are different from how the Supreme Court approaches the Federal Constitution. One could imagine, therefore, different patterns in how judges approach judicial review when interpreting state rather than national constitutions.²⁴⁵

²³⁹ See Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1601-02 (2010).

²⁴⁰ *Id.* at 1596-97.

²⁴¹ *Id.* at 1593-94.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Marshfield, *supra* note 217, at 1183-86 (explaining that flexible subnational constitutions and lower agency costs encourage deliberation).

²⁴⁵ I am grateful to Richard Albert for emphasizing the importance of this consideration. It is truly a significant line of inquiry that deserves more focused attention. In future research,

Despite these important countervailing considerations, scholars of comparative constitutional law have increasingly drawn on state constitutions to test general principles of constitutional design and performance.²⁴⁶ Future research will hopefully provide more representative data from national constitutional systems around the world, but state constitutions are, at the very least, a good starting point for empirical inquiry. Nevertheless, I rely on them with the understanding and disclaimer that they contain these (and perhaps other) limitations.

Regarding a measure of amendment flexibility, I use the annual amendment rate for each state constitution, which is simply the number of amendments divided by the constitution's age in years.²⁴⁷ As noted above, amendment rates are generally the preferred measure of constitutional flexibility because they account for the structure of formal amendment rules as well as any cultural influences that might impact amendment frequency.²⁴⁸

I hope to investigate whether these factors have any systematic effect on the practice of judicial review by state judges.

²⁴⁶ *E.g.*, Versteeg & Zackin, *supra* note 10, at 666; Dixon, *supra* note 224, at 200; *see also*, *e.g.*, Nicholas Stephanopoulos & Mila Versteeg, *The Contours of Constitutional Approval*, 94 WASH. U. L. REV. 113, 178 (2016).

²⁴⁷ My data include an amendment rate for each year in the sample. I lagged the amendment rate so that it would correspond to the known amendment rate at the time of a court's decision. I gathered all of this information from the various editions of the COUNCIL OF STATE GOVERNMENT, BOOK OF THE STATES from 1960 to 2004. There were a handful of years for a handful of states where data were missing. For those years, I extrapolated amendment rates from the years known before and after the missing data.

²⁴⁸ *See supra* Section II.A.3 (summarizing literature on this point). Several scholars have used amendment years (the number of years when one or more amendments were adopted) to calculate amendment rates rather than the actual number of ratified amendments. *See supra* note 145 and accompanying text. This is based on the concern that some amendments are adopted in bundles (like the Bill of Rights) and should properly be counted together as a single political act. *See supra* note 144 and accompanying text. I doubt whether this is an especially common occurrence in state constitutional law for several reasons. First, the vast majority of states impose single-subject requirements on amendment proposals. *See* A.E. v. State, 949 N.E.2d 1204, 1221 & n.1 (Ind. 2011) (Dickson, J., concurring) (listing forty-one state constitutions that contain single-subject rule for legislation); *Single Subject Rules*, NAT'L CONFERENCE OF STATE LEGISLATURES (May 8, 2009), <http://www.ncsl.org/research/elections-and-campaigns/single-subject-rules.aspx> [<https://perma.cc/YA8Y-YALX>] (listing fifteen state constitutions that contain single-subject rule for ballot initiatives). Second, some states place a cap on the number of amendments that the legislature can propose in one election. *See* DINAN, *supra* note 22, at T1.2. Third, some states have strict rules requiring that amendments be clearly described to voters in a caption or synopsis. *See, e.g.*, FLA. STAT. § 101.161(3) (2017) (stating that each proposed amendment must include ballot statement of seventy-five words or fewer). Finally, states have a tradition of considering and adopting amendments on a great variety of issues at one time and voters often approve some and reject others. Thus, it seems speculative to assume that systematic bundling of amendments occurs such that

Regarding a measure of judicial activism, I adopt Lindquist and Cross's conclusion that the frequency with which courts overrule their own precedent is a reliable indicator of at least one dimension of judicial activism.²⁴⁹ Explicitly overruling *constitutional* precedent is an especially reliable indicator of judicial activism or restraint because it represents discrete, countable instances where a court intentionally breaks from the constitutional status quo and brings about constitutional change.²⁵⁰ Overruling behavior may be an underinclusive measure of instances where courts have changed constitutional rules. Courts can depart from existing constitutional doctrine without explicitly overruling prior precedent by, for example, recognizing new constitutional rights that courts have not previously been rejected.²⁵¹ Nevertheless, due to the difficulty in systematically and reliably identifying such rulings,²⁵² I rely on overruling frequency as a measure of judicial activism with the understanding that this measure has inherent limitations.²⁵³

To identify how frequently state supreme courts overturn constitutional precedent, I created an original dataset that captures every instance between 1970 and 2004 where a state supreme court overruled one of its own constitutional precedents.²⁵⁴ To gather this data, I first retrieved from Westlaw all citations for all published cases by all state supreme courts from their

amendments should not be individually counted. In fact, lumping amendments together for counting purposes would seem to create more errors. At least for purposes of this study, I rely on actual amendment rates as reported by the states themselves to the Council of State Governments.

²⁴⁹ LINDQUIST & CROSS, *supra* note 21, at 43 (counting votes of justices and searching for trends in various contexts).

²⁵⁰ It should be noted that my data eliminate all instances where a court overruled a prior constitutional precedent because of intervening amendments or federal rulings that rendered the precedent invalid. In this sense, it captured instances where the courts truly made independent choices to change constitutional doctrine.

²⁵¹ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 402 (1932) (Brandeis, J., dissenting) (explaining that significant changes in constitutional doctrine can occur without explicit overruling).

²⁵² LINDQUIST & CROSS, *supra* note 21, at 43.

²⁵³ It should also be noted that Lindquist and Cross measured overruling behavior at the level of votes by individual Justices on the Supreme Court. *Id.* at 130-31. This obviously provides a more precise measure of judicial decision-making from a strategic account. *See* Lindquist, *supra* note 232, at 186-87 (noting that this is generally preferred approach). However, in subsequent work regarding state court activism, Lindquist has relied on rulings by court majorities rather than judge-level data. *Id.* Because of limitations on available judge-level data for state judges, I also rely on rulings by court majorities.

²⁵⁴ As explained below, this date range was determined by the availability of data for certain important control variables.

inception until the end of 2004.²⁵⁵ This captured citation information for more than two million cases. After collecting the citation information, I retrieved Westlaw KeyCite flags for all those cases.²⁵⁶ I then identified all cases with a red KeyCite flag, which indicates that the case is no longer valid for at least one point of law. There were 42,730 cases from all state high courts with red KeyCite flags. I then retrieved full KeyCite reports for all those cases. Along with a team of six law students, I reviewed the KeyCite reports for all cases that Westlaw had red flagged because they were overturned by another state supreme court opinion.²⁵⁷ We excluded all cases that were red flagged because they were overruled or superseded by a federal court, a federal statute, a state statute, or a state constitutional amendment.²⁵⁸ Because of limitations on available data for other relevant control variables, I further limited the KeyCite review to identifying opinions decided between 1970 and 2004.

This resulted in a dataset of 5445 cases from all state high courts that Westlaw flagged as overruling prior precedent from the same court. I then personally reviewed all of those opinions and coded them based on whether they involved the overruling of a state constitutional precedent.²⁵⁹ The final dataset includes all cases from all state high courts between 1970 and 2004 that overruled precedent from the same state supreme court. As part of my coding, I eliminated cases that overturn prior precedent because of intervening rulings by the U.S. Supreme Court that effectively invalidated older state precedent. I also

²⁵⁵ My methodology here is inspired by Lindquist's methods in *Stare Decisis as a Reciprocity Norm*. See Lindquist, *Stare Decisis*, *supra* note 232, at 178-79, 189. However, her work did not code cases by category and did not hand-code the KeyCite reports.

²⁵⁶ The use of KeyCite information for this sort of research is rather common practice. See, e.g., Lindquist, *supra* note 33, at 189; Westerland, et al., *supra* note 85, at 896 (using LEXIS Shepard's citator for empirical study).

²⁵⁷ We excluded cases overruled by federal courts, federal statutes, state legislation, or state constitutional amendments. All reviewers followed a strict protocol and coding was subjected to blind spot checking. The review protocol is on file with the author and available upon request.

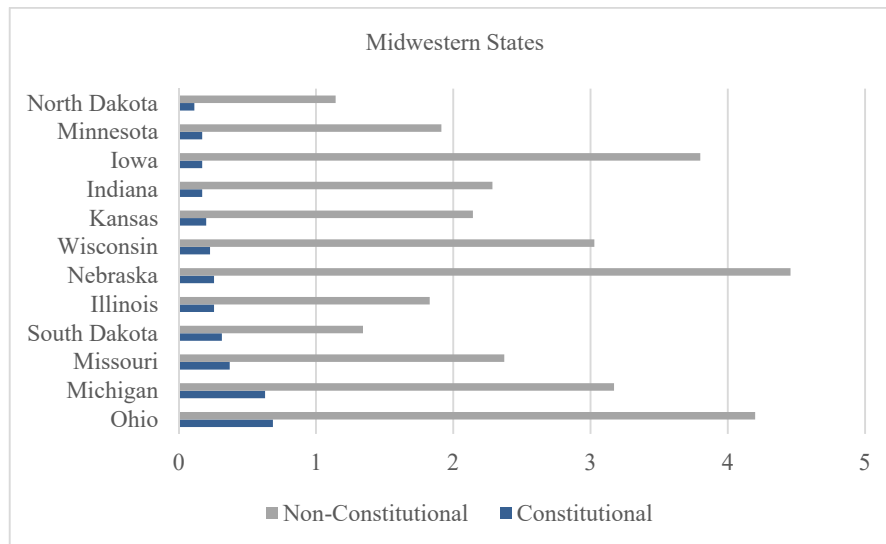
²⁵⁸ Because I applied this methodology to the KeyCite reports for every case decided by each state high court from its beginning until the end of 2004, I was able to capture all overruling events during my timeframe even if the overruling case was later invalidated by federal court rulings, statutes, or constitutional amendments. However, if a state high court case was invalidated only because of a federal court ruling, statute, or constitutional amendment, I did not include it in my count of overruling events.

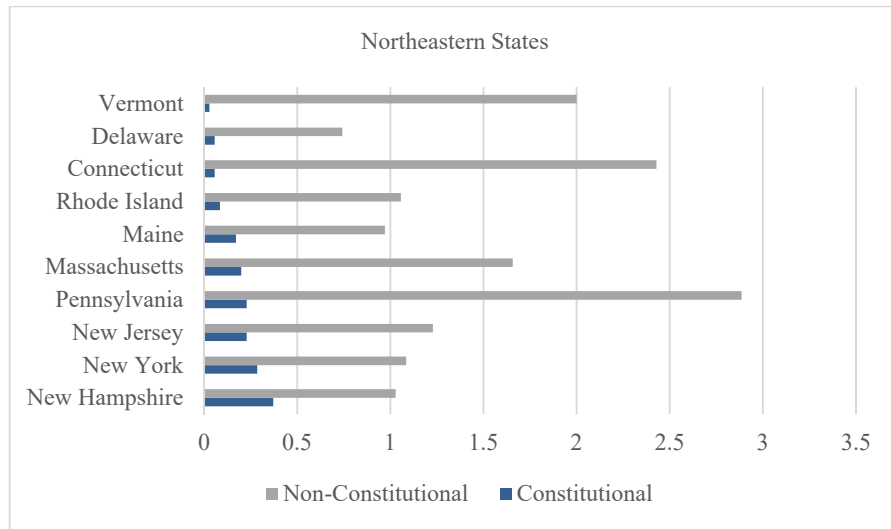
²⁵⁹ This coding was relatively complex. For consistency, I developed and applied a coding protocol, which is available upon request. The guiding principle in this coding was to identify all instances where a court overturned an existing constitutional rule set by a prior opinion from the same court. Thus, I did not include cases where the court recognized that one of its prior precedents was trumped by a federal law or court ruling or an intervening state constitutional amendment or statutory change. Consequently, my database captures all instances where a state court brought about a change in constitutional doctrine *on its own accord*.

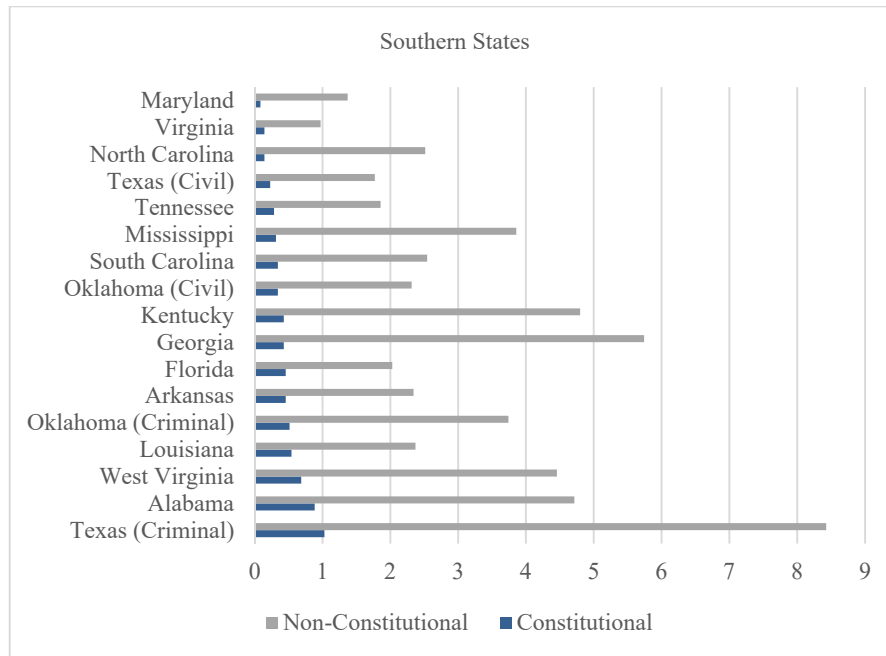
eliminated cases that overruled prior precedent based on intervening state constitutional amendments or legislative enactments that necessitated the overruling. These cuts result in a reliable dataset of state supreme court opinions that overturned prior constitutional precedent for reasons unrelated to actions by other political actors, which enhances the data's reliability as indicative of judicial activism.

Of the 5445 cases, 643 involved the overruling of a constitutional precedent on these terms. Figure 1 below shows the average number of constitutional cases overturned per year and the average number of nonconstitutional cases overturned per year for each state, organized by region. The average rate of overruling constitutional cases is 0.35 cases per year (or 1 overruling every 2.8 years). The median is 0.3 (or 1 overruling every 3.3 years). California has the highest annual rate of overruling constitutional precedents at 1.17 precedents per year. Vermont has the lowest rate at 0.03 (or 1 overruling every 35 years). Oklahoma (civil), South Carolina, and Utah are closest to the average overruling rate, and Mississippi is the median.

Figure 1. Average Annual Frequency of Overruling Constitutional and Non-Constitutional Precedent per Year, 1970-2004







Finally, as explained in more detail below, my regression model accounts for various institutional factors other than amendment frequency. Those factors include, but are not limited to, judicial selection and retention procedures, the number of judges on the court, the ideological balance of the court, the length of experience of the judges, ideological gaps between the court and citizens, ideological gaps between the court and political elites, the constitution's age and length, and other demographic information. Most of the data for these variables comes from the *State Politics and the Judiciary Codebook*,²⁶⁰ but I provide more details regarding each of these variables and their data sources below. Unfortunately, data for some of these important variables were not available for all times, which is why my study was limited to the period 1970-2004.

B. *Empirical Findings*

Before discussing the results of my regression analysis, I describe various important observations from the aggregate data. Specifically, the data show that several states defy the prevailing hypothesis because they appear to exist in a state of extreme constitutional volatility on account of high formal amendment rates and high rates of judicial activism. Conversely, various states appear to exist in a remarkable state of constitutional stagnation with very old

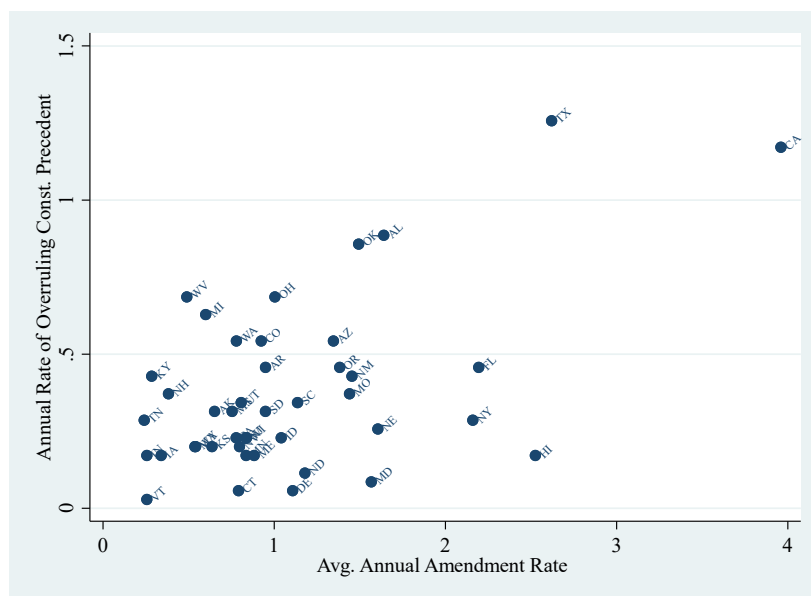
²⁶⁰ STEPHANIE A. LINDQUIST, *STATE POLITICS AND THE JUDICIARY CODEBOOK* (2007). The Codebook is a comprehensive database including longitudinal data about state government, politics, and courts regarding a variety of issues over a large span of years.

constitutions that are amended infrequently and where courts are very inactive. There are, of course, states that fit the prevailing hypothesis, but my findings challenge prevailing assumptions about the interaction between formal amendment and judicial review.

1. Aggregate Findings

Several interesting observations emerge when comparing the average overruling rates described above to each state's average annual amendment rate.²⁶¹ Figure 2 below illustrates each state's amendment rate across its annual rate of overruling constitutional precedent. For purposes of this analysis, I exclude seven states that adopted new constitutions during the period of my study because the young age of those constitutions and the few years available for change make them unfair comparisons to other states with more established constitutions.²⁶² For both Oklahoma and Texas, I combine totals from the Court of Criminal Appeals and the Supreme Court to calculate aggregate amounts for those states.

Figure 2. Average Annual Frequency of Overruling Constitutional Precedent Compared to Average Formal Amendment Rate, 1970-2004



²⁶¹ Appendix A shows the average annual amendment rate for each state constitution through 2004 as well as the average number of constitutional and nonconstitutional precedents overturned per year for each state between 1970 and 2004.

²⁶² Those states are Georgia, Illinois, Louisiana, Montana, North Carolina, Rhode Island, and Virginia.

The data show that some states fit the prevailing hypothesis. Hawaii, for example has a very high amendment rate (third highest) and a very low overruling rate (sixth lowest). Maryland also has a relatively high amendment rate (eighth highest), and a low overruling rate (fourth lowest). Conversely, West Virginia has a relatively low amendment rate (seventh lowest) and a relatively high overruling rate (fifth highest).

However, the most striking revelation from these data is that many states experience amendment frequency and judicial activism in quantities that challenge the prevailing hypothesis. Several states with high amendment rates also have high rates of overturning constitutional precedent. California stands out in this regard because it has the highest amendment rate of any state and the second highest overruling rate for constitutional precedent. Alabama, Oklahoma, and Texas are similar. Texas has the fourth highest amendment rate and the highest overruling rate. Similarly, Alabama has the eighth highest amendment rate and the third highest overruling rate, and Oklahoma has the eleventh highest amendment rate and the fourth highest overruling rate. These states defy the conventional expectation that high amendment rates should correspond to low rates of judicial activism. Remarkably, these states appear to exist in a state of multidimensional volatility with frequent amendments to the constitutional text and frequent changes to constitutional doctrine by the courts.

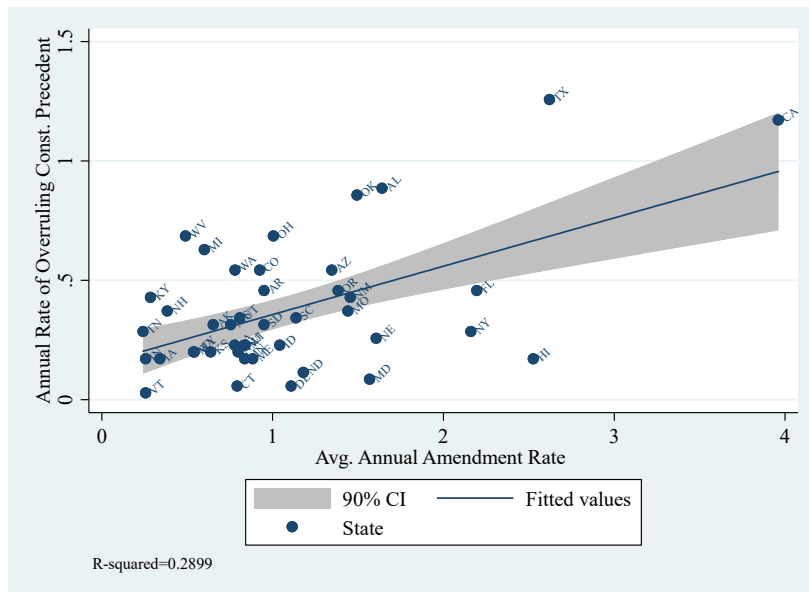
It is also significant that several states seem to exist in a condition of constitutional stagnation without much change occurring through the courts or through amendment. Vermont is striking in this regard. It has the third lowest amendment rate, the lowest overruling rate, and one of the oldest constitutions (ratified in 1793).²⁶³ Indiana is similar. It has the fourth lowest amendment rate, the sixth lowest overruling rate, and a very old constitution (ratified in 1851).²⁶⁴ Iowa and Wyoming also fit this category. These constitutionally stagnant states also defy prevailing hypotheses.

Finally, the overall correlation between the states' amendment rates and overruling rates contradicts the prevailing hypothesis. Rather than showing a negative correlation (i.e., an inverse relationship), there is actually a statistically significant ($p=0.0002$) slightly positive correlation (coefficient=0.5384).²⁶⁵ Figure 3 illustrates the correlation with a fitted regression line showing ninety percent confidence intervals.

²⁶³ See Dinan, *supra* note 22, at 11-12 tbl.1.1 (listing year of adoption for all state constitutions).

²⁶⁴ See *id.*

²⁶⁵ For a similar analysis of judicial involvement in constitutional change and frequency of formal amendment, see LUPHART, *supra* note 1, at 229 fig. 12.1.

Figure 3. Correlation Between Amendment Rate and Overruling Rate, 1970-2004

This correlation suggests that, on aggregate, judicial overruling behavior actually increases as amendment frequency increases. This is a surprising and counterintuitive result in view of the prevailing hypothesis, which would suggest the exact opposite relationship. To be sure, the fitted line is a relatively poor representation of the data as a whole ($r\text{-squared}=0.2899$), but the data seem to provide almost no support for the prevailing hypothesis. Even when California, Indiana, Texas, and Vermont are omitted as potential outliers, the correlation remains slightly positive (coefficient=0.1030) but is now statistically insignificant ($p=0.5328$). The fitted regression line for this truncated data also shows a slightly positive coefficient (0.0401), but the line is even less representative ($r\text{-squared}=0.0106$). Thus, at the very least, my data provide no reliable support for the prevailing hypothesis and some evidence that there can be a positive linear relationship between amendment frequency and judicial activism.

Although these aggregate data are informative, they do not take full advantage of all the information and variation in the database. Most importantly, they fail to account for any alternative predictors of judicial activism besides amendment rates. Thus, I now turn to the panel data count regression to calculate more reliable estimates.

2. Regression Analysis and Findings

Political scientists and legal scholars have developed quantitative models to test whether institutional variables are related to a state court's "propensity to

overrule precedent.²⁶⁶ These models analyze year-to-year panel count data by regressing the number of times an event occurs in a year (the count dependent variable) on a variety of potentially related measures (independent and control variables).²⁶⁷ This structure lends itself to the use of a Poisson regression.²⁶⁸ However, because count data often present the problem of overdispersion,²⁶⁹ it is necessary to use a negative binomial regression to account for the overdispersion.²⁷⁰

Lindquist has applied this approach to identify variables that accurately predict a state supreme court's propensity to overrule its own precedent.²⁷¹ Lindquist did not distinguish between overruling constitutional precedent and nonconstitutional precedent and she did not include annual amendment-rate data.²⁷² Nevertheless, I adopt the basic structure of her regression model here to analyze whether amendment frequency reliably predicts a court's propensity to overturn its own constitutional precedent.

The dependent variable in my regression is a positive integer count variable that captures the number of times each year that a court overruled one of its own constitutional precedents from 1970 to 2004. As explained above, these data are the result of my own review and coding of state supreme court opinions. Because of the likelihood of overdispersion in the count data, I used a negative binomial regression.

²⁶⁶ *E.g.*, Lindquist, *supra* note 33, at 179. Similar models have been used to test a state's propensity to amend its constitution. Dixon, *supra* note 33, at 201.

²⁶⁷ *E.g.*, Lindquist, *supra* note 33, at 179.

²⁶⁸ *See* Dixon, *supra* note 33, at 202 (explaining how ordinary least squared regression is not suitable approach to count data, which can indicate only positive integer outcomes).

²⁶⁹ Overdispersion occurs where the conditional variance is larger than the conditional mean for a variable of interest. *Id.* at 202 n.7. In this case, the dependent count variable displays overdispersion.

²⁷⁰ J. SCOTT LONG & JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL VARIABLES USING STATA 507 (3d ed. 2014). This approach does not necessarily solve all difficulties in modeling a court's propensity to overturn constitutional precedent. For example, the negative binomial assumes that each observation is independent and not affected by earlier observations. This may be a poor assumption for these data because one could imagine that political actors considering amendment and overrulings are affected by the number of similar events in the prior year.

²⁷¹ *E.g.*, Lindquist, *supra* note 33, at 179 (identifying tenure length, selection method, and court size).

²⁷² Lindquist's data included a loose measure of amendment frequency. She relied on amendment rates from Lutz's 1994 article. *Id.* at 183. However, these rates do not change over time. *Id.*; *see* Lutz, *supra* note 5, at 362. This represents a rather significant limitation on the data to test for the influence of amendment frequency over time. As described above, my data include a lagged measure of each constitution's average annual amendment rate based on the number of amendments actually made to each constitution from year to year.

I regressed the count variable over the following sixteen independent variables with fixed and random effects for the states: (1) constitutional amendment rate; (2) constitutional amendment rate squared; (3) the number of justices on the court; (4) the number of clerks assigned to the justices; (5) the average tenure length of the particular justices on the court at the time of decision; (6) whether justices are elected in partisan elections; (7) a dummy variable capturing whether justices are subject to retention elections or recurring partisan elections, whether they are subject to retention via nonpartisan elections, or whether they are subject to retention by gubernatorial or legislative re-appointment; (8) whether the state has an intermediate appellate court; (9) the absolute value of any ideological change on the court the year before the decision; (10) a measure of legislative professionalism; (11) the constitution's length in words; (12) the constitution's age in years; (13) the state's population; (14) the state's level of urbanization; (15) the absolute difference in ideology between the median justice on the court and the median citizen; and (16) the absolute difference in ideology between the median justice on the court and state government officials.

As described above, the amendment rate variable is based on the total number of amendments divided by the age of the constitution during each year.²⁷³ I also included the square of this variable to test for a nonlinear relationship with the count data. I included the number of justices on the court as a control variable because other scholars have shown that the size of a court is a reliable institutional predictor of a court's propensity to overrule precedent.²⁷⁴ Similarly, I included the number of clerks assigned to justices as a control variable because scholars have suggested that the professionalism of the judiciary might affect overruling behavior because professional courts could have an increased sensitivity to protecting judicial legitimacy.²⁷⁵ As others have done, I used the number of clerks as a proxy for measuring judicial professionalism.²⁷⁶ I also

²⁷³ I compiled this data from various publications of the BOOK OF THE STATES, which report reliable and consistent amendment counts for every state from year to year. There were a few years for which data were missing for a few states. For those years, I estimated the amendment rate based on available data from before and after the missing years. Because I am testing whether amendment frequency impacts judicial decision-making, the amendment rates are offset by a year. For example, the amendment rate appearing in the observations for 1970 represents the number of amendments to a constitution through the end of 1969 divided by the constitution's age through the end of 1969. This ensures that the amendment rate in my data is consistent with the amendment rate that would be known to judges deciding cases in 1970. Descriptive statistics for these data are in Appendix B.

²⁷⁴ Lindquist, *supra* note 33, at 183-84. These data are from the JUDICIAL CODEBOOK, *supra* note 260 ("size" variable no. 128).

²⁷⁵ *E.g.*, Lindquist, *supra* note 33, at 182.

²⁷⁶ *See id.* at 182 (noting that number of clerks can "cut both ways" if young lawyers pressure judges to innovate or provide them with "necessary leisure time to craft opinions that

included the average tenure of the justices on the court because others have found that tenure length can be associated with overruling behavior.²⁷⁷

Because judicial elections could be associated with how judges respect precedent and how they practice judicial review, I include a dummy variable that indicates whether judges are elected via partisan elections.²⁷⁸ I also included a dummy variable for judicial retention methods. Some states subject sitting judges to retention elections or partisan elections for reappointment. Other states utilize nonpartisan elections for retention, and some states authorize the governor or legislature to pass on judicial reappointments. These retention procedures may provide judges with varying degrees of security and independence, which can affect how judges approach precedent. I included a dummy variable for retention processes to account for this.²⁷⁹

As explained earlier, courts sometimes control their dockets strategically based on how they hope to decide cases on the merits. The strategic use of discretionary review might affect the frequency of overruling behavior as courts use the power of certiorari “to identify cases as vehicles for legal change.”²⁸⁰ To account for this, I also include a dummy variable indicating whether a state has an intermediate appellate court, which operates as a proxy for a discretionary docket.²⁸¹

A court’s docket size might independently affect overruling behavior and the practice of judicial review because fewer cases will presumably provide fewer opportunities to overrule precedent.²⁸² Unfortunately, reliable and consistent information about state court dockets is hard to collect.²⁸³ However, in states where docket data are available, Lindquist has found a strong correlation between state population size and docket size.²⁸⁴ Thus, as she has done, I use population size and urbanization (to account for any demographic effects) as

change the legal status quo”). These data are from the JUDICIAL CODEBOOK, *supra* note 260 (“clerk_assoc” variable no. 60).

²⁷⁷ *E.g.*, Lindquist, *supra* note 33, at 182. I also include the standard deviation of average tenure for the same reason. These data are from the JUDICIAL CODEBOOK, *supra* note 260 (“tenure” and “sdtenure” variables nos. 180 & 182).

²⁷⁸ These data are from the JUDICIAL CODEBOOK, *supra* note 260 (recoded from the “select” variable no. 150 to isolate partisan elections).

²⁷⁹ These data are from the JUDICIAL CODEBOOK, *supra* note 260 (recoded from the “select” variable no. 150 to isolate variations in retention methods).

²⁸⁰ Lindquist, *supra* note 33, at 182.

²⁸¹ *See id.* (doing the same). These data are from the JUDICIAL CODEBOOK, *supra* note 260 (recoded from “structure” variable no. 129 to isolate courts with intermediate appellate court).

²⁸² Lindquist, *supra* note 33, at 182.

²⁸³ *Id.*

²⁸⁴ *Id.*

proxies for docket size.²⁸⁵ This strengthens the model by controlling for varying degrees of opportunity to overrule precedent from state to state and from year to year.

An ideological shift in the configuration of a court's membership might also be associated with increased overruling behavior.²⁸⁶ Indeed, scholars have demonstrated this to be true for the U.S. Supreme Court.²⁸⁷ Consequently, models exploring overruling behavior should account for ideological shifts. As others have done, I use the "PAJID" scores developed by Paul Brace, et al. that rank state court justice ideology based on various indicia, including citizen and elite ideology at the time the judge took the bench, as well as party affiliation.²⁸⁸ The scores range from zero to one hundred with low scores indicating conservatism and high scores indicating liberalism. To include this data in the model, I followed Lindquist's approach and calculated the "absolute ideological change in the court's median PAJID score from the previous year."²⁸⁹

Similarly, a court's fear of constitutional override might be affected by ideological gaps between itself and override actors. Courts may fear override more if they perceive a significant difference between their own ideological preferences and those of actors with the power to override the court.²⁹⁰ Thus, I include the absolute difference between each court's median PAJID score and the 100-point ideological score for citizens and state government ideologies created by William Berry, et al.²⁹¹ This value provides a measure of any gaps in ideology between the courts and potential override actors.²⁹² I also included a measure of legislative professionalism, developed by Peverill Squire, because a

²⁸⁵ *Id.* These data are from the JUDICIAL CODEBOOK, *supra* note 260 ("pop" and "urban" variable nos. 7 and 12). A few years of population data was missing. I added that information from the same sources as used by the Judicial Codebook.

²⁸⁶ Lindquist, *supra* note 33, at 179-82.

²⁸⁷ *E.g., id.* (citing SAUL BRENNER & HAROLD SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946-1992 (1995)).

²⁸⁸ *See generally* Paul Brace, Laura Langer & Melinda Gann Hall, *Measuring the Preferences of State Supreme Court Judges*, 62 J. POL. 387 (2000).

²⁸⁹ Lindquist, *supra* note 33, at 179-82. I used the raw PAJID scores as reported in the JUDICIAL CODEBOOK, *supra* note 260 ("medideol" variable no. 60), to create a variable with absolute difference in score from the prior year.

²⁹⁰ *See* Epstein & Jacobi, *supra* note 40, at 353.

²⁹¹ *See generally* William D. Berry, et al., *Measuring Citizen and Government Ideology in the American States*, 42 AM. J. POL. 327 (1998). These data are from the JUDICIAL CODEBOOK, *supra* note 260.

²⁹² Citizen ideology is relevant because of the initiative and referendum pathways for state constitutional amendments, *see id.* at 327-28, which apply in some form in all states except Delaware. DEL. CONST. art. XVI, § 1; *see* Dinan, *supra* note 22, at 4. Elite ideology is relevant because it captures the ideology of government officials representing the legislature and the governor. *See* Berry, *supra* note 291, at 327-28.

professional legislature might impact the exercise of judicial review by limiting obvious and direct conflicts between statutes and the constitution.²⁹³

Finally, I include two control variables for the age of each state constitution because older constitutions will likely have generated a larger pool of cases vulnerable to being overruled.²⁹⁴ I also include the number of words in each constitution because constitution length is a proxy for constitutional detail, which may impact judicial activism as described above.²⁹⁵ Appendix B provides summary statistics for all variables included in the model.

The results of both the fixed and random effects models are shown in Tables 1 and 2 respectively.

²⁹³ See Lindquist, *supra* note 33, at 182-83. These data are from the JUDICIAL CODEBOOK, *supra* note 260 (“legprof_squire” variable no. 104).

²⁹⁴ I calculated these data using the ratification years listed for each state constitution in Dinan, *supra* note 22, at 11-12 tbl.1.1.

²⁹⁵ See *supra* Section II.B.3 (discussing how constitutional detail can impact judicial review). These data are from the JUDICIAL CODEBOOK, *supra* note 260 (“const_length” variable no. 123).

Table 1. Fixed-Effects Negative Binomial Regression Model—Count of Overruling Constitutional Precedent

Variable	Coef.	Std. Err.	P-Value
Amend. Rate	-0.5431197	0.183614	0.003
Amend. Rate Sq.	0.0652375	0.018956	0.001
Constitution Age	0.0012254	0.004539	0.787
Constitution Length (words)	-0.0000758	0.000129	0.557
Court Size	0.3435577	0.104033	0.001
Clerks Per Justice	-0.292045	0.262311	0.266
Av. Tenure of Justices	-0.0327221	0.021166	0.122
Av. Tenure of Justices (SD)	0.0036878	0.02492	0.882
Partisan Judicial Election	0.8078193	0.351972	0.022
Retention Process - Ref. = Leg. Ret.			
Governor	1.876891	3.31652	0.571
Non-Partisan Elec.	6.169826	3.594255	0.086
Retention Elec. or Partisan Elec.	5.756942	3.5905	0.109
Court Ideological Change	0.0110671	0.004807	0.021
Intermediate App. Ct.	-0.2521064	0.202865	0.214
Leg. Professionalism (Squire)	-1.220459	1.176727	0.3
Ideological Gap (Court to Citizens)	-0.0111422	0.004821	0.021
Ideological Gap (Court to St. Gov.)	0.0087847	0.005085	0.084
Population	-0.0000457	3.35E-05	0.172
Urbanization	0.0064633	0.018244	0.723
cons	0.4264793	3.352808	0.899
Observations = 1820 Prob>chi2 = 0.0000 Wald chi2(19) = 64.90			

Table 2. Random-Effects Negative Binomial Regression Model—Count of Overruling Constitutional Precedent

Variable	Coef.	Std. Err.	P-Value
Amend. Rate	-0.27904	0.138642	0.044
Amend. Rate Sq.	0.041028	0.014363	0.004
Constitution Age	0.001041	0.001549	0.502
Constitution Length (words)	0.000017	6.63E-06	0.01
Court Size	0.076444	0.054881	0.164
Clerks Per Justice	0.144279	0.095789	0.132
Av. Tenure of Justices	-0.04879	0.020878	0.019
Av. Tenure of Justices (SD)	0.007679	0.024046	0.749
Partisan Judicial Election	0.198396	0.212538	0.351
Retention Process - Ref. = Leg. Ret.			
Governor	0.122446	0.40221	0.761
Non-Partisan Elec.	0.952117	0.358992	0.008
Retention Elec. or Partisan Elec.	0.686598	0.358704	0.056
Court Ideological Change	0.011204	0.004813	0.02
Intermediate App. Ct.	-0.17724	0.161172	0.271
Leg. Professionalism (Squire)	-0.00662	0.721164	0.993
Ideological Gap (Court to Citizens)	-0.00986	0.004611	0.032
Ideological Gap (Court to St. Gov.)	0.006898	0.004866	0.156
Population	1.16E-05	1.96E-05	0.555
Urbanization	0.003855	0.007022	0.583
cons	0.456931	1.039399	0.66
Observations = 1820 Prob>chi2 = 0.0000 Wald chi2(16) = 72.150			

These results show several independent variables that are statistically significant. For present purposes, however, the most significant association is between constitutional amendment rates and the rate of overturning constitutional precedent. The statistical significance of amendment rate squared suggests a nonlinear relationship between amendment frequency and overruling frequency. Figures 4 (fixed effects) and 5 (random effects) illustrate the relationship by plotting the predicted overruling frequency based on amendment rate and its square (while holding all other variables at their means). Confidence intervals at the 90% level are separately illustrated.

Figure 4. Predicted Frequency of Overruling—Fixed Effects Model

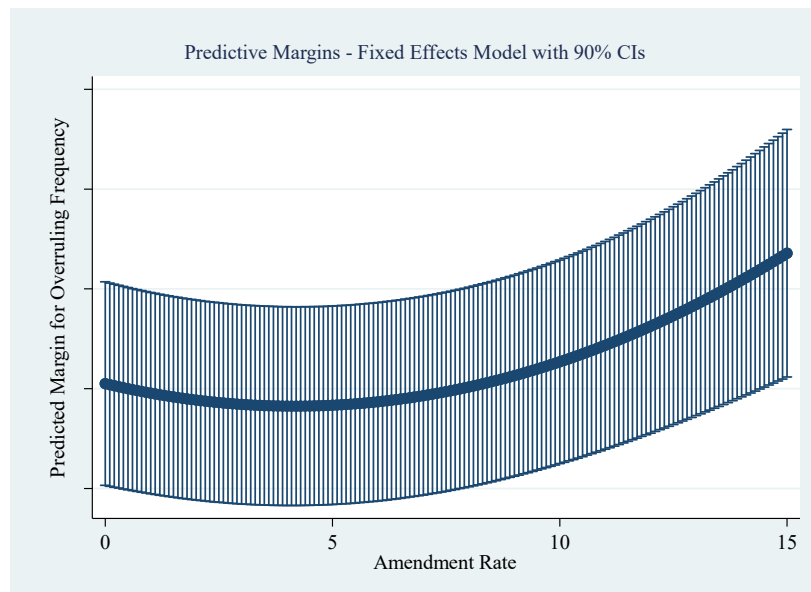
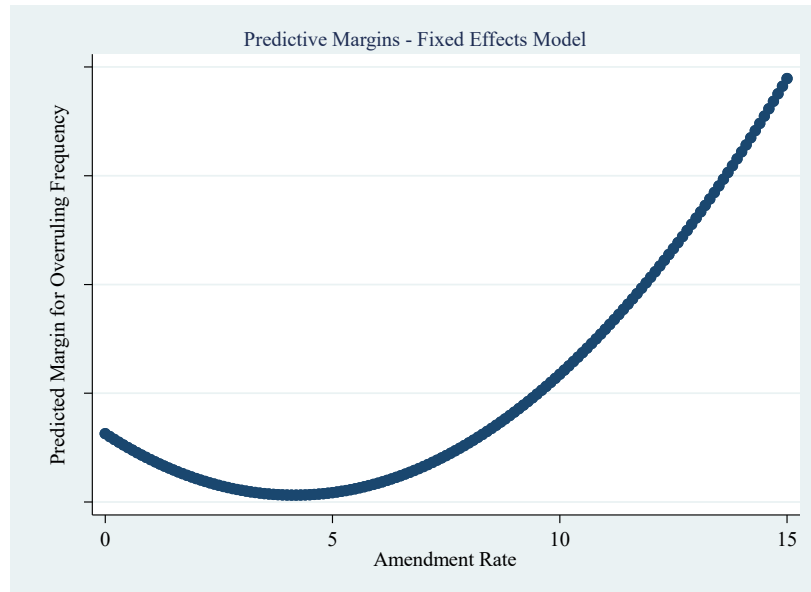
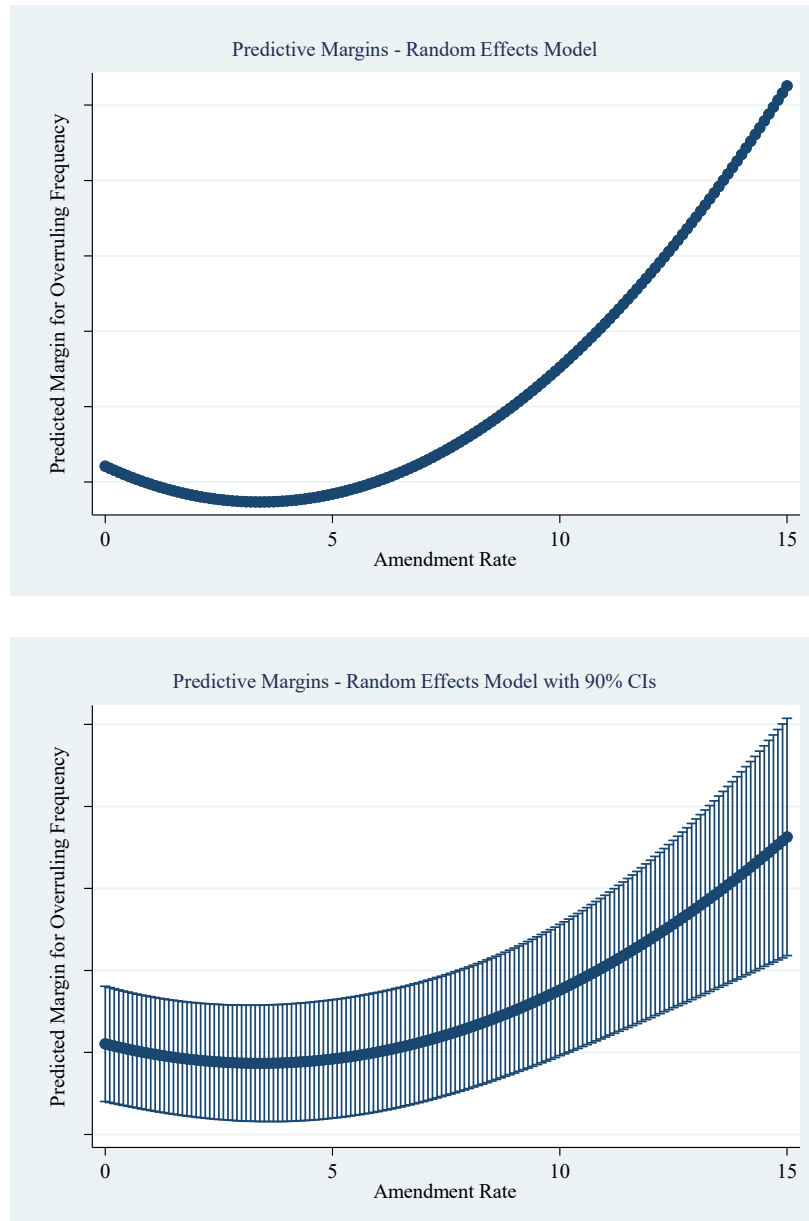


Figure 5. Predicted Frequency of Overruling—Random Effects Model

This association is surprising in light of prevailing theories regarding the relationship between formal amendment and judicial activism, which suggest a linear relationship where judicial activism decreases as amendment frequency increases. My model suggests that the prevailing hypothesis may be roughly

true, but only to a point. In my model, when a constitution's amendment rate is between 0 and 4.2 amendments per year (3.4 in the random effects model), judicial activism decreases as amendment frequency increases. This is consistent with conventional ideas. However, when amendment frequency passes 4.2 amendments per year (3.4 in the random effects model), judicial activism begins to accelerate as amendment frequency increases.²⁹⁶ After this "tipping point," the relationship between judicial activism and amendment frequency is the inverse of prevailing theories. Rather than corresponding with greater judicial restraint, high amendment rates reliably correspond with increased judicial activism.²⁹⁷

The confidence intervals for these estimates are wide, however, so they come with a degree of caution, and further investigation is surely warranted. Nevertheless, these results offer evidence challenging existing notions regarding the relationship between amendment frequency and judicial decision-making on constitutional issues. They suggest that judges may react to textual volatility in ways that are very different from what we currently anticipate. Most importantly, they suggest that amendment frequency may not be an effective way to restrain the power of judicial review. Indeed, my model suggests that constitutional designers seeking to restrain courts can undermine their objective if they make a constitution too difficult to amend. Finding the "tipping point" in any given context might be the key to designing amendment rules that effectively restrain courts in their practice of judicial review.

Tables 1 and 2 show that there are other variables that reliably predict the frequency with which a court might overturn constitutional precedent. Both the fixed effects and random effects models suggest that an ideological shift in a court's median justice reliably predicts overruling behavior. As the size of the ideological shift increases, the likelihood of a court overruling a past precedent increases. This positive correlation is relatively slight, but it nevertheless suggests that judicial ideology influences respect for constitutional norms.

Similarly, both the fixed effects and random effects models suggest that courts are less likely to overturn a constitutional precedent as the ideological gap between the court and citizens grows. This finding is consistent with assumptions related to override threats. To the extent citizen ideology is a proxy

²⁹⁶ In my dataset, California, Georgia, Hawaii, Louisiana, and Texas have all experienced average annual amendment rates near or above these ranges from time to time. The maximum average annual amendment rates for those states are: California (4.07), Georgia (6.82), Hawaii (3.38), Louisiana (10.08), and Texas (3.38).

²⁹⁷ To test the prevailing hypothesis of a linear relationship more directly, I replicated my model without the square of the amendment-rate variable. The results for both the fixed effects and random effects model show that amendment rate is not a statistically significant independent variable when analyzed as a linear predictor. However, both models produced positive linear coefficients for the amendment-rate variable, indicating that judicial activism increases as amendment frequency increases.

for potential override actions (perhaps by citizen initiatives or legislative kowtowing to citizen preferences), the models suggest that courts may be less inclined to disturb the constitutional status quo when the court's preferences diverge from citizen preferences.

The fixed effects model also suggests that partisan elections may reliably predict overruling behavior. All else being equal, courts where justices are subject to partisan elections are more likely to overrule constitutional precedent than courts where the justices are not subject to partisan elections. This finding is consistent with prior findings that elected judges are generally more willing to overrule precedent.²⁹⁸

This model is not perfect. It contains a few noteworthy limitations. First, it does not fully account for possible interactions between control variables that might more accurately predict overruling behavior or otherwise influence the model. Second, some of the control variables besides amendment frequency may also have nonlinear relationships with the dependent variable. There are multiple plausible permutations of the model in this regard. Finally, like any predictive model, there is the possibility that other reliable predictors exist that the model has not adequately addressed. These limitations highlight the need for continued research in this area. Nevertheless, the model provides at least a starting point for investigating the relationship between amendment frequency and the practice of judicial review, and it surely casts doubt on the prevailing assumption that amendment frequency has a limiting effect on judicial activism.²⁹⁹

IV. EXPLANATIONS AND IMPLICATIONS FOR CONSTITUTIONAL DESIGN

The above findings present somewhat of a puzzle. Amendment frequency reliably predicts judicial restraint, but only up to a point. Once constitutions become too easy to amend, judges are more likely to make their own constitutional changes by overturning constitutional precedent. In this Section, I suggest a few possible explanations for this and briefly discuss how these findings might implicate current theories of constitutional design. My goal is not to exhaust these issues here but to raise a few ideas for consideration and further research.

²⁹⁸ See Lindquist, *supra* note 33, at 185-86.

²⁹⁹ Scholars have also suggested that amendment frequency can have a restraining effect on legislatures. See, e.g., John Dinan, *Law & Politics in the Age of Direct Democracy: State Constitutional Initiative Processes and Governance in the Twenty-First Century*, 19 CHAP. L. REV. 61, 74-75 (2016). The idea is that frequent amendment, especially amendments conducted by citizen initiative, can facilitate legislative accountability and reduce agency costs. Political scientists have developed various measures of legislative accountability that might be used to investigate whether amendment frequency (especially amendment by initiative) reliably correlates with legislative accountability. In future work, I plan to investigate this hypothesis empirically by drawing on data from state legislatures and state constitutions. I am currently developing this empirical inquiry.

A. *Possible Explanations*

My findings suggest that existing theories have overlooked certain dynamics that influence how judges decide constitutional cases. Why then, at least from the standpoint of strategic analysis, would judges become more active when a constitution has an exceptionally high amendment rate. A few preliminary thoughts are appropriate.

First, several scholars have made normative arguments in favor of courts being more active when interpreting a frequently amended constitution.³⁰⁰ These scholars suggest that judges should be *less* fearful of breaking new ground when their rulings can be easily corrected by amendment.³⁰¹ The intuition is that frequent amendment lowers the stakes of constitutional adjudication, so judges can be more progressive and creative in their rulings.³⁰² This is especially true, as the argument goes, for rulings that would expand constitutional rights because any countermajoritarian problem created by a court ruling can easily be corrected by constitutional amendment.³⁰³

Although these arguments are explicitly normative, they may provide insight into my empirical findings.³⁰⁴ It is possible that exceptionally high amendment rates have a destabilizing effect on constitutional entrenchment and undermine predictability in the law. If this is true, then the strategic judge might recalibrate his expectations when deciding constitutional cases. Rather than issue rulings that accommodate override actors so that a ruling becomes entrenched in constitutional law, the judge might conclude that, because the override threat is unpredictable, she has no reason to accommodate the preferences of override

³⁰⁰ See, e.g., A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 939 (1976); Conor O'Mahony, *If a Constitution is Easy to Amend, Can Judges be Less Restrained? Rights, Social Change, and Proposition 8*, 27 HARV. HUM. RTS. J. 191, 192 (2014); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1453 (1999) (“[T]heir greater accountability might render state judges more willing to read state constitutional guarantees expansively.”); Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 285-86 (1994).

³⁰¹ See, e.g., O'Mahony, *supra* note 300, at 192.

³⁰² Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 358 (2011) (“It is possible that the political accountability of state judges (and the amendability of state constitutions) might encourage them to read state constitutions *more* expansively, knowing that their rulings can always be ‘corrected’ by a democratic majority.”).

³⁰³ See, e.g., O'Mahony, *supra* note 300, at 192, 228.

³⁰⁴ The only empirical suggestions of this nature that I could find were passing statements by Stephen Holmes and Cass Sunstein as well as Joseph Blocher. See Holmes & Sunstein, *supra* note 149, at 279-80 (arguing that “[i]f it is easy to amend the Constitution, the stakes of constitutional decision are lowered,” which “may embolden the court”); see also Blocher, *supra* note 302, at 358 (“[T]he political accountability of state judges (and the amendability of state constitutions) might encourage them to read state constitutions *more* expansively.”).

actors. In that scenario, the judge has an incentive to “swing for the fences” by issuing rulings that fully realize her ideological preferences in the hope that if the ruling is lucky enough to escape the chaotic and unpredictable override risk, it will maximize the judge’s ideological preferences.

Second, it is possible that when constitutions are amended frequently, judges view their roles differently. Many judges understand the judiciary’s role, especially when exercising the power of judicial review, as being a referee between majoritarian preferences and basic minority protections. When a constitution is very rigid, the court can invoke the constitution as a basis for pushing back on political actions taken by the political branches. However, when a constitution is amended incredibly frequently and presumably leveraged by majorities through those amendments, courts may have to engage in more activist tactics if they wish to defend minority interests.³⁰⁵ This explanation is rather substantive in that it assumes a common ideology for judges, but it may explain why judges behave differently than expected under incredibly flexible constitutions.

Another possible explanation is that amendment frequency may somehow increase opportunities for courts to exercise the power of judicial review. Gabriel Negretto has theorized that frequent formal amendment might catalyze the exercise of judicial review because frequent additions to the constitutional text provide courts with new rules to invoke when reviewing legislation and executive action.³⁰⁶ Negretto suggests that when a constitution is easy to amend, court rulings based on judicial review will likely instigate responsive amendments, which then will provide new grounds for judicial review of the political branches, and which can start the cycle all over.³⁰⁷ In this way, frequent amendment might proliferate how frequently a court uses the power of judicial review, and explain why some courts operating under flexible constitutions appear to be more active than courts operating under more rigid texts.³⁰⁸

³⁰⁵ See, e.g., O’Mahony, *supra* note 300, at 192.

³⁰⁶ See Gabriel L. Negretto, *Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America*, 46 *LAW & SOC. REV.* 749, 761-62 (2012).

³⁰⁷ Negretto describes his proliferation theory this way:

[I]f courts have strong powers of judicial review and the constitution is easily amendable, judicial interventions may increase amendments by Congress since legislators would often resort to this mechanism to overcome controversial judicial interpretations. In addition, a constitution that incorporates substantive policies may encourage both amendments to incorporate policy shifts and frequent judicial interventions to decide on the constitutionality of legislation.

Id. at 761.

³⁰⁸ This theory is interesting when used to assess my data gathering. Because I focused only on explicit overruling of constitutional precedent, and excluded all instances where the court suggested that the overruling was necessitated by intervening constitutional amendments, it is possible that my dataset already accounts for Negretto’s proliferation theory. That is, to the extent Negretto’s theory suggests that increased use of judicial review

In any event, my data demonstrate the salience of these new lines of inquiry and reveal how little we currently know about the institutional interaction between amendment frequency and the practice of judicial review.

B. *Constitutional Design Implications*

Whatever the explanation, my findings are significant for the practice and study of constitutional design for at least three reasons. First, they suggest that the relationship between amendment frequency and judicial restraint is unlikely to be an inverse linear relationship. It is more likely that amendment frequency and judicial review have a curvilinear relationship of some kind. This means that constitutional designers must be mindful of a tipping point in amendability that might cause their amendment processes to have unintended consequences. Specifically, when constitutional designers craft amendment processes to restrain courts, those processes need to be flexible enough that judges can anticipate override threats, but not so flexible that frequent amendment has the unintended consequence of facilitating greater judicial involvement in constitutional change.

Second, my findings leave unanswered whether courts might behave differently based on the subject matter under review. It is plausible, for example, that courts might be more active when deciding issues related to individual rights than when deciding structural issues. I plan to pursue this line of inquiry in future work, but it is worth noting here that constitutional designers seeking to use amendment rules to influence the practice of judicial review may need to account for the possibility that courts behave differently when deciding different constitutional questions.

Finally, my findings point to other variables besides amendment frequency that are associated with judicial activism. Perhaps the most meaningful of these from a constitutional design perspective is judicial selection processes. This finding draws attention to the interdependent dynamics of constitutional design. Constitutional performance is rarely monolithic or one-dimensional. There are many interactions between institutions, actors, and laws that drive constitutional performance. My findings suggest that efforts to restrain judges are incredibly complex endeavors that require careful attention. Designing amendment rules should not be done in isolation from other design considerations. Moreover, design theories that fail to consider complex interactions, or at least recognize this reality, should be treated with suspicion.

is not indicative of judicial activism per se, but simply increased opportunities to practice judicial review that are created by frequent amendment, I may have already excluded cases where courts are exercising judicial review primarily because of new textual insertions that require them to do so.

CONCLUSION

Constitutional change is an incredibly complex but important field. We once knew very little about how constitutions could direct and manage deep political change. As our knowledge continues to grow, constitutional designs will hopefully be improved. The study of amendment rules is an important part of this evolution. This Article will hopefully advance the field by drawing attention to the complicated empirical relationship between amendment frequency and judicial decision-making. It will also hopefully correct simplistic notions about how to use amendment rules to restrain judges.

Appendix A. Aggregate Count Data Summary

State	Avg. Amend. Rate	Avg. Const. Overrule	Avg. Non-Const. Overrule	Const. Overrule Total	Non-Const. Overrule Total
Alabama	1.6403676	0.88571429	4.7142859	31	165
Alaska	0.65185227	0.31428573	1.6857142	11	59
Arizona	1.3460732	0.54285717	2.3428571	19	82
Arkansas	0.94948596	0.45714286	2.3428571	16	82
California	3.95999	1.1714286	2.8	41	98
Colorado	0.92420028	0.54285717	2.0857143	19	73
Connecticut	0.79173499	0.05714286	2.4285715	2	85
Delaware	1.1078617	0.05714286	0.74285716	2	26
Florida	2.1946065	0.45714286	2.0285714	16	71
Georgia	3.3505139	0.42857143	5.742857	15	201
Hawaii	2.5255851	0.17142858	1.4857143	6	52
Idaho	1.0411692	0.22857143	2.1714287	8	76
Illinois	0.20571548	0.25714287	1.8285714	9	64
Indiana	0.25629897	0.17142858	2.2857144	6	80
Iowa	0.34002314	0.17142858	3.8	6	133
Kansas	0.63679628	0.2	2.1428571	7	75
Kentucky	0.28461676	0.42857143	4.8000002	15	168
Louisiana	3.3967517	0.54285717	2.3714285	19	83
Maine	0.88314842	0.17142858	0.97142857	6	34
Maryland	1.5672826	0.08571429	1.3714286	3	48
Massachusetts	0.53683472	0.2	1.6571429	7	58
Michigan	0.59998918	0.62857145	3.1714287	22	111
Minnesota	0.83574651	0.17142858	1.9142857	6	67
Mississippi	0.75434559	0.31428573	3.8571429	11	135
Missouri	1.4402792	0.37142858	2.3714285	13	83
Montana	0.72440073	0.62857145	5.6571426	22	198
Nebraska	1.6058489	0.25714287	4.4571428	9	156
Nevada	0.79746961	0.2	3.2571428	7	114
New Hampshire	0.38272252	0.37142858	1.0285715	13	36
New Jersey	0.83592866	0.22857143	1.2285714	8	43
New Mexico	1.4542502	0.42857143	2.9714286	15	104
New York	2.1600852	0.2857143	1.0857143	10	38
North Carolina	1.3278486	0.14285715	2.5142858	5	88
North Dakota	1.1794685	0.11428571	1.1428572	4	40
Ohio	1.0041668	0.6857143	4.1999998	24	147
Oklahoma (Civil)	1.4935535	0.34285715	2.3142858	12	81
Oklahoma (Crim.)	1.4935535	0.51428574	3.7428572	18	131
Oregon	1.3828177	0.45714286	2.8857143	16	101
Pennsylvania	0.77819237	0.22857143	2.8857143	8	101
Rhode Island	0.33225634	0.08571429	1.0571429	3	37
South Carolina	1.1365893	0.34285715	2.5428572	12	89
South Dakota	0.94909833	0.31428573	1.3428571	11	47
Tennessee	0.24086932	0.2857143	1.8571428	10	65
Texas (Civil)	2.6205042	0.22857143	1.7714286	8	62
Texas (Crim.)	2.6205042	1.0285715	8.4285717	36	295

Utah	0.80700684	0.34285715	2.1714287	12	76
Vermont	0.25611112	0.02857143	2	1	70
Virginia	0.96970414	0.14285715	0.97142857	5	34
Washington	0.77930668	0.54285717	4.0857143	19	143
West Virginia	0.48981252	0.6857143	4.4571428	24	156
Wisconsin	0.83881272	0.22857143	3.0285714	8	106
Wyoming	0.54103076	0.2	1	7	35

Appendix B. Descriptive Statistics

Variable	Obs.	Mean	Std. Dev.	Min	Max
Count	1820	0.353297	0.655601	0	4
Amend Rate	1820	1.181215	0.986245	0	10.08163
Amend Rate Sq.	1820	2.367414	6.287621	0	101.6393
Constitution Age	1820	89.5978	50.54404	1	224
Constitution Length	1820	20217.31	12741.34	5200	65400
Court Size	1820	6.481319	1.416615	3	9
Clerks Per Justice	1820	2.066484	0.94603	1	6
Av. Tenure of Justices	1820	7.942643	3.125612	0	23.33333
Av. Tenure of Justices (SD)	1820	5.271795	2.590203	0	14.31666
Partisan Judicial Election	1820	0.247253	0.431534	0	1
Retention Process					
Legislature	Ref	Ref	Ref	Ref	Ref
Governor	1820	0.141209	0.348333	0	1
Non-Partisan Elec.	1820	0.251099	0.433765	0	1
Retention Elec. or Partisan Elec.	1820	0.530769	0.49919	0	1
Court Ideological Change	1820	2.269215	7.491386	0	58.12
Intermediate App. Ct.	1820	0.695055	0.460511	0	1
Leg. Professionalism (Squire)	1820	0.2062	0.118016	0.027	0.659
Ideological Gap (Court to Citizens)	1820	16.09288	12.40804	0.03176	63.86565
Ideological Gap (Court to St. Gov.)	1820	19.26671	11.95506	0.00848	55.21853
Population	1820	5073.73	5449.098	303	35841
Urbanization	1820	68.65797	14.32403	32.2	94.4